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Workers' Compensation Law

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WORKERS' COMPENSATION LAW

I. Degree of Disability May Be Higher Than Established By Medical Testimony

The South Carolina Court of Appeals addressed the standard of judicial review in workers' compensation cases[1] in *Cropf v. Pantry, Inc.*[2] The court of appeals found that substantial evidence in the record supported the Industrial Commission's award; therefore, the trial court violated section 1-23-380(g) of the Administrative Procedures Act[3] by substituting its judgment regarding the extent of the claimant's disability for that of the Commission. *Cropf* not only reaffirmed the South Carolina Supreme Court's interpretation of section 1-23-380(g) in *Lark v. Bi-Lo, Inc.*[4], but more significantly, the court rejected the notion that the degree of disability can be no greater than the highest degree established by expert medical testimony.[5]

In *Cropf* the claimant slipped and fell while on the job and injured her back. The Hearing Commissioner found that she suffered a five percent permanent partial disability of her back.[6]

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1. For a collection of cases addressing this issue, see Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986); Linen v. Ruscon Constr. Co., 286 S.C. 67, 332 S.E.2d 211 (1985); Holcombe v. Dan River Mills, 286 S.C. 223, 333 S.E.2d 338 (Ct. App. 1985); Webber v. Michelin Tire Corp., 285 S.C. 581, 330 S.E.2d 547 (Ct. App. 1985); Poulos v. Pete's Drive-In No. 3, 284 S.C. 264, 325 S.E.2d 583 (Ct. App. 1985); Lowe v. Am-Can Transp. Servs., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984); Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984).

2. 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986).

3. S.C. Code Ann. § 1-23-380(g) (Law. Co-op. 1986) provides in part that "[t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings . . . are . . . (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record."

4. 276 S.C. 130, 276 S.E.2d 304 (1981). *Lark* established the substantial evidence rule as the appropriate standard of judicial review. For a survey of the *Lark* decision, see *Administrative Law, Annual Survey of South Carolina Law*, 34 S.C.L. Rev. 11-14 (1982); *see also Administrative Law, Annual Survey of South Carolina Law*, 38 S.C.L. Rev. 1 (1986).

5. 289 S.C. at 108, 344 S.E.2d at 881.

6. The Hearing Commissioner's primary function is to gather evidence and to determine the dispute in a summary manner. *See* S.C. Code Ann. § 42-17-40 (Law. Co-op. 1985). *See generally* Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967); 289 S.C. at 47 n. 1, 344 S.E.2d at 614 n. 1.

The Industrial Commission, pursuant to section 42-17-50 of the Code,[7] increased the award because it found that the claimant had incurred thirty percent disability.[8] On appeal by the employer, the trial court modified the award to fifteen percent and stated that there was no reasonable basis for the Commission's increase. Cropf appealed and the South Carolina Court of Appeals reversed and reinstated the Commission's award.

A key issue in *Cropf* concerned the weight to be given expert testimony offered by two chiropractors and two orthopedic surgeons. The testimony conflicted on the extent of the claimant's back injury. Neither of the two orthopedic surgeons found any permanent disability, and in fact, both diagnosed the claimant's condition as a mild strain. One of the chiropractors determined that there was a ten to fifteen percent impairment of the back, and the other acknowledged some permanent disability, but did not express an opinion about a particular percentage of disability. From the record, it appears that the trial court based its fifteen percent permanent disability award on the highest impairment rating given by the medical experts, and the court of appeals took issue on this analysis.

The court of appeals was concerned that the trial court had disregarded established workers' compensation principles by implicitly holding that the claimant's degree of disability was limited to the highest degree established by medical testimony.[9] The court appeared to caution that when determining whether the evidence in the record supports the Commission's award, the reviewing court must carefully examine the entire record and must not intrude upon the province of the fact finder by reversing findings supported by substantial evidence. The court reasoned that although the degree of disability chosen by the Commission was not supported by medical testimony, the claimant's own testimony concerning her limitations and her medical history was credible and substantial, and along with the expert tes-

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7. S.C. CODE ANN. § 42-17-50 (Law. Co-op. 1985); *see also* Cauble v. Macke Co., 78 N.C. App. 793, 338 S.E.2d 320 (1986) (Commission may adopt, modify, or reject the findings of fact of the Hearing Commissioner). *See generally* 283 S.C. at 536-38, 324 S.E.2d at 89 (Commission may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the Hearing Commissioner).

