

NORTH CAROLINA WORKERS' COMPENSATION LAW

By: John M. McCabe

I. BACKGROUND & HISTORY

A. Adoption of the North Carolina Worker's Compensation Act and its effect

In 1929, North Carolina adopted its workers' compensation act as a "statutory compromise" between employees and their employers. Under the Act, employees are guaranteed compensation for injuries by accident arising out of and in the course of employment, without having to prove negligence on the part of the employer. However, in exchange for this guaranteed recovery, the employee forfeits his right to pursue common-law remedies. In effect, workers' compensation replaced tort liability with no-fault liability.

B. Construction of the Act

Case law has held repeatedly that the workers' compensation provisions should be liberally construed to effectuate the broad intent of the act in providing compensation for injured employees. As a result, no technical or strained construction should be given to the applicable statutes to defeat this broad purpose. Despite this liberal construction, courts have held that the North Carolina Workers' Compensation Act cannot be extended beyond its clearly expressed language. Courts remain bound by the terms used by the legislature and cannot extend liability beyond legislative intent. Thus, even though it is to be liberally construed, the Workers' Compensation Act is not equivalent to a general accident or health insurance plan.

C. Compensation

Unlike general negligence or tort law, workers' compensation provides recovery only for loss of earning power. Hence, there is no recovery for pain and suffering, loss of consortium, etc. Further, workers' compensation does not attempt to restore a claimant to his pre-injury status. Rather, compensation is limited to "a sum which, added to [an employee's] remaining earning ability, if any, will presumably enable him to exist without being a burden to others." Under North Carolina's Workers' Compensation Act, the amount of compensation depends on an employee's previous earnings. Based on these earnings, an average weekly wage is calculated to determine the extent of his compensation. In addition, the North Carolina Act establishes a maximum rate of recovery. This rate is determined annually by the North Carolina Industrial Commission.

II. BRINGING A WORKERS' COMPENSATION CLAIM IN NORTH CAROLINA

A. Overview

In order to successfully bring a workers' compensation action, a claimant must establish each of the following elements by a preponderance of the evidence:

1. An employee-employer relationship;
2. An injury by accident or occupational disease;
3. That the injury arose out of and in the course of his employment; and
4. Such injury caused the incapacity or loss which is compensated under the Act.

To fully understand these elements, it is necessary to examine how courts have interpreted them.

B. Employment

1. Employee v. Independent Contractor

In order for the Workers' Compensation Act to apply, a claimant must establish that an employer-employee relationship existed at the time of the injury. One of an employer's strongest defenses to a workers' compensation claim is to assert that a worker is not an "employee," but rather an "independent contractor." The significance of this distinction is that if a worker is found to be an independent contractor, the North Carolina Industrial Commission will not have jurisdiction.

Historically, courts have struggled in distinguishing an "employee" from an "independent contractor." As a result, courts continue to apply common law tests to make this distinction. According to the North Carolina Supreme Court:

An independent contractor is defined at common law as one who exercises an independent employment and contracts to do certain work according to his own judgment and method without being subject to his employer except as to the result of his work . . . Where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed, however, it is universally held that the relationship of employer and employee is created.

Applying these definitions, most cases turn on the amount of control an employer has over the worker. It should also be emphasized that it is irrelevant whether the employer actually exercises control over the worker. Rather, it is merely the right of control that creates an employer-employee relationship.

To help guide courts in making this determination, North Carolina courts have held that the following factors create an independent contractor relationship with an employer:

The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

2. Employers Subject To The Act

In order to come under the provisions of the Workers' Compensation Act, an employer must regularly employ at least three or more employees. Traditionally, these cases turn on whether the workers are "regularly employed." North Carolina law does not define "regularly employed" and the outcome of these cases usually depends on the duration and regularity of the employment period. Furthermore, if an employer has once regularly employed enough employees to come under the Act, it remains under its provisions even when the numbers of employees temporarily falls below the minimum. An employer cannot be allowed to oscillate between coverage and exemption as his labor force exceeds or falls below the minimum from day to day.

