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Chronicles

Workers' Compensation
Significant Opinions in 2009

by John S. Nichols,
Bluestein, Nichols, Thompson & Delgado, LLC
Columbia SC

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Exclusivity provision of the Workers' Compensation Act at statutory employees

Personal representative of temporary worker's estate, and injured temporary worker, brought wrongful death and personal injury actions against concrete products supplier and its parent company after workers were involved in a work-related accident at the supplier's leased work site. The Circuit Court dismissed plaintiffs' causes of action as barred by the exclusivity provision of the Workers' Compensation Act. Personal representative and injured worker appealed and the Court of Appeals affirmed, holding that: (1) supplier was the workers' statutory employer and, thus, was entitled to immunity under the exclusivity provision of the Workers' Compensation Act; (2) supplier's alleged fraud and the alleged lack of meeting of the minds between supplier and workers' employer did not bar supplier from asserting entitlement to immunity under the exclusivity provision; and (3) supplier's parent company was an upstream statutory employer of the workers and, thus, was entitled to immunity under the exclusivity provision.

(A) The existence of the employer-employee relationship is a jurisdictional question and one of law.
(B) When deciding questions of law, the court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence.
(C) It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act.
(D) Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.
(E) While the circuit court has subject matter jurisdiction over tort claims, certain cases may be taken from the circuit court's original jurisdiction by the General Assembly.
(F) The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over an employee's work-related injuries.
(G) The South Carolina Workers' Compensation Act contains an exclusivity provision. Pursuant to this provision, the Act is the exclusive remedy for an employee's work-related accident or injury, and the exclusivity provision precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee. Specifically, the exclusivity provision states: "The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death. Provided, however, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer." S.C. Code Ann. § 42-1-540.
(H) If the activity at issue meets even one of these three criteria, the injured employee qualifies as the statutory employee of the owner. [Footnote 2]
(I) In *Cason v. Duke Energy Corp.*, the South Carolina Supreme Court expressed only four exceptions to the exclusivity provision: (1) where the injury results from the act of a subcontractor who is not the injured person's direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations.
(J) Pursuant to S.C. Code Ann. § 42-1-415(B): "To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable

continued next page

Exclusivity provision of the Workers' Compensation Act at statutory employees *continued*

to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee." This section concerns only whether a higher tier subcontractor, contractor, or project owner can qualify for reimbursement from the Uninsured Employer's Fund.

(K) The concept of statutory employment is designed to protect the employee by assuring workmen's compensation coverage by either the subcontractor, the general contractor, or the owner if the work is a part of the owner's business.

(L) Pursuant to S.C. Code Ann. § 42-1-410: "When any person, in this section and §§ 42-1-420 to 42-1-450 referred to as contractor, contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as subcontractor) for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

(M) In determining whether a worker is a statutory employee, courts consider the following three factors: (1) whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the business, and (3) whether the identical activity in question has been performed by employees of the principal employer.

(N) Neither fraud nor a lack of the meeting of the minds were articulated in *Cason v. Duke Energy Corp.*, as exceptions to the exclusivity provision.

(O) South Carolina Code Ann. § 42-1-400 provides: "When any person, in this section and §§ 42-1-420 and 42-1-430 referred to as owner, undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and § § 42-1-420 to 42-1-450 referred to as subcontractor) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

(P) Depending on the nature of the work performed by the subcontractor, an employee of a subcontractor may be considered a statutory employee of the owner or upstream employer.

