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Workers' Compensation Law

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WORKERS' COMPENSATION LAW

I. LIMITATIONS ON WORKERS' COMPENSATION RECOVERY FOR MENTAL INJURY

Professor Arthur Larson[1] often quotes a "poignant judicial cry" in an effort to describe the problems attending the development of workers' compensation law relating to mental and nervous injury:[2] "How could it be real when . . . it was purely mental?"[3] The Court of Appeals of South Carolina addressed the mental injury issue in *Yates v. Life Insurance Co. of Georgia*.[4] The issue was whether an injury resulting from a suicide attempt is compensable under South Carolina law.[5] The court denied recovery on the theory that the claimant did not suffer the accident at work.[6]

Christopher Yates worked for the Life Insurance Company of Georgia. Yates sold insurance policies and collected insurance premiums. After approximately two years at work, Yates became dissatisfied with this job. He disliked pressuring low income clients to pay for their insurance, and he disliked cancelling their insurance when they did not pay. One day Yates went to work and performed his normal duties. In the afternoon he returned to his apartment for lunch. While at his apartment, Yates shot himself in the head. He survived, but the gunshot destroyed his eyesight.

Yates filed a claim to recover workers' compensation,[7] but Life Insurance Company of Georgia denied the claim.[8] Yates' medical expert testified that the suicide attempt "was a direct

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1. Professor of Law and Director of the Rule of Law Research Center, Duke University School of Law.

2. Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 VAND. L. REV. 1243 (1970).

3. *Id.* (citing Hood v. Texas Indemn. Ins. Co., 146 Tex. 522, 537, 209 S.W.2d 345, 354 (1948) (Smedley, J., dissenting)).

4. 291 S.C. 301, 353 S.E.2d 297 (Ct. App. 1987).

5. *See* S.C. CODE ANN. §§ 42-1-10 to -40 (Law. Co-op. 1976).

6. 291 S.C. at 306, 353 S.E.2d at 297.

7. Record at 2.

8. *Id.* at 3.

result of stress and pressures from the job."[9] The single commissioner allowed recovery.[10] The full commission affirmed.[11] The circuit court reversed the award, relying on *Petty v. Associated Transport, Inc.*[12] The circuit court denied compensation because Yates did not suffer a physical injury prior to the suicide attempt.[13]

On appeal Yates argued that the circuit court erred in conditioning compensation on a prior physical injury.[14] The court of appeals, however, did not address the *Petty* issue in affirming the circuit court's decision.[15] In *Petty* the court held that "an employee who becomes mentally deranged and deprived of normal judgment as the result of a compensable accident and commits suicide in consequence does not act wilfully."[16] Therefore, the initial inquiry is whether or not there was a compensable accident. The court of appeals stated simply that Yates did not suffer an accident and, therefore, was not entitled to compensation.[17] The court reasoned that because there was no sudden or unexpected event at work, there was no accident.[18] In holding that there was no accident, the court missed an opportunity to develop the law relating to mental and nervous injury that results from work-related stress.

The three bases of recovery for cases concerning mental and nervous injury are as follows: (1) mental stimulus causing physical injury; (2) physical trauma causing nervous injury; and (3) mental stimulus causing nervous injury.[19] In *Yates* the court focused on the third basis of recovery. Yates argued that stressful working conditions induced a mental disorder that ultimately prevented him from working. The court, however, held Yates did

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9. *Id.* at 89.
10. *Id.* at 108.
11. *Id.* at 114.
12. 276 N.C. 417, 173 S.E.2d 321 (1970).
13. Record at 120.
14. *See* Findley v. Industrial Comm'n, 135 Ariz. 273, 660 P.2d 874 (Ct. App. 1933); Burnight v. Industrial Accident Comm'n, 181 Cal. App. 2d. 816, 5 Cal. Rptr. 786 (1960); Trombley v. State, 366 Mich. 649, 115 N.W.2d 561 (1962); Anderson v. Armour & Co., 257 Minn. 281, 101 N.W.2d 435 (1960); University of Pittsburg v. Workmen's Compensation Appeal Bd., 49 Pa. Commw. 347, 405 A.2d 1048 (1979).
15. 291 S.C. at 304, 353 S.E.2d at 299.
16. 276 N.C. at 428, 173 S.E.2d at 329.
17. 291 S.C. at 306, 353 S.E.2d at 300.
18. *Id.*
19. Larson, *supra* note 2, at 1243.

not suffer an injury by accident; the court would address the *Petty* issue of causation only if it first determined that a compensable accident had occurred.

Certainly a lawyer could use *Yates* to argue that work-related stress is not a compensable accident under any circumstances. Did the court intend this result? The court held that the "mental stimulus causing nervous injury" (work-related stress inducing a mental disorder) was not an accident, but it failed to discuss under what circumstances, if any, this situation could be a basis for compensation.

There are methods available for the court to allow recovery for mental injury while protecting against the danger of generating numerous fraudulent claims. Some states allow compensation for mental injury in certain limited circumstances. For example, in Arizona a claimant can recover for a mental injury when it results from unexpected, unusual, or extraordinary stress.[20] Arizona refuses to allow recovery for a mental injury that results from the general building of emotional stress from the usual, ordinary, and expected incidents of employment.[21] In Michigan the courts disallow recovery when the claimant's mental condition is caused by a failure to attain personal goals.[22] Michigan courts also require that a precipitating or triggering event occur at work in order to allow recovery.[23] California courts refuse to allow recovery for mental injuries when the employee's duties at work merely set the stage for the injury.[24] Pennsylvania courts require the claimant to accurately pinpoint the cause of the mental injury. In Pennsylvania an employee's subjective reactions to work and exposure to normal working conditions are insufficient bases of recovery for a mental injury.[25]

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20. Sloss v. Industrial Comm'n, 121 Ariz. 10, 588 P.2d 303 (1978).

21. *See, e.g.*, Verdugo v. Industrial Comm'n, 114 Ariz. 477, 561 P.2d 1249 (Ct. App. 1977), *cert. denied*, 434 U.S. 863 (1977).

22. Milton v. Oakland County Bd. of Auditors, 54 Mich. App. 429, 221 N.W.2d 197 (1974).

23. *See, e.g.*, McDaniel v. General Motors Corp., 129 Mich. App. 638, 341 N.W.2d 850 (1983).

24. *See, e.g.*, Twentieth Century-Fox Film Corp. v. Workers' Compensation Appeals Bd., 141 Cal. App. 3d 778, 190 Cal. Rptr. 560 (1983).

25. *See, e.g.*, Allegheny Ludlum Steel Corp. v. Workmen's Compensation Appeal Bd., 91 Pa. Commw. 480, 498 A.2d 3 (1985); Thomas v. Workmen's Compensation Appeal Bd., 55 Pa. Commw. 449, 423 A.2d 784 (1980).

A rule requiring a mental injury that results from something more than everyday stress is fair. This analysis recognizes that workers' compensation was never intended to serve as health or accident insurance. It also addresses the difficulty of proving the cause of mental injuries.[26] South Carolina already recognizes this type of analysis in heart attack cases.[27] Applying this analysis to *Yates*, Christopher Yates would have to pinpoint a triggering work event in order for the court to conclude that there was an accident. Exposure to normal working conditions would be insufficient to render his mental injury compensable.

Is work-related stress resulting in a mental disorder a compensable accident? Should a "mental-mental" injury satisfy the accident requirement? As Professor Larson suggests, "when a perfect opportunity to clear up an important unsettled point does at last happen to come along," the court should take advantage of it.[28] On the particular facts in *Yates*, the court reached a proper result. The court, however, missed an opportunity to develop South Carolina law relating to mental and nervous injury.

Daniel S. Sanders, Jr.

II. COURT RULES ON WORKERS' COMPENSATION CLAIMS INVOLVING SUCCESSIVE INJURIES

In *Wyndham v. R.A. & E.M. Thornley & Co.*[29] the South Carolina Court of Appeals ruled on two important issues concerning employees with successive injuries. The cases that generally involve a successive-injury situation are those in which an employee with a permanent disability sustains another permanent injury by a job-related accident. An example would be a one-legged man who loses his other leg in an accident. The first issue the court considered was whether the employee's right to

26. *See* School Dist. No. 1. v. Department of Indus., Labor, & Human Relations, 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

27. *See* Bridges v. Housing Auth. City of Charleston, 278 S.C. 342, 344, 295 S.E.2d 872, 873 (1982) ("[A] coronary attack suffered by an employee constitutes a compensable accident . . . if it is induced by unexpected strain or over-exertion in the performance of the duties of his employment, or by unusual and extraordinary conditions in the employment.").

28. Larson, *supra* note 2, at 1255.

29. 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 1987).

compensation under the Second Injury Fund is dependent upon the employer's fulfilling the statutory requirements for reimbursement from the fund. The court decided that if the employee qualifies under the fund, he is entitled to full compensation regardless of whether the employer is entitled to reimbursement. The second issue that the court considered was whether the statutory maximum week limitation on workers' compensation payments applies to successive injuries. The court decided that the maximum limitation of 500 weeks did not apply to successive injuries incurred while working for different employers.

