CHAPTER 9

Compensation and Payment

**SECTION 42‑9‑5.** Basis for award.

 Any award made pursuant to this title must be based upon specific and written detailed findings of fact substantiating the award.

HISTORY: 2007 Act No. 111, Pt I, Section 16, eff July 1, 2007, applicable to injuries that occur on or after that date.

Library References

Workers’ Compensation 1767.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1263 to 1265, 1269 to 1275.

NOTES OF DECISIONS

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1. In general

An award under the workers’ compensation act may not rest upon surmise, conjecture, or speculation; instead, an award must be founded on evidence of sufficient substance to afford a reasonable basis for it. Hutson v. South Carolina State Ports Authority (S.C. 2012) 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 1408

2. Substantial evidence

Substantial Evidence to support a decision of the Workers’ Compensation Commission is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Commission reached or must have reached to support its orders. Lewis v. L.B. Dynasty, Inc. (S.C. 2017) 419 S.C. 515, 799 S.E.2d 304. Workers’ Compensation 1776

Workers’ Compensation Commission’s determination that claimant who was injured by an errant bullet while working as a exotic dancer was entitled to $75 per week in benefits was not supported by substantial evidence; Commission summarily concluded that claimant was entitled to an award of $75 per week without indicating what total it assigned to her average weekly wages, or how it reached that figure, and Commission’s finding that claimant presented “no evidence whatsoever” as to the amount of money she earned was plainly wrong. Lewis v. L.B. Dynasty, Inc. (S.C. 2017) 419 S.C. 515, 799 S.E.2d 304. Workers’ Compensation 1939.4(4)

**SECTION 42‑9‑10.** Amount of compensation for total disability; what constitutes total disability.

 (A) When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty‑six and two‑thirds percent of his average weekly wages, but not less than seventy‑five dollars a week so long as this amount does not exceed his average weekly salary; if this amount does exceed his average weekly salary, the injured employee may not be paid, each week, less than his average weekly salary. The injured employee may not be paid more each week than the average weekly wage in this State for the preceding fiscal year. In no case may the period covered by the compensation exceed five hundred weeks except as provided in subsection (C).

 (B) The 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.

 (C) 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.

 (D) Notwithstanding the provisions of Section 42‑9‑301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits.

HISTORY: 1962 Code Section 72‑151; 1952 Code Section 72‑151; 1942 Code Sections 7035‑32, 7035‑34; 1936 (39) 1231; 1937 (40) 613; 1941 (42) 221; 1953 (48) 103; 1966 (54) 2753; 1972 (57) 2339; 1974 (58) 2265; 1976 Act No. 532 Section 3; 1978 Act No. 500 Section 1; 1984 Act No. 417; 1986 Act No. 389, eff April 29, 1986; 2007 Act No. 111, Pt I, Section 17, eff July 1, 2007, applicable to injuries that occur on or after that date.

CROSS REFERENCES

Conclusiveness of Commission’s findings of fact, see Section 42‑17‑60.

Lump sum payment, see S.C. Code of Regulations R. 67‑1605.

Mediation required with certain claims, see S.C. Code of Regulations R. 67‑1802.

Total or partial loss or loss of use of a member, organ, or part of the body, see S.C. Code of Regulations R. 67‑1101.

Library References

Workers’ Compensation 850.7.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 631 to 640.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 200:8, Temporary Total Disability.

Modern Workers’ Compensation Section 205:5, Lump Sum Payments‑Types of Benefits Commutable.

Modern Workers’ Compensation Section 116:26, Concurrent Benefits.

Modern Workers’ Compensation Section 200:19, Permanent Total Disability.

Modern Workers’ Compensation Section 200:20, Permanent Total Disability‑Specific Losses.

Modern Workers’ Compensation Section 200:27, Maximum Disability Period.

Modern Workers’ Compensation Section 321:10, Temporary Total Disability and Benefits.

Modern Workers’ Compensation Section 321:13, Permanent Total Disability and Benefits.

Modern Workers’ Compensation Section 200:21.2, Lifetime Benefits.

LAW REVIEW AND JOURNAL COMMENTARIES

An Analysis of the Problem of Determining Nonschedule Partial Disability Claims Under the South Carolina Workmen’s Compensation Law. 9 SCLQ 355.

Extraordinary and unusual circumstances: compensability of psychological injuries under South Carolina’s Workers’ Compensation Law. Jordan Michael Janoski, 64 S.C. L. Rev. 1063 (Summer 2013).

Products Liability ‑ An Analysis of the Law Concerning Design and Warning Defects in Workplace Products. 33 S.C. L. Rev. 273 (December 1981).

Recovery limitation held inapplicable. 39 S.C. L. Rev. 239 (Autumn 1987).

Attorney General’s Opinions

Veterans must be rated by the Veterans’ Administration as permanently and totally disabled in order for their children to qualify for free tuition benefits. 1978 Op.Atty.Gen., No. 78‑213, p 245, 1978 WL 22681.

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1. In general

A workers’ compensation claimant’s loss of earning capacity is generally a prerequisite to a finding of permanent total disability (PTD). Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 880.5

Two competing models of workers’ compensation are available; the first, the economic model, defines disability and incapacity in terms of the claimant’s loss of earning capacity as a result of the injury, and the second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 880.3; Workers’ Compensation 880.5; Workers’ Compensation 885.1

South Carolina provides three methods to obtain disability compensation: (1) total disability, (2) partial disability, and (3) scheduled disability; the first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 850.1; Workers’ Compensation 885.1

Generally, injured claimant may proceed under either Workers’ Compensation Act’s general disability sections or under scheduled member section in order to maximize recovery; only where scheduled loss is not accompanied by additional complications affecting another part of body is scheduled recovery exclusive. Lee v. Harborside Cafe (S.C.App. 2002) 350 S.C. 74, 564 S.E.2d 354, rehearing denied, certiorari denied. Workers’ Compensation 885.1

Firefighter was entitled to workers’ compensation benefits under the general disability statute, in light of substantial evidence supporting finding by Workers’ Compensation Commission that firefighter suffered additional complications to another part of his body, other than the left leg which was amputated due to complications from a spider bite to the right leg. Simmons v. City of Charleston (S.C.App. 2002) 349 S.C. 64, 562 S.E.2d 476, rehearing denied, certiorari dismissed. Workers’ Compensation 885.14

The policy behind allowing a claimant to proceed under the general disability provisions of both Section 42‑9‑10 and Section 42‑9‑20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section; however, when a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive. Brown v. Owen Steel Co., Inc. (S.C.App. 1994) 316 S.C. 278, 450 S.E.2d 57, rehearing denied, certiorari denied. Workers’ Compensation 885.7

Date of first disability of claimant controlled, despite fact that he later returned to work, where condition causing later disability was merely continuation of that suffered earlier. Corbett v. City of Columbia (S.C. 1988) 294 S.C. 327, 364 S.E.2d 459.

Employee who suffers second injury is entitled to recover full compensation benefits even though employee recovered benefits after first injury, and employee may qualify for compensation even if employer is not entitled to reimbursement from Second Injury Fund because of employer’s failure to maintain proper records, as written record requirement in Section 42‑9‑400(c) was condition of employer’s eligibility to recover from Second Injury Fund. Wyndham v. R.A. & E.M. Thornley and Co. (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

Workers’ compensation benefits are awarded not for a physical injury as such, but for “disability” produced by such injury, as measured by the employee’s capacity or incapacity to earn the wages which he was receiving at the time of his injury. Corbett v. City of Columbia (S.C.App. 1986) 290 S.C. 71, 348 S.E.2d 191, reversed 294 S.C. 327, 364 S.E.2d 459. Workers’ Compensation 880.5

Award of workmen’s compensation benefits may not be offset by amounts received as unemployment compensation while employee is out of work and awaiting award. McLeod v. South Carolina Ins. Co. (S.C. 1979) 272 S.C. 254, 251 S.E.2d 193.

An award in an employee’s favor may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it. Coleman v. Quality Concrete Products, Inc. (S.C. 1965) 245 S.C. 625, 142 S.E.2d 43. Workers’ Compensation 1375; Workers’ Compensation 1627.11(1)

The principle that reliance on lay testimony and administrative expertise is not justified when the medical question becomes a complicated one and carries the fact‑finders into realms which are properly within the province of medical experts, is applicable to testimony as to the extent of disablement. Wynn v. Peoples Natural Gas Co. of S. C. (S.C. 1961) 238 S.C. 1, 118 S.E.2d 812.

1.5. Constitutional issues

Workers’ compensation claimant was not denied procedural due process in connection with hearing to determine permanent total disability (PTD) benefits, where Workers’ Compensation Commission held hearings to determine benefits after notice was provided to claimant and employer, claimant had a right to call any witness and cross‑examine adverse witnesses and was allowed to present any admissible evidence to support claim, and claimant received evaluations from a physician, a neurologist, an independent medical examiner, physical therapist, and a vocational assessment, which Commission considered in deciding claim. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Constitutional Law 4186; Workers’ Compensation 1687

2. Construction and application

Statute governing payment of unpaid compensation when workers’ compensation claimant dies did not provide for inheritability of benefits paid under first paragraph of statute governing amount of compensation for total disability, which concerned wage loss, and thus claimant’s widow was not entitled to receive unaccrued benefits after claimant’s death, which occurred due to causes unrelated to compensable injury; statute governing payment of unpaid compensation only provided for inheritability of awards for losses of scheduled member and for losses covered by second paragraph of statute governing amount of compensation for total disability, which concerned physical loss. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 460.4; Workers’ Compensation 1169

The statutory restriction against “total” lump sum payments should be construed strictly and not expanded to prohibit all lump sum payments in lifetime benefits workers’ compensation cases. Cox v. BellSouth Telecommunications (S.C.App. 2003) 356 S.C. 468, 589 S.E.2d 766, rehearing denied, certiorari denied. Workers’ Compensation 1005

The decisions of North Carolina courts interpreting that state’s workers’ compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina’s. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 45

Employee’s right to compensation benefits accrued on date of his injury, and liability of employer and rights of worker were limited to maximum amount under law existing on that date, such that amendment to Workers’ Compensation Act subsequent to injury does not operate to deprive either party of substantive rights fixed as of date of injury, and date of commissioner’s final award is of no consequence; 1984 amendment to SC Code Ann Section 42‑9‑10 providing that paraplegics could receive workers’ compensation benefits for life was substantive in nature, and not merely remedial or procedural in nature, such that amendment would not be construed retroactively absent specific provision or clear legislative intent to contrary. Bartley v. Bartley Logging Co. (S.C. 1987) 293 S.C. 88, 359 S.E.2d 55.

The maximum amount of worker’s compensation benefits an injured worker could recover was to be determined by the statute in effect at the time he became totally and permanently disabled, rather than by the statute in effect at the time of his injury. Corbett v. City of Columbia (S.C.App. 1986) 290 S.C. 71, 348 S.E.2d 191, reversed 294 S.C. 327, 364 S.E.2d 459.

Workers had to suffer disability within meaning of South Carolina Workers’ Compensation Act for their asbestosis to be treated as “injury” within meaning of the Act, and thus workers who did not suffer any lost wages resulting from asbestosis could not have claims for medical treatment under the Act. Southern v. Bishoff (C.A.4 (S.C.) 2017) 675 Fed.Appx. 239, 2017 WL 118016. Workers’ Compensation 549.2; Workers’ Compensation 962

3. Construction with other laws

Generally, an injured claimant may proceed under either the general disability statutes or under the scheduled member statute to maximize recovery under the Workers’ Compensation Act. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.1

An award of workers’ compensation benefits under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Specific workers’ compensation provision governing compensability of pulmonary disease controlled, in proceeding in which claimant sought benefits for asbestosis, over the more general provisions allowing for compensation to be paid to an employee with an occupational disease who suffers from a disability. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 549.2

Under the Worker’s Compensation Act, a claimant may proceed under Section 42‑9‑10 or Section 42‑9‑20 to prove a general disability; alternatively, he or she may proceed under Section 42‑9‑30 to prove a loss or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. An award under the general disability statutes must be predicated upon a showing of loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award. Fields v. Owens Corning Fiberglas (S.C. 1990) 301 S.C. 554, 393 S.E.2d 172.

An employee was not entitled to recover compensation for a second back injury where the employee’s first back injury, which was sustained while he was working for the same employer, resulted in a recovery for total and permanent disability under Sections 42‑9‑10 and 42‑9‑30(19). The employee was limited to a recovery for successive injuries to 500 weeks under Section 42‑9‑170, and, having received that recovery from the first injury, he had no basis to recover for the second injury. Medlin v. Greenville County (S.C.App. 1990) 301 S.C. 411, 392 S.E.2d 192, affirmed as modified 303 S.C. 484, 401 S.E.2d 667.

An employee’s injury to her nose, which resulted in an increased frequency of upper respiratory infection, sinusitis, occasionally severe headaches and increased allergic symptoms, was not covered by Sections 42‑9‑10 and 42‑9‑20, but rather by Section 42‑9‑30(20), where the employee had no diminution of earning capacity. Bixby v. City of Charleston (S.C.App. 1989) 300 S.C. 390, 388 S.E.2d 258.

Claimant’s benefits for total disability were governed by rate and conditions in effect on date claimant became totally disabled, at which time Section 42‑9‑100 (repealed) limited amount of compensation recoverable to $40,000. Date of permanent disability is irrelevant in determining claimant’s rate of compensation where total disability occurred prior to amendment of total disability statute. Corbett v. City of Columbia (S.C. 1988) 294 S.C. 327, 364 S.E.2d 459.

Where repealed Section 42‑9‑100, limiting the total amount of compensation to $40,000, was in effect on the date of an employee’s injury, it limited the amount of compensation payable notwithstanding the fact that the final award was made and became payable after the effective date of the repeal of the statute. Sellers v. Daniel Const. Co. (S.C. 1985) 285 S.C. 484, 330 S.E.2d 305.

The weekly maximum which is allowable for total disability and for partial disability is the same, but the weekly payments for partial disability are limited to a total of 300 weeks under Code 1962 Section 72‑152, whereas the total may be 500 weeks for total disability under the terms of Code 1962 Section 72‑151. Utica‑Mohawk Mills v. Orr (S.C. 1955) 227 S.C. 226, 87 S.E.2d 589.

4. Period for compensation

Permanency and physicality are requirements for lifetime benefits under workers’ compensation law, but the severity of the injury is the lynchpin of the analysis. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 840.7

Workers’ compensation claimant was entitled to the sum of 500 weeks of compensation less the number of weeks she received temporary partial compensation; Workers’ Compensation Act provided that the period for compensation could not exceed 500 weeks, and claimant was not paid “half weeks” as she alleged, but, rather, was paid temporary partial disability benefits to compensate for her reduced earnings during the period she worked part‑time. Roberts v. McNair Law Firm (S.C.App. 2005) 366 S.C. 50, 619 S.E.2d 453, rehearing dismissed. Workers’ Compensation 875.4

Claimant was limited to benefits for 500 weeks, and not for life where 1984 amendment to Section 42‑9‑10 was substantive in nature, and not remedial, because claimant’s right to compensation benefits accrues on date of injury, not on date of award, and liability of employer and rights of claimant are limited to maximum amount under law as it exists on date of injury; general rule is that statutes are to be construed prospectively, rather than retroactively, absent specific provision or clear legislative intent to contrary, unless statute is remedial or procedural in nature. Bartley v. Bartley Logging Co. (S.C. 1987) 293 S.C. 88, 359 S.E.2d 55.

Five hundred week limit on recovery of compensation benefits does not apply to successive injuries incurred while working for different employers. Wyndham v. R.A. & E.M. Thornley and Co. (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

5. Total disability

Capability of performing other work that is continuously available. An employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. Wynn v Peoples Natural Gas Co. (1961) 238 SC 1, 118 SE2d 812. Coleman v Quality Concrete Products, Inc. (1965) 245 SC 625, 142 SE2d 43.

Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. Wynn v Peoples Natural Gas Co. (1961) 238 SC 1, 118 SE2d 812. Colvin v E. I. Du Pont De Nemours & Co. (1955) 227 SC 465, 88 SE2d 581. Coleman v Quality Concrete Products, Inc. (1965) 245 SC 626, 142 SE2d 43.

The generally accepted test of total disability is inability to perform services other than those that are “so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.” Wynn v Peoples Natural Gas Co. (1961) 238 SC 1, 118 SE2d 812. Coleman v Quality Concrete Products, Inc. (1965) 245 SC 625, 142 SE2d 43.

Evidence supported finding that workers’ compensation claimant was not permanently and totally disabled, even though she had five pound weight lifting restrictions; rehabilitation counselor identified available jobs for claimant that were within her restrictions, and physician stated that he placed a five pound weight lifting restriction upon claimant at her request. Dozier v. American Red Cross (S.C.App. 2014) 411 S.C. 274, 768 S.E.2d 222, rehearing and rehearing en banc denied, certiorari denied. Workers’ Compensation 1627.17(4)

Substantial evidence supported Workers’ Compensation Commission’s finding that claimant was entitled to permanent and total disability (PTD) benefits; vocational expert testified that given claimant’s age, education, vocational background, lack of transferable skills, impairments, limitations, and chronic pain, he was “not job ready” and was totally disabled, and doctor testified that claimant had a forty‑eight percent impairment of the left lower extremity and an eleven percent impairment of the spine and would require ongoing pain management treatment and psychological support. Swilling v. Pride Masonry of Gaffney (S.C.App. 2012) 401 S.C. 178, 736 S.E.2d 672. Workers’ Compensation 1646.11; Workers’ Compensation 1646.14

Substantial evidence supported finding that workers’ compensation claimant was not permanently and totally disabled on the basis that her work injury resulted in total incapacity for work; claimant graduated from high school and attended several training courses and vocational training, she was versed in the operation of computers, she had extensive experience and training in occupations of a sedentary nature, and physicians evaluated claimant and testified that she could return to work in an occupation that complied with her job factor restrictions. Watson v. Xtra Mile Driver Training, Inc. (S.C.App. 2012) 399 S.C. 455, 732 S.E.2d 190, rehearing denied. Workers’ Compensation 1627.8(2); Workers’ Compensation 1627.11(2)

Employer, rather than workers’ compensation claimant, was entitled to select claimant’s treating physician after commissioner determined that claimant was permanently and totally disabled. McKinney v. Kimberly Clark Corp. (S.C.App. 2008) 376 S.C. 636, 658 S.E.2d 112. Workers’ Compensation 974

Workers’ compensation claimant is entitled to compensation for total disability resulting from work‑related injury. Orr v. Elastomeric Products (S.C.App. 1996) 323 S.C. 342, 474 S.E.2d 448. Workers’ Compensation 850.8

In a Workers’ Compensation action, the claimant was not limited to benefits under Section 42‑9‑30(15) for an injury to her leg as a scheduled member where, as a result of a hip injury in an on‑the‑job accident, she required a total hip replacement; rather, the claimant was entitled to compensation for total disability. Gilliam v. Woodside Mills (S.C. 1995) 319 S.C. 385, 461 S.E.2d 818.

An employee was eligible for permanent disability under the Workers’ Compensation Act where her injury resulted in a hip replacement, because the hip socket is not a scheduled member; the hip socket is part of the pelvis and not part of the leg for workers’ compensation purposes. Gilliam v. Woodside Mills (S.C.App. 1993) 312 S.C. 523, 435 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, remanded in part 319 S.C. 385, 461 S.E.2d 818.

Under the Workers’ Compensation Act, “total disability” does not require complete, abject helplessness. Rather, it is an inability to perform services other than those that are so limited in quality, dependability, or quantity that no reasonably stable market exists for them. Evidence that the claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability or require that it be reduced to partial. Thus, the fact that a claimant was able to drive a car for an hour, walk for ten minutes and go shopping did not preclude a finding of total and permanent disability. McCollum v. Singer Co. (S.C.App. 1989) 300 S.C. 103, 386 S.E.2d 471.

Compensation for total disability could not be awarded under this section where Commission found that the injury was confined to the employee’s leg, a member of the body scheduled in Code 1962 Section 72‑153. Singleton v. Young Lumber Co. (S.C. 1960) 236 S.C. 454, 114 S.E.2d 837.

Where claimant was disabled to perform common labor and could not obtain employment at such, and he was not qualified by training or experience for any other, award for total disability was sustained. Colvin v. E. I. Du Pont De Nemours Co. (S.C. 1955) 227 S.C. 465, 88 S.E.2d 581.

Total disability as a result of lung collapse (pneumothorax). See Colvin v. E. I. Du Pont De Nemours Co. (S.C. 1955) 227 S.C. 465, 88 S.E.2d 581.

Awards for total disability should be made separately from those for partial disability. Dameron v. Spartan Mills (S.C. 1947) 211 S.C. 217, 44 S.E.2d 465.

