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ADMINISTRATIVE LAW

I. WORKMEN'S COMPENSATION LAW

A. Procedural Requirements Protect Carrier's Right of Subrogation

Under the provisions of the South Carolina Workmen's Compensation Act, a recovery against a third party tortfeasor after the employee receives workmen's compensation benefits is subject to an insurance carrier's statutory lien.[1] In *Fisher v.*

1. S.C. CODE ANN. § 42-1-560(b) (1976). This section provides in pertinent part:

> The injured employee or, in the event of his death, his dependents, shall be entitled to receive the compensation and other benefits provided by this Title and to enforce by appropriate proceedings his or their rights against the third party; *provided* that action against the third party must be commenced not later than one year after the carrier accepts liability for the payment of compensation or makes payment pursuant to an award under this Title, except as hereinafter provided. In such case the carrier shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier, less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier. . . . Any balance remaining after payment of necessary expenses and satisfaction of the carrier's lien shall be applied as a credit against future compensation benefits for the same injury or death and shall be distributed as provided in subsection (g) of this section. Notice of the commencement of the action shall be given within thirty days thereafter to the Industrial Commission, the employer and carrier upon a form prescribed by the Industrial Commission.

(emphasis in original).

See generally A. CUSTY, THE LAW OF WORKMEN'S COMPENSATION IN SOUTH CAROLINA

South Carolina Dep't. of Mental Retardation—Coastal Center,[2] the South Carolina Supreme Court fortified this protection of a carrier's interest. The court held that an employee who accepts a third party settlement without the insurance carrier's consent has elected his remedy and is therefore precluded from collecting additional benefits under the South Carolina Workmen's Compensation Act.[3] This decision is in accord with the rule followed by most jurisdictions.[4]

The claimant was injured at a Sears store when she fell while shopping for clothes for residents of her employer's facility, the South Carolina Department of Mental Retardation.[5] After collecting a small amount in workmen's compensation benefits,[6] the claimant proceeded against Sears and accepted a compromise settlement without obtaining the carrier's consent.[7] The claimant then attempted to recover benefits under the South Carolina Workmen's Compensation Act.[8] The single commissioner, full commission, and circuit court dismissed her claim, and found that she had no remedy under the South Caro-

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§ 13.2.1 (1977) for a discussion of the statute.

2. 277 S.C. 573, 291 S.E.2d 200 (1982).

3. *Id.* at 575, 291 S.E.2d at 201.

4. *E.g.*, Hornback v. Indus. Comm'n, 106 Ariz. 216, 474 P.2d 807 (1970); Travelers Ins. Co. v. Haden, 418 A.2d 1078 (D.C. 1980); Berenberg v. Park Memorial Chapel, 286 A.D. 167, 142 N.Y.S.2d 345 (1955). Many states have codified this rule as part of their Workmen's Compensation Act. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-293 (West 1972); FLA. STAT. ANN. § 440.39 (West Supp. 1981); ILL. ANN. STAT. ch. 48, § 656.587 (Smith-Hurd 1981); VA. CODE § 65.1-41 (1980). *See generally* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 74.17(a) (1982).

5. 277 S.C. at 574, 291 S.E.2d at 201. It was undisputed that Mrs. Fisher suffered a compensable injury.

6. Mrs. Fisher collected $61.80 in workmen's compensation benefits before she decided to pursue an action against Sears. Record at 11, 25.

7. 274 S.C. at 574, 291 S.E.2d at 201. Mrs. Fisher settled her claim against Sears for $10,000 an amount less than the available coverage and below the anticipated workmen's compensation claim. Record at 12, 27; Brief for Respondents at 8. In settling her claim, Mrs. Fisher executed a written release and an order of discontinuance which discharged Sears from all further claims arising out of the accident. Record at 27, 31-32.

Prior to the settlement, Mrs. Fisher submitted to Sears an affidavit in which she stated, "I have not received workmens [sic] compensation payments as a result of my injury . . . occurring at Sears Roebuck Company while working at the Mental Retardation Coastal Center, and I am not now receiving compensation payments from the State Workmen's Compensation Fund." *Id.* at 27, 31. Because Sears made the settlement without notice or knowledge of the workmen's compensation carrier's lien, the settlement was not binding against the carrier. S.C. CODE ANN. § 42-1-560(f) (Supp. 1982); Brief for Respondent at 9. *See infra* note 20.