In 1966 Carroll V. Wyndham, the plaintiff, injured his back in the course of his employment with United Piece Dye Works. Because of this injury, Wyndham received compensation for 248 weeks. Subsequently, Wyndham went to work for the defendant, R.A. & E.M. Thornley & Company. Thornley knew of Wyndham's prior back injury at the time he was hired but did not maintain written records of that knowledge. In 1980, while still employed by Thornley, Wyndham sustained a second injury to his back. Thornley filed a claim for reimbursement from the Second Injury Fund under section 42-9-400(a)[30] of the South Carolina Code. The claim was denied for failure to comply with the requirement of filing written records showing the employer's knowledge of the prior impairment when it hired the employee.[31]

The single commission found Wyndham was totally, permanently disabled and ordered Thornley to pay weekly compensation of $123.33 for a period not to exceed 500 weeks. The full commission affirmed this award. The circuit court judge ordered the number of weekly payments reduced by the 248 weeks Wyndham had been compensated for his first injury. The court of appeals decided that an employer's failure to comply with the requirements of the Second Injury Fund[32] does not bar a previously-impaired employee from receiving full compensation. The court also held that the 500 week limit required in section 42-9-10[33] does not apply to successive injuries incurred while working

30. S.C. CODE ANN. § 42-9-400(a) (Law. Co-op. 1976).

31. On April 13, 1982, the legislature amended § 42-9-400(c) of the S.C. Code, deleting the written record requirement for reimbursement from the Second Injury Fund.

32. S.C. CODE ANN. § 42-9-400 (Law. Co-op. 1976).

33. *Id.* § 42-9-10 (Law. Co-op. 1976 & Supp. 1987).

for different employers.[34]

The first issue the court decided was whether an employee is entitled to total compensation for a second injury despite the employer's failure to comply with the written record requirement of section 42-9-400(c).[35] There are three approaches to handling successive injuries in workers' compensation cases.[36] The first approach is the "full responsibility" rule, which imposes liability on the employer for the entire subsequent disability.[37] The second approach involves apportionment statutes under which the employer is liable only for the degree of disability that would have resulted from the latter accident if the earlier disability had not occurred.[38] The third approach is the Second Injury Fund concept in which the employee receives full compensation, but the employer is reimbursed for the difference between the full disability and what he would pay under the apportionment statute.[39]

While it appears that the apportionment rule favors the employer and the full responsibility rule favors the employee, in practice, both approaches tend to have harsh effects on handicapped workers. Under the full responsibility rule, the employer has strong financial incentives to fire handicapped employees.[40] Under the apportionment statutes, handicapped employees often receive inadequate compensation. The loss of an eye is much more devastating to a one-eyed man than it is to a man with two eyes in terms of the permanency of the injury and the hope of future gainful employment.

The legislature designed the Second Injury Fund concept to remedy the problems of the full responsibility rule and apportionment statutes. In South Carolina, as well as in some other

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34. 291 S.C. at 500, 354 S.E.2d at 402.

35. S.C. CODE ANN. § 42-9-400(c) (Law. Co-op. 1976).

36. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 59.00 (1987).

37. *Id.* § 59.10.

38. S.C. CODE ANN. § 42-9-150 (Law. Co-op. 1976).

39. 2 A. LARSON, *supra* note 36, § 59.10. In South Carolina, the employer is reimbursed for all compensation payments after 78 weeks, 50 percent of all medical payments in excess of $3,000 during the first 78 weeks, and all medical payments after the first 78 weeks following the injury. S.C. CODE ANN. § 42-9-400(a) (Law. Co-op. 1976).

40. As an example, Professor Larson cites the situation in Oklahoma where, within 30 days following the adoption of the full responsibility rule, between 7,000 and 8,000 one-eyed, one-legged, one-armed, and one-handed men were fired. 2 A. LARSON, *supra* note 36, § 59.31(a).

states,[41] the employer must fully compensate the injured handicapped worker in the first instance. He then may seek reimbursement from the fund if he fulfills the statutory requirements.[42] Thus, the legislature has placed the burden on the employer, rather than on the employee, to seek reimbursement.[43]

In *Wyndham* the court held that the employee's right to full compensation was not defeated by the employer's failure to be reimbursed from the Second Injury Fund for not meeting one of its requirements. The court held that if the employee "has a permanent physical impairment from any cause or origin [and] incurs a subsequent disability from injury by accident arising out of and in the course of his employment," the employee is entitled to full compensation.[44] The court emphasized that the written record requirement is a condition to the employer's eligibility to recover from the Second Injury Fund, not a condition to the employee's right to compensation. Therefore, Wyndham was entitled to full compensation even though Thornley, the employer, was not entitled to reimbursement from the Second Injury Fund.[45]

This holding is consistent with the purpose of the Second Injury Fund. The fund was designed to compensate fully handicapped workers for subsequent injuries without penalizing employers for hiring them. By providing reimbursement to the employer for compensation paid as a result of a second injury, employers are encouraged to hire handicapped persons.[46] In order to receive reimbursement, however, the employer must fulfill

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41. Other states include New York, Texas, Florida, and Connecticut. In California, however, the employee must apply directly to the fund for the additional compensation due. *Id.* § 59.31(g).

42. S.C. CODE ANN. § 42-9-400(a) (Law. Co-op. 1976).

43. *See* Custy, *The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South Carolina*, 27 S.C.L. REV. 661, 664 (1976).

44. 291 S.C. at 499, 354 S.E.2d at 401 (quoting S.C. CODE ANN. § 42-9-400(a) (Law. Co-op. 1976)).

45. *See* S.C. CODE ANN. § 42-9-400(a) (Law. Co-op. 1976). Although the Second Injury Fund statute no longer requires an employer to keep written records of his knowledge of an employee's prior disability, this case is still important in the sense that it unequivocally places the burden on the employer to fulfill the statutory requirements. The statute still requires that the employer establish his knowledge of the disability at the time the employee was hired; it simply does not have to be in writing.

46. Boone's Masonry Const. Co. v. South Carolina Second Injury Fund, 267 S.C. 277, 227 S.E.2d 659 (1976).

the statutory requirements. As stated by the court, "[i]t would be unfair, and would frustrate the fund's purpose, to penalize the employee because of the employer's failure to maintain proper records."[47]

The second issue the court discussed was whether section 42-9-10 of the South Carolina Code[48] prohibits an employee from receiving more than 500 weeks of compensation for multiple disabilities of the same member.[49] The court followed the cardinal rule that words used in a statute should be given their plain and ordinary meaning. Therefore, "an injury" in section 42-9-10 refers to a single injury and a single disability. The court also noted that section 42-9-170,[50] which deals with successive injuries sustained in the same employment, explicitly limits total compensation to 500 weeks, while section 42-9-150,[51] which deals with successive injuries incurred while working for different employers, does not expressly limit total compensation. From its interpretation of these two statutes, the court held that the 500 week limit does not apply to successive injuries incurred while working for different employers. Therefore, the court held that the lower court should not have reduced Wyndham's number of weekly payments by the 248 weeks he had been compensated for his first injury.[52]

The court did not address the issue of whether there is a distinction between successive injuries to unrelated parts of the body and successive injuries to the same member.[53] Arguably, allowing more than the maximum compensation allowed for an injury to an employee who previously had been compensated for an injury to the same member provides a windfall to the employee.[54] Considering the remedial nature of workers' compensa-

47. 291 S.C. at 500, 354 S.E.2d at 401.

48. S.C. CODE ANN. § 42-9-10 (Law. Co-op. 1976 & Supp. 1987).

49. 291 S.C. at 500, 354 S.E.2d at 401. Section 42-9-10 provides: "When the incapacity for work resulting from an injury is total, the employer shall pay . . . to the injured employee during the total disability, a weekly compensation . . . and in no case may the period covered by the compensation exceed five hundred weeks except as hereinafter provided."

50. S.C. CODE ANN. § 42-9-170 (Law. Co-op. 1976).

51. *Id.* § 42-9-150.

52. 291 S.C. at 500, 354 S.E.2d at 401.

53. This issue was addressed in both attorneys' briefs to the court of appeals.

54. This argument was more crudely put in Miles v. Gallagher, 194 Pa. Super. 338, 341, 168 A.2d 805, 807 (1961) (citation omitted): "A man who has little more than a

tion laws, however, perhaps the better view is that the maximum week limitation should not apply to successive injuries either to unrelated parts of the body or to the same member. This is the view expressed by Larson.[55] The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. After having received his prior payments, the employee, in future years, may be able to resume gainful employment. If so, there is no reason why a disability that would bring anyone else total permanent disability benefits should yield him only half as much.

Allison Molony Carter

III. No Separate Recovery for Bad Faith Refusal to Pay Under the Workers' Compensation Statute

A worker who sustains physical injuries covered by the South Carolina Workers' Compensation Act[56] (Act) may not bring a separate action for damages by alleging bad faith refusal to pay his claim. The South Carolina Court of Appeals held in *Cook v. Mack's Transfer & Storage*[57] that the Act provides the worker an exclusive remedy. The decision reinforces the statutory framework of the Act and adopts the majority rule from other jurisdictions.[58]

The dispute in *Cook* arose from an automobile accident in which Kenneth Cook, the plaintiff, was injured while driving a truck for his employer, Mack's Transfer and Storage (Mack's). Cook furnished Mack's with timely notification of the accident and his resulting injuries, but the employer did not immediately notify its workers' compensation insurer, United States Fidelity and Guaranty Company (U.S. Fidelity).[59] Eventually, the insurance company received all the information concerning the acci-

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stump of a hand, outside of his thumb and little finger, as a result of prior accidents, cannot ask an insurance carrier to pay for the loss of the *hand* because he accidentally loses the little finger remaining on the stump."

55. 2 A. LARSON, *supra* note 36, § 59.42(g).