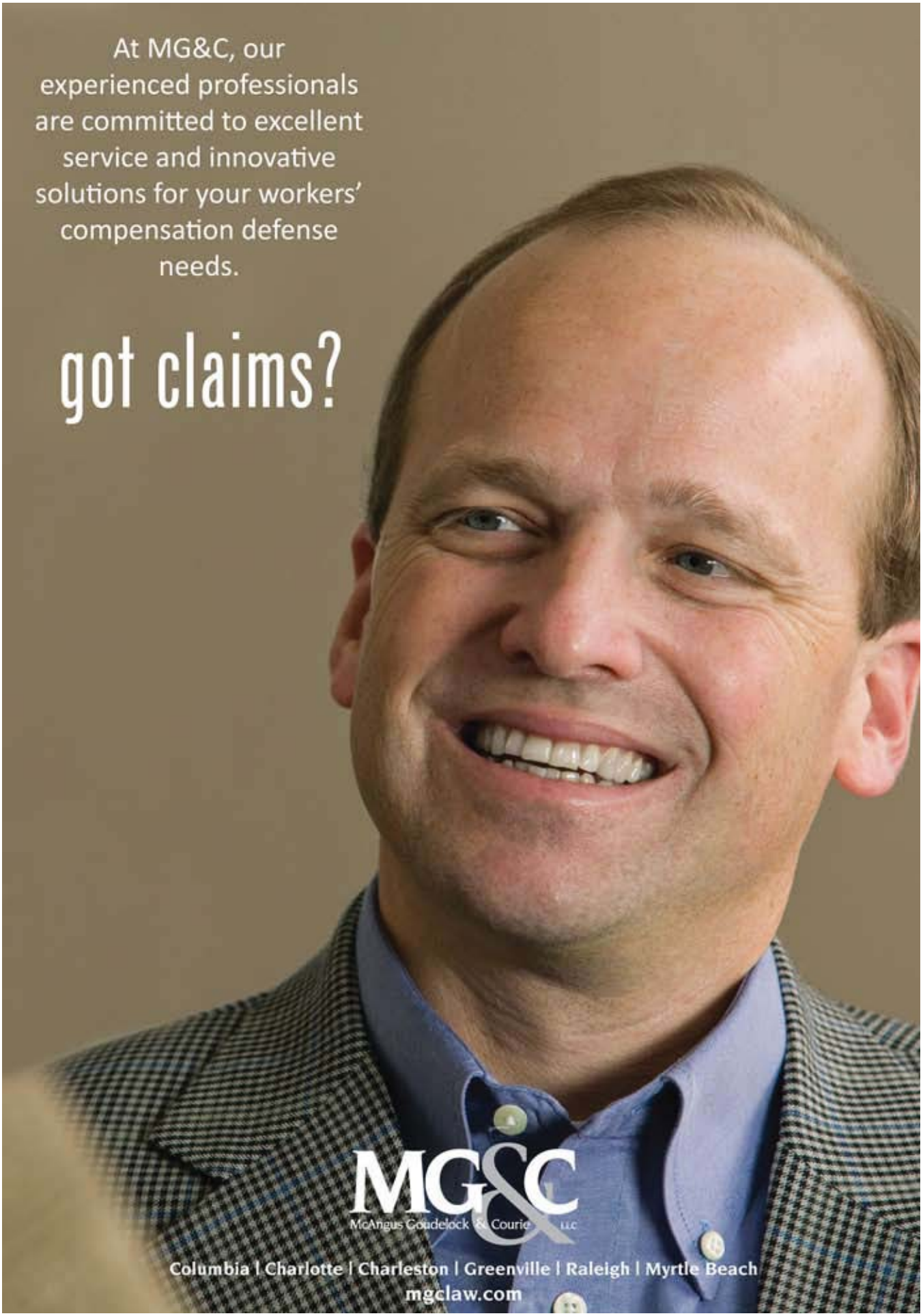
(Q) It is within the circuit court's discretion to decide what is admissible and on appeal the court of appeals should reverse the circuit court's ruling only when based on a legal error.

(R) In general, expert testimony on issues of law is inadmissible.

(S) A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.

(T) Short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.

Poch v. Bayshore Concrete Products/South Carolina, Inc., Op. No. 4617 (S.C. Ct. App. filed Sept. 9, 2009) (Shearouse Adv. Sh. No. 40 at 87).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Employment relationship does not exist for person elected to cooperative's Board of Trustees

Claimant, a member of rural electric cooperative's board of trustees who was injured in automobile accident while driving to annual electric cooperative convention, sought workers' compensation benefits. The hearing commissioner found that claimant was not the cooperative's employee and was therefore ineligible for workers' compensation benefits. The appellate panel reversed, but the circuit court reversed and reinstated the hearing commissioner's decision. The Court of Appeals affirmed, 374 S.C. 516, 649 S.E.2d 98 (Ct. App. 2007), holding that claimant was not the cooperative's employee and thus was not entitled to benefits. Claimant sought review, and the Supreme Court affirmed, holding that (1) claimant was not a cooperative employee under a contract of hire, and (2) claimant was not a cooperative employee under an appointment. The Court stated:

(A) Workers' compensation awards are authorized only if an employment relationship exists at the time of the injury.
(B) The existence of an employment relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission and is reviewable under the preponderance of the evidence standard.
(C) When the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence.
(D) It is South Carolina's policy to resolve jurisdictional doubts in favor of inclusion rather than exclusion. However, a construction should not be adopted that does violence to the specific provisions of the Act.
(E) Under the Workers' Compensation Act, an employee is defined as a person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written.... S.C. Code Ann. § 42-1-130.
(F) To be considered an employee under a contract of hire pursuant to section 42-1-130, a person must have a right to payment for his services.
(G) The word hire' generally connotes payment of some kind.
(H) The Electric Cooperative Act states: "The bylaws [of a cooperative] may make provision for the compensation of trustees; provided, however, that compensation shall not be paid except for actual attendance upon activities authorized by the board. The bylaws may also provide for the travel, expenses and other benefits of trustees, as set by the board. A trustee, except in emergencies, shall not be employed by the cooperative in any other capacity involving compensation." S.C. Code Ann. § 33-49-630. As the statute indicates, cooperatives are not required to compensate their trustees, but may draft their bylaws to permit some payment. Additionally, any payment provided to the trustees may be given only for time spent on specific business authorized by the board, not as compensation for general services to the cooperative. Therefore, claimant was not compensated for his services to the cooperative, and he did not have a right to demand any payment at all. Further, the final sentence makes clear that the trustees are not considered employees of the cooperative and may only be employed by the cooperative in cases of emergency.
(I) The cooperative's bylaws expressly state the trustees do not receive compensation for their services to the cooperative, but rather they may, at the Board's discretion, receive a per diem or be reimbursed for their expenses. Therefore, because claimant was not entitled to compensation, he was not an employee under a contract of hire. The supreme court held the court of appeals correctly determined that the reimbursement for actual expenses and the additional benefits claimant received were discretionary and that claimant had no right to demand such payment.
(J) The supreme court also held the court of appeals' analysis of the existence of an employment relationship confuses the "gratuitous worker doctrine" by stating that the benefits and compensation given to claimant constitute gratuitous payments. The supreme court stated it took this opportunity to clarify that doctrine.

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Employment relationship does not exist for person elected to cooperative's Board of Trustees *continued*

(K) According to Larson's Workers' Compensation Law, gratuitous employees are those who neither receive nor expect to receive any kind of pay for their services. 3 Larson's Workers' Compensation Law § 65.01 (2009). Thus, the term "gratuitous," in this context, normally is used to describe the nature of the work being performed, not the nature of the compensation received.
(L) Gratuitous workers are not employees under a contract of hire.
(M) In this case, the supreme court found claimant performed his duties as a trustee of the cooperative without receiving compensation for his services. Although he may have received reimbursement for expenses and other benefits, these payments were given at the discretion of the Board and claimant had no right to demand such payment. Thus, claimant was not an employee because his services were offered gratuitously, not, as the court of appeals erroneously stated, because the cooperative's payments were gratuitous.
(N) Section 42-1-130 does not define "appointment." Regardless, claimant was elected to serve as a trustee, and the difference between an appointment and an election is clear. Black's Law Dictionary defines an appointment as "[t]he designation of a person, such as a nonelected public official, for a job or duty; especially, the naming of someone to a nonelected public office." Black's Law Dictionary, 8th ed. (2004). The emphasis on "nonelected" officials precludes the possibility that a person who is elected could also be appointed to the same position.
(O) Although the statute does not define the term, it certainly comprehends that "election" and "appointment" are two distinct concepts. See S.C. Code Ann. § 42-1-130 (including as employees "all officers and employees of the State, except those elected ... or appointed"). [Footnote 1]
(P) The Electric Cooperative Act specifically states that "[a]t each annual meeting ... the members shall elect trustees to hold office...." S.C. Code Ann. § 33-49-640. Similarly, the cooperative's bylaws provide that "members of the board shall be elected by ballot at each annual meeting of the members...." Claimant was clearly elected to his position as a trustee, and therefore cannot simultaneously be employed under an appointment.

Shuler v. Tri-County Elec. Co-Op, Inc., ___ S.C. ___, 684 S.E.2d 765 (2009)

Disciplinary - disbarment

The Supreme Court disbarred a lawyer for misconduct including mishandling of trust fund accounts, failure to turn over settlement funds to client, and failure to pay an invoice to a court reporter. In addition, the attorney represented a client in a workers' compensation case, which settled for $7,000 in November 2001. The funds were not disbursed to the client prior to the attorney's interim suspension on May 16, 2002. Next, a chiropractor treated one of Smalls' clients. The client assigned part of her settlement to the chiropractor, and the client settled in April 2002. The chiropractor was not paid. The Court found he violated Rule 1.15, RPC, as well as the record keeping requirements of Rule 417, SCACR.

In the Matter of Smalls, 382 S.C. 551, 677 S.E.2d 211 (2009).