6. Temporary total

Substantial evidence supported award of temporary total disability (TTD) compensation; after claimant was injured he was assigned to light duty work by employer, physician placed claimant under a number of work restrictions, and, based on the restrictions, employer told claimant not to return to work. Lee v. Bondex, Inc. (S.C.App. 2013) 406 S.C. 97, 749 S.E.2d 155. Workers’ Compensation 1627.17(4)

Unappealed order of commissioner of the Workers’ Compensation Commission that employer was liable for continuing temporary total disability (TTD) benefits until claimant reached maximum medical improvement (MMI) from all injuries arising from work‑related accident was the law of the case. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 1953

In medically complex case, medical evidence and lay testimony, considered together, were sufficient to establish that discitis was present prior to date of claimant’s back injury and, thus, substantial evidence supported award of temporary total benefits plus medicals to claimant for aggravation of the condition. Tiller v. National Health Care Center of Sumter (S.C. 1999) 334 S.C. 333, 513 S.E.2d 843, rehearing denied. Workers’ Compensation 1646.11

Workers’ compensation claimant who, upon recommendation of her surgeon and physical therapists, discontinued treatment for her work‑related back injury after becoming pregnant was entitled to temporary total compensation during time when she was not participating in treatment program; fact that claimant’s pregnancy indirectly prolonged period during which she was unemployable did not change fact that her injury, not her pregnancy, rendered her unable to work. Orr v. Elastomeric Products (S.C.App. 1996) 323 S.C. 342, 474 S.E.2d 448. Workers’ Compensation 840.5; Workers’ Compensation 850.10

Where disability wages were paid to a claimant on the basis of his disability and were in effect a continuation of wage payments during a portion of the period of his disability, an award for temporary total disability should be modified to exclude any payment of compensation for the period during which the employer paid such disability wages to the claimant. Poole v. E. I. Du Pont De Nemours & Co. (S.C. 1955) 227 S.C. 232, 87 S.E.2d 640.

7. Maximum medical improvement

Evidence was sufficient to support the Workers’ Compensation Commission’s finding that claimant had reached maximum medical improvement (MMI) and was no longer entitled to temporary total benefits, regardless of whether there was a finding of MMI for claimant’s back; the only required MMI determination was for claimant’s injury to her right ankle and foot, which was supported by her treating physician’s conclusions that claimant had reached MMI, and the only medical evidence documenting claimant’s care after her spinal cord surgery was that of her treating physician who concluded the implantation of a spinal cord stimulator was successful. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 1627.14

Under workers’ compensation law, the concepts of maximum medical improvement (MMI) and permanent impairment are not mutually exclusive; simply because a claimant suffers a permanent impairment does not preclude him from reaching MMI. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 840.7; Workers’ Compensation 870.4

Essentially, worker’s compensation benefits accrue along a time continuum: temporary total disability (TTD) benefits are available from the date of injury through the date of maximum medical improvement (MMI), and post‑MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 885.6

In a workers’ compensation proceeding, the employer and its carrier were not entitled to credit for temporary total disability benefits paid to the employee after the date he reached maximum medical improvement, pursuant to Section 42‑9‑210, since a finding of maximum medical improvement did not establish that the employee was no longer disabled, and without such finding, his disability was presumed to continue. Swinton v. South Carolina Dept. of Mental Health (S.C.App. 1994) 314 S.C. 202, 442 S.E.2d 215.

8. Two body‑part rule

The implantation of a spinal cord stimulator to treat workers’ compensation claimant’s reflex sympathetic dystrophy (RSD) of her lower right extremity did not constitute an indirect injury to claimant’s back for purposes of triggering the “two‑body part” rule, and entitlement to total disability benefits, absent any showing that the implantation of the spinal cord stimulator injured claimant’s back or caused additional back impairment. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.11; Workers’ Compensation 957

While workers’ compensation claimant could proceed under the general disability statutes to maximize her recovery, the Workers’ Compensation Commission was not required to make an award for permanent and total disability, and claimant’s recovery was subject to the scheduled member statute, absent a showing by claimant of an additional injury or impairment to a second body part. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.6

9. Paraplegic

Evidence was insufficient to establish workers’ compensation claimant was a paraplegic, so as to preclude claimant’s estate from receiving the unpaid balance of claimant’s permanent and total disability benefits; claimant was never diagnosed by either of his treating physicians with incomplete or total paraplegia, employer denied claimant’s claim for injury to his legs as a result of his accident at the outset of treatment, and employer could not argue later that claimant sustained injury to his legs such that he was a paraplegic. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Constitutional Law 3879

Substantial evidence supported finding that workers’ compensation claimant was a paraplegic as a result of a work‑related accident; even though claimant had back and spinal problems and bladder and bowel incontinence before her work‑related accident, she was able to work full time, and after the accident claimant was diagnosed with “incomplete paraplegia,” she had problems with both of her legs, and she had loss of control of her anal sphincter. Reed‑Richards v. Clemson University (S.C.App. 2006) 371 S.C. 304, 638 S.E.2d 77, rehearing denied, certiorari denied. Workers’ Compensation 1627.13(1)

The workers’ compensation commission’s determination that the term “paraplegic” included a diagnosis of incomplete paraplegia, for the purpose of workers’ compensation statute that awarded lifetime workers’ compensation benefits to a paraplegic, did not constitute reversible error; the term was interpreted consistently with the legislative purpose of construing workers’ compensation laws in favor of claimants, and evidence established that claimant, who was diagnosed with incomplete paraplegia, was totally and permanently disabled. Reed‑Richards v. Clemson University (S.C.App. 2006) 371 S.C. 304, 638 S.E.2d 77, rehearing denied, certiorari denied. Workers’ Compensation 885.15

Person who becomes paraplegic as result of work‑related accident may recover for permanent and total disability workers’ compensation benefits and yet continue to work; if she suffers additional work‑related injury that is either scheduled injury distinct from her paraplegia, or that deprives her of earning capacity, she may recover benefits for that injury. Stephenson v. Rice Services, Inc. (S.C. 1996) 323 S.C. 113, 473 S.E.2d 699, rehearing denied. Workers’ Compensation 880.10

10. Physical brain damage

Workers’ compensation appellate panel could rely on testimony by neuropsychologist that diagnostic imaging of claimant’s brain revealed no physical brain damage, even though neuropsychologist was allegedly unqualified to interpret images from such diagnostic testing, where neuropsychologist was merely reiterating findings made by doctors qualified to interpret the images. Fragosa v. Kade Const., LLC (S.C.App. 2013) 407 S.C. 424, 755 S.E.2d 462, rehearing denied. Workers’ Compensation 1531.5

There must be sufficient evidence in the record to support a finding of physical brain damage in order to award benefits under workers’ compensation statute provision governing total long term disability entitling a claimant to payment of benefits for life. Baker v. Hilton Hotels Corp. (S.C.App. 2013) 406 S.C. 395, 752 S.E.2d 279. Workers’ Compensation 885.10

The Supreme Court would decline to impose a requirement that physical damage, as required to award life‑time benefits for totally disabled claimants suffering physical brain damage, must be proved through an “objective diagnostic medium,” since some indisputably physical brain damage may not be revealed by diagnostic instruments that can detect only relatively gross physical abnormalities. Sparks v. Palmetto Hardwood, Inc. (S.C. 2013) 406 S.C. 124, 750 S.E.2d 61, rehearing denied. Workers’ Compensation 1646.10

The term, “physical brain damage,” as contemplated in workers’ compensation statute awarding life‑time benefits for totally disabled claimants suffering physical brain damage, required claimant to show severe and permanent physical brain damage as a result of a compensable injury; General Assembly used the term “brain damage” only one other time in workers’ compensation statutes, where it was included in a list of “permanent physical impairments,” and such a definition was consonant with purpose of workers’ compensation statutes to provide only minimal compensation. Sparks v. Palmetto Hardwood, Inc. (S.C. 2013) 406 S.C. 124, 750 S.E.2d 61, rehearing denied. Workers’ Compensation 885.10

Mere presence of any physical brain injury or damage, regardless of degree, did not trigger workers’ compensation statute awarding lifetime benefits to claimant who suffered physical brain damage; inclusion of “physical brain damage,” along with quadriplegia and paraplegia, in statute was indicative of the General Assembly’s intent to compensate claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 1646.10

Inclusion of “physical brain damage” among the most serious injuries within the statutory exception to the 500 week cap on workers’ compensation benefits was an indication that the legislature was contemplating a brain injury so severe that claimant could not subsequently return to suitable gainful employment. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 880.10; Workers’ Compensation 885.10

Only in cases of physical brain damage that are both permanent and severe is workers’ compensation claimant be entitled to benefits for life. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 885.10

Supreme Court is reluctant to require use of a specific diagnostic tool in proving medically‑technical brain injury for purposes of workers’ compensation statute awarding claimant, who has suffered physical brain damage, lifetime benefits. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 568.4; Workers’ Compensation 885.10

Inherent in the statutory requirement for lifetime benefits, that the injury to the brain be severe, is the requirement that workers’ compensation claimant is unable to return to suitable gainful employment. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 880.10; Workers’ Compensation 885.10

Statute governing total disability as result of physical brain damage only requires that workers’ compensation claimant be totally and permanently disabled and suffer physical brain damage as result of injury; statute does not require total and permanent disability to be solely result of physical brain damage. Pearson v. JPS Converter & Indus. Corp. (S.C.App. 1997) 327 S.C. 393, 489 S.E.2d 219, rehearing denied, certiorari denied. Workers’ Compensation 850.8

11. Additional benefits

Substantial evidence existed to support Workers’ Compensation Commission’s finding that claimant was not entitled to additional disability benefits due to a changed condition for the worse; claimant had already received permanent partial disability for the injury she received to her right ankle and foot, her impairment rating decreased following surgery, and despite a diagnosis of reflex sympathetic dystrophy (RSD) of her lower right extremity, her treating physician did not assign claimant with an impairment rating for the RSD, but rather concluded the implantation of a spinal cord stimulator was successful, and that claimant had reached maximum medical improvement (MMI) for her right leg and foot pain. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 1646.14

When in consequence of an accident, total and permanent disability is shown, and the statutory award is made therefor, this automatically excludes any further allowance. For to add an award for bodily disfigurement would be to go beyond the whole scheme of our workmen’s compensation legislation. Montgomery v. York Mills (S.C. 1944) 204 S.C. 469, 30 S.E.2d 68.

An employee who has suffered a 50 percent or more loss of use of his or her back and has received total and permanent compensation for this loss, is not entitled to any further total and permanent benefits for successive injuries to that same body part. Only if an employee has suffered less than a 50 percent loss to his or her back in a prior accident, will he or she be entitled to compensation for the degree of disability resulting from a subsequent accident. These principles are applicable in any case, regardless of whether the successive injury occurred while working for the same or different employers. (Overruling Wyndhan v R.A. & E.M. Thornley and Co., 291 SC 496, 354 SE2d 399 (Ct App 1987) to the extent that it distinguishes between successive injuries incurred while working for the same rather than for different employers.) Medlin v. Greenville County (S.C. 1991) 303 S.C. 484, 401 S.E.2d 667.

12. Lump sum payments

Statute prohibiting total lump sum payments from workers’ compensation claimant’s lifetime benefits does not preclude partial lump sum payments of lifetime benefits. Thompson v. South Carolina Steel Erectors (S.C.App. 2006) 369 S.C. 606, 632 S.E.2d 874, rehearing denied, certiorari denied. Workers’ Compensation 1005

Workers’ Compensation Commission erred as a matter of law in ruling that it was not empowered to award a partial lump sum payment of claimant’s lifetime benefits awarded for a brain injury; the statutory restriction against “total” lump sum payments should be construed strictly and not expanded to prohibit all lump sum payments in lifetime benefits cases. Cox v. BellSouth Telecommunications (S.C.App. 2003) 356 S.C. 468, 589 S.E.2d 766, rehearing denied, certiorari denied. Workers’ Compensation 1005

The Workers’ Compensation Commission may properly approve lump sum attorney’s fees to claimants awarded lifetime benefits, to be deducted from the end of the claimant’s award pursuant to Reg. 67‑1207. Glover by Cauthen v. Suitt Const. Co. (S.C. 1995) 318 S.C. 465, 458 S.E.2d 535, rehearing denied. Workers’ Compensation 1980.18

Section 42‑9‑10 and Reg 67‑1207, when read together, clearly evince a legislative intent to permit recovery of lump sum attorney’s fees to any claimant who receives benefits in excess of 100 weeks. Glover by Cauthen v. Suitt Const. Co. (S.C. 1995) 318 S.C. 465, 458 S.E.2d 535, rehearing denied.

Where it was contended that Code 1962 Section 72‑181 did not apply to this section [Code 1962 Section 72‑151] and Code 1962 Section 72‑152, because such awards are not for a definite sum of money payable in all events over a definite period of years and months, but are contingent in nature, it was held that the terms of Code 1962 Section 72‑181 are very broad and that the Industrial Commission is empowered under certain circumstances to authorize a lump sum settlement of weekly compensation awarded for total disability. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

13. Loss of earning capacity

An award of workers’ compensation benefits under the general‑disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled‑loss statute does not require such a showing. Hutson v. South Carolina State Ports Authority (S.C. 2012) 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Driver for collateral repossession company injured while he was repossessing vehicle did not have to show a loss of earning capacity in order to be entitled lifetime permanent total disability benefits, as driver had become a paraplegic and thus by statute was presumptively totally disabled. Paschal v. Price (S.C.App. 2008) 380 S.C. 419, 670 S.E.2d 374, rehearing denied, certiorari granted, affirmed 392 S.C. 128, 708 S.E.2d 771. Workers’ Compensation 1377

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 Section 42‑9‑10. Since such an injury is included in the list of specific disabilities found in Section 42‑9‑30, it is an exception to the general rule under Section 42‑9‑10 requiring a claimant to show a loss of earning capacity. Bateman v. Town & Country Furniture Co. (S.C.App. 1985) 287 S.C. 158, 336 S.E.2d 890.

Disability in compensation cases is to be measured by loss of earning capacity. Coleman v. Quality Concrete Products, Inc. (S.C. 1965) 245 S.C. 625, 142 S.E.2d 43. Workers’ Compensation 880.5

Award under this section [Code 1962 Section 72‑151] is predicated upon loss of earnings or of earning capacity. G. E. Moore Co. v. Walker (S.C. 1958) 232 S.C. 320, 102 S.E.2d 106.

14. Spouse

Circuit court’s award to workers’ compensation claimant’s widow of a limited balance of 500 weeks on claimant’s lifetime award, after claimant died from a cause unrelated to his work injury, was the law of the case and was to be affirmed on appeal, where employer’s insurer did not appeal the award. Floyd v. C.B. Askins & Co. Contractors (S.C.App. 2009) 382 S.C. 84, 675 S.E.2d 450, certiorari denied. Workers’ Compensation 1964

Widow was not entitled to the full balance of compensation remaining on workers’ compensation claimant’s lifetime award, after claimant died from a cause unrelated to his work injury; statute governing payment of unpaid compensation only provided for inheritability of full awards for loss of use of a scheduled member or loss of both hands, arms, feet, legs or vision in both eyes, and claimant’s award had instead been based on serious brain injury. Floyd v. C.B. Askins & Co. Contractors (S.C.App. 2009) 382 S.C. 84, 675 S.E.2d 450, certiorari denied. Workers’ Compensation 911

14.5. Res judicata

Doctrine of res judicata did not bar workers’ compensation claimant from raising issue of her complex regional pain syndrome (CRPS/RSD) before single commissioner when seeking permanent total disability benefits, although in prior proceedings commissioner did not rule upon or acknowledge claimant’s claim for CRPS/RSD in awarding her temporary total disability benefits, and issue of CRPS/RSD was not specifically enumerated in claimant’s issues on appeal from commissioner’s order in prior proceedings; neither commissioner’s prior order nor Appellate Panel’s decision on appeal from that order demonstrated that the issue of CRPS/RSD was addressed with finality. Dozier v. American Red Cross (S.C.App. 2014) 411 S.C. 274, 768 S.E.2d 222, rehearing and rehearing en banc denied, certiorari denied. Workers’ Compensation 2001

14.75. Estoppel

Employer’s conduct in permitting workers’ compensation claimant to receive ongoing medical treatment, including three stellate ganglion blocks and several carpal tunnel injections, in an effort to alleviate her pain and to rehabilitate her injuries, and in paying for those treatments, did not bar employer, under doctrine of equitable estoppel, from denying that claimant suffered from complex regional pain syndrome (CRPS/RSD), in proceedings for permanent total disability benefits; it was not clear that employer possessed actual knowledge that claimant suffered from CRPS/RSD because the issue of compensability of claimant’s wrists was a contested issue from the outset of claimant’s case. Dozier v. American Red Cross (S.C.App. 2014) 411 S.C. 274, 768 S.E.2d 222, rehearing and rehearing en banc denied, certiorari denied. Workers’ Compensation 1114

14.85. Waiver

Employer did not waive its right to contest compensability of workers’ compensation claimant’s complex regional pain syndrome (CRPS/RSD) in proceedings on claimant’s request for permanent total disability benefits, even though it had provided medical treatment for a period of 728 days for claimant’s condition, where employer had previously accepted responsibility for claimant’s carpal tunnel syndrome and allowed treatment on that basis, but denied all other alleged injuries, including CRPS/RSD. Dozier v. American Red Cross (S.C.App. 2014) 411 S.C. 274, 768 S.E.2d 222, rehearing and rehearing en banc denied, certiorari denied. Workers’ Compensation 1114

14.9. Discovery

Workers were not entitled to rely on their supplemental summary judgment affidavits of compensable workers’ compensation wages due to disability from asbestosis within two years of their last exposure to asbestos at employer, which they submitted nearly two months after deadline for completion of discovery, in their action against attorneys alleging malpractice, breach of contract, and breach of fiduciary duty under South Carolina law, where workers did not offer any justification whatsoever for not producing evidence on that point prior to the discovery deadline and attorneys had made timing of onset of any asbestos‑caused disability a critical issue from start of this case. Southern v. Bishoff (C.A.4 (S.C.) 2017) 675 Fed.Appx. 239, 2017 WL 118016. Federal Civil Procedure 1278; Federal Civil Procedure 1938.1

15. Attorney fees

A workers’ compensation claimant and a carrier may agree that the claimant’s attorney’s fees, paid by the carrier, will be deducted from an award of a fixed duration greater than one hundred weeks. Floyd v. C.B. Askins & Co. Contractors (S.C.App. 2009) 382 S.C. 84, 675 S.E.2d 450, certiorari denied. Workers’ Compensation 1980.18

Conduct of personal injury attorneys pursuing asbestos claims on behalf of workers without representing or advising them on their workers’ compensation claims was not clear and serious violation, and thus such conduct was not breach of fiduciary duty under South Carolina law and could not support fee disgorgement, where those workers did not have viable claims at time those attorneys commenced representing them. Southern v. Bishoff (C.A.4 (S.C.) 2017) 675 Fed.Appx. 239, 2017 WL 118016. Attorney and Client 109; Attorney and Client 153

16. Presumptions and burden of proof

Fact that the injury alleged is physical brain damage, under statute allowing lifetime benefits for such injury, does not change the workers’ compensation claimant’s ultimate burden of proving his or her injuries. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 1357

Proof that workers’ compensation claimant sustained injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident. Tiller v. National Health Care Center of Sumter (S.C. 1999) 334 S.C. 333, 513 S.E.2d 843, rehearing denied. Workers’ Compensation 1490

To serve as proof that workers’ compensation claimant sustained an injury, circumstantial and direct evidence need not reach such degree of certainty as to exclude every reasonable or possible conclusion other than that reached by the South Carolina Workers’ Compensation Commission. Tiller v. National Health Care Center of Sumter (S.C. 1999) 334 S.C. 333, 513 S.E.2d 843, rehearing denied. Workers’ Compensation 1490

The burden is upon the employee to prove, in accordance with the generally acceptable test of total disability, that he is unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Coleman v. Quality Concrete Products, Inc. (S.C. 1965) 245 S.C. 625, 142 S.E.2d 43. Workers’ Compensation 880.10; Workers’ Compensation 880.16

Workers could not prove they lost wages due to their asbestosis in order to establish right to compensation, and thus they did not have viable workers’ compensation claims under South Carolina law and personal injury attorneys pursuing asbestos claims on their behalf were not negligent in not advising them or representing them with regard to workers’ compensation claims, where workers had stopped working and were collecting Social Security payments based on disability from other conditions years before they were diagnosed with asbestosis. Southern v. Bishoff (C.A.4 (S.C.) 2017) 675 Fed.Appx. 239, 2017 WL 118016. Attorney and Client 112

17. Questions of fact

As is question of when claimant is able to return to work. Halks v Rust Engineering Co. (1946) 208 SC 39, 36 SE2d 852. Poole v E. I. Du Pont De Nemours & Co. (1955) 227 SC 232, 87 SE2d 640.