56. S.C. CODE ANN. §§ 42-1-10 to 42-19-40 (Law. Co-op. 1976 & Supp. 1987).

57. 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986), *cert. denied*, 292 S.C. 230, 355 S.E.2d 861 (1987).

58. *See* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.34(c) (1987).

59. 291 S.C. at 85, 352 S.E.2d at 297.

dent but refused to honor the claim.[60] The plaintiff alleged that both Mack's and U.S. Fidelity wilfully, maliciously, and in bad faith denied his claim.[61] Cook attempted to avoid the limited remedies of the Act by alleging that the injuries for which he sought damages[62] derived, not from his employment, but separately and independently from his employer's and insurer's refusal to pay.[63] Based on the landmark decision *Nichols v. State Farm Mutual Automobile Insurance Co.*,[64] Cook claimed he was entitled to a remedy independent from that provided in the Act. He further alleged that workers' compensation provided an insufficient remedy for his additional injuries.[65]

At trial Mack's and U.S. Fidelity demurred to the complaint. The trial court overruled their demurrers, finding a valid cause of action under *Nichols*. The defendants appealed. On ap-

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60. The automobile accident occurred on January 31, 1985. The defendant-employer received notification of the accident on February 1, 1985. Brief of Respondent at 1. Later, on approximately February 26, 1985, the defendant-insurer received all the necessary information. Amended Complaint at 4.

61. Amended Complaint at 4-5. The plaintiff also alleged that the withholding of information from the insurer about the accident was willful and intentional. *Id.* at 4. The wording of the complaint in this type of suit, however, is not determinative. "If every case in which there is a delay . . . could be brought into a court . . . by merely alleging that the acts were intentional . . . [or] outrageous . . . without alleging the specific conduct and how it was carried out, it would make shambles of the workers' compensation system . . . ." Everfield v. State Compensation Ins. Fund, 115 Cal. App. 3d 15, 19, 171 Cal. Rptr. 164, 166 (1981).

62. Cook sought combined actual and punitive damages of one million dollars. 291 S.C. at 86, 352 S.E.2d at 297. Cook contended his damages included "unreimbursed medical expenses, . . . denied workers' compensation benefits of $287.16 [per week], . . . [inability] to pay his debts or provide for his family, and . . . mental suffering." *Id.*

63. *Id.* at 88, 352 S.E.2d at 299.

64. 279 S.C. 336, 306 S.E.2d 616 (1983). The author of the instant opinion, Judge Bell, refers to the *Nichols* opinion as a "landmark decision" in Bartlett v. Nationwide Mut. Fire Ins. Co., 290 S.C. 154, 157, 348 S.E.2d 530, 531 (Ct. App. 1986). In *Nichols* the defendant insurer allegedly refused to pay the costs of repair after the recovery of a stolen automobile. Plaintiff alleged that the insurer caused over seven months of delay in the repairs. 279 S.C. at 339, 306 S.E.2d at 618. The *Nichols* court held:

> [If] an insured can demonstrate bad faith . . . by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a *tort action*. . . . Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.

Id. at 340, 306 S.E.2d at 619 (emphasis added).

Subsequently, the *Bartlett* court held that "*Nichols* created a new remedy for the violation of rights arising *in contract*, not a new substantive right *in tort*." 290 S.C. at 158, 348 S.E.2d at 532 (emphasis added).

65. 291 S.C. at 88, 352 S.E.2d at 299.

peal, to test the validity of the demurrers, the court assumed that all facts alleged in the complaint were true.[66] The court of appeals reversed the trial court judgment and held that *Nichols* does not allow a separate action for damages.[67] The decision to reverse hinged on the exclusive remedy provision of the Act, section 42-1-540.[68]

The reasoning of the *Cook* court can be broken down into two separate, but related, analyses. In its first analysis,[69] the court reasoned that "where a remedy exists under the [workers' compensation] statute, the injured worker no longer has the right to bring a common law action to enforce his claim."[70] The court detailed a step-by-step, statute-by-statute application which resulted in its holding that Cook had a right to compensation.[71] Once Cook had a right to a statutory remedy, whether exercised or not, the Act became his exclusive remedy.[72] The

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66. *Id.* at 85, 352 S.E.2d at 297.

67. *Id.* at 92-93, 352 S.E.2d at 301.

68. S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1976) provides in part:

> The rights and remedies granted by this Title to an employee . . . to pay and accept compensation on account of personal injury or death by accident, shall *exclude all other rights and remedies* of such employee . . . against his employer, *at common law or otherwise*, on account of such injury . . . .

Id. (emphasis added). Professor Larson classifies exclusive remedy provisions as falling into three categories. *See* 2A A. LARSON, *supra* note 58, § 66.10. Section 42-1-540 is a "New York type," the broadest of the three classifications. *See id.* at 12-70.

69. Labeled section "I" in the reported opinion.

70. 291 S.C. at 88, 352 S.E.2d at 299.

71. The *Cook* court notes that the legislature provided a statutory remedy aimed at relieving workers in Cook's situation. Accordingly, if not satisfied, Cook should have filed for a hearing under the Act. *See* S.C. CODE ANN. § 42-17-20 (Law. Co-op. 1976) (either employer or worker may apply to the Industrial Commission if agreement is not reached within 14 days after employer receives notification). Under the Act, the Industrial Commission has exclusive jurisdiction over all such claims. *Id.* § 42-3-180. Once the above procedure is followed § 42-1-540 excludes any common law action on Cook's part. *Id.* § 42-1-540.

72. The "balancing of advantages," *quid pro quo* concept, is essential to the proper application of the Act. The historical impetus for workers' compensation established that "it is desirable to discard the common law doctrines of tort liability in the employer-employee relationship and substitute a duty of the employer, regardless of fault, to compensate the employee." 291 S.C. at 86, 352 S.E.2d at 298 (citing Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980)).

"The operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in a particular case." Barrino v. Radiator Specialty Co., 315 N.C. 500, 506, 340 S.E.2d 295, 300 (1986) (quoting 2A A. LARSON, *supra* note 58, § 65.14). Note that because South Carolina's Workers' Compensation Act is patterned after North Carolina's Workers' Compensation Act, South Carolina courts find North Car-

Cook court stressed that the Workers' Compensation Act must be applied as a comprehensive plan, a statutory scheme for the benefit of both worker and employer.[73] Under the court's analysis, the character of the defendants' conduct became "immaterial."[74]

In the second analytic section of his opinion, Judge Bell, writing for the court, confronted the applicability of *Nichols* to the facts of *Cook*. Judge Bell directly addressed the claimant's argument that the alleged damages did not "arise[] . . . from his employment, but from the refusal of [the defendant] to pay [Cook] benefits."[75] Cook's argument that *Nichols* applied, even in the context of his on-the-job injuries, was denied for four reasons.

The first two of these reasons focused on the contractual nature of a *Nichols* cause of action.[76] First, the Act is a statutory plan and any right to entitlement given to Cook is a result of the statute, not the common law of contract.[77] The court stated that an essential element of *Nichols* is a "mutually binding contract."[78] Even assuming that the statute is analogous to a con-

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olina case law unusually persuasive precedent. *See* Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973).

73. The court of appeals emphasized the systematic, independent coverage provided by the Act. For example, the court refers to the Act as "an exclusive system . . . wholly substitutional." 291 S.C. at 87, 352 S.E.2d at 298 (quoting Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948)); a "comprehensive legislative plan," *id.* at 89, 352 S.E.2d at 300; and a "comprehensive framework for enforcement of the workers' right to benefits," *id.* at 91, 352 S.E.2d at 300.

74. 291 S.C. at 88, 352 S.E.2d at 299.

75. *Id.*

76. It is not entirely clear that a *Nichols* action is an action in contract rather than tort. *See supra* note 64. The *Bartlett* court notes that the *Nichols* cause of action originally was defined as a tort action. Later in the same opinion, the court of appeals hesitated to make a definite categorization of the action as tort or contract stating that "[t]he critical matter is not one of labels." 290 S.C. at 157, 348 S.E.2d at 532. Notwithstanding this confusion, the court of appeals in *Cook* treats a *Nichols* action as one based entirely on contract.

For the court of appeals' underlying rationalization for branding a *Nichols* action as an action in contract, see Brown v. South Carolina Ins. Co., 284 S.C. 47, 55 n.4, 324 S.E.2d 641, 646 n.4 (Ct. App. 1984) (holding that the fact that the covenant of good faith and fair dealing in an insurance contract is implied in law and does not arise from a bargained-for agreement does not place the action in tort; ordinarily, terms in an insurance policy are not bargained for and "nonconsensual terms are a commonplace in the modern law of contract"), *appeal dismissed*, 290 S.C. 154, 348 S.E.2d 530 (1985).

77. 291 S.C. at 89, 352 S.E.2d at 299.

78. *Id.*

tract, the appellate court concluded that the statute, not contract law, would determine Cook's remedies. Under this conclusion Cook's only remedy is pursuant to sections 42-3-180[79] and 42-1-540.[80] "Exclusivity is not incidental to the system of workers' compensation; it is an essential feature of a comprehensive legislative plan . . . ."[81]

The second reason that Cook could not employ the *Nichols* doctrine also focused on the contractual nature of a *Nichols* attack. In its analysis, the court determined that the only binding contract existed between the employer and the insurer. At most, reasoned the court, Cook was a third party to this contract.[82] South Carolina courts have never allowed a third party to recover on a bad faith claim.[83] Again stressing the exclusivity of the Act, the court rejected Cook's attempt to posit himself as a first party to the insurance contract by virtue of section 42-5-80.[84] A piecemeal application of the Act will not be tolerated: "Cook cannot adopt the statute for one purpose [to override contract law, thus becoming a first party to the contract under section 42-5-80] and disavow it for another [the exclusive remedy of section 42-1-540]."[85]

As its third reason, the court addressed the difference between a workers' compensation remedy and an insurance contract remedy. The former is governed by statute while the latter is governed by common law. The court feared that allowing at-

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79. S.C. CODE ANN. § 42-3-180 (Law. Co-op. 1976). This portion of the Workers' Compensation Act provides the Industrial Commission with subject matter jurisdiction over all questions arising under the Act. Even if a private agreement is reached, the Commission must approve it. *Id.*

80. *Id.* § 42-1-540. *See supra* note 68, for text of statute.