The SCWCEA extends its heartfelt sympathy to the family, associates and friends of

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January 23, 1974 - January 16, 2010

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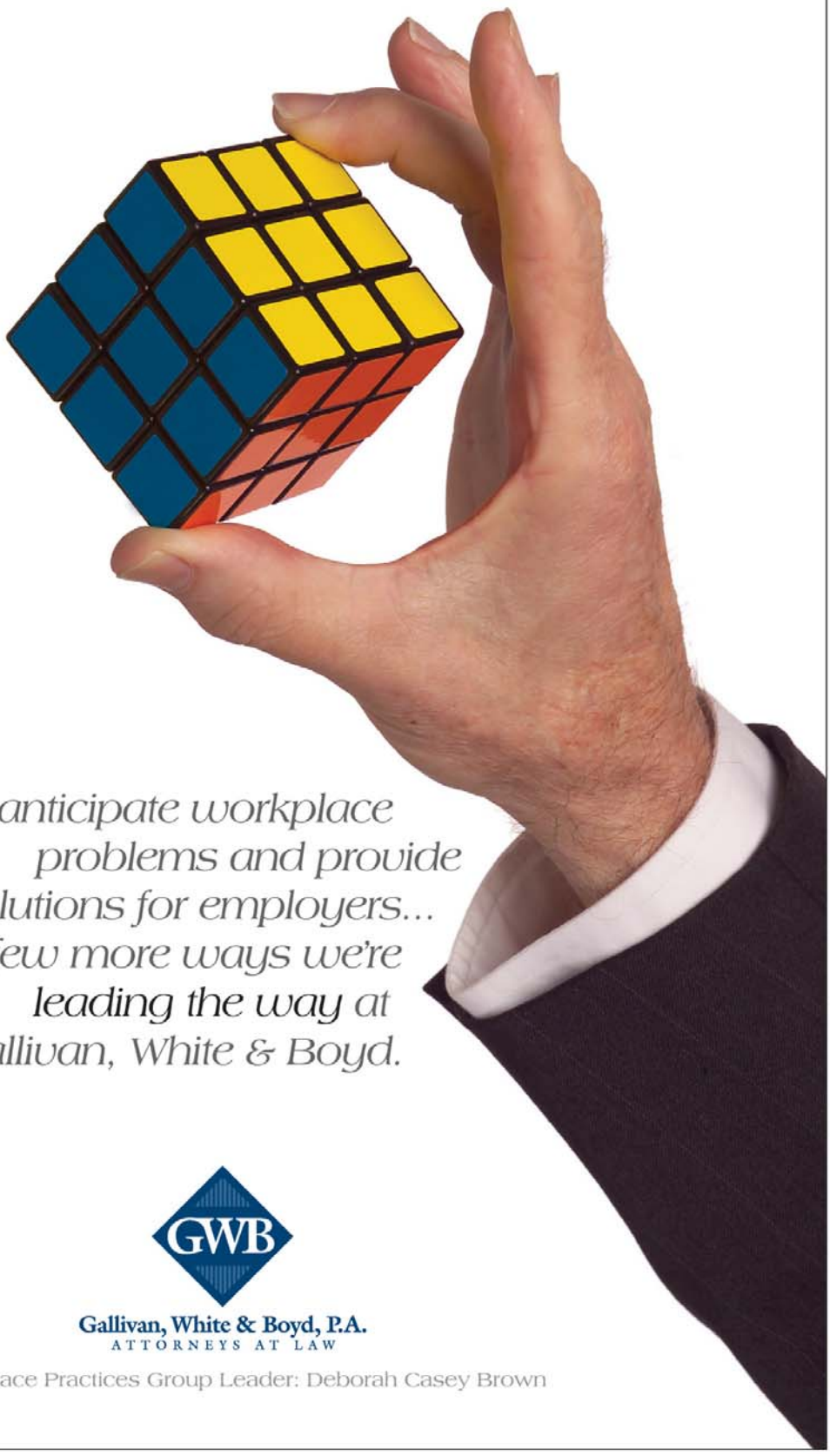

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Fraud in the employment application vitiates the employment contract, and is a jurisdictional issue

The Supreme Court held that claimant's fraudulent responses on his employment application vitiated his employment relationship pursuant to the three-factor test in *Cooper v. McDevitt & St. Co.*, 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973) and barred his recovery of workers' compensation benefits. The Court reversed the circuit court, which had affirmed the Commission's award of benefits, stating:

(A) The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review.

(B) The Supreme Court held it must determine if Claimant was an employee at the time of his injury and thus eligible for workers' compensation benefits. No award under the Workers' Compensation Act is authorized unless the employer-employee relationship existed at the time of the alleged injury for which claim is made. This relation is contractual in character.

(C) An employee is statutorily defined in S.C. Code Ann. § 42-1-130 as "every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written...."

(D) In *Cooper*, the Court set forth three necessary factors for a material misrepresentation in the employment application to vitiate the employment relationship: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) There must have been a causal connection between the false representation and the injury.

Brayboy v. WorkForce, ___ S.C. ___, 681 S.E.2d 567 (2009); *Fredrick v. Wellman, Inc.*, Op. No. 4599 (S.C. Ct. App. filed July 28, 2009) (Shearouse Adv. Sh. No. 34 at 22).