Extent of injured workman’s disability is a question of fact for determination by the Commission and will not be reversed if it is supported by competent evidence. Colvin v. E. I. Du Pont De Nemours Co. (S.C. 1955) 227 S.C. 465, 88 S.E.2d 581. Workers’ Compensation 1939.11(5)

17.5. Sufficiency of evidence

Finding that workers’ compensation claimant did not suffer from complex regional pain syndrome (CRPS/RSD) was supported by opinions of two physicians that claimant did not suffer from CRPS/RSD. Dozier v. American Red Cross (S.C.App. 2014) 411 S.C. 274, 768 S.E.2d 222, rehearing and rehearing en banc denied, certiorari denied. Workers’ Compensation 1531.6

18. Review

Workers’ Compensation Commission’s order, refusing to transfer responsibility for continuing compensation and benefits to the Uninsured Employers’ Fund, was not immediately appealable because it left the merits of employee’s workers’ compensation claim for permanent disability unresolved; dismissing appeal did not deprive employer of an adequate remedy, and employer made no specific argument as to how the Commission’s refusal to address transfer at this time affected it in any way other than to delay the payment of money. Rose v. JJS Trucking, LLC (S.C.App. 2015) 411 S.C. 366, 768 S.E.2d 412, rehearing denied, certiorari denied. Workers’ Compensation 1833

Remand was required to determine whether claimant suffered permanent brain damage that would entitle him to lifetime benefits under provision of worker’s compensation statute governing permanent disability, where appellate commission made inconsistent findings as to the presence of a physical brain injury, and failed to clarify whether the injury, if any, constituted permanent damage. Fragosa v. Kade Const., LLC (S.C.App. 2013) 407 S.C. 424, 755 S.E.2d 462, rehearing denied. Workers’ Compensation 1949

Workers’ compensation appellate panel’s finding that claimant did not suffer physical brain damage was inconsistent with treating psychologist’s finding that there was physical brain damage, and thus, remand was required to determine how exactly appellate panel treated the psychologist’s evaluation of claimant. Baker v. Hilton Hotels Corp. (S.C.App. 2013) 406 S.C. 395, 752 S.E.2d 279. Workers’ Compensation 1949

The single commissioner’s finding that workers’ compensation claimant had some aggravation of pre‑existing psychological problems because of her right foot and ankle injury, but failed to prove that her need for psychological treatment was the sole result of her accidental injury, and thus did not constitute a second injury for purposes of her total disability claim, was not appealed by claimant, and thus, became the law of the case. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 1821

Because Workers’ Compensation Commission did not resolve the permanent status of claimant’s brain injury, case would be remanded to the Commission for a determination of maximum medical improvement (MMI), permanency, and whether claimant’s injury constituted physical brain damage, which would entitle him to workers’ compensation benefits for life. Crisp v. SouthCo., Inc. (S.C. 2013) 401 S.C. 627, 738 S.E.2d 835. Workers’ Compensation 1950

Employer and carrier waived their appellate argument that alleged the interpretation of the term “paraplegic” endorsed by the workers’ compensation commission and the trial court could not be logically reconciled with other statutes within the Workers’ Compensation Act that set forth a partial loss ration scheme on which statutory benefits were based, where there was no ruling on the argument by a single commissioner, the full commission, or the trial court, and there was no evidence the omission was raised in a post‑trial motion. Reed‑Richards v. Clemson University (S.C.App. 2006) 371 S.C. 304, 638 S.E.2d 77, rehearing denied, certiorari denied. Workers’ Compensation 1846

Employer and insurance carrier waived for appellate review their claim that Workers’ Compensation Commission erred in finding that partial lump sum payment should be deducted from “back end” of claimant’s lifetime monetary benefits award, although employer and carrier raised claim as exception to Commission in appeal from single commissioner’s ruling; Commission never specifically addressed claim, and issue was not raised in Circuit Court on appeal. Thompson v. South Carolina Steel Erectors (S.C.App. 2006) 369 S.C. 606, 632 S.E.2d 874, rehearing denied, certiorari denied. Workers’ Compensation 1856

Employer and insurance carrier waived for appellate review their claim that workers’ compensation claimant was not entitled to lifetime benefits following work‑related injury that resulted in paraplegia, where claim was not raised before Workers’ Compensation Commission or circuit court, and employer and carrier stipulated to claimant’s entitlement to lifetime benefits at hearing before single commissioner. Thompson v. South Carolina Steel Erectors (S.C.App. 2006) 369 S.C. 606, 632 S.E.2d 874, rehearing denied, certiorari denied. Workers’ Compensation 1842; Workers’ Compensation 1856

Finding of full Workers’ Compensation Commission that claimant’s back injury resulted in a 40% permanent impairment, rather than 19% awarded by commissioner, was supported by substantial evidence and, thus, should have been affirmed by the circuit court. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 1646.11

In a Workers’ Compensation action, the Court of Appeals should have remanded the case to the Workers’ Compensation Commission so that it could address the issue of whether claimant was totally disabled under Section 42‑9‑10 or partially disabled under Section 42‑9‑20 where such determination had not been made by the commission, and the Court of Appeals had reversed the Commission’s finding that the claimant’s injury was confined to a scheduled member. Gilliam v. Woodside Mills (S.C. 1995) 319 S.C. 385, 461 S.E.2d 818.

There was substantial evidence to support the finding of the hearing commission that a workers’ compensation claimant suffered more than a 50 percent impairment to his back where the claimant testified at length to the character and extent of his back injury, the restrictions the injury had placed on his physical activities, and his inability to do the type of work he did at the time of the injury. Lyles v. Quantum Chemical Co. (Emery) (S.C.App. 1993) 315 S.C. 440, 434 S.E.2d 292, rehearing denied, certiorari denied. Workers’ Compensation 1646.11

**SECTION 42‑9‑20.** Amount of compensation for partial disability.

 Except as otherwise provided in Section 42‑9‑30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty‑six and two‑thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

HISTORY: 1962 Code Section 72‑152; 1952 Code Section 72‑152; 1942 Code Section 7035‑33; 1936 (39) 1231; 1937 (40) 613; 1953 (48) 103; 1966 (54) 2753; 1972 (57) 2339; 1974 (58) 2265; 1976 Act No. 532 Section 4; 1977 Act No. 70.

CROSS REFERENCES

Total or partial loss or loss of use of a member, organ, or part of the body, see S.C. Code of Regulations R. 67‑1101.

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Workers’ Compensation 850.2, 875.4.

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Modern Workers’ Compensation Section 200:7, Temporary Partial Disability.

Modern Workers’ Compensation Section 200:17, Unscheduled Injuries‑Loss of Wages or Wage‑Earning Capacity.

Modern Workers’ Compensation Section 200:23, Overlapping Disabilities‑Same Injury.

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LAW REVIEW AND JOURNAL COMMENTARIES

An Analysis of the Problem of Determining Nonschedule Partial Disability Claims Under the South Carolina Workmen’s Compensation Law. 9 SC LQ 355.

Products Liability—An Analysis of the Law Concerning Design and Warning Defects in Workplace Products. 33 S.C. L. Rev. 273 (December 1981).

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1. In general

Under the Workers’ Compensation Act, a work‑related injury is compensable above and beyond the cost of treatment to the extent it renders the employee disabled. Johnson v. Beauty Unlimited Landscape Co. (S.C.App. 2008) 379 S.C. 403, 665 S.E.2d 656, rehearing denied, certiorari granted. Workers’ Compensation 836; Workers’ Compensation 966

South Carolina provides three methods to obtain disability compensation: (1) total disability, (2) partial disability, and (3) scheduled disability; the first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 850.1; Workers’ Compensation 885.1

Firefighter was entitled to workers’ compensation benefits under the general disability statute, in light of substantial evidence supporting finding by Workers’ Compensation Commission that firefighter suffered additional complications to another part of his body, other than the left leg which was amputated due to complications from a spider bite to the right leg. Simmons v. City of Charleston (S.C.App. 2002) 349 S.C. 64, 562 S.E.2d 476, rehearing denied, certiorari dismissed. Workers’ Compensation 885.14

In a workers’ compensation action, the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable. Mullinax v. Winn‑Dixie Stores, Inc. (S.C.App. 1995) 318 S.C. 431, 458 S.E.2d 76, rehearing denied, appeal dismissed. Workers’ Compensation 597

This section [Code 1962 Section 72‑152] requires weekly payments (not exceeding 300) of a percentage of the difference between the average weekly wages before the injury and the average weekly wages which the employee is able to earn thereafter. Utica‑Mohawk Mills v. Orr (S.C. 1955) 227 S.C. 226, 87 S.E.2d 589.

Correct method for computing compensation, where currently unemployed claimant had sustained 30 per cent permanent disability, is to take 30 per cent of wages being earned at time of injury and allow 60 per cent of that amount for 300 weeks. Utica‑Mohawk Mills v. Orr (S.C. 1955) 227 S.C. 226, 87 S.E.2d 589.

When claimant over a period of fifteen months was totally disabled for part and partially disabled for the other part, the Commission should determine the proportion for each and make an award for the time she was totally disabled and an award for the time she was partially disabled. Dameron v. Spartan Mills (S.C. 1947) 211 S.C. 217, 44 S.E.2d 465.

2. Construction with other laws

While workers’ compensation claimant could proceed under the general disability statutes to maximize her recovery, the Workers’ Compensation Commission was not required to make an award for permanent and total disability, and claimant’s recovery was subject to the scheduled member statute, absent a showing by claimant of an additional injury or impairment to a second body part. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.6

Generally, an injured claimant may proceed under either the general disability statutes or under the scheduled member statute to maximize recovery under the Workers’ Compensation Act. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.1

Specific workers’ compensation provision governing compensability of pulmonary disease controlled, in proceeding in which claimant sought benefits for asbestosis, over the more general provisions allowing for compensation to be paid to an employee with an occupational disease who suffers from a disability. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 549.2

Workers’ compensation award under the general disability statutes, rather than an award under the statute for loss of a member was proper; evidence established that claimant suffered mental problems as a result of a physical injury and, thus, statute limiting a claimant to scheduled recovery for scheduled loss not accompanied by additional complications affecting another body part did not apply. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 885.26

Generally, injured claimant may proceed under either Workers’ Compensation Act’s general disability sections or under scheduled member section in order to maximize recovery; only where scheduled loss is not accompanied by additional complications affecting another part of body is scheduled recovery exclusive. Lee v. Harborside Cafe (S.C.App. 2002) 350 S.C. 74, 564 S.E.2d 354, rehearing denied, certiorari denied. Workers’ Compensation 885.1

The policy behind allowing a claimant to proceed under the general disability provisions of both Section 42‑9‑10 and Section 42‑9‑20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section; however, when a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive. Brown v. Owen Steel Co., Inc. (S.C.App. 1994) 316 S.C. 278, 450 S.E.2d 57, rehearing denied, certiorari denied. Workers’ Compensation 885.7

Award under Code 1962 Section 72‑153 rather than this section [Code 1962 Section 72‑152] is within the power of the Commission if there be evidence to support it. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52.

Where it was contended that Code 1962 Section 72‑181 did not apply to this section [Code 1962 Section 72‑152] and Code 1962 Section 72‑151 because such awards are not for a definite sum of money payable in all events over a definite period of years and months but are contingent in nature, it was held that the terms of Code 1962 Section 72‑181 are very broad and that the Industrial Commission is empowered under certain circumstances to authorize a lump sum settlement of weekly compensation awarded for total disability. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

3. Disability

The evidence supported a finding by the Workers’ Compensation Commission that a claimant suffered a permanent 10 percent impairment to her back, despite the testimony of 2 neurosurgeons and one orthopaedic surgeon that she had no permanent partial impairment, where her family physician, who had treated her throughout her recuperation, testified that she had a permanent 10 percent impairment. Williams v. South Carolina Dept. of Mental Retardation (S.C.App. 1992) 308 S.C. 438, 418 S.E.2d 555.

A medical estimate of the percentage of disability may furnish reasonable basis for calculation of compensation for partial disability under this section [Code 1962 Section 72‑152]. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99. Workers’ Compensation 1627.10(3)

Where there is medical testimony as to percentage of disability and also testimony as to average post‑injury wages, the Commission, in its search for a proper basis for computing reasonable compensation under this section [Code 1962 Section 72‑152], may avail itself of either. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99. Workers’ Compensation 1402

4. Period for compensation

Workers’ compensation claimant was entitled to the sum of 500 weeks of compensation less the number of weeks she received temporary partial compensation; Workers’ Compensation Act provided that the period for compensation could not exceed 500 weeks, and claimant was not paid “half weeks” as she alleged, but, rather, was paid temporary partial disability benefits to compensate for her reduced earnings during the period she worked part‑time. Roberts v. McNair Law Firm (S.C.App. 2005) 366 S.C. 50, 619 S.E.2d 453, rehearing dismissed. Workers’ Compensation 875.4

5. Loss of earning capacity

By the clear terms of this section [Code 1962 Section 72‑152] and Code 1962 Section 72‑10, compensation under the Act is not awarded for the physical injury as such, but for “disability” produced by such injury. The disability is to be measured by the employee’s capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion. There is no recognition of the elements of pain and suffering, or of increased discomfort and difficulty in performing the work, as long as there is no diminution in earning capacity. Owens v Herndon (1969) 252 SC 166, 165 SE2d 696. Outlaw v Johnson Service Co. (1970) 254 SC 486, 176 SE2d 152.

Award under this section [Code 1962 Section 72‑152] is predicated upon loss of earnings or of earning capacity. Roper v Kimbrell’s of Greenville, Inc. (1957) 231 SC 453, 99 SE2d 52. G. E. Moore Co. v Walker (1958) 232 SC 320, 102 SE2d 106.

Beckman v. Sysco Columbia, LLC (S.C.App. 2014) 2014 WL 1047090, [main volume], Unreported, superseded 408 S.C. 501, 759 S.E.2d 750, withdrawn from bound volume, superseded 2014 WL 10788900, rehearing denied, certiorari dismissed as improvidently granted, opinion ordered depublished 414 S.C. 538, 779 S.E.2d 554.

An award of workers’ compensation benefits under the general‑disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled‑loss statute does not require such a showing. Hutson v. South Carolina State Ports Authority (S.C. 2012) 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 880.5; Workers’ Compensation 885.1

An award of workers’ compensation benefits under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Evidence was sufficient to support commissioner’s finding that workers’ compensation claimant was capable of running a restaurant, and thus, not entitled to an award for a loss of earning capacity, where claimant testified he had studied culinary arts and food sanitation, his family had been in the restaurant business for many years, and since his release from treatment, he had been working on a restaurant project, researching locations, getting menu selections, and pricing equipment. Hutson v. State Ports Authority (S.C.App. 2010) 390 S.C. 108, 700 S.E.2d 462, rehearing denied, certiorari granted, reversed 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 1627.17(2)

A workers’ compensation claimant may obtain partial permanent disability benefits; to do so a claimant must show an injury and a loss of earning capacity. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 840.7; Workers’ Compensation 850.3; Workers’ Compensation 880.5

An award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Employer failed to establish that workers’ compensation claimant drove a truck for employer while insulin dependent, which, employer argued, would result in claimant earning income when he was not legally able to earn income and would not support a loss of earning capacity claim; claimant testified that he was not insulin dependent at any time while he drove a truck for employer, and employer failed to present any evidence that contradicted that testimony. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 1627.17(2)

Under the Worker’s Compensation Act, a claimant may proceed under Section 42‑9‑10 or Section 42‑9‑20 to prove a general disability; alternatively, he or she may proceed under Section 42‑9‑30 to prove a loss or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. An award under the general disability statutes must be predicated upon a showing of loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award. Fields v. Owens Corning Fiberglas (S.C. 1990) 301 S.C. 554, 393 S.E.2d 172.

An employee’s injury to her nose, which resulted in an increased frequency of upper respiratory infection, sinusitis, occasionally severe headaches and increased allergic symptoms, was not covered by Sections 42‑9‑10 and 42‑9‑20, but rather by Section 42‑9‑30(20), where the employee had no diminution of earning capacity. Bixby v. City of Charleston (S.C.App. 1989) 300 S.C. 390, 388 S.E.2d 258.

Loss of earning capacity alone is the criterion for compensation under the Act and medical opinion as to the extent of physical disability can have no probative value against actual earnings. Outlaw v. Johnson Service Co. (S.C. 1970) 254 S.C. 486, 176 S.E.2d 152.

Since disability is to be measured by the employee’s capacity or incapacity to earn the wages he was receiving at the time of his injury, the fact that after the injury the employee has not worked, and has therefore earned no wages, is not in itself determinative of the extent of loss of his earning capacity. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99.

Though the amount of the post‑injury wage, averaged over a reasonable period of time, is not necessarily conclusive of the diminution of earning capacity, it does furnish a reasonable basis for comparison with the average pre‑injury wage in determining whether and to what extent there has been such diminution, assuming a fair appraisal of such variable factors as the employee’s willingness to work and the availability to him of employment, within his capabilities, sufficiently regular and continuous to establish his true earning capacity. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99. Workers’ Compensation 880.4

The award may not rest upon a speculation that diminution of earning capacity not shown to exist at the time of the hearing may occur at some time in the future as the result of the injury. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99.

Where there was no diminution of claimant’s earning capacity he was not entitled to partial disability, and the Commission was without authority to retain jurisdiction for three hundred weeks pending change of conditions. Keeter v. Clifton Mfg. Co. (S.C. 1954) 225 S.C. 389, 82 S.E.2d 520.

6. Lost wages

Testimony of workers’ compensation claimant about a possible restaurant business was based on speculation, surmise, and conjecture and, thus, could not constitute substantial evidence supporting a decision that claimant was not entitled to wage‑loss benefits, even though claimant, who had been a crane operator before he was injured, had family members in the restaurant business, had taken a course in culinary arts, and was confident in his own abilities; claimant never worked in a restaurant in his life, much less operated one, and clearly had no idea what income he might realize from such a venture. Hutson v. South Carolina State Ports Authority (S.C. 2012) 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 1627.17(1)

Claimant with occupational disease of asbestosis was unable to prove lost wages, as necessary to recover workers’ compensation benefits for a partial disability, where claimant made more money with a subsequent employer than he did in job during which his asbestos exposure occurred. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.5; Workers’ Compensation 885.3

Claimant’s partial disability from asbestosis, a pulmonary disease, was not compensable under scheduled loss provisions of workers’ compensation statute, and was only compensable if claimant made a showing of lost wages under provisions governing awards for partial disability. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.7; Workers’ Compensation 885.3

7. Credits

Employer was not entitled to credit against the permanent partial disability benefits it was ordered to provide claimant for the temporary total benefits paid after claimant reached maximum medical improvement (MMI); claimant’s initially injured his shoulder and received temporary total disability benefits, claimant’s depression developed as a result of and after that period of total disability, and claimant was later determined to have a permanent partial general disability resulting from his depression and mental health problems. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 934.4

It is error to fail to allow employer and insurance carrier credit for overpayment of compensation as for total disability instead of partial, which was the award. Utica‑Mohawk Mills v. Orr (S.C. 1955) 227 S.C. 226, 87 S.E.2d 589.

8. Presumptions and burden of proof

Claimant has the burden of proving his case by the preponderance of the evidence. Frady v. Pacific Mills (S.C. 1957) 231 S.C. 601, 99 S.E.2d 398. Workers’ Compensation 1421

9. Review

In a Workers’ Compensation action, the Court of Appeals should have remanded the case to the Workers’ Compensation Commission so that it could address the issue of whether claimant was totally disabled under Section 42‑9‑10 or partially disabled under Section 42‑9‑20 where such determination had not been made by the commission, and the Court of Appeals had reversed the Commission’s finding that the claimant’s injury was confined to a scheduled member. Gilliam v. Woodside Mills (S.C. 1995) 319 S.C. 385, 461 S.E.2d 818.

In a workers’ compensation action, the employer did not preserve for appeal its allegation that the claimant made an election of remedies by checking the “general disability” box on his form 50 rather that the “specific disability” box where the employer (1) failed to raise the argument to the full commission or the Circuit Court, (2) failed to claim any resulting prejudice ‑ e.g. that the lack of notice of a Section 42‑9‑30 claim caused a failure to procure, discover, or present relevant evidence, and (3) failed to seek to introduce any additional evidence to the Workers’ Compensation Commission as allowed by Section 42‑17‑50 upon learning that the single commissioner awarded benefits under Section 42‑9‑30. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112.

An order of the Workers’ Compensation Commission reversing the issue of whether a claimant was required to elect pursuing a claim under Section 42‑9‑20 or Section 42‑9‑30 involved the merits of the case so as to be immediately appealable to the circuit court since the findings of fact and law by the hearing commissioner would become the law of the case, and due process requires that litigants receive notice of the issues to be met on trial, hearing, or appeal. Green v. City of Columbia (S.C.App. 1993) 311 S.C. 78, 427 S.E.2d 685.

An employer’s appeal of a Circuit Court order to the Supreme Court would not suspend payment of weekly benefits that had been awarded pursuant to Section 42‑9‑20, since such payments, like temporary total disability payments, are in the nature of support. McLeod v. Piggly Wiggly Carolina Co. (S.C.App. 1984) 280 S.C. 466, 313 S.E.2d 38.

It is for the Commission to determine the average weekly wages earned after the accident, and the circuit judge was correct in remanding the case to the Commission to make specific findings thereon. Frady v. Pacific Mills (S.C. 1957) 231 S.C. 601, 99 S.E.2d 398.

