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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. LIBERAL CONSTRUCTION

The compensation act is liberally construed in favor of coverage and doubts over the Act's applicability are resolved in favor of compensation for an injured employee.[1] An injury must be "by accident arising out of and in the course of employment" for the claimant to recover under the Act.[2] "The term 'arose out of' refers to the origin of the cause of the accident, while the term 'in the course of' refers to the time, place and circumstances under which it occured."[3] As a result of the doctrine of liberal construction, if an employee's activity logically relates to his job and is not inconsistent with his duties the activity usually is within the course of his employment.[4] Similarly an injury is caused by a work-related accident if the result is unexpected, even though it may have developed gradually and without a pinpointable impact.[5] Two 1977 cases demonstrate applications of the liberal construction principle.[6]

A. Diseases as Accidents

In *Sturkie v. Ballenger Corp.*,[7] the supreme court was faced with the question of whether emphysema is a compensable accident. The claimant was employed in Puerto Rico as a cement truck driver. His employment exposed him to rain, high humidity, hot temperatures, and cement and dynamite dust. The claimant was hospitalized on two occasions for his condition. After returning to work, he blacked out while on the job. The claimant filed for disability insurance benefits.

The Commission found for the claimant. It held he was subject to a greater risk of adverse exposure to the elements by his employment and that after his hospitalization, reexposure under

1. *E.g.*, Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 349, 200 S.E.2d 64, 67 (1973).

2. S.C. CODE ANN. § 42-1-160 (1976).

3. Bickley v. South Carolina Electric & Gas, 259 S.C. 463, 467, 192 S.E.2d 866, 868 (1972) (citation omitted).

4. Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (citing Kohlmayer v. Keller, 24 Ohio St. 2d 10, 263 N.E.2d 231 (1970)).

5. Hiers v. Brunson Constr. Co., 221 S.C. 212, 231, 70 S.E.2d 211, 219-20 (1952).

6. *See also* Moore v. Family Service of Charleston County, 269 S.C. 275, 237 S.E.2d 84 (1977).

7. 268 S.C. 536, 235 S.E.2d 120 (1977).

strenuous exertion caused his collapse and disability.[8] The circuit court affirmed. On appeal to the supreme court the issue was whether a disease contracted from exposure to the elements is a compensable accident under the Act.

The supreme court discussed the requirement that the accident must arise out of and in the course of employment, and upheld the Commission.[9] The court emphasized three factors. First, the term "accident" within the meaning of the compensation act has been interpreted as an unexpected result or effect.[10] This claimant-oriented definition of accident is in line with the doctrine of liberal interpretation in favor of coverage for the claimant.[11] Because Sturkie did not expect to develop emphysema, it was a compensable accident.[12] "Emphysema develops gradually, but its effect in collapse is sudden."[13] Second, in dealing with atmospheric conditions, the question is " 'whether under all the circumstances, the employee was exposed to a greater risk by reason of his employment and duties than was imposed upon an ordinary member of the public.' "[14] The court agreed that the claimant had been exposed to atmospheric weather conditions different from those experienced by the general public.[15] Third, even if the claimant's emphysema was a preexisting condition, if it was exacerbated or accelerated by work-related causes, it was a compensable accident.[16]

The court's rationale is not surprising. In *Hiers v. Brunson,*[17] the court addressed the issue of whether the environment can cause a compensable accident under the Act,[18] and developed the principles applied in *Sturkie.* As noted in *Hiers,* other states also follow a general rule of allowing recovery for diseases contracted during employment when the nature of the job causes the claimant to be exposed to the elements to a greater extent than the

8. Record at 83, 93.

9. 268 S.C. at 539-43, 235 S.E.2d at 121-23. Justice Littlejohn dissented, stating diseases should not be classified as accidents. *Id.* at 544-45, 235 S.E.2d at 124.

10. *Id.* at 540, 235 S.E.2d at 122.

11. *See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.20 (1978).

12. *See* 268 S.C. at 542-43, 235 S.E.2d at 123.

13. *Id.* at 542, 235 S.E.2d at 123.

14. *Id.* at 542, 235 S.E.2d at 122-23 (citing Hiers v. Brunson, 221 S.C. 212, 230, 70 S.E.2d 211, 219 (1952)). For a criticism of the unusual exposure requirement, see A. LARSON, *supra* note 11, at §§ 38.60-.63.

15. 268 S.C. at 542, 235 S.E.2d at 123. *See* A. LARSON, *supra* note 11, at § 8.41-.42.

16. 268 S.C. at 541, 235 S.E.2d at 122. *See* A. LARSON, *supra* note 11, at § 12.20.

17. 221 S.C. 212, 70 S.E.2d 211 (1952).

18. *Id.* at 230-32, 70 S.E.2d at 219-20.

general population.[19]

The tendency of courts to find diseases to be compensable "accidents" exemplifies how the courts liberally construe the requirement that an accident arise out of and in the course of employment. Another facet of this liberality is the South Carolina courts' willingness to allow a claim to be classified as an accident rather than as a disease.[20] The Act specifically provides for compensation for certain disabling diseases related to employment.[21] Because the employer was not liable at common law for occupational diseases, at first legislatures were hesitant to create liability for these diseases and courts were hesitant to read the statutes as compensating for them.[22] Even though South Carolina now has occupational disease provisions, these sections are more restrictive than those governing accidents.

For the claimant in *Sturkie* to have recovered for an occupational disease, he would have had to prove not only that the disease was caused by hazards greater than those to which the general public is exposed, but also that the hazard was "in this state" and was recognized as peculiar to the business.[23] A disease also does not meet the statutory criteria if it "results from exposure to outside climatic conditions."[24] Generally, if brought under the accident provisions, acceleration of a preexisting condition is fully compensable.[25] With occupational diseases, however, if the disease is found to accelerate some condition that is "not otherwise compensable," compensation is limited by that proportion of the disability that the "occupational disease bears to the entire disability."[26] Another restricting factor is the statute of limitations imposed upon the occupational disease claimant. The supreme court has held that for occupational diseases, the time for filing a compensation claim with the employer is calculated from the point at which the employee is disabled and " 'when by reasonable diligence the claimant could have discovered his condition was a compensable one.' "[27] Disability is actual incapacity to

19. *See* A. LARSON, *supra* note 11, at §§ 8.41-.42, 39.10.
20. S.C. CODE ANN. §§ 42-11-10 to -200 (1976 & Cum. Supp. 1977).
21. *Id.*
22. A. LARSON, *supra* note 11, at § 41.20 nn.9-11.
23. S.C. CODE ANN. § 42-11-10 (1976).
24. *Id.* § 42-11-10(2).
25. *See* note 16 and accompanying text *supra.*
26. S.C. CODE ANN. § 42-11-90 (1976).
27. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 123, 127 S.E.2d 288, 292 (1962) (citing A. LARSON, *supra* note 11, at § 78.52). *See* Glenn v. Columbia Silica Sand

perform the employee's work.[28] In addition, for a pulmonary disease, the employee's last exposure to the hazard must have been within two years of the contracting of the disease.[29] A problem with some occupational diseases is that if the employee ceases to be exposed to the hazard or if the disease is not immediately found to be work related, the statutory time limits may have lapsed.

