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Workers' Compensation Law

WORKERS' COMPENSATION LAW

I. STANDARD OF REVIEW, TEST FOR CAUSATION, AND ALLOCATION OF BURDENS OF PROOF IN WORKERS' COMPENSATION RETALIATORY DISCHARGE CASES ESTABLISHED

In *Wallace v. Milliken & Co.*[1] the South Carolina Supreme Court established the standard of review, test for causation, and allocation of burdens of proof in workers' compensation retaliatory discharge cases.

Milliken & Company (Milliken) hired Jimmy Wallace as a machine operator on July 22, 1986. Wallace severely injured his hand on September 10, 1986, while operating an industrial machine. A workers' compensation claim was filed, and Wallace received temporary total and permanent disability benefits. After being hospitalized and undergoing several operations, Wallace returned to work on December 9, 1986. Milliken discharged him that same day.[2]

Wallace sued Milliken under section 41-1-80 of the South Carolina Code,[3] which prohibits employer retaliation against employees that institute or participate in workers' compensation proceedings.[4] Wallace alleged that Milliken discharged him because of his workers' compensation claim.[5] Milliken countered that it fired Wallace because he violated safety rules.[6] The trial court, sitting without a jury, awarded Wallace $12,500.69 in back wages and ordered reinstatement.[7] The South Carolina Court of Appeals affirmed.[8] Milliken appealed.

The supreme court first addressed whether a retaliatory discharge action is one at law or in equity. The court recognized that under section 41-1-80 a wrongfully discharged employee is entitled only to lost wages and reinstatement.[9] The court determined that these forms of

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1. 406 S.E.2d 358 (S.C. 1991), *aff'g as modified*, 300 S.C. 553, 389 S.E.2d 448 (Ct. App. 1990).

2. *Id.* at 359.

3. S.C. CODE ANN. § 41-1-80 (Law. Co-op. Supp. 1990).

4. Section 41-1-80 provides in pertinent part, "No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law (Title 42 of the 1976 Code), or has testified or is about to testify in any such proceeding." *Id.*

5. *Wallace*, 406 S.E.2d at 359.

6. *Id.* at 360.

7. *Id.* at 359.

8. Wallace v. Milliken & Co., 300 S.C. 553, 389 S.E.2d 448 (Ct. App. 1990), *aff'd as modified*, 406 S.E.2d 358 (S.C. 1991).

9. *Wallace*, 406 S.E.2d at 359. Section 41-1-80 states in pertinent part, "Any em-

relief are equitable remedies.[10] Therefore, the court concluded that a cause of action arising under section 41-1-80 is equitable in nature.[11] Because the case involved an equitable action tried by a judge without a jury, the appellate courts had jurisdiction to find facts in accordance with their own views of the preponderance of the evidence.[12]

The supreme court next determined the appropriate test for causation in retaliatory discharge cases. The court of appeals held that to prevail in a retaliatory discharge action brought under section 41-1-80, the claimant must prove by a preponderance of the evidence that the filing of the workers' compensation claim was a substantial factor in bringing about the discharge.[13] The supreme court decided that the substantial factor test is inappropriate for this cause of action and adopted the determinative factor causation test.[14] The determinative factor test requires the employee to establish that the discharge would not have occurred "but for" the filing of the workers' compensation claim.[15]

Finally, the supreme court considered the allocation of burdens of proof in retaliatory discharge cases. Section 41-1-80 gives employers certain affirmative defenses to retaliation claims.[16] One such defense is the violation of a specific written company policy. Milliken raised this defense and alleged that Wallace violated a company rule by placing

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ployer who violates any provision of this section is liable in a civil action for lost wages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section is entitled to be reinstated to his former position." S.C. CODE ANN. § 41-1-80 (Law. Co-op. Supp. 1990).

10. *Wallace*, 406 S.E.2d at 359.

11. *Id.*; *see also Wallace*, 300 S.C. at 555, 389 S.E.2d at 449 ("An action created by statute is generally considered a law action unless the statute provides otherwise or the nature of the relief permitted by the statute is clearly equitable.") (citing 1A C.J.S. *Actions* § 126, at 539 (1985)).

12. Kelly v. Peeples, 294 S.C. 63, 362 S.E.2d 636 (1987) (per curiam); *see Wallace*, 406 S.E.2d at 359 (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

13. *Wallace*, 300 S.C. at 557, 389 S.E.2d at 450.

14. *Wallace*, 406 S.E.2d at 360.