Where an award is in the words of this section [Code 1962 Section 72‑152] but does not state the exact amount to be paid, the award is indefinite and must be remanded to the Commission to determine the amount of the weekly payments to be made thereunder. Poole v. E. I. Du Pont De Nemours & Co. (S.C. 1955) 227 S.C. 232, 87 S.E.2d 640.

**SECTION 42‑9‑30.** Schedule of period of disability and compensation.

 In cases included in the following schedule, the disability in each case is considered to continue for the period specified and the compensation paid for the injury is as specified:

 (1) for the loss of a thumb sixty‑six and two‑thirds percent of the average weekly wages during sixty‑five weeks;

 (2) for the loss of a first finger, commonly called the index finger, sixty‑six and two‑thirds percent of the average weekly wages during forty weeks;

 (3) for the loss of a second finger, sixty‑six and two‑thirds percent of the average weekly wages during thirty‑five weeks;

 (4) for the loss of a third finger, sixty‑six and two‑thirds percent of the average weekly wages during twenty‑five weeks;

 (5) for the loss of a fourth finger, commonly called the little finger, sixty‑six and two‑thirds percent of the average weekly wages during twenty weeks;

 (6) the loss of the first phalange of the thumb or any finger is considered to be equal to the loss of one half of such thumb or finger and the compensation must be for one half of the periods of time above specified;

 (7) the loss of more than one phalange is considered the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand;

 (8) for the loss of a great toe, sixty‑six and two‑thirds percent of the average weekly wages during thirty‑five weeks;

 (9) for the loss of one of the toes other than a great toe, sixty‑six and two‑thirds percent of the average weekly wages during ten weeks;

 (10) the loss of the first phalange of any toe is considered to be equal to the loss of one half of such toe and the compensation must be for one half the periods of time above specified;

 (11) the loss of more than one phalange is considered as the loss of the entire toe;

 (12) for the loss of a hand, sixty‑six and two‑thirds percent of the average weekly wages during one hundred and eighty‑five weeks;

 (13) for the loss of an arm, sixty‑six and two‑thirds percent of the average weekly wages during two hundred twenty weeks;

 (14) for the loss of a shoulder, sixty‑six and two‑thirds percent of the average weekly wages during three hundred weeks;

 (15) for the loss of a foot, sixty‑six and two‑thirds percent of the average weekly wages during one hundred forty weeks;

 (16) for the loss of a leg, sixty‑six and two‑thirds percent of the average weekly wages during one hundred ninety‑five weeks;

 (17) for the loss of a hip, sixty‑six and two‑thirds percent of the average weekly wages during two hundred eighty weeks;

 (18) for the loss of an eye, sixty‑six and two‑thirds percent of the average weekly wages during one hundred forty weeks;

 (19) for the complete loss of hearing in one ear, sixty‑six and two‑thirds percent of the average weekly wages during eighty weeks; and for the complete loss of hearing in both ears, sixty‑six and two‑thirds percent of the average weekly wages during one hundred sixty‑five weeks, and the commission, by regulation, shall provide for the determination of proportional benefits for total or partial loss of hearing based on accepted national medical standards;

 (20) total loss of use of a member or loss of vision of an eye is considered as equivalent to the loss of the member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye is the proportion of the payments provided in this section for total loss as such partial loss bears to total loss;

 (21) for the loss of use of the back in cases where the loss of use is forty‑nine percent or less, sixty‑six and two‑thirds percent of the average weekly wages during three hundred weeks. In cases where there is fifty percent or more loss of use of the back, sixty‑six and two‑thirds percent the average weekly wages during five hundred weeks. The compensation for partial loss of use of the back shall be such proportions of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is fifty percent or more loss of use of the back the injured employee shall be presumed to have suffered total and permanent disability and compensated under Section 42‑9‑10(B). The presumption set forth in this item is rebuttable;

 (22) for the total or partial loss of, or loss of use of, a member, organ, or part of the body not covered in this section and not covered under Section 42‑9‑10 or 42‑9‑20, sixty‑six and two‑thirds of the average weekly wages not to exceed five hundred weeks. The commission, by regulation, shall prescribe the ratio which the partial loss or loss or partial loss of use of a particular member, organ, or body part bears to the whole man, basing these ratios on accepted medical standards and these ratios determine the benefits payable under this subsection;

 (23) proper and equitable benefits must be paid for serious permanent disfigurement of the face, head, neck, or other area normally exposed in employment, not to exceed fifty weeks. Where benefits are paid or payable for injury to or loss of a particular member or organ under other provisions of this title, additional benefits must not be paid under this item, except that disfigurement also includes compensation for serious burn scars or keloid scars on the body resulting from injuries, in addition to any other compensation.

 The weekly compensation payments referred to in this section all are subject to the same limitations as to maximum and minimum as set out in Section 42‑9‑10.

HISTORY: 1962 Code Section 72‑153; 1952 Code Section 72‑153; 1942 Code Section 7035‑34; 1936 (39) 1231; 1937 (40) 613; 1941 (42) 221; 1972 (57) 2339; 1974 (58) 2265; 1982 Act No. 343; 1988 Act No. 412, eff March 28, 1988; 2007 Act No. 111, Pt I, Section 18, eff July 1, 2007, applicable to injuries that occur on or after that date.

CROSS REFERENCES

Conclusiveness of the commission’s findings of fact, see Section 42‑17‑60.

Mediation required with certain claims, see S.C. Code of Regulations R. 67‑1802.

Other pre‑existing disease, condition or impairment which is permanent in nature and continuing for a length of time, see Section 42‑9‑400.

Library References

Workers’ Compensation 885.1 to 885.26.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 616 to 618, 623, 655 to 680.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 116:26, Concurrent Benefits.

Modern Workers’ Compensation Section 200:10, Scheduled Losses.

Modern Workers’ Compensation Section 200:13, Scheduled Losses‑Partial Loss of Vision.

Modern Workers’ Compensation Section 200:14, Scheduled Losses‑Disfigurement.

Modern Workers’ Compensation Section 321:11, Temporary Partial Disability and Benefits.

Modern Workers’ Compensation Section 321:12, Permanent Partial Disability and Benefits.

Modern Workers’ Compensation Section 321:13, Permanent Total Disability and Benefits.

Modern Workers’ Compensation Section 321:16, Disfigurement.

LAW REVIEW AND JOURNAL COMMENTARIES

An Analysis of the Problem of Determining Nonschedule Partial Disability Claims Under the South Carolina Workmen’s Compensation Law. 9 SC LQ 355.

Annual Survey of South Carolina Law: Administrative Law. 38 S.C. L. Rev. 3 (Autumn 1986).

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Vision 7

1. In general

The scheduled recovery under the Workers’ Compensation Act is exclusive only when a scheduled loss is not accompanied by additional complications affecting another part of the body. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.6

Workers’ compensation claimant established at least a prima facie case for compensation for the injury to his leg pursuant to the scheduled loss statute based on commissioner’s finding of fact that claimant suffered radicular symptoms to his right leg that affected the functioning of the limb, which the commissioner reiterated when he commented that, but for claimant’s testimony that he could run a restaurant, the commission would have found claimant permanently and totally disabled with affects to the right leg. Hutson v. State Ports Authority (S.C.App. 2010) 390 S.C. 108, 700 S.E.2d 462, rehearing denied, certiorari granted, reversed 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 1646.14

Workers’ compensation law’s scheduled recovery scheme focuses on the site of the injury in determining the type of proper compensation. Therrell v. Jerry’s Inc. (S.C. 2006) 370 S.C. 22, 633 S.E.2d 893. Workers’ Compensation 885.1

A workers’ compensation claimant with one scheduled injury was limited to recovery under the scheduled disability statutes only, and a scheduled disability coupled with lost earning capacity did not result in claimant becoming totally disabled, as alleged by claimant; scheduled disability statute clearly provided for compensation for a limited period of time based on a specified injury, and the statutory meaning was not ambiguous. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 885.1

The legislature intended to make certain the compensation to be paid to a worker who sustains any one of a number of scheduled injuries set forth in Section 42‑9‑30. In such cases, the compensation depends upon the character of the injury rather than upon the loss of earnings. Bixby v. City of Charleston (S.C.App. 1989) 300 S.C. 390, 388 S.E.2d 258. Workers’ Compensation 885.1

The former section contains a list of eighteen (now nineteen) specific losses for which disability shall be deemed to continue for the periods stated and a statement of the amount of compensation to be paid in each instance. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

Where no physical disability has been suffered by the claimant there is no ground for action under the Workmen’s Compensation Act. Stewart v. McLellan’s Stores Co. (S.C. 1940) 194 S.C. 50, 9 S.E.2d 35.

2. Construction with other laws

The Commission has power to award compensation for specific loss and also compensation for disfigurement of the same member. Murdaugh v Robert Lee Const. Co. (1937) 185 SC 497, 194 SE 447. Tinsley v Walgreen Drug Co. (1941) 197 SC 415, 15 SE2d 667.

If the record shows the claimant to be totally disabled, and an award is made therefor, claimant is barred from further allowance for bodily disfigurement. Dickey v Springs Cotton Mills (1946) 209 SC 204, 39 SE2d 501. Burnette v Startex Mills (1940) 195 SC 118, 10 SE2d 164.

Generally, an injured claimant may proceed under either the general disability statutes or under the scheduled member statute to maximize recovery under the Workers’ Compensation Act. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.1

While workers’ compensation claimant could proceed under the general disability statutes to maximize her recovery, the Workers’ Compensation Commission was not required to make an award for permanent and total disability, and claimant’s recovery was subject to the scheduled member statute, absent a showing by claimant of an additional injury or impairment to a second body part. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.6

Statute governing payment of unpaid compensation when workers’ compensation claimant dies did not provide for inheritability of benefits paid under first paragraph of statute governing amount of compensation for total disability, which concerned wage loss, and thus claimant’s widow was not entitled to receive unaccrued benefits after claimant’s death, which occurred due to causes unrelated to compensable injury; statute governing payment of unpaid compensation only provided for inheritability of awards for losses of scheduled member and for losses covered by second paragraph of statute governing amount of compensation for total disability, which concerned physical loss. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 460.4; Workers’ Compensation 1169

An award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Workers’ compensation award under the general disability statutes, rather than an award under the statute for loss of a member was proper; evidence established that claimant suffered mental problems as a result of a physical injury and, thus, statute limiting a claimant to scheduled recovery for scheduled loss not accompanied by additional complications affecting another body part did not apply. Bass v. Kenco Group (S.C.App. 2005) 366 S.C. 450, 622 S.E.2d 577. Workers’ Compensation 885.26

Generally, injured claimant may proceed under either Workers’ Compensation Act’s general disability sections or under scheduled member section in order to maximize recovery; only where scheduled loss is not accompanied by additional complications affecting another part of body is scheduled recovery exclusive. Lee v. Harborside Cafe (S.C.App. 2002) 350 S.C. 74, 564 S.E.2d 354, rehearing denied, certiorari denied. Workers’ Compensation 885.1

In a Workers’ Compensation action, the claimant was not limited to benefits under Section 42‑9‑30(15) for an injury to her leg as a scheduled member where, as a result of a hip injury in an on‑the‑job accident, she required a total hip replacement; rather, the claimant was entitled to compensation for total disability. Gilliam v. Woodside Mills (S.C. 1995) 319 S.C. 385, 461 S.E.2d 818.

The policy behind allowing a claimant to proceed under the general disability provisions of both Section 42‑9‑10 and Section 42‑9‑20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section; however, when a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive. Brown v. Owen Steel Co., Inc. (S.C.App. 1994) 316 S.C. 278, 450 S.E.2d 57, rehearing denied, certiorari denied. Workers’ Compensation 885.7

Under the Worker’s Compensation Act, a claimant may proceed under Section 42‑9‑10 or Section 42‑9‑20 to prove a general disability; alternatively, he or she may proceed under Section 42‑9‑30 to prove a loss or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. An award under the general disability statutes must be predicated upon a showing of loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award. Fields v. Owens Corning Fiberglas (S.C. 1990) 301 S.C. 554, 393 S.E.2d 172.

An employee’s injury to her nose, which resulted in an increased frequency of upper respiratory infection, sinusitis, occasionally severe headaches and increased allergic symptoms, was not covered by Sections 42‑9‑10 and 42‑9‑20, but rather by Section 42‑9‑30(20), where the employee had no diminution of earning capacity. Bixby v. City of Charleston (S.C.App. 1989) 300 S.C. 390, 388 S.E.2d 258.

Award under this section [Code 1962 Section 72‑153] rather than Code 1962 Section 72‑152 is within the power of the Commission if there be evidence to support it. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52.

When in consequence of an accident, total and permanent disability is shown, and the statutory award is made therefor, this automatically excludes any further allowance. For to add an award for bodily disfigurement would be to go beyond the whole scheme of our workmen’s compensation legislation. Montgomery v. York Mills (S.C. 1944) 204 S.C. 469, 30 S.E.2d 68.

3. Construction and application

In a workers’ compensation action, there can be no election of remedies problem where there is a single wrong and a single recovery under Section 42‑9‑30. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112.

Since Section 42‑9‑30 is remedial, it could be retroactively applied to awards made before its effective date, and a lump sum award made under the statute, as so retroactively applied, did not impair the employers vested right, because it would shorten the period during which review could be sought, since the right claimed by the employer was not substantive, but procedural. Hooks v. Southern Bell Tel. & Tel. Co. (S.C.App. 1986) 291 S.C. 41, 351 S.E.2d 900.

“Loss of use” and “partial loss of use” are simple, everyday, unambiguous words, and are to be given their ordinary, generally accepted meaning, and nothing in the Workmen’s Compensation Act suggests restriction of their meaning to such total or partial loss of use as has resulted from a direct injury to the member itself. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52.

4. Loss of earnings or earning capacity

In G. E. Moore Co. v Walker (1958) 232 SC 320, 102 SE2d 106, the Supreme Court held that in determining the amount to be awarded under this section [Code 1962 Section 72‑153] wages are considered only for the purpose of determining the amount to be allowed per week. The period during which the weekly payments are to continue is based solely on the character of the injury and not upon the earnings or earning capacity of the injured employee. Singleton v Young Lumber Co. (1960) 236 SC 454, 114 SE2d 837. Moss v Davey Tree Expert Co. (1964) 245 SC 127, 139 SE2d 532. G. E. Moore Co. v Walker (1958) 232 SC 320, 102 SE2d 106.

The whole philosophy of our Workmen’s Compensation Act is to compensate for, or relieve from, the loss or impairment of an employee’s capacity to earn, or from the deprivation of support from his earnings, and not to indemnify for any physical ailment or impairment as such, except in the class of cases specifically provided in the Act; to exclude from allowable elements of compensation everything except diminution of earning power. Bodily disfigurement, when shown to affect this earning power, is therefore logically an element of compensation specifically provided for in the Act, to the extent therein covered. Jewell v R. B. Pond Co. (1941) 198 SC 86, 15 SE2d 684. Burnette v Startex Mills (1940) 195 SC 118, 10 SE2d 164.

Beckman v. Sysco Columbia, LLC (S.C.App. 2014) 2014 WL 1047090, [main volume], Unreported, superseded 408 S.C. 501, 759 S.E.2d 750, withdrawn from bound volume, superseded 2014 WL 10788900, rehearing denied, certiorari dismissed as improvidently granted, opinion ordered depublished 414 S.C. 538, 779 S.E.2d 554.

An award of workers’ compensation benefits under the general‑disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled‑loss statute does not require such a showing. Hutson v. South Carolina State Ports Authority (S.C. 2012) 399 S.C. 381, 732 S.E.2d 500. Workers’ Compensation 880.5; Workers’ Compensation 885.1

An award of workers’ compensation benefits under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.5; Workers’ Compensation 885.1

Claimant’s partial disability from asbestosis, a pulmonary disease, was not compensable under scheduled loss provisions of workers’ compensation statute, and was only compensable if claimant made a showing of lost wages under provisions governing awards for partial disability. Skinner v. Westinghouse Elec. Corp. (S.C. 2011) 394 S.C. 428, 716 S.E.2d 443, rehearing denied. Workers’ Compensation 880.7; Workers’ Compensation 885.3

South Carolina provides three methods to obtain disability compensation: (1) total disability, (2) partial disability, and (3) scheduled disability; the first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 850.1; Workers’ Compensation 885.1

Failure of workers’ compensation claimant to demonstrate any loss of earning capacity precluded her from receiving general disability benefits, where there was no evidence that she even sought employment. Nettles v. Spartanburg School Dist. #7 (S.C.App. 2000) 341 S.C. 580, 535 S.E.2d 146, rehearing denied. Workers’ Compensation 880.7

The law clearly allows an award of “scheduled member” compensation under Section 42‑9‑30 without any proof of lost earning capacity; this is true even if the employee subsequently returns to work and earns more money than before the injury. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112. Workers’ Compensation 885.1

The workers’ compensation commission properly ruled that a claimant entitled to benefits even though the injury did not affect his performance in his subsequent job because compensation is based on the character and extent of the injury and not whether the claimant lost earnings or is otherwise employable in another occupation. Lyles v. Quantum Chemical Co. (Emery) (S.C.App. 1993) 315 S.C. 440, 434 S.E.2d 292, rehearing denied, certiorari denied.

Under Section 42‑9‑30, a claimant may establish permanent and total disability by demonstrating impairment to a scheduled body member; in including specific body members within this schedule, the legislature presumes a claimant has lost earning capacity to a degree which corresponds to the claimant’s degree of impairment. Lyles v. Quantum Chemical Co. (Emery) (S.C.App. 1993) 315 S.C. 440, 434 S.E.2d 292, rehearing denied, certiorari denied. Workers’ Compensation 885.1

A claimant who is found to be totally and permanently disabled need not show or prove lack of earning capacity since lack of earning capacity is presumed. McCollum v. Singer Co. (S.C.App. 1989) 300 S.C. 103, 386 S.E.2d 471. Workers’ Compensation 880.3; Workers’ Compensation 1377

Loss of earnings is not required for recovery under Section 42‑9‑30; compensation is based on the character of the injury. Bateman v. Town & Country Furniture Co. (S.C.App. 1985) 287 S.C. 158, 336 S.E.2d 890.

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 Section 42‑9‑10. Since such an injury is included in the list of specific disabilities found in Section 42‑9‑30, it is an exception to the general rule under Section 42‑9‑10 requiring a claimant to show a loss of earning capacity. Bateman v. Town & Country Furniture Co. (S.C.App. 1985) 287 S.C. 158, 336 S.E.2d 890.

Compensation depends upon functional loss rather than upon the loss of earnings. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

In order to be entitled to a disfigurement award the claimant must prove that the disfigurement reduced his earning capacity or handicapped him in obtaining employment, such proof not being required, however, where the disfigurement is to face or head, since in such cases reduction in earning capacity was presumed to have resulted. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

The purpose and effect of the 1941 amendment to this section [Code 1962 Section 72‑153] was stated in Bowen v Chiquola Mfg. Co. (1961) 238 SC 322, 120 SE2d 99, as follows: “The first proviso of the amendment enlarged the scope of ‘serious bodily disfigurement’ to include loss or serious or permanent injury of nonscheduled members of the body; it did not, either expressly or by reasonable inference, extend the scope of ‘serious bodily disfigurement’ to nondisfiguring loss or injury of such members. The second proviso was not intended to, and did not, divorce the idea of disfigurement from that of earning capacity; its intent and effect were simply to relieve the claimant of the necessity of proving reduction of earning capacity resulting from the disfigurement, and to substitute for such proof a conclusive presumption that serious bodily disfigurement, as well as that of face or head, will result in reduction of earning capacity.” Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

The Workmen’s Compensation Act undertakes to make certain the compensation to be paid to a workman who sustains any one of a number of scheduled injuries, including the loss of a hand, arm, foot, leg, or any digit of a hand or foot. In such cases, compensation depends upon the character of the injury rather than upon loss of earnings. Dunmore v. Brooks Veneer Co. (S.C. 1966) 248 S.C. 326, 149 S.E.2d 766.

Compensation for the loss of a member or the loss of the use of a member under this section [Code 1962 Section 72‑153] is not dependent on actual wage loss, and the fact that the claimant after his injury is regularly employed at greater earnings than before is immaterial. G. E. Moore Co. v. Walker (S.C. 1958) 232 S.C. 320, 102 S.E.2d 106. Workers’ Compensation 885.13

Award may be made under this section [Code 1962 Section 72‑153] for loss, or loss of use, of a specific member, though there be no showing that the injured employee has suffered loss of earnings or of earning capacity. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52. Workers’ Compensation 1377

There may be an award under this section [Code 1962 Section 72‑153] regardless of the fact that the workman has not been incapacitated to perform accustomed duties, or suffered no loss of earnings or earning capacity. Hoke v. Cherokee County (S.C. 1950) 216 S.C. 376, 58 S.E.2d 330.