81. 291 S.C. at 89, 352 S.E.2d at 299.

82. *Id.* at 90, 352 S.E.2d at 300.

83. *Id.* The court cited Carter v. American Mut. Fire Ins. Co., 279 S.C. 368, 307 S.E.2d 227 (1983), and Swinton v. Chubb & Son, Inc., 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984), as supporting this proposition. To support a related proposition, the court cited Kennedy v. Henderson, 289 S.C. 393, 346 S.E.2d 526 (1986) (no cause of action involving third party and a surety bond).

84. S.C. CODE ANN. § 42-5-80 (Law. Co-op. 1976). This section requires each workers' compensation insurance policy issued in South Carolina to contain an "agreement of the insurer that it will promptly pay [benefits] to the person entitled thereto . . . [and that] [s]uch agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name." *Id.* Cook argued that this statute implicitly demonstrates legislative intent that each insured be a first party to his employer's workers' compensation insurance contract.

85. 291 S.C. at 91, 352 S.E.2d at 300.

tack on a workers' compensation entitlement would permit attacks on "a myriad of other entitlements common in today's society."[86] Emphasis was on a narrow interpretation of *Nichols*.

As its fourth and final reason for denying a *Nichols* action, the court of appeals found the case law of other jurisdictions persuasive. The court cited authority supporting the majority rule that the existing workers' compensation system should provide an injured worker's exclusive remedy.[87] The minority rule of nonexclusiveness also was acknowledged.[88] Although the court stated that a common law remedy may be advantageous[89] over the statutory remedy in Cook's situation, Judge Bell noted that "amending [the Act] to afford more complete relief against employers . . . is the function of the Legislature, not this Court."[90]

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86. *Id.* at 90, 352 S.E.2d at 300. The South Carolina Court of Appeals is mindful of and hesitant to render opinions that might substantially increase the number of suits filed. In Swinton v. Chubb & Son, Inc., 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984), the court of appeals refused to allow a bad faith suit by a third party against a motor vehicle insurance carrier. The court denied that a private right of action could implicitly arise from the language of the Automobile Reparation Reform Act, S.C. CODE ANN. § 38-37-1110 (Law. Co-op. 1976). 283 S.C. at 14, 320 S.E.2d at 497. There was a chance, if the third party cause of action was allowed, that "the courts would be . . . besieged with so called 'bad faith' suits." *Id.* at 16, 320 S.E.2d at 497.

87. For an extensive listing of cases that support this proposition, including the cases cited by the *Cook* court, see 2A A. LARSON, *supra* note 58, § 68.34(c) n.49.19; *see also* Annotation, *Tort Liability of Worker's Compensation Insurer for Wrongful Delay or Refusal to Make Payments Due*, 8 A.L.R.4TH 902 (1981).

88. For an extensive listing of cases that support this proposition, see 2A A. LARSON, *supra* note 58, § 68.34(c) n. 49.20. The *Cook* court cites five cases that have allowed a separate cause of action similar to the one sought by Mr. Cook, but none are on all fours. 291 S.C. at 92 n.3, 352 S.E.2d at 301 n.3. The court is unclear in its attempt to distinguish each case and summarily states that "[s]ome of those decisions involved statutes materially different from the South Carolina Workers' Compensation Act." 291 S.C. at 92, 352 S.E.2d at 301. An example of this material difference is noted in Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978), in which the Supreme Judicial Court of Maine reasoned that a separate remedy was not barred, partly because the penalty section of the workers' compensation statute made the penalties payable to the state rather than to the claimant. *Id.* at 223 (referring to ME. REV. STAT. ANN. tit. 39, § 104-A (1964)). The Maine statute is significantly different from the South Carolina penalty provision, S.C. CODE ANN. § 42-9-90 (Law. Co-op. 1976), which provides a 10% penalty payable to the claimant if his payments are delayed.

89. A *Nichols* cause of action allows for consequential damages and punitive damages. 290 S.C. 154, 157, 348 S.E.2d 530, 531-32 (Ct. App. 1986). This probably will far exceed any workers' compensation payments.

90. 291 S.C. at 92, 352 S.E.2d at 301. For different views on how active a role courts should play in "improving" workers' compensation statutes, compare Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1653-61 (1983) (encouraging courts to take an active role in carving out

Holding as it did, the *Cook* court failed to focus on the conduct of the employer or the insurer, in essence, ignoring important tort aspects of the issues raised. Yet, anomalously, the court cited as persuasive precedent tort cases from various jurisdictions.[91]

The court also perceived the employer and the insurer as a single defendant.[92] One could argue that the two entities have different duties[93] or contractual obligations.[94]

Other courts have reached the same result as the *Cook* court, but they employed different reasoning. Courts have held the workers' compensation remedy exclusive, based on the existence of a statutory penalty[95] or the distinction between physical and nonphysical injury.[96]

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exceptions to the exclusive remedy rule) with Note, Hogan v. Forsyth Country Club Co.: *Workers' Compensation and Mental Injuries*, 65 N.C.L. REV. 816 (1987) (criticizing the North Carolina Court of Appeals for allowing an emotional distress claim in a workers' compensation context, notwithstanding the exclusivity provision of the applicable workers' compensation statute).

91. *See* cases cited *supra* notes 87, 88.

92. "[T]he carrier is in effect the 'alter ego' of the employer . . . ." Whitten v. American Mut. Liab. Ins. Co., 468 F. Supp. 470, 474 (D.S.C. 1977) (citing S.C. CODE ANN. § 42-5-70 (Law. Co-op. 1976), as controlling over the question of whether the carrier and employer should be considered separately).

93. *See* Stafford v. Westchester Fire Ins. Co., 526 P.2d 37 (Alaska 1974). In *Stafford* the Alaska Supreme Court separately analyzed the duties of the employer and insurer. The employer was protected, but the insurer was not. *Id.* at 43. Admittedly, *Stafford* may be distinguished from the instant case since it involved "tortious conduct beyond . . . the bounds of untimely payments," but the decision itself demonstrates the separate analysis that a court might employ. *Id.*

94. The *Cook* court does not address the question of whether the employment contract between Cook and his employer may be relevant to the rejection of the *Nichols* attack — an attack requiring a mutually binding contract. 291 S.C. at 89, 352 S.E.2d at 299 ("A necessary element of . . . a *Nichols* action is to prove benefits are due under a mutually binding contract."). *But see* 2A A. LARSON, *supra* note 58, § 65.38 (an attempt to posit an action in contract based on the employment contract circumvents the public policy underlying the compensation laws, yet some courts have allowed such actions).

95. *E.g.*, Goetz v. Aetna Casualty & Sur. Co., 710 F.2d 561 (9th Cir. 1983); Ricard v. Pacific Indem. Co., 132 Cal. App. 3d 886, 183 Cal. Rptr. 502 (1982); Bright v. Nimmo, 253 Ga. 378, 320 S.E.2d 365 (1984) (Georgia Supreme Court decided a question certified to it from the Court of Appeals for the Eleventh Circuit; court of appeals then applied the supreme court's holding in the final disposition of the *Bright* case. *See* Bright v. Nimmo, 756 F.2d 1513 (11th Cir. 1985)); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

96. 2A A. LARSON, *supra* note 58, § 68.34(a). Under this theory, "if the essence of the action is recovery for physical injury . . . the [separate] action should be barred even if it can be cast in the form of a normally non-physical tort." *Id.* at 13-117. Applying this reasoning to the instant case, Cook's separate damage claim for emotional distress would

Although the South Carolina Court of Appeals concentrated on the contractual aspects of the case and ignored possible tort implications, the decision is sound. After *Cook*, in situations of delay or denial of payment, South Carolina will follow the exclusive remedy rule. *Cook* protects the statutory framework of the Act. At the same time, the instant decision sends a clear message to the legislature that justice may require changes in the Act to provide adequate remedies to the injured workers and to deter egregious behavior on the part of employers or carriers who deny payment of benefits. Other legislatures have responded to similar judicial messages.[97]

Jeffrey Albert Winkler

IV. RETROACTIVE APPLICATION OF STATUTE FORCES EMPLOYER TO PAY DISABILITY AWARD IN A LUMP SUM

In *Hooks v. Southern Bell Telephone & Telegraph*[98] the South Carolina Court of Appeals determined that a 1983 amendment to the Workers' Compensation Act was remedial and, hence, applied retroactively. Although her injury and award occurred in 1982, the court found that Ms. Hooks, the claimant,

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be barred because the essence of his original claim is one for physical injuries arising from the automobile accident.