8. Now codifed at S.C. CODE ANN. §§ 42-1-10 to 42-19-40, (1976 & Supp. 1981).

lina Workmen's Compensation Act because she had elected a remedy against a third party tortfeasor without complying with section 42-1-560 (Supp. 1981) of the South Carolina Code of Laws.[9] On appeal, the supreme court affirmed.[10]

The court noted that an injured employee has three remedies for job-related injuries: proceed solely against the employer, proceed solely against the third party tortfeasor, or proceed against both the employer and the third party by complying with section 42-1-560.[11] This section does not specifically state that settlement with a third party without the carrier's consent constitutes an election of remedies. The supreme court, however, determined that the legislature did not intend to allow a claimant to pursue workmen's compensation benefits and to settle a third party claim while disregarding the carrier's right of subrogation.[12] Citing *Stroy v. Millwood Drug Store, Inc.*,[13] the court reasoned that to allow an injured employee to destroy a carrier's right to reimbursement from a third party[14] would run counter to the statute's purpose of effecting an equitable adjustment of the rights of all the parties.[15] The claimant's noncompliance[16] with the statutory procedure violated the spirit of the Act and constituted an election of remedies which precluded the claimant from collecting additional workmen's compensation benefits.[17]

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9. 299 S.C. at 574, 291 S.E.2d at 200-01. *See supra* note 1.

10. *Id.* at 291, S.E.2d at 201.

11. *Id.* at 575, 291 S.E.2d at 201.

12. *Id.* at 291, S.E.2d at 201.

13. 235 S.C. 52, 109 S.E.2d 706 (1959). In *Stroy*, the South Carolina Supreme Court held that an employee's action in prosecuting the third party action to a final determination barred his right to workmen's compensation benefits. *Id.* at 60, 109 S.E.2d at 710. In deciding *Stroy* the court followed its earlier decisions in Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947), and Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 57 S.E.2d 308 (1950). In *Taylor* and *Gardner*, the court held that when an injured employee settles his third party action without the knowledge or consent of his employer, the settlement is a bar to an action for workmen's compensation benefits. These cases, however, were decided under a previous workmen's compensation act which did not permit injured employees to pursue both claims. *See infra* note 18 and accompanying text.

14. *See supra* note 7.

15. 277 S.C. at 575-76, 291 S.E.2d at 201.

16. Mrs. Fisher failed to comply with the procedural requirements implicit in S.C. CODE ANN. § 42-1-560(b) (1976) when she settled her claim against Sears without the carrier's consent or the Industrial Commission's approval.

17. 277 S.C. at 576, 291 S.E.2d at 201. The court concluded that Mrs. Fisher had

Prior to 1974, an employee who sustained job-related injuries, caused by a third party, could either collect workmen's compensation benefits or recover damages from the third party in an action at law. The recovery of one was a bar to the other.[18] In 1974 the legislature amended the South Carolina Workmen's Compensation Act to permit injured employees to simultaneously pursue workmen's compensation benefits and damages from third parties.[19] The amendment, now codified as section 42-1-560, protects an insurance carrier's subrogation rights by imposing a statutory lien on the proceeds of the third party recovery to the extent of the total amount of compensation paid or to be paid by the carrier.[20] Section 42-1-560 is thus designed to achieve an equitable adjustment of the rights of all parties by allowing injured employees to pursue both remedies while protecting the subrogation rights of the carrier.[21]

The supreme court's decision in *Fisher* furthers an equitable result for all parties in a workmen's compensation case by forcing a claimant to comply with the procedural requirements of section 42-1-560. The court's construction of the statute follows the majority view[22] that a claimant who settles a third party claim without the carrier's consent has elected a remedy and may not collect additional workmen's compensation benefits. Injured employees can easily avoid the result in *Fisher* by obtaining the carrier's consent to any third party settlement.[23] Compliance with statutory procedure will allow an injured employee to simultaneously pursue workmen's compensation bene-

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elected to pursue the remedy provided in S.C. CODE ANN. § 42-1-550 (1976) which provides that injured employees "may institute an action at law against such third person before an award is made under this Title and prosecute it to its final determination."

18. S.C. CODE ANN. § 72-123 (1962).

19. S.C. CODE ANN. § 72-126.1 (Supp. 1975).

20. S.C. CODE ANN. § 42-1-560(b) (1976). *See supra* note 1. Section 42-1-560(f) (Supp. 1982) provides additional protection for the insurance carrier's statutory lien. This section states that an employee's compromise settlement with a third party is not binding against the carrier's right to reimbursement if: (1) the settlement was accepted without the carrier's written consent, (2) the third party had notice or knowledge of the carrier's lien, and (3) the settlement was for an amount less than the total workmen's compensation to which the employee was entitled. *See supra* note 7.

21. 277 S.C. at 575, 291 S.E.2d at 201.

22. *See supra* note 4.

23. If the carrier refuses to approve the proposed compromise settlement, S.C. CODE ANN. § 42-1-560(f) (Supp. 1982) allows the claimant to petition the Industrial Commission for approval of the settlement.

fits and third party damages under section 42-1-560 while protecting the carrier's subrogation rights.