In addition to these differences between the accident and disease provisions, either the claimant, employer, or the Commission can move to submit medical questions in an occupational disease claim to a Medical Board.[30] The Act binds the Commission to follow the Medical Board's findings unless they are proved to be "erroneous, due to fraud, undue influence, or mistake of law or material facts."[31] If Sturkie had filed under the occupational disease provisions, he would have been bound by the findings of the Medical Board if the employer or the Commission moved to submit a medical question to it and would have been foreclosed from supplying his own medical testimony. Normally claimants would rather supply their own medical experts and face the "arising out of" and "in the course of" requirements of the accident provisions rather than deal with the stricter requirements of the occupational disease provisions. The liberal construction of the accident requirement circumvents the disease provisions because these injuries, which might logically be classified as occupational diseases, are liberally construed to be accidents.

An employer faced with payments for a disease of this kind

Co., 263 S.C. 13, 112 S.E.2d 711 (1960) (*dicta*) (the one year time limit is calculated from the time of disability from disease, not from the time of contraction of the disease).

28. S.C. CODE ANN. § 42-11-20 (1976).

29. *Id.* § 42-11-70. For byssinosis, the statute also requires that the claimant be "exposed to dust in his employment for a period of at least seven years." *Id.* § 42-11-60 (Cum. Supp. 1977).

30. *Id.* § 42-11-120 (1976). A medical question is "any issue concerning the existence, cause and duration of disease or disability, the date of disablement, the degree of disability and the proportion thereof attributable to a non-compensable cause and any other matter necessarily pertinent thereto requiring the opinion of experts." *Id.* The Board is chosen from a group of medical experts who are appointed to the Medical Advisory Panel by the governor with the approval of the Commission. *Id.* § 42-11-170 (Cum. Supp. 1977).

31. *Id.* § 42-11-160. A 1977 amendment to this section removed the requirement that upon such a finding of error the Commission must remand the medical questions to the same or another Medical Board. No. 103, 1977 S.C. Acts 188. One could argue the intent is to allow the parties to supply their own medical witnesses after the overturning of one Medical Board report; conversely, one could argue the provision in § 42-11-190 that allows either party or the Commission to move for a Medical Board Report still can be utilized on remand. *Id.* § 42-11-190 (1976).

that he believes resulted from the aggravation of a permanent, preexisting, nonwork-related condition that would have been an obstacle to the employee's obtaining employment might consider applying to the Second Injury Fund for reimbursement of compensation and medical payments after the first seventy-eight weeks of compensation.[32] The Second Injury Fund was created initially to encourage the hiring of the handicapped by relieving the employer of the risk that any later injury to the employee would cause the employee to be eligible for greater compensation payments than if the employee had not had the permanent physical impairments.[33] Originally the employer had to file with the Commission a written statement either that the employer knew of the impairment at the time of hiring or that he retained the employee after learning of it.[34] A 1974 amendment, however, qualifies an employer for Second Injury Fund reimbursement if he can prove that "the existence of such condition was concealed by the employee or was unknown to the employee."[35] The employer, therefore, no longer must show that he hired or retained the employee with knowledge of the handicap; it is sufficient if the injury was unrelated to this employment and was either concealed by the employee or unknown to him. If the impairment is not one presumed to be permanent,[36] the employer must prove that it was

32. S.C. CODE ANN. § 42-9-400 (Cum. Supp. 1977). Second Injury Fund relief is for permanent physical impairments. *Id.* § 42-9-400(a). A "permanent physical impairment" is defined as one serious enough to be "a hindrance or obstacle to obtaining employment." *Id.* § 42-9-400(d). For the full definition, see notes 33, 36 *infra.*

33. Boone's Masonry Construction Co. v. South Carolina Second Injury Fund, 267 S.C. 277, 281-82, 227 S.E.2d 659, 661 (1976). *See* Custy, *The Second Injury Fund: Encouraging Employment of the Handicapped in South Carolina,* 27 S.C.L. REV. 661 (1976). "*'[P]ermanent physical impairment'* means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed." S.C. CODE ANN. § 42-9-400(d) (Cum. Supp. 1977).

34. Act of June 20, 1972, No. 1390 § 1(c), 1972 S.C. Acts 2578 (amended 1974) (current version at S.C. CODE ANN. § 41-9-400(c) (Cum. Supp. 1977)).

35. S.C. CODE ANN. § 42-9-400(c) (Cum. Supp. 1977).

36. *Id.* § 42-9-400(d)(1) to (30). This section is ambiguous because it states that a presumption of permanence and hindrance to employment "exists when the condition is any one of the following impairments." The statute there lists 30 specific impairments and one general one:

> (31) Any other preexisting condition or impairment which is *permanent* in nature and which:
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> (a) would qualify for payment of weekly disability benefits of seventy-eight weeks or more under § 42-9-30 exclusive of benefits payable for disfigurement or
>
> (b) would support a rating of seventy-eight or more weeks of weekly disability benefits when evaluated according to the standards applied to workmen's

"permanent in nature"[37] and that the impairment either alone[38] or when added to the later injury makes the employee eligible for at least seventy-eight weeks of disability payments.[39] The employer can opt to bind the Fund to the Commission's findings at the original hearing by giving notice to the Fund at least twenty days before the liability hearing or by joining the Fund as a party to the hearing.[40] If this option is not taken, the employer must, in writing, notify the fund and the Commission of the claim before the first seventy-eight weeks of payments are complete.[41] Failure to do so bars reimbursement.[42]

Whenever the employer can prove a preexisting permanent physical impairment he should consider applying to the Second Injury Fund for reimbursement. The impairment must have resulted in a disability that entitles a claimant to over seventy-eight weeks of compensation and that predates the employment and perhaps postdates retention. In addition either the employer must have filed written notice of the impairment with the Commission or the employee must have concealed the impairment, or have been unaware of it. The employer should notify the Fund in writing of the claim before the first seventy-eight weeks of payments are concluded. While this interpretation of this statute is undoubtedly not what was intended when the Second Injury Fund provisions were initially passed, the 1974 amendment creates this possibility and relieves the employer of some of the burden of the liberal construction doctrine.

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compensation claims in South Carolina, or combines with a subsequent injury to cause a permanent impairment rated at seventy-eight weeks or more under § 42-9-30.