South Carolina courts implicitly have accepted this reasoning in other factual contexts. *See, e.g.*, Ritter v. Allied Chem. Corp., 295 F. Supp. 1360 (D.S.C. 1968), *aff'd*, 407 F.2d 403 (4th Cir. 1969) (tort action against employer for assault not barred because physical injuries were slight while mental distress was severe); Stewart v. McLellan's Stores, 194 S.C. 50, 9 S.E.2d 345 (1940) (assault by employer on employee with no resulting physical injury was not barred by the exclusive remedy provision of the Act). *Cf.* Whitten v. American Mut. Liab. Ins. Co., 468 F. Supp. 470 (D.S.C.1977) (implying that facts sufficient to give rise to the tort of outrage may provide an exception to the exclusionary rule). Three years after *Whitten*, South Carolina accepted the tort of outrage. *See* Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

97. Legislatures have responded to the problems raised by plaintiffs similarly situated to Cook. The Wisconsin Legislature responded by enacting WIS. STAT. ANN. § 102-18(1)(6) (West Supp. 1986), to make its workers' compensation statute the exclusive remedy. 291 S.C. at 92 n.4, 352 S.E.2d at 301 n.4. For an excellent overview of legislative response to the conflict between the tort system and the workers' compensation system, see Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857 (1985). *See also* Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181 (1983) (proposing an alternative uniform statutory provision to clarify the current confused state of the law).

98. 291 S.C. 41, 351 S.E.2d 900 (Ct. App. 1986).

was entitled to a lump-sum payment of her previous disability award pursuant to the retroactive application of the 1983 amendment. This decision is in accord with the widely-accepted rules of statutory construction applied in most jurisdictions.

In October 1982 Linda Hooks injured her back while she was employed by Southern Bell. In December 1982 the Industrial Commissioner awarded her weekly disability benefits of $197 per week for 500 weeks. The full Industrial Commission affirmed this award in May of 1983, but Hooks subsequently made application for a lump-sum payment of the balance due on the award. The statute in effect at the time of her injury, section 42-9-300 of the South Carolina Code,[99] provided for lump-sum payment in unusual cases when the injured worker could show that exceptional circumstances existed which would justify this payment. Effective June 10, 1983, however, section 42-9-301[100] replaced section 42-9-300. This new statute deleted the phrase "in unusual cases" and thereby relieved a claimant of the burden of proving that a lump-sum payment was proper.[101]

The Industrial Commissioner, as well as the full Commission, approved the lump-sum payment. The circuit court affirmed this decision holding that the 1983 amendment was remedial and could be applied retroactively to awards made before its effective date. Thus, the court of appeals was faced with the question of whether to apply the amendment retroactively.

In concluding that the statute could be applied retroactively, the court relied on the rule of construction that "[a] stat-

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99. Section 42-9-300 provided:

> Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, *in unusual cases*, when the employee so requests and the Commission deems it to be to the best interest of the employee or his dependents, . . . be redeemed . . . by the payment by the employer of a lump sum . . . .

S.C. CODE ANN. § 42-9-300 (Law. Co-op. 1976) (repealed 1983) (emphasis added).

100. Section 42-9-301 provides:

> Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents, . . . be redeemed . . . by the payment by the employer of a lump sum . . . . Upon a finding by the commission that a lump sum payment should be made, the *burden of proof* as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal proceeding.

Id. § 42-9-301 (emphasis added).

101. 291 S.C. at 43, 351 S.E.2d at 902.

ute is presumed to be prospective unless it is remedial or procedural in nature."[102] The court explained that the amendment, section 42-9-301, is remedial since it merely enables claimants to receive their disability payments in a lump sum instead of in weekly installments. The commissioner already had established the parties' rights and obligations by determining the disability and weekly monetary award. The court of appeals concluded that only the remedy, not the claimant's rights, had been enlarged.[103]

Southern Bell contended, however, that the statute impaired its "vested right," pursuant to section 42-17-90,[104] to seek review of workers' compensation awards. This section would allow Southern Bell to seek review and alter awards for up to twelve months *after the final payment*,[105] based upon changes in the employee's condition. It argued that awarding a lump sum would "impair this right because it would shorten the period during which review could be sought."[106] The court dismissed this argument, based upon the following findings: (1) the right to seek review was procedural rather than substantive;[107] (2) statutes limiting the time in which to exercise a right (*e.g.*, statutes of limitation) were remedial and retroactive in application;[108] and (3) Southern Bell's rights were not altered significantly when compared to its rights under the previous statute since lump-sum payments in "unusual cases" likewise would limit the right to seek review to one year from the date of the payment.[109] Based upon this analysis, the appellate court held that retroactive application of section 42-9-301 did not deprive Southern

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102. *Id.* (citing Hercules Inc. v. South Carolina Tax Comm'n., 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980)).

103. *Id.*, 351 S.E.2d at 903.

104. S.C. CODE ANN. § 42-17-90 (Law. Co-op. 1976).

105. Section 42-17-90 provides:

> Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded. . . . No such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this Title.

Id.

106. 291 S.C. at 44, 351 S.E.2d at 902.

107. *Id.*

108. *Id.*

109. *Id.*

Bell of any substantive, as opposed to remedial or procedural, right. The court held that the statute was remedial and, therefore, should apply to injuries occurring prior to its enactment date.[110]

The South Carolina Court of Appeals applied the general rule that a statute is presumed to apply prospectively[111] unless it is remedial or procedural in nature.[112] In workers' compensation law, a statutory change is substantive in character and, thus, prospective in application when it "enlarges[s] [or diminishes] the employee's existing rights and the employer's corresponding obligations."[113] Statutes are remedial in character and, thus, retroactive in application " 'when they create new remedies for existing rights,[114] . . . enlarge the rights of persons under disability,[115] . . . unless in doing this we violate some contract

110. *Id.*

111. When a statute applies *prospectively*, it operates on causes of action arising after its effective date, not those having already accrued. *See* Wood v. J. P. Stevens & Co., 297 N.C. 636, 644, 256 S.E.2d 692, 698 (1979) (noting that the rule in many jurisdictions is that "the right to compensation in cases of *accidental* injury is governed by the law in effect at the time of injury") (emphasis in original); 81 AM. JUR. 2D *Workmen's Compensation* § 34 (1976 & Supp. 1985); 82 C.J.S. *Statutes* §§ 416-22 (1953 & Supp. 1987).

112. 82 C.J.S. *Statutes* §§ 416, 421 (1953 & Supp. 1987) reveals that most jurisdictions include remedial and procedural statutes as exceptions to the general rule of prospective statutory application.

113. Industrial Indem. Co. v. Workers' Compensation Appeals Bd., 85 Cal. App. 3d 1028, 1031, 149 Cal. Rptr. 880, 881 (Ct. App. 1978) (quoting Aetna Casualty & Sur. Co. v. Industrial Accident Comm'n, 30 Cal. 2d 388, 392-93, 182 P.2d 159, 160 (1947)).

114. *See* Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941) (where a statute that gave claimants the new remedy of attachment to enforce their rights was retroactively applied); 82 C.J.S. *Statutes* § 421 (1976 & Supp. 1987). *But see* Wilson v. Wilson, 45 N.Y.S.2d 733 (N.Y. Sup. Ct. 1943) (court held that creating a new remedy where no remedy previously existed will disqualify a statute from retroactive application since this actually creates a right of action).

115. Proper explanation of why enlarging one's rights under disability is considered "remedial" is difficult, at best. Perhaps this is unfortunate wording. For example, see Thompson v. Wilbert Vault Co., 178 Ga. App 489, 343 S.E.2d 515 (1986). *Thompson* concerned an employer's responsibility for replacement of an injured employee's artificial leg. The original statute required the employer to provide a replacement prosthesis only if the original was damaged in a compensable accident. On the other hand, the amendment made the employer responsible for any prosthetic devices that the board deemed necessary to effect a cure or give relief. The court stated that if retroactive application of the rule made the employer liable for an *injury* that would not otherwise be compensable, the rule could not be applied. Here, the amendment "merely expand[s] the scope of treatment required to be provided for an injury the compensability of which is not in question." *Id.* at 491, 343 S.E.2d at 517. *Accord* Smith v. Eagle Constr. Co., 282 S.C. 140, 318 S.E.2d 8 (1984) (also addressing a controversy over prosthesis replacement).

obligation or divest some vested right.' "[116] The significance of the exception regarding vested rights is readily apparent once one realizes that even procedural and remedial statutes may adversely affect one's legal rights.[117] Accordingly, even though a lump-sum statute appears to apply only to the remedy by providing a substituted form of payment,[118] certain amendments to lump-sum statutes have been held to operate only prospectively. For example, an amendment that alters the amount recoverable as a lump sum under a statute cannot be retroactively applied.[119]

The foregoing explains the progression of *Hooks*' analysis. The court, after determining that the 1983 amendment affected only the remedy available to Hooks, turned its attention to Southern Bell's argument that it was being divested of its vested right to seek review of the award. The court's response to this argument was rather cursory. Though no authority was cited, there is support for the court's proposition that the right to seek review of an award is procedural.[120] Likewise, although there is

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116. Byrd v. Johnson, 220 N.C. 184, 188, 16 S.E.2d 843, 846 (1941) (quoting Larkin v. Saffarans, 15 F. 147 (1883)).

117. In Wood v. J. P. Stevens & Co., 297 N.C. 636, 650, 256 S.E.2d 692, 701 (1979), the North Carolina Supreme Court determined, in a workers' compensation case, that the real question to be considered "is not whether the amendment affects some imagined obligation of contract but rather whether it interferes with vested rights and liabilities." Though generally a change may be regarded as procedural, it may affect a party in such a harsh and arbitrary manner as to be constitutionally prohibited. There is no formula for this proposition because the distinction is often one of degree. Even though a remedial or procedural change may work to the disadvantage of a party, the change will be valid unless it deprives one of a *substantial* right. *Id.* at 650, 256 S.E.2d at 701. 16 AM. JUR. 2D *Constitutional Law* §§ 646, 675, 676 (1979 & Supp. 1987). *See* Aetna Casualty & Sur. Co. v. Industrial Accident Comm'n, 30 Cal. 2d 388, 182 P.2d 159 (1947).