Failure to grant continuance

The Court of Appeals held that the Appellate Panel's failure to grant continuances or keep the record open for Employer to take depositions of claimant's supervisor and her treating physician was prejudicial error, stating:

(A) Administrative agencies are required to meet minimum standards of due process, and in cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses.

(B) An administrative or quasi judicial body is allowed a wide latitude of procedure and is not restricted to the strict rule of evidence adhered to in a judicial court.

(C) Great liberality is to be exercised in allowing the introduction of evidence in workers' compensation proceedings.

(D) A single commissioner has similar discretion as that of a trial judge in deciding whether to reopen a case for the introduction of additional evidence.

(E) A motion for continuance due to the absence of a material witness is addressed to the judge's discretion, and therefore, the ruling will not be disturbed unless it is shown to be an abuse of discretion. This abuse of discretion must result in prejudice to the moving party. Additionally, to justify a continuance, the moving party must show not only the absence of some material evidence but also due diligence on his part to obtain it.

(F) An appellate court considers whether the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error.

(G) The record contained no evidence of misconduct, intentional or otherwise, by Employer that would warrant the exclusion of a crucial witness.

(H) While an appellate court recognizes the Appellate Panel is the sole fact-finder in workers' compensation cases, the improper exclusion of testimony by the single commissioner amounts to an error of law that deprives the party of his right to present his case and deprived the Appellate Panel of the evidence it needed to make its findings of fact.

Change of condition - psychological injury - *res judicata*

Employer appealed from decision of the Circuit Court finding claimant was entitled to workers' compensation benefits for a change in condition to her spine and for psychological benefits. The Court of Appeals held: (1) the circuit court's order which mandated an award for change of condition to the cervical spine and for psychological benefits was a final, appealable order; (2) the appropriate date from which the single commissioner should have evaluated a change in claimant's condition was the date that doctor found claimant had reached maximum medical improvement (MMI), and not the subsequent date of the change of condition hearing; (3) the hearing commissioner and the Appellate Panel committed legal error in ruling that they could not consider the issue of depression raised by claimant at the change of condition hearing. The Court affirmed in part, reversed in part, and remanded, stating:

(A) A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award. When the original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate for the Appellate Panel to then consider any subsequent events or diagnoses made after that date when making a determination about an alleged change of condition. Review of an award at a change of condition hearing is, therefore, concerned with the date as of which the claimant's condition was determined rather than the date of the actual hearing in which that award was rendered.
(B) Just as physical changes of condition are properly considered when reviewing a claimant's initial award, so too are mental changes of condition. If the mental condition is causally connected to the original injury, is a newly manifested symptom of that injury, and has caused a worsening of the claimant's condition, then it is proper for the single commissioner to consider the mental condition at a change of condition hearing.
(C) A mental condition is causally related to the original injury if the condition was induced by the physical injury. The mental condition would be a new symptom manifesting from the same harm to the body, and in such circumstances, it may properly be compensated in a change of condition proceeding as a part of the original injury. Additionally, a symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition," and such an occurrence is one of the reasons the Commission may review awards through change of condition hearings. Therefore, even if the mental condition was not raised at the original hearing, it may be raised at the change of condition hearing.
(D) A mental condition which is induced by a physical injury, is thereby causally related to that injury, and may properly be compensated in a change of condition proceeding as a part of the original injury.
(E) In this case, Claimant could raise the issue of depression at the change of condition hearing because the psychological condition was induced by the original physical injury and any symptoms of depression she experienced prior to the June 3, 2003 hearing were mild, undiagnosed, and untreated. A symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition. Further, because Claimant did not raise the issue of depression in her original Form 50 or at the initial hearing and because all records from the treating physician's June 3, 2003 evaluation, in which she mentioned psychological effects from the physical injury, were excluded from evidence, the doctrine of *res judicata* does not prevent this issue from being litigated. The doctrine of *res judicata* only acts to preclude relitigation of issues actually litigated or which might have been litigated in the first action. Consequently, the change of condition hearing was the first opportunity a single commissioner could consider Claimant's psychological condition, and it was error for the single commissioner and the Appellate Panel to not consider the issue.

Mungo v. Rental Uniform Service of Florence, Inc., 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009).