Id. § 42-9-400(d)(31) (emphasis added). The statute could have several interpretations. First, the permanence and hindrance presumptions might apply only to diseases (1) to (30) because (31) requires proof of permanence and is a general provision. Second, the presumption of permanence might not apply to diseases under (31), but the employer need not prove hindrance to employment. Third, both presumptions might apply to (31). This last interpretation is reached by construing "permanent in nature" to be somehow different from the "permanent" presumption. Underlying these interpretations is the question whether any impairment not listed in (1) to (31) can come under the second injury provisions provided the employer proves permanence and hindrance without the aid of these presumptions. In addition, the employer would have to show the benefits will be paid over seventy-eight weeks because reimbursement for benefits does not begin until then. *Id.* § 42-9-400(a), (d). *See id.* § 42-9-400(a)(2), -400(b).

37. *Id.* § 42-9-400(d)(31).

38. *Id.* § 42-9-400(d)(31)(a).

39. *Id.* § 42-9-400(d)(31)(b).

40. *Id.* § 42-9-400(e).

41. *Id.* § 42-9-400(f).

42. *Id.*

B. *Aggressor Defense and Termination of Employment*

A second example of how the Act is liberally construed in favor of compensating the claimant centers on one of the employer's defenses to liability. In *Kinsey v. Champion American Service Center,*[43] the court held the aggressor defense is not a bar to compensation in South Carolina for injuries sustained in an on the job fight. The claimant in *Kinsey,* a service station attendant, was injured in a fight with a co-employee. The claimant had a history of conflicts with the other employee, Brown, over Brown's authority to supervise the claimant at the station. On the day of the injury, Brown ordered claimant to service some cars that had arrived at the station and a fight ensued. The facts were in conflict over whether one or two fights occurred, whether claimant's employment was terminated, and whether Kinsey or Brown struck the first blow.[44]

The employer argued that claimant had been the aggressor in the fight and was therefore barred from recovery under the Compensation Act.[45] The Commission and the court of common pleas found that the claimant was the aggressor and denied compensation.[46]

On appeal the issue presented to the court was whether the claimant had been the aggressor, in the sense of one who began the violence.[47] The employer contended that under *Zeigler v. South Carolina Law Enforcement Division*[48] the aggressor defense was recognized in South Carolina.[49] Reversing for the claimant, the supreme court held the Act does not encompass an aggressor defense.[50]

> The Commission's basic finding was bottomed upon the inappropriately denominated "aggressor defense." The Workmen's

43. 268 S.C. 177, 232 S.E.2d 720 (1977).

44. The employer's claim was that after an initial fight the claimant returned and started another. This could have the effect of removing the work-related flavor from the incident and could make the injury a noncompensable accident because it did not arise out of and in the course of employment. *See generally* A. LARSON, *supra* note 11, at § 11.13.

45. Brief of Defendants-Respondents at 3-10.

46. Transcript of Record at 63-65, 70-72.

47. Brief of Claimant-Appellant at 1, 5-7; Brief of Defendants-Respondents at 1, 3-10. Although the question was so phrased in the appellant's brief, the appellant's focus was the statute's language, not whether the Act has an aggressor defense as a matter of law.

48. 250 S.C. 326, 157 S.E.2d 598 (1967).

49. Brief of Defendants-Respondents at 2-3.

50. 268 S.C. at 180, 232 S.E.2d at 721.

> Compensation Act has eliminated all issues and degrees of negligence. There is no statutory defense labeled aggressor defense. The only relevant statutory provisions which, under certain well delineated circumstances, supports an aggresor defense is S.C. Code § 72-156 [S.C. Code Ann. § 42-9-60 (1976)].[51]

The court then addressed the meaning of section 42-9-60, which creates a "wilful intention" defense. The statute reads as follows:

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another.[52]

The employer contended that an aggressor or one who struck the first blow, willfully intended to do injury and was barred from receiving compensation.[53] According to the court, however, the question cannot be answered by determining who threw the first punch. The "delineated circumstances" in which the defense will bar compensation are first, when the employee's conduct is serious or aggravated,[54] and second, when the conduct is deliberate or premeditated, evincing "a voluntary acquiescence in the settlement of the dispute by violence."[55] Altercations do not make out a defense if they are "spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury."[56]

Characterizing the claimant's conduct as serious, deliberate, or spontaneous will be a question of fact for the Commission.[57] Forcing the Commission to focus on the "willful intention" rather than "merely on who strikes the first blow,"[58] requires a more difficult determination, but in view of the language of the statute, it is probably more congruous with the legislative intent of the Act. The interpretation is also another example of how the Act is liberally construed in favor of compensation coverage for the claimant.

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51. *Id.*

52. S.C. CODE ANN. § 42-9-60 (1976).

53. Brief of Defendants-Respondents at 2-10.

54. 268 S.C. at 181, 232 S.E.2d at 721-22 (quoting Zeigler v. South Carolina Law Enforcement Div., 250 S.C. 326, 157 S.E.2d 598 (1967), and citing Reeves v. Carolina Foundry & Machine Works, 194 S.C. 403, 409, 9 S.E.2d 919, 921 (1940)).

55. 268 S.C. at 180-81, 232 S.E.2d at 721-22, (quoting Zeigler v. South Carolina Law Enforcement Division, 250 S.C. 326, 157 S.E.2d 598 (1967)). *See* A. LARSON, *supra* note 11, at § 11.15(d).

56. 268 S.C. at 181, 232 S.E.2d at 722.

57. This is implied in the court's discussion of the Commission as the fact finding body. *Id.*

58. *Id.* at 181, 232 S.E.2d at 721.

Justice Littlejohn, in his dissent, disagreed with the majority's reading of the case precedent.[59] He stated, "It is the law of this State that a claimant cannot be said to have suffered 'an injury by accident,' as defined by § 72-14 [S.C. Code Ann. § 42-1-160] of the Act if he is found to be the aggressor. *Zeigler v. S.C. Law Enforcement Division.* . . . "[60] As the majority noted, however, the court in *Zeigler* had not denominated its holding as an aggressor defense and instead had concentrated on the seriousness of the conduct as proving a willful intention to injure the coemployee.[61] Most jurisdictions align with the stance taken by the majority.[62] When the employee's conduct is not serious or premediated, the employee is entitled to compensation for the injury.[63] Professor Larson has noted the "volatile" nature of the aggressor defense: since 1947, most jurisdictions have reversed their previous positions and abolished the defense.[64]

Even if the employer cannot prove willful intent, the claimant cannot recover unless the injury arose by accident arising out of and in the course of employment.[65] In considering this question, the court in *dicta* indicated it may accept an important new rule for South Carolina. The employer had argued that claimant's employment had been terminated before the altercation and therefore the injury was not "in the course of employment" under the statute.[66] Looking at the employer's own testimony, the court held it could not conclude that the injurry was not in the course of employment.[67] Even if the claimant's employment had been terminated the court found that "[t]he employee is still within the course of employment for a reasonable time to allow for his departure and the conclusion of his affairs."[68] In future cases involving termination of employment, therefore, the court has indicated it will look to whether the employee has had a reasonable opportunity to leave the premises in deciding whether the injury was in the course of employment.