8. Record at 60-61. Commissioner Macmillan, however, opined that the disability should be increased to 15%.

9. 289 S.C. 108, 344 S.E.2d at 880-81.

timony, supported the Commission's award.[10]

The South Carolina Supreme Court has held that when there is a conflict in the testimony of different witnesses, findings of fact by the Commission are conclusive.[11] Accordingly, when, as in *Cropf*, medical testimony regarding the extent of disability is in conflict, the possibility of drawing two inconsistent inferences or findings does not prevent the Commission's finding from being supported by substantial evidence.[12] This view, which conforms with the view of the majority of jurisdictions,[13] places the Commission in a position similar to that of a jury. Analogous to a jury's findings of fact on disputed issues, the Commission's findings will not be overturned "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based."[14] The existence of evidence in the record that contradicts the Commission's finding is of no consequence if substantial evidence in the record supports the finding. The supreme court in *Lark* cautioned that a court may not substitute its judgment for an agency's judgment regarding the weight of the evidence on questions of fact.[15] In reversing the trial court in *Cropf*, the court of appeals established that reversals of Commission decisions will be scrutinized carefully.

The court in *Cropf* indicated that medical testimony does not necessarily limit the amount of the Commission's award and that the finding of disability may be greater than the highest degree supported by medical testimony. Professor Larson observes that the difference between jurisdictions which hold that a commission must never find a degree of disability greater than

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10. 289 S.C. at 107, 344 S.E.2d at 880.

11. Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961); *see also* Holcombe v. Dan River Mills, 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985).

12. Webber v. Michelin Tire Corp., 285 S.C. 581, 584, 330 S.E.2d 547, 548 (Ct. App. 1985) (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)); *see* Hunter v. Patrick Constr. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

13. 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 80.21 (1983); *see also* Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 392, 342 S.E.2d 582 (1986), *aff'd in part, remanded in part*, 348 S.E.2d 814 (N.C. App. 1986).

14. 276 S.C. at 136, 276 S.E.2d at 307 (citing Independent Stave Co. v. Fulton, 251 Ark. 1086, 476 S.W.2d 792 (1972)).

15. *Id.*

that established by medical testimony[16] and those which hold that a commission's award of disability is not limited by the degree established by medical testimony[17] is the manner in which they define disability.[18] In the former view the disability recognized is anatomical, whereas in the latter the disability may also include components of training, education, age, intelligence, and economic opportunity.[19] The better view appears to be the latter, which was advocated by the court in *Cropf*, because it allows the Commission to take into account not only medical evaluations, but also many other factors relevant when determining the disability award. The Commission's award, however, may not rest on surmise, conjecture, or speculation.[20] Absent a clear abuse of discretion or error of law, the award will be upheld on appeal.

The court of appeals' decision in *Cropf* reaffirms the substantial evidence rule of judicial review in workers' compensation cases. The court also suggested that it will continue to construe liberally the Workers' Compensation Act in favor of the claimant-employee when the evidence in the record is contradictory.[21] The significance of the decision, however, lies in the court's response to the argument that the thirty percent award was not supported by substantial evidence because the highest impairment rating given by any of the medical experts was fifteen percent. Neither the Commission nor the court is compelled to accept blindly the medical expert's opinion concerning disability. Blind acceptance of medical testimony, in the words of one court, "would impermissibly shift the legal determination of 'disability' to physicians [and] would be in clear contravention

16. Judicial Admin. Comm'n v. Marks, 394 So. 2d 211 (Fla. Dist. Ct. App. 1981) (award for 25% disability could not be upheld when the highest evaluation given by a physician was 20%); Yuba Heat Transfer v. Wiggins, 630 P.2d 783 (Okla. 1980) (state supreme court held that award must be within limits expressed by medical experts in evaluating the extent of disability), *cited in* 3 A. LARSON, *supra* note 13, § 79.52(d), at 15-426.142 n.39.1.