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Employee versus independent contractor - appropriate test - overrules *Dawkins v. Jordan* and progeny - effect of federal regulations on trucking

This workers' compensation case involves the jurisdictional question of whether the claimant (a truck driver) was an employee or independent contractor. The Supreme Court granted a writ of certiorari to review the court of appeals decision holding the claimant was an employee. *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 371 S.C. 365, 638 S.E.2d 109 (Ct. App.2006). The Supreme Court reversed, holding the claimant was an independent contractor for workers' compensation purposes. The Court stated that in connection with its jurisprudence in evaluating whether a claimant is an employee or an independent contractor for workers' compensation purposes, the Court overruled the test announced in *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). The Court stated:

(A) The question whether claimant was, at the time of his fatal accident, an employee or independent contractor is jurisdictional, so that the Court may take its own view of the preponderance of the evidence. *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995).
(B) Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work. In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire.
(C) In *Dawkins*, the Supreme Court took the additional step of imposing a framework for weighing the standard factors in a manner that favored, unduly we now believe, a finding of employment, stating: "[F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." The Court overruled *Dawkins*' analytical framework, stating it "most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions."
(D) The Court noted, "We overrule post- *Dawkins* appellate court decisions of this state to the extent those decisions relied on *Dawkins*' claimant-friendly approach. Those cases include *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002) and *Paschal v. Price*, 380 S.C. 419, 670 S.E.2d 374 (Ct. App.2008). We take no position with respect to the proper result in such cases under the pre-*Dawkins*' evenhanded and balanced approach." [Footnote 3]
(E) In evaluating the four factors, the Court is guided initially by the parties' independent contractor agreement. But more importantly, the Court is guided by the parties' conduct, which mirrored the terms of the contract. In determining the nature of the parties' relationship, the contract has considerable weight, but the language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive.
(F) The Court stated, "This Court remains sensitive to the general principle sanctioned by the Legislature that workers' compensation laws are to be construed liberally in favor of coverage. That principle, however, does not go so far as to justify an analytical framework that preordains the result. Moreover, that principle should not trump an unchallenged independent contractor arrangement where the parties' conduct follows the agreement in every material respect. Materiality, in this context, is measured by the factors of right or exercise of control, method of payment, furnishing of equipment and right to fire. The policy considerations favoring a finding of compensability are further diminished where, as here, the independent contractor procures workers' compensation coverage or its functional equivalent."

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Employee versus independent contractor - appropriate test - overrules *Dawkins v. Jordan* and progeny - effect of federal regulations on trucking
continued

(G) The Court added, "It is not uncommon in the long-haul trucking industry for carriers to utilize drivers who own and operate their own tractors, known as owner-operators. These arrangements must be carefully scrutinized to ensure that the actual relationship between the trucking company and the purported independent contractor truly reflects the parties' stated agreement. We are sensitive to the unequal bargaining power that may exist between the trucking company and the driver. In this regard, it naturally follows that a trucking company, with a desire to avoid a workers' compensation claim, may be tempted to have 'its cake and eat it, too.' The result would be an ostensible independent contractor arrangement where the trucking company exercises almost complete control over the method and manner of the transportation services."
(H) Requiring a worker to comply with the law (governmental regulatory controls affecting the transportation of goods in interstate commerce) is not evidence of control by the putative employer. Restrictions upon a worker's manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. Indeed, employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status. The employer cannot evade the law and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver. The strong regulatory presence concerning motor carriers reflects control by the government, not the motor carrier.
(I) The presence of a carrier's insignia on the outside of a rig is merely one of the many factors to be considered when determining employee/independent contractor status and does not command a conclusion of employee status. The placement of a motor carrier's insignia and identification number on the tractor is required by federal regulations. 49 C.F.R. § 376.11(c)(1); 49 C.F.R. § 390.21.
(J) The Supreme Court stated, "We do not give controlling weight to the presence of Palmetto's insignia and identification number on Wilkinson's tractor. Again, we view the presence of Palmetto's insignia and identification number on the tractor as governmental control, not carrier control. On balance, we find the factor of 'furnishing of equipment' points to an independent contractor relationship. We make this finding primarily because Wilkinson owned his own tractor and paid for all costs associated with the tractor."
(K) The Court also stated, "We believe it helpful to address a related area of law, specifically the existence of federal law in the trucking industry. Although the parties raise no issue concerning the federal law, an overview of certain federal regulations serves to support our ultimate determination as well as inform the narrow reach of our decision."
(L) Congress provides in 49 U.S.C.A. § 14102(a) that the "Secretary [of Transportation] may require a motor carrier ... that uses motor vehicles not owned by it ... to-(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier." The Secretary of Transportation, through the Federal Motor Carrier Safety Administration, has promulgated regulations addressing a carrier's lease of equipment from an owner-operator. For example, 49 C.F.R. § 376.12(c)(1) states that the "lease [of equipment by the carrier] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." This regulation, and others, reflects the regulatory goal of promoting highway safety.
(M) The Court stated, "As a result of a motor carrier's general duty for the safe operation of leased equipment, our finding today of an independent contractor relationship between Wilkinson and Palmetto is necessarily limited to the workers' compensation context. Moreover, federal law is not intended to affect a state court's determination of the relationship between a carrier and a lessor of equipment under workers' compensation laws. 49 C.F.R. § 376.12(c)(4) (2008) (providing that imposing ultimate responsibility on

