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Booker V. Medical Center: Workman's Compensation and the Infectious Disease

"[T]he vast majority of American workers, and their families, are dependent on workman's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment. . . ."1 The Congress in 1970 declared that the full protection of American workers required "an adequate, prompt, and equitable system of workman's compensation as well as an effective program of occupational health and safety regulation. . . ."2 The concern which Congress has evidenced through the passage of The Occupational Safety and Health Act of 1970 is well founded. It is estimated that each year more than 14,000 workers die, another 90,000 are permanently injured, and more than 2,000,000 miss at least one day of work because of job related injuries and diseases.³

Job related injuries resulting from accidents have been covered under the workman's compensation statutes of all the states for a long period of time. However, the same has not been true for work related diseases which have caused workers to miss great amounts of time from their jobs.⁴ Though the majority of states in this country have been slow to enact legislation which would protect workers suffering from occupational diseases, all states now have workman's compensation laws which afford some protection. However, not all of these laws cover every occupational disease which is work related.⁵

North Carolina's workman's compensation law covers specific dis-

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. § 676 (1970).

2. *Id.*

3. NATIONAL COMMISSION ON STATE WORKMAN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMAN'S COMPENSATION LAWS 31 (1972) [hereinafter cited as NATIONAL COMMISSION].

4. In 1934 the Supreme Court of North Carolina in *McNeely v. Asbestos Co.*, 206 N.C. 568, 174 S.E. 509 (1934), denied coverage to an employee, who had contracted pulmonary asbestosis during his employment as a spinner, upon a theory of occupational disease. The Court held that occupational diseases did not come within the contemplation of the workman's compensation law as it existed at the time. *Id.* at 572, 174 S.E. at 511. However, in 1935, after the *McNeely* case, the North Carolina legislature amended the Workman's Compensation Act to include coverage for some occupational diseases. Note, *Workman's Compensation—Development of North Carolina Occupational Disease Coverage*, 7 WAKE FOREST L. REV. 341, 344, (1970-1971).

5. NATIONAL COMMISSION, *supra* note 3, at 32. A majority of the states in this country provide coverage for all occupational diseases. Over the years the number of states which have changed from listing specific diseases covered to providing full coverage for all diseases has increased tremendously. The following chart shows the number of states which have allowed full coverage. *Id.* at 50.

1946—18	1956—30	1966—30	1972—41
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eases,⁶ but includes a catchall provision which covers work related occupational diseases.⁷ The North Carolina Court of Appeals has been given the opportunity on several occasions to interpret this statute in cases dealing with infectious diseases contracted by hospital employees, but has failed in each instance to hold whether or not the statute covers such work related diseases.⁸ The most recent opportunity that the court has had to interpret the breadth of this new statute arose in the case of *Booker v. Medical Center*.⁹

The *Booker* case involved a proceeding under the North Carolina Workman's Compensation Act to obtain death benefits for the wife and children of Robert S. Booker, who died on January 3, 1974 of serum hepatitis.¹⁰ Mr. Booker worked as a laboratory technician in the Clinical Chemistry Laboratory at Duke Medical Center.¹¹ Mr. Booker's duties as a laboratory technician involved testing blood serum from blood samples taken from patients at the hospital.¹² In performing these tests, he frequently received small amounts of blood on his fingers, some of which came from patients suffering from hepatitis.¹³ Although the samples of blood were not always labeled, evidence showed that at least one sample per day contained the hepatitis associated antigen.¹⁴ On July 4, 1971, Mr. Booker was diagnosed as suffering from serum hepatitis.¹⁵

Mr. Booker's claim was heard before a Hearing Commissioner of the North Carolina Industrial Commission. The Commissioner found "that at some time between December 1970 and May 1971, Mr. Booker

6. N.C. GEN. STAT. § 97-53 (Cum. Supp. 1977). The diseases included in G.S. 97-53 include Anthrax, Arsenic Poisoning, Brass poisoning, Zinc poisoning, Manganese poisoning, Lead poisoning, Mercury poisoning, Phosphorous poisoning, Poisoning by carbon bisulphide, Chrome alceration, Compressed-air illness, Benzel poisoning, Epitheliomatous cancer, Radium poisoning, Blisters due to use of tools or appliances in the employment, Bursitis, Miner's nystagmus, Bone felon, Synovitis, Tenosynovitis, Carbon monoxide poisoning, Poisoning by sulphuric, hydrochloric or hydrofluoric acid, Asbestosis, Silicosis, Psittaccsis, Undulant fever, and Loss of hearing caused by harmful noise in the employment. *Id.*

7. N.C. GEN. STAT. § 97-53(13) (Cum. Supp. 1977) provides,

The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article . . .