17. Carroll Constr. Co. v. Hutcheson, 347 So. 2d 527 (Ala. Ct. App. 1977) (court awarded benefits for total permanent disability although medical testimony established only 5% disability), *cited in* 3 A. LARSON, *supra* note 13, § 79.52(d), at 15-426.142. n.39.2; Gly Constr. Co. v. Davis, 60 Md. App. 602, 483 A.2d 1330 (1984).

18. 3 A. LARSON, *supra* note 13, § 79.52(d).

19. *Id.* § 79.52(d), at 15-426.142 to -426.143.

20. *See* McLeod v. Piggly Wiggly Carolina Co., 280 S.C. 466, 313 S.E. 2d 466 (Ct. App. 1984).

21. Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1967).

of the legislative intent and traditional role of the Commission or court."[22]

Harry J. Stathopoulos

II. STATUS OF TRAVELING EMPLOYEES RULE UNCLEAR

In *Brownlee v. Wetterau Food Services*[23] the South Carolina Court of Appeals affirmed the denial of workers' compensation benefits to the dependents of an employee who died from injuries received in an automobile accident in St. Louis, Missouri. The court of appeals agreed with the conclusion of the single Industrial Commissioner that the claimants failed to establish that Kenneth Brownlee had been using the company automobile at a time and place where his duty as an employee required him to be.[24] More importantly, however, the court of appeals' reasoning leaves some doubt about the continued existence of the "traveling employees rule" in South Carolina.[25]

Wetterau sent Brownlee, who worked in Wetterau's North Charleston, South Carolina office, to St. Louis, Missouri to attend an employer-sponsored training seminar.[26] Activities relating to the week-long seminar began each day at approximately 7:00 a.m. and ended at 10:00 p.m. At 1:55 a.m. on the last day of the seminar,[27] Brownlee and three other Wetterau employees died in an automobile accident.[28] Brownlee was a passenger in the company-owned automobile.

In denying benefits, the court of appeals noted that the record contained no evidence that Brownlee died while attending

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22. Gly Constr. Co. v. Davis, 60 Md. App. 602, 607, 483 A.2d 1330, 1333 (1984).

23. 288 S.C. 82, 339 S.E.2d 694 (Ct. App. 1986).

24. Record at 9. The court rejected the claimants' attempt to extend compensation for traveling employees beyond the factual situation in which a traveling employee is killed while on the way back to the motel from a restaurant. *See* Merritt v. Smith, 269 S.C. 301, 237 S.E.2d 366 (1977).

25. *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 25.00 (1985). Employees whose work entails travel away from the employer's premises are held in a majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

26. The seminar occurred during the week of September 25-29, 1978. Record at 4.

27. 288 S.C. at 84, 339 S.E.2d at 695.

28. Record at 3.

either a job-related function or an employer-sponsored event. Rather, the court of appeals concluded, there was "substantial evidence that Brownlee died while engaged in an outing that occurred after work, away from the premises of the employer, and at a time when his employer exercised no control over his activities."[29] The fact that Brownlee died in a company automobile did not render the conclusion of the Industrial Commission clearly erroneous; in the past, Wetterau had permitted employees to use company cars for personal business if the employees paid for gasoline and oil.[30]

In denying recovery, the court of appeals relied on *Grice v. National Cash Register Co.*[31] The court's reliance on *Grice*, however, was misplaced for two, related reasons: (1) *Grice* was decided before South Carolina recognized a traveling employees rule; and (2) continued use of *Grice* in cases involving traveling employees relegates *Merritt v. Smith*,[32] a case decided after *Grice*, to an exception to the general law concerning workers' compensation coverage for recreational and social activities.

The court's language in *Grice* demonstrates that it was decided before South Carolina recognized a traveling employees rule.[33] The *Grice* court stated that Grice's accident was indistin-

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29. 288 S.C. at 85, 339 S.E.2d at 695. Particularly damaging to the claimants was the testimony of Tom Jameson, who was assigned to the same motel room as Brownlee. Jameson's deposition included a statement by Brownlee that "he [Brownlee] and Jerry Aue, Martha Courtney and Dixie Mazurie were all going to a movie." Record at 134. Jameson was invited to go along but declined. Claimants objected to this testimony on the basis of the Dead Man's Statute. Record at 6-7.