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Employee versus independent contractor - appropriate test - overrules *Dawkins v. Jordan* and progeny - effect of federal regulations on trucking
continued

a carrier under federal law is not 'intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee'). We find the comment to subsection (c)(4) of the federal regulation instructive: 'While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect 'employment' status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship....' We conclude that adopting the proposed amendment will reinforce our view of the neutral effect of the control regulation and place our stated view squarely before any court or agency asked to interpret the regulation's impact.... By presenting a clear statement of the neutrality of the regulation, we hope to bring a halt to erroneous assertions about the effect and intent of the control regulation, saving both the factfinders and the carriers time and expense. Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (1992)."

(N) The federal regulations may not be viewed as controlling when a state court is charged with assessing whether the relationship between a motor carrier and a lessor of equipment is one of employment or independent contractor for workers' compensation purposes. In the workers' compensation setting, the Court properly makes the determination under our common law framework.

(O) The Court concluded, "We reverse the court of appeals and find Wilkinson was an independent contractor for purposes of workers' compensation. As such, his estate is not entitled to benefits. We overrule the approach approved in Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000) that the presence of 'any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation.' Consistent with pre- Dawkins' case law, the common law factors-right or exercise of control, method of payment, furnishing of equipment and right to fire-should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor. We emphasize the narrow reach of our decision today, as we analyze the employment versus independent contractor question for purposes of workers' compensation only. Having found that Wilkinson was an independent contractor for workers' compensation purposes, we need not reach the remaining issues."

Wilkinson v. Palmetto State Transportation Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

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Survivor benefits when employer under lifetime award dies from unrelated cause

Claimant's widow appealed the circuit court's ruling limiting her husband's workers' compensation award upon his death from an unrelated cause. Employer cross-appealed the circuit court's failure to deduct attorney's fees from Claimant's award pursuant to an agreement between the parties. The Court of Appeals affirmed the appellate panel's finding that the widow was not entitled to the commuted value of the full balance of claimant's lifetime award, and reverse the failure to give the Employer credit for attorney's fees paid against the widow's award, stating:

(A) S.C. Code Ann. § 42-9-280 provides the next of kin of a claimant who dies from an unrelated injury may receive the balance of unpaid compensation if the award was made pursuant to the second paragraph of S.C. Code Ann. § 42-9-10 or § 42-9-30.
(B) Section 42-9-10 is composed of four paragraphs, (A)-(D). Paragraph (A) limits a claimant's award to a maximum of five-hundred weeks even for total, permanent disability. Paragraph (B) provides "[t]he loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section." Consequently, an injury listed in Paragraph (B) would entitle the claimant to the maximum allowable award of five-hundred weeks. Paragraph (C) provides the only exception to this limitation: "Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five-hundred-week limitation and shall receive the benefits for life."
(C) Section 42-9-280 addresses situations in which an injured claimant later dies from a cause unrelated to the workplace injury: "When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived."
(D) The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not. The legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well. Professor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments. In construing a workers' compensation statute, "the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Section 42-9-280 specifically provides for the inheritability of two types of awards only.
(E) Section 42-9-10(A) focuses on situations in which a claimant's "incapacity for work resulting from an injury is total." Likewise, paragraph (C) seems to focus on a claimant's inability to earn a wage as opposed to a physical loss. The statute conditions the lifetime award of benefits upon a finding of total and permanent disability. See § 42-9-10(C) ("[A]ny person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage ... shall receive benefits for life.").
(F) Claimants suffering catastrophic injuries may require specialized healthcare without the means to earn a wage. The award of compensation for a claimant's life expectancy seems to recognize this reality. If so, it is also logical benefits would terminate upon such a claimant's death from an unrelated cause.

Survivor benefits when employer under lifetime award dies from unrelated cause *continued*

(G) Pursuant to Rule 225(a), the circuit court had jurisdiction to compel the payment of benefits, as well as interest and penalty, during the pendency of the appeal. (H) The Supreme Court added, "The principle payment of the ten percent penalty ($20,513) should be made promptly. Moreover, the parties can compute the amount of interest due [Claimant], and we urge the parties, through counsel, to do so and bring this unreasonably protracted litigation to an end. The circuit court should not be further burdened with this unnecessary litigation." [Footnote 2]

Johnson v. Sonoco Products Co., 381 S.C. 172, 672 S.E.2d 567 (2009).