59. *Id.* at 183-86, 232 S.E.2d at 723-24 (Littlejohn, J., dissenting).

60. *Id.* at 184-85, 232 S.E.2d at 723.

61. *Id.* at 181, 232 S.E.2d at 721. *See* Zeigler v. South Carolina Law Enforcement Div., 250 S.C. at 329-31, 157 S.E.2d at 579-80.

62. *See* A. LARSON, *supra* note 11, at § 11.15(a), (c)-(d).

63. *See id.* at § 11.15(d).

64. *Id.* at § 11.15(c).

65. *See* notes 1-5 and accompanying text, *supra;* 268 S.C. at 182, 232 S.E.2d at 722.

66. Brief of Defendants-Respondents at 10-13.

67. 268 S.C. at 183, 232 S.E.2d at 722-23.

68. *Id.* at 182-83, 232 S.E.2d at 722. *See* A. LARSON, *supra* note 11, at § 26.10.

II. Compensation As Exclusive Remedy

In *Merritt v. Smith*,[69] plaintiff's husband was killed in a single car accident that occured after a meal and on the way to the hotel where the three occupants of the car were staying on an out-of-town business trip. Plaintiff accepted over $22,000 from the employer's carrier under an award from the Industrial Commission. In a negligence action against the driver, defendant was granted summary judgment based on a finding that as a co-employee, he was immune from suit under section 42-5-10 of the compensation act.

On appeal, plaintiff argued that the requirements for immunity raised issues of fact.[70] The supreme court affirmed the judgment for defendant but in so doing the court used language that raises questions about the status of the immunity test under the South Carolina Act.

When an employer pays compensation under the Act, section 42-5-10 grants to the employer and "those conducting his business" immunity from other lawsuits.[71] Co-employees of the injured person are among those who conduct the employer's business and therefore can be immune.[72] Three conditions must be

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69. 269 S.C. 301, 237 S.E.2d 366 (1977).

70. *Id.* at 304, 237 S.E.2d at 367-68.

71. S.C. Code Ann. § 42-5-10 (1976). The section provides:

> Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter. While such security remains in force he or those conducting his business shall only be liable to any employee who elects to come under this Title for personal injury or death by accident to the extent and in the manner specified in this Title.

Id.

The immunity accorded by the South Carolina statute and others with similar provisions is not only from common-law causes of action. A. Larson, *supra*, note 11 at § 72.20. In recent cases claimants have attempted to limit immunity by advancing the dual capacity doctrine. *Id.* at 72.80. In Smalls v. Blackmon, 269 S.C. 614, 239 S.E.2d 640 (1977), plaintiff contended that under St. Paul Fire & Marine Insurance Co. v. American Insurance Co., 251 S.C. 56, 159 S.E.2d 921 (1968), and the permissive user statute, S.C. Code Ann. § 56-9-810(2) (1976), the defendant could be sued in his capacity as a permissive user of an automobile as opposed to his capacity as a co-employee. The court stated that language in *St. Paul* was "clearly *dicta*" and the defendant's demurrer should have been granted. 269 S.C. at 617, 239 S.E.2d at 641. The language of the Federal Longshoremen's and Harbor Workers' Compensation Act (LHWA), 33 U.S.C. §§ 901-50 (1970), which was at issue in *Smalls* is different from the South Carolina Act. Under the LHWA, compensation is the exclusive remedy against the employer and "any other person, or persons in the same employ." *Id.* § 933(i). *See also* Strickland v. Textron, 433 F. Supp. 326 (D.S.C. 1977) (discussing the dual capacity doctrine in suits against employers as opposed to co-employees).

72. *E.g.*, Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952).

met for a co-employee to be immune in tort. Logically, the first requirement is that the injured person's employer must be liable under the compensation act. Without liability under the Act, there would be no reason to raise the Act's immunity provisions. The compensation act test for liability is that the injury must be by an accident arising out of and in the course of employment.[73] The courts, applying the doctrine of liberal construction, interpret this test broadly and resolve doubts in favor of coverage for the injured employee.[74] The second prerequisite is that the co-employee-defendant must have been conducting the employer's business at the time of the accident. This follows precisely the language of section 42-5-10.[75] The court has held this requirement is met by proof that the employer would have been vicariously liable for the defendant's actions under the common-law doctrine of respondeat superior.[76] The rationale behind the use of this test is that if the employer would have been liable for the defendant's acts at common law but for the immunity of the compensation act, the co-employee-defendant should also be accorded immunity. Unlike the first requirement, the courts traditionally did not interpret the respondeat superior test broadly in favor of coverage for the employee. Although both of these requirements are essentially "course of employment" tests, because of the varying interpretations and policies behind them, a deviation from the course of employment under the common-law test is not always a deviation under the compensation test.[77] The third requirement is that the defendant must be an employee of the injured person's employer.[78] This requirement removes the cloak of immunity

73. This requirement is expressed in section 42-5-10 in that immunity extends only for "personal injury or death by accident," which is defined by section 42-1-160 as "injury by accident arising out of and in the course of employment." *See* McNaughton v. Sims, 247 S.C. 382, 147 S.E.2d 631 (1966).

74. *E.g.*, Moore v. Family Service of Charleston County, 269 S.C. 275, 281, 237 S.E.2d 84, 87 (1977); Douglas v. Spartan Mills, Startex Division, 245 S.C. 265, 140 S.E.2d 173 (1965). For a discussion of this doctrine, see text at notes 1-5 *supra*.

75. S.C. CODE ANN. § 42-5-10 (1976). For the text of the statute, see note 71 *supra*.

76. Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971); McNaughton v. Sims, 247 S.C. 382, 147 S.E.2d 631 (1966); Williams v. Bebbington, 247 S.C. 260, 146 S.E.2d 853 (1966). For a discussion of the respondeat superior doctrine, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 460-61 (4th ed. 1971).

77. *E.g.*, Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971).

78. This requirement was set out in Nolan v. Daley, 222 S.C. 407, 415, 73 S.E.2d 449, 453 (1952), although the statute is not this specific. It states only that "those conducting [the employer's] business" are immune. S.C. CODE ANN. § 42-5-10 (1976). The employee requirement might have developed as a consequence of the *respondeat superior* test, although *Nolan* did not recognize this test by name. The court in a North Carolina case

from third parties, casual workers, and independent contractors.[79]

In *Merritt,* the court found that no issue of fact was raised over whether the defendant was an employee of decedent's employer.[80] The main issues, therefore, were whether questions of fact were raised under the compensation act and common-law tests as conditions for immunity.[81] The court considered together the questions of whether the husband's death during an out-of-town business trip was by an accident arising out of and in the course of employment and whether the co-employee-defendant was acting within the scope of his employment in a common-law

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from which the *Nolan* court quoted extensively states: "We hold that an officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is . . . entitled to the immunity . . . ." Warner v. Leder, 234 N.C. 727, 732, 69 S.E.2d 6, 9 (1952) *cited in* Nolan v. Daley, 222 S.C. 407, 414, 73 S.E. 2d 449, 452 (1952). The court in *Nolan* went on to state that the co-employee should not be liable "especially where the act of the employee, in whatever capacity, would render the employer liable at common law." *Id.* at 416, 73 S.E.2d at 453.