15. *Id.* The determinative factor test places a more stringent burden on the employee than does the substantial factor test. *Id.* Although the supreme court rejected the court of appeals use of the substantial factor test, it affirmed the result and found that Wallace had established retaliation even under the determinative factor test. *Id.* at 361.

16. Section 41-1-80 provides in pertinent part:

> Any employer shall have as an affirmative defense to this section the following: wilful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer's property; failure to meet established employer work standards; malingering; embezzlement or larceny of the employer's property; violating specific written company policy for which the action is a stated remedy of the violation.

S.C. CODE ANN. § 41-1-80 (Law. Co-op. Supp. 1990).

his hands in an operating machine. The supreme court agreed with the court of appeals and the trial court and held that Milliken failed to prove this affirmative defense.[17] The supreme court disagreed, however, with that part of the court of appeals decision which held that Milliken was required to prove by a preponderance of the evidence that Wallace was discharged for violating a safety rule.[18]

The supreme court concluded that the court of appeals decision implied that the employer had the burden of justifying the discharge.[19] The supreme court stated that requiring Milliken to prove it discharged Wallace for a company policy violation "effectively shifted the burden to [Milliken] to *disprove* that the discharge was in retaliation for filing the claim."[20] The court decided that this requirement was improper. The court established that even though the employer has the burden of proving affirmative defenses, the ultimate burden of persuasion remains at all times with the employee.[21]

The supreme court's decision in *Wallace* establishes that actions arising under section 41-1-80 are equitable in nature; that the determinative factor test, which requires the employee to establish that he or she would not have been discharged "but for" the filing of the workers' compensation claim, is the appropriate test of causation; and that the burden of persuasion remains at all times with the employee even though the employer has the burden of proving any statutory affirmative defense pleaded.

Stephen Coe

II. RECOVERY FOR SUCCESSIVE PERMANENT AND TOTAL DISABILITY TO THE SAME BODY PART NOT ALLOWED

In *Medlin v. Greenville County*[22] the South Carolina Supreme Court held that when a claimant suffers a permanent and total disability and recovers compensation for the injury, the claimant is precluded from collecting an additional permanent and total disability award for a successive injury to the same body part under the scheduled loss pro-

17. *Wallace*, 406 S.E.2d at 360.

18. *Id.* (citing Wallace v. Milliken & Co., 300 S.C. 553, 559, 389 S.E.2d 448, 451 (Ct. App. 1990)).

19. *Id.*

20. *Id.*

21. *Id.* Again, this modification of the court of appeals decision did not affect the result in the case. The supreme court concluded that the record supported the finding that the reason Milliken offered for firing Wallace was a pretext. *Id.* at 360.

22. 401 S.E.2d 667 (S.C. 1991).

visions of the South Carolina Workers' Compensation Law.[23] The supreme court modified the court of appeals decision[24] and overruled important dicta from an earlier court of appeals case.[25]

In 1983 James Medlin suffered a back injury while employed by Greenville County. The hearing commissioner awarded benefits for total and permanent disability.[26] The employer settled the claim for $60,000 during the pendency of the appeal. The commissioner approved the settlement. The claimant reinjured his back in 1985. The single commissioner, citing the award from 1983, denied benefits for permanent and total disability. The review panel reversed the single commissioner's decision and awarded benefits for total and permanent disability. The circuit court affirmed the review panel's award. The court of appeals reversed.[27]

The court of appeals focused its analysis on section 42-9-170[28] and interpreted the section to be a lifetime limitation on recovery while in the same employment.[29] The supreme court reached its result by holding that section 42-9-170 does not apply to the case.[30] The supreme court stated that section 42-9-170 only applies to cases in which an employee is receiving payments for a previous disability when benefits are awarded for the subsequent injury.[31] The court further found that the facts of *Medlin* are indistinguishable from the facts of *Hopper v. Firestone Stores*[32] and that no section of the Workers' Compensation

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23. S.C. CODE ANN. §§ 42-9-10 to -30 (Law. Co-op. 1976 & Supp. 1990).

24. Medlin v. Greenville County, 301 S.C. 411, 392 S.E.2d 192 (Ct. App. 1990), *aff'd as modified*, 401 S.E.2d 667 (S.C. 1991).

25. Wyndham v. R.A. & E.M. Thornley & Co., 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987).

26. Under section 42-9-30(19) a back injury that results in a fifty-percent or greater loss of use entitles the claimant to a finding of total and permanent disability. S.C. CODE ANN. § 42-9-30(19) (Law. Co-op. 1976). Section 42-9-10 provides for up to five hundred weeks of compensation for such a disability. *Id.* § 42-9-10 (Law. Co-op. Supp. 1990).