Stephen E. Hudson

B. When Death by Occupational Disease may be Considered Accidental Injury

In *Marquard v. Pacific Columbia Mills*[24] the South Carolina Supreme Court affirmed the State Industrial Commission's finding that a decedent's widow was entitled to death benefits under the state workmen's compensation statute.[25] The court found substantial evidence in the record to support the Commission's holding that the decedent suffered from an occupational disease, byssinosis, which placed an unusual strain on his heart and led to his fatal heart attack.[26] The court approved the Commission's finding that the decedent died of an accidental injury, heart attack, rather than an occupational disease. The court then upheld the Commission's denial of the defendant's motion to submit to a medical board the question whether the decedent suffered from an occupational disease.[27] This decision is clearly in derogation of the statutory language that the Commission *shall* upon motion of either party to the proceeding, submit any question concerning the existence of a disease to the medical board.[28]

Plaintiff's decedent worked in the card room of Pacific Columbia Mills for fifteen years.[29] At the hearing, the plaintiff tes-

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24. ___ S.C. ___, 295 S.E.2d 870 (1982).

25. *Id.*, 295 S.E.2d 870. The court relied on S.C. CODE ANN. §§ 42-1-10 to -11-200 (1976 & Supp. 1981).

26. ___ S.C. at ___, 295 S.E.2d at 871.

27. *Id.* at ___, 295 S.E.2d at 871.

28. S.C. CODE ANN. § 42-11-120 (1976) provides the procedure for determining claims:

> The procedure for determining claims for benefits from an occupational disease shall be the same as that followed in determining other claims under this Title, save that if any medical question shall be in controversy the Commission may, upon its own motion, and shall, upon motion of either party to the proceeding, refer the question to the medical board as provided in this chapter for investigation and report. A medical question shall be deemed to include any issue concerning the existence, cause and duration of a disease or disability, the date of disablement, the degree of disability and the proportion thereof attributable to a noncompensable cause and any other matter necessarily pertinent thereto requiring the opinion of experts.

29. ___ S.C. at ___, 295 S.E.2d at 870. The court noted that "[t]he card room section

tified that the decedent came home from work covered with cotton dust, that he complained of shortness of breath, and that he had a noticeable cough that worsened on Monday nights.[30] She also testified that for a few weeks before his death, the decedent had complained of pains in his arms.[31] He died of heart failure at work,[32] but he had not been under any unusual strain or exertion at the time.[33]

The plaintiff's action began before the Industrial Commission, where she sought recovery on the theory that the decedent's occupational disease had proximately caused his fatal heart attack.[34] After the Commission heard testimony from the plaintiff's witnesses, the defendant moved to submit to a medical board the question whether the decedent had actually suffered from byssinosis.[35] The Commission denied this motion,[36] and both the circuit court and the supreme court[37] affirmed.

The supreme court reasoned that "[t]he circuit court and this Court are bound by the Commission's decision unless clearly erroneous in view of the substantial evidence on the whole record."[38] The Commission had held the medical question provision of the statute "inapplicable to a claim based upon an accidental injury arising out of and in the course of employment."[39] Three members of the supreme court agreed with this determination and found substantial evidence in the record to

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of the mill has a higher concentration of cotton dust than others." *Id.* at n.1., 295 S.E.2d at 870, n.1.

30. ___ S.C. at ___, 295 S.E.2d at 870; Record at 219-20. Symptoms of byssinosis include tightness in the chest and wheezing, particularly on Mondays when the employee is first exposed to cotton dust after a weekend away from work. Record at 148-49.

31. Record at 221.

32. *Id.* at 236.

33. ___ S.C. at ___, 295 S.E.2d at 872 (Gregory, A.J., concurring and dissenting); Record at 221.

34. Record at 217-18.

35. *Id.* at 239-41.

36. *Id.* at 240-41.

37. ___ S.C. at ___, 295 S.E.2d at 870.

38. *Id.* at ___, 295 S.E.2d at 871.

39. Record at 240. The Commission also noted that even if the claim were based upon the existence of an occupational disease, the submission of the medical question to the medical board would "serve no purpose other then [sic] to delay the ultimate decision." *Id.* The Commission thought that the medical board would merely make an independent determination based upon evidence already before the Commission, and that the statutory purpose did not encompass "[s]uch a delegation of the decision making authority of the Commission. . . ." *Id.* at 241.

support the Commission's holding that the decedent's employment conditions had caused the occupational disease which led to the heart attack.[40] The majority reasoned that the term "accidental injury" includes "unexpected events caused by employmentrelated disease."[41] The court seems to have classified the decedent's heart attack as an unexpected result of an employment-related disease; thus, according to the court, the heart attack was compensable as an accidental injury arising out of and in the course of employment.[42] Under this line of reasoning the question whether the decedent suffered from an occupational disease became moot, and no medical question existed.[43]

The court's decision in *Marquard* is the result of an erroneous reading of the Workmen's Compensation statute. The statutory scheme provides compensation for death resulting from injury by accident.[44] An employee or his beneficiaries may recover for accidental injury by proving either that the employee suffered from an occupational disease[45] or that he experienced an accidental injury arising out of and in the course of his employment.[46] Under the occupational disease provision, the claimant must prove that the employee suffered from one of the statutorily defined employment-related diseases.[47] If either party in the

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40. ___ S.C. at ___, 295 S.E.2d at 871. Justice Ness wrote the majority opinion in which Justices Lewis and Harwell concurred. Justices Gregory and Littlejohn concurred in part, but dissented on the medical question issue. *Id.*, 295 S.E.2d at 871.

