

**MARTIN & BRASINGTON, PA**

**WORKERS  
COMPENSATION  
QUESTIONS AND ANSWERS**

**FOR THE STATE OF SOUTH CAROLINA:**

**HOW LONG IS THE WAITING PERIOD FOR TEMPORARY BENEFITS?**

Eight (8) Days. Temporary benefits are payable when an employee has been out of work due to a reported work-related injury or occupational disease for eight (8) days, an employer may start temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported. The day of injury is the first day of incapacity, unless the injured person receives full pay, then the first day of incapacity is the day following. The benefits are not payable during the first seven (7) calendar days after the disability begins, EXCEPT if the disability lasts for more than fourteen (14) days, compensation is allowed for *all* lost time. *S.C. Code Ann. § 42-9-200.*

**HOW IS AVERAGE WEEKLY WAGE (AWW) CALCULATED?**

Average Weekly Wage (AWW) means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury. *S.C. Code Ann § 42-1-40.*

Average weekly wage is to be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Employment Security Commission's Employer Contribution Reports divided by fifty-two or the actual number of weeks for which wages were paid, whichever is less. *S.C. Code Ann. § 42-1-40.*

If the employee has been employed for such a short period of time that it is impractical to compute the average weekly wage, reference may be had to an employee of the same grade and character employed in the same class of employment in the same locality or community. If the foregoing method of calculation would be unfair to the employer or employee due to exceptional reasons (i.e. a particularly rapid increase in salary, such as a 63% increase in wages in less than 12 months), other methods may be employed to determine what the employee would be earning were it not for the injury. *S.C. Code Ann. § 42-1-40.*

In South Carolina, a Form 20 is used to calculate an employee's average weekly wage. The Form 20 is typically completed by the company's personnel department and forwarded to the

adjuster. The adjuster reviews the Form 20 to insure it has been completed correctly and forwards it to the Commission.

The Commission calculates the compensation rate by multiplying the average weekly wage from the Form 20 X .6667.

Generally, when an employee works at concurrent jobs, the employee's wages from his multiple jobs may be combined to compute his average weekly wage under worker's compensation law. *Steele v. Self Serve, Inc.* 335 S.C. 323, 516 S.E.2d 674 (S.C. App. 1999). The Claimant also has the burden of proving wages earned from jobs other than the one where the accident occurred, for purposes of calculating average weekly wage. *Id.*

### **WHAT IS THE MAXIMUM COMPENSATION RATE?**

1990	\$350.19
1991	\$364.37
1992	\$379.82
1993	\$393.04
1994	\$410.26
1995	\$422.48
1996	\$437.79
1997	\$450.62
1998	\$465.18
1999	\$483.47
2000	\$507.34
2001	\$532.77
2002	\$549.42
2003	\$563.55
2004	\$577.73
2005	\$592.56
2006	\$616.48

In terms of total disability for 500 weeks, the maximum compensation award for 2006 will be \$308,240. Generally, an individual must have earned \$48,061 annually (\$924.26 weekly) or more during the four quarters immediately preceding the quarter in which an accident occurs in order to be paid at the maximum compensation rate.

The average weekly wage and compensation rate is issued annually on January 1<sup>st</sup> by the Office of the Executive Director.

### **WHAT IS THE MINIMUM COMPENSATION RATE?**

The minimum compensation rate is seventy-five (\$75.00) dollars.

### **HOW LONG DOES AN EMPLOYEE HAVE TO REPORT AN INJURY?**

Ninety (90) days. No compensation shall be payable unless notice of the injury is given within ninety (90) days after the occurrence of the accident, unless a reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer is not prejudiced *S.C. Code Ann.* § 42-15-20. Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident. The employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Title prior to the giving of such notice unless employer had knowledge of the accident. *Id.*

With an occupational disease, the "accident" occurs, for notice purposes, when the workers' compensation claimant becomes disabled and could, through reasonable diligence, discover that his condition is compensable. *Muir v. C.R. Bard, Inc.* 336 S.C. 266, 519 S.E.2d 583 (S.C. App. 1999).

The statutory notice provisions for workers' compensation coverage for work-related injury should be liberally construed in favor of claimants. *Etheredge v. Monsanto Co.* 349 S.C. 451, 562 S.E.2d 679 (S.C. App. 2002).

## **WHAT IS THE NUMBER OF WEEKS FOR TOTAL AND PERMANENT DISABILITY?**

Five hundred (500) weeks for permanent and total disability and lifetime medicals. However, if the claimant is totally and permanently disabled and is either a paraplegic, a quadriplegic, or has suffered physical brain damage, the claimant is entitled to lifetime benefits. *S.C. Code Ann.* § 42-9-10.

Also, if a claimant has an impairment to the back of 50% or more, he is presumed permanently and totally disabled; therefore, receiving 500 weeks of compensation. *S.C. Code Ann.* § 42-9-30 (19).

Permanent and total disability is typically paid in lump sum, in which case it must be reduced to the present value of the remaining weeks owed. However, in cases where lifetime benefits are awarded, the award cannot be paid in lump sum.

## **WHAT ARE THE SCHEDULED PARTS WORTH?**

Disability for scheduled parts are divided into two categories. If the specific part is covered under *S.C. Code Ann.* § 42-9-30, an award must be made pursuant to the statute. If the statute does not cover the specific part, reference should be made to the scheduled parts listed in the regulations. *S.C. Code Ann.* § 42-9-30(20); R. 67-1105. **See attached chart.**

## **WHAT FORMULA IS USED TO DETERMINE WAGE LOSS/DISABILITY BENEFITS?**

Calculation of disability for scheduled injuries is done according to a formula set out in the Workers' Compensation Act. Each body part is assigned a particular number of weeks in *S.C. Code Ann.* § 42-9-30. To determine the disability of an individual, the employee's compensation rate is multiplied by the number of weeks for the injured part set out by the statute and then multiply the resulting amount by the percentage of impairment that the doctor has given the claimant to determine the amount of disability benefits owed.

