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Morris York Williams Barringer Lewis & Briggs LLP

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Welcome To The First *E-Brief* Of Morris York Williams Barringer Lewis & Briggs, L.L.P

It is with great excitement that we announce a change in our firm's name. We are now Morris York Williams Barringer Lewis & Briggs, L.L.P. ***Greg Lewis*** has been a partner with the firm since 1997. Greg is a trial and appellate attorney, and practices in the areas of tort litigation, insurance law and coverage issues, medical and professional liability, premises liability, products liability, appellate practice, and trucking and transportation law. Greg is also a certified Superior Court Mediator.

Susan Briggs has been a partner with the firm since 2002. Susan is a trial lawyer and practices primarily in the areas of workers' compensation and appellate practice. She is a Board Certified Specialist in Workers' Compensation Law.

Despite the name change, our mission remains the same — to continue to provide the highest quality service to our clients. We hope everyone has an opportunity to work with Greg and Susan this year.

Further Confirmation That UIM Carrier Is Entitled To Medical Payments Coverage Set-off

In Kessler v. Shimp, 640 S.E.2d 822 (2007), Plaintiff suffered severe bodily injuries during an automobile accident allegedly caused by Defendant Shimp. Plaintiff's UIM carrier paid $2,000.00 in medical payments coverage, which was the full amount available under Plaintiff's policy. Plaintiff's UIM carrier argued that it was entitled to reduce the limits of its UIM policy by the $2,000.00 paid under the medical payments portion of its own policy. The Court of Appeals held that the UIM carrier was entitled to a setoff for payments made under the medical payments portion of its own policy.

In reaching its decision, the Court looked at the policy language expressly stating that coverage shall not duplicate any amount paid or payable under Part B, which was entitled "Medical Payments Coverage." The Court found that the express terms of the insurance policy were clear that the UIM carrier was not obligated to duplicate payments, and the UIM carrier was therefore entitled to a set-off for payments made under the medical payments portion of its policy.

Compensability Of An Occupational Disease Under N.C. Gen. Stat. § 97-2(6)

In a significant ruling for the defense, the North Carolina Supreme Court in Chambers v. Transit Management found that the plaintiff failed to meet his burden of proving an occupational disease, because he did not demonstrate that his job placed him at a greater risk of *contracting* the disease than the general public. In that case, the plaintiff had been employed as a bus driver for the employer for approximately thirty years. At some point during one of his shifts, the plaintiff began experiencing pain in his left arm, shoulder, and neck. While the plaintiff requested a relief driver approximately six hours into his shift, he did not notify the director of safety and administration that he was experiencing pain for ten days and similarly did not file an employee injury and illness report for fourteen days. Further, the plaintiff initially was unsure as to whether his condition was related to his work or arose from other factors. The plaintiff subsequently was diagnosed with "double crush syndrome," a condition involving a left ulnar nerve entrapment and a cervical spine condition, and underwent two surgeries. Eventually, he was given a thirty percent permanent partial impairment rating for his left arm.

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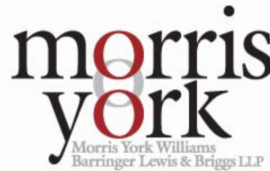
Contributory Negligence In North Carolina May Be Re-examined

If passed, House Bill 446, which was introduced on March 1, 2007, would authorize the Legislative Research Commission to issue an opinion on whether the doctrine of contributory negligence should continue to be the law in North Carolina. Under this bill, a final report and recommendation would be due in 2009. Currently, only four jurisdictions other than North Carolina still apply this doctrine: Maryland, the District of Columbia, Virginia and Alabama.

Need Continuing Education?

As a service to our clients, we have prepared liability and workers' compensation seminars that we can present in-house. The content of the seminars has been approved by the North Carolina Department of Insurance for 3 P&L credits. Our liability seminar addresses such topics as: UM/UIM questions, basic insurance coverage issues, illegal immigrants, imputed negligence, attorneys' fees and recent case law. Our workers' compensation seminar addresses such topics as: managing compensability, managing disability, ex parte communications, medicare set asides, catastrophic claims, illegal aliens and worker's compensation; and recent and relevant case law.

Please let us know if you would be interested in one or both of our seminars.



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In a letter and during deposition testimony, the plaintiff's physician provided several statements regarding aggravation of the plaintiff's condition, but did not give any firm opinions as to whether the plaintiff's employment placed him at a greater risk of contracting his condition than the general population.