30. 288 S.C. at 85, 339 S.E.2d at 696.

31. 250 S.C. 1, 156 S.E.2d 321 (1977). In *Grice* the claimants were denied death benefits. The court held that the deceased was not acting within the scope of his employment when he died in an automobile accident in Dayton, Ohio, while returning from a picnic. The employee, however, was only in Dayton because his employer sent him there. The picnic was planned by the deceased and other employees and was held after working hours and off the premises of the employer.

32. 269 S.C. 301, 237 S.E.2d 366 (1977). In *Merritt* the executrix of the decedent's estate brought an action against the co-employee driver of the employer's car for wrongful death. The court held that since both employees were returning to their motel after having gone to eat at a nearby restaurant with their direct supervisor in a company car, both the deceased and the respondent were acting within the course and scope of their employment. Therefore, the respondent was immune from suit by reason of the co-employee immunity provision of S.C. CODE ANN. § 42-5-10 (Law. Co-op. 1985).

33. The claimants in *Grice* unsuccessfully urged that

> [w]here an employee is sent to a distant place by his employer to perform duties in connection with his employment and sustains an injury after working hours, while engaged in reasonable activities in seeking to satisfy his physical

guishable from the hypothetical case in which an employee was killed while returning home from a picnic in the city where he was regularly employed.[34] If *Grice* had been decided in a jurisdiction that recognized the traveling employees rule, the issue would have been analyzed differently.[35]

Not until *Merritt v. Smith*[36] did the South Carolina Supreme Court recognize the traveling employees rule as stated by Professor Larson.[37] While the *Merritt* court did not expressly overrule *Grice*,[38] a thorough reading of the two cases in light of the traveling employees rule shows that *Merritt* is not an exception to *Grice*, but rather is based on a separate workers' compensation doctrine. Under the traveling employees rule, traveling employees are presumed to be "within the course of their employment continuously during the trip, except when a distinct department [sic] on a personal errand is shown."[39]

This shift in the normal presumption concerning whether an employee is within the scope of his or her employment can be outcome determinative, especially in cases like *Brownlee* in which all the occupants of the automobile are killed. Since the *Grice* rule treats traveling employees the same as local employees and removes the presumption of coverage for traveling employees, it is in conflict with the rationale of *Merritt* and the traveling employees rule. Because *Brownlee* involved the death of a traveling employee, the court of appeals should have ap-

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needs, including relaxation and recreation, or while returning to his quarters after having engaged in reasonable activities, he is entitled to the protection of the act.

250 S.C. at 5, 156 S.E.2d at 323.

34. *Id.* at 6, 156 S.E.2d at 323-24.

35. Even if the court in *Grice* had applied the traveling employees rule, a different result would not necessarily follow. If Grice's death were found to have been caused by a "distinct department [sic] on a personal errand," the death would still have been noncompensable. *See supra* note 25.

36. 269 S.C. 301, 237 S.E.2d 366 (1977).

37. *Id.* at 307, 237 S.E.2d at 369; *see* A. LARSON, *supra* note 25, § 25.00, at 5-252. Although the court did not state that *Merritt* was the first use of the traveling employees rule in South Carolina, *Merritt* is the only case cited by Professor Larson as applying the traveling employees rule in South Carolina. *See id.* § 25.21, at 5-261 n.7.

38. The *Merritt* court did not even cite *Grice* in its opinion. The appellant, however, cited and distinguished the case. Brief of Appellant at 32-34.

39. A. LARSON, *supra* note 25; *see* Hobgood v. Anchor Motor Freight, 68 N.C. App. 783, 316 S.E.2d 86 (1984) (employee whose work entails activity away from the employer's premises acts within the course of his employment continuously during the trip unless there is proof of *distinct* or *total* departure on a personal errand).

plied the traveling employees rule as developed in *Merritt*.