The other reason for restricting the immunity to employees of the same employer is to give meaning to the sections allowing suits against third parties. *See* Warner v. Leder, 234 N.C. 727, 732-33, 69 S.E.2d 6, 8-9 (1952) *cited in* Nolan v. Daley, 222 S.C. at 413-14, 73 S.E.2d at 452 (1952). This interpretation of the requirement, however, leaves open the question of whether independent contractors are third parties or those conducting the employer's business. South Carolina has used the employee requirement to restrict coverage to "employees" under the compensation Act, *i.e.,* casual workers and independent contractors are not immune under this section. *See* Parker v. Williams & Madjanik, 269 S.C. 662, 239 S.E.2d 487 (1977). North Carolina and Virginia have not limited "conducting the employer's business" to employees and have extended immunity to some independent contractors' employees. *See* A. LARSON, *supra* note 11 at § 72.34.

79. Parker v. Williams & Madjanik, 269 S.C. 662, 239 S.E.2d 487 (1977). *See also* note 78, *supra,* for discussion of third party liability.

80. 269 S.C. at 305, 237 S.E.2d at 368. Appellant asserted a question of fact was raised over whether her husband and the driver were employed by the same employer because in his first amended answer, respondent listed Philco-Ford Corporation as his employer. Appellant had listed her husband's employer as Ford Marketing Corporation in response to request for admissions. In the second amended answer, respondent listed his employer as Ford Marketing. The court held that respondent's "error, standing alone, does not create an issue of fact." *Id.* at 304-05, 237 S.E.2d at 368.

81. Appellant had restricted the questions on appeal to whether the respondent and deceased were employed by the same employer and whether respondent was conducting the employer's business; however, the court also considered the other condition for immunity, whether the injury was by accident arising out of and in the course of employment. *Id.* at 304, 237 S.E.2d at 367-68. Because the meeting of this condition is also a requirement for receiving a compensation award from the Industrial Commission, this condition actually should not have been in issue because the Commission already should have determined that the compensation act test was met in granting its award to appellant. The court, however, appears to be reviewing this finding because the section it cited from Larson's treatise dealing with business trip cases discusses the compensation act test. *Id.* at 307, 237 S.E.2d at 369. *See* A. LARSON, *supra* note 11 at § 25.21.

respondeat superior sense.[82] Upon noting that no South Carolina authority had been cited, the court turned to Professor Larson's treatise and determined that trips to and from a restaurant while out-of-town on business "are within the course and scope of the employment unless the circumstances attending the taking of the meal constitute a deviation."[83] After considering the precedent on deviation, the court concluded that the trip to the restaurant was unquestionably not a deviation.[84]

In deciding to consider together these two conditions for immunity, the court used some language which, if taken out of context, could be misleading. The court stated that "[t]he status of the Appellant's testate was the same as that of the Respondent. . . ."[85] While it is true both employees were on an out-of-town business trip and in that sense their "status" might be the same, this language should not be construed as stating that the facts necessary to meet the first requirement, the compensation act test, also will always meet the second prerequisite, that the defendant be conducting the employer's business.[86] The court also stated that "the co-employee's right to immunity parallels that of an employer."[87] Although whenever the co-employee is granted tort immunity, the employer, by reason of the compensation act test, necessarily must be immune, the converse is not always true.

Illustrating these points is the 1971 case of *Boykin v. Prioleau.*[88] Although the employer in *Boykin* was found liable under the compensation act, the co-employee also was held liable in tort.[89] Because of the broad interpretation of the compensation act test under the statute, common-law liability is not equivalent to statutory immunity. As in *Boykin,* cases occur in which the defendant-employee deviates from his scope of employment and absolves the employer from liability at common law, but under

82. 269 S.C. at 306, 237 S.E.2d at 368-69. The court did not mention the respondeat superior test by name but cited the cases in which the test was developed and applied. *Id.* at 306, 237 S.E.2d at 368 (citing Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969); Powers v. Powers, 239 S.C. 423, 123 S.E.2d 646 (1962); Nolan v. Daley, 222 S.C. 407, 73 S.E.2d 449 (1952)).

83. 269 S.C. at 307, 237 S.E.2d at 369 (citing A. LARSON, *supra* note 11 at § 25.21).

84. *Id.* at 308, 237 S.E.2d at 369-70.

85. *Id.* at 306, 237 S.E.2d at 368.

86. *E.g.,* Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971).

87. 269 S.C. at 306, 237 S.E.2d at 369.

88. 255 S.C. 437, 179 S.E.2d 599 (1971).

89. *Id.* at 440, 179 S.E.2d at 600. The hearing commissioner found the employer liable, but the claim was settled while on appeal without an admission of liability by the employer. *Id.* at 440, 179 S.E.2d at 600.

the broader interpretations of liabilty under the Act, the employer is liable for compensation payments.[90] Immunity in tort is not coextensive with the employer's liability at common law. In *Merritt,* because nothing raised a question of fact over whether defendant had deviated from the scope of his employment, the result reached by the court is in line with prior cases, but by collapsing the two separate tests for compensation act liability and common-law liability, the court laid the groundwork for future confusion.

Any speculation that the collapsing of these conditions in *Merritt* might be a retreat from use of the common-law respondeat superior definition for the conducting the employer's business test was put to rest by *Parker v. Williams & Madjanik, Inc.*[91] Plaintiff's husband was employed by a roofing subcontractor at a construction project on Hilton Head Island. The husband's employer contracted with a crane company to provide a crane and crane operator to erect trusses. The crane operator was requested by the deceased's employer to place a load of plywood on the roof. The weight of the load collapsed the roof killing the plaintiff's husband. On appeal from summary judgment for the defendant crane company, the supreme court reversed for plaintiff.[92]

In *Parker,* the condition that the injury be by an accident arising out of and in the course of employment was not at issue because the death clearly was compensable under the Act.[93] The next issue, as in *Merritt,* was whether the crane operator was conducting the employer's business. The court stated:

> In order for the crane operator to be immune from suit under section 42-5-10 as a co-employee of the deceased, he must have been engaged in a course of conduct at the time of the delict that would have rendered [the subcontractor] liable at common law under the doctrine of respondeat superior. If the operator is immune from suit, then [the crane company] is likewise relieved of its vicarious liability.[94]

Obviously, the common-law respondeat superior test has not been abandoned despite the confusing language in *Merritt.*

The question remains whether two different tests for the

90. *See also* Williams v. Bebbington, 247 S.C. 260, 146 S.E.2d 853 (1966).

91. 269 S.C. 662, 239 S.E.2d 487 (1977).