3. Excluded Employees

The Workers' Compensation Act excludes recovery for certain categories of workers. N.C. GEN. STAT. §§ 97-13 (1991). Among the excluded categories of employees are domestic servants and casual employees. With respect to this latter category, employment is "casual" when it is "irregular, unpredictable, sporadic, and brief in nature." The determination of who constitutes a "casual employee" is of particular significance in the part-time employee and seasonal employee context. Decisions in this area usually depend on the specific facts of the case.

There is no coverage under the Act for farm laborers when fewer than ten (10) full-time non-seasonal farm laborers are regularly employed by the same employer. Other groups of excluded employees are railroad workers with particular railroads, prisoners, and all federal government employees.

However, any employer without regard to the number of employees, who has purchased workers' compensation insurance to cover his compensation liability, shall be conclusively presumed during the life of the policy to have accepted provisions of the North Carolina Workers' Compensation Act.

4. Minors

North Carolina's Workers' Compensation expressly provides that minors are considered "employees" within the scope of the act. N.C. GEN. STAT. § 97-2(2) (1991). In fact, North Carolina statutorily provides that even when a minor is too young to be legally employed, he is nevertheless considered an "employee" for the purposes of recovering workers' compensation benefits. N.C. GEN. STAT. § 97-10.3 (1991).

5. Special Provisions for Employees of Subcontractors or Independent Contractors

In general, an injured worker can only recover from his employer for his injuries. However, the North Carolina Workers' Compensation Act has special provisions to protect certain employees whose employer failed to purchase workers' compensation insurance. Under North Carolina law, any contractor (whether it is a general contractor, a principal contractor, an intermediate contractor, or a subcontractor) who subcontracts for work will be responsible for the payment of workers' compensation to any injuries suffered by a subcontractor's employee during the performance of the work covered by the contract *if* the contractor failed to obtain a certificate of workers' compensation insurance stating that the subcontractor had workers' compensation coverage. If the contractor fails to obtain the certificate, the contractor will be responsible even if he employees less than three workers.

6. Special Provisions for Truck Drivers under North Carolina's Workers' Compensation Act

Depending on the particular facts of a case, a truck driver may or may not be an employee of an interstate or intrastate motor carrier. However, the truck driver may still be entitled to workers' compensation benefits. The North Carolina General Assembly adopted N.C. Gen. Stat. §97-19.1, which became effective for all workers' compensation claims arising on or after October 1, 2003. The stated intent of the legislation is to address the circumstances under which interstate or intrastate motor carriers and/or owner-operators must secure workers' compensation insurance or provide proof of self insurance. Subsection (a) of the statute provides:

“Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set fort in G.S. §97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident

arising out of and in the course of the performance of the work covered by such contract.”

The statute essentially states that workers' compensation coverage is required to cover owner-operators, even if deemed independent contractors under the common law of North Carolina. Under this paragraph, an owner-operator may procure workers' compensation insurance. However, the statute clearly provides that if the owner-operator, even as an “independent contractor” under North Carolina common law, does not have workers' compensation insurance, the licensed intra or interstate motor carrier must pay workers' compensation benefits. In sum, if the owner-operator does not have workers' compensation coverage, the motor carrier must provide workers' compensation coverage. Additionally, the specific language appears to require the intra or interstate motor carrier to provide coverage under the Act even if the intra or interstate motor carrier has less than three employees. A logical conclusion is that the intra or interstate motor carrier must provide workers' compensation coverage under the Act so long as it contracts with even one owner-operator.

The application of the second paragraph of subparagraph (a) appears analogous to the requirements for contractors and subcontractors as provided in N.C. GEN. STAT. §97-19 in placing the ultimate burden of providing workers' compensation coverage on the motor carrier if the owner-operator does not maintain the coverage. Unlike N.C. GEN. STAT. §97-19, an owner-operator's producing a certificate of workers' compensation insurance to the motor carrier does not insulate the motor carrier from liability under the Act if the owner/contractor does not actually have workers' compensation coverage on the date of any work related accident. In essence, the statute appears to contemplate vicarious strict liability upon the motor carrier.

Subparagraph (b) of the statute provides that trucking companies will have no workers' compensation liability for independent contractors who, at the time of injury, are injured while operating their own trucks under their own individual DOT licenses.

