Case Law Update

and

Effective Impact of New Law

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I. Case Law Update

The following are summaries of ten cases that were impacted by the passage of Act No. 111:

Ellison v. Frigidaire, 371 S.C. 159, 638 S.E.2d. 664 (2006). INJURY TO SPECIFIC MEMBER MAY RESULT IN AWARD OF TOTAL DISABILITY IF INJURY COMBINES WITH PRE-EXISTING CONDITIONS SO AS TO RESULT IN TOTAL DISABILITY.

Ellison broke his left leg in three places. The treating physician rated his impairment as twenty per cent to the left lower extremity, and restricted him from lifting more than twenty-five pounds and from standing or walking more than six hours a day. At the time of the accident, Ellison had hypertension and prostrate cancer. Following the accident, Ellison was diagnosed with sleep apnea, diabetes, and congestive heart failure. A single commissioner awarded him total disability, concluding that the injury combined with his other medical ailments so as to render Ellison totally and permanently disabled. The appellate panel and the circuit court affirmed. The Court of Appeals reversed, citing Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) and Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960), as holding that where an injury is confined to a specific member, the award is limited by S.C. Code Ann. Section 42-9-30, the specific member statute. Ellison's petition for writ of certiorari was granted.

HELD: The Supreme Court reversed, holding that an injury to a single body member may result in a total disability award if the injury combines with pre-existing conditions so as to render the claimant totally disabled.

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Brown v. Bi-Lo, 354 S.C. 436, 581 S.E.2d 836 (2003). WORKERS' COMPENSATION ACT DOES NOT AUTHORIZE COMMUNICATION BETWEEN HEALTH CARE PROVIDERS AND AN INSURANCE CARRIER, EMPLOYER OR THEIR REPRESENTATIVES EXCEPT BY WRITTEN REPORTS OR WITH THE PATIENT'S CONSENT.

Brown moved to Pennsylvania while still receiving medical treatment for a work related accident. Bi-Lo hired a rehabilitation nurse in Pennsylvania to contact her physicians. Brown's attorney in South Carolina wrote the rehabilitation nurse and Brown's doctors warning them not to engage in communications with Bi-Lo or its representatives unless he was present. As the result of this letter, one of the physicians indicated he would not respond to Bi-Lo's representatives. Bi-Lo sought and obtained an order from a single commissioner ordering Brown's attorney to cease and desist from obstructing communications between Bi-Lo's representatives and Brown's physicians. Brown appealed the order. The full commission, circuit court and Court of Appeals affirmed the order. Brown petitioned for writ of certiorari, which was granted.

HELD: The Supreme Court reversed. It held that the Workers' Compensation Act authorized communication between health care providers and a carrier, employer or their

representatives by written reports only. To discuss the claim with a health care provider, a carrier, employer or their representatives need authorization from the employee.

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Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). MEDICAL CAUSATION MAY BE ESTABLISHED WITHOUT EXPERT TESTIMONY.

Tiller, a registered nurse, experienced pain in her lower back and right leg when the wheels on the medication cart she was pushing unexpectedly jammed. Upon medical examination, Tiller was diagnosed with discitis, a disc space infection caused by E. Coli. The single commissioner awarded Tiller temporary total weekly benefits, determining that the jamming of the medical cart wheels aggravated Tiller's pre-existing conditions of a degenerated disc and discitis. National Health Care appealed, arguing that Tiller failed to prove her case by a preponderance of the evidence because she failed to provide expert medical testimony about causation. The full commission, circuit court, and the Court of Appeals affirmed the single commissioner.

HELD: The Supreme Court affirmed the Court of Appeals. The court determined that in medically complex workers' compensation cases, the claimant doesn't have to provide expert testimony in order to establish causation. Rather, courts must consider lay and expert evidence in deciding whether substantial evidence supports a finding of causation.

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Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). SECTION 42-15-60: EMPLOYER MAY BE LIABLE FOR CONTINUED MEDICAL TREATMENT EVEN AFTER MAXIMUM MEDICAL IMPROVEMENT IF SUCH TREATMENT WOULD TEND TO LESSEN PERIOD OF DISABILITY.

Dodge worked as a computer programmer. He had a non-work related back injury which required surgery. While recovering, he re-injured his back while lifting a laser printer at work. He then had a second operation. Following the second operation, the treating physician found he was at MMI and rated him as having 10% impairment as the result of the non-work related injury and the first surgery, and an additional 5% as the result of the work related accident and the second surgery.

Then, Dodge had a third operation by a second surgeon. This doctor gave him a 10% impairment rating. He was next referred to a pain management program. He reached MMI and was rated as having a 30% impairment. He returned to work. An issue arose as to whether or not he needed to continue taking Tylenol #3 (with codeine).