118. *See* Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (1947) (commutation is the substitution of another form of compensation for the weekly compensation).

119. For cases holding that removal of the requirement for commutation to present value of lump-sum payments alters vested rights and such change may not be retroactive, see Fairfax Mfg. Co. v. Bragg, 342 So. 2d 17 (Ala. Civ. App. 1977); Harris v. Nat'l Truck Serv., 56 Ala. App. 350, 321 So. 2d 690 (Ala. Civ. App. 1975); Sullivan v. Mayo, 121 So. 2d 424 (Fla. 1960). *Compare* Lee Way Motor Freight, Inc. v. Wilson, 609 P.2d 777 (Okla. 1980) (where an amendment placing a "cap" on the amount of a lump sum could not be applied retroactively) *with* Special Indem. Fund v. Dailey, 272 P.2d 395 (Okla. 1954) (where an amendment was held retroactive since it merely conferred the right to receive a lump-sum commutation and in no way changed the amount of the liability).

120. Statutes conferring the right to seek review generally are procedural and only affect one's remedy. *See* 16A AM. JUR. 2D *Constitutional Law* § 650 (1979); 82 AM. JUR.

authority to the contrary,[121] the court's proposition, that a statute of limitations deals with remedies and may be applied retroactively, enjoys considerable support also.[122] After characterizing the right to seek review as "procedural" and a statute of limitation as "remedial," the court implicitly based its decision upon the principle that "there is no vested right in any particular mode of procedure or remedy."[123] Since Southern Bell was deprived of no substantive right, the retroactive application of the lump-sum amendment was proper.

2D *Workmen's Compensation* § 614 (1976). *But see* Hart v. Owens-Illinois, Inc., 250 Ga. 397, 297 S.E.2d 462 (1982) (holding that appellant's right to apply for change of condition benefits is a substantive right that vested when she was injured). For cases allowing retroactive statutory changes that shorten the time in which to seek review of a workers' compensation award, see cases cited *infra* note 123.

121. "Statutory amendments changing limitations periods are generally not applied retroactively, whether the effect of the change would be to improve or worsen the claimant's position." 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.12 (1987).

122. "There is no vested right in the statute of limitations in force when a cause of action accrues, and the period allowed for suit may be shortened *provided a reasonable time is permitted to bring the action.* It follows, manifestly, that an existing right of action cannot be taken away by legislation shortening the period of limitation to a time that has already run." 51 AM. JUR. 2D *Limitation of Actions* § 38 (1970) (footnotes omitted) (emphasis added). Thus, the significance of a point made in *Hooks* becomes apparent. The court emphasized that "application of Section 42-9-301 will *only limit*, not eliminate, the availability of review." 291 S.C. at 44, 351 S.E.2d at 902. Cases applying the above rule are cited *infra* note 123.

123. 16A AM. JUR. 2D *Constitutional Law* § 675 (1979) (footnotes omitted). Many jurisdictions have held that an amended review statute, which shortens the period in which review of a workers' compensation award may be sought, is procedural and merely affects the remedy. *See* Mattson v. Department of Labor, 293 U.S. 151 (1934), *aff'g* 176 Wash. 345, 29 P.2d 675 (1934) (where previous Washington statute contained no time limitation as to review of an award, a subsequent amendment providing a three-year time limit may be applied to existing controversies since the amendment merely limits the time for assertion of the right and affects the remedy only).

See also Tischer v. Council Bluffs, 231 Iowa 1134, 3 N.W.2d 166 (1942); Schaefer v. Buffalo Steel Car Co., 250 N.Y. 507, 166 N.E. 183 (1929); Sager v. General Elec. Co., 269 A.D. 801, 55 N.Y.S.2d 138 (1945); State *ex rel.* Thompson v. Industrial Comm'n, 138 Ohio St. 439, 35 N.E.2d 727 (1941); State *ex rel.* Boswell v. Industrial Comm'n, 125 Ohio St. 341, 181 N.E. 476 (1932); Earl W. Baker & Co. v. Morris, 176 Okla. 68, 54 P.2d 353 (1935); Hartman v. Pennsylvania Salt Mfg. Co., 155 Pa. Super. 86, 38 A.2d 431 (1944); Allen v. Mottley Constr. Co., 160 Va. 875, 170 S.E. 412 (1933), where courts held that retroactive application of an amendment limiting the time for review does not impair substantive rights. *But see* Daytona Beach Boat Works v. Spencer, 153 Fla. 540, 15 So. 2d 256 (1943); London Guar. & Accident Co. v. Pittman, 69 Ga. App. 146, 25 S.E.2d 60 (1943); Kelley v. Prouty, 54 Idaho 225, 30 P.2d 769 (1934); Jenkins v. Heaberlin, 107 W. Va. 287, 148 S.E. 117 (1929) (courts held that amendments shortening the period in which to seek review either affect vested rights or were not expressly intended by the legislature to be retroactively applied and, thus, will not be).

Finally, the court noted that even under the prior lump-sum statute, section 42-9-300, a claimant could receive a lump-sum payment in "unusual cases." When section 42-9-300 was in effect, the statute conferring the right to seek review was the same one that Southern Bell relied on as the source of its vested right. Thus, the court reasoned that a lump-sum payment under the prior statute would have the same limiting effect on Southern Bell's right of review. The court pointed this out to show that there had been only a minimal alteration of Southern Bell's procedural right to seek review.[124]

The *Hooks* decision is in accord with the general rules of statutory construction and application. The central issue regarding the new statute will be whether lump-sum payments will now become the rule, rather than the exception. Practitioners should pay close attention to whether South Carolina courts adopt a liberal view concerning what is "contrary to the best interest of the employee"; this will determine the scope of South Carolina's lump-sum provision.

Ronnie D. Talley

V. ELECTION OF REMEDIES AND NOTICE REQUIREMENTS BROADENED IN WORKERS' COMPENSATION CASES

The South Carolina Court of Appeals in *Johnson v. Pennsylvania Millers Mutual Insurance Co.*[125] held that under the workers' compensation statute dealing with the election of coverage by an employer,[126] the employer is required to notify, ei-

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124. The actual effect of the new South Carolina statute was noted in the respondent's brief: "[I]t has become apparent that the legislature intended to give claimants the right to receive the compensation in a lump sum and place the burden of proof upon the employer and insurance carrier as to an abuse of discretion." Brief of Respondent at 5. Under the prior statute, the claimant carried the burden of proving *unusual circumstances*. Woods v. Sumter Stress-Crete, 266 S.C. 245, 248, 222 S.E.2d 760, 761 (1976). To compare the wording of the two statutes, see *supra* notes 99 and 100.

Since the Commission still must find that a lump sum is not "contrary to the best interest of the employee or his dependents," it is not clear under the new statute whether lump sums will become the rule rather than the exception. S.C. CODE ANN. § 42-9-301 (Law. Co-op. 1976). Should lump-sum payments turn out to be the rule in South Carolina, see 3 A. LARSON, *supra* note 121, §§ 82.71-72 (1987), which states that lump-sum payments generally should be discouraged.

125. 292 S.C. 33, 354 S.E.2d 791 (Ct. App. 1987).

126. S.C. CODE ANN. § 42-1-130 (Law. Co-op. 1976).

ther orally or in writing, only the carrier of his election. The court also held, in construing section 42-1-560,[127] that the insured was not foreclosed from continuing a workers' compensation claim after litigating with a third party when the insured had (1) filed a claim prior to bringing the third-party suit, (2) the carrier had consented to the action, and (3) the third-party claim had been prosecuted to a final unsuccessful conclusion. In other portions of the workers' compensation statute, notice had been construed to allow either verbal or written notification, especially for employer notice of injury,[128] but this was the first time a majority adopted the rule for section 42-1-130[129] regarding an insurance policy. The court adopted a new construction of section 42-1-560 (b)[130] by allowing an injured worker to maintain and prosecute a third-party action while also prosecuting a worker's compensation claim, provided the worker complies with all provisions of the statute. The court held that maintaining the third-party suit did not constitute an election of remedies.

Johnson, a partner in a grain storage business, was accidentally injured while acting in his capacity as manager. Several months prior to the accident, the partnership changed its workers' compensation coverage from the Insurance Company of North America (INA) to Pennsylvania Millers Mutual Insurance Co. (PMMIC). The partnership had maintained other insurance coverage with PMMIC for the preceding twenty years. During this twenty-year period, the partnership and PMMIC had made all insurance coverage changes orally. Johnson and PMMIC reviewed the partnership's prior INA Workers' Compensation Policy, and Johnson expected to receive coverage similar to the INA policy.[131] Johnson did not specifically request coverage for himself as a partner, but rather as a manager, because he believed that he was covered under INA's policy as a manager.

Johnson initiated a claim with the carrier for his injury, but

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127. *Id.* § 42-1-560.

128. Written notice by an injured employee to an employer has not been required since 1974 when the word "written" was deleted from S.C. CODE ANN. § 42-15-20 (Law. Co-op. 1942); however, Aristizabal v. I. J. Woodside - Division of Dan River, Inc., 268 S.C. 366, 234 S.E.2d 21 (1977), dictates that actual notice of the injury must still be given to the employer.