27. *Medlin*, 301 S.C. at 412, 392 S.E.2d at 193.

28. S.C. CODE ANN. § 42-9-170 (Law. Co-op. 1976). This section provides:

> If an employee receives a permanent injury as specified in § 42-9-30 or the second paragraph of § 42-9-10 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

Id.

29. *Medlin*, 301 S.C. at 413, 392 S.E.2d at 194.

30. Medlin v. Greenville County, 401 S.E.2d 667, 668 (S.C. 1991).

31. *Id.*

32. 222 S.C. 143, 72 S.E.2d 71 (1952). In *Hopper* the claimant was injured in a non-work-related motorcycle accident prior to being employed. The accident resulted in the amputation of a leg. The claimant suffered a subsequent work-related injury to the remaining stub. The supreme court granted the claimant temporary total compensation

Law provides the relief sought by Medlin.[33] Consistent with *Hopper* the court found that "[Medlin] is not entitled to any further benefits for loss of use to the *same* body part as the loss of use to his back has already been fully 'written-off,' and is non-existent in so far as the Act is concerned."[34]

The *Medlin* court's holding avoided two major inequities that result from the court of appeals construction of section 42-9-170. First, by focusing on the totality of the injury as opposed to the permanence of the injury, the court avoided a myriad of anomalous results possible under the court of appeals rationale.[35] Second, the court avoided an irrational classification scheme[36] first set forth in dicta in *Wyndham v. R.A. & E.M. Thornley & Co.*[37] and followed by the court of appeals in *Medlin.*

The *Wyndham* court held that a limitation on the recovery of benefits under the Second Injury Fund provisions[38] does not exist when a

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and medical benefits, but denied him permanent benefits. The supreme court held that the claimant was not entitled to an award for permanent benefits because the subsequent injury did not cause any serious disfigurement in excess of what existed prior to the subsequent injury. *Id.* at 151, 72 S.E.2d at 74.

33. *Medlin*, 401 S.E.2d at 668-69.

34. *Id.* at 669.

35. For example, in his dissent in the court of appeals decision, Judge Gardner pointed out that a permanent injury could be followed by a partial and nonpermanent injury, compensable under section 42-9-20. S.C. CODE ANN. § 42-9-20 (Law. Co-op. 1976). In such a case the claimant would receive the 500 weeks of compensation for the first injury and then receive 340 weeks for the subsequent injury. On the other hand, if the second injury is permanent, the claimant would recover nothing for the second injury under the court of appeals interpretation of section 42-9-170. "This is illogical and to thus interpret Section 42-9-170 requires an absurd result." Medlin v. Greenville County, 301 S.C. 411, 416, 392 S.E.2d 192, 195 (Ct. App. 1990), *aff'd as modified*, 401 S.E.2d 667 (S.C. 1991).

36. The classification under section 42-9-170 is based upon whether the claimant changed employers between the successive injuries. For the only known example of a case that upheld this type of classification, see Corbitt v. Mohawk Rubber Co., 256 Ark. 932, 511 S.W.2d 184 (1974) (classification that allows separate recovery for claimants who change employers between injuries but denies recovery for those who remain with the same employer is rationally related to state's interest in encouraging employers to retain injured employees).

37. 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987).

38. S.C. CODE ANN. § 49-2-400 (Law. Co-op. 1976 & Supp. 1990). The *Wyndham* court stated, "One of the purposes behind establishing the Second Injury fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury." 291 S.C. at 499, 354 S.E.2d at 401 (citing Boone's Masonry Constr. Co. v. South Carolina Second Injury Fund, 267 S.C. 277, 227 S.E.2d 659 (1976)). "The fund was designed to compensate handicapped workers fully for their subsequent injuries without penalizing employers for having them in the first place." *Id.* at 500, 354 S.E.2d at 401 (citing Custy, *The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South*

claimant changes employers between successive compensable claims.[39] In support of its view that the legislature did not impose a limitation on the claimant's ability to recover, the *Wyndham* court stated, "When the legislature wished to impose a 500 week limit on successive injuries it did so explicitly."[40] The court then cited section 42-9-170 as an example and noted that the section "limit[s] to 500 weeks the total compensation available for successive permanent injuries sustained in the same employment."[41] The court of appeals in *Medlin* relied in part on this language to hold that section 42-9-170 limits the claimant to five hundred weeks compensation.[42]