The single commissioner found Dodge had reached maximum medical improvement, awarded him 45% disability to the back, but held the carrier was not required to continue providing medical benefits. The full commission affirmed, but amended the order to provide that Dodge could apply for additional medical if his

condition changed. The circuit court reversed and remanded the case to the Commission to award Dodge continued medical benefits. Following a number of appeals, remands, amended orders, etc., the circuit judge's first order reached the Court of Appeals for review.

HELD: The Court of Appeals agreed with the employer that the circuit judge should not have substituted his judgment for the Workers' Compensation Commission on the factual issue as to whether continued medical care was necessary. Therefore, it remanded the case to the Workers' Compensation Commission to make its own findings on that issue. In so doing, the Court of Appeals made it clear that under Section 42-15-60, the medical statute, an employer or carrier may be liable for continued medical treatment even after the employee has reached maximum medical improvement and has returned to work if such treatment would tend to lessen the period of his disability.

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Gilliam v. Woodside Mills, 319 S.C. 385, 461 S.E.2d 818 (1995). THE HIP IS NOT A SCHEDULED MEMBER UNDER § 42-9-30; CASE REMANDED FOR DETERMINATION WHETHER THE AWARD SHOULD BE UNDER EITHER § 42-9-10 OR § 42-9-20.

Gilliam injured her hip and required a total hip replacement. The employer accepted the claim and paid temporary total and medical benefits. Later, the employer filed a stop payment application on the grounds that Gilliam had reached MMI.

The single commissioner awarded permanent and total disability pursuant to § 42-9-10. [Note: In the Court of Appeals opinion, the ratings are described as 45% of right hip and 10% of right knee by one physician, and 50 to 55% of right lower extremity by another physician.] The full commission reduced the award to 85% of the leg. The circuit court affirmed. The Court of Appeals reversed, finding that the hip was not part of the leg. The employer petitioned for writ of certiorari to the Supreme Court.

HELD: The Supreme Court affirmed that the hip is not part of the leg, and is therefore not a scheduled member under §42-9-30. The Supreme Court remanded the case to the Workers' Compensation Commission for a determination of whether the award should be made under § 42-9-10 for total disability or under § 42-9-20 for partial disability.

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Therrell v. Jerry's Inc., 370 S.C. 22, 633 S.E.2d 893 (2006). AWARDS FOR INJURIES TO THE SHOULDER.

Therrell, a waitress at a truck stop, fell and tore the rotator cuff in her right shoulder. The treating physician rated her injury as an impairment to the "right upper extremity". A single commissioner awarded her twenty percent loss of the arm. Therrell appealed, raising the issue as to whether an award for loss of the arm was appropriate where the injury was to the shoulder. A full commission appellate panel affirmed the ruling with regard to the arm, but increased the award to thirty per cent loss of the arm. The circuit court and Court of Appeals affirmed. Therrell's petition for writ of certiorari was granted.

HELD: The Supreme Court affirmed, but modified with regard to the issue as to how shoulder injuries should be awarded. The Supreme Court held that the proper course in cases involving injuries to the rotator cuff is to proceed pursuant to S.C. Code Ann. Section 42-9-30(20) and use the AMA Guides or "any other accepted medical treatises or authority" to convert the injury to the rotator cuff into a percentage of impairment to the whole person. In spite of this modification, the Supreme Court held that the decision was not "clearly erroneous" and affirmed.

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Wilkinson, ex rel. Wilkinson v. Palmetto State Transportation, 371 S.C. 365, 638 S.E.2d. 109 (2006). TRUCK DRIVER WAS AN EMPLOYEE REGARDLESS OF INDEPENDENT CONTRACTOR AGREEMENT DUE TO EXERCISE OF CONTROL.

Wilkinson, a truck driver, was killed in an accident. His widow contended that at the time of his death, Wilkinson was an employee of Palmetto State Transportation Company. The truck company and its carrier contended he was an independent contractor under an independent contractor agreement. The single commissioner awarded the widow death benefits. The full commission appellate panel and the circuit court affirmed. The employer and carrier appealed to the Court of Appeals.

HELD: The Court of Appeals also affirmed. The court held that a written agreement that the decedent was an independent contractor was not determinative of the issue of employment. The test to be applied is the right of control. This is determined by a four factor test (right of control, furnishing equipment, right to fire, and method of payment).

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Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002). CARPAL TUNNEL SYNDROME AS INJURY BY ACCIDENT.