An award for partial loss of hearing may be made under the provision of this Act, and payment made according to the schedule in this section [Code 1962 Section 72‑153], where the claimant has suffered no loss of diminution of earning capacity. Long v. Cappell (S.C. 1950) 216 S.C. 243, 57 S.E.2d 415.

Disability award was made where it was shown that the claimant was then earning as much or more at the same work as he did prior to the accident. Ripley v. Anderson Cotton Mills (S.C. 1946) 209 S.C. 401, 40 S.E.2d 508.

It is now immaterial whether disfigurement affects the earning power of the employee or his capacity to retain or procure employment as a workman is entitled to reasonable compensation for serious bodily disfigurement without regard to earning capacity. Parrott v. Barfield Used Parts (S.C. 1945) 206 S.C. 381, 34 S.E.2d 802.

The right to compensation for serious facial or head disfigurement is not dependent on diminution of earning capacity, as in serious bodily disfigurement. If the condition exists, compensation under this section [Code 1962 Section 72‑153] is mandatory. Ferguson v. State Highway Department (S.C. 1941) 197 S.C. 520, 15 S.E.2d 775. Workers’ Compensation 594

The purpose of that part of this section [Code 1962 Section 72‑153] providing for an award for bodily disfigurement is to compensate the workman for loss he has incurred to his earning capacity by the injury which he has sustained. Manning v. Gossett Mills (S.C. 1939) 192 S.C. 262, 6 S.E.2d 256.

5. Scheduled member

The issue under the scheduled‑member statute of the Workers’ Compensation Act is not impairment as to the whole body, but rather it is the loss of use of a specific body part. Clemmons v. Lowe’s Home Centers, Inc. (S.C. 2017) 2017 WL 2829630. Workers’ Compensation 885.1

When a workers’ compensation claimant’s injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation; to obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected. Colonna v. Marlboro Park Hosp. (S.C.App. 2013) 404 S.C. 537, 745 S.E.2d 128, certiorari dismissed as improvidently granted 412 S.C. 122, 771 S.E.2d 635. Workers’ Compensation 885.6

Under workers’ compensation law, a rotator cuff injury is not properly compensable under the loss of use of an arm schedule, and instead, the proper course is to use medical guides or any other accepted medical treatise or authority to convert the injury to the rotator cuff into a percentage of impairment to the whole person. Therrell v. Jerry’s Inc. (S.C. 2006) 370 S.C. 22, 633 S.E.2d 893. Workers’ Compensation 885.10; Workers’ Compensation 885.18

Claimant’s psychological system was not “scheduled member” for which claimant could recover benefits pursuant to Workers’ Compensation Act. Lee v. Harborside Cafe (S.C.App. 2002) 350 S.C. 74, 564 S.E.2d 354, rehearing denied, certiorari denied. Workers’ Compensation 885.26

As a matter of law, the hip is part of the pelvis, not part of the leg for Workers’ Compensation purposes. Gilliam v. Woodside Mills (S.C. 1995) 319 S.C. 385, 461 S.E.2d 818.

There is no requirement that loss of use or partial loss of use of a member of the body requires evidence of direct injury to the member itself. Mixson v. Westinghouse Elec. Corp. (S.C.App. 1991) 304 S.C. 31, 402 S.E.2d 893. Workers’ Compensation 885.13

The word leg in the Workmen’s Compensation Act refers to a lower limb of the body including the thigh, even though in the nomenclature of anatomy it bears the restricted meaning of lower leg as distinguished from thigh. Dunmore v. Brooks Veneer Co. (S.C. 1966) 248 S.C. 326, 149 S.E.2d 766.

6. Back injury

Evidence supported finding that workers’ compensation claimant was totally and permanently disabled, and thus claimant’s estate was entitled to be paid the unpaid balance of claimant’s permanent and total disability benefits, after claimant died of a heart condition that was not related to his work injuries; claimant’s treating physician examined claimant, ordered X‑rays, an magnetic resonance imaging (MRI), a computerized tomography (CT) scan, and a duplex scan, and he concluded claimant was totally disabled and assigned a 54% impairment rating to his whole person pursuant to the American Medical Association (AMA) guidelines. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1646.9

Workers’ compensation claimant’s exclusion from the job market was irrelevant under statute providing rebuttable presumption of permanent total disability (PTD) when a claimant has 50% or more loss of use of the back. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1375

While permanent total disability (PTD) is generally based on loss of earning capacity, there is a rebuttable presumption of PTD when a workers’ compensation claimant has 50% or more loss of use of the back. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1375

Substantial evidence existed that workers’ compensation claimant did not suffer a 50% or greater loss of use of his back, and thus claimant did not qualify for permanent total disability (PTD) benefits, even though he presented medical evidence that supported 50% or more loss of use of his back; Appellate Panel of the Workers’ Compensation Commission relied on medical reports of claimant’s treating neurosurgeon, who assigned a 25% whole person impairment rating based on claimant’s cervical spine injury, and neurosurgeon noted that claimant’s back pain and stiffness was strongly suggestive of arthritic‑type symptoms and advised that stretching exercises and weight loss would help symptoms. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1646.11

Appellate Panel of the Workers’ Compensation Commission did not err in considering claimant’s wage loss in deciding that he did not suffer 50% or more loss of use of his back in determining entitlement to permanent total disability (PTD) benefits; Panel found that claimant had 48% loss of use of his back, and claimant returned to work for almost two years in a job similar to that which he had prior to accident making the same salary. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 880.17; Workers’ Compensation 885.11

Substantial evidence supported finding by Workers’ Compensation Commission (WCC) that claimant did not sustain any permanent partial disability to his back; claimant did not seek medical treatment for back pain until six months after injury and did not follow up one week later as instructed by health care provider, MRI revealed no evidence of a fracture, orthopedic surgeon to whom claimant was referred found a minimal disc protrusion but concluded it was likely of no clinical significance, and surgeon prescribed muscle relaxant for limited period of 30 days while concluding that claimant was capable of returning to work with “the use of good body mechanics and careful lifting techniques.” Cranford v. Hutchinson Const. (S.C.App. 2012) 399 S.C. 65, 731 S.E.2d 303, rehearing denied. Workers’ Compensation 1531.4

Evidence was sufficient to establish that workers’ compensation claimant suffered a 40% loss of use of his back, even though physician stated that claimant had an impairment of 22% to the whole person; claimant testified at length about the character and extent of his back injury and the restrictions the injury placed on his physical activities, he also stated that he had pain in the lower back, he had trouble sitting, he took pain medication to walk normally, his pain affected his sleep, and that since the accident he was no longer an active person. Sanders v. MeadWestvaco Corp. (S.C.App. 2006) 371 S.C. 284, 638 S.E.2d 66, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785. Workers’ Compensation 1646.7; Workers’ Compensation 1646.11

Award of benefits to workers’ compensation claimant for “permanent loss of the use of the lumbar spine and sacroiliac joint (SI joint)” was not reversible error, even though statute that provided for compensation for an injury to the back did not specifically mention the lumbar spine or the SI joint; the order and record reflected that claimant’s injury and subsequent disability was to his back. Sanders v. MeadWestvaco Corp. (S.C.App. 2006) 371 S.C. 284, 638 S.E.2d 66, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785. Workers’ Compensation 885.11

Claimant, who had previously suffered a series of lower back injuries, was not precluded from receiving workers’ compensation benefits for a back injury allegedly sustained during the course of her employment as a cashier, despite a contention that she made a false statement on her job application when she checked “No” in response to the question “Do you have any physical disability which would limit your ability to perform the job for which you are applying?” since the language on the application did not require disclosure of all health problems. Wilbanks v. Kentucky Fried Chicken/Holt Industries (S.C.App. 1993) 312 S.C. 131, 439 S.E.2d 300.

There was substantial evidence to support the finding of the hearing commission that a workers’ compensation claimant suffered more than a 50 percent impairment to his back where the claimant testified at length to the character and extent of his back injury, the restrictions the injury had placed on his physical activities, and his inability to do the type of work he did at the time of the injury. Lyles v. Quantum Chemical Co. (Emery) (S.C.App. 1993) 315 S.C. 440, 434 S.E.2d 292, rehearing denied, certiorari denied. Workers’ Compensation 1646.11

The evidence did not support a finding by the Workers’ Compensation Commission that a claimant had reached maximum medical improvement of her back injury as of April 7, 1989 where the claimant was examined and treated by 4 different physicians whose opinions as to when she reached maximum improvement ranged from October 20, 1987, through June or July of 1989. Williams v. South Carolina Dept. of Mental Retardation (S.C.App. 1992) 308 S.C. 438, 418 S.E.2d 555.

An award under Section 42‑9‑30 is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific “member, organ, or part of the body.” Thus, a claimant should not have been compensated for a psychological impairment under Section 42‑9‑30 because it was not a scheduled loss, where the claimant’s only injury to a member, organ, or body part was an injury to her back for which she received a specific scheduled loss award. Fields v. Owens Corning Fiberglas (S.C. 1990) 301 S.C. 554, 393 S.E.2d 172.

An employee was not entitled to recover compensation for a second back injury where the employee’s first back injury, which was sustained while he was working for the same employer, resulted in a recovery for total and permanent disability under Sections 42‑9‑10 and 42‑9‑30(19). The employee was limited to a recovery for successive injuries to 500 weeks under Section 42‑9‑170, and, having received that recovery from the first injury, he had no basis to recover for the second injury. Medlin v. Greenville County (S.C.App. 1990) 301 S.C. 411, 392 S.E.2d 192, affirmed as modified 303 S.C. 484, 401 S.E.2d 667.

An employee who has suffered a 50 percent or more loss of use of his or her back and has received total and permanent compensation for this loss, is not entitled to any further total and permanent benefits for successive injuries to that same body part. Only if an employee has suffered less than a 50 percent loss to his or her back in a prior accident, will he or she be entitled to compensation for the degree of disability resulting from a subsequent accident. These principles are applicable in any case, regardless of whether the successive injury occurred while working for the same or different employers. (Overruling Wyndhan v R.A. & E.M. Thornley and Co., 291 SC 496, 354 SE2d 399 (Ct App 1987) to the extent that it distinguishes between successive injuries incurred while working for the same rather than for different employers.) Medlin v. Greenville County (S.C. 1991) 303 S.C. 484, 401 S.E.2d 667.

7. Vision

“Total loss of vision” does not necessarily mean complete loss of all visual perception. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

If sight is destroyed to the extent that there remains no vision useful in performing any employment available to the claimant, there is a “total loss of vision” in the eye even though some sight remains. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646. Workers’ Compensation 885.22

While there are periods when the loss of vision in claimant’s eye is partial, there are other periods when there is no useful vision; and the effect of the variances in visual acuity, from partial to almost total, are such as to render sight in the eye so unreliable as to destroy its usefulness for any industrial purpose. This would constitute a “total loss of vision” in the eye, within the meaning of this section [Code 1962 Section 72‑153]. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

Since compensation is not based upon loss of earnings but is payable when the member or its function is impaired or lost, the testimony that the loss of vision in the injured eye might be reduced by the use of corrective lenses is not properly considered in determining whether the claimant has suffered a loss of vision in that eye, within the meaning of item (18). Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

Section does not restrict recovery to loss of perfect or impaired eye. Moss v. Davey Tree Expert Co. (S.C. 1964) 245 S.C. 127, 139 S.E.2d 532.

Hence, one who has only partial vision in an eye and loses such eye as the result of a second injury, is entitled to the scheduled compensation for the loss of such eye. Moss v. Davey Tree Expert Co. (S.C. 1964) 245 S.C. 127, 139 S.E.2d 532.

8. Disfigurement

The word “disfigurement,” as used in this section [Code 1962 Section 72‑153], means that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect, or deforms in some manner. Mitchum v Inman Mills (1946) 209 SC 307, 40 SE2d 38. Godfrey v Watts Mills (1942) 199 SC 437, 19 SE2d 902. Tinsley v Walgreen Drug Co. (1941) 197 SC 415, 15 SE2d 667. Poole v Saxon Mills (1939) 192 SC 339, 6 SE2d 761. Bowen v Chiquola Mfg Co. (1961) 238 SC 322, 120 SE2d 99.

In the case of facial or head disfigurement it is mandatory that the Commission give compensation. In the case of bodily disfigurement other than to the face or head, the Commission is given discretion to award compensation. Murdaugh v Robert Lee Const. Co. (1937) 185 SC 497, 194 SE 447. Poole v Saxon Mills (1939) 192 SC 339, 6 SE2d 761.

Disfigurement connotes appearance. To presume that disfigurement will impair earning capacity is one thing; to say that disfigurement need not disfigure is another. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

The disfigurement provisions of this section [Code 1962 Section 72‑153] do not entitle a claimant to a disfigurement award for loss of a testicle. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

The Industrial Commission cannot, under this section [Code 1962 Section 72‑153], in addition to the disfigurement award for an abdominal scar, make a separate disfigurement award based solely on the loss of the spleen as an organ of the body. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

This section [Code 1962 Section 72‑153] contains provisions relative to disfigurement after the listed specific losses. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

Where the Commission made two awards for disfigurement under this section [Code 1962 Section 72‑153] prior to the 1972 amendment, one for serious bodily disfigurement and an additional award solely for loss of two intervertebral discs as organs of the body, in reversing the additional award for loss of the discs, the Supreme Court held that the award for disfigurement for impairment of appearance of necessity included all disfigurement resulting from the injury. Smith v. Daniel Const. Co. (S.C. 1969) 253 S.C. 248, 169 S.E.2d 767.

Essentially disfigurement connotes appearance; but, except in cases of facial disfigurement, the deformity or imperfection need not itself be visible, if its results are. Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99.

But an injured employee is not entitled, under this section [Code 1962 Section 72‑153], in addition to an award for disfigurement resulting from the loss of two intervertebral discs, to a further disfigurement award for the loss of said discs as “members or organs of the body.” Bowen v. Chiquola Mfg. Co. (S.C. 1961) 238 S.C. 322, 120 S.E.2d 99. Workers’ Compensation 895.3

Sum of $1,500.00 awarded for disfigurement resulting from loss of one eye held not excessive. McCoy v. Easley Cotton Mills (S.C. 1950) 218 S.C. 350, 62 S.E.2d 772. Workers’ Compensation 895.3

Where employee lost four natural front teeth and two on a bridge, the proviso of this section [Code 1962 Section 72‑153] covers the injury even though it does not specifically cover “member or organ” of the head. Cagle v. Clinton Cotton Mills (S.C. 1949) 216 S.C. 93, 56 S.E.2d 747.

Where any physical member or organ of the anatomy (body), not included in the schedule of specific loss, is lost, or seriously or permanently injured, such loss or injury is covered by the proviso and it is not necessary that the loss or serious or permanent injury to the organ impair the appearance of a claimant. Cagle v. Clinton Cotton Mills (S.C. 1949) 216 S.C. 93, 56 S.E.2d 747. Workers’ Compensation 895.1

If there is an issue as to the permanency of the alleged disfigurement, medical testimony may be necessary; but where the only question involved is the existence or nonexistence of disfigurement, the presence or absence of same can be discerned in the ordinary case by a layman and is not a question peculiarly within the knowledge of medical experts. Polk v. Brooklyn Cooperage Co. (S.C. 1946) 209 S.C. 386, 40 S.E.2d 505.

Where the hearing commissioner made an award for the loss of teeth and parts of the jawbone, the full Commission upon review of the case properly amended the award so as to make it an award for facial disfigurement. In making this amendment, the full Commission recognized that that portion of this section [Code 1962 Section 72‑153] providing for loss of a member of the body has no application to parts of the head or face. Vick v. Springs Cotton Mills (S.C. 1946) 209 S.C. 372, 40 S.E.2d 409.

When claimant after his recovery continued to work until voluntary retirement, there was no factual foundation for an award for disfigurement. McPherson v. American Mut. Liability Ins. Co. (S.C. 1946) 208 S.C. 76, 37 S.E.2d 136.

The extent and permanency of disfigurement cannot usually be determined in advance of the completion of the healing process. Halks v. Rust Engineering Co. (S.C. 1946) 208 S.C. 39, 36 S.E.2d 852.

In order to constitute disfigurement, so as to be compensable under this section [Code 1962 Section 72‑153], it must be more than slight and must partake of permanency. While it is not necessary that the disfigurement be “grotesque and unsightly to such an extent that it renders him obnoxious and repulsive,” it is however, essential that it at least be of a character which impairs the appearance of the person or which renders him unsightly, imperfect or deformed in some manner. Parrott v. Barfield Used Parts (S.C. 1945) 206 S.C. 381, 34 S.E.2d 802. Workers’ Compensation 594

Evidence was sufficient to justify award on ground that bodily disfigurement diminished earning power and prevented claimant from obtaining employment. Kelly v. Postal Telegraph‑Cable Co. (S.C. 1944) 204 S.C. 530, 30 S.E.2d 369.

Disfigurement is merely an additional element of compensation and claims for disability and disfigurement are not separate and distinct claims under Code 1962 Section 72‑303 which requires notice of a claim to be filed within one year. Gold v. Moragne (S.C. 1943) 202 S.C. 281, 24 S.E.2d 491.

A carpenter’s loss of the first joint of his thumb on his right hand comes within the definitions by the Supreme Court of disfigurement. Haynes v. Ware Shoals Mfg. Co. (S.C. 1941) 198 S.C. 75, 15 S.E.2d 846.

An award for the loss of and disfigurement to the same member of the body may be made. Bodily disfigurement, when shown to affect a claimant’s earning power by a diminution thereof, is logically an element of compensation specifically provided for in the Act, though not compensable merely as such. Jewell v. R.B. Pond Co. (S.C. 1941) 198 S.C. 86, 15 S.E.2d 684.

It is not necessary to have the actual disfigurement under the observation of the public, but the essential is the existence of a disfigurement of the body that lessens earning capacity and is in deprivation of the power to obtain employment. The actual appearance of the disfigurement is the criterion in cases of facial disfigurement, but not necessarily in bodily disfigurement. Hamilton v. Little (S.C. 1941) 197 S.C. 434, 15 S.E.2d 662.

Evidence submitted by the claimant was insufficient to sustain an award for bodily disfigurement. Stone v. Ware Shoals Mfg. Co. (S.C. 1940) 192 S.C. 459, 7 S.E.2d 226.

9. Serious disfigurement

The amputation of a foot necessitating the wearing of an artificial limb, is per se a serious bodily disfigurement. Jewell v R. B. Pond Co. (1941) 198 SC 86, 15 SE2d 684. Dunmore v Brooks Veneer Co. (1966) 248 SC 326, 149 SE2d 766.

The word “serious” is used in the sense that the disfigurement should be much more than slight, and partaking of permanency. And “disfigurement” is defined as “that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.” Ferguson v State Highway Dept. (1941) 197 SC 520, 15 SE2d 775. Stone v Ware Shoals Mfg. Co. (1939) 192 SC 459, 7 SE2d 226.

The word “serious” is used in the sense that the disfigurement should be much more than slight, and partaking of permanency. Schwartz v Mt. Vernon‑Woodberry Mills, Inc. (1945) 206 SC 227, 33 SE2d 517. Shillinglaw v Springs Cotton Mills (1946) 209 SC 379, 40 SE2d 502. Godfrey v Watts Mills (1942) 199 SC 437, 19 SE2d 902. Hamilton v Little (1941) 197 SC 434, 15 SE2d 662. Poole v Saxon Mills (1939) 192 SC 339, 6 SE2d 761.

A claimant is not entitled to compensation for serious bodily disfigurement, where in consequence of an accident, one testicle is removed. Johnston v Sam E. Finley Const. Co. (1939) 192 SC 392, 7 SE2d 1. Manning v Gossett Mills (1939) 192 SC 262, 6 SE2d 256.

Determination of proper and equitable compensation for a serious disfigurement has been committed to the Commission by the legislature. An award within the statutory limit will not be reversed on appeal in the absence of a showing that it was influenced by caprice, passion, prejudice, or fraud. Dunmore v. Brooks Veneer Co. (S.C. 1966) 248 S.C. 326, 149 S.E.2d 766.

There was competent evidence to support the findings of the Commission that a claimant sustained an injury to his right knee and leg, resulting in serious bodily disfigurement and 40 per cent functional loss of use thereof, where it was shown that a fall aggravated preexisting osteoarthritis of both knees necessitating the use of crutches. Daley v. Public Sav. Life Ins. Co. (S.C. 1960) 236 S.C. 236, 113 S.E.2d 758. Workers’ Compensation 1646.14; Workers’ Compensation 1647.4

The making of an award to a claimant for serious bodily disfigurement being discretionary with the Commission, and the Commission having found as a fact that the claimant has no serious bodily disfigurement, there is no power resting in either the circuit or the Supreme Court to compel the Commission to make such award. Hopper v. Firestone Stores (S.C. 1952) 222 S.C. 143, 72 S.E.2d 71.

The word “serious” involves a necessary ingredient that disfigurement is of such a character that it substantially detracts from the appearance of the person disfigured. Mitchum v. Inman Mills (S.C. 1946) 209 S.C. 307, 40 S.E.2d 38.