92. *Id.* at 663, 239 S.E.2d at 488.

93. *Id.* at 664, 239 S.E.2d at 488. On whether the compensation act test should have been at issue in *Merritt,* see note 81 *supra.*

94. 269 S.C. at 665, 239 S.E.2d at 488-89.

scope of employment should be applied in deciding a co-employee's immunity. South Carolina is one of only a few states that uses a test separate from the usual compensation act test to define the scope of co-employee immunity.[95] As Professor Larson states, "After all, there are troubles and complications enough administering one course of employment test under the Act, without adding a second."[96] In addition to the simplicity of using one definition for both tests, Larson advances the argument that part of the *quid pro quo* an injured employee receives for giving up the right to sue the employer in tort is immunity from suit when the employee himself is later the wrongdoer in a work-related accident.[97]

Despite the criticism of using two definitions, some justification for using the respondeat superior test has been advanced.[98] Use of the respondeat superior test restricts the number of situations in which a co-employee will be found immune. In response to Larson, it can be argued that the immunity the employer receives is sufficient consideration for the employee's relinquishment of the right to sue at common law.[99] Use of the contract concept of consideration also seems to have little relevance to actions against co-employees. The employer and injured employee are the ones exchanging rights and benefits. Only in a situation in which a tortfeasing co-employee could hold the employer liable at common law should the immunity attach. This is what is accomplished with use of the respondeat superior test. Other theories have been advanced for not granting *any* immunity to co-employees. For example, it is argued that exempting tortfeasors from suit does not encourage safety on the job.[100] Of

95. A. LARSON, *supra* note 11 at § 72.20. California and Texas also use separate tests. Saala v. McFarland, 63 Cal. 2d 124, 403 P.2d 400, 45 Cal. Rptr. 144 (1965) (the statutory language "acting within the scope of his employment" indicates that a test narrower than the compensation act test is to be used); Ward v. Wright, 490 S.W.2d 223 (Tex. Civ. App. 1973) (respondeat superior test). *See* A. LARSON, *supra* note 11 at § 72.20 nn.28-31.

96. A. LARSON, *supra* note 11 at § 72.20.

97. *Id.* The *quid pro quo* rationale is used to explain the benefits and detriments exchanged by employers and employees under the compensation statutes. In exchange for relinquishment of defenses and automatic liability, the employer is immune to verdicts outside the compensation statute for work-related injuries. *See generally id. supra* note 11 at § 65.10.

98. *See, e.g.*, cases cited in note 95 *supra.*

99. In a strong dissent to the case that established coemployee immunity in South Carolina, Justice Stukes sets out several reasons why no immunity should be given fellow employees. Nolan v. Daley, 222 S.C. 407, 417-21, 73 S.E.2d 449, 553-55 (1952). For his discussion of the *quid pro quo* rationale, see *id.* at 417, 73 S.E.2d at 453.

100. *Id.* at 419, 73 S.E.2d at 454. For this argument and others used against co-

course the appropriate juggler of these policy considerations is the legislature, which has not overruled the court's respondeat superior definition for the conducting the employer's business test.

Despite the ambiguous language in *Merritt,* the later statement in *Parker* seems to reaffirm that in industrial accidents involving two employees, the compensation act test for scope of employment will be used to define when the employer is immune in tort and liable under the Act, and the common-law respondeat superior scope of employment test will be used to define when the co-employee is conducting the employer's business and immune from suit in tort.

III. Good Faith Payment Of Death Benefits

When an employee dies from an accident arising out of and in the course of employment, the employer must pay death benefits under the Workmen's Compensation Act.[101] The Act sets out a four-tiered priority structure under which a prior claimant takes the death benefits to the exclusion of subordinate claimants.[102] First priority is accorded to persons wholly dependent upon the deceased.[103] Widows,[104] widowers,[105] and children[106] are presumed

employee immunity, *see generally* A. Larson, *supra* note 11 at § 72.10.

101. S.C.Code Ann. § 42-9-290 (Cum. Supp. 1977). "Death" is defined as "death resulting from an injury." *Id.* § 42-1-110 (1976). "Injury" is defined as "injury by accident arising out of and in the course of employment." *Id.* § 42-1-160.

102. *Id.* §§ 42-9-140, -290. When partial dependents are first in priority, however, the excess of the death benefit is distributed to either the parents or the Second Injury Fund. *Id.* § 42-9-140(b), 140(d).

103. *Id.* § 42-9-290 (Cum. Supp. 1977). If more than one person was totally dependent upon the deceased, the benefit is divided among them. *Id.* § 42-9-130. An exception is that a surviving spouse with two or more dependent children receives at least one-third of the death benefit. *Id.* § 42-9-290.

104. *Id.* § 42-1-180.

105. *Id.* § 42-1-190. "Widower" is defined as one who is living with the deceased *and* is dependent upon her. *Id.* "Widow," however, is defined as one living with the deceased *or* dependent upon him. *Id.* § 42-1-180. Although this definition of widower appears to circumvent the conclusive presumption of dependency, the supreme court interpreted similar language in the definition of "child" as not requiring proof of dependency. Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, 190 S.E.2d 751 (1972). In addition, the United States Constitution may require the widows and widowers have the same burden of proof. Frontiero v. Richardson, 411 U.S. 677 (1973) (statute requiring servicewoman to prove her husband's dependency in fact while servicemen's wives are presumed dependent violates due process). *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). *But see* Kahn v. Shevin, 416 U.S. 351 (1974) (upheld validity of tax exemption for widows).

106. S.C. Code Ann. § 42-1-70 (1976). The definition of "child" includes an "acknowledged illegitimate child dependent upon the deceased." The "dependent" language of the definition does not require independent proof of dependency by the child.

to be wholly dependent.[107] Nevertheless, other claimants can qualify for the first priority by proving their actual total dependence upon the deceased.[108] If no total dependents exist, the statute entitles partial dependents to claim the death benefits.[109] If no total or partial dependents exist, the deceased's parents receive the benefits.[110] Finally, if the deceased is survived by neither dependents nor parents, the actual cost of burial and administration of the deceased's estate are paid to his personal representative and the balance to the benefit is paid to the Second Injury Fund.[111]

The payment of death benefits to a claimant actually entitled to priority under the Act discharges the employer from additional liability.[112] In contrast, disbursements to a claimant apparently entitled to the benefits may not relieve the employer from liability to a person who subsequently files a claim asserting a prior right to the payments.[113] Section 42-9-340 delineates the situations in which the erroneous payments will discharge the employer from liability to the rightful claimant for the already expended installments.[114] Under that section if an employer act-

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Flemon v. Dickert-Keowee, Inc., 259 S.C 99, 190 S.E.2d 751 (1972). *See Workmen's Compensation, Annual Survey of South Carlina Law*, 25 S.C.L. REV. 512-13 (1973).