The second problem with the *Brownlee* decision is that the court, in using *Merritt* as an exception to the general rule of *Grice*, confused two separate doctrines of workers' compensation law. In *Grice* the court rejected the appellants' theory of relief, which was based on a form of the traveling employees rule, saying that "general benefits to the employer from social and recreational activities of its employees are not sufficient alone to establish coverage under the Act."[40] In *Merritt* the court recognized that "it is generally observed that accidents arising while an employee is eating or traveling to and from an eating establishment while out-of-town are acts within the course and scope of employment."[41] Applying appropriate doctrinal labels, *Grice* was decided under the recreational and social activities rule[42] and *Merritt* was decided under the traveling employees rule.[43] In *Brownlee* the court of appeals viewed *Merritt* as a narrow exception to *Grice*.[44] If this were the law of South Carolina, it would deny traveling employees the benefit of the traveling employees rule and place South Carolina in a minority of states that do not recognize the traveling employees rule.[45]

In denying workers' compensation benefits, the Industrial Commission and the court of appeals analyzed the *Brownlee* case as though the rationale of *Grice* could be applied to both local and traveling employees. Therefore, since any future reliance on *Grice* in cases involving traveling employees will only further push South Carolina into the minority of states that do not recognize the traveling employees rule, both *Grice v. National Cash Register Co.* and *Brownlee v. Wetterau Food Services* should be overruled. The failure of future courts to clarify

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40. 250 S.C. at 5, 156 S.E.2d at 323; *see also* A. LARSON, *supra* note 25, § 22.00 at 5-82 ("Recreation or social activities are within the course of employment when . . . (3) the employer derives substantial benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.").

41. 269 S.C. at 237, 237 S.E.2d at 369; *see also* A. LARSON, *supra* note 25.

42. *See* A. LARSON, *supra* note 25, § 22.00, at 5-82.

43. *Id.* § 25.00.

44. The court stated the general rule from *Grice* and then stated that since Brownlee did not die while on his way back to the motel from a restaurant, *Merritt* did not apply. 288 S.C. at 85, 339 S.E.2d at 695-96.

45. *See* A. LARSON, *supra* note 25, at 5-252 (traveling employees rule is recognized in a majority of jurisdictions).

the distinctions between the recreational and social activities rule and the traveling employees rule will only further cloud South Carolina workers' compensation law.

David A. Raeker

III. Recovery Limitation Held Inapplicable

In *Corbett v. City of Columbia*[46] the South Carolina Court of Appeals held that section 42-9-100 of the South Carolina Code,[47] which provided for a maximum recovery of $40,000 in all workers' compensation cases,[48] did not apply to a claimant who initially had been injured while the statute was in effect, but who did not become permanently and totally disabled until after section 42-9-100 was repealed.[49] While *Corbett* does not represent a novel approach to this particular factual situation,[50] consideration of the decision in light of two earlier supreme court cases[51] presents a definite framework for analyzing cases involving section 42-9-100.

Corbett, a firefighter for the City of Columbia, suffered smoke inhalation in 1977.[52] Although the incident left him temporarily and totally disabled for several months, Corbett was able to return to "light" work at full salary for approximately fifteen months.[53] On January 1, 1979, however, Corbett was declared permanently and totally disabled. Consequently, he retired from the Fire Department for medical reasons.[54]

At the time of the 1977 accident, section 42-9-100 provided for a maximum recovery of $40,000 in all workers' compensation

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46. 290 S.C. 71, 348 S.E.2d 191 (Ct. App. 1986), *cert. granted*, No. 0780, Davis Adv. Sh. No. 10 (S.C. Mar. 21, 1987).

47. S.C. Code Ann. § 42-9-100 (Law. Co-op. 1976), repealed 1978).

48. Section 42-9-100 read, "The total compensation payable under this Title shall in no case exceed forty thousand dollars."

49. S.C. Code Ann. § 42-9-100 (Law. Co-op. 1976), repealed 1978).

50. In reaching its decision, the court of appeals relied heavily on the North Carolina case Smith v. American & Efird Mills, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982), which contains the same basic factual situation as *Corbett*.

51. The two prior cases are Sellers v. Daniel Constr. Co., 285 S.C. 484, 330 S.E.2d 305 (1985) and Mizell v. Raybestos-Manhattan, Inc., 281 S.C. 430, 315 S.E.2d 123 (1984).