(13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

8. *Booker v. Medical Center*, 32 N.C. App. 185, 231 S.E.2d 187 (1977); *Smith v. Hospital*, 21 N.C. App. 380, 204 S.E.2d 546 (1974); *Marrow v. Hospital*, 21 N.C. App. 299, 204 S.E.2d 543 (1974).

9. 32 N.C. App. 185, 231 S.E.2d 187 (1977).

10. *Id.* at 185, 231 S.E.2d at 189.

11. *Id.*

12. *Id.* at 186, 231 S.E.2d at 189.

13. *Id.*

14. *Id.*

15. *Id.*

contracted serum hepatitis 'due to exposure to hepatic blood in his employment,' that '[t]he general public is not exposed to this disease as is a laboratory technician,' and that '[s]aid occupational disease resulted in his death.'¹⁶ The Hearing Commissioner made an award to Mr. Booker's family, which the full Commission affirmed. From this decision, Duke Medical Center and its insurance carrier appealed.

After holding that Mr. Booker could not be covered by the accident provisions of the workman's compensation act,¹⁷ the court based its decision on the version of G.S. 97-53(13), the catchall provision of the occupational disease section, applicable in determining whether or not infectious hepatitis was an occupational disease under the statute.¹⁸ Until 1963, the North Carolina Workman's Compensation Act simply listed a number of specific diseases which were covered. In 1963, G.S. 97-53(13) was added to provide coverage for diseases due to "irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances."¹⁹ G.S. 97-53(13) was amended in 1971 to cover "any disease" which is proven to be "characteristic of or peculiar to" a particular trade or employment.²⁰ The court held that the 1963 version of G.S. 97-53(13) was applicable in this case,²¹ and therefore, once again refused to address the question of whether or not

16. *Id.*

17. *Id.* at 188, 231 S.E.2d at 190. The court found that:

The major route of transmission of serum hepatitis is by contact of blood products from a person suffering with or carrying the disease through some point of entry, such as a break in the skin or by direct injection, into another persons body. Only one such exposure to a very small amount of contaminated blood is required to transmit the disease.

Id. at 186, 231 S.E.2d at 189.

However, Mr. Booker could not remember any particular accident which might have occurred or how he contracted the hepatitis. The court concluded that he was not protected by the accident provisions of the act, which required the showing of a single unexpected event, not a part of the workers duties, and therefore, had to rely on the occupational disease provisions. *Id.* at 186-87, 231 S.E.2d at 190.

18. *Id.* at 189, 231 S.E.2d at 190.

19. N.C. GEN. STAT. § 97-53(13) (1963). The entire section read as follows:

The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article . . .

(13) Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritation oils, cutting compounds, chemical dusts, liquids, fumes, gases or vapors, and any other materials or substances. *Id.*

20. N.C. GEN. STAT. § 97-53(13) (Cumulative Supp. 1977). The full text of this section is cited at note 7 *supra*.

21. The 1971 amendment states that it shall apply only to cases originating on or after July 1, 1971. 1971 N.C. Sess. Laws, c.547, s.3. Under the Workman's Compensation Act a case is considered originating on the date when the disease is contracted. Mr. Booker was diagnosed as having serum hepatitis on July 4, 1971, but since there is an incubation period of six weeks to six months for serum hepatitis, he must have contracted the disease before July 1, 1971. Therefore, the court held that the 1963 version should apply. *Booker v. Medical Center*, 32 N.C. App. at 190, 231 S.E.2d at 191. The soundness of this argument will not be the subject of this note, although it is clearly suspect.

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infectious diseases are occupational diseases under the 1971 amendment to G.S. 97-53(13).²² The court held "only that under the statute as written when Mr. Booker contracted the disease, serum hepatitis could not properly be considered an occupational disease and the Industrial Commission erred in so holding."²³ The purpose of this note is to analyze that issue which the court of appeals has evaded, that being the status of infectious diseases under the statute as now written.