107. S.C. CODE ANN. § 42-9-110 (1976).

108. *Id.* § 42-9-120. The supreme court has defined dependency as follows:

> " 'Total dependency' had reference to a dependent who receives all of his support from the employee, and 'partial dependency' to one who receives less than his entire support from that source * * *." . . . A claimant is not to be deprived of the benefits of a wholly dependent person, when otherwise entitled thereto, on account of temporary gratuitous services rendered by others, occasional financial assistance received from other sources, existence of other possible sources of support, minor considerations or benefits which do not substantially modify or change the status of the claimant, some slight savings of his own, some other slight property, mere physical ability to work in the past, present or future, or the mere ability to earn something in any manner by his own services.

Cokeley v. Robert Lee, Inc., 197 S.C. 157, 165-66, 14 S.E.2d 889, 892 (1941) (citations omitted).

109. S.C. CODE ANN. § 42-9-290 (Cum. Supp. 1977). If more than one person is partially dependent, the benefit is divided among them according to their dependency. *Id.* § 42-9-130. Any excess is paid the parents or the Second Injury Fund. *Id.* 42-9-140(b), 140(d).

110. *Id.* § 42-9-140(a).

111. *Id.* § 42-9-140(c). Payments from the Second Injury Fund are governed by § 42-9-400. *See generally* Custy, *supra* note 33 at 678-79.

112. S.C. CODE ANN. §§ 42-9-140, 340 (1976).

113. *Id.*; Airco v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977).

114. S.C. CODE ANN. § 42-9-340 (1976).

> Payment of death benefits by an employer in good faith to a dependent subsequent in right to another dependent shall protect and discharge the employer, unless and until such dependent prior in right shall have given notice of his

ing in good faith pays death benefits to a dependent not entitled to priority, the employer is discharged from liability to the rightful claimant.[115] The supreme court first interpreted the good faith provision of the section in *Airco, Inc. v. Hollington*[116] and held that for an employer to qualify for protection from double liability it must conduct a reasonably diligent investigation into the claimant's right to benefits.

At the original hearing before the Commissioner in *Airco,* the parents of the deceased employee testified under oath that they were wholly dependent upon the deceased.[117] They also testified that the deceased had no legitimate or illegitimate children.[118] The Commissioner held the parents were dependent and awarded them commuted death benefits.[119]

After the carrier had paid over $22,000 to the deceased's parents, an illegitimate child of the deceased filed a claim for benefits. At a second hearing evidence was presented that the parents had not been actually dependent on the deceased. Furthermore, many witnesses from the community testified that the deceased had acknowledged paternity of the child. Therefore, the Commissioner found that under the Act's priority structure the child, not the parents, was entitled to the death benefit.[120] Never-

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claim. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Commission to decide between them.

Id.

115. *Id.*

116. 269 S.C. 152, 236 S.E.2d 804 (1977).

117. Record at 9, 12.

118. *Id.*

119. Commutation has been defined as "[t]he conversion of the right to receive a variable or periodical payment into the right to receive a fixed or gross payment." BLACK'S LAW DICTIONARY 351 (4th ed. 1968). The finding and the award are possibly inconsistent. If the parents were actually dependent, payment would normally have been weekly rather than lump sum. S.C. CODE ANN. § 42-9-290 (Cum. Supp. 1977). If no dependents exist and the parents are paid under § 42-9-140, the award is the commuted amount of the benefits. *Id.* § 42-9-140 (1976). Therefore, the method of payment ordered may not have been the proper one. In *Airco,* it meant the carrier was forced to pay the whole commuted balance twice rather than the sum of the weekly payments from the award date to the date of notice given by Everette Frazier, the illegitimate child, and his mother.

The method of payment is not wholly out of line because the Commission does have some leeway in paying lump sums to dependents. After the first installment, "compensation shall be paid in installments weekly, except when the Commission determines that payment *in installments* shall be made monthly or *in some other manner.*" *Id.* § 42-9-240 (emphasis added). After six weeks of installments the parties can request the Commission to redeem weekly payments for a lump sum. *Id.* § 42-9-300. For further discussion of lump sum payments, see *Administrative Law—Annual Survey of South Carolina Law,* 29 S.C.L. REV. 1, 11-15 (1977).

120. Record at 33.

theless the Commissioner denied the child's claim because the employer had, in good faith and pursuant to a Commission order, paid the employee's parents.[121]

The full Commission reversed the Commissioner's ruling and ordered payment of benefits to the child.[122] Commissioner Leverette asserted that the facts presented did not establish the exercise of good faith in the payment of the death benefits to the parents.[123] In addition to the failure of the employer to conduct a good faith investigation into the parents' right to the benefits, the Commission mentioned other factors supporting reversal. Commissioners Nelson and Reid stressed the duty of "administrative tribunals . . . [to] bend over backwards to protect the rights of a minor."[124] Those Commissioners felt that the burden of pursuing proceedings against the unjustly enriched parents should be on the employer, who could better bear it, rather than on the child who was entitled to the benefits.[125]

The full Commission's decision was affirmed by both the court of common pleas[126] and the supreme court.[127] The supreme court held that the employer must prove that it actually made an investigation to locate the proper recipient of the death benefits to meet the good faith standard for protection from payment of double benefits.[128]

In rendering the decision the supreme court viewed as precedent *Green v. Briley,*[129] a case decided under a similar provision of the North Carolina Workmen's Compensation statute.[130] In *Green* the carrier investigated the dependency status of the de-

121. *Id.*

122. *Id.* at 37-38. Commissioner Addis, without explanation, voted to affirm the award of Commissioner Dreher. *Id.* at 39.

123. *Id.* at 36.

124. *Id.* at 38.

125. *Id.* at 38-39. On the employer's problems with suing for back compensation, see *Workmen's Compensation: Recovery* for *Payments Made Pursuant to a Subsequently Reversed Award,* 32 MD. L. REV. 427 (1973), *reprinted in* 2 WORK. COMP. L. REV. 217 (1975).

126. Record at 39-48.

127. 269 S.C. 152, 236 S.E.2d 804 (1977).

128. *Id.* at 159-60, 236 S.E.2d at 807. The court had first ruled that the res judicata defense did not apply to a situation in which the illegitimate son was not a party to the prior proceeding and that the son's claim was timely filed. *Id.* at 158, 236 S.E.2d at 807.

129. 242 N.C. 196, 87 S.E.2d 213 (1955).

130. The court often looks to North Carolina decisions in cases in which our statute has not been interpreted and the North Carolina statute is similar. *See, e.g.,* Nolan v. Daley, 222 S.C. 407, 412-13, 73 S.E.2d 449, 451 (1952). For North Carolina's comparable statute, see N.C. GEN. STAT. § 97-48(c) (1972).

ceased's relatives but received only information substantiating the false testimony of the deceased's mother and brother. The North Carolina Industrial Commission awarded benefits to the mother, and the carrier paid her. Afterwards, the mother sent a Christmas card to the deceased's wife informing her for the first time that her husband had died. The Supreme Court of North Carolina affirmed the Commission's order denying the wife benefits and held the insurance carrier had paid in good faith and had met the statute's requirements.[131]

The South Carolina Supreme Court noted that the significant difference between *Airco* and *Green* is that the insurance carrier and employer in *Airco* did not show they had conducted an independent investigation.