FORMULA: (Comp Rate X # weeks) X % impairment rating = Disability Benefits Owed

*Example:* Employee has a compensation rate of \$100. He has suffered an injury to his leg. His doctor released him to go to work at Maximum Medical Improvement (MMI) and gave him a 10% impairment rating to the leg. The leg is valued at 195 weeks. Based on this information Claimant would be awarded \$1950.00

$$(\$100 \times 195 \text{ weeks}) \times .10 = \$1950.00$$

Disability does not equal Impairment. Unlike some states, impairment is an "objective" finding by the medical provider. Disability is a "subjective" factual determination made by the Commission in South Carolina. Impairment is but one factor in the determination of disability. Age, physical condition, education, training, nature of the injury, and work experience are some of the other factors the Commission may take into consideration, as well as their subjective opinion. The AMA Guide is relied upon by the Commission in some, not all, situations. It is not unusual for the Commission to award an amount in excess of the claimant's impairment rating.

The kind of disability determinations can result in unpredictable awards. For instance, a 60 year-old, illiterate brick layer with a 20% impairment rating to his back and 15 pound lifting restriction may be given a permanent and total award because of his reduced ability to earn a living.

### **Clincher Agreements**

A Clincher Agreement is entered between an employee and the company to permanently resolve a claim without any additional liability. Once a Clincher Agreement has been entered, an employee cannot ever come back with complaints about the same injury and he/she has no claim for a change of condition.

*Practice Note:* In South Carolina, a Clincher Agreement involving a pro se claimant must be approved at an informal conference before a Commissioner. The Commission will not approve a Clincher Agreement with a pro se claimant unless the pro se claimant is receiving some amount in excess of his impairment, typically an additional 5%. For example, pro se claimant has a 10% impairment to the back, the Commission will require a Clincher amount equal to 15% or greater. The Commission's rationale for this is that the pro se claimant is giving

up certain rights by entering a Clincher Agreement and may be getting a lower settlement than he would if represented by an attorney.

If a claimant is represented by an attorney and a settlement is reached, no informal conference is required.

### **MAY THE AMOUNT OF TEMPORARY TOTAL DISABILITY PAID BE CREDITED TOWARD THE AMOUNT ENTITLED FOR PERMANT PARTIAL DISABILITY?**

Typically, NO. However, it is credited in a permanent and total disability case.

### **WHAT IS A COMPENSABLE INJURY?**

A compensable injury is “an injury by accident arising out of and in the course of the employment and shall not include a disease, except when it results naturally and unavoidably from the accident.” *S.C. Code Ann.* § 42-1-160

The courts have been extremely liberal in interpreting the language of this statute. In determining whether something constitutes "injury by accident" the focus is not on some specific event, but on the injury itself. In determining whether something constitutes "injury by accident" under workers' compensation law, no slip, fall or other fortuitous event or accident in cause of the injury is required; unexpected result or industrial injury is itself considered the compensable accident. *Creech v. Ducane Co.*, 320 S.C. 559, 467 S.E.2d 114, (S.C.App. 1995). The Court of Appeals in *Creech*, ruled that an...

"Injury by accident" under workers' compensation law includes not only injury the means or cause of which is an accident, but also an injury which is itself accident, that is, an injury occurring unexpectedly from the operation of internal or subjective conditions, without prior occurrence of any external event of accidental character. *Id.*

Basically, what this means is if you suffer an injury at work, it will be presumed to be covered by workers' compensation regardless of whether the employee can point to any particular accident. In *Creech*, the claimant had previously suffered a back injury and had been compensated. His claim arose when he bent over to lift an object weighing less than one pound and re-injured his back.

*S.C. Code Ann.* § 42-1-160 defines “injury” for purposes of the Act, and requires that an injury must be “arising out of and in the course of employment.” “Arising out of” refers to the causal connection between the work and the accident. “In the course of” refers to the time, place and circumstances under which the accident occurred. Most often, these issues arise in determining whether an employee was actually working at the time of an accident. “Accident” as used in the workers compensation act, means an unlooked for and untoward event that the person who suffered the injury did not expect, design, or intentionally cause. *Yates v. Life Ins. Co. of Ga.* 291 SC 301, 353 S.E.2d 297 (S.C. App. 1987).

The language “injury by accident arising out of and in the course of the employment” requires not only that the injury occur within the period of employment, but also that it arise because of

the employment as when the employment is a contributing proximate cause. *Lee v. Wentworth Mfg. Co.* 240 S.C. 165, 125 S.E.2d 7 (1962). Also, the phrases “arising out of” and “in the course of employment” are used conjunctively. One of these elements without the other will not sustain an award. The two elements must coexist. *Dicks v. Brooklyn Cooperage Co.* 208 SC 139, 37 SE2d 286 (1946).

### **Occupational Diseases**

Occupational Diseases are also compensable, but are under a different set of criteria. The claimant must suffer from (1) a disease, (2) that arises out of and in the course of employment, (3) which is due to hazards in excess of those ordinarily incident to employment, (4) and is peculiar to the occupation in which the claimant was engaged. (5) It must be caused by a hazard recognized as peculiar to a particular trade, process, occupation, or employment, as a (6) direct results from the claimant’s continuous exposure to the normal working conditions thereof. *S.C. Code Ann.* § 42-11-10. Ordinary diseases may be occupational if produced or aggravated by distinctive conditions of employment. The aggravation, acceleration, or lighting up of a pre-existing or latent infirmity or weakened physical condition may constitute a disability of such a character as to come within the meaning of workers’ compensation acts, even though the accident would have caused no injury to a perfectly normal, healthy individual. *Ferguson v. State Highway Department* 197 S.C. 520, 15 S.E.2d 775 (S.C. 1941).

No compensation is payable for employees 1) refusal to wear safety appliance provided and required, 2) intoxication, or 3) willful intent to injure one’s self. *S.C. Code Ann.* § 42-11-100.

### **WHAT IS A NONCOMPENSABLE INJURY?**

#### **EXAMPLES: STRESS, HEART ATTACK, REPETITIOUS MOTION, COMING AND GOING, HERNIA, INTOXICATION AND HORSEPLAY.**

**Stress/Mental Injury:** Stress arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury is not a personal injury unless it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal condition of the employment and if the stress is not result of any event or series of events which is incidental to normal employer/employee relations including, but not limited to , personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner. *S.C. Code Ann.* § 42-1-160.