Where claimant had a scar beginning about the upper inner third of the brow, downward through and parallel to the brow for about an inch and a half, the width of the scar being very small, not more than just a small line through the eyebrow, and such scar was pretty much parallel to and resembled somewhat the wrinkles of the forehead, and would not be noticed unless one were very close, the court held that such scar did not come within the province of serious head or facial disfigurement as contemplated by this section [Code 1962 Section 72‑153]. Mitchum v. Inman Mills (S.C. 1946) 209 S.C. 307, 40 S.E.2d 38.

In a disfigurement case the claimant is for all practical purposes an exhibit and his appearance may be considered along with the testimony by the circuit judge (and the Supreme Court on appeal) in reaching a conclusion, as to whether there is any evidence upon which there is a reasonable basis for an award for serious bodily disfigurement. Parrott v. Barfield Used Parts (S.C. 1945) 206 S.C. 381, 34 S.E.2d 802. Workers’ Compensation 1939.1; Workers’ Compensation 1969

What is reasonable compensation for serious disfigurement is for the determination of the Commission in each case in the light of the facts established by competent evidence. Schwartz v. Mount Vernon‑Woodberry Mills (S.C. 1945) 206 S.C. 227, 33 S.E.2d 517.

Upon the factual finding of serious facial or head disfigurement it is mandatory upon the Commission to make an award and the legislative injunction is upon them that it be “proper and equitable,” not upon the court of appeal, which should not interfere in the absence of an arbitrary or capricious award. The amount of the award is within the discretion of the Commission provided it be within the statutory limit. Schwartz v. Mount Vernon‑Woodberry Mills (S.C. 1945) 206 S.C. 227, 33 S.E.2d 517.

Where it was contended that an employee is not entitled to an award for serious bodily disfigurement when the serious bodily disfigurement relied on is due entirely to pain, it was held that since the pain was caused by the injury the award was justified. Kelly v. Postal Telegraph‑Cable Co. (S.C. 1944) 204 S.C. 530, 30 S.E.2d 369. Workers’ Compensation 594; Workers’ Compensation 1647.4

Where claimant’s right eye was cut by a briar, resulting in the loss of the sight of that eye, and the Commission examined claimant’s eye and observed his appearance, and held that a white spot on the pupil of the eye was unsightly and repulsive, an award for serious head and facial disfigurement was affirmed in Ferguson v. State Highway Department (S.C. 1941) 197 S.C. 520, 15 S.E.2d 775. Workers’ Compensation 1531.10; Workers’ Compensation 1939.1

Claimant, a young woman employed as a waitress, was entitled to compensation for “serious bodily disfigurement” where, as a result of operations performed upon her right hand, two of her fingers had become consolidated and were stiff, and the first or index finger ran diagonally across these, leaving only for her use on that hand the thumb and little finger. Tinsley v. Walgreen Drug Co. (S.C. 1941) 197 S.C. 415, 15 S.E.2d 667. Workers’ Compensation 1647.4

Award for “serious bodily disfigurement” from limp in leg of structural steel worker, because of which he had been refused employment, was sustained in Hamilton v. Little (S.C. 1941) 197 S.C. 434, 15 S.E.2d 662.

A scar and depression extending from one’s eye about three inches long into the scalp is a “serious” one when it is visible at a distance of several feet, and attracts the attention of others. Poole v. Saxon Mills (S.C. 1940) 192 S.C. 339, 6 S.E.2d 761.

If the disfigurement is to members of the body other than the face or head, and does not handicap the claimant in obtaining employment, it is not of the serious nature to which the Act refers; or, if the disfigurement is to the face or head and does not render the claimant so grotesque and unsightly as to make him obnoxious and repulsive to others, it is not of the nature to which the Act refers. Murdaugh v. Robert Lee Const. Co. (S.C. 1937) 185 S.C. 497, 194 S.E. 447.

10. Disability

Sufficient evidence existed to support the Workers’ Compensation Commission’s Appellate Panel’s finding that claimant had sustained a 10% permanent partial disability, despite conflicting testimony as to the percentage of impairment claimant sustained from her right hand and arm injury; a hand specialist opined that claimant had sustained a 2% permanent impairment to her right arm, and an independent medical examiner opined that claimant had sustained a 7% whole person impairment rating. Hamilton v. Martin Color‑Fi, Inc. (S.C.App. 2013) 405 S.C. 478, 748 S.E.2d 76, rehearing denied. Workers’ Compensation 1646.7; Workers’ Compensation 1646.16

Evidence supported finding that workers’ compensation claimant sustained a permanent partial disability to his right leg instead of only his right foot; claimant testified that during a typical workday, “there is a lot of pain in [his] leg,” he further stated that the pain sometimes ran all the way up to the small of his back, but at the time of the hearing, it was confined to his lower leg, and the commissioner’s order found that claimant walked with a limp, and this was supported by the medical records. Peoples v. Henry Co. (S.C.App. 2005) 364 S.C. 123, 611 S.E.2d 527. Workers’ Compensation 1646.14; Workers’ Compensation 1646.15

An employee was eligible for permanent disability under the Workers’ Compensation Act where her injury resulted in a hip replacement, because the hip socket is not a scheduled member; the hip socket is part of the pelvis and not part of the leg for workers’ compensation purposes. Gilliam v. Woodside Mills (S.C.App. 1993) 312 S.C. 523, 435 S.E.2d 872, rehearing denied, certiorari granted, affirmed in part, remanded in part 319 S.C. 385, 461 S.E.2d 818.

Workmen’s compensation benefits would not be terminated, on the argument that claimant’s return to school on a full time basis removed him from the labor market and hence his attendance at school rather than any injury resulted in his being unemployed, where evidence showed injury to claimant’s hands causing his disability to retain regular employment. Hines v. Hendricks Canning Co. (S.C. 1975) 263 S.C. 399, 211 S.E.2d 220.

Where employer‑carrier, in workmen’s compensation proceeding, attempted to stop the payment of compensation for temporary total disability prior to the claimant’s reaching maximum medical improvement, but before his degree of permanent disability based upon damage to scheduled members could be ascertained, the compensation award of the Industrial Commission was reinstated since compensation which workmen would be entitled to for permanent disability would not be in lieu of all other compensation. Hines v. Hendricks Canning Co. (S.C. 1975) 263 S.C. 399, 211 S.E.2d 220.

While the award must be based upon evidence and not upon surmise, speculation or conjecture, it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52. Workers’ Compensation 1627.10(3)

Employee who sustained rib fractures and shoulder separation was properly awarded compensation for partial disability of each arm notwithstanding there was no direct injury to arms themselves. Roper v. Kimbrell’s of Greenville, Inc. (S.C. 1957) 231 S.C. 453, 99 S.E.2d 52.

It is not necessary that claimant show the extent of disability with mathematical exactness and direct evidence of the percentage of a permanent partial loss of normal efficiency is not essential to the determination of such percentage, but such an award must be based upon evidence which fairly proves the extent or percentage of a disability. Dickey v. Springs Cotton Mills (S.C. 1946) 209 S.C. 204, 39 S.E.2d 501. Workers’ Compensation 1627.10(3)

11. Computation of award

Where an injury is confined to a scheduled member of the body, the employee is limited to the scheduled compensation fixed in the statute. Moss v. Davey Tree Expert Co. (S.C. 1964) 245 S.C. 127, 139 S.E.2d 532. Workers’ Compensation 885.1

The Supreme Court is not at liberty to extend by construction the meaning implicit in the language found in the Act in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt. Singleton v. Young Lumber Co. (S.C. 1960) 236 S.C. 454, 114 S.E.2d 837.

Where injury is confined to a scheduled member of the body, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation fixed in this section [Code 1962 Section 72‑153], even though other considerations or conditions peculiar to the individual effect a total or partial industrial incapacity. Singleton v. Young Lumber Co. (S.C. 1960) 236 S.C. 454, 114 S.E.2d 837. Workers’ Compensation 885.6

12. Partial loss

The Appellate Panel could not base workers’ compensation claimant’s award of a 40% impairment rating of the back upon a potential need for future surgery; there was no evidence that surgery would be needed to alleviate claimant’s symptoms. Sanders v. MeadWestvaco Corp. (S.C.App. 2006) 371 S.C. 284, 638 S.E.2d 66, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785. Workers’ Compensation 1646.11

Substantial evidence supported finding that workers’ compensation claimant suffered a compensable injury to her arm, rather than to her shoulder, for purposes of determining the extent of her permanent partial disability for specific, scheduled body parts; claimant’s testimony established that her injury affected her ability to use her arm, that it curtailed her ability to use her right hand and required her to be more left‑hand dominant, and claimant’s treating physician rated her injury as an impairment to the “right upper extremity.” Therrell v. Jerry’s Inc. (S.C.App. 2004) 360 S.C. 314, 600 S.E.2d 127, rehearing denied, certiorari granted, affirmed as modified 370 S.C. 22, 633 S.E.2d 893. Workers’ Compensation 1646.10; Workers’ Compensation 1646.16

The term “impairment,” as used in the Singleton case, which held that a workers’ compensation claimant with a scheduled injury was limited to recovery under the scheduled disability statutes, did not encompass medical and wage loss consideration, as alleged by workers’ compensation claimant; the Singleton court intended for an “impairment” to be an impairment to a part of the body by injury. Wigfall v. Tideland Utilities, Inc. (S.C. 2003) 354 S.C. 100, 580 S.E.2d 100, rehearing denied. Workers’ Compensation 885.2

Substantial evidence supported the determination of the workers’ compensation commission that an injured worker had sustained a 15 percent permanent partial disability to his back where no award for a hernia injury which had been surgically repaired was made and the worker’s treating physician gave the opinion that the worker (1) had approximately a 5 percent permanent impairment to his back, and (2) required no further medical treatment. Solomon v. W.B. Easton, Inc. (S.C.App. 1992) 307 S.C. 518, 415 S.E.2d 841. Workers’ Compensation 1627.14; Workers’ Compensation 1646.11

Where a claimant suffered no functional impairment to any part of his hand other than the thumb and ring finger, an award for partial loss of use of the hand contravened the legislative plan of Section 42‑9‑30(1‑7), providing scheduled amounts for loss of use of thumbs and fingers. Lail v. Georgia‑Pacific Corp. (S.C. 1985) 285 S.C. 234, 328 S.E.2d 911.

The extent of partial loss of use need not be shown with mathematical exactness, but the award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it. Bundrick v. Powell’s Garage and Wrecker Service (S.C. 1966) 248 S.C. 496, 151 S.E.2d 437. Workers’ Compensation 1646.2

Where not otherwise specified, the Workmen’s Compensation Act requires proration in case of partial loss of a member, which is to be applied by reducing proportionately the number of weekly payments allowed for total loss of such member. Dunmore v. Brooks Veneer Co. (S.C. 1966) 248 S.C. 326, 149 S.E.2d 766.

By the explicit language of this section [Code 1962 Section 72‑153], one who sustains a partial loss of a leg is entitled to proportionate compensation only. Dunmore v. Brooks Veneer Co. (S.C. 1966) 248 S.C. 326, 149 S.E.2d 766.

Commission’s formula for determining compensation for partial specific losses, which provided for reduction of the weekly compensable rate by the percentage of incapacity, to be paid for the period specified for total losses, was held null and void. G. E. Moore Co. v. Walker (S.C. 1958) 232 S.C. 320, 102 S.E.2d 106.

This section [Code 1962 Section 72‑153] clearly contemplates that compensation for partial loss of a member shall be that amount which the percentage of incapacity bears to the amount which the claimant would have been permitted to recover if he had sustained a complete loss of such member. The underlying basis is proportionate compensation and this can only be achieved by applying the percentage of incapacity to the period specified for the loss of a member, thereby reducing the number of weekly payments rather than the amount of such weekly payments. G. E. Moore Co. v. Walker (S.C. 1958) 232 S.C. 320, 102 S.E.2d 106. Workers’ Compensation 885.13

The proper method of computing compensation for partial specific losses is to reduce the number of weekly payments by the percentage of incapacity and then apply the weekly compensable rate to that period of time. G. E. Moore Co. v. Walker (S.C. 1958) 232 S.C. 320, 102 S.E.2d 106.

13. Offset

An offset of award for temporary total disability, against an award for loss of specific member, was denied insurance carrier where claimant was given an award for temporary total disability from entry into hospital until maximum recovery, and was also given an award for the loss of his foot. Burns v. Joyner (S.C. 1975) 264 S.C. 207, 213 S.E.2d 734.

14. Change of condition

Substantial evidence supported finding during hearing on workers’ compensation claimant’s petition alleging a substantial change of condition that claimant was totally and permanently disabled; in the original proceeding the commission rated claimant’s impairment at 30%, physician testified that claimant was permanently vocationally disabled, and that he would need lifelong medication and follow‑up treatment, claimant’s wife testified that she had been the sole financial provider for the family since claimant’s injury and that claimant required assistance in dressing and using the lavatory, and claimant testified that he continued to have pain and could no longer enjoy his former hobbies of hunting, fishing, and camping. Clark v. Aiken County Government (S.C.App. 2005) 366 S.C. 102, 620 S.E.2d 99. Workers’ Compensation 2030

Substantial evidence supported the Workers’ Compensation Commission’s finding that claimant sustained a change in condition subsequent to the prior award, even though claimant had back surgery before the full commission issued its order in the initial proceeding; claimant had no way of knowing whether back surgery would improve his condition, and thus the issue of whether there had been a change in condition was not yet ripe for review when the full commission issued its initial order, and physician testified that claimant’s condition worsened prior to the surgery and that he recommended urgent surgery, and claimant testified that surgery initially relieved some of his pain, but that pain to his legs and back returned several months later. Clark v. Aiken County Government (S.C.App. 2005) 366 S.C. 102, 620 S.E.2d 99. Workers’ Compensation 2033

Substantial evidence supported finding during hearing on workers’ compensation claimant’s petition alleging a substantial change of condition that claimant was totally and permanently disabled; in the original proceeding the commission rated claimant’s impairment at 30%, physician testified that claimant was permanently vocationally disabled, and that he would need lifelong medication and follow‑up treatment, claimant’s wife testified that she had been the sole financial provider for the family since claimant’s injury and that claimant required assistance in dressing and using the lavatory, and claimant testified that he continued to have pain and could no longer enjoy his former hobbies of hunting, fishing, and camping. Clark v. Aiken County Government (S.C.App. 2005) 366 S.C. 102, 620 S.E.2d 99. Workers’ Compensation 2030

15. Maximum medical improvement

A disfigurement award is generally not proper in a workers’ compensation proceeding prior to a finding of maximum medical improvement (MMI). Cranford v. Hutchinson Const. (S.C.App. 2012) 399 S.C. 65, 731 S.E.2d 303, rehearing denied. Workers’ Compensation 895.1

Petitions for the termination of temporary total payments are governed by Workers’ Compensation Regulation 67‑507; thus, the commission did not err in allowing the employer to stop payment of temporary total disability compensation, although the employer failed to establish that the employee was no longer disabled, where the employer presented evidence that the employee had reached maximum medical improvement. Brown v. Owen Steel Co., Inc. (S.C.App. 1994) 316 S.C. 278, 450 S.E.2d 57, rehearing denied, certiorari denied.

16. Estoppel

No estoppel can be claimed against a person where such person is charged with accepting benefits to which he is entitled, irrespective of the transaction on which the estoppel is asserted. Dickey v. Springs Cotton Mills (S.C. 1946) 209 S.C. 204, 39 S.E.2d 501. Estoppel 92(1)

17. Pleadings

The niceties of pleadings and process in the courts of law are not required in workers’ compensation proceedings; thus, a workers’ claim for “any and all rights” under the Workers’ Compensation Act was a sufficient pleading to support an award of workers’ compensation “scheduled member” benefits. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112.

18. Admissibility of evidence

Unless the question of the extent of partial loss of use is so technically complicated as to require exclusively expert testimony, lay testimony is admissible in workers’ compensation case. Burnette v. City of Greenville (S.C.App. 2012) 401 S.C. 417, 737 S.E.2d 200, rehearing denied, certiorari denied. Workers’ Compensation 1417

Unless the question of the extent of partial loss of use under the workers’ compensation disability schedule is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. Sanders v. MeadWestvaco Corp. (S.C.App. 2006) 371 S.C. 284, 638 S.E.2d 66, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785. Workers’ Compensation 1402

In a workers’ compensation action, the existence of any conflicting opinions between the doctors is a matter left to the Workers’ Compensation Commission. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112. Workers’ Compensation 1939.8

Unless the question of the extent of partial loss of use under Section 42‑9‑30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible. The extent of loss of use need not be shown with mathematical precision. Nevertheless, the award may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis. Linen v. Ruscon Const. Co. (S.C. 1985) 286 S.C. 67, 332 S.E.2d 211. Workers’ Compensation 1417

The lay testimony of injured workman and his wife, as to his inability to see, is admissible. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

It was for the Commission to give the testimony of the injured workman and his wife such probative value as it deems proper under the circumstances. Dykes v. Daniel Const. Co. (S.C. 1974) 262 S.C. 98, 202 S.E.2d 646.

Unless the question of the extent of partial loss of use under this section [Code 1962 Section 72‑153] is so technically complicated as to require, exclusively, expert professional testimony, medical or other, lay testimony is admissible. Bundrick v. Powell’s Garage and Wrecker Service (S.C. 1966) 248 S.C. 496, 151 S.E.2d 437. Workers’ Compensation 1402

18.5. Sufficiency of evidence

Substantial evidence did not support Workers’ Compensation Commission’s order finding claimant had a 48% impairment to his back under the scheduled‑member statute and thus he was not entitled to the presumption of permanent total disability; every medical professional who assigned claimant an impairment rating indicated claimant lost more than 70% of the use of his back, and although there was medical evidence that claimant’s whole person was impaired less than 50%, the issue under the scheduled member statute was claimant’s loss of use of his back. Clemmons v. Lowe’s Home Centers, Inc. (S.C. 2017) 2017 WL 2829630. Workers’ Compensation 1716

Appellate Panel of the Workers’ Compensation Commission did not err in assigning great weight to claimant’s treating neurosurgeon in determining that he was not entitled to permanent total disability (PTD) benefits, even though neurosurgeon’s report implied that claimant’s myelopathy existed prior to his work‑related injury and contradicted his earlier report; neurosurgeon was claimant’s authorized treating physician who treated him for two years, and it was Panel’s duty as the fact finder to resolve contradiction. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1418

Substantial evidence supported decision of Appellate Panel of the Workers’ Compensation Commission to include claimant’s residual myelopathy in its permanent partial disability (PPD) award to the back and rejecting claim for a separate neurological injury, where treating neurosurgeon noted that claimant continued to have altered gait from previous myelopathy but did not offer a separate impairment rating for it, and he opined that claimant’s current symptoms were consistent with axial and myofascial pain and strongly suggestive of arthritic‑type symptoms. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1646.11

Workers’ compensation claimant did not present substantial evidence showing that he sustained an injury to his “low back” that was separate and distinct from the injury to his back, and thus Appellate Panel of the Workers’ Compensation Commission did not err in not making a separate award for low back injury; Panel’s finding that claimant sustained a 48% permanent partial disability (PPD) to the back included any impairment to the low back, and “low back” was not recognized as a separate scheduled member. Clemmons v. Lowe’s Home Centers, Inc.‑Harbison (S.C.App. 2015) 412 S.C. 366, 772 S.E.2d 517, rehearing denied, reversed 2017 WL 920730, withdrawn and superseded on rehearing 2017 WL 2829630. Workers’ Compensation 1531.4

19. Review

In a workers’ compensation action, the employer did not preserve for appeal its allegation that the claimant made an election of remedies by checking the “general disability” box on his form 50 rather that the “specific disability” box where the employer (1) failed to raise the argument to the full commission or the Circuit Court, (2) failed to claim any resulting prejudice ‑ e.g. that the lack of notice of a Section 42‑9‑30 claim caused a failure to procure, discover, or present relevant evidence, and (3) failed to seek to introduce any additional evidence to the Workers’ Compensation Commission as allowed by Section 42‑17‑50 upon learning that the single commissioner awarded benefits under Section 42‑9‑30. Harbin v. Owens‑Corning Fiberglas (S.C.App. 1994) 316 S.C. 423, 450 S.E.2d 112.

An order of the Workers’ Compensation Commission reversing the issue of whether a claimant was required to elect pursuing a claim under Section 42‑9‑20 or Section 42‑9‑30 involved the merits of the case so as to be immediately appealable to the circuit court since the findings of fact and law by the hearing commissioner would become the law of the case, and due process requires that litigants receive notice of the issues to be met on trial, hearing, or appeal. Green v. City of Columbia (S.C.App. 1993) 311 S.C. 78, 427 S.E.2d 685.

If there is competent evidence to support an award made by the fact‑finding body, the Supreme Court is without power to pass upon the force and effect of such evidence. Ripley v. Anderson Cotton Mills (S.C. 1946) 209 S.C. 401, 40 S.E.2d 508.