The establishment of the Second Injury Fund did not confer, however, additional substantive rights upon claimants. Instead, the Second Injury Fund is a procedural source of reimbursement for the employer that hires the previously injured claimant. Therefore, the supreme court wisely avoided a tap dance around the *Wyndham* dicta and held, "To the extent that *Wyndham* . . . distinguishes between successive injuries incurred while working for the same rather than for different employers, it is overruled."[43]

The supreme court's holding also eliminates the greatest danger of the court of appeals decision. Under the court of appeals rationale, employees that suffer a total disability are well advised to change employers. Only by changing employers after suffering a total and permanent injury, could employees become eligible for future compensation. This is not in the best interest of either the employer or the employee. Statutorily encouraged turnover not only would disrupt the workplace, but also may force an injured employee to accept alternative employment on less desirable terms. Under the supreme court's interpretation, this turnover is neither encouraged nor rewarded.

Carolina, 27 S.C.L. REV. 661, 662 (1976)).

39. *Wyndham*, 291 S.C. at 500, 354 S.E.2d at 402.

40. *Id.*

41. *Id.*

42. Medlin v. Greenville County, 301 S.C. 411, 413, 392 S.E.2d 192, 194 (Ct. App. 1990), *aff'd as modified*, 401 S.E.2d 667 (S.C. 1991). The court of appeals also attempted to distinguish *Wyndham* factually. It asserted that there is a legislatively intended "distinction between employees who incur a partial disability followed by a permanent total disability versus those who incur successive permanent total disabilities." *Id.* at 413, 392 S.E.2d at 194. The difficulty with the assertion is that neither the *Wyndham* dicta nor section 42-9-170 require that the prior or subsequent injuries be total in nature. They only require that both disabilities be permanent. The court of appeals reasoning failed to recognize that section 42-9-170 also applies to partial disabilities as long as they are permanent and are preceded or followed by another permanent injury. Likewise, section 42-9-170 would apply to successive permanent disabilities whether or not either is a total disability.

43. Medlin v. Greenville County, 401 S.E.2d 667, 669 (S.C. 1991).

One classification created by the supreme court's interpretation of section 42-9-170 warrants examination. The court correctly pointed out that section 42-9-170 only "sets forth the amount of compensation an employee can receive while he is at the same time drawing compensation for a previous disability in the same employment."[44] The claimant in *Medlin* received a lump sum settlement and thus "was not drawing compensation for [the prior] injury at the time his second injury occurred."[45] Although claimants now cannot recover twice for total permanent disability, claimants remain eligible for temporary benefits. Because section 42-9-170 limits the recovery to five hundred weeks of compensation when the payment periods for the permanent injury overlap, claimants that receive lump sum settlements may receive more advantageous terms of recovery than do the claimants that receive periodic payments. Therefore, a colorable equal protection argument exists on behalf of claimants that receive periodic payments.[46]

The supreme court's decision in *Medlin* resolved many potential difficulties that could have resulted from the application of previous decisions. The decision leads to a rational result regarding the application of section 42-9-170 and repairs the anomalous results of the court of appeals treatment of the Second Injury Fund cases.

Brian P. Murphy

III. DISCOVERY RULE NOT APPLICABLE TO WORKERS' COMPENSATION CLAIMS

In *Mauldin v. Dyna-Color/Jack Rabbit*[47] the South Carolina Court of Appeals held that the statute of limitations applicable to workers' compensation claims[48] barred a claimant from recovering for a knee injury because she had not filed the claim within two years of the acci-

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44. *Id.* at 668.

45. *Id.*

46. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' ") (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

47. 400 S.E.2d 494 (S.C. Ct. App. 1990).

48. S.C. CODE ANN. § 42-15-40 (Law. Co-op. 1976) (amended 1990). Section 42-15-40 stated in pertinent part that "[t]he right to compensation under this title shall be forever barred unless a claim is filed with the commission within two years after an accident." *Id.* The 1990 amendment to section 42-15-40 substituted "is barred" for "shall be forever barred." 1990 S.C. Acts 3314 (codified as S.C. CODE ANN. § 42-15-40 (Law. Co-op. Supp. 1990)).

dent. The court expressly declined to apply the discovery rule[49] to stay the running of the statute of limitations in workers' compensation cases.[50]