Subsection (c) of N.C. GEN. STAT. §97.19.1 provides that the contractor may insure any and all of his independent contractors in a blanket policy. The governing contract may require the independent contractor to reimburse the costs of covering the independent contractor under the contractor's coverage of his business.

C. Injuries By Accident

1. In General

After satisfying the jurisdictional requirement of establishing an employer-employee relationship, the analysis then turns to whether there is an "injury by accident." This analysis consists of two questions: (1) was there an "injury?" and (2) if so, was it "by accident?"

No injury -- no matter how serious -- will be compensable unless it is preceded by and due to an accident. Even when a given work routine requires very strenuous work which leads to injury, if there is no accident, the claim will not be compensable.

An "accident" is often defined as an "unlooked for and untoward event which is not expected or designed." However, a more useful definition might be "a departure from the work routine." Applying these definitions, if an injury is caused by an event that involves both an employee's normal work routine and normal work conditions, it is not "caused by accident."

Obvious "accidents" include those in which an employee slips and falls, where an employee is injured by a piece of machinery, or is involved in an automobile collision. However, "accidents" may also include cases where unusual effort is needed to do an otherwise routine task. Thus, an accident occurs if there is some new circumstance not part of usual work routine. Performing one's job in an awkward position, as where one must crouch and twist to perform a task, has been held sufficiently out of the work routine to support a finding of compensability. But if an employee's job reasonably requires shifting of positions, injuries which occur while so shifting are not compensable.

2. Back Injuries – An Exception to the Rule

The standard for compensability for back injuries is markedly different than the standard for injuries which are not to the back. A back injury claimant may recover under either the traditional "accident" standard discussed in the previous section, or the "specific traumatic incident" standard established by legislative amendment to G.S. §97-2(6) in 1983. The definition of specific traumatic incident is far more encompassing than the definition of injury by accident, and includes virtually any back injury which occurs during an identifiable time period, but excludes conditions which arise slowly over indefinite periods of time. The identifiable period of time need not be just an instant, but may include a relatively long period of time, perhaps as large as an entire workday,

... We believe that through the amendment [to G.S. §97-2(6)] the General Assembly also recognized the complex nature of back injuries, and did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence. Back injuries which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. *Richards*, 374 S.E.2d at 118-119.

Under this standard it is not relevant that the employee was doing his job in the routine fashion at the time of the injury, or that the employee even be exerting himself. In the case of *Bradley v. E.B. Sportswear, Inc.*, 77 N.C.App. 450, 335 S.E.2d. 52 (1985), for example, plaintiff bent over to pick up a box and felt sudden pain in her back, before she even touched the box. Nevertheless, the Court of Appeals held that her injury had occurred during a specific traumatic incident.

D. Injury Arising Out of the Employment

The term "arising out of" refers to the origin or cause of the accident. Under North Carolina law, an injury "arises out of the employment" when it is a natural and probable consequence of the employment and the natural result of risk inherent with such employment, so that there is some casual relationship between the employment and the injury. To have its origins in the employment, an injury must come from a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. This is commonly known as the increased-risk doctrine. Under the increased-risk doctrine, compensation is awarded simply if the employment increased the risk of an employee incurring a harm.

E. Injury in the Course of Employment.

1. Definition and Interpretation

The term "in the course of" refers to the time, place, and circumstances under which an injury occurs. With respect to time, the "course of employment" begins a reasonable time before actual work begins, and continues for a reasonable time after work ends. Hence, an employee does not necessarily have to be "on the clock" in order for an injury to be compensable.

With respect to the place requirement, an injury is not required to occur on the employer's premises in order to be compensable. Rather, so long as the work is being done at the direction and for the direct or indirect benefit of the employer, the place requirement will be satisfied.

On the other hand, an injury is not automatically compensable simply because it occurs on the employer's premises. For instance, if the employee's work did not reasonably require his presence at the time and place of the event giving rise to the claim, then the "in the course of" requirement will not be met.

Similarly, if an employee is injured while performing purely personal acts not related to his employment, then the injuries are not covered by the Act.

However, consistent with the Act's broad remedial purposes, an injury will be compensable so long as the employer receives some indirect benefit. Hence, the "course of employment" includes visits to the restroom, coffee breaks, and voluntarily assisting another employee. Furthermore, activities which an employee undertakes in pursuit of his personal comfort have generally been considered part of the circumstances of the course of employment.