A mental injury which causes a mental condition may be compensable under certain circumstances. Mental injuries are compensable under workers’ compensation law if induced by either physical injury or unusual or extraordinary conditions of employment. *Getsinger v. Owens-Corning Fiberglass Corp.* 335 S.C. 77, 515 S.E.2d 104 (S.C. App.1999). “Unusual or extraordinary conditions in employment, “required for a workers’ compensation claimant to recover for a mental-mental injury, refers to conditions extraordinary to the particular job in which the injury occurs, rather than to employment in general. *Shealy v. Aiken County* 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000).

**Repetitive Motion Injuries:** There used to be no reported decisions on repetitive motion injuries in South Carolina; however, *Pee v. AVM, Inc.* changed history. *Pee* stated that the claimant's carpal tunnel syndrome was compensable under the workers' compensation Act as an injury by accident; although claimant experienced her symptoms from some time during her repetitive work activity, there was no indication that she expected or intended the resulting condition of median nerve compression. 344 S.C. 162, 543 S.E.2d 232 (S.C. App. 2001). An injury need only be unexpected in order to be considered an injury by accident under the Workers' Compensation Act; there is no requirement in the Act that the injury be distinct, as opposed to gradual. *Id.*

**Heart Attack/Stroke:** A heart injury, when brought on by overexertion or strain in the course of work, is compensable, though a pre-existing pathology may have been a contributing factor. But in order to obtain an award for any accidental injury resulting from aggravation of heart trouble, there must be a sudden, unusual exertion, violence or strain. *Raley v. Camden* 222 S.C. 303, 72 S.E.2d 572 (1952).

A heart attack suffered by an employee constitutes a compensable accident under the Workers' Compensation Act if it is induced by unexpected strain or overexertion in the performance of his duties of employment, or by unusual and extraordinary conditions in employment; however, if a heart attack results as a consequence of ordinary exertion that is required in performance of employment duties in an ordinary and usual manner, and without any untoward event, it is not compensable as an accident. *Shealy v. Aiken County* 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000).

If an employee dies of a heart attack, cerebral hemorrhage, apoplexy or other injury to the blood vessels, he or she must show not only that the injury was in the course of employment but also that the death arose out of employment, in that it was brought about by unexpected strain or over-exertion, or as a result of unusual and extraordinary conditions of employment; however, if such an injury results as a consequence of the ordinary exertion that is required in the performance of the employment duties in the ordinary and usual manner, and without any outward untoward event, it is not compensable as an accident. *Jennings v. Chambers Development Co.* 335 S.C. 249, 516 S.E.2d 453 (S.C. App. 1999).

**Intoxication:** An injury resulting from an employee's intoxication is not compensable. *S.C. Code Ann.* § 42-9-60. The rule applies even if the alcohol is provided by the employer. *Spoone v. Newsome Chevrolet Buick*, 412 S.E.2d 434 (Ct. App. 1991). However, the intoxication must be causally related and the proximate cause of the injury. For intoxication to be a bar to recovery, it must be the proximate cause of the injury, and not just precede the injury. *Kinsey v. Champion Am. Service Center* 268 S.C. 177, 232 S.E.2d 720 (S.C. 1977).

**Coming and Going:** When an employee is injured off the employer's premises while coming to or going from work, the injury is generally not compensable. There are, however, numerous exceptions making the injury compensable:

- 1) If the employer provided the means of transportation or pays travel time;

- 2) If the employee performs duty or task connected with his employment during the commute;
- 3) If the way used is inherently dangerous and it is either (a) the exclusive way of egress or ingress to and from work or (b) it is constructed and maintained by employer;
- 4) If the place where the injury occurs is in such close proximity to the workplace that it is brought within the scope of employment; and
- 5) If the injury occurs while the employee is on a special errand for the employer.  
*Aughtry v. Abbeville County School District. No. 60, 332 S.C. 453, 504 S.E.2d 830, rehearing denied, reversed 340 S.C. 604, 533 S.E.2d 885 (S.C. App. 1998).*

**Hernia:** In an attempt to limit compensation to those cases when there is a close connection between the accidental injury and the hernia, and to ensure that only work-induced hernias are compensable, the legislature has prescribed five elements that a claimant must establish in addition to showing that the hernia resulted from an injury by accident arising out of and in the course of his employment. These elements are: (1) that there was an injury resulting in a hernia or rupture; (2) that the hernia or rupture appeared suddenly; (3) that it immediately followed the accident; (4) that it did not exist prior to the accident for which compensation is claimed; and (5) that it was accompanied by pain. *S.C. Code Ann. § 42-9-40.*

**Horseplay:** Horseplay may involve an injured “innocent victim” or an “instigator.” Generally, the injury of an innocent employee in the course of his employment by the horseplay of a fellow employee in which the injured did not participate, arises out of the employment and nothing more appearing, is compensable. *Allsep v. Daniel Const. Co., 216 S.C. 268, 57 S.E.2d 427 (S.C. 1950).* The compensability of injuries sustained by an instigator remains an unresolved question in South Carolina, but the language of some opinions suggests instigator’s injuries are not compensable.

**Intentional Acts:** The Workers’ Compensation Act provides that no compensation is payable where an injury or death is the result of an employee’s willful intention to injure or kill himself or another.

## **IS THERE A TIME LIMIT TO FILE A WORKERS’ COMPENSATION CLAIM?**

**Notice of the accident:** No compensation shall be payable unless notice of the injury is given within ninety (90) days after the occurrence of the accident, unless (1) the employee demonstrates a reasonable excuse for his failure to give notice, and it is made to the satisfaction of the Commission and (2) the Commission is satisfied that the employer has not been prejudiced. *S.C. Code Ann. § 42-15-20.*

### **Statute of Limitations:**

A Claimant has two (2) years after she discovers she has a compensable injury to file a workers’ compensation claim. The right to compensation for accidental injuries “shall be forever barred unless a claim is filed with the Commission within two (2) years after an accident, or if death resulted from the accident, within two (2) years of the date of death.”

For an occupational disease, the two year period does not begin to run until the afflicted employee has been definitely diagnosed as having an occupational disease and has been notified of such diagnosis.

Also, an act of the employer may constitute estoppel to plead the statute of limitations if the employer made representations that misled the claimant, who, acting upon them in good faith, failed to commence his action within the statutory period.

**Change of Condition:**

There is also a statute of limitations for a Change of Condition *S.C. Code Ann.* § 42-17-90. A change in the claimant's physical condition as a result of the original injury, occurring after the first award must be made twelve (12) months from the date of the last payment of compensation.