20. Posthumous award

Statute which provided for the payment of the unpaid balance of workers’ compensation benefits to a claimant’s estate after the claimant died from a cause other than the injury for which he was entitled to compensation allowed for a posthumous adjudication of a workers’ compensation claimant’s permanent disability; employer had accepted claimant’s claim and admitted claimant had suffered from a work‑related injury prior to his death. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1687

A posthumous award to workers’ compensation claimant’s estate did not violate employer’s due process right to conduct full discovery, to present and cross‑examine witnesses, and to introduce evidence; employer never deposed or examined the witnesses who would have knowledge of claimant’s condition and treatment, claimant’s wife testified as to his work history, education, and transferable skills, and employer chose not to cross‑examine wife. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1687

**SECTION 42‑9‑35.** Evidence of preexisting injury or condition.

 (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

 (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or

 (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.

 (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury. However, if the subsequent injury is limited to a single body part or member scheduled in Section 42‑9‑30, except for total disability to the back as provided in Section 42‑9‑30(21), the subsequent injury must impair or affect another body part or system in order to obtain benefits in addition to those provided for in Section 42‑9‑30.

 (C) As used in this section, “medical evidence” means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider.

 (D) The provisions of this section apply whether or not the employer knows of the preexisting permanent disability.

 (E) On and after the effective date of this section, an employee who suffers a subsequent injury which affects a single body part or member injury set forth in Section 42‑9‑30 is limited to the recovery set forth in that section.

HISTORY: 2007 Act No. 111, Pt I, Section 19, eff July 1, 2007, applicable to injuries that occur on or after that date.

Library References

Workers’ Compensation 865.1 to 865.4, 1544.1.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 623 to 625, 1136.

NOTES OF DECISIONS

In general 1

Sufficiency of evidence 2

1. In general

Workers’ compensation claimant who has a permanent physical impairment or preexisting condition may receive benefits for a subsequent work‑related disability if he establishes by a preponderance of the evidence that the subsequent injury aggravated the preexisting condition or permanent physical impairment. Burnette v. City of Greenville (S.C.App. 2012) 401 S.C. 417, 737 S.E.2d 200, rehearing denied, certiorari denied. Workers’ Compensation 552; Workers’ Compensation 1421

2. Sufficiency of evidence

Evidence supported the Workers’ Compensation Commission’s determination that workers’ compensation claimant aggravated a pre‑existing condition; the Commission found that claimant suffered an aggravation of her underlying neck condition by the repetitive trauma of performing overhead work on her job and that the aggravation had manifested itself in neck pain, headaches, shoulder pain, arm pain and hand pain, and the finding was based on claimant’s medical records and the deposition of her physician. Murphy v. Owens Corning (S.C.App. 2011) 393 S.C. 77, 710 S.E.2d 454. Workers’ Compensation 1544.6(3)

**SECTION 42‑9‑40.** Compensation for hernia.

 In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee’s employment, it must be definitely proven to the satisfaction of the commission that:

 (1) there was an injury resulting in hernia or rupture;

 (2) the hernia or rupture appeared suddenly;

 (3) it was accompanied by pain;

 (4) the hernia or rupture immediately followed an accident; and

 (5) the hernia or rupture did not exist prior to the accident for which compensation is claimed.

 All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of the employment shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury and compensation paid in accordance with the provisions of Section 42‑9‑290. In nonfatal cases if it is shown by special examination, as provided in Section 42‑15‑80, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this title.

 In case the injured employee refuses to undergo the radical operation for the cure of the hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease or is otherwise in such physical condition that the commission considers it unsafe for the employee to undergo such operation, the employee shall be paid compensation in accordance with the provisions of this title.

HISTORY: 1962 Code Section 72‑154; 1952 Code Section 72‑154; 1942 Code Section 7035‑2; 1936 (39) 1231.

Library References

Workers’ Compensation 885.24.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 680.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 108:14, Compensability.

Modern Workers’ Compensation Section 108:15, Treatment.

Modern Workers’ Compensation Section 108:16, Treatment‑Compensation and Benefits.

NOTES OF DECISIONS

In general 1

Construction with other laws 2

Pain 4

Presumptions and burden of proof 5

Sudden 3

1. In general

The legislative purpose evident in this section [Code 1962 Section 72‑154] is to restrict compensation for hernia to those cases where there is a relative and reasonably close coincidence between the accidental injury and the hernia, and where it is clear that no other agency intervened, as to time, place or action, to cause the injury. Rudd v Fairforest Finishing Co. (1939) 189 SC 188, 200 SE 727. Henderson v Graniteville Co. (1941) 197 SC 420, 15 SE2d 637.

While this section [Code 1962 Section 72‑154] says that the essential elements of the hernia claim must be definitely proven to the satisfaction of the Commission, this can only mean that the proof should be so definite as reasonably to satisfy them; and the court cannot reverse their findings if there is a rational basis in the evidence for the same. Henderson v. Graniteville Co. (S.C. 1941) 197 S.C. 420, 15 S.E.2d 637. Workers’ Compensation 1531.13(1); Workers’ Compensation 1939.11(5)

One whose previous hernia had been repaired could not be deprived of compensation merely because an operation would naturally tend to weaken the abdominal wall, so that an accident or unusual strain might perhaps be more likely to result in hernia than if there had been no previous operation. Henderson v. Graniteville Co. (S.C. 1941) 197 S.C. 420, 15 S.E.2d 637. Workers’ Compensation 576

A claimant seeking compensation for hernia cannot recover under this section [Code 1962 Section 72‑154] unless he has a finding in his favor on all of the requirements. Rudd v. Fairforest Finishing Co. (S.C. 1939) 189 S.C. 188, 200 S.E. 727.

2. Construction with other laws

There is no distinction between a hernia injury and any other injury suffered by reason of an accident. It was not the intention of the legislature to attach any greater significance to the word “accident” as used in this section [Code 1962 Section 72‑154] than in Code 1962 Section 72‑14. Layton v. Hammond‑Brown‑Jennings Co. (S.C. 1939) 190 S.C. 425, 3 S.E.2d 492.

3. Sudden

The words “suddenly” and “immediately” are elastic terms, admitting much variation of definition. As used here, these words should not be construed as the equivalent of the word “instantaneous.” Like similar absolute expressions, they are used here with less strictness than the literal meaning requires. For to give them their literal signification in all cases, regardless of the attendant situations and circumstances, would often defeat meritorious claims upon purely technical grounds, and thus frustrate the purpose of the Act. Sligh v Pacific Mills (1945) 207 SC 316, 35 SE2d 713. Rudd v Fairforest Finishing Co. (1939) 189 SC 188, 200 SE 727. Layton v Hammond‑Brown‑Jennings (1939) 190 SC 425, 3 SE2d 492.

4. Pain

The injury and the pain must be referable to a definite time, place, and circumstance, and, in accordance with the provisions of this section [Code 1962 Section 72‑154], pain must accompany the accidental injury. Otherwise, how could the inception of the hernia be definitely fixed and accounted for. The office of this statutory requirement is to date the onset of the hernia. A requirement that pain accompany the rupture or protrusion would be of no effect in determining its cause, unless the rupture or hernia occurred instantaneously with the accidental injury. Rudd v. Fairforest Finishing Co. (S.C. 1939) 189 S.C. 188, 200 S.E. 727.

The common‑sense meaning of the word “pain” cannot be ascribed to the words “tired” and “exhausted.” Rudd v. Fairforest Finishing Co. (S.C. 1939) 189 S.C. 188, 200 S.E. 727.

Nontechnical definitions of “pain,” while varying in form of expression, all connote some degree of present distress or suffering, contradistinguished from normal fatigue. Rudd v. Fairforest Finishing Co. (S.C. 1939) 189 S.C. 188, 200 S.E. 727.

5. Presumptions and burden of proof

Because of the peculiar characteristics of hernia, the legislature has seen fit to make hernia subject to the provisions of this section [Code 1962 Section 72‑154]. The burden is upon the claimant to establish proof that there was an injury resulting in hernia, that the hernia appeared suddenly, that it immediately followed the accident, that it did not exist prior to such accident for which compensation is claimed, and that the accidental injury was accompanied by pain. Failure in either one of the above requirements will bar the claimant from recovery. Sligh v. Pacific Mills (S.C. 1945) 207 S.C. 316, 35 S.E.2d 713.

**SECTION 42‑9‑60.** Injury or death occasioned by intoxication or wilful intention of employee; burden of proof.

 No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. In the event that any person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

HISTORY: 1962 Code Section 72‑156; 1952 Code Section 72‑156; 1942 Code Section 7035‑15; 1936 (39) 1231; 2007 Act No. 111, Pt I, Section 20, eff July 1, 2007, applicable to injuries that occur on or after that date.

CROSS REFERENCES

Employer’s answer to a request for hearing, time for filing and service, see S.C. Code of Regulations R. 67‑603.

Library References

Workers’ Compensation 798, 799, 1369, 1371.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 520, 540 to 542, 1045.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 115:2, Serious or Willful Misconduct.

Modern Workers’ Compensation Section 115:4, Intentionally Self‑Inflicted Injury.

Modern Workers’ Compensation Section 115:18, Alcohol or Drug Abuse.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Workmen’s Compensation. 30 S.C. L. Rev. 177.

Products Liability ‑ An Analysis of the Law Concerning Design and Warning Defects in Workplace Products. 33 S.C. L. Rev. 273 (December 1981).

NOTES OF DECISIONS

In general 1

Estoppel 5

Intoxication 2

Jurisdiction 6

Presumptions and burden of proof 7

Review 8

Suicide, generally 4

Wilful intention 3

1. In general

Generally, the fault of a claimant in a workers’ compensation claim has no bearing on the claimant’s right to recover, however, there is an exception to such rule if the injury was occasioned by the intoxication of the claimant. Jones v. Harold Arnold’s Sentry Buick, Pontiac (S.C.App. 2008) 376 S.C. 375, 656 S.E.2d 772, rehearing denied, certiorari denied. Workers’ Compensation 6; Workers’ Compensation 798

This section [Code 1962 Section 72‑156] constitutes an exception to the general principle that fault has no bearing upon an employee’s right to recover workmen’s compensation benefits. Zeigler v. S. C. Law Enforcement Division (S.C. 1967) 250 S.C. 326, 157 S.E.2d 598.

2. Intoxication

For purposes of statute barring recovery of workers’ compensation by a claimant injured as result of intoxication, “intoxication” is a condition that results from the use of a stimulant, which renders the claimant impaired in his or her faculties to the extent that the claimant is incapable of carrying on the accustomed work without danger to himself or herself. Jones v. Harold Arnold’s Sentry Buick, Pontiac (S.C.App. 2008) 376 S.C. 375, 656 S.E.2d 772, rehearing denied, certiorari denied. Workers’ Compensation 798

Substantial evidence supported conclusion of the Workers’ Compensation Commission that claimant was intoxicated at time of both his falls, and thus the injuries sustained by claimant as a result of the falls were not compensable; claimant tested positive for cocaine on date of first fall, second fall occurred the following day, and on both days, witness stated that claimant exhibited slurred speech, and red, glassy, swollen eyes, signs which expert stated a person under the influence exhibits. Jones v. Harold Arnold’s Sentry Buick, Pontiac (S.C.App. 2008) 376 S.C. 375, 656 S.E.2d 772, rehearing denied, certiorari denied. Workers’ Compensation 1604

Statute prohibiting claimant from receiving workers’ compensation benefits if claimant’s injury was occasioned by his intoxication did not preclude recovery of benefits by claimant who was assaulted by coemployee in bar, where claimant had been repairing pool table which employer leased to bar; claimant had consumed portion of one beer when he was confronted by coemployee, and there was no evidence that claimant was intoxicated or that his consumption of alcohol proximately caused his injury. Baggott v. Southern Music, Inc. (S.C. 1998) 330 S.C. 1, 496 S.E.2d 852, rehearing denied. Workers’ Compensation 798

No workers’ compensation is payable where the injury or death is occasioned by the intoxication of the employee. Chandler v. Suitt Const. Co. (S.C.App. 1986) 288 S.C. 503, 343 S.E.2d 633. Workers’ Compensation 798

Testimony of a truck driver, in workers’ compensation case, that he had seen the deceased driving erratically immediately before the motor vehicle accident did not render clearly erroneous the finding of the industrial commissioner, which was supported by substantial evidence, that the employer had failed to prove by the preponderance of the evidence either that the deceased was intoxicated at the time of the accident or that intoxication was a proximate cause of the accident and death. Chandler v. Suitt Const. Co. (S.C.App. 1986) 288 S.C. 503, 343 S.E.2d 633.

In a workers’ compensation proceeding arising from the death of a highway patrolman who was killed as he was driving his family home from a family social while intoxicated, the Highway Department failed to carry its burden of proof that the accident was proximately caused by intoxication where the record reflected that the patrolman’s memory had been affected by a prior accident and that he could not perform menial tasks, all of which could have affected his driving ability; however, the evidence did support the conclusion that his death arose out of and within the course of his employment where there was evidence that he suffered posttraumatic depression as a result of the former accident arising out of and within the course of his employment and that his increased drinking was related to his head injury suffered in the earlier accident. South Carolina Dept. of Highways and Public Transp. v. Higgins by Higgins (S.C.App. 1985) 284 S.C. 359, 326 S.E.2d 425.

For intoxication to be a bar to recovery under Code 1962 Section 72‑156 [Code 1976 Section 42‑9‑60], intoxication must be the proximate cause of the injury, and not just precede the injury. Kinsey v. Champion Am. Service Center (S.C. 1977) 268 S.C. 177, 232 S.E.2d 720. Workers’ Compensation 798

The word “intoxicated” as used in this section [Code 1962 Section 72‑156] is intended to denote a condition produced by the use of some stimulant, rendering an employee impaired in his faculties to the extent that he is incapable of carrying on his accustomed work without danger to himself. Reeves v. Carolina Foundry & Machine Works (S.C. 1940) 194 S.C. 403, 9 S.E.2d 919. Workers’ Compensation 798

This section [Code 1962 Section 72‑156] provides that in order to bar a recovery, the injury must be occasioned by the intoxication of the employee, which means that the proximate cause of the injury must be the intoxication of the employee. Reeves v. Carolina Foundry & Machine Works (S.C. 1940) 194 S.C. 403, 9 S.E.2d 919. Workers’ Compensation 798

3. Wilful intention

“Willful intent standard,” under which a claimant’s suicide can break the chain of causation between a compensable injury and death, rather than “chain of causation standard,” under which a suicide may be compensable if the injury and its consequences directly result in the claimant’s loss of normal judgment and domination by a disturbance of the mind, applies when determining whether a self‑inflicted death is compensable under South Carolina’s workers’ compensation statutes. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 603; Workers’ Compensation 799

Fault generally has no bearing upon an employee’s right to recover workers’ compensation benefits in South Carolina, the only exception to the general principle being the statute barring benefits if an injury or death is the result of the claimant’s “willful intention.” Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 6; Workers’ Compensation 799

Provision in Workers’ Compensation Act, stating that no compensation would be payable if an injury or death was occasioned by the “willful intention” of the employee to injure or kill himself, barred an award of death benefits to mother of deceased worker who killed himself with an overdose of pain medication, though worker’s treating psychiatrist was of the opinion that the worker’s suicide was the result of emotional trauma or depression secondary to his compensable work accident, as death from suicide by definition was the result of an individual’s “willful intention” to kill himself. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

If an employee’s conduct is spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury, it is not the result of “willful intention,” for purposes of statute barring workers’ compensation benefits if an injury or death is the result of the claimant’s “willful intention.” Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

An act of deliberate intent is not impulsive or instinctive, but rather it is voluntary conduct, so grave and serious as to evidence “willful intent,” for purposes of statute barring workers’ compensation benefits if an injury or death was the result of the claimant’s “willful intention.” Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

The term “willful intention,” as used in the statute barring workers’ compensation benefits if an injury or death is the result of the claimant’s “willful intention,” means a deliberate or formed intention. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

The statute that denies workers’ compensation benefits if an employee’s injury is caused by the “wilful intention of the employee to injure or kill himself or another” operates as a defense to the employee’s recovery. Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 799; Workers’ Compensation 800

Whether an employee acted with willful intent to injure, for purposes of the statute that denies workers’ compensation benefits if an employee’s injury is caused by the “wilful intention of the employee to injure or kill himself or another,” is a question of fact for the Workers’ Compensation Commission to determine. Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 1721

As used in the statute that denies workers’ compensation benefits if an employee’s injury is caused by the “wilful intention of the employee to injure or kill himself or another,” the term “willful intention” is defined as a deliberate or formed intention. Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 799; Workers’ Compensation 800

In determining whether an employee acted with willful intent to injure himself or another, which would disqualify him from receiving workers’ compensation benefits, the deciding factor is not necessarily who was the aggressor or struck the first blow; rather, the defense is applicable only when the acts of the employee are so serious and aggravated as to evince a wilful intent to injure. Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 799; Workers’ Compensation 800

Under the statute that denies workers’ compensation benefits if an employee’s injury is caused by the “wilful intention of the employee to injure or kill himself or another,” benefits are not precluded if the altercation is spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury. Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 799; Workers’ Compensation 800

Evidence supported Workers’ Compensation Commission’s finding that claimant’s altercation with his supervisor resulted from claimant’s spontaneous reaction to racial slur directed at him by supervisor, rather than from claimant’s willful intent to injure, and thus, claimant was not disqualified from receiving workers’ compensation benefits for injuries he suffered during altercation; claimant testified that he and supervisor had work‑related disagreement, that supervisor uttered racial slur, that supervisor pushed claimant when claimant confronted him about racial slur, and that they then “got into a spontaneous fight” after “instinct took over.” Youmans v. Coastal Petroleum Co. (S.C.App. 1998) 333 S.C. 195, 508 S.E.2d 43. Workers’ Compensation 1601

Code 1962 Section 72‑156 [Code 1976 Section 42‑9‑60] only applies to injuries resulting from “willful intention” or a “deliberate intention or formed intention” and does not apply to spontaneous, impulsive, or instinctive altercations. Kinsey v. Champion Am. Service Center (S.C. 1977) 268 S.C. 177, 232 S.E.2d 720.

This section [Code 1962 Section 72‑156] finds application only in those cases where it is shown that the acts of the employee are so serious and aggravated as to evince a willful intent to injure. Zeigler v. S. C. Law Enforcement Division (S.C. 1967) 250 S.C. 326, 157 S.E.2d 598. Workers’ Compensation 800; Workers’ Compensation 1370

“Wilful intention,” as used in this section [Code 1962 Section 72‑156], means a deliberate or formed intention. Zeigler v. S. C. Law Enforcement Division (S.C. 1967) 250 S.C. 326, 157 S.E.2d 598.

The conduct of a police officer who voluntarily engaged in a shoot‑out with a fellow officer was of such a grave or serious nature as to evidence a wilful intent on his part to injure his fellow employee, thereby barring any right to benefits under the Workmen’s Compensation Act. Zeigler v. S. C. Law Enforcement Division (S.C. 1967) 250 S.C. 326, 157 S.E.2d 598. Workers’ Compensation 1601

The word “wilful” has the same meaning as it has always had under the common law. “Wilful” means “intentional.” Reeves v. Carolina Foundry & Machine Works (S.C. 1940) 194 S.C. 403, 9 S.E.2d 919.

4. Suicide, generally

Worker’s suicide was not a natural consequence flowing from the worker’s compensable injury, and thus his mother was not entitled to death benefits, though worker’s treating psychiatrist was of the opinion that the suicide was the result of worker’s emotional trauma or depression secondary to his work accident, as worker’s willful intention to kill himself was an independent intervening cause that severed the link with the injury; suicide, by definition, was an act of willful intention and was an unnatural consequence of work related depression. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 603; Workers’ Compensation 799

Suicide of worker was not the result of a spontaneous or uncontrollable impulse, or lapse of conscious volition negating willful intention, for purposes of determining whether worker’s mother was barred by statute from recovering death benefits because the suicide was the result of worker’s willful intention; worker in prior years had two previous suicide attempts, both attempts suggested deliberative thinking that contemplated one’s own demise as a way of coping with depression, pathologist concluded, based on the number of residual pills and pill debris in the stomach, that the cause of worker’s death was suicide, and worker’s psychiatrist testified that if worker had committed suicide it was intentional. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

In order for an employee to have acted with willful intent to injure or kill himself, and for the injury to be noncompensable under the workers’ compensation statutes, the act must be a product of the employee’s conscious volition. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

A finding in a workers’ compensation proceeding that an employee acted with willful intent to injure or kill himself must be predicated on the employee’s deliberate or formed intention rather than on spontaneous, impulsive, or instinctive conduct. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799

In a workers’ compensation proceeding, whether an employee acted with willful intent to injure or kill himself is a question of fact for the Appellate Panel to determine. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 1716

5. Estoppel

An employer was not equitably estopped from raising Section 42‑9‑60, prohibiting compensation for injuries occasioned by the intoxication of an employee, where the employee was treated to a steak dinner as the winner of a sales contest sponsored by the employer, the dinner included an “open bar,” the employee was injured in an auto accident while driving home from the dinner, and the accident was caused by his intoxication. Spoone v. Newsome Chevrolet Buick (S.C.App. 1991) 306 S.C. 438, 412 S.E.2d 434, certiorari granted, affirmed 309 S.C. 432, 424 S.E.2d 489.