On January 2, 1985, Virginia Gaynell Mauldin, an employee of Dyna-Color/Jack Rabbit (Jack Rabbit), injured her left knee when she tripped on an uneven doorway of the film collection booth where she worked. Mauldin immediately notified her supervisor of the accident. The supervisor instructed Mauldin to seek immediate medical attention, and she went to the emergency room. The hospital physician on duty diagnosed Mauldin's injury as a medial collateral strain. Despite the injury, Mauldin continued to work without lost wages, and Jack Rabbit paid her medical bills.[51]

The condition of Mauldin's knee improved. However, over the next two years her knee, occasionally swelling and stiffening, continued to be the source of chronic pain. Although she reported her continued knee problem to her family physician and to her supervisor, Mauldin received no further medical attention until November 1, 1987.[52]

On November 1, 1987, after her knee remained swollen, Mauldin sought the advice of an orthopedic surgeon. After diagnosing the condition as a torn medial meniscus,[53] the surgeon operated on the knee on December 3, 1987. Mauldin returned to work a week later, and on December 30, 1987, over two years and eleven months after the accident, she filed her claim for compensation with the Workers' Compensation Commission.[54]

Jack Rabbit asserted that the two-year statute of limitations barred the claim because Mauldin's accident occurred over two years prior to the filing of the claim. Nonetheless, a single commissioner, a

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49. Under the discovery rule, the statute [of limitations] does not begin to run from the date the negligent act or the breach of contract occurred; rather, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.

Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 215, 332 S.E.2d 555, 559 (Ct. App.), *cert. granted*, 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed*, 288 S.C. 468, 343 S.E.2d 613 (1986) (citing Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 278 S.E.2d 333 (1981) (per curiam)); *accord* Wilson v. Shannon, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989).

50. *Mauldin*, 400 S.E.2d at 496.

51. *Id.* at 495.

52. *Id.*

53. Because Mauldin's injury is different than what a doctor originally diagnosed, Mauldin could have argued that she did not "discover" this condition until November 1, 1987. However, the court determined that the discovery pertained to the knee injury and "observ[ed] that if a 'discovery rule' were applied, the result would be the same" because the date of injury and date of discovery are the same. *Id.* at 496.

54. *Id.* at 495.

panel of the full commission, and a circuit court found the claim timely. Jack Rabbit appealed.[55]

The court of appeals characterized the issue as "whether the two year limitation period of Section 42-15-40 runs from the date of the accident or the date the employee discovers the injury."[56] Although it recognized that the South Carolina Workers' Compensation Law[57] should be liberally construed,[58] the *Mauldin* court stated that "the courts are not at liberty by judicial construction to add to or amend its provisions so as to excuse a claimant from complying with its mandatory requirements."[59] The court found the limitation language "plain and decisive" and held, therefore, that section 42-15-40 barred Mauldin's claim.[60]

The *Mauldin* court noted that other parts of section 42-15-40 supported its decision not to apply the discovery rule to claims like Mauldin's.[61] Section 42-15-40 contains two provisions that do provide for a delay in the running of the statute. First, if the injury results in death, the two-year limitation period runs from the date of the death regardless of the date of the accident.[62] Similarly, for recovery in occupational disease cases, the statutory clock does not begin to tick until the date the claimant receives notice of a definitive diagnosis of the occupational disease.[63] The court decided that these two exceptions prove that the General Assembly intended that claimants must file other workers' compensation claims under section 42-15-40 within two years of the date of the accident, not within two years of the date the claimant discovered the injury.[64]

The court noted that even under the discovery rule, Mauldin could not recover because she discovered her injury on the same day as the

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55. *Id.*

56. *Id.*

57. S.C. CODE ANN. §§ 42-1-10 to 42-19-50 (Law. Co-op. 1976 & Supp. 1990).

58. *Mauldin*, 400 S.E.2d at 495 (citing Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 64 S.E.2d 396 (1951); Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955)).

59. *Id.* at 496.

60. *Id.*

61. *Id.*

62. S.C. CODE ANN. § 42-15-40 (Law. Co-op. 1976) (amended 1990).

63. *Id.* The 1990 amendment to section 42-15-40 added an additional exception: "For the death or injury of a member of the South Carolina National Guard, as provided for in Section 42-7-67, the time for filing a claim is two years after the accident or one year after the federal claim is finalized, whichever is later." 1990 S.C. Acts 3314 (codified as S.C. CODE ANN. § 42-15-40 (Law. Co-op. Supp. 1990)).