**WHAT IS EXPOSURE TO BAD FAITH?**

There is no cause of action for bad faith refusal to pay workers' compensation in South Carolina. *Mack's Transfer & Storage v. Cook*, 355 S.E.2d 861 (Ct. App. 1986). The Court of Appeals held that a worker who sustains injury covered by the Workers' Compensation Act may not bring separate action in courts for damages if employer and employer's insurance carrier allegedly act in bad faith in processing and paying his claim. However, if the Commission determines that an employer/carrier has withheld temporary benefits on an admitted claim in violation of *S.C. Code Ann.* § 42-9-260, then the employer/carrier may be subjected to a penalty of 25% of the amount improperly withheld.

**DOES THE EMPLOYER HAVE TO BEGIN PAYING TTD BENEFITS FROM THE DATE DISABILITY BEGINS?**

NO. If the case is denied, no benefits are due until ordered by the Commission.

**COULD THERE BE ANY PENALTIES FOR NOT BEGINNING BENEFITS PROMPTLY?**

YES. If the case is admitted, benefits must be paid promptly according to the regulations. A penalty and/or interest may be assessed for late payments. *R. 67-1602 (D)*. The interest is ten (10) percent of the unpaid installment. *S.C. Code* § 42-9-90. See also *S.C. Code Ann.* § 42-9-230. Temporary benefits may be terminated up to 150 days after the injury is reported. Ground for termination of temporary benefits is discussed more thoroughly below.

**WHAT IS THE RULE ON TERMINATING TEMPORARY BENEFITS?**

Temporary Compensation is due on the eighth (8<sup>th</sup>) calendar day of incapacity and payments may continue for up to 150 days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making first payment, the employer immediately shall notify the commission, in accordance with the form prescribed by the

commission, that payment of compensation has begun. If incapacity lasts for more than 14 days, then benefits are due for the first seven. The company's insurance adjuster is responsible for filing a partially completed Form 15 when payment of temporary benefits begins (Section I of the form). The Form 15 must be filed with the Claims department and served on the claimant with the claimant's first check. *S.C. Code Ann.* §42-9-260.

### **Within 150 Days**

Within the first 150 days from the date the injury is reported, the claim may be denied, even if the employer has begun payment of temporary benefits. There are six grounds for stopping payment of benefits during the initial 150 days:

- (1) The employee has returned to work. However, if the employee does not remain at work for a minimum of 15 days, temporary disability payments must be resumed immediately; or
- (2) The employee agrees that he/she is able to return to work and executes the proper Commission form (Form 17) indicating that he/she is able to return to work; or
- (3) A good faith investigation by the employer reveals grounds for the denial of the claims; or
- (4) The employee has been released by the treating physician to work without restriction and the employer offers comparable employment; or
- (5) The employee has been released by the treating physician to limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released; or
- (6) The employee refuses medical treatment or refuses an examination or evaluation and the termination or suspension of benefits continues until the refusal ceases or the Commission determines that the refusal is justified.

### **After 150 Days**

After the 150 day period has expired, the employer's representative shall not suspend or terminate temporary compensation except as provided in *R.67-506*.

Temporary compensation may be suspended as follows:

- (1) When the authorized health care provider reports the claimant is able to return to work without restriction to the same or other suitable job and such job is provided by the employer;
- (2) When the authorized health care provider authorizes the claimant is able to return to work at limited duty and employer provides limited duty work consistent with the restrictions.
- (3) When the claimant returns to work for another employer, unless temporary partial compensation is due.

With all of the above, the compensation may be suspended unless temporary partial compensation is due.

After the 150 day period has expired, the commission shall provide by *Regulation 67-505* the method and procedure by which benefits may be suspended or terminated for any cause, but

the regulation must provide for an evidentiary hearing and commission approval prior to termination or suspension unless such prior hearing is expressly waived in writing by the recipient or the circumstances identified in (1) or (2) above are present. Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due.

Failure to comply with this section shall result in a twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in this section.

When compensation is terminated or suspended, the employer's representative shall complete Section II of the Form 15, Temporary Compensation Report. The employer's representative shall file the Form 15 immediately with the Claims Department and shall serve two copies of the Form 15 immediately on the claimant. The claimant may request a hearing to dispute the termination of temporary compensation by completing Section III of the Form 15 and filing it with the Commission.

If an injured employee refuses to sign a Form 17 in any of the three cases noted above, then the employer is required to continue paying temporary benefits and file a Form 21 with the Commission to obtain permission to stop payment.

When the claimant is unable to complete 15 calendar days of work, the employer's representative shall reinstate compensation according to the terms of the Form 15, but may request a hearing to determine compensation by filing a Form 21.

If the claimant completes 15 calendar days of work, or 15 days after the claimant agrees he/she could have returned to work, the claimant should be provided with a completed Form 17 for signature. The signed Form 17 must be filed with the Claims Department within 31 days of the date the claimant returned to work or agreed he/she was able to return. Filing the form 17 terminates temporary compensation. If claimant returns to work and refuses to sign a Form 17, the employer may file a Form 21, request for hearing. When the employer's representative suspends benefits for a claimant's refusal of medical treatment, the employer must file a Form 21 also.

*Regulation 67-506* states that if the claimant is receiving temporary benefits and the authorized health care provider reports that the claimant may return to work at the same or other suitable job and such job has been offered by the employer but the claimant refuses to return to work, the employer must continue payment of temporary compensation. Likewise, if the claimant is receiving temporary benefits and the authorized health care provider assigns an impairment rating and reports the claimant is unable to return to work at the same or other suitable job, the employer must continue payment of temporary benefits.

In instances such as these and also where the employee and employer do not agree to a suspension or termination of benefits, the employer must request a hearing to terminate benefits by filing the Form 21. The Form 21 must be accompanied by supporting documentation such as doctor's report, or unsigned Form 17, Form 18, Form 19 or 20 (if not previously filed). The Form 21 must be served on the claimant according to *R 67-211*. The Commission may schedule

an informal conference to certify a Form 17 when compensation has been suspended according to R.67-505.