Pee was employed by AVM in various capacities from 1987. Each of her jobs involved repetitive use of her hands. In 1995, Pee was diagnosed as having carpal tunnel syndrome in both wrists. She had release surgery on her left wrist in June and was released to return to work in July. In 1996, her symptoms returned to her left hand,

and her right hand worsened. The treating neurologist removed her from work beginning April 20, 1996. Pee filed a claim for workers' compensation benefits, asserting accidental injuries from repetitive trauma to both arms. AVM denied the claimant sustained an injury by accident. The single commissioner, full commission and circuit court judge all ruled in favor of Pee. AVM appealed.

Noting that this was a case of first impression, the Court of Appeals held that the Workers' Compensation Commission did not err in treating carpal tunnel syndrome as an injury by accident. In so doing, the Court pointed out that an injury need only to be unexpected to be an injury by accident, and that there is no requirement in the Act that an injury be distinct, as opposed to gradual. AVM petitioned for writ of certiorari, which was granted.

HELD: The Supreme Court affirmed, finding that a repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma.

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White v. MUSC and State Accident Fund, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003). SUFFICIENCY OF STATED GROUND FOR APPEAL; STATUTE OF LIMITATIONS FOR REPETITIVE BACK INJURY.

White was employed as an operating room technician/nursing assistant. His job required some heavy lifting. In 1997, he complained of severe lower back pain to his supervisor. He saw several doctors over the next few years and continued to work. On March 24, 2000, an MRI showed a small disc herniation. On December 8, 2000, White filed a Form 50, the employee's request for hearing. A single commissioner found his claim was barred by the two-year statute of limitations. The full commission affirmed. In his notice of appeal to the circuit court, White stated the following ground for appeal: "The Full Commission erred in finding as a fact and concluding as a matter of law the claimant was not entitled to benefits under the South Carolina Workers' Compensation Act." The circuit judge ruled that the claim was not barred by the statute of limitations because White would not know he had a ruptured disc until April 2000, when he had an MRI. MUSC appealed.

HELD: First, MUSC argued that the appeal should have been dismissed at the circuit court level for failure to set forth sufficient grounds for appeal. The Court of Appeals held that the ground for appeal stated above was sufficient. Second, MUSC argued the claim was barred by the two-year statute of limitations. The Court of Appeals ruled that the statute of limitations had not run in this case because there was substantial evidence that White's injury was due to "repetitive trauma" and the statute of limitations did not begin to run until April of 2002, when White last worked.

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Bateman v. Town & Country Furniture Co., 287 S.C. 158, 336 S.E.2d 890 (Ct. App. 1985); EMPLOYEE WHO PROVES 50% OR MORE LOSS OF USE OF THE BACK IS ENTITLED TO TOTAL DISABILITY REGARDLESS OF THE EMPLOYEE'S EARNING CAPACITY.

Bateman originally received 42% of the back on Form 16, but then he petitioned to re-open the matter on grounds of change of condition. The single commissioner gave him a total disability based upon a 50% or more loss of use of the back under Section 42-9-30(19) and § 42-9-10. The record showed that Bateman's earnings had actually increased after his accident. The full commission and circuit court affirmed the award of total disability.

HELD: The Court of Appeals held that a claimant who suffers a 50% or more loss of use of the back need not show a loss of earning capacity to recover permanent total disability under § 42-9-30 (19) and § 42-9-10.

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II. Effective Impact of New Law

Listed below are the key holdings in the foregoing cases, references to the sections of the bill which address these holdings, and the apparent effect of the new law:

- **Holding:** An injury to a single body member may be the source of a total disability award if the injury combines with pre-existing conditions so as to render the claimant totally disabled. **Ellison v. Frigidaire**, 371 S.C. 159, 638 S.E.2d 664 (2006).

  Where addressed in Act No. 111 of 2007: Part I, section 19, page 17 and Part II, section 3, page 24.

  Effect: A new section, Section 42-9-35, codifies the holdings in **Wigfall v. Tideland Utilities, Inc.**, 354 S.C. 100, 580 S.E.2d 100 (2003) and **Singleton v. Young Lumber Company**, 236 S.C. 454, 114 S.E.2d 837 (1960) that where an injury is confined to a specific member, and does not impair or affect another body part or system, benefits in addition to those provided in Section 42-9-30, the specific member statute, may not be awarded. Language in the Second Injury Fund statute, S.C. Code Ann. 42-9-400 (a), that was relied upon by the Supreme Court in **Ellison** has been deleted.

- **Holding:** The Workers' Compensation Act authorizes communication between health care providers and employer representatives by written reports only. **Brown v. Bi-Lo**, 354 S.C. 436, 581 S.E.2d 836 (2003).

  Where addressed in Act No. 111 of 2007: Part I, sections 28-29, pages 21-22.