2. The "Coming and Going" Rule

As a general rule, accidents sustained while an employee is going to and from work are not considered to have occurred within his or her employment. However, courts have carved out several exceptions to this rule.

First, North Carolina case law holds that if an accident occurs on the employer's premises, then the injury will be compensable. However, the line between what constitutes an employer's premises is often blurred. For example, a highway outside an employer's factory generally will not be thought of as part of the employer's premises. However, under North Carolina's Workers' Compensation Act, if the highway is the only means of ingress and egress to and from work, then the hazards of that route become the hazards of the employment.

A second exception to the "coming and going rule" is the "special errand" rule. The "special errand rule" provides that if an employee is injured while engaged in a special duty or errand for his employer, then he is entitled to workers' compensation benefits. A clear example of an application of the special errand rule is *State Compensation Ins. Fund v. Industrial Acc. Comm'n*, 89 Cal. App. 197, 264 P. 514 (1928). In that case, an employer asked one of his salesmen to return to the store at night in order to admit an electrician who was going to do some repair work. As the salesman returned home, he sustained injuries which lead to his death. The court held that the salesman was performing a special errand for his employer and was therefore entitled to compensation.

3. Lent Employees and Dual Employers

With respect to lent employees, North Carolina courts have established a presumption that the general employer should remain liable. In order to overcome this presumption, the following requirements must be found:

- (a) the employee has made a contract of hire, express or implied, with the special employer;
- (b) the work being done is essentially that of the special employer; and
- (c) the special employer has the right to control the details of the work.

Only when all three of the above conditions are satisfied are both employers liable for workers' compensation. Failure to satisfy any of these conditions results in the general employer remaining solely liable for the employee's injuries.

It should also be emphasized that the contract of hire, required in the first condition, may be implied. Consent may be inferred from the employee's acceptance of the special employer's control or direction.

With respect to dual employers, the Workers' Compensation Act provides the employer whose work was being done at the time of injury will be held exclusively liable. In situations in which it cannot be determine whose work the employee was doing at the time of the injury, the general rule is to hold both employers liable.

4. Horseplay

North Carolina's Workers' Compensation Act contemplates that when workers are gathered together, the risks and hazards of such close contact, including joking and pranks by the workers, are incidents to the business and grown out of it. Therefore, an employer is generally responsible for accidents arising from horseplay, even when the injured employee instigated or voluntarily participated in the horseplay.

III. AVERAGE WEEKLY WAGE

The most important calculation in a workers' compensation case is the determination of an employee's average weekly wage. This calculation is important because it provides the basis for all payments of indemnity compensation. An employee's average weekly wage is determined based on his actual earnings and not his earning capacity. In addition, an employee's gross earnings, not net earnings, are used. Also included in the calculation of an employee's average weekly wage are any special allowances made by an employer, *e.g.*, board, lodging, and travel.

There are five methods of calculating an employee's average weekly wage.

- (1) If an employee has worked every week for an employer for at least 52 weeks prior to his injury, his total earnings are divided by 52 weeks.
- (2) If an employee has missed seven or more consecutive calendar days (although not necessarily in the same week on one or more times during the 52-week period preceding the injury, then one week will be deducted from the 52-week period for each seven-day period.
- (3) Where the employment prior to the injury was for less than 52 weeks, average weekly wage is calculated by dividing the earnings during that period by the number of weeks that the employee worked; provided the results are fair and just to both parties.
- (4) Where it is impractical to compute the average weekly wage because of shortness of employment or because of the casual terms of the employment, an injured employee may use the average weekly wage of a person of the same grade and character employed in the same class of employment in the same locality or community during the 52 weeks prior to the date of injury.

- (5) Lastly, where exceptional reasons exist that would make the above methods of computation unfair, either to the employee or to the employer, other methods for calculating average weekly wage may be used if they will provide the most approximate amount which the injured employee would have earned were it not for the injury. This method may not be used unless there has been a finding that unjust results would occur by using an alternative method.