### **DOES THE CLAIMANT HAVE TO SUSTAIN A SPECIFIC OCCURRENCE OR TRAUMA IN ORDER TO HAVE A COMPENSABLE CLAIM?**

NO. In *Creech v. The Ducane Co.* (467 S.E.2d 114, SC Ct. App. 1996) the Court of Appeals ruled that "In determining whether something constitutes "injury by accident" under workers' compensation law, no slip, fall or other fortuitous event or accident in cause of injury is required; unexpected result or industrial injury is itself considered the compensable accident." *Id.* Proof of the "causative event" is not required to establish "injury by accident" under workers' compensation law. The claimant had previously suffered a back injury and had been compensated. He later re-injured his back, when he bent over to lift an object weighing less than one pound, bringing about this case.

### **WHAT IS THE RULE ON CHOICE OF PHYSICIAN?**

The employer's representative chooses authorized health care providers and pays for authorized treatment. R. 67-509; S.C. Code Ann. §42-15-60. It is always recommended that an employer develop a network of doctors who are acquainted with industrial medicine. If a claimant goes to his own doctor after an injury and is excused from work, the employer can require the employee to be evaluated by the company doctor and return to work if the company doctor so directs. Further, the employer/carrier is only responsible for payment of services by authorized medical providers. An employer is not responsible to pay for other doctors or care providers an employee might seek attention from, unless the company doctor has referred the employee to those doctors or other care providers.

In the past, once an injured employee had been taken out of work by the company doctor, a company representative would maintain contact with that doctor to determine

- (1) when the employee may return to work;
- (2) what restrictions applied to the employee;
- (3) when the employee had reached MMI; and
- (4) whether the employee had any permanent impairment.

There were no restrictions on communicating with any doctor treating the employee in South Carolina.

HOWEVER, *Brown v. Bi-Lo, Inc.*, (S.C. Sup. Ct. Opinion No. 25662) abruptly changed this behavior. The South Carolina Supreme Court said that S.C. Code Ann. §42-15-95, governing disclosure of medical information only allowed disclosure of existing written medical reports. This means employers and carriers can no longer contact doctors, other than to obtain written medical reports, without the Claimant's consent or by means of deposition. The only way to alter this new case law will be implementation of new legislation.

## **AFTER SETTLING A CLAIM, CAN IT BE REOPENED FOR A CHANGE OF CONDITION?**

YES (with an exception). The claim may be reopened for a change of condition for up to one year from date of the last payment. The exception comes in when the claim was settled on a Clincher Agreement. R.67-801(E) The Clincher Agreement or final release relieves the employer and its representative from any further responsibility for payment of compensation or medical expenses even if the claimant's medical condition worsens. When there has been no clincher agreement, if there has been a change of condition, the Commission may end, diminish, or increase the previous compensation award. The review cannot be made after twelve months from the date of the last payment of compensation made pursuant to the previous award. S.C. Code Ann. §42-17-90.

Under S.C. Code Ann. §42-17-90, the review of an award based on a change of condition is sharply restricted to the question of the extent of improvement or worsening of the injury on which the original award was based; consequently, the statute is not applicable to a claim which was not previously compensated. *Owenby v. Owens Corning Fiberglass*, 313 S.C. 181, 437 S.E.2d 130 (S.C. App. 1993). A change in condition means a change in the physical condition of the claimant as a result of the original injury, occurring after the first award. *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 153 S.E.2d 697 (1967). If a claimant seeks review, the claimant must prove a change of condition and a causal connection between the change and the original compensable accident. The issue of change and causation are issues of fact to be determined by the Commission. *Allen v. Benson Outdoor Advertising Co.*, 112 S.E.2d 722 (S.C. 1960). If claimant's mental condition is causally connected to the original, compensable physical injury, and is a newly manifested symptom of original injury which has caused worsening of the condition it can be considered in the change of condition proceeding. *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 482 S.E.2d 577, rehearing denied (S.C. App. 1997).

The claimant may request an informal conference by letter to have the employer pay for a medical evaluation to determine if there has been a change of condition. R.67-602(C).

## **CAN A CLAIM BE LUMP SUM SETTLED?**

YES. However, compensation is normally paid on a weekly basis. Whenever any weekly payment has been continued for not less than six weeks, the liability for weekly payment may be redeemed by the payment of a lump sum fixed by the Commission. Payment by lump sum is possible if it is not contrary to the employee's best interest and it is either (1) requested by the employee, or (2) requested by the employer to prevent undue hardship. The burden of showing facts sufficient to justify a lump sum settlement is on the claimant. *Ashley v. Ware Shoals Mfg. Co.* 210 S.C. 273, 42 S.E.2d 390 (S.C. 1947). Undoubtedly it was intended that periodic payments should be the rule and lump sum settlements the exception. *Id.*

The lump sum may not be less than ninety (90%) percent of the commuted value of the future installments. The future installments must be commuted so as not to exceed six percent (6%) nor be less than two percent (2%). S.C. Code Ann. §42-9-301. The Commission may not order a

lump sum payment without notice to the employer and carrier, who are entitled to be heard on the issue. *Todd v. Holt & Vereen Constr. Co.*, 281 S.E.2d 215 (S.C. 1981). *Regulations 67-1605* (lump sum payments) and *R. 67-1606* (lump sum payments in claims involving fatalities) provide a specific procedure for lump sum payments. *R.67-1605* states that the employer's representative shall pay, in lump sum, a settlement or award which is less than one hundred weeks. When a settlement or award is more than one hundred weeks, the Hearing Commissioner may order a lump sum payment or the claimant may request a lump sum payment by filing a WCC Form 24, Application for Lump Sum Payment.

### **CAN A CLAIM BE SETTLED WITHOUT COURT/COMMISSION APPROVAL?**

Ordinarily NO, but if a claim is very minor it does not have to be reported to the Commission or the carrier. Additionally, if a claim is for "medicals only," the case may be closed by filing a WCC Form 12-M. When an injury requires less than \$500 in medical treatment and does not cause more than one (1) lost work day or permanency, the employer may pay for the medical treatment. The employer is not required to make a written report to the employer's representative or to the Commission. When an injury requires less than \$2,500 in medical treatment and does not result in compensable lost time or permanency, the employer's representative shall retain the Form 12-A (First Report of Injury) filed by the employer for two years. The employer's representative shall make a report of the injuries in this category on a Form 12-M to the Commission's Accident Reporting Division annually on April 1st. Those injuries which exceed \$2,500 in medical treatment or result in compensable lost time or the possibility of permanency must be reported within ten business days after the occurrence or knowledge of the injury.