41. *Id.*, 295 S.E.2d at 871.

42. *Id.*, 295 S.E.2d at 871. *See infra* note 44.

43. ___ S.C. at ___, 295 S.E.2d at 871.

44. S.C. CODE ANN. § 42-1-110 (1976) states that "[t]he term '*death*' as a basis for right to compensation means only death resulting from an injury." (Emphasis in original). Section 42-1-160 defines injury as "only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except . . . such diseases as are compensable under the provisions of Chapter 11 of this Title." Chapter 11 of the Title covers occupational diseases. *See infra* note 47.

45. S.C. CODE ANN. § 42-11-40 (1976) provides in part that the "disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident. . . ."

46. *See supra* note 44.

47. S.C. CODE ANN. § 42-11-10 (1976) defines occupational disease as follows:

> The words "*occupational disease*" mean a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof.

proceedings requests that this question be determined by a medical board, the Commission must grant the request, and a medical board must decide whether the employee had an occupational disease.[48] Under the accidental injury prong of the statute the claimant must prove that the employee's injury was accidental, that it arose out of the employment, and that it occurred in the course of employment.[49] Generally, the claimant meets these requirements by showing that the injury was unusual, unexpected, and unintentional,[50] that the employment was the proximate cause of the injury,[51] and that the employee was "at work" when the injury occurred.[52]

No disease shall be deemed an occupational disease when:

(1) It does not result directly and naturally from exposure in this State to the hazards particular to the particular employment;

(2) It results from exposure to outside climatic conditions;

(3) It is a contagious disease resulting from exposure to fellow employees or from a hazard to which the workman would have been equally exposed outside of his employment;

(4) It is one of the ordinary diseases of life to which the general public is equally exposed, unless such disease follows as a complication and a natural incident of an occupational disease or unless there is a constant exposure peculiar to the occupation itself which makes such a disease a hazard inherent in such occupation;

(5) It is any disease of the cardiac, pulmonary or circulatory system not resulting directly from abnormal external gaseous pressure exerted upon the body or the natural entrance into the body through the skin or natural orifices thereof of foreign organic or inorganic matter under circumstances peculiar to the employment and the processes utilized therein; or

(6) It is any chronic disease of the skeletal joints.

(Emphasis in original).

48. *See supra* note 28.

49. *See supra* note 44.

50. The court has found a compensable accident when "[t]he cause and the result were unexpected, unusual and unintended. . . ." Riley v. South Carolina State Ports Auth., 253 S.C. 621, 627, 172 S.E.2d 657, 660 (1970). *See also* Colvin v. E.I. du Pont de Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955); Hiers v. Brunson Constr. Co., 221 S.C. 212, 70 S.E.2d 211 (1952).

51. "An accident 'arises out of the employment' when the employment is a contributing proximate cause." Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973). *See also* Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973); Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965).

52. The court has held that:

[A]n injury arises in the course of employment within the meaning of the Workmen's Compensation Act when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties, and while he is fulfilling those duties, or engaged in doing something

In heart attack cases, the claimant usually seeks compensation under the accidental injury prong of the statute. The court has generally found a heart attack to be an injury by accident,[53] *i.e.*—unexpected and unforeseeable but not arising out of and in the course of employment unless the attack results from some unusual strain or exertion not normally incident to the employment.[54] In *Marquard*, the decedent's heart attack did not result from any unusual strain or exertion.[55] According to undisputed testimony, the decedent was returning from lunch when he died.[56] Therefore, under the unusual strain or exertion rule, the plaintiff clearly should not have been able to recover workmen's compensation benefits by claiming her husband's death was caused by an employment-related injury.

To circumvent the unusual strain or exertion rule the plaintiff argued that the decedent suffered from an employment-related disease which proximately caused the heart attack, and therefore the heart attack should be interpreted as an injury arising out of and in the course of employment.[57] Because existence of the occupational disease was a crucial element of the plaintiff's cause of action, she should have been required to prove the existence of the alleged disease, as required by the occupational disease provision of the statute.

The Commission, however, ruled that the plaintiff did not have to prove her claim before a medical board.[58] The supreme court limited the scope of its review and held that it was bound by the Commission's findings unless they were clearly erroneous.[59] Admittedly, the Commission's findings of fact were not

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incidental thereto.

Fowler v. Abbott Motor Co., 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1960). *See also* Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 200 S.E.2d 83 (1973); Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965).

