

The Brown Lung Battle Into the Courtroom

by Marion A. Ellis

"We feel that the North Carolina system — the role of the Industrial Commission and the courts — is working well."

— Dick Byrd, Director of Community Relations,
Burlington Industries

"I think the courts have been forced to act because the Industrial Commission hasn't been doing its job."

— Blair Levin, legal staff, Carolina Brown
Lung Association

"It's up to the courts to tell us what the law means."

— William Stephenson, chairman of the
Industrial Commission



Elsie Morrison doesn't look like a controversial public figure. She's a shy, 53-year-old woman who is quietly making history as the key figure in a case currently before the North Carolina Supreme Court. A former cotton mill worker seeking workers' compensation for an occupational disease called byssinosis (brown lung), Mrs. Mor-

risson didn't know she would be breaking new legal ground when she first filed her claim with the state's Industrial Commission in August 1976. She just felt she was due compensation for having had her work-life cut short by her breathing problems. After several medical examinations, doctors concluded that Mrs. Morrison's disability was due in part to her exposure to cotton dust during 27 years as an employee of Burlington Industries and in part to other factors, including smoking.

Although it has been more than four-and-a-half years since Mrs. Morrison filed her notice with the Industrial Commission, she is still awaiting the final disposition of her claim for total disability.* But she is not waiting alone. The federal government estimates that up to 11,000 textile workers in North Carolina are disabled by brown lung, many of whom may have cases similar to Mrs. Morrison's. Burlington Industries, as well as other textile manufacturers and large industries in the state and major insurance carriers, are also closely following the court's deliberations in this case. The North Carolina Supreme Court is now about to decide, as a result of Elsie Morrison's claim, exactly how the state's workmen's compensation statutes apply to a person whose disability was

* Mrs. Morrison has received compensation benefits, based on 55 percent disability. The case before the N.C. Supreme Court concerns the benefits for the other 45 percent of her disability.



Photo by Michael Russell

caused by more than one factor.

As of February 1981, a total of sixteen byssinosis cases were before the state Court of Appeals and Supreme Court. Like the Morrison case, many of them are breaking new legal ground by testing sections of the state workmen's compensation statutes which have never been clearly defined by the courts. Ironically, when the workmen's compensation system was established in North Carolina in 1929, one of its purposes was to keep workers' liability claims out of the courts. To reduce the expense and uncertainty of lengthy

Retired textile worker being tested for brown lung disease at a clinic sponsored by the Brown Lung Association.

suits, industrial and worker advocates designed a kind of compromise — the workmen's compensation system.

The Industrial Commission, set up to administer the law, determines whether a worker's disability is due to employment conditions. If so, the Commission automatically awards the worker a percentage of lost wages, according to a formula based on a rate and maximum amount fixed by statute. This procedure makes it easier for the worker to receive compensation for a job-related disability, but it provides that only a portion of lost wages can be recovered and requires that a person who files a workmen's compensation claim

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cannot file a liability suit against the employer. The Industrial Commission acts in a quasi-judicial fashion, ruling on the evidence of the case just as a court does. Either party can appeal a Commission ruling directly to the N.C. Court of Appeals. From there, the appeal goes to the N.C. Supreme Court.

The statutes have been amended a number of times over the years, including a 1935 change that expanded coverage to include occupational diseases as well as injuries by accident. In 1971, the General Assembly added the broad language that requires compensation for any disease proven "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 employment."

In the last 50 years, the Commission has routinely handled hundreds of thousands of claims for external injuries such as a broken leg. Until the mid-1970s, there were very few occupational disease claims filed at all. But in the last five years, public awareness of byssinosis has increased dramatically and an organization of disabled textile workers, the Carolina Brown Lung Association with several thousand members in North Carolina, has encouraged disabled workers to utilize the compensation system.

During the 1970s, workers filed a total of 913 byssinosis claims; the number in 1980 *alone* was 684. The volume and variety of brown lung cases have presented the Industrial Commission with

a situation it has never faced before. While two to four percent of all compensation cases are disputed and require hearings before the Commission, over 50 percent of byssinosis claims are disputed. *The Charlotte Observer*, in its February 1980 series on brown lung, reported that the Commission takes an average of 26 months to decide a byssinosis claim, a much longer time than other disputed cases. William Stephenson, chairman of the Industrial Commission, says the average is 290 days, a figure which does not include the additional time spent awaiting court rulings for those parties who choose to appeal. "With more byssinosis claims coming down the pike," says Stephenson, "more decisions are being appealed to the courts."