### **WHAT, IF ANY, IS THE TIME LIMIT FOR COMPENSATION, TTD, AND MEDICAL BILLS TO BE PAID? ARE PENALTIES A POSSIBILITY? WHAT ARE THOSE PENALTIES?**

#### **Compensation**

Under Agreement: The first installment of compensation, payable under the terms of an agreement, is due on the fourteenth day after the employer has knowledge of the injury or death. Thereafter, it must be weekly (or monthly if ordered by the Commission) on the same day of week. *S.C. Code Ann.* §42-9-230.

Under Award: The first installment of compensation payable under the terms of an award by the Commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court, including interest from the original date of the award. Thereafter, it must be paid weekly. *S.C. Code Ann.* §42-9-240.

## **TTD**

Temporary Benefits are due eight (8) days after incapacity. If benefits are improperly withheld, an employer may be subjected to a 25% penalty based on the amount withheld. *S.C. Code Ann.* §42-9-260.

For General disability, the period covered by compensation may not exceed five hundred weeks. However, if the claimant is totally and permanently disabled and is either a paraplegic, a quadriplegic, or has suffered physical brain damage, the claimant is entitled to lifetime benefits. *S.C. Code Ann.* §42-9-10. The limit for TTD in partial disability claims is outlined in the schedules and charts referenced above and attached. If an employer's representative suspends, terminates or reduces temporary benefits without first complying with all necessary procedures, the claimant may be entitled to additional compensation and penalty. *R.67-510.*

## **Medical Bills**

Payment to an authorized health care provider for services shall be made in a timely manner, but no later than thirty (30) days from the date the authorized health care provider tenders request for payment to the employer's representative, unless the Commission has received a request to review the medical bills. *S.C. Code Ann.* §42-9-360(D). Medical treatment, as may be reasonably required, shall be provided by the employer for a period not exceeding ten weeks from the date of injury to effect a cure or give relief and for additional time with judgment by the Commission if it will tend to lessen the period of disability. *S.C. Code Ann.* §42-15-60. There is no liability on the part of an employer to furnish medical treatment to an injured employee beyond ten weeks from the date of injury unless in the judgment of the Commission it "will tend to lessen the period of disability." *Dykes v. Daniel Const. Co.* 262 S.C. 98, 202 S.E.2d 646 (S.C. 1974). Medical benefits provision of Workers' Compensation Act allows the Workers' Compensation Commission to award medical benefits beyond 10 weeks from the date of injury only where the Commission determines such medical treatment would tend to lessen the period of disability. *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (S.C. App. 1999).

## **WHAT IS THE SECOND INJURY FUND AND WHAT IS THE CRITERIA FOR FILING FOR SECOND INJURY FUND RECOVERY?**

It was in part, the variety of claims that have now become compensable, as well as a desire to have employers hire workers who were previously injured, that brought about the creation of the Second Injury Fund.

Through the Second Injury Fund, an employer can be reimbursed for a portion of the money it has to pay out on a workers' compensation claim if the injured worker has a pre-existing injury or condition, and the pre-existing injury/condition is aggravated by the work injury.

### **Criteria for filing for the Second Injury Fund Recovery**

The simplest way to qualify for recovery is to have both (1) an affidavit from the employee stating that he/she did not know of the pre-existing condition and (2) a listed pre-existing condition.

\*Attached is a copy of the statutory provision on Second Injury Fund reimbursement, which includes a chart of all the listed conditions. *S.C. Code Ann.* §42-9-400.

What situation would place responsibility on the employer to pay claimant attorney fees?

1. In appeals to the Supreme Court or Court of Appeals, costs are taxed against the appellant when an appeal is dismissed or affirmed. When a judgment is reversed, costs are taxed against the respondent. Costs include attorney's fees of \$750.00.
2. Frivolous Actions: While an uncharted area of South Carolina Law, the South Carolina Frivolous Civil Proceedings Sanctions Act applies to workers' compensation proceedings. *S.C. Code Ann.* §15-36-10.

### **ARE THERE ANY STATE REQUIREMENTS FOR VOCATIONAL REHAB?**

NO. The South Carolina Vocational Rehabilitation system is usually free. The Commission has been known to recommend, but not require or order vocational rehabilitation.

### **ARE THERE ANY PENALTIES AGAINST THE EMPLOYER FOR UNSAFE WORK CONDITIONS?**

*S.C. Code Ann.* §42-9-70, the statutory provision that used to cover this subject, has been repealed and no longer exists. However, the employer may face penalties under OSHA.

### **IS THERE ANY RECOVERY FOR CLAIMS OF FRAUD?**

*S.C. Code Ann.* § 42-1-540 "excludes all other rights and remedies...at common law or otherwise..." The employer is therefore relieved of common law tort liability as well as state and federal statutory liability for a covered injury.

The frivolous Civil Proceedings Act, *S.C. Code Ann.* §15-36-10, allows a party to seek reimbursement of attorney's fees and costs for frivolous claims as determined by the Act.

### **Fraud in the Application of Employment**

Due to the adoption of the Americans with Disabilities Act (ADA), this defense has been significantly reduced in its applicability. Previously an employer could avoid liability, if (1) an employee knowingly and intentionally falsified his pre-employment questionnaire/application concerning his physical condition, and (2) the employer relied upon the false representation, and the employer's reliance was a substantial factor in hiring that employee, and finally (3) there was a causal connection between the false representation and the injury the employee suffered.

With the implementation of the ADA, employment applications do not include questions about an employee's previous injuries. Since employment applications do not request information about past injuries, the employee does not have the opportunity to make a false representation; therefore, this defense has arguably been eliminated.

*For Example:* An employee has a pre-existing back injury. On his employment application to become a furniture mover, he states that he is in perfect physical condition with no prior injuries. The furniture co. relies on his false application, believing that he has a good back, and hires him. Subsequently, the employee is moving furniture and re-injures his back. The falsification of the employment contract may be a valid defense to payment of the claim.

## **WHICH PROSTHETIC DEVICES ARE COVERED AND FOR HOW LONG?**

*S.C. Code §42-15-60* grants lifetime replacement of prosthetic devices. All prosthetic devices which a doctor finds necessary in relation to the work injury are covered.