53. Robinson v. City of Cayce, 265 S.C. 441, 219 S.E.2d 835 (1975); Pellum v. W.C. Chaplin Transp., 249 S.C. 348, 154 S.E.2d 432 (1967); Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961); Kearse v. S.C. Wildlife Resources Dep't, 236 S.C. 540, 115 S.E.2d 183 (1960).

54. McWhorter v. S.C. Dep't of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969); Sims v. S.C. State Comm'n of Forestry, 235 S.C. 1, 109 S.E.2d 701 (1959). *See also* cases cited *supra* note 53.

55. ___ S.C. at ___, 295 S.E.2d at 872 (Gregory, A.J., concurring and dissenting).

56. Record at 221.

57. *Id.* at 217-18.

58. *Id.* at 240-41.

59. ___ S.C. at ___, 295 S.E.2d at 871.

clearly erroneous. The supreme court was probably correct in deciding that "ample evidence" existed in the record to support the Commission's finding that the decedent suffered from a work-related disease that proximately caused his fatal heart attack. Both the Commission and the court, however, misread the statute. As evidenced by the defendant's motion to submit the question to the Board, the existence of an occupational disease was clearly at issue. The statutory language does not give the Commission an option to submit the question only if it agrees that a medical question exists; the statutory language is mandatory.[60] Upon motion by either party—and at any point in its hearings—the Commission *must* refer any issue concerning the existence of a disease to the medical board.

The court's reluctance to remand this case for such a technical misreading of the statute is not surprising in light of its longstanding policy of broadly construing the Workmen's Compensation statute to best effectuate the statute's purpose of benefitting employees and their dependents.[61] The result of the court's error, however, is not so easily reconciled. The plaintiff's claim that the decedent died of a heart attack at work was clearly not compensable under South Carolina workmen's compensation law.[62] The plaintiff therefore claimed that the existence of an occupational disease proximately caused the heart attack. This innovative theory provided the link necessary to qualify the heart attack as an accidental injury arising out of and in the course of employment. When the defendant moved to have the disease question decided by a medical board, however, as provided in the chapter on occupational disease, the Commission, and later the court, held that the occupational disease chapter was inapplicable because the claim was for an accidental injury.[63] The supreme court allowed the plaintiff to use the alleged existence of an occupational disease to recover under the statute without requiring her to follow the mandatory statutory procedure for proving the existence of that disease. Thus, the

60. *See supra* note 28.

61. *See, e.g.*, Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973); Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965); Price v. B.F. Shaw Co., 224 S.C. 89, 77 S.E.2d 491 (1953).

62. *See supra* notes 54-57 and accompanying text.

63. *See supra* notes 39-43 and accompanying text.

defendant in *Marquard* was denied, through the court's "Catch-22"[64] ruling, the statute's protection against having compensable diseases being diagnosed by unqualified administrative and judiciary bodies.

The implications of *Marquard* are unclear. The court correctly applied the "clearly erroneous" standard of review and properly concluded that the Commission's findings of fact were not clearly erroneous. However, the court incorrectly assumed that the Commission had discretion to determine whether the decedent suffered from an occupational disease and then use the results of its investigation to grant or deny the defendant's motion. Both the Commission and the court incorrectly allowed the plaintiff, whose decedent died from an occupational disease, "[t]o disregard the provisions of the Occupational Disease Chapter of the Workmen's Compensation Act by pursuing his claim as one for accidental injury."[65] The court's split decision[66] indicates that the holding may be limited to these particular facts, and a well-reasoned argument may convince the court to disregard *Marquard* as precedent.

Karen E. Molony

II. HUMAN AFFAIRS LAW: INVESTIGATION BY COMMISSION DOES NOT GIVE RISE TO JUSTICIABLE CONTROVERSY

As the first case decided under the amended South Carolina Human Affairs Law,[67] *Orr v. Clyburn*[68] indicates the supreme court's willingness to exercise judicial self-restraint in dealing with the Commission on Human Affairs. The court held that an employer being investigated for discrimination may not seek a declaratory judgment that he is not subject to the Commission's proceedings because an investigation does not in itself give rise to a justiciable controversy.[69] This holding is in accord with the rule in other American jurisdictions.[70]

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64. Brief for Appellants at 12.

65. ___ S.C. at ___, 295 S.E.2d at 872 (Gregory, A.J., concurring and dissenting).

66. *See supra* note 40.

67. S.C. CODE ANN. §§ 1-13-10 to -110 (1976 & Supp. 1982).

68. 277 S.C. 536, 290 S.E.2d 804 (1982).

69. 277 S.C. at 540, 290 S.E.2d at 807.

70. *See, e.g.*, Sterling Drug, Inc. v. Weinberger, 384 F. Supp. 557 (S.D.N.Y. 1974); Allegheny Airlines, Inc. v. Fowler, 261 F. Supp. 508 (S.D.N.Y. 1966); H.W. Rowl Co. v.