52. 290 S.C. at 72, 348 S.E.2d at 192.

53. *Id.* at 72-73, 348 S.E.2d at 192-93.

54. *Id.*, 348 S.E.2d at 192.

cases.[55] Subsequently, on May 19, 1978, the statute was repealed.[56] On March 1, 1980, Corbett filed a workers' compensation claim under the provisions of the amended statute.[57] The Hearing Commissioner found that Corbett's permanent and total disability was a continuation of his 1977 chest and lung condition, and, therefore, his recovery was limited by section 42-9-100. Both the Industrial Commission and the circuit court agreed with the Hearing Commissioner's findings.[58] The court of appeals reversed and remanded, concluding that Corbett was entitled to a recovery not limited by section 42-9-100.[59]

Relying on a well-defined line of South Carolina law, the court of appeals distinguished "physical injury" from "disability."[60] In South Carolina, workers' compensation benefits are awarded for disability, as measured by the "incapacity because of the injury to earn the wages which the employee was receiving at the time of the injury."[61] The court of appeals reasoned, therefore, that Corbett did not have a valid claim and that the City of Columbia did not become liable for Corbett's permanent and total disability until after section 42-9-100 had been repealed.[62] Because Corbett suffered no permanent and total impairment of his capacity to earn wages until January 1, 1979, the court of appeals concluded that the right to recover for permanent and total disability did not vest in Corbett until January 1, 1979. Therefore, the statute in effect on January 1, 1979 gov-

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55. *See* S.C. CODE ANN. § 42-9-100 (Law. Co-op. 1976) (repealed 1978).

56. Section 42-9-100 was repealed by Act effective May 19, 1978, 1978 S.C. Acts 500 § 1.

57. S.C. CODE ANN § 42-9-10 (Law. Co-op 1985) (amended by Act effective May 19, 1978, 1978 S.C. Acts 500 § 1); 290 S.C. at 73, 348 S.E.2d at 192.

58. *Id.* at 72, 348 S.E.2d at 192.

59. *Id.* at 75, 348 S.E.2d at 194.

60. For the statutory definition of "injury," see S.C. CODE ANN. § 42-1-160 (Law. Co-op. 1976). For the statutory definition of "disability," see S.C. CODE ANN. § 42-1-120 (Law. Co-op. 1976). For a sampling of cases which distinguish "injury" from "disability," see Outlaw v. Johnson Serv. Co., 254 S.C. 486, 176 S.E.2d 152 (1970); Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969); and Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954).

61. S.C. CODE ANN. § 42-1-120 (Law. Co-op. 1985) (definition of "disability").

62. 290 S.C. at 73-75, 348 S.E.2d at 193-94. The court of appeals interpreted Outlaw v. Johnson Serv. Co., 254 S.C. 486, 176 S.E.2d 152 (1970) to bar a finding of disability where the injured employee receives post-injury wages equal to pre-injury wages on the same job. 290 S.C. at 73-74, 348 S.E.2d at 193.

erned the case.[63]

Including the court of appeals decision in *Corbett*, three South Carolina appellate cases have involved the repeal of section 42-9-100. Prior to *Corbett*, the South Carolina Supreme Court in *Sellers v. Daniel Construction Co.*[64] and *Mizell v. Raybestos-Manhattan, Inc.*[65] addressed the legal determination of when a claimant has a vested right to receive workers' compensation benefits.

In *Sellers* the single commissioner found that an employee was injured and rendered permanently and totally disabled on April 4, 1978.[66] These findings were not appealed.[67] Later, when the employee died from a cause completely unrelated to his compensated injury, his widow requested and received a lump sum payment of the remaining benefits payable to the deceased.[68] In awarding Mrs. Sellers the lump sum award, the Industrial Commission affirmed the single commissioner's order that Mrs. Sellers could receive no more than $40,000 because section 42-9-100 applied.[69]

The supreme court agreed with the Industrial Commission and held that Mrs. Sellers' award was subject to section 42-9-100, even though the single commissioner's finding that Mr. Sellers was disabled on April 4, 1978 occurred after section 42-9-100 was repealed. The court quoted with approval from the Illinois case *Grigsby v. Industrial Commission*:[70] "The law in effect at the time of the injury [which, in *Sellers*, was also when the disability arose] governs the rights of the parties and not the law effective at the time the award is made . . . ."[71] Because Mrs. Sellers' right to receive the lump sum payment arose from her husband's disability,[72] her rights under the workers' compensa-

63. 290 S.C. at 75, 348 S.E.2d at 194.