IV. DISABILITY UNDER NORTH CAROLINA'S WORKERS' COMPENSATION ACT

A. What is Disability?

As noted above, the Workers' Compensation Act provides compensation for disability. The term 'disability' means incapacity because of injury or disease to earn the wages which the employee was receiving at the time of injury in the same or other employment. In discussing the basic disability concepts, the North Carolina Court of Appeals in the case of *Russell v. Lowes* held: Supreme Court held:

A workers' compensation claimant may meet burden of proving that (1) he is unable to earn same wages he had earned before with production of medical evidence that he is physically or mentally incapable of work in any employment as consequence of work-related injury, (2) evidence that he is capable of some work, but that he has been unsuccessful in obtaining employment after reasonable effort, (3) evidence that he is capable of some work but that it would be futile because of preexisting conditions to seek other employment, or (4) evidence that he has obtained other employment at wage less than that earned before injury.

While proof of loss of earnings is some evidence of disability, such proof in and of itself does not establish disability as the statute requires proof of loss of earning *capacity*. Proof of loss of earning capacity generally requires expert evidence from physicians, therapists, functional capacity evaluators, and depending on the case, vocational rehabilitation specialists. It is for this reason that employers and workers' compensation insurance carriers usually require a doctor's certification of disability for an injured employee before voluntarily paying disability benefits.

Note, however, simply establishing lost earnings does not entitle an employee to compensation. Likewise, merely showing the existence of an injury or physical infirmity will not automatically entitle the employee to benefits. In order to receive compensation, an employee must establish that he suffered a loss of earning *capacity*.

Similarly, an employer may not escape liability by showing that an employee has received wages. North Carolina case law holds that an employer cannot create a job for a disabled employee which is not available under normally prevailing market conditions in the competitive labor market. However, a presumption does exist that disability continues until the employee returns to work at the same wages he was earning at the time of injury.

An employee's disability consists of both the degree and duration of the loss of earning capacity. Degree is measured in terms of total or partial disability. Case law has held that disability is "total" when the employee's power or capacity to earn is totally obliterated. However, if the employee only suffers a diminution of the power or capacity to earn, he will be deemed "partially disabled". *Id.*

Duration, on the other hand, is based on whether the disability is temporary or permanent. In determining the extent of an employee's disability, as measured by degree and duration, several other factors are considered. These factors include the employee's age, work experience, training, education, and any other preexisting factor which might affect his ability to earn wages.

Depending on the degree and duration of the disability, an employee may receive compensation for:

- (1) Temporary total disability;
- (2) Temporary partial disability;
- (3) Permanent total disability; and
- (4) Permanent partial impairment.

B. Temporary Total Disability

An employee is entitled to compensation for temporary total disability during the period typically known as the "healing period." The healing period includes the time during which a claimant is unable to work and is undergoing medical treatment or is convalescing. During this period, the employee is entitled to two-thirds of his average weekly wage, up to a maximum amount set by statute. Typically, benefits for temporary total disability are paid until the employee returns to work or until he reaches maximum medical improvement. Maximum medical improvement ("MMI") means that medical science has done all it can to aid the worker in recovering from the injury. As a practical matter, the medical records may not specifically indicate the date of maximum medical improvement. Therefore, the date on which a doctor assigns a permanent partial disability rating is generally recognized as being the date on which the employee's condition has stabilized and thus the point of maximum medical improvement.

Depending on the particular employee's physical and vocational circumstances, the end of the temporary total disability period could be followed by (1) ongoing total disability for so long as the employee remains totally incapable of returning to work and, potentially, for the employee's lifetime; (2) partial disability available under N.C.G.S. 97-30, where the employee is able to return to work in some capacity but unable to earn as much as he or she was earning at the time of the injury; (3) permanent partial impairment, if the worker has permanent loss or loss of use of a member or part of the body covered by N.C.G.S. 97-31, even though the worker is able to return to work and earn at least the same wages as he or she was earning at the time of the injury; or (4) total and permanent disability, where the nature and extent of the injury constitutes total and permanent disability as a matter of law under N.C.G.S. 97-31(17) or where there is clearly no hope that the worker will ever be able to return to work in any capacity in the competitive labor market.