> [T]he text of the opinion in the *Green* case leaves little doubt in our view that no such good faith can be said to be present absent the showing of an investigation to determine who is actually entitled to receive the benefits. Such a holding, while not expressed in precise language, is certainly inferable. Even were this not so, we think that the necessity for requiring the showing of such an investigation would follow logically and fairly nonetheless.[132]

Therefore, under *Airco,* to establish the good faith necessary to invoke the Act's protection against double payment, the employer must present evidence of an investigation.

The court did not fully detail the scope of this investigation. The court defined good faith as follows:

> We agree with the rationale of the lower court that good faith "imports reasonable diligence in utilizing the available sources of information and seeking to ascertain the facts upon which an intelligent good faith judgment can be made" as to the person entitled to the benefits.[133]

The decision indicates that the investigation must involve more than simply questioning interested parties.[134] Furthermore, the employer apparently will be held responsible for any readily available evidence of the existence and dependency of potential

131. 242 N.C. at 201, 87 S.E.2d at 216.

132. 269 S.C. at 159, 236 S.E.2d at 807.

133. *Id.*

134. In Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955), the carrier had questioned persons other than the deceased's relatives in the county where he died. *Id.* at 200, 87 S.E.2d at 216.

claimants.[135] To protect the interest of statutorily entitled dependents from fraudulent claims, the court has placed the burden of investigation upon the employer. Although the employer is only arguably the best qualified entity to probe into one's entitlement to benefits, the prospect of paying twice should provide sufficient incentive to compel the employer to investigate the claimant's actual right to benefits.[136]

The *Airco* decision is troubling in at least one aspect. The court stressed that the parents of the deceased "were not entitled to payment at all under the pertinent provisions of the Workmen's Compensation Act."[137] This assertion, however, is misleading and obscures a significant issue on the scope of the protection against double liability provided by the good faith provision. At the first hearing the evidence established that the claimants were the parents of the deceased. Therefore, under section 42-9-140, they were entitled to benefits if the deceased employee left no dependents.[137.1] If the employer in *Airco* had made an investigation sufficient under section 42-9-340 into the entitlement to death benefits and concluded that the deceased left no dependents, the employer would have been justified under the statute in paying the benefits to the deceased's parents. A problem arises, however, if after the payment is made to the parents, a dependent of the deceased surfaces and files a claim against the employer for death benefits. In this situation the employer apparently cannot invoke the good faith provision of section 42-9-340 to bar a recovery by the dependent, because the protection of section 42-9-340 applies only to payments made to a "*dependent*" subsequent in right to another dependent."[138] The separate discharge

135. 269 S.C. at 160, 236 S.E.2d at 807-08.

136. Under the Act, once liability is established the employer must pay the entire amount of the death benefit to either the dependents, the parents, or the Second Injury Fund. S.C. CODE ANN. §§ 42-9-140, 290 (1976 & Cum. Supp. 1977). In addition, if the employer is tardy with payments, a ten percent penalty can be assessed. *Id.* § 42-9-90 (1976). The upshot is that other than the prospect of paying twice, the employer has little incentive to investigate a claimant's actual right to death benefits.

137. 269 S.C. at 159, 236 S.E.2d at 807.

137.1. S.C. CODE ANN. § 42-9-140(a) (1976).

> If the deceased employee leaves no dependents, the employer shall pay the commuted amounts provided for in § 42-9-290 for whole dependents, less burial expenses which shall be deducted therefrom, to his father and mother, irrespective of age or dependency.

Id. *See* note 110 and accompanying text *supra.*

138. S.C. CODE ANN. § 42-9-340 (1976) (emphasis added). The court appeared to recognize this problem by stating the parents "were not 'dependents subsequent in right to another dependent' under Section 42-9-340." 269 S.C. at 159, 236 S.E.2d at 807.

provision in section 42-9-140 releases the employer if "payment is made as prescribed in this section," but that section decrees that the deceased employee must have left no dependents if parents are paid the benefits.[139] Therefore, when parents are paid under section 42-9-140 without regard to dependency, the statute apparently affords the employer no protection against double payments if a dependent subsequently appears.

An appropriate amendment to the statute would be to provide for discharge of liability if payment under section 42-9-140 is made after a reasonably diligent investigation into the possibility of claimants prior in right.[140] Meanwhile, when a factual basis exists, the employer should ensure that a death benefits award to parents is grounded on dependency, not section 42-9-140. If the employer makes a sufficient investigation to establish good faith and bases the award on section 42-9-340 it would then be protected from the possibility of double payment.

The *Airco* decision also raises a problem concerning the method of payment.[141] Obviously, an employer who pays benefits by the week, rather than in a lump sum, is likely to have paid out less by the time a new claimant appears. Lump sum awards in these cases subject the employer to higher liability if the original claimant is ultimately declared ineligible for benefits. The administrative burden of weekly benefit payments and the cost of maintaining insurance reserves may, however, weigh in favor of lump-sum payments despite the rare case in which large benefits will have to be paid twice. An alternative approach to lump sum payments might be periodic payments until the running of the statute of limitations for filing claims,[142] but the one-year limit might not bar the action of a minor.[143]

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139. S.C. CODE ANN. § 42-9-140 (1976). Of course, an employer could argue that "dependent" under section 42-9-340 should be interpreted broadly or that section 42-9-140 should be interpreted as only requiring the employer to conduct a good faith investigation into whether there are dependents.

140. The discharge provision of § 42-9-140 could be amended as follows:

> Payment under this section after a reasonably diligent investigation into the claimant's right to benefits shall release the employer from all death benefit liability.

141. *See* note 119 *supra.*

142. S.C. CODE ANN. § 42-15-40 (1976). "The right to compensation under this Title shall be forever barred . . . if death resulted from the accident, unless a claim be filed with the Commission within one year thereafter." *Id.*

143. *Id.* § 42-15-50. "No limitation of time provided in this title for the giving of notice or making claim under this Title shall run against any person who is mentally incompetent or a minor dependent as long as he has no guardian, trustee or committee." *Id.*

The easiest method of ensuring protection, therefore, is to conduct and document a diligent investigation into the claimant's right to receive the death benefits. If the employer pays benefits to a dependent and can prove a diligent investigation, the Act protects the employer from double liability. In this situation, the rightful recipient's sole remedy is an action against those unjustly enriched for the benefits paid before notice was given to the employer.[144]

Elizabeth A. Carpentier

144. *Id.* § 42-90-340. The statute protects the employer "unless and until such dependent prior in right shall have given notice." *Id.* The legislature's apparent intent is to protect the employer from having to repay benefits paid before notice was given.