The process by which the *Booker* court arrived at its determination that infectious diseases are not occupational diseases under the 1963 version of G.S. 97-53(13), is very important to any analysis of the scope and breadth of the 1971 amendment. In deciding what an occupational disease is, the Court of Appeals in *Booker* seemed concerned not to turn the Workman's Compensation Act into a "species of broad scale compulsory health insurance."²⁴ The court further held that for this reason, G.S. 97-53(13) should be interpreted to come within the "well understood definitions of occupational disease."²⁵ The court cited *Henry v. Leather Co.*²⁶ for that definition.²⁷ The *Henry* case involved a man who contracted tenosynovitis, commonly known as tennis elbow, by constantly dipping crops into a vat and then loading them onto a wagon.²⁸ The court distinguished an accident from an occupational disease, indicating that an accident arises "from a definite event, the time and place of which can be fixed, while [an occupational disease] develops gradually over a long period of time."²⁹ Under this reasoning, an occupational disease is one that develops as a result of the "cumulative effect" of a series of events.³⁰ The adoption of the restrictive "cumulative effect" definition of *Henry* indicates the *Booker* court's desire to effect its declared intention to limit workman's compensation coverage. Therefore, the *Booker* court found that the "cumulative effect" definition would preclude an infectious disease from being classified an occupational disease, since infectious diseases, such as serum hepatitis, could be transmitted from person to person by a single event.³¹

22. *Id.* at 190, 231 S.E.2d at 191.

23. *Id.* at 193, 231 S.E.2d at 193 (emphasis added).

24. *Id.* at 191, 231 S.E.2d at 192. Although on the surface this seems to be a valid concern, the "opening the floodgates" argument has been completely refuted by the many states who have successfully operated programs which provided wide coverage of work related injuries and diseases. NATIONAL COMMISSION, *supra* note 3, at 36.

25. 32 N.C. App. at 191, 231 S.E.2d at 192.

26. 234 N.C. 126, 66 S.E.2d 693 (1951).

27. 32 N.C. App. at 191, 231 S.E.2d at 192.

28. 234 N.C. at 127, 66 S.E.2d at 694.

29. *Id.* at 131, 66 S.E.2d at 696.

30. *Id.* at 131, 66 S.E.2d at 697.

31. 32 N.C. App. at 192, 231 S.E.2d at 193. See note 17 *supra*.

The *Booker* and *Henry* decisions represent a strong line of authority for the "cumulative effect" definition of occupational disease. However, there is an equally strong line of authority, *McNeely v. Asbestos Co.*³² and *Duncan v. City of Charlotte*,³³ which favors a more liberal interpretation of occupational diseases. *McNeely* is considered the first case in North Carolina dealing with the issue of occupational diseases. The claimant in *McNeely* worked in an asbestos factory.³⁴ Mr. McNeely contracted plumonary asbestosis due to his employer's negligence.³⁵ The court, however, held that Mr. McNeely did not suffer an occupational disease under these facts, since his disease did not stem from an incidence of his employment, but rather from his employer's actionable negligence.³⁶ In coming to this conclusion the court defined occupational disease as, "a disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment. . . ."³⁷ In *Duncan*, the court used the above *McNeely* definition of occupational disease to deny coverage to a fireman who suffered a heart attack while on vacation.³⁸ The *McNeely-Duncan* definition of occupational disease takes on even more significance when compared to the 1971 amendment to G.S. 97-53(13). They both speak of the disease as one which is "characteristic of" or "peculiar" to a particular occupation,³⁹ or incidental to a particular employment or occupation.⁴⁰

The final blow to the "cumulative effect" definition of occupational disease derives from the companion cases of *Morrow v. Hospital*⁴¹ and *Smith v. Hospital*,⁴² which interpret the 1971 amendment to G.S. 97-53(13). In those cases, Morrow and Smith contracted hepatitis as a result of cuts to their hands while unplugging a commode in a hospital room.⁴³ The court held that an occupational disease under G.S. 97-53(13) is "a disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be

32. 206 N.C. 568, 174 S.E. 451 (1934).

33. 234 N.C. 86, 66 S.E.2d 22 (1951).

34. 206 N.C. at 569, 174 S.E. at 509.

35. *Id.*

36. *Id.* at 572, 174 S.E. at 511.

37. *Id.* The *McNeely* Court extracted its definition from the definition of occupational disease given in 3 W. SCHNEIDER, WORKMAN'S COMPENSATION LAW 502 (3d ed. 1941).