In reviewing the case, the North Carolina Supreme Court noted that pursuant to N.C. Gen. Stat § 97-53(13), an occupational disease is compensable if a plaintiff can satisfy that: (1) the disease is characteristic of persons engaged in the particular trade or occupation in which the plaintiff is engaged; (2) the disease is not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there is a causal connection between the disease and the plaintiff's employment. The first two elements are satisfied if the employment exposed the plaintiff to a greater risk of *contracting* the disease than the public generally. Accordingly, even where a plaintiff's condition may have been aggravated but not generally caused by his employment, the plaintiff must still show that that his employment placed him at a greater risk of *contracting* his condition. Aggravation of a preexisting condition is only sufficient toestablish causation, i.e., the third prong. Focusing on the first and second elements, the Supreme Court held that the plaintiff's evidence only demonstrated that his injuries were aggravated by his employment and therefore he failed to demonstrate that he sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13).

Following the decision in Chambers, the North Carolina Court of Appeals issued a decision tracking the occupational disease analysis set forth by the North Carolina Supreme Court. Specifically, in Thomas v. McLaurin Parking Co., the Court of Appeals held that even though the plaintiff presented evidence that his job placed him at an increased risk of aggravating his arthritis, he failed to establish a compensable occupational disease where he did not demonstrate that his employment placed him at a greater risk of *contracting* or *developing* his debilitating arthritis condition in the first place.

Subsequently, in Hassell v. Onslow County Board of Education, the Court of Appeals, although not citing Chambers, held that the plaintiff failed to establish that her employment as a sixth-grade school teacher placed her at an increased risk of developing generalized anxiety than the general public. In that case, the Court of Appeals' analysis focused on the plaintiff's inability to perform her job duties rather than anything caused by the defendant or anything unusual the plaintiff was required to do as a teacher. In issuing its decision, the Court of Appeals also determined that the opinion of the plaintiff's physician, in which he said that the plaintiff's employment placed her at a greater risk of developing generalized anxiety disorder, was entitled to little weight where he did not review the plaintiff's employment records and did not identify

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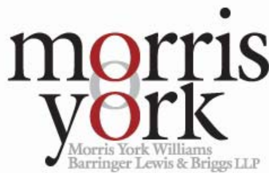

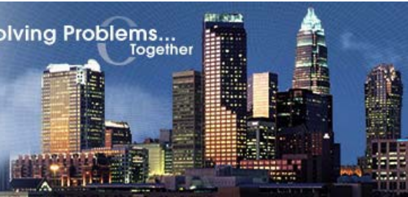

specific factors unique to the plaintiff's job.

TIP: These recent decisions will certainly provide sound legal authority to contest and defend future occupational disease claims. When evaluating claims, insureds should obtain and review all available records before considering whether to accept an occupational disease claim as compensable. Insureds should pay particular attention to cases where physicians merely express an opinion that a plaintiff's employment aggravated a preexisting condition. Under Chambers and its progeny, the plaintiff's employment must have exposed the plaintiff to an increased risk of *contracting*, rather than aggravating, the disease in question. Further, as set forth in Hassell, it is important to determine whether a treating physician, who has rendered an opinion as to compensability, has reviewed a plaintiff's employment records or identified specific factors unique to a plaintiff's job.

Compensability Of An Injury Due To A Specific Traumatic Incident Under N.C. Gen. Stat. § 97-2(6)

The North Carolina Supreme Court also in Chambers issued a favorable decision for the defense as to the compensability of an injury due to a specific traumatic incident under N.C. Gen. Stat. § 97-2(6). Pursuant to N.C. Gen. Stat. § 97-2(6), a back injury is compensable if a plaintiff proves that such injury occurred by accident or arose from a specific traumatic incident. If proceeding under the specific traumatic incident theory, a plaintiff must demonstrate that his injury was the direct result of a definite traumatic event of the work assigned.

Applying the plain language of the statute to the facts of the case, the Supreme Court concluded that the plaintiff failed to identify a definite traumatic event causing his cervical spine injury. Instead, the plaintiff only described a gradual onset of pain and was unable to determine what caused his injury, even at one point stating that he might have injured himself doing yard work. The Supreme Court noted that a "specific traumatic incident" must not have developed gradually but must have occurred at a judicially cognizable time. In other words, a plaintiff must show when, within a reasonable period, the specific injury occurred. The Supreme Court further held that the onset of pain is not a specific traumatic incident, but rather the result of a specific traumatic incident. The Court listed several examples of specific traumatic incidents, including cases in which plaintiffs loaded a box into a vehicle, slipped on rainwater, lifted a forty-pound box of syrup out of a truck, carried a heavy spotlight backwards up a flight of stairs, and carried a door while climbing down a ladder.