## **HOW ARE DEATH BENEFITS COMPENSATED?**

Death benefits are set out in *S.C. Code Ann. §42-9-290*. In order to qualify as a compensable death, the employee's death must "result proximately from the accident," and occur "within two years of the accident or while total disability still continues and within six years after the accident." *Id.* *S.C. Code Ann. § 42-9-290* provides burial expenses of up to \$2,500 as well as compensation benefits. The section provides two classes of dependents: (1) wholly dependent and (2) partly dependent. "Weekly compensation benefits must be paid to persons wholly dependent in the amount of sixty-six and two thirds of the decedent's average weekly wages (typically compensation rate), but not less than \$75 nor more than the average weekly wage in this state for the proceeding fiscal year, for a period of up to 500 weeks from the date of injury." *Id.*

## **IS SUBROGATION AVAILABLE UNDER WORKERS' COMPENSATION?**

*S.C. Code Ann. §42-1-560* provides that an injured employee or his personal representative in the case of death may receive compensation benefits and enforce by "appropriate proceedings" his rights against a third party tortfeasor. The statute also states that "the carrier shall have a lien on the proceeds of any recovery from the third party, whether by judgment, settlement or otherwise..." *Id.*

South Carolina also recognizes an equitable lien in such matters.

No claim for compensation under this title shall be assignable and all compensation and claims therefore shall be exempt from all claims of creditors and from taxes. *S.C. Code Ann. §42-9-360(A)*.

## **IS THERE A STATUTE OF LIMITATIONS FOR AN INJURED MINOR? IF SO, WHAT IS IT?**

*S.C. Code Ann.* §42-15-50 provides that no time limitation shall run against any person who is mentally incompetent or a minor dependent as long as he has no guardian, trustee or committee. *S.C. Code Ann.* §42-1-590 states that “any injury while employed contrary to the laws of this State shall be compensable under this Title the same, and to the same extent, as if such minor employee was an adult.” The statute is considered to stand for the proposition that a minor may recover regardless of a false statement in an application concerning her age. *S.C. Code Ann.* §42-1-130 defines the term “employee” under the Act and provides that it shall include “minors, whether lawfully or unlawfully employed.”

## **IS THERE ANY DEFENSE FOR FALSIFICATION OF EMPLOYMENT RECORDS REGARDING MEDICAL HISTORY?**

*Small v. Oneita Industries* determined that an employee's false statement in an employment application bars recovery of workers' compensation benefits if: (1) employee knowingly and willfully makes false representation as to his physical condition; (2) employer relies upon representation and reliance is substantial factor in hiring; and (3) there is causal connection between false representation and injury. 318 S.C. 553, 459 S.E.2d 306 (1995).

If, subsequent to an employee's injury, an employer discovers the employee misrepresented his physical condition, is the employer liable for worker's compensation benefits if it fails to terminate the employee? “We find no authority to hold that the failure to terminate an employee upon discovery of a misrepresentation subsequent to an injury vitiates the employer's reliance.” *Small*(1995). To so hold would be to require an employer who learns of a misrepresentation subsequent to an injury to elect either termination, in which case it may be subject to a wrongful discharge suit, or retention of the employee, in which case it is liable for worker's compensation. *Id.* We decline to put the employers of this state on the horns of such a dilemma.

A series of cases decided by our Supreme Court and this Court have dealt with this issue: *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973), *Givens v. Steel Structures, Inc.*, 279 S.C. 12, 301 S.E.2d 545 (1983) and *McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 313 S.E.2d 38 (Ct.App.1984). All three cases involve claims for workers' compensation, and each presents the issue of what an employer must prove to escape liability for compensation, based on a misrepresentation by an applicant for employment.

In *Cooper*, the employer denied liability on the ground that the injured employee had intentionally misrepresented a previous back injury. The Industrial Commission rejected the defense. The employer appealed. The trial judge reversed, and the employee appealed. The Supreme Court reversed the decision of the trial judge. According to the Court, there was “ample evidence to sustain the finding[s] of the trial judge that the employee was guilty of fraud in securing his employment through false representation as to his previous back injury and that the employer would not have hired him had he not misrepresented his physical condition.” *Cooper* (1973). Despite these findings, however, the Court required that the employer also prove “a

causal connection between the false representation made by the appellant and his subsequent injury." *Id.* at 469, 196 S.E.2d at 836. *Givens* and *McLeod* are in accord.

Job applicant's representations to employer that he was good laborer, he had strong back, and could operate jackhammer did not amount to affirmative misrepresentations such as would warrant denial of workers' compensation benefits for subsequent back injury, though worker had suffered prior unrelated injury, absent evidence that worker believed his statements were not true or of causal connection between alleged misrepresentations and second injury.

*Small* filled out an employment application for Respondent, *Oneita Industries*, in which he denied ever having any back problems. In fact, *Small* had a twenty-five percent disability rating due to back injuries suffered in prior employment. Unaware of his back problems, *Oneita* hired *Small* as a materials handler. *Small* injured his back in March 1991 while pushing a 200 pound box full of cloth. He did not return to work but was not officially terminated subsequent to his injury. *Small's* application for worker's compensation was denied by the Single Commissioner on the ground the claim was barred by this Court's opinion in *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 196 S.E.2d 833 (1973). The Full Commission affirmed, as did the Circuit Court and the Court of Appeals. *Id.* In *Cooper*, we adopted the rule enunciated by Professor Larson that an employee's false statement in an employment application bars recovery of worker's compensation benefits if: (1) the employee knowingly and willfully makes a false representation as to his physical condition, (2) the employer relies upon the representation and the reliance is a substantial factor in the hiring, and (3) there is a causal connection between the false representation and the injury. *Id.*

## **WHAT IS THE EXPOSURE ON TERMINATING AN EMPLOYEE WHO HAS BEEN INJURED?**

Under the South Carolina "determinative factor" test, an employee alleging that an employer retaliated against him for filing workers' compensation claim must establish that he would not have been discharged but for filing claim. *Porter v. U.S. Alumoweld Co., Inc.*, 125 F.3d 243 (C.A.4 (S.C.) 1997).

The burden of proving a violation of the provisions of the anti-retaliatory discharge statute S.C. Code Ann. § 41-1-80 is on the employee. To prove workers' compensation retaliatory discharge claim, a plaintiff must establish three elements: (1) institution of workers' compensation proceedings; (2) discharge or demotion; and (3) a causal connection between the first two elements. *Hinton v. Designer Ensembles, Inc.* (S.C. 2000) 343 S.C. 236, 540 S.E.2d 94.