64. 285 S.C. 484, 330 S.E.2d 305 (1985).

65. 281 S.C. 430, 315 S.E.2d 123 (1984).

66. Record at 7.

67. 285 S.C. at 485, 330 S.E.2d at 306.

68. Record at 13.

69. *Id.*

70. 76 Ill. 2d 528, 531, 394 N.E.2d 1173, 1174 (1979) (quoting Stanswsky v. Industrial Comm'n, 344 Ill. 436, 440, 176 N.E. 898, 899 (1931)).

71. 285 S.C. at 486, 330 S.E.2d at 306.

72. Mr. Sellers died from a cancer that was completely unrelated to his compensable injury. 285 S.C. at 485, 330 S.E.2d at 306. Additionally, the record reveals no evidence that the cancer was related to Mr. Sellers' employment.

tion statutes vested at the time her husband's rights vested.

Mizell v. Raybestos-Manhattan, Inc.,[73] the third case, also dealt with the effect of the repeal of section 42-9-100 on the award a deceased's widow was entitled to receive. In *Mizell* an employee, who had been exposed to asbestos fibers in his work environment, retired in July 1977 when doctors discovered that he had lung cancer.[74] In February 1979 Mr. Mizell died of bronchogenic carcinoma. In May 1979 Mrs. Mizell filed a workers' compensation claim for death benefits.[75] The question at issue was whether Mrs. Mizell's right to death benefits was subject to the $40,000 limit of section 42-9-100. The supreme court ruled that Mrs. Mizell was entitled to death benefits of $86,000.[76] Relying on both South Carolina law[77] and the general rule in the United States,[78] the court concluded that because "the dependents' rights are truly separate and distinct from the injured employee's rights, the date of death of the employee logically governs which statute is to be applied."[79]

In *Corbett*, *Sellers*, and *Mizell* the South Carolina appellate courts established a framework for determining how the repeal of section 42-9-100 will affect an individual claimant. In applying the framework, practitioners must determine the precise statutory basis for the claim in order to decide when a right to workers' compensation benefits vests in the claimant.

Although section 42-9-100 was repealed in 1979, it is unlikely that *Corbett* will be the last case to address the effect of the repeal of the statute. By examining *Corbett*, *Sellers*, and *Mizell*, as well as any relevant North Carolina cases,[80] the prac-

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73. 281 S.C. 430, 315 S.E.2d 123 (1984).

74. *See* Record at 19 (deposition of Mr. Mizell); Record at 86 (deposition of diagnosing physician).

75. 281 S.C. at 431, 315 S.E.2d at 123. On May 31, 1978, Mr. Mizell filed a claim for total disability benefits for the period beginning in July 1977. The claim was disputed by Mr. Mizell's employer, however, and was abandoned upon Mr. Mizell's death before any hearing was held. Record at 1.

76. 281 S.C. at 431, 315 S.E.2d at 123.

77. Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960) (in occupational disease cases, compensability accrues when death or disability occurs).

78. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 64.00 (1983). Professor Larson states the general rule as follows: "The dependent's right to death benefits is an independent right derived from statute, not from the rights of the decedent."

79. 281 S.C. at 433, 315 S.E.2d at 125 (quoting Sizemore v. State Workmen's Compensation Comm'r, 159 W. Va. 100, 106, 219 S.E.2d 912, 915 (1975)).

80. Because South Carolina's Workers' Compensation Act was fashioned upon the

titioner can interpret his factual situation under the analysis that the South Carolina appellate courts have used in deciding workers' compensation cases involving the repeal of section 42-9-100.

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North Carolina Act, South Carolina courts give weight to decisions by the high court of North Carolina. *See* Carter v. Penny Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973). The *Corbett* court relied heavily on a North Carolina case. *See supra* note 50. The *Mizell* court found the North Carolina case Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979), very useful.

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