C. Temporary Partial Disability

Temporary partial disability is available when an injured employee returns to part-time work or some kind of gainful employment at a reduced wage. N.C. GEN. STAT. §97-30 (1991). In these situations, an employee's condition is expected to eventually improve to the point where he can earn his former wage; and therefore, the benefits are temporary in nature. Benefits for temporary partial disability are equal to two-thirds of the difference between his pre-injury and post-injury wage earning capacity. Thus, an employee earning an average weekly wage of \$300.00 prior to an accident and earning an average weekly wage of \$225.00 after the accident would be entitled to temporary partial disability in the amount of \$50.00 per week (*i.e.*, two-thirds the difference between \$300.00 and \$225.00, up until the time he returns to his normal work or reaches maximum medical improvement.

D. Permanent Partial Disability

North Carolina has two statutes addressing permanent partial disability. In § 97-31, the Act provides a schedule of injuries and corresponding compensation. (Note: a more detailed discussion of the provisions contained in the schedule statute follows below.) This schedule is based on the future disability or diminished earning capacity which presumably stems from certain types of injuries, usually loss of a member. Because of this presumed decrease in earning capacity, an employee making a claim for a scheduled injury does not have to establish actual diminished earning capacity.

In addition to the schedule statute, the Act in § 97-30 contains a "nonscheduled" statute, which addresses partial disability in general. Under this statute, employees are required to demonstrate actual diminished earning capacity. Assuming they can do so, benefits will not be limited to the fixed compensation contained in the schedule.

Courts initially held that if an employee sustained a scheduled injury, his compensation would be dictated solely by the schedule and he would be excluded from pursuing recovery under the nonschedule statute. However, under the North Carolina Supreme Court decisions of *Gupton* and *Whitley*, North Carolina moved away from the exclusivity rule and held that schedules are

designed to expand, not restrict, an employee's remedies. Hence, employees may now elect to pursue the more favorable remedy. However, the employee will not be able to recover benefits under both statutes.

The practical effect of these decisions is that the schedule set forth in § 97-31 generally represents the minimum amount of potential recovery.

1. Disfigurement

§ 97-31 also provides recovery for "serious" disfigurement. The philosophy behind granting recovery for disfigurement is a presumption that a marred appearance affects an employee's future earning potential. In determining what constitutes "serious" disfigurement, the North Carolina Supreme Court stated a bodily disfigurement "must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power." Thus, for example, in *Anderson v. Shoney's*, 76 N.C. App. 158, 332 S.E.2d 93 (1985), disfigurement compensation was denied where the scars on the top of one of plaintiff's breasts were not visible during her normal employment, which she returned to without a reduction in pay and where she testified that she would not want a type of job where the scars might show.

A common issue arising in disfigurement cases is whether a claimant may receive awards for both loss of a member and statutory disfigurement resulting from the same loss. In North Carolina, if compensation has already been awarded for loss of the disfigured body part, no recovery for the disfigurement is allowed. For example, an individual receiving benefits for a ruptured disc will not be able to recover disfigurement compensation for scarring to the back caused by surgery to remove the disc. However, if the individual suffered a compensable leg injury and the surgery necessary to treat the injury required an incision to be made in the back, any consequential scarring to the back will be compensable.

2. Catch-all Provisions

The schedule under § 97-31 also includes a catch-all provision which allows recovery for "the loss of or permanent injury to any important internal or external organ." Compensation under this provision is left to the Industrial Commission's discretion.

E. Permanent Total Disability

In order to recover payments for permanent total disability, an employee must establish that he is permanently incapable of obtaining gainful employment. If an employee is permanently and totally disabled, he or she is entitled to lifetime benefits. The only provision in the North Carolina Workers' Compensation Act that provides for mandatory or statutory permanent and total disability is §97-31(17). This section provides that an employee who losses both hands, both arms, both feet, both legs, both eyes, or any two thereof shall be statutorily deemed permanently and totally disabled. Thus, double amputees, paraplegics, and quadriplegics are entitled to lifetime benefits, even if they return to work.

V. DEATH BENEFITS

Under § 97-37 through § 97-40, the North Carolina Workers' Compensation Act provides death benefits for the dependents of deceased employees. According to these provisions, dependents are entitled to share death benefits for 400 weeks from the date of the employee's death. However, a widow, who is unable to support herself because of physical or mental disability, is entitled to benefits for life or until remarriage. In addition, minor children are entitled to benefits for 400 weeks or until they reach age 18, whichever is longer.