On May 21, 1979, Nancy Grant Raines applied to Chester County Sheriff Orr for a position as deputy sheriff. When she was not hired, Ms. Raines filed a complaint with the respondent Commission on Human Affairs alleging that the sheriff denied her the position because of her race and sex. The Commission subsequently notified Sheriff Orr that it was investigating the charge against him.[71]

Orr, individually and as representative of all South Carolina sheriffs, sought both a declaratory judgment that the Human Affairs Law did not apply to sheriffs and injunctive relief from the Commission's investigation.[72] His complaint asserted that he had no adequate remedy at law to restrain the Commission from acting further on Raines' complaint and that its investigation could result in a Commission order to hire her.[73] The respondent demurred to the complaint. The trial court granted the demurrer on the grounds that the court lacked jurisdiction and because the complaint failed to state a cause of action warranting declaratory and injunctive relief.[74] On appeal, the supreme court affirmed.

In upholding the demurrer, the court first took judicial notice that the legislature had amended the statutory provision which allegedly gave the Commission the power to order the hiring of Ms. Raines.[75] The amended act provides that the order to hire an applicant may only issue from a judge after a proceeding initiated by the Commission.[76] Therefore, the court concluded Orr's claim that he would be irreparably harmed if the Commission ordered him to hire Ms. Raines was moot.[77]

County of San Diego, 212 Cal. App. 2d 707, 28 Cal. Rptr. 196 (1963).

71. 277 S.C. at 539, 290 S.E.2d at 805-06.

72. *Id.*, 290 S.E.2d at 806.

73. *Id.*, 290 S.E.2d at 806. Appellant also alleged that this order would violate his constitutional rights of due process and equal protection because, as a sheriff, he would be vicariously liable in tort for damages caused by his servant. Record at 10.

74. 277 S.C. at 539, 290 S.E.2d at 805.

75. *Id.*, 290 S.E.2d at 806.

76. Under S.C. CODE ANN. § 1-13-90(d) (Supp. 1982), which discusses proceedings involving "employers . . . including counties," the Commission is no longer empowered to order a county employer such as the sheriff to hire an applicant. *Cf.* S.C. CODE ANN. § 1-13-90(d)(14) (1976). The Commission may conduct an investigation and decide whether to bring an action in equity in a court of common pleas, S.C. CODE ANN. § 113-90(d)(7) (Supp. 1982), and the court may order the applicant to be hired, S.C. CODE ANN. § 1-13-90(d)(9) (Supp. 1982).

77. 277 S.C. at 539-40, 290 S.E.2d at 806.

The court next turned to Orr's allegation that he was irreparably injured by the Commission's continuing investigation[78] and held that Orr's complaint did not present a justiciable controversy.[79] The court gave four reasons for its determination. First, because the final step of the Commission's investigation—a decision to bring an action in equity—could not determine any of Orr's legal rights, due process considerations did not arise.[80] Second, the Commission's decision to bring an action in equity at the conclusion of its investigation was expressly precluded from judicial review by statute.[81] Third, the investigation could terminate before its conclusion without the court's intervention.[82] Fourth, the Commission did not have any interest adverse to Orr.[83] The court concluded that the dispute presented in Orr's complaint was contingent and hypothetical and, therefore, inappropriate for judicial determination.[84]

The significance of *Orr v. Clyburn* to the attorney practicing administrative law in South Carolina depends on how narrowly one reads this decision. Given a narrow reading, *Orr* may apply only to the limited investigatory nature of the Commission's

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78. The appellant objected that the agency had no power to investigate, that the investigation might lead to a court action against him and that the investigation would require him to spend time and money to furnish the Commission with any information requested. Brief for Appellant at 7-9.

79. 277 S.C. at 540, 290 S.E.2d at 807. The court cited Notios Corp. v. Hanvey, 256 S.C. 275, 182 S.E.2d 55 (1979), for the proposition that a justiciable controversy is one which is real, substantial, ripe, and appropriate for judicial determination.

80. 277 S.C. at 540-41, 290 S.E.2d at 806. The court analogized the South Carolina Human Affairs Act to Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e)(1)-(17) (1976), and then cited Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979). *See also* S.C. CODE ANN. § 1-13-100 (Supp. 1982) which states that the Human Affairs law does not create any cause of action that Title VII does not also create.

81. S.C. CODE ANN. § 1-13-90(d)(4) (Supp. 1982).

82. The investigation could terminate by a Commission finding that it did not have jurisdiction, by a finding that the complaint was without merit, or by Ms. Raines' request to terminate the investigation so that she could personally sue. ___ S.C. at ___, 290 S.E.2d at 807.

83. The court asserted that the applicant was the only person with any possible adverse interest to Orr. *Id.* at 542, 290 S.E.2d at 807.