64. *Mauldin*, 400 S.E.2d at 496 (stating that "exceptions made in a statute give rise to a strong inference that no other exceptions were intended") (citing Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 555, 320 S.E.2d 458, 463 (Ct. App. 1984)).

accident.[65] Therefore, even if the court had judicially expanded the clear statutory language and applied the discovery rule, *Mauldin* clearly was not the appropriate case in which to do it. However, if a case presenting greater inequities emerges, the court may be tempted to re-evaluate its position.[66]

Professor Larson contends that "accident" statutes such as South Carolina's are patently unfair when they bar recovery for injuries that do not manifest themselves within the limitation period.[67] The latent injury scenario makes a stronger case for application of the discovery rule in workers' compensation cases for at least two reasons. First, the exclusive remedy provision of the South Carolina Workers' Compensation Law abolishes the claimant's common-law remedies.[68] Therefore, if the claimant does not or cannot discover the injury until two years after the accident, she cannot recover from the employer at all for her injuries without estoppel or waiver theories. Second, the only way to achieve the overall beneficent legislative intent underlying the Workers' Compensation Law is to liberally apply the limitations period in favor of the claimant.[69] However, the imposition of a limitation on actions is designed to alleviate the problems associated with claims that become stale after a few years. Most jurisdictions hold that the former interest trumps the latter.[70]

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65. *Id.*

66. By changing the facts in *Mauldin* slightly, the argument in favor of the discovery rule becomes somewhat stronger. For example, if Mauldin had suffered an apparently insignificant bruise that subsequently matured into a torn medial meniscus after the two year-period had expired, the court may have been less inclined to find against her.

67. *See* 2B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.42(b), at 15-268 (1989). Professor Larson states:

> It is odd indeed to find, in a supposedly beneficent piece of legislation, the survival of this fragment of irrational cruelty surpassing the most technical forfeitures of legal statutes of limitation. Statutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them, and any number of excuses will toll the running of the period. But here no amount of vigilance is of any help. The limitations period runs against a claim that has not yet matured; and when it matures, it is already barred.

Id.

68. *See* S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1976).

69. *See, e.g.*, Hardee v. Bruce Johnson Trucking Co., 293 S.C. 349, 356, 360 S.E.2d 522, 526 (Ct. App. 1987) (citing Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941)).

70. 2B A. LARSON, *supra* note 67, § 78.41(b), at 15-234. Professor Larson states:

> [T]he great majority of the courts have been sufficiently impressed with the acute unfairness of a literal application of this language [requiring the statute to run immediately from the date of accident] to read in an implied condition suspending the running of the statute until by reasonable care and diligence it

Despite the equitable arguments in favor of the discovery rule, especially in latent injury cases, *Mauldin* clearly holds that South Carolina does not apply the discovery rule in workers' compensation cases that involve neither occupational diseases nor death benefits.

David A. Wilson

IV. EXCEPTION TO THE TRADITIONAL HEART ATTACK RULE FOR HEAT-INDUCED HEART ATTACKS CREATED

In *Holley v. Owens Corning Fiberglas Corp.*[71] the South Carolina Court of Appeals held that a worker's heart attack caused by exposure to extreme temperature in a place where the worker is required to be and in the normal course of employment is compensable under the South Carolina Workers' Compensation Law.[72] In so holding, the court created an exception to the traditional heart attack rule and enlarged the category of excessive heat injuries compensable under South Carolina Workers' Compensation Law to include heart attacks.

Prior to *Holley* South Carolina courts awarded workers' compensation benefits for heart attacks only when "induced by unexpected strain or overexertion in the performance of the duties of the employment or by unusual and extraordinary conditions in the employment."[73] This is the traditional heart attack rule, and courts did not consider excessive temperature in the normal course of employment to be an unusual or extraordinary condition of employment.

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is discoverable and apparent that a compensable injury has been sustained.

> The number of jurisdictions that are still capable of destroying compensation rights for failure to file a claim at a time when its existence could not reasonably have been known has dwindled to three or four at the most—all under statutes dating the period from time [of] accident rather than time of injury. The use of the "accident" rather than the "injury" as the starting point for the limitations period has not been an insuperable obstacle to the judicial achievement of the more humane rule . . . .

Id. at 15-234 to -235 (footnotes omitted). Oddly enough, Professor Larson cites South Carolina as one of the seven "accident" jurisdictions that accept the discovery rule. *Id.* & 15-235 n.27. However, an analysis of the South Carolina cases Professor Larson cites, *see id.* § 78.41(a), at 15-219 to -220 n.23, as well as the holding in *Mauldin*, clearly shows that South Carolina has not accepted the discovery rule in workers' compensation cases that involve claims other than occupational diseases.