In the next year, the state appeals courts will hand down a series of rulings on byssinosis and disability. The judiciary, all parties seem to agree, will be establishing the guidelines for workmen's compensation claims that will amount to hundreds of millions of dollars. The decisions will affect tens of thousands of workers and the state's largest employers and insurance companies.

Morrison v. Burlington

As the number of byssinosis claims has jumped dramatically, so has the involvement of the courts taken on an added importance. In *Morrison v. Burlington*, Mrs. Morrison is seeking full compensation for her breathing disability, even though her condition is complicated by several other non-pulmonary diseases and a history of cigarette smoking. The defendants, Burlington Industries and its insurer, Liberty Mutual Insurance Co., are

High-speed, shuttleless weaving machinery, recently installed in a Burlington Industries textile plant.

Photo courtesy of Burlington Industries





Photo courtesy of Southern Exposure

Traditional weaving room, where high cotton dust concentrations are visible.

asking that Morrison be awarded compensation only for that percentage of her disability which can be traced exclusively to cotton dust exposure. Determining a percentage of disability due to the workplace and basing compensation payment on that percentage is known as "apportionment."

Almost two years after Morrison filed her claim in 1976, the Industrial Commission followed the apportionment concept and ruled that only 55 percent of her disability was caused by cotton dust exposure. The Commission based its computation of lost wages on that percentage and awarded Morrison \$43.90 per week for 300 weeks, totalling \$13,176. She appealed the decision, and in June 1980 the N.C. Court of Appeals overturned the Commission, ruling that she was due full compensation for total disability. Burlington Industries and its insurer subsequently appealed that decision to the N.C. Supreme Court.

In their brief, the company's lawyers wrote: "The (Court of Appeals) decision, if allowed to stand, will transform the Workers' Compensation Act into a general health and insurance benefit act that awards compensation for disabilities which arise neither out of nor in the course of employment." The National Association of Manufacturers filed an amicus (friend of the court) brief for Burlington, contending that the economic consequences of the Court of Appeals decision would be enormous.

In October 1980, the Supreme Court ruled that the evidence was unclear and remanded the case to the Industrial Commission. The court instructed the Commission to retake the testimony of the three medical witnesses in the case. After considering the new findings the Commission

withdrew Morrison's phlebitis, varicose veins, and diabetes from causative factors in her disability but stuck to its apportionment concept. It ruled all disability was due to lung impairment, 55 percent from her workplace and 45 percent from "other factors," including smoking.

On March 11, 1981, after the Supreme Court had received the new Commission ruling, attorneys for the two parties appeared before the high court to argue the Morrison case for the second time. Charles Hassell, Mrs. Morrison's attorney and one of the state's leading plaintiff lawyers on byssinosis cases, contended that the Court of Appeals had ruled correctly, that the law provided for full compensation. McNeill Smith, a prominent Greensboro attorney and former state senator who represented Burlington Industries, argued for the Commission ruling, for apportioning compensation awards according to the percentage of the disability caused by the workplace. As of April 1, the Court had not yet handed down its decision on whether "apportioning" the disability award is legal in North Carolina.

"If the Court decides for apportionment, the employer would be liable only for the degree of impairment caused by occupational exposure," says Commission Chairman Stephenson. "In more than 90 percent of the (byssinosis) cases that come before us, the claimants have some malady other than byssinosis. All the employers and carriers are saying is that they are entitled to pay for only that percentage of the illness caused by cotton dust."

But Hassell strongly disagrees with Stephenson's analysis. "What the apportionment concept comes down to is the destruction of the integrity of the compensation system, which was a compromise to begin with," says Hassell. "Apportionment has never been permitted under the North Carolina

Workers' Compensation Act. We're going to find out here whether the Supreme Court will uphold the statute as written." Mrs. Morrison had to quit work at age 48, totally disabled by her breathing problems, and Hassell says she is entitled to full compensation. "Instead, the Commission's emphasis has been on figuring ways to further reduce the money people will receive," says Hassell. "Who's going to bear the burden? Is it going to be the industry or the individual worker who has to pay? No other state apportions compensation when there happens to be non-occupational factors that contribute to a total loss of wage-earning capacity."

A ruling upholding the Court of Appeals would entitle claimants to total compensation for total disability, if occupational disease played any part in the worker's disability. Burlington estimates that such a ruling could cost the company up to \$100 million, based on the number of potential claims. Regardless of the outcome, the Supreme Court decision will clarify questions concerning apportioning disability. "We will then know what the law is on this issue," says Stephenson.