In addressing claims for death benefits, the threshold question is whether the claimant is, in fact, a dependent. Failure to establish dependency automatically bars a claimant from recovering death benefits. Under North Carolina law, widows and minor children are conclusively presumed to be wholly dependent. However, secondary issues, such as, who is included as a "child" may arise. For example, issues may arise as to whether the word "children" includes step children or illegitimate children. Under § 97-2(12), a stepchild is entitled to death benefits. However, a stepchild can recover only after establishing that he was "substantially dependent" on the deceased employee. Likewise, an illegitimate child can recover only if he was "acknowledged" by the employee.

In addition to establishing presumptions of who are "dependents," the Act also allows recovery for other persons who can demonstrate "dependency." Thus, if a claimant is unable to show that he falls within a statutorily-defined class of dependents, he may still recover by asserting that he was dependent on the employee.

VI. OCCUPATIONAL DISEASES

A. Overview

Historically, occupational diseases received dramatically different treatment than injuries by accident. In fact, at common law, most occupational diseases were generally considered to result from the "normal" conditions of the employment which should not be compensated. However, through legislative amendment and judicial interpretation, the distinction between "occupational disease" and "injury by accident" has become largely irrelevant.

B. What Is An "Occupational Disease"?

North Carolina defines "occupational disease" to include any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally. N.C. GEN. STAT. § 97-52 (1991). In addition, G.S. § 97-53 enumerates 27 diseases which are statutorily recognized as "occupational diseases." These diseases include, for example, asbestosis, silicosis, synovitis, and loss of hearing. In addition, § 97-53 also contains a "catch-all" provision granting recovery for "any disease . . .

which is proven to be due to causes and conditions which are characteristic of and peculiar to" the employment. Most of the conditions listed in the statute are specific disease conditions and have raised little controversy. Most litigation concerning the determination of occupational disease has focused on the scope of § 97-53(13).

Under the "catch-all" provision of § 97-53(13), a medical condition may be a compensable occupational disease if the employee's work exposed him to a greater risk of contracting a disease than members of the general public, and if such exposure significantly contributed to, or was a significant causal factor in the development of the disease. To prove the existence of a compensable occupational disease under Section 97-53(13), the employee must prove the following:

- (1) that the employee was exposed to a hazardous substance or condition in employment;
- (2) that the employee developed a disease;
- (3) that the employee's occupation exposed him/her to an increased risk of developing the disease compared to members of the general public; and
- (4) that is a causal connection between the disease and the employment.

One of the leading cases regarding occupational disease is *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). In *Booker*, the plaintiff was a lab technician who contracted serum hepatitis. The defendants denied the claim, arguing that serum hepatitis was not "peculiar to" the occupation of laboratory technician since employees in other occupations and members of the general public may also contract the disease; and that serum hepatitis is a disease which is an "ordinary disease of life," not characteristic of the employment of laboratory technician. These arguments were rejected by the Court which clarified the rule as follows:

[T]he statute does not place all ordinary diseases in a non-compensable class, but, rather those 'to which the public is generally exposed outside of the employment.' The evidence in this case indicates that the plaintiff was exposed in his employment to the risk of contracting tuberculosis in a far greater degree and in a wholly different manner than is the public generally.' The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation Clearly, serum hepatitis is an "ordinary disease of life" in the sense that members of the general public may contract the disease.... Our statute, however, does not preclude coverage for all ordinary diseases of life but instead only those to which the general public is equally exposed outside of the employment.

Id. at 121, 256 S.E.2d at 200 (quoting *Mills v. Detroit Tuberculosis Sanitarium*, 35 N.W.2d 239 (Mich. 1948)).

The nexus in simplified form is that where a link between employment and an increased risk of contracting a disease is proven, diseases contracted in the employment are compensable as occupational diseases "catch-all" provision of § 97-53(13). The converse is true that where the employment creates no increased risk of contracting the disease, the disease so contracted will not be compensable even if the disease was an actual result of employment (unless, of course, it is an enumerated occupational disease).