Therefore even if provision could be construed in a manner advocated by plaintiff to allow relief where compensation proceedings are instituted subsequent to termination, plaintiff's claim would be fatally deficient because it is undisputed that she was unable to perform duties of her job as package delivery driver because of indefinite lifting restrictions placed on her by her physician, and according to plaintiff's own testimony she was terminated because her job required her to be able to lift packages weighing up to 70 pounds, and nothing in statute prohibits termination under such circumstances. *Hines v. United Parcel Service, Inc.*, , 736 F.Supp. 675 (1990).

## **FORMS REQUIRED AND WHEN THEY NEED TO BE FILED**

The forms are published by the Workers' Compensation Commission. Packets of originals are available from the Commission on request. The packet includes an overview of the forms, highlights the most often used and the most important form and explains their usage. Most are self-explanatory and most reference the relevant regulations on the bottom margin.

**Form 12-A** –Must be filed within ten (10) days of reported accident/injury unless costs are under \$2,500 and employee loses no time from work.

**Form 12-M** –medicals only reported injury

**Form 14** –Physician's Report and Itemized Statement (prepared by Doctor's office for approval of fees).

**Form 15** –Temporary Compensation Report

Section I—filed ten (10) days after compensation begins;

Section II –filed then (10) days after compensation is terminated;

Section III –Claimant's request for hearing

**Form 15S** –Supplemental Report of Varying Temporary Partial Payments –filed when temporary compensation varies from week -to -week (six months after initial compensation begins).

**Form 16** – Supplemental Agreement for Compensation – filed when settlement is reached (other than Clincher).

**Form 17** – Receipt of Compensation – you may ask employee to sign this form fifteen (15) days after employee returns to work or agrees he can return to work. It can be signed when the "claimant returned to work without restriction," or "claimant agrees that he/she was able to return to work."

**Form 18** – Six (6) Month Report – required to be filed with Commission every six (6) months while claim is open to verify all compensation is current. Completed copy must always accompany Form 21.

**Form 19** – Status Report and Compensation Receipt –verifies the amount of compensation paid; must be filed when claim is denied or settled on a Form 16 or Clincher Agreement. This is a receipt showing that all payments due under the Clincher have been paid to the employee and the matter has been resolved.

**Form 20** – Statement of Days Worked and Earnings of Injured Employee (Wage Calculation)– must be completed and submitted within thirty (30) days after notice of injury or within thirty (30) days after receipt of Form 50, claimant's hearing request. Used to determine compensation rate.

**Form 21**– Employer’s Request for Hearing – filed with Form 18 and other appropriate documents as noted on the form. Used to stop or reduce payment of temporary compensation or pay permanent disability after a claimant reaches maximum medical improvement.

**Form 30** – If an employer or employee is not happy with the decision of a commissioner at a contested hearing, either or both parties may appeal the Commissioner’s decision. An initial appeal is made pursuant to a Form 30 filed with the Commission. It must be filed within fourteen (14) days of the losing party receiving a copy of the Commission’s Order. Appeals from the Full Commission are made to the Circuit Court of the County in which the accident occurred. Decisions of the Circuit Court may be appealed to the South Carolina Supreme Court.

**Form 50** – Claimant’s Notice of Claim and Request for Hearing – claimant must file Form 50 within two (2) years of the date of injury.

**Form 51** – Employer’s Answer to Request for Hearing – must be filed within thirty (30) days after receipt of claimant’s request for hearing.

## SECOND INJURY FUND: ELEMENTS FOR RECOVERY

- I. Criteria for recovery when pre-existing injury is a listed condition
  - A. Notice within 78 weeks:
    - i. The Fund must receive notice of a possible claim before the seventy-eight (78) week of compensation has been paid to the employee.  
\*\*Note: notice should be sent certified mail return receipt requested to both the Fund and Workers' Compensation Commission.
  - B. Pre-existing Permanent Physical Impairment
    - i. Permanent
      - 1. Pre-existing condition was permanent at the time employee was hired. Permanency is presumed when the employer knew of the pre-existing condition. While the statute does not appear to presume permanency for unknown pre-existing conditions, the Second Injury Fund has been accepting claims without proof of permanency where the pre-existing condition is listed.
  - C. Knowledge Requirement (Employer had...)
    - i. Knowledge of Condition when employee hired OR
    - ii. Knowledge of Condition and continued to employ the employee or
    - iii. No prior knowledge because the condition was known by employee and concealed by employee
  - D. Greater Liability
    - i. Either the degree of disability is greater or the employer's liability for compensation and medical payments is greater.
    - ii. "Substantially Greater" from either
      - 1. combined effects OR
      - 2. injury's aggravation of pre-existing impairment OR
    - iii. "But For" pre-existing injury, subsequent injury most probably would not have occurred OR
    - iv. No death but for
- II. Criteria for recovery non-listed conditions
  - A. Notice within 78 weeks
    - i. The Fund must receive notice of a possible claim before the seventy-eight (78) week of compensation has been paid to the employee. \*\*Note: notice should be sent certified mail return receipt requested to both the Fund and Workers' Compensation Commission.
  - B. "Permanent Physical Impairment"
    - i. Physical Impairment
      - 1. Pre-existing condition qualifies under S.C. Code Ann. §42-9-30 for more than 78 weeks; OR
      - 2. Pre-existing condition supports impairment rating of 78 weeks; OR
      - 3. Combined disability qualifies for more than 78 weeks
    - ii. Permanent

1. Pre-existing condition was permanent at the time employee was hired
- iii. Hindrance
    1. Pre-existing condition is a hindrance to future reemployment
- C. Knowledge
- i. Knowledge of Condition when employee hired OR
  - ii. No knowledge of Condition because either unknown to employee or concealed by employee
- D. Greater Liability
- i. Either the degree of disability is greater or the employer's liability for compensation and medical payments is greater.
    1. "Substantially Greater" from either
      - a. combined effects OR
      - b. injury's aggravation of pre-existing impairment OR
    2. "But For" pre-existing injury, subsequent injury most probably would not have occurred OR
    3. No death "But For" pre-existing condition