38. 234 N.C. at 91, 66 S.E.2d at 26. The case was brought under a 1949 amendment to G.S. § 97-53 which provided that, as to active firemen of cities and towns of the State, heart disease was an occupational disease *per se*. *Id.* at 87, 66 S.E.2d at 23. However, that section was found to violate Article I, Section 7 of the North Carolina Constitution and was therefore, declared invalid. *Id.* at 94, 66 S.E.2d at 26.

39. N.C. GEN. STAT. § 97-53(13) (Cum. Supp. 1977).

40. 206 N.C. at 572, 174 S.E. at 511.

41. 21 N.C. App. 299, 204 S.E.2d 543 (1974).

42. 21 N.C. App. 380, 204 S.E.2d 546 (1974).

43. 21 N.C. App. at 300, 204 S.E.2d at 544; 21 N.C. at 381, 204 S.E.2d at 546.

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incidental to a particular employment."⁴⁴ This language makes it clear that the *McNeely-Duncan* definition of occupational disease is the one that is operative under the 1971 amendment to G.S. 97-53(13). However, the court in *Morrow* and *Smith* failed to determine whether or not infectious diseases, such as hepatitis, fit within the *McNeely-Duncan* definition of occupational disease in cases where the claimant is a hospital employee who is exposed to the disease as a normal part of his or her duties. The court side-stepped this issue by holding that the evidence was "insufficient to show that infectious hepatitis is a disease which is characteristic of, and peculiar to, the occupation of a master mechanic acting, sometimes as a plumber, in the course of his employment for a hospital."⁴⁵

In states which have occupational disease statutes and definitions similar to those found in North Carolina, the courts have been consistent in awarding workman's compensation benefits to hospital employees who have come in contact with infectious diseases in the performance of their daily duties. The most active state in this area of the law has been New York. The New York workman's compensation statute contains a list of thirty specific diseases which the statute covers as occupational diseases.⁴⁶ Like North Carolina's workman's compensation statute, the New York statute contains a catchall provision which covers "any and all occupational diseases."⁴⁷ New York has defined occupational disease as a disease which is the "natural or unavoidable result of employment,"⁴⁸ or a disease which is contracted due to circumstances created by the natural incidents of the claimant's employment.⁴⁹ Using this definition, the New York court in *Shepart v. Tioga General Hospital*⁵⁰ held that a nurse who, as a usual incident of her employment, had come in contact with patients suffering from tuberculosis, was eligible to receive workman's compensation benefits for the

44. 21 N.C. App. at 301, 204 S.E.2d at 545.

45. *Id.* at 302, 204 S.E.2d at 545.

46. N.Y. WORKMAN'S COMPENSATION LAWS § 3(2) (McKinney 1965). The diseases listed in the New York statute contain Anthrax, Lead poisoning, Zinc poisoning, Mercury poisoning, Phosphorus poisoning, Arsenic poisoning, Poisoning by wood alcohol, Poisoning by benzol or any benzene derivative, Carbon bisulphide poisoning, Poisoning by nitrous fumes, Nickel carbonyl poisoning, Dope poisoning, Poisoning by formaldehyde, Chrome ulceration, Epitheliomatous cancer, Glanders, Compressed air illness, Miner's disease, Cataracts in glassworkers, Radium poisoning, methychloride poisoning, Carbon monoxide poisoning, Poisoning by sulphuric, hydrochloric or hydrofluoric acid, Respiratory, gastrointestinal or physiological nerve and eye disorders due to contact with petroleum products and their fumes, Disability arising from blisters or abrasions, Bursitis or synovitis, Dermatitis, Silicosis, and any and all occupational diseases. *Id.*

47. *Id.*

48. *DiMarco v. State Univ. of New York at Buffalo*, 39 App. Div. 2d 623, 624, 331 N.Y.S.2d 47, 48 (1972).

49. *Herdick v. New York Zoological Soc'y*, 45 App. Div. 2d 120, 122, 356 N.Y.S.2d 706, 708 (1974).