  Effect: The new legislation 1) allows ex parte discussions with medical providers if the claimant is notified of the conference in advance and is given an opportunity to attend and participate; 2) makes medical evidence that is obtained in violation of the statute inadmissible; and, 3) requires the Workers' Compensation Commission to promulgate regulations as to the duties to the parties and standards of care of rehabilitation professionals.

- **Holding:** The claimant does not have to provide expert testimony to prove causation in medically complex cases. **Tiller v. National Health Care Center**, 334 S.C. 333, 513 S.E.2d 843 (1999).

  Where addressed in Act No. 111 of 2007: Part I, section 6, page 9.

  Effect: The new legislation defines "medically complex cases" as sophisticated cases that require highly scientific procedures or techniques for diagnosis or treatment (but excludes MRI, CAT Scans, X-rays or similar diagnostic techniques), and requires in "medically complex cases" that an employee "establish by medical evidence that the injury arose in the course of employment."

- **Holding:** The defendants may be liable for continued medical treatment after an employee has reached maximum medical improvement if, in the discretion of the Workers' Compensation Commission, such treatment would tend to lessen the period of disability. **Dodge v. Bruccoli, Clark, Layman, Inc**., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999).

  Where addressed in Act No. 111 of 2007: Part I, section 27, pages 20-21.

  Effect: In claims settled on Form 16 or by awards not providing for future medical, the employer and carrier are no longer responsible for future medicals after 1 year. Also, a lapse in treatment for more than one year may result in terminating an employer or carrier's responsibility to provide treatment.

- **Holding:** A written agreement that the decedent truck driver was an independent contractor was not determinative of the issue of employment. The test to be applied is the right of control. This is determined by a four factor test

(Right of Control, Furnishing Equipment, Right to Fire, Method of Payment). **Wilkinson ex rel. Wilkinson v. Palmetto State Transportation**, 371 S.C. 365, 638 S.E.2d 109 (2006).

Where addressed in Act No. 111 of 2007: Part I, section 8, pages 10-11.

Effect: Individuals who own their trucks subject to bona fide lease-purchase or installment agreements may be independent contractors and not employees of motor carriers under the Workers' Compensation Act.

- **Holding:** Carpal tunnel syndrome is a compensable injury by accident. **Pee v. AVM**, 352 S.C. 167, 573 S.E.2d 785 (2002).

  Where addressed in Act No. 111 of 2007: Part I, section 7, pages 9-10.

  Effect: The legislation (1) defines "repetitive trauma" as an injury that happens gradually and is caused by cumulative effects of repetitive traumatic events; (2) requires specific finding of fact in the award that the repetitive, regular job activities caused the repetitive trauma injury; (3) requires medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury; and, (4) allows for awards in repetitive trauma claims to be made under total, partial or scheduled injury statutes.

- **Holding:** Where a claim is brought for "repetitive trauma to the back," the statute of limitations does not begin to run until the last day worked. **White v. MUSC**, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003).

  Where addressed in Act No. 111 of 2007: Part 1, sections 25, 26 and 31, pages 19, 20, 22 and 23.

  Effect: Establishes notice, statute of limitations and change of condition deadlines for repetitive trauma claims.

- **Holding:** An employee who is found to have sustained a 50% or more loss or disability to the back is deemed to be totally disabled regardless of the fact that the employee may have returned to work. **Bateman v. Town & Country Furniture Co.**, 287 S.C. 158, 336 S.E.2d 890 (Ct. App. 1985) S.C. Code Ann. Section 42-9-30 (19).

  Where addressed in Act No. 111 of 2007: Part I, section 18, page 16.

Effect: The legislation makes the presumption of total disability for a 50% or more loss of the back rebuttable by the defense, and increases the value of the back in claims where there is more than a 50% or more loss of the back (but the claimant is proven not to be totally disabled) to the percentage loss of 500 weeks. Awards for less than a 50% loss of the back shall still be based on a percentage of 300 weeks.

- **Holding:** The hip is not a scheduled member under S.C. Code Ann. Section 42-9-30. **Gilliam v. Woodside Mills**, 319 S.C. 385, 461 S.E.2d 818 (1995).

  Where addressed in Act No. 111 of 2007: Part I, section 18, page 32.

  Effect: The legislation schedules the hip as worth a maximum of 280 weeks.

- **Holding:** The shoulder is not a scheduled member under S.C. Code Ann. Section 42-9-30. **Therrell v. Jerry's, Inc.**, 370 S.C. 22, 633 S.E.2d 893 (2006).

  Where addressed in Act No. 111 of 2007: Part 1, section 18, page 31.

  Effect: The legislation schedules the shoulder as worth a maximum of 300 weeks.