Substantial evidence supported Commission's coverage findings

Sunshine Recycling (Sunshine) and the South Carolina Uninsured Employers' Fund (UEF) appealed the circuit court's reversal of the Appellate Panel's finding that Capital City Insurance (Capital City) was the workers' compensation insurance carrier for Sunshine when claimant was injured. Specifically, Sunshine and UEF argued the circuit court erred in: (1) incorrectly applying the substantial evidence rule; (2) failing to give proper deference to the Appellate Panel's coverage determination when that determination is exclusively within the purview of the Appellate Panel per *Labouseur v. Harleysville Mutual Ins. Co.*, 302 S.C. 540, 397 S.E.2d 526 (1990); and (3) failing to find as an additional sustaining ground for upholding the Appellate Panel's coverage determination that Capital City was estopped to deny coverage. The Court of Appeals reversed the circuit court's determination that the Appellate Panel lacked substantial evidence in finding Capital City reinstated Sunshine's insurance policy without a lapse in coverage. *Jeffrey v. Sunshine Recycling*, Op. No. 4626 (S.C. Ct. App. filed Oct. 28, 2009) (Shearouse Adv. Sh. No. 47 at 26).

Average weekly wage for an inmate

An inmate injured while serving time on weekends may not include his full time employment wages in addition to prison pay in determining his average weekly wage, for purposes of workers' compensation because the legislature intended to deny inmates the right to combine wages. *Smith v. Barnwell County*, Op. No. 26716 (S.C. Sup. Ct. filed Sept. 8, 2009) (Shearouse Adv. Sh. No. 39 at 36).

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Workers' Compensation - combined effects of injury with pre-existing problems - *Ellison v. Frigidaire*

Claimant appealed the Appellate Panel's failure to find her totally and permanently disabled, arguing the Panel failed to consider the combined effects of a workplace injury and a pre-existing problem. Claimant argued the single commissioner, Appellate Panel, and circuit court all erred in failing to consider the combined effects of a workplace injury and preexisting physical and/or emotional and mental problems. Specifically, Claimant maintained the Appellate Panel erred in relying on the Court of Appeals' decision in *Ellison v. Frigidaire Home Products*, 360 S.C. 236, 600 S.E.2d 120 (Ct. App.2004) (*Ellison I*), which the supreme court reversed, 371 S.C. 159, 638 S.E.2d 664 (2006) (*Ellison II*). Further, Claimant contended because substantial, reliable, competent, and probative evidence in the record as a whole supported that she is totally disabled and her psychological and physical problems affect more than just her back and hinder her employment, she must be awarded additional benefits. The Court of Appeals affirmed, stating:

(A) For an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160(A). An injury arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances.
(B) The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation.
(C) Under S.C. Code Ann. § 42-9-10, a claimant has three (3) ways to obtain total disability. **First**, a claimant can be presumptively disabled. The list of injuries included in the presumptive total disability category include: "[t]he loss of both hands, arms, feet, legs, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section" or that claimant "is a paraplegic, a quadriplegic, or who has suffered physical brain damage...." For these injuries, a claimant need not show a loss of earning capacity because the loss is conclusively presumed. **Second**, a claimant can show an injury that is not a scheduled injury under S.C. Code Ann. § 42-9-30 "caused sufficient loss of earning capacity to render him totally disabled." **Third**, a claimant may establish total disability through multiple physical injuries.
(D) When a mental injury is induced by physical injury, unlike a purely mental injury, it is not necessary that it result from unusual or extraordinary conditions of employment.
(E) Aggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury. Pre-existing depression does not preclude workers' compensation benefits for a mental injury. However, the right of a claimant to compensation for aggravation of a pre-existing condition arises only when the claimant has a dormant condition that has produced no disability but becomes disabling because of the aggravating injury.
(F) The language of § 42-9-400(a) and (d) indicates the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition.
(G) In fact, § 42-9-400 provides for the aggravation of a pre-existing condition as an alternative to the combined effects provision. [Footnote 4]
(H) An injured claimant is entitled to compensation and medical benefits for disability arising from a permanent physical impairment in combination with a pre-existing impairment if the combined effect results in a substantially greater disability.

continued next page

Workers' Compensation - combined effects of injury with pre-existing problems - *Ellison v. Frigidaire* *continued*

(I) South Carolina has adopted the "last injurious exposure rule," which places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. Consistent with the rule that an employer takes its employee as it finds her, the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition. However, if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second.

(J) When a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable. The same principle is equally applicable when the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier one.

(K) The essence of the last injurious exposure rule is to hold the insurer on the risk at the time of the second injury solely liable when the second injury aggravates the first injury.

Bartley v. Allendale County School Dist., 381 S.C. 262, 672 S.E.2d 809 (Ct. App. 2009).

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