50. 35 App. Div. 2d 764, 314 N.Y.S.2d 863 (1970).

tuberculosis she contracted.⁵¹ In *Hendrick v. New York Zoological Society*, a zoo keeper was held eligible to receive workman's compensation benefits for tuberculosis he contracted from monkeys which he came in contact with as an incidence of his employment.⁵² The court held that the zoo keeper's contact with the diseased animals was "greatly similar to that found in hospitals between persons having direct contact with patients or with paraphernalia which has been in direct contact with patients."⁵³ However, like North Carolina, the New York court has not granted a blanket coverage for all infectious diseases, and has held that a workman's compensation "award cannot be sustained in the absence of proof that the employee was exposed to the disease in the course of his employment."⁵⁴

Other states have reached similar results. The Illinois workman's compensation act provides that an "occupational disease means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public."⁵⁵ In *County of Cook v. Industrial Commission*,⁵⁶ the Illinois court, applying this statute, allowed a workman's compensation claim for a pathologist's assistant who contracted pulmonary tuberculosis as a result of his employment at the hospital.⁵⁷ Maine's workman's compensation law is similar, providing that an occupational disease is one "which is due to causes and conditions which are characteristic of a particular trade, occupation, process or employment and which arises out of and in the course of employment."⁵⁸ In *Russell v. Camden Community Hospital*,⁵⁹ the Maine court held that the requirement in the statute that the disease be characteristic of or peculiar to the occupation of the claimant precluded coverage of diseases contracted merely because the employee was on the job.⁶⁰ The court however, held that the risk of exposure to a wide spectrum of infectious diseases by a nurses

51. *Id.* at 764, 314 N.Y.S.2d at 864. *Accord*, *Lachowicz v. Albany Medical Center Hosp.*, 30 App. Div. 2d 1004, 294 N.Y.S.2d 186 (1968).

52. 45 App. Div. 2d at 120, 356 N.Y.S.2d at 707.

53. *Id.*

54. *Esposito v. New York State Willowbrook State School*, 38 App. Div. 2d 985, 329 N.Y.S.2d 355, 356 (1972) (Denying coverage to a food service worker where no evidence that he ever came in contact with hepatitis.) *Accord*, *Middleton v. Coxsackie Correctional Facility*, 45 App. Div. 2d 903, 357 N.Y.S.2d 732 (1974); *DiMarco v. State Univ. of New York at Buffalo*, 39 App. Div. 2d 623, 331 N.Y.S.2d 47 (1972).

55. ILL. ANN. STAT. ch. 48, § 172.36(d)(Smith-Hurd Cumulative Supp. 1977).

56. 54 Ill.2d 79, 295 N.E.2d 465 (1973).

57. *Id.*

58. ME. REV. STAT. tit. 39, § 183 (Cumulative Supp. 1977-1978).

59. 359 A.2d 607 (1976).

60. *Id.* at 611.

aid was sufficient to award compensation for the contracted disease.⁶¹

These cases provide clear guidance for the North Carolina courts. The court in *Booker* seemingly realized that Mr. Booker would have been covered by workman's compensation under the *McNeely-Duncan* definition of occupational disease.⁶² The court said, "We recognize, of course, that in his employment Mr. Booker was exposed to a recurring hazard of contracting a disease which placed him in a position of risk greater than that to which members of the public are generally exposed. The same is true for many hospital employees."⁶³ The National Commission on State Workman's Compensation Laws has strongly endorsed a system of workman's compensation in which diseases which are work related are not excluded from coverage because of legal technicalities.⁶⁴ One of the Commissions main recommendations is that "all states provide full coverage for work related diseases."⁶⁵ The main conclusion which can be drawn is that hospital workers, who come in contact with infectious diseases as a natural consequence of performing their regular duties, should be covered under the workman's compensation act.

The United States Congress has stated,

[I]n recent years serious questions have been raised concerning the fairness and adequacy of present workman's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risk to health and safety, and increases in the general level of wages and the cost of living.⁶⁶

North Carolina's courts should cease sidestepping this important issue in the hope that it will go away or in the fear that it will 'open the floodgates.' It is time for North Carolina to align itself with the majority of states in this country and adopt the position that an infectious disease, contracted by a hospital employee in connection with his duties, is an occupational disease covered by the Workman's Compensation Act.

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61. *Id.* at 612.

62. *Booker v. Medical Center*, 32 N.C. App. at 193, 231 S.E.2d at 193.

63. *Id.*

64. NATIONAL COMMISSION, *supra* note 3, at 36.

65. *Id.* at 50.

66. The Occupational Safety and Health Act of 1970, *supra* note 1.