129. S.C. CODE ANN. § 42-1-130 (Law. Co-op. 1976).

130. *Id.* § 42-1-560(b).

131. Record at 21-22.

PMMIC denied coverage under the policy and refused to pay the claim. Johnson filed for a hearing before the South Carolina Workers' Compensation Commission (Commission). After a hearing had been set, however, Johnson and PMMIC agreed to bring a third-party suit prior to the hearing and requested a continuance. The parties agreed to the suit because if Johnson were successful, resolution of the issue pending before the Commission would be unnecessary.[132] The third-party action, however, resulted in a verdict in favor of the third party, and the Commission hearing was held. The single commissioner stated that the insurance policy did not cover Johnson and that Johnson had elected his remedy and waived his workers' compensation rights by litigating the third-party action. The full Commission, in a 3-2 vote, affirmed. The circuit court held that there was an error of law and remanded to the Commission for a finding that Johnson did not waive his workers' compensation claim by prosecuting the third-party action and that Johnson should be considered an employee.

The court of appeals interpreted the notice requirement of section 42-1-130[133] as requiring that only the insurer, and not the Commission, be notified of the partners' election to be covered. The court applied the literal and ordinary meaning of the terms in the statute[134] and stated that the statute specifically did not state that the notice must be written; therefore, either oral or written notice satisfied the statutory requirements.

In construing the notice requirement, the court made a logically successive step in a line of South Carolina insurance cases. In *Carter v. Associated Petroleum Carriers*[135] the dissent made a strong argument in favor of allowing an oral binder with an insurance policy. In *Cantrell v. Allstate Insurance Co.*[136] the court allowed a written insurance agreement to be reformed to

132. *Id.* at 64.

133. S.C. CODE ANN. § 42-1-130 (Law. Co-op. 1976) states in part:

> Any sole proprietor or partner of a business whose employees are eligible for benefits under this Title may elect to be included as employees under the workers' compensation coverage of such business if they are actively engaged in the operation of the business and if the insurer is notified of their election to be so included.

134. 292 S.C. at 37, 354 S.E.2d at 793.

135. 235 S.C. 80, 110 S.E.2d 8 (1959).

136. 281 S.C. 92, 313 S.E.2d 646 (1984).

reflect a previous verbal agreement because the policy, as written, did not reflect the full substance of the agreement. In this case, Johnson and PMMIC had worked together for many years on the basis of oral changes, and Johnson had no reason to believe that the oral agreement would not be fully incorporated into the workers' compensation policy.[137]

In addition to Johnson's providing oral notice of his election to be included as a partner, the carrier also had notice of his election when it calculated the premium and included the manager's salary.[138] The carrier knew that Johnson was the grain elevator manager.[139]

PMMIC also contended that the required notice included filing a copy of the election with the Commission. That requirement, however, is necessary only when an employer has exempted himself from coverage and, subsequently, wants to waive the exemption and accept the provisions of the statute.[140] That provision was not applicable to Johnson because he previously had insurance with INA and merely was transferring coverage to PMMIC. "[The] procuring and filing of the insurance was sufficient notice of the election of the employer and of its desire to become subject to the terms of the Compensation law."[141]

In construing the election of remedies provision of the statute,[142] the court distinguished *Fisher v. South Carolina Department of Mental Retardation - Coastal Center*,[143] in which a workers' compensation claim was denied, and stated that the basic purpose of the statute was to prevent double recovery.[144] The

137. In Middleton v. David A. Cantley Constr.,.278 S.C. 154, 293 S.E.2d 311 (1982), the employer was estopped from denying coverage since it had told the employee that he was covered and that insurance payments had been withdrawn, even though the employer did not have coverage on the employee.

138. Carver v. Bill Pridemore Co., 278 S.C. 235, 294 S.E.2d 419 (1982) also construed S.C. CODE ANN. § 42-1-130 (Law. Co-op. 1976) as not requiring written notice of intention to be covered when the "insurer had notice of the election by auditing Pridemore's records to calculate the amount of premium due." 278 S.C. at 238, 294 S.E.2d at 421.

139. Record at 68.

140. S.C. CODE ANN. §§ 42-1-310, -330, -340 (Law. Co-op. 1976).

141. Yeomans v. Anheuser-Busch, Inc., 198 S.C. 65, 69, 15 S.E.2d 833, 834 (1941).

142. S.C. CODE ANN. § 42-1-560(b) (Law. Co-op. 1976).

143. 277 S.C. 573, 291 S.E.2d 200 (1982). The claimant, after making a compromise settlement with a third party but without the consent of the insurer, sought additional workers' compensation benefits. The workers' compensation claim was denied.

144. 292 S.C. at 38-39, 354 S.E.2d at 795. The court follows 2A. A. LARSON, THE LAW

possibility of a double recovery was precluded in *Johnson* when the carrier consented to the third-party action and the action was then prosecuted to an unsuccessful conclusion.

Under *Fisher*,[145] a claimant has the following three remedies for a job related injury: to proceed solely against the employer, to proceed solely against the third-party tortfeasor,[146] or to proceed against both the employer-carrier and the third-party tortfeasor.[147] Johnson pursued the third remedy; he provided notice, within one year of the accident, to the insurer and the Commission of his intent to pursue the third-party claim, and the insurer consented to a continuance of the workers' compensation hearing during the pendency of the third-party claim. Although a workers' compensation claim may be barred when the conditions are not followed,[148] Johnson followed the statutory requirements. The unique aspect of this case is that the carrier had not yet accepted liability for the payment of compensation. The court, however, justly asserted that the choice to prosecute the third party did not amount to an election of remedies even with the lack of carrier acceptance of liability. An "election of remedies presupposes two or more remedies from which a choice may be made, and conclusiveness of such election is predicated on inconsistency of such remedies."[149] Here, the third party claim and the workers' compensation claim are consistent.[150]

In conclusion, the court broadened the case law position regarding insurance contracts by holding that notice of election of

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OF WORKMEN'S COMPENSATION § 73.30, at 14-335 (1987) (doctrine of election of remedies should be used to prevent double recovery).

145. 277 S.C. 573, 291 S.E.2d 200 (1982).

146. *See* S.C. CODE ANN. § 42-1-550 (Law. Co-op. 1976).

147. This complies with S.C. CODE ANN. § 42-1-560(b) (Law. Co-op. 1976):

> The injured employee . . . shall be entitled to receive the compensation and other benefits provided by this Title and to enforce by appropriate proceedings his . . . 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 . . . .

Id. (emphasis added).

148. Taylor v. Mt. Vernon-Woodbury Mills, 211 S.C. 414, 45 S.E.2d 809 (1947). A workers' compensation claim was barred when the employee settled with a third party without providing notice to the employer/carrier and before a workers' compensation claim was filed.

149. Lancaster v. Smithco, Inc., 241 S.C. 451, 456, 128 S.E.2d 915, 918 (1962).

150. 292 S.C. at 41, 354 S.C. at 795.

employer coverage could be made either orally or in writing. It followed the 1974 legislative changes in the statute by not requiring the notice to be written when notice was not so modified.

The new construction of the election of remedies statute is fair because it allows the employee to pursue the third-party claim whether or not the carrier has accepted liability, as long as the Commission and the carrier are informed of his intention. The carrier must also consent to the action and may subrogate if it desires, and the employee must receive a judgment on the third-party action.

Gwendelyn Geidel

VI. REDUCTION OF CARRIER'S LIEN PERMITTED

After a workers' compensation insurance carrier admits liability for a worker's injuries, the carrier usually is deemed to have a lien on any proceeds that the worker recovers from a third party for those same injuries.[151] This lien prevents the worker from receiving double compensation for a single injury and also alleviates that portion of the insurance carrier's monetary burden arising from a third party's culpable conduct. Prior to 1978, a carrier was given a lien on the entire amount that the third party paid to the injured worker.[152] In 1978, however, section 42-1-560(f) of the South Carolina Code was amended to provide as follows:

> [W]here an employee or his representative enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of such settlement in the proportion that such settlement or judgment bears to the commission's evaluation of the employee's *total cognizable damages at law*. Any such reduction shall be based on a determination by the commission that such reduction would be equitable to all parties concerned and serve the interests of justice.[153]

151. S.C. CODE ANN. § 42-1-560(b) (Law. Co-op. 1976).
152. *Id.* §§ 42-1-560(b), (f) (amended in 1978).
153. *Id.* § 42-1-560(f) (emphasis added).

In the recent case of *Garrett v. Limehouse & Sons, Inc.*,[154] the South Carolina Court of Appeals rendered the first decision to apply this code provision to reduce the amount of a carrier's lien. Specifically, the court sought the meaning of the phrase "total cognizable damages at law" as used in the statute.

The factual background of *Garrett* is straightforward. While in the employ of the defendant, Limehouse & Sons, Inc., Mazon Garrett was assigned to work on a project at Dean Dempsey Lumber Company. Garrett was fatally injured on this project, and Limehouse's insurance carrier admitted liability.[155] Subsequently, Garrett's widow, the administratrix of his estate, brought a wrongful death action against Dean Dempsey as a third party.[156] As a defense, Dean Dempsey asserted that it, as well as Limehouse, was Garrett's statutory employer; this defense, if established, would have limited Garrett to recovery under the Workers' Compensation Act alone. Nevertheless, prior to trial of the wrongful death action, Dean Dempsey paid a settlement figure of $75,000.[157]

Under section 42-1-560(b), Limehouse's insurance carrier was entitled to a lien on the proceeds.[158] Garrett's widow, however, pursuant to section 42-1-560(f), petitioned to have the carrier's lien on the $75,000 reduced. As quoted above, this section permits the Industrial Commission to reduce the lien on the settlement proceeds in the proportion that such settlement bears to

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154. 293 S.C. 539, 360 S.E.2d 519 (Ct. App. 1987).