VII. DEFENSES TO A WORKERS' COMPENSATION CLAIM

A. Failure To Comply With Statutory Notice Requirements

The North Carolina Workers' Compensation Act requires an employee to notify his employer notice of an injury within 30 days of the injury. However, in occupational disease cases, an employee must notify his employer within thirty day after the employee has been advised by competent medical authority that he is suffering from an occupational disease. The purpose behind these notice requirements is to allow an employer to promptly investigate and treat the injury. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). However, the Industrial Commission will excuse an employee's failure to provide 30-days notice if:

1. The employer has actual notice;
2. The employee is prevented from giving notice because of physical or mental impairment; or
3. There is any other reasonable excuse, so long as there is no prejudice to the employer.

In addition, the Act requires an employee to file his claim with the Industrial Commission within two years after the accident. N.C. GEN. STAT. § 97-24(a) (1991).

With respect to death claims, a separate statutory limit starts running from the date of death. Under § 97-38, death benefits are recoverable if the death results proximately from a compensable injury and occurs within six years of the accident or within two years of a final determination of disability by the Industrial Commission, whichever is later. Note that this period is independent from the period which runs from the date of injury. The purpose behind this separate statute is that the date of death marks the time which the rights of the deceased employee's dependents first accrue.

One issue of particular interest in the death claim context is what occurs when the employee fails to comply with the notice and filing requirements for the original claim and the dependents later file a death claim. In regards to the statute of limitations, the employee's failure to file a claim is irrelevant. This is because courts treat the injury claim and the death claim as two independent and separate claims. Therefore, the employee's failure to file a claim will not bar the dependent's action for death benefits.

B. Willful Intent To Injure

As a general rule, an employee or his estate will be barred from recovering workers' compensation benefits if his injury or death is caused by his willful intention to injure or kill himself or another. An exception to this rule arises, however, when a compensable injury produces mental derangement, which, in turn, leads to suicide. In these situations, courts have held that where mental derangement deprives an employee of his normal judgment, the employee cannot act "willfully" within the meaning of § 97-12(3), and therefore compensation will be awarded.

C. Intoxication/Impairment

North Carolina has enacted provisions establishing intoxication or impairment as a defense to a workers' compensation claim. Note, however, that simply establishing that an employee was intoxicated or impaired at the time of injury is not enough to successfully establish this defense. In addition to proving intoxication, an employer must establish that the employee's intoxication proximately caused the injury. In addressing the employer's burden, the North Carolina Court of Appeals held an employer does not need to prove that intoxication was the sole proximate cause of the employee's injury. Rather, an "employer is required to prove only that the employee's intoxication was "more likely than not" a cause in fact of the accident resulting in the injury to the employee."

D. Failure To Obey Safety Rules

The North Carolina Act does not create an affirmative defense for an employer if an employee willfully disobeys a safety rule or fails to use a safety device. Rather, the Act reduces the amount of benefits the employee may recover by 10%. A defense of failure to obey a safety rule will be allowed only if two conditions are met. First, the employee must have actual knowledge of the rule. Thus, an employer cannot argue that the employee had constructive knowledge of a safety rule. Second, the employer must demonstrate that the rule was enforced to create an understanding of the danger.

With respect to the knowledge requirement, the great majority of cases accept an employee's excuse of ignorance of the rule or statute. For example, if an employee is injured while violating a safety regulation, his recovery will not necessarily be reduced, provided he had no actual knowledge of the regulation. Thus, the common law maxim of imputed knowledge of statutes does not necessarily apply in the workers' compensation arena.

In addition, a claimant can also rebut a defense of failure to obey a safety rule by showing that the rule was not enforced. For example, in *Patterson v. Gaston County*, 62 N.C. App. 544, 303 S.E.2d 182, cert. denied, 309 N.C. 822, 310 S.E.2d 351 (1983), a landfill employee was killed when he fell off a dragpan which he was riding for the purpose of leaving the landfill for lunch. Although the employee was disobeying his employer's oral directive not to ride the dragpan, compensation was nevertheless awarded because the employer's directive was not strictly followed by his employees.

It should be noted, however, that habitual disregard of rules is relevant only in the context of charging the employer with knowledge or acquiescence. If the only violations occur behind the employer's back, the rule will not be considered as lacking enforcement.