84. *Id.* 290 S.E.2d at 807. The court also set forth several policy reasons for refusing to allow declaratory relief: (1) the mere inconvenience of an investigation is part of the burden of living under a system of government, *Id.* at 540, 290 S.E.2d at 806; (2) courts should not interfere with an agency's discretionary powers, *Id.* at 542, 290 S.E.2d at 807; (3) premature judicial intrusions disrupt the administrative process, *Id.* at 541, 290 S.E.2d at 807; and (4) merely taking a position and challenging the Commission to dispute it is tantamount to asking for an advisory opinion, *Id.* at 542, 290 S.E.2d at 807.

proceedings in this case.[85] However, the opinion suggests a broader interpretation by stating that even if an actual controversy were to have been alleged by Orr, a declaratory judgment was nevertheless inappropriate[86] because Orr should not be given an opportunity to test his legal defenses until action is properly initiated in court by the Commission. An expansive reading of this decision indicates that, unless an investigatory agency has enforcement power, one cannot impede its proper inquiries by haling it into court.[87]

In conclusion, *Orr v. Clyburn* reassures state administrative agencies that the courts will not prematurely intrude into their delegated functions. This decision maintains the separation of the administrative and judicial functions by characterizing the inconvenience of a government investigation as part of the burden of living under government and not an irreparable injury for which declaratory relief lies.

Charles J. Baker, III

III. EMPLOYMENT SECURITY LAW: EMPLOYEE MISCONDUCT

In *Lee v. South Carolina Employment Security Commission*,[88] the South Carolina Supreme Court affirmed the Commission's application of a "fault" standard to determine whether employee misconduct has occurred.[89] *Lee* is the first South Caro-

85. *See supra* note 76.

86. There is authority in the context of an Equal Employment Opportunity Commission (EEOC) proceeding that the judiciary cannot intervene in the conciliatory phase of the proceeding because the EEOC has no enforcement authority itself, but instead must have the Attorney General enforce its order. Board of Governors of Wayne State Univ. v. Perry, 17 EPD 8530 (E.D. Mich. 1976). The EEOC was created by Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e)(1)-(17) (1976), and its procedures are substantially similar to those of the Human Affairs Commission. *See supra* note 80.

87. Such an interpretation of *Orr* does not necessarily conflict with the rule of Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914 (D.S.C. 1977). There, the plaintiff's cause was ripe for declaratory and injunctive relief because the Secretary of the Interior's action would probably have run the plaintiff out of business. The plaintiff's right as a practical matter could not be recovered in further administration action. This situation is distinguishable from that of mere inconvenience caused by standard proceedings.

88. 277 S.C. 586, 291 S.E.2d 378 (1982).

89. Appellant challenged the Commission's definition of misconduct as a matter of *law*. Brief for Appellant at 2. Thus, the court's decision in *Lee* is best considered as an exercise in statutory construction rather than one of administrative review. Although appellant also excepted to the Commission's application of the definition to the facts in

lina case to provide the practitioner with a clear and workable definition of "misconduct" under the Employment Security law.[90]

Appellant worked as a sheet metal mechanic for a heating and air conditioning contractor in Charleston, South Carolina.[91] He was fired after his employer was forced to correct mistakes attributable to appellant's sloppy workmanship. During the six months preceding his discharge, appellant was warned that his work did not meet the standards required by his employer. After a hearing conducted in accordance with the Employment Security Law and Commission regulations,[92] the full Commission determined that appellant had in fact been discharged for "misconduct" and disqualified him from receiving unemployment benefits for a period of six weeks.[93] Both the circuit court and supreme court affirmed this decision.[94]

In the leading case on misconduct, *Boynton Cab Company v. Neubeck*,[95] the Wisconsin Supreme Court defined misconduct as "wilful or wanton disregard of an employer's interest. . . or carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design. . . ."[96] Although that court implied in dicta that an aggravated lack of proper regard for an employer's interests or standards could also constitute misconduct,[97] it quoted at great length from an English case which suggested that mere incompetence or a general failure to do right will never provide a basis for misconduct. Wilfulness or wanton behavior is required.[98]

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the case, Brief for Appellant at 9, this exception was dismissed as without merit pursuant to Supreme Court Rule 23. 277 S.C. at 589, 291 S.E.2d at 379. While *Lee* may raise questions as to the scope or standard of review of administrative decisions in South Carolina courts, the opinion sheds no light on the state of the law in this area. For a thorough review of recent decisions dealing with the standard of review under the state Administrative Procedures Act, see *South Carolina Administrative Procedures Act: The Standard of Review for Administrative Agency Decisions*, 34 S.C.L. REV. 11 (1982).

90. S.C. CODE ANN. §§ 41-27-10 to -42-40 (1976 & Supp. 1981).

91. Record at 17.

92. S.C. CODE ANN. §§ 41-35-610 to -750 (1976); S.C. Employment Sec. Comm'n Reg. 47-21, 47-51 to -57 (1976).

93. Record at 26.

94. *Id.* at 34-36.