155. *Id.* at 540, 360 S.E.2d at 520.

156. *Id.*

157. *Id.* at 541, 360 S.E.2d at 520.

158. The Code provides as follows:

> [T]he 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 . . . 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.

S.C. CODE ANN. § 42-1-560(b) (Law. Co-op. 1976).

Under the Workers' Compensation Act, Garrett's widow and dependent children were awarded compensation of $228.79 per week for 500 weeks. Record at 1. These benefits totaled $114,395.00. Apparently, Limehouse's insurance carrier had completed the payment of approximately 50% of this award. Brief of Respondent at 11. Even though all payments to Mrs. Garrett had not been made, section 42-1-560(b) entitles the carrier to a lien in the amount if $114,395.00 (with a deduction to reflect the present value of the remaining payments).

the employee's *total cognizable damages at law*. The code, however, does not reveal how to compute these damages. According to the Hearing Commissioner's interpretation, the amount of the employee's cognizable damages at law equaled the $75,000 settlement, and the commissioner allowed no reduction of the carrier's lien.[159] On appeal the Industrial Commission reversed; the total cognizable damages were determined to be $500,000, and the lien was reduced in the proportion that $75,000 bore to $500,000, which was fifteen percent.[160] The Court of Common Pleas affirmed, and Limehouse and its carrier appealed to the South Carolina Court of Appeals.[161]

Limehouse and its insurance carrier argued that the Commissioner was correct in holding that "the probability or improbability of a full recovery in the third party action is a necessary factor to be considered in arriving at the 'total cognizable damages at law.' "[162] Thus, the carrier believed that the $75,000 settlement figure adequately reflected the probability of recovery, as assessed by both Garrett's widow and Dean Dempsey. Probability of recovery being a factor in both the settlement and the cognizable damages at law, the carrier asserted that each was $75,000. Following this interpretation, the statute would not permit a reduction of the carrier's lien because section 42-1-560(f) permits lien reduction in the proportion that the settlement bears to the total cognizable damages at law. When these two figures are equivalent, the proportion is 1:1, and no reduction is permitted. The court of appeals, however, rejected this interpretation and affirmed the order of the full Commission.[163]

Since the court found no relevant materials on the subject,

159. The single commissioner found that the "total cognizable damages at law" should be determined by evaluating factors such as "liability, punitive damages, the value of estimated damages in the eyes of a jury and the likelihood of a successful recovery." Record at 8-9.

160. The full Industrial Commission determined that "total cognizable damages at law" meant "those damages that are legally recognized elements of damage" in the type of action involved—i.e., wrongful death. Record at 15. The Commission found the elements of damages to include "1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship and (6) deprivation of the use and comfort of the victim's society." 293 S.C. at 541, 360 S.E.2d at 520. In arriving at the total figure of $500,000, the estimate of pecuniary loss alone to the beneficiaries was $336,353. Record at 17-18.

161. 293 S.C. at 542, 360 S.E.2d at 520.

162. *Id.*, 360 S.E.2d at 521.

163. *Id.*, 360 S.E.2d at 520.

it proceeded solely on the legislative intent elicited from the wording of section 42-1-560. In determining whether the probability of recovery at trial should bear on the "total cognizable damages at law," the court focused on the word "settlement." The court observed that "settlement," as the term is used in section 42-1-560(f), is synonymous with "compromise" and includes both litigants' assessment of the probability of recovery.[164] Therefore, "the legislature did encompass within its thinking the uncertainties of trial; this was done by the use of the word 'settlement' but not by the use of the words 'total cognizable damages at law,' which have a clear and distinct meaning of their own . . . ."[165] Based upon this reasoning, the court rejected Limehouse's argument and left undisturbed the Commission's order reducing the lien.

This interpretation of the statute is reasonable and survives even more thorough analysis. Both the full Commission and the trial court recognized that the carrier's approach to the phrase "total cognizable damages at law" would preclude most, if not all, reductions of carrier liens.[166] Since most settlements are reached by considering both liability and damages, including both factors in the calculation of cognizable damages would normally result in equivalency between the settlement amount and the cognizable damages. In the instant case, for example, the $75,000 settlement figure and the cognizable damages at law were determined to be equivalent under this interpretation. Additionally, the statute clearly contemplates that it will be possible to reduce a carrier's lien upon proceeds obtained through judgment.[167] A judgment upon trial also resolves the questions of liability and damages. Including both of these elements in the determination of cognizable damages results in perpetual equality between cognizable damages and the judgment amount. Thus, section 42-1-560(f) never could be invoked to permit the reduction of a lien.[168] Surely this was not the legislature's intent.

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164. *Id.* at 543, 360 S.E.2d at 521.

165. *Id.*

166. Record at 15 (full Commission) and 24 (trial court).

167. Reduction may be had in the proportion "that such settlement *or judgment* bears to the commission's evaluation of the employee's total cognizable damages at law." S.C. CODE ANN. § 42-1-560(f) (Law. Co-op. 1976) (emphasis added).

168. When the two figures used in the formula are equivalent, reduction in the proportion that one bears to the other results in no lien reduction. The trial court expressly

The apparent purpose of the 1978 amendment is "to encourage out of court settlements for the benefit of [both] the employee and the carrier."[169] Prior to 1978, an injured employee had little incentive to initiate a third-party action or to compromise prior to trial; the carrier generally was entitled to a lien against all of the proceeds. Supposedly, the amended version is intended to protect the carrier and also the injured employee. This is evidenced by the last sentence of section 42-1-560(f), which states that any reduction shall "be equitable to all parties concerned and serve the interests of justice."[170]

In the instant case all parties, including the carrier, admitted that Mrs. Garrett's decision to settle the third-party action was wise in view of the likelihood of success against Dean Dempsey at trial.[171] Yet if reduction of the lien had been impossible in this case, Mrs. Garrett would have had no incentive to compromise because the carrier's lien ($114,200) was greater than the settlement proceeds ($75,000). Had Mrs. Garrett not settled the case, the carrier probably would have received nothing because Dean Dempsey's liability was questionable. It would be inequitable to allow the carrier to take the entire $75,000 pursuant to its lien when Garrett's widow pursued the third-party claim, incurred expenses, and obtained a favorable settlement. Therefore, the *Garrett* court's interpretation of section 42-1-560(f) encourages settlements and allows both parties to benefit proportionately.[172]

The court of appeals' interpretation of South Carolina Code section 42-1-560(f) is reasonable and provides an equitable result in the *Garrett* case. When computing an employee's "total cognizable damages at law," the only relevant inquiry concerns the elements of damages recoverable in the type of third-party action brought by the employee. Probability of the employee's

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recognized that the inclusion of probability of recovery as a factor would pose this problem. Record at 24.

169. *Id.* at 14 (order of the full Industrial Commission).

170. S.C. CODE ANN. § 42-1-560(f) (Law. Co-op. 1976).

171. 293 S.C. at 541, 360 S.E.2d at 520.

172. The statute provides that the lien may be reduced in the proportion that the settlement bears to the total cognizable damages at law. When the settlement amounts to only 15% of the employee's sustained damages, the carrier receives an amount equal to 15% of its lien. Thus, the lien is reduced by 85%. In the instant case, the calculations would be as follows:

success is not a proper consideration. Additionally, practitioners should make no distinction between the words "estimated total damages," as utilized in the statute, and "total cognizable damages at law."[173] The court also has interpreted the phrase "estimated total damages" to mean those damages suffered by the employee that are recoverable in the third-party action.[174] Practitioners also should note that section 42-1-560(f) gives an abundance of discretion to the Industrial Commission: they "*may* reduce the amount of the carrier's lien"[175] but shall only do so after finding it "equitable to all parties."[176] Consequently, even though section 42-1-560(f) provides for reduction of a carrier's lien, creative arguments that appeal to a sense of equity and justice may permit some carriers to escape lien reduction.

Ronnie D. Talley

Mrs. Garrett's settlement in the third-party action	=	$ 75,000.00
Total cognizable damages at law in third-party action	=	500,000.00
Settlement/cognizable damages	=	.15
Amount of compensation already paid by the carrier	=	56,053.51
		58,146.93
Present value of remaining payments	=	$114,200.44
		x .15
Amount of carrier's lien after reduction		$17,130.06

See Brief of Respondent at 11. The amount received by the carrier also may be lessened by attorney fees and other expenses pursuant to section 42-1-560(b) of the Code.

173. The statute states: "[W]here an employee . . . enters into a settlement with . . . a third party in an amount less than the amount of the employee's *estimated total damages*, the commission may reduce the amount of the carrier's lien . . . ." S.C. CODE ANN. § 42-1-560(f) (Law. Co-op. 1976) (emphasis added).

174. Though *Garrett* did not address this issue, the court of appeals dealt with the meaning of the phrase in Hardee v. Bruce Johnson Trucking Co., 293 S.C. 349, 357, 360 S.E.2d 522, 526 (Ct. App. 1987), decided two weeks after *Garrett*.

175. S.C. CODE ANN. § 42-1-560(f) (Law. Co-op. 1976) (emphasis added).

176. *Id.*