71. 301 S.C. 519, 392 S.E.2d 804 (Ct. App.), *aff'd per curiam*, 397 S.E.2d 377 (S.C. 1990) (adopting court of appeals opinion).

72. The South Carolina Workers' Compensation Law is codified at S.C. CODE ANN. §§ 42-1-10 to -19-50 (Law. Co-op. 1976 & Supp. 1990).

73. *Holley*, 301 S.C. at 521, 392 S.E.2d at 805; *e.g.*, Kearse v. South Carolina Wildlife Resources Dep't, 236 S.C. 540, 544, 115 S.E.2d 183, 186 (1960).

Wilton Holley's job as a hot repairman required him to climb to the top of a tall ladder to remove slag[74] from the top of a furnace. Temperatures along the ladder reached 120 degrees fahrenheit.[75] On the day of his death, Holley climbed to the top of the ladder and cleaned the top of the furnace. After he descended, Holley told his supervisor, "[S]omething happened to me."[76] Moments later, he had difficulty breathing. He pounded his chest and collapsed. An ambulance transported Holley to a hospital where he was pronounced dead on arrival.[77]

Holley's widow instituted a claim for workers' compensation death benefits. The Workers' Compensation Commissioner found that the extreme heat caused by the furnace and the climb on the day of death contributed to, accelerated, or aggravated a pre-existing heart condition and thereby caused Holley's heart attack and subsequent death. The Commissioner held that the exposure to the heat and the strenuous climbing required by Holley's job constituted unusual and extraordinary conditions and awarded Holley's widow death benefits based upon the traditional heart attack rule. The full commission and the circuit court affirmed the order.[78]

The court of appeals also affirmed, but on different grounds. The court of appeals held that a heart attack caused by excessive temperature is compensable under the Workers' Compensation Law even if the excessive temperature is a normal incident of the employment.[79]

The court's rationale for its decision was fourfold. First, the court noted the "wide latitude" given to the extreme heat rule in workers' compensation cases in South Carolina.[80] The rule already included injuries similar to heart attacks, such as heat stroke, heat exhaustion, and sun stroke.[81] Because of this wide latitude and the similarity of the injuries already compensable under the rule, the extension to include heat-induced heart attacks was logical. Second, the court found highly

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74. "[F]used and vitrified matter separated during the reduction of a metal from its ore." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1338 (6th ed. 1973).

75. Holley's fellow employees testified that the temperature was so hot that it would take a person's breath away. *Holley*, 301 S.C. at 520, 392 S.E.2d at 805.

76. *Id.*

77. *Id.*

78. *See id.* at 521, 392 S.E.2d at 805.

79. *Id.* at 523-24, 392 S.E.2d at 807.

80. *Id.* at 521, 392 S.E.2d at 806. The court quoted from Smith v. Southern Builders, 202 S.C. 88, 24 S.E.2d 109 (1943), to illustrate this point. " '[H]eat prostration which results from the employee's engaging in the employment, *whether due to unusual or extraordinary condition or not, is to be deemed an accidental injury within the meaning of the statutes.*' " *Holley*, 301 S.C. at 521-22, 392 S.E.2d at 806 (emphasis added by court) (quoting *Smith*, 202 S.C. at 101, 24 S.E.2d at 115).

81. *Holley*, 301 S.C. at 521, 392 S.E.2d at 806.

persuasive the North Carolina Supreme Court's adoption of the same type of exception to the traditional heart attack rule.[82] The *Holly* court's holding made South Carolina's application of the excessive heat rule to heart attacks consistent with interpretations of North Carolina's act, upon which South Carolina modeled its act.[83] Third, the court observed that its holding was "consistent with the developing law on this subject."[84] Finally, the court noted that when it must construe an unclear section of the Workers' Compensation Law, any reasonable doubt as to the construction of the Law should be resolved in favor of providing coverage rather than noncoverage.[85]

The question left open by the *Holley* court is what standard applies in heart attack cases to determine whether a condition of employment is unusual and extraordinary. Both sides in *Holley* argued the traditional heart attack rule. Holley's widow argued that the heat from the furnace was an unusual and extraordinary condition.[86] Holley's employer, on the other hand, argued that the exposure to the heat was neither unusual nor extraordinary because it was part of Holley's normal employment.[87] Holley's employer argued that the unusualness of a condition had to be judged relative to the normal duties required of the job. The court avoided resolving this key issue by creating an exception to the traditional heart attack rule. Thus, the court had left open the question of whether unusual and extraordinary conditions in

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82. *Id.* at 522, 392 S.E.2d at 806 (citing Dillingham v. Yeargin Constr. Co., 320 N.C. 499, 358 S.E.2d 380 (1987)).