95. 237 Wis. 249, 296 N.W. 636 (1941).

96. *Id.* at 259-60, 296 N.W. at 640.

97. *Id.* at 260, 296 N.W. at 640.

98. *Id.*, 296 N.W. at 640.

Other jurisdictions interpret *Boynton Cab* in two different ways. Roughly half reject any fault criteria for misconduct and hold that mere carelessness or sloppiness can never be grounds for misconduct.[99] Other jurisdictions focus on the "proper regard for an employer's interests" language in *Boynton Cab* and look to the surrounding circumstances to determine if the employee's conduct did in fact rise to the level of misconduct.[100] From a claimant's standpoint, the former position is more desirable, since an employer has more difficulty showing misconduct. In *Lee*, however, South Carolina has clearly chosen to adopt the latter position.

Application of a fault standard for misconduct is sound statutory construction in light of the manifest legislative intent. The stated legislative purpose of the Employment Security Law is to provide compensation for those who become unemployed "through no fault of their own."[101] Therefore, when an employee contributes to his discharge, he should be penalized. Section 41-35-120(2) provides this penalty in cases of discharge for misconduct.[102] In *Stone Manufacturing Company v. South Carolina Employment Security Commission*,[103] the supreme court, interpreting a different term in the Employment Security Law, used the same logic. Pointing out that the law was designed to benefit

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99. *See, e.g.*, Seavy and Jensen v. Industrial Comm'n, 523 P.2d 157 (Colo. Ct. App. 1974); In Re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

100. *See, e.g.*, Sheink v. Maine Dep't of Manpower Affairs, 423 A.2d 519 (Me. 1980); Heilman v. United Dressed Beef Co., 273 N.W.2d 628 (Minn. 1978); Marlette Homes, Inc. v. Employment Div., 33 Or. App. 547, 577 P.2d 89 (1978).

101. S.C. CODE ANN. § 41-27-20 (1975).

102. S.C. CODE ANN. § 41-35-120(2) (1976) states as follows:

> (2) *Discharge for Misconduct*—If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request, and continuing not less than five nor more than the next twenty-six consecutive weeks (in addition to the waiting period), as determined by the Commission in each case according to the seriousness of the misconduct, and if the Commission finds that the misconduct for which the insured worker was discharged was aggravated it may in its discretion cause to be charged against the benefits to which the insured worker is entitled under § 41-35-50 an amount not to exceed his weekly benefit amount multiplied by the number of weeks of his disqualification. *Provided* no charge of misconduct shall be made for failure to meet production requirements unless such failure is occasioned by wilful failure or neglect of duty.

103. 219 S.C. 239, 64 S.E.2d 644 (1951).

working people who become unemployed because of forces in the marketplace which are beyond their control, the court rejected blameworthiness or culpability as requisites for fault.[104]

Appellant suggested that the application of a fault standard to determine misconduct would lead to an injustice to claimants.[105] While injustice may result if the Commission defined misconduct as "mere incompetence", the facts in *Lee* suggest that mere incompetence was not the basis on which appellant was discharged. Mr. Lee was a capable and competent sheet metal worker; he had received merit pay raises during his tenure with his employer.[106] In fact, his negligence rose to the level of misconduct only after the quality of his work declined and after he failed to heed the warnings of his employer.[107] On these facts the result in *Lee* is consistent with cases in more liberal jurisdictions because even those courts concede that misconduct may be inferred from a substantial degree of carelessness or negligence when the carelessness or negligence does not stem from the employee's "inabilities or incapacities."[108] Since appellant had capably performed in the past, his negligence was not due to inability; thus, even under the liberal definition, his acts could be characterized as misconduct. Despite the South Carolina court's broad language suggesting that "causing losses to the employer" was the reason appellant was guilty of misconduct,[109] neither the Commission nor the courts are likely to find misconduct where unsatisfactory performance is simply due to incompetence or inability.

Lee appears to provide South Carolina with a definition of employee misconduct that includes both willful and wanton acts and repeated negligent failure to perform to an employer's standards; but negligence should not rise to the level of misconduct if it results from mere incompetence, inefficiency or inability. While the supreme court's definition places South Carolina in a more conservative position than those states following a more

104. *Id.* at 246, 64 S.E.2d at 646.
105. Brief for Appellant at 8.
106. Record at 20-21.
107. *Id.* at 17.
108. 237 Wis. at 259-60, 296 N.W. at 640.
109. 277 S.C. at 589, 291 S.E.2d at 379.

literal interpretation of *Boyton Cab*, the holding is consistent with the mainstream of decisions in this area.[110]

W. Dixon Robertson, III

110. *See supra* notes 100 and 101 and accompanying text. A holding that equated incompetence with misconduct would place South Carolina in an isolated minority.