There is disagreement, however, on how such a clarification will affect future claims. If the high court rules in favor of apportionment, for example, Stephenson feels "the person would get less money, but he would get it quicker. . . . There will be less (cases) that go to a hearing." Blair Levin,

who heads the Brown Lung Association's legal staff, says that an apportionment ruling would "result in serious delays in the process. Every case will have to be litigated. Under the present system," says Levin, "you just have to prove there is a (workplace-related) disease and that the person is disabled. Then the benefit level is set. Once you start talking about apportionment, you have more difficult factual questions to be decided. The process will be slower and it will be more complicated."

A Heightened Role for the Courts

The Morrison ruling will join a growing body of state court decisions affecting byssinosis cases. In 1979, the Supreme Court handed down what William Stephenson calls the first "absolutely landmark" decision by the courts on occupational disease compensation. In *Booker v. Duke Medical Center*, the Court defined work-related conditions which must be present to make a claim of occupational disease valid. In addition to the statutorily prescribed elements that a disease be due to causes and conditions which are not found equally among the general public, the Court said the plaintiff's disability must be traceable to some duty of employment. The case involved a Duke Medical Center worker who died after contracting serum hepatitis. The Court ruled he had contracted the disease as part of his job and therefore his dependents were eligible for full death benefits under workers' compensation. "It established in North Carolina what an occupational disease is," says Stephenson.

In 1980, the appeals courts overturned Commission rulings in three prominent cases:

- In *Taylor v. J.P. Stevens*, the Appeals Court and Supreme Court ruled that a person could file for compensation up to two years after being told that he or she has byssinosis, and could subsequently be found totally disabled. Previously, the Commission had ruled that a person could receive compensation only if the employee's disability became known within two years upon leaving the workplace.

- In *Wood v. J.P. Stevens*, the Supreme Court ruled that the Industrial Commission could not deny workers' claims without first hearing medical evidence. Only then, the Court ruled, could the date of disability be established. The date of disability is used to determine compensation (including benefits level, disability definition, etc.), according to statute.

- In *Walston v. Burlington*, the Court of Appeals ruled that if a workplace environment aggravates and contributes to a disabling condition that existed prior to the job, then the condition be-

In the lobby of the Justice Building, where the N.C. Supreme Court holds hearings, Mrs. Elsie Morrison (center) confers with her attorneys, Charles Hassell and Robin Hudson.

Photo by Paul Cooper





Photo courtesy of Labor Unity

A typical spinning room in a textile mill.

comes an occupational disease and the worker is eligible for compensation. In March 1981, this case was appealed to the Supreme Court. The legal questions in the *Walston* case relate closely to those in the *Morrison* case. In *Walston*, the Court of Appeals ruling said:

... in the view of the Commission, if a condition is non-occupational in its incipience, it is noncompensable as a matter of law notwithstanding the intervention of several years of occupational exposure to hazardous conditions between the time the disease was contracted and the time it became disabling. We view this failure to inquire into the causal relation between plaintiff's intervening occupational exposure and his resulting disability as error. . . .

The occupational disease provisions of the North Carolina Workers' Compensation Act are clearly an integrated part of the entire act and must be construed in light of the same liberal principles as are applied in cases of injury by accident. . . .

Since a disability resulting from an accidental injury which aggravates a pre-existing infirmity is fully compensable we can perceive of no valid reason why a different rule should pertain where, as here, the evidence tends to show that the plaintiff's exposure to environmental irritants on his job precipitated the onset of a disability which did not previously exist.

Determining What The Law Says

The importance of the court decisions in articulating legislative policy on byssinosis is particularly important in North Carolina, says

plaintiff attorney Hassell, because the Industrial Commission "operates in sheer secrecy." Moreover, says Hassell, "there's no recorded information on the legislative debate, no committee reports on what the drafters intended the legislation to do." Unlike the U.S. Congress and some state legislatures, North Carolina lacks a legislative history that includes such information. "The Industrial Commission has a far stricter view of what the law is than the courts," says Blair Levin of the Brown Lung Association. "In important cases, the appellate courts have overruled the Industrial Commission."

McNeill Smith, the attorney for Burlington Industries in the *Morrison* case, says that the state's appellate courts are handing down more byssinosis decisions simply because more are coming to them. "The legislature has made it easier to file a workers' compensation claim for this particular malady without being barred by some lapse of time," says Smith. "And there's a lot more medical literature on occupational diseases and their causes. Therefore, more of these disease cases end up in court. The issues are more complex than injury by an accident on the job."

The courts have not backed away from interpreting the law. When the Supreme Court sent the *Morrison* case back to the Industrial Commission for more medical testimony last October, it reiterated that the Commission "has the exclusive duty and authority to find the facts relative to disputed claims and such findings are conclusive on appeal when supported by competent evidence." But it left unstated the conclusion that only the legislature — and the courts — can determine what the law says. □