83. The *Holley* court noted that "[t]he South Carolina Workers' Compensation Act was tailored after the North Carolina Act and opinions of the North Carolina Supreme Court construing such Act are entitled to great weight with the appellate courts of this state." *Id.* at 523, 392 S.E.2d at 806 (citing Carter v. Penny Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973)).

84. *Id.* at 524 n.2, 392 S.E.2d at 807 n.2 (citing 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 38.40, .50, .64 (1987 & Supp. 1989)). Interestingly, section 38.40 indicates that frostbite and sunstroke are accidental injuries when caused by usual conditions of employment, but mentions nothing about heart attacks. 1B A. LARSON, *supra*, § 38.40. Likewise, section 38.50 mentions nothing about heart attacks in usual exposure or exertion cases. *Id.* § 38.50. Section 38.64, however, does discuss heart attack cases. *Id.* § 38.64. In the past New York and New Jersey both required satisfaction of an unusualness test in heart attack cases similar to that required in South Carolina before *Holley*. *Id.* Larson traces the erosion of this requirement in both states and notes that nearly all on-the-job heart attacks are compensable. *Id.*

New York holds that an event is sufficiently unusual if it is unusual in relation to any of the following: "(1) the employee's own usual work; (2) the 'wear and tear' of ordinary nonemployment life; or (3) the usual work of other employees." *Id.* § 38.64(a)(7). Section 38.64 also contains a discussion of New York cases involving heart attacks caused by climbing on the job, *id.* § 38.64(a)(6), but the *Holley* court did not refer to it.

85. *Holley*, 301 S.C. at 524, 392 S.E.2d at 807.

86. Record at 3.

87. *Holley*, 301 S.C. at 521 n.1, 392 S.E.2d at 805 n.1.

heart attack cases were to be judged in reference to the typical duties and functions of the claimant's job, the typical duties and functions of a normal job, or according to some absolute scale.[88]

In *DeBruhl v. Kershaw County Sheriff's Department*[89] the court of appeals resolved this ambiguity. The sheriff of Kershaw County suffered a heart attack soon after reporting to a late night crime scene. The Workers' Compensation Commission denied benefits, but the circuit court reversed. The circuit court noted that the sheriff had worked twenty hours that day, and the crime being investigated involved the death of a friend. The circuit court decided that these factors would constitute an unusual strain on any individual.[90]

The court of appeals reversed. The court stated that conditions of employment causing heart attacks must be unusual or extraordinary relative to the ordinary exertion required in the performance of the claimant's job.[91] Because the conditions of employment contributing to the heart attack in question were not "unusual or unexpected for the Sheriff of Kershaw County,"[92] the court held that the heart attack was not compensable.

DeBruhl also underscores the significance of *Holley*. The exception to the traditional heart attack rule adopted in *Holley* allows for benefits to be awarded even if the excessive heat causing the heart attack is a normal part of the claimant's job. Those suffering heat-induced heart attacks in the course of employment confront a reduced burden for receiving workers' compensation benefits, whereas claimants that suffer exertion-related heart attacks must show extraordinary conditions.

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88. Prior to *Holley* South Carolina courts recognized various conditions in heart cases as unusual and extraordinary working conditions. Courts have held that unusually long work schedules, extreme time pressures, and great physical exertion meet this standard. *See, e.g.*, McWhorter v. South Carolina Dep't of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969) (per curiam) (heart attack held compensable when immediately prior to attack the claimant had been working unusually long hours and laboring under extreme emotional pressure); Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961) (heart attack held compensable when prior to the attack claimant had been required to increase his work schedule from eight and one-half to sixteen hours per day); Poulos v. Pete's Drive-In No. 3, 284 S.C. 264, 325 S.E.2d 583 (Ct. App.), *cert. denied*, 286 S.C. 128, 332 S.E.2d 529 (1985) (heart attack held compensable when prior to attack claimant had been assigned additional duties requiring him to work longer hours). The method used by these courts in determining that the conditions were unusual, however, is not entirely clear.

89. 397 S.E.2d 782 (S.C. Ct. App. 1990).

90. *Id.* at 784-85.

91. *Id.* at 785-86.

92. *Id.* at 786.