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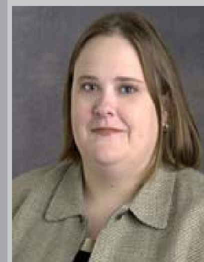
Welcome!

Angela Easley joined the firm in January of 2007.She earned her law degree from Cambell University Norman Adrian Wiggins School of Law in 2000. Prior to joining the firm, Ms. Easley served as a federal law clerk to the Honorable Fernando M. Olguin at the United States District Court for the Central District of California in Los Angeles, California.

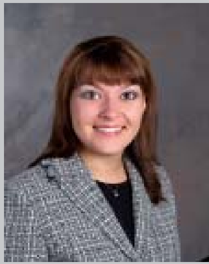
Jodi Ramsey joined the firm in March of 2007.She earned her law degree from the University of South Carolina School of Law in 2006. She practices in the areas of business and commercial litigation as well as worker's compensation.

Congratulations!



We are pleased to announce that **Heather Graham Connor** has become a partner in the firm effective January 2007. Ms. Connor joined the firm in 2003. She is a trial attorney practicing in the areas of civil and commercial litigation, insurance coverage, insurance defense, premises liability, and construction litigation.

Spotlight!



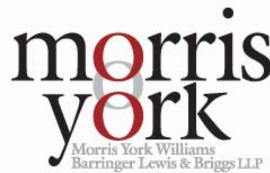
Robyn Lacy is a trial and appellate lawyer who practices in the areas of liability, insurance coverage, and workers' compensation defense.

Ms. Lacy has experience with insurance coverage issues and automobile liability. She has completed over 20 trials to verdict. She has argued carrier and employer's positions to the Full Industrial Commission.

Ms. Lacy is licensed to practice and a member of the North Carolina State Bar. She is also a member of the United States District Court for the Western District of North Carolina. She is a member of the North Carolina and Mecklenburg County Bar Associations, as well as the North Carolina Association of Defense Attorneys and the Defense Research Institute. She is also a member of the West Virginia University alumni organization,NCICIE and St. Patrick's Catholic Church.

Ms. Lacy's interests and hobbies include: reading, taking her dogs to the park, traveling and West Virginia University football. Her heros and mentors in life are her parents. They have been shining examples of every aspect of life from a loving couple, wonderful parents, successful professionals, community service and faith.

Recently Ms. Lacy was published in Winter 2007 edition of The Defender for an article on premises liability, has assisted in giving seminars to insurance claim representatives and will be presenting a CLE on civil trial practice in the fall in Charlotte.



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TIP: When evaluating back claims, insureds should pay particular attention to situations in which an injured worker describes a gradual onset of back pain rather than any specific incident. It also will be important to determine what the worker was doing when his back pain started. If a worker was performing his normal job in a normal manner and a specific event cannot be identified as to the cause of his back pain, the claim should be denied as noncompensable pursuant to Chambers.

Traffic Stop By Police Does Not Constitute "Use" Of Vehicle

In Smith v. Harris, 640 S.E.2d 436 (2007), the Court of Appeals held that a state trooper's injuries, which were incurred during a foot chase that ensued from a routine traffic stop, did not arise out of the "use" of the vehicle that had been stopped. Plaintiff state trooper had directed the driver of an automobile to pull over. When the driver ran from his vehicle, the state trooper twisted his ankle while pursuing the driver through a field.

The state trooper had a personal liability policy with UIM coverage. After arbitration in this matter, the UIM carrier was ordered to pay $45,000.00 to the state trooper. However, the UIM carrier argued that the trooper's broken ankle was not covered under the UIM policy language because the state trooper's injuries did not arise "out of the ownership, maintenance or use" of the driver's vehicle.

In making its decision, the Court determined that the trooper's injury resulted from something "wholly disassociated from, independent from and remote from" the normal use of the vehicle, and the Court found that the causal link between the driver's underinsured vehicle and the trooper's broken ankle was too tenuous and remote. Accordingly, there was no UIM coverage available for the state trooper's injuries.

" A jury consists of twelve persons chosen to decide who has the better lawyer."

- Robert Lee Frost

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