6. Jurisdiction

When this section [Code 1962 Section 72‑156] is pleaded as a defense, or as a bar to a recovery under the Act, this cannot have the effect ipso facto of ousting the Commission of jurisdiction, although the jurisdiction of the Commission may thereby become a mixed question of law and fact. Reeves v. Carolina Foundry & Machine Works (S.C. 1940) 194 S.C. 403, 9 S.E.2d 919. Workers’ Compensation 1177; Workers’ Compensation 1705

7. Presumptions and burden of proof

Suicide is a defense to a workers’ compensation death claim, for which the party asserting it has the burden of proof. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 799; Workers’ Compensation 1372

Where the testimony on the subject produces a conviction in favor of suicide, that fact shows that the employer has met the burden resting upon him to establish the suicide defense to a workers’ compensation death claim; only if, after a consideration of all of the testimony, a reasonable inference of suicide cannot be drawn, can it be said that the employer failed to meet the burden. Thompson ex rel. Harvey v. Cisson Const. Co. (S.C.App. 2008) 377 S.C. 137, 659 S.E.2d 171, rehearing denied, certiorari granted, vacated 385 S.C. 451, 684 S.E.2d 756. Workers’ Compensation 1372

Intoxication of a workers’ compensation claimant is an affirmative defense which requires the party asserting the defense to carry the burden of proof. Jones v. Harold Arnold’s Sentry Buick, Pontiac (S.C.App. 2008) 376 S.C. 375, 656 S.E.2d 772, rehearing denied, certiorari denied. Workers’ Compensation 1371

The burden of proving the intoxication in a workers’ compensation case is on the person claiming it as a defense. Chandler v. Suitt Const. Co. (S.C.App. 1986) 288 S.C. 503, 343 S.E.2d 633. Workers’ Compensation 1371

This section [Code 1962 Section 72‑156] is a defense and the burden of establishing it rests upon the one asserting it. Zeigler v. S. C. Law Enforcement Division (S.C. 1967) 250 S.C. 326, 157 S.E.2d 598.

Where the testimony on the subject produces a conviction in favor of suicide, that fact shows that the employer has met the burden resting upon him. In re Crawford (S.C. 1944) 205 S.C. 72, 30 S.E.2d 841. Workers’ Compensation 1607

8. Review

Use by Appellate Panel of the Workers’ Compensation Commission of statute providing that no compensation shall be payable if the injury or death was occasioned by the intoxication of the employee was a scrivener’s error, as there was no evidence showing that employee was under the influence of intoxication, and the Appellate Panel’s error in citing this statute was not prejudicial; instead, the Panel intended to cite law which discussed medical benefits, and indeed, the Appellate Panel cited to this law when concluding employer was only responsible for the medical care claimant received. Sanders v. Wal‑Mart Stores, Inc. (S.C.App. 2008) 379 S.C. 554, 666 S.E.2d 297. Workers’ Compensation 1937

**SECTION 42‑9‑90.** Increase in compensation which is not paid when due.

 If any installment of compensation payable in accordance with the terms of an agreement approved by the commission without an award is not paid within fourteen days after it becomes due, as provided in Section 42‑9‑230, or if any installment of compensation payable in accordance with the terms of an award by the commission is not paid within fourteen days after it becomes due, as provided in Section 42‑9‑240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

HISTORY: 1962 Code Section 72‑159; 1952 Code Section 72‑159; 1942 Code Section 7035‑21; 1936 (39) 1231.

Library References

Workers’ Compensation 1042.14 to 1042.19.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1616 to 1618.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 317:11, Penalties.

NOTES OF DECISIONS

In general 1

1. In general

The Workers’ Compensation Commission’s Appellate Panel’s removal of a ten percent statutory penalty against the Property and Casualty Insurance Guaranty Association after it failed to pay workers’ compensation claimant’s estate a lump‑sum award constituted an abuse of discretion; the statutory provision that governs when payment of an unpaid balance of compensation shall be made when an employee dies mandated a penalty any time compensation is not paid within 14 days of becoming due, absent a showing of circumstances beyond the Association’s control that prevented it from paying. Hudson ex rel. Hudson v. Lancaster Convalescent Center (S.C. 2014) 407 S.C. 112, 754 S.E.2d 486, rehearing denied. Workers’ Compensation 1042.29

Workers’ compensation claimant’s estate was entitled to ten percent statutory penalty after employer and South Carolina Property and Casualty Insurance Guaranty Association stopped paying compensation to claimant’s estate, even though defendants had a non‑frivolous defense; imposition of the penalty was mandatory under statutory provision that required a ten percent penalty unless nonpayment was excused by the Commission after a showing by employer that due to conditions over which he had no control, such installments could not be paid within prescribed statutory time period. Hudson v. Lancaster Convalescent Center (S.C.App. 2011) 393 S.C. 1, 709 S.E.2d 65, rehearing denied, affirmed in part, reversed in part 407 S.C. 112, 754 S.E.2d 486. Workers’ Compensation 1042.9

Employer and insurance carrier who discontinued weekly compensation payments, due under the terms of an agreement with the employee, without following the procedure outlined in Code 1962 Section 72‑352 were liable to the penalty provided by this section [Code 1962 Section 72‑159]. Singleton v. Young Lumber Co. (S.C. 1960) 236 S.C. 454, 114 S.E.2d 837.

**SECTION 42‑9‑110.** Persons conclusively presumed to be wholly dependent.

 A surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee.

HISTORY: 1962 Code Section 72‑161; 1952 Code Section 72‑161; 1942 Code Section 7035‑42; 1936 (39) 1231; 1983 Act No. 92 Section 2.

Library References

Workers’ Compensation 1353, 1354.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1032, 1044.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:8, Children.

Modern Workers’ Compensation Section 321:15, Death Benefits.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Workers’ Compensation Act treats nonmarital children like bastards out of Carolina. 49 S.C. L. Rev. 1281 (Summer 1998).

NOTES OF DECISIONS

In general 1

Construction with other laws 2

Jurisdiction 3

Sufficiency of evidence 4

1. In general

Stepchild who can show reliance upon employee at time of employee’s death for reasonable necessities of life will be deemed “wholly dependent” under workers’ compensation death benefit statute. Adams v. Texfi Industries (S.C.App. 1998) 330 S.C. 305, 498 S.E.2d 885, rehearing denied, reversed 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 420.23; Workers’ Compensation 420.29

For purposes of receiving death benefits under the Workers’ Compensation Law, one may be deemed wholly dependent either through a conclusive statutory presumption under Section 42‑9‑110 or through a factual demonstration under Section 42‑9‑120. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 410.6; Workers’ Compensation 410.15

Section 42‑9‑110 delineates two categories of persons who are deemed to be wholly dependent: a surviving spouse and a child. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

Under Workers’ Compensation Law regarding the award of death benefits, a stepchild will be deemed to be “wholly dependent” under Section 42‑9‑110 where he is determined to be dependent upon the deceased employee. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

Under Section 42‑1‑70, a stepchild must be dependent on the decedent worker before she may be considered a child of the decedent, conclusively presumed to be wholly dependent under Section 42‑9‑110, for purposes of recovering death benefits. Hammond v. Pickens County Dept. of Social Services (S.C. 1994) 314 S.C. 312, 443 S.E.2d 913.

A niece of a deceased employee may ordinarily qualify for compensation as a dependent. The Worker’s Compensation Act does not define dependency, does not list who may be dependents, and only designates those persons who are conclusively presumed to be wholly dependent upon a deceased employee. The 1972 amendment of Section 72‑165, which is now Section 42‑9‑140, merely eliminated payments to certain next of kin; it in no way restricted the class of persons who could claim as dependents. South Carolina Second Injury Fund v. Young (S.C.App. 1990) 301 S.C. 524, 392 S.E.2d 807.

Step‑son of deceased employee, who was under age of majority at time of step‑father’s death, and who subsequently reached age of majority, is no longer entitled to Workmen’s Compensation benefits in absence of evidence that he is physically or mentally incapable of self‑support or that he is full‑time student. Wilkes v. Chappell (S.C. 1981) 276 S.C. 690, 281 S.E.2d 485. Workers’ Compensation 420.30; Workers’ Compensation 420.31

One of the obvious primary purposes of this Act is to prevent injured employees and those lawfully dependent upon them for support from becoming charges upon society and the public generally for support. Flemon v. Dickert‑Keowee, Inc. (S.C. 1972) 259 S.C. 99, 190 S.E.2d 751.

An illegitimate child of the deceased is entitled to compensation benefits. Flemon v. Dickert‑Keowee, Inc. (S.C. 1972) 259 S.C. 99, 190 S.E.2d 751.

The philosophy of the common law which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by this Act. Flemon v. Dickert‑Keowee, Inc. (S.C. 1972) 259 S.C. 99, 190 S.E.2d 751.

Where widow and mother, who was wholly dependent in fact, survived deceased employee, Commission properly ordered the benefits equally divided between the two. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

This section [Code 1962 Section 72‑161] removes the burden of proving dependency by making persons enumerated herein a preferred class, but there is nothing in this Title that gives such persons a prior or exclusive right over others who are proven to be wholly dependent in fact without regard to any presumption. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

This section [Code 1962 Section 72‑161] and Code 1962 Sections 72‑162, 72‑163 and 72‑180 relate to the same subject matter, are in pari materia and must be construed together, keeping in mind the legislative intent. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

A woman previously married who entered into a bigamous marriage with deceased employee was not entitled to any benefit under this section [Code 1962 Section 72‑161] as a widow even though she thought the marriage was a valid one. Day v. Day (S.C. 1950) 216 S.C. 334, 58 S.E.2d 83.

The word “dependent” refers to those lawfully dependent. Day v. Day (S.C. 1950) 216 S.C. 334, 58 S.E.2d 83.

A wife living apart from her husband at the time of his death without justifiable cause cannot be deemed his widow or dependent upon him for support. Young v. Hyman Motors (S.C. 1942) 199 S.C. 233, 19 S.E.2d 109. Workers’ Compensation 420.10

2. Construction with other laws

When this section [Code 1962 Section 72‑161] is construed in connection with Code 1962 Section 72‑17 there is no conflict as to the term “widow.” This section uses the term “widow” without qualifying or defining it for the simple reason that it had already been specifically defined in Code 1962 Section 72‑17. The very purpose of giving these definitions at the beginning of the Act was to obviate the necessity of defining and qualifying these terms throughout the various subsequent sections of the Act, and the context of this section [Code 1962 Section 72‑161] does not justify disregarding the definition of widow. Young v. Hyman Motors (S.C. 1942) 199 S.C. 233, 19 S.E.2d 109.

3. Jurisdiction

Absent an express statutory restriction on the broad power of the Workers’ Compensation Commission to determine a deceased worker’s dependents under the workers’ compensation law, the Commission has jurisdiction to determine the issue of paternity when determining dependency. Although the family court has exclusive jurisdiction under Section 20‑7‑420 to hear and determine actions to determine the paternity of an individual, and the determination of dependency necessarily requires a resolution of the issue of paternity, nothing in Section 20‑7‑420 either gives the family court exclusive jurisdiction to determine dependency under the workers’ compensation law or restricts the Commission’s jurisdiction to determine the issue of dependency where death benefits are claimed by a “child” under the workers’ compensation law. Brown v. Ryder Truck Rental (S.C.App. 1990) 300 S.C. 530, 389 S.E.2d 161.

4. Sufficiency of evidence

Workers’ Compensation Commission’s finding that deceased employee’s stepchild relied on employee for reasonable necessities of life and was sufficiently dependent to be entitled to workers’ compensation benefits was supported by evidence that employee provided medical insurance coverage, braces, household utilities, groceries, car expenses, clothing, summer camp, made payments on the indebtedness on the family home, and claimed stepchild as dependent on employee’s and wife’s joint tax return. Adams v. Texfi Industries (S.C. 2000) 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 420.23

Stepdaughter of deceased employee did not show that she relied on deceased for her reasonable necessities of life at time of his death, and, thus, was not entitled to workers’ compensation death benefits, where although record showed that employee provided stepdaughter with medical insurance coverage and may have paid for items such as braces, summer camp and car expenses, stepdaughter’s mother and natural father supported her during employee’s life and her mother’s testimony was sole evidence that employee provided for any of stepdaughter’s needs. Adams v. Texfi Industries (S.C.App. 1998) 330 S.C. 305, 498 S.E.2d 885, rehearing denied, reversed 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 420.23; Workers’ Compensation 420.33

The evidence was sufficient to support a commissioner’s determination that a child was the illegitimate child of a deceased worker and therefore was conclusively presumed “to be wholly dependent for support” on the deceased under Section 42‑9‑110 so as to be entitled to workers’ compensation benefits, even though the child’s mother was married to another man at the time of the child’s birth, where the husband was incarcerated at the time of the child’s conception and the mother testified that she engaged in sexual intercourse with the worker during the period the child was conceived. Palm v. General Painting Co., Inc. (S.C.App. 1988) 296 S.C. 41, 370 S.E.2d 463, affirmed as modified 302 S.C. 372, 396 S.E.2d 361. Workers’ Compensation 1478

**SECTION 42‑9‑120.** Determination and requirements of other cases of dependency.

 In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment in lieu of board and lodging or services and no compensation shall be allowed unless dependency existed for a period of three months or more prior to the accident.

HISTORY: 1962 Code Section 72‑162; 1952 Code Section 72‑162; 1942 Code Section 7035‑42; 1936 (39) 1231.

Library References

Workers’ Compensation 410.1 to 410.16.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 287, 289 to 296, 323.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:4, Tests of Dependency.

Modern Workers’ Compensation Section 107:5, Dependency Determination Date.

Modern Workers’ Compensation Section 321:15, Death Benefits.

NOTES OF DECISIONS

In general 1

Sufficiency of evidence 2

1. In general

Son of employee killed on the job was not entitled to recover that portion of workers’ compensation death benefits that would have been awarded to his mother and brother had their claims not been barred by statute of limitations; mother and brother could not be said to have waived their rights to death benefits because they had no legal right to benefits. Steele v. Self Serve, Inc. (S.C.App. 1999) 335 S.C. 323, 516 S.E.2d 674. Workers’ Compensation 911

For purposes of receiving death benefits under the Workers’ Compensation Law, one may be deemed wholly dependent either through a conclusive statutory presumption under Section 42‑9‑110 or through a factual demonstration under Section 42‑9‑120. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 410.6; Workers’ Compensation 410.15

For a stepchild or illegitimate child to receive workers’ compensation benefits arising from the death of a parent, the stepchild or illegitimate child must demonstrate dependence upon the deceased. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

Under Workers’ Compensation Law regarding the award of death benefits, a stepchild will be deemed to be “wholly dependent” under Section 42‑9‑110 where he is determined to be dependent upon the deceased employee. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

For purposes of the award of workers’ compensation death benefits, married brothers or married sisters must be “wholly dependent” upon the deceased employee in order to come with in the definition of “brother” and “sister.” Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 420.50

The level of dependency required for a stepchild to be considered a child is something less than being “wholly dependent” for purposes of workers’ compensation death benefits. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 420.23; Workers’ Compensation 420.29

The standard for determining the degree of dependency required in order for stepchildren and acknowledged illegitimate children to be deemed dependent under Section 42‑1‑70 is as follows: a dependent is one who looks to another for support and maintenance; one who is in fact dependent ‑ one who relies on another for the reasonable necessities of life. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

A niece of a deceased employee may ordinarily qualify for compensation as a dependent. The Worker’s Compensation Act does not define dependency, does not list who may be dependents, and only designates those persons who are conclusively presumed to be wholly dependent upon a deceased employee. The 1972 amendment of Section 72‑165, which is now Section 42‑9‑140, merely eliminated payments to certain next of kin; it in no way restricted the class of persons who could claim as dependents. South Carolina Second Injury Fund v. Young (S.C.App. 1990) 301 S.C. 524, 392 S.E.2d 807.

The 3‑month requirement of Section 42‑9‑120 does not apply to a surviving illegitimate child. Palm v. General Painting Co., Inc. (S.C.App. 1988) 296 S.C. 41, 370 S.E.2d 463, affirmed as modified 302 S.C. 372, 396 S.E.2d 361.

A person who, while married to another,cohabits with one not his or her spouse with no belief that they are married is not to be considered a dependent within the meaning of the Workers’ Compensation Act. Palm v. General Painting Co., Inc. (S.C.App. 1988) 296 S.C. 41, 370 S.E.2d 463, affirmed as modified 302 S.C. 372, 396 S.E.2d 361. Workers’ Compensation 420.1

This section [Code 1962 Section 72‑162] and Code 1962 Sections 72‑161, 72‑163 and 72‑180 relate to the same subject matter, are in pari materia and must be construed together, keeping in mind the legislative intent. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

Where surviving mother was wholly dependent in fact under this section [Code 1962 Section 72‑162] she was entitled to share benefits equally with widow conclusively presumed wholly dependent under Code 1962 Section 72‑161, since latter has no prior or exclusive right under this title. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

2. Sufficiency of evidence

Each case involving a determination of dependency under the Worker’s Compensation Act must rest on its own particular facts and circumstances because no hard and fast rule can be laid down as to what constitutes actual dependency and because the question of dependency is one of fact. The particular facts and circumstances supported a finding that a deceased employee’s niece was a dependent under the Worker’s Compensation Act where the niece, who was 55 or 56 years old when the employee died, lived in a mobile home next to the employee’s mobile home on the family’s home place, the niece quit work because of poor health approximately a year before the employee died, the niece testified that the employee told her “to go ahead on and quit and he would take care of [her] home and his home,” and the employee was the niece’s only source of income and the person on whom she depended for transportation and for payment of all of her expenses. South Carolina Second Injury Fund v. Young (S.C.App. 1990) 301 S.C. 524, 392 S.E.2d 807.

**SECTION 42‑9‑130.** Division of death benefit when there is more than one dependent.

 If there is more than one person wholly dependent, the death benefit shall be divided among them and the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

HISTORY: 1962 Code Section 72‑163; 1952 Code Section 72‑163; 1942 Code Section 7035‑42; 1936 (39) 1231.

Library References

Workers’ Compensation 430.1 to 430.6.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 321 to 322.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:6, Priority Among Dependents.

Modern Workers’ Compensation Section 107:15, Partial Dependents.

Modern Workers’ Compensation Section 321:15, Death Benefits.

LAW REVIEW AND JOURNAL COMMENTARIES

The South Carolina Workers’ Compensation Act treats nonmarital children like bastards out of Carolina. 49 S.C. L. Rev. 1281 (Summer 1998).

NOTES OF DECISIONS

In general 1

Construction with other laws 2

1. In general

Son of employee killed on the job was not entitled to recover that portion of workers’ compensation death benefits that would have been awarded to his mother and brother had their claims not been barred by statute of limitations; mother and brother could not be said to have waived their rights to death benefits because they had no legal right to benefits. Steele v. Self Serve, Inc. (S.C.App. 1999) 335 S.C. 323, 516 S.E.2d 674. Workers’ Compensation 911

Workers’ compensation death benefits are divided among persons who were wholly dependent upon deceased employee. Adams v. Texfi Industries (S.C.App. 1998) 330 S.C. 305, 498 S.E.2d 885, rehearing denied, reversed 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 410.3

Stepchild who can show reliance upon employee at time of employee’s death for reasonable necessities of life will be deemed “wholly dependent” under workers’ compensation death benefit statute. Adams v. Texfi Industries (S.C.App. 1998) 330 S.C. 305, 498 S.E.2d 885, rehearing denied, reversed 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 420.23; Workers’ Compensation 420.29

Stepdaughter of deceased employee did not show that she relied on deceased for her reasonable necessities of life at time of his death, and, thus, was not entitled to workers’ compensation death benefits, where although record showed that employee provided stepdaughter with medical insurance coverage and may have paid for items such as braces, summer camp and car expenses, stepdaughter’s mother and natural father supported her during employee’s life and her mother’s testimony was sole evidence that employee provided for any of stepdaughter’s needs. Adams v. Texfi Industries (S.C.App. 1998) 330 S.C. 305, 498 S.E.2d 885, rehearing denied, reversed 341 S.C. 401, 535 S.E.2d 124. Workers’ Compensation 420.23; Workers’ Compensation 420.33

Under the Workers’ Compensation Law, death benefits are to be divided among persons “wholly dependent” upon the deceased. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109. Workers’ Compensation 410.3

Persons who were partly dependent on the deceased receive no portion of the workers’ compensation death benefits where there are persons who were wholly dependent. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

For a stepchild or illegitimate child to receive workers’ compensation benefits arising from the death of a parent, the stepchild or illegitimate child must demonstrate dependence upon the deceased. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

The standard for determining the degree of dependency required in order for stepchildren and acknowledged illegitimate children to be deemed dependent under Section 42‑1‑70 is as follows: a dependent is one who looks to another for support and maintenance; one who is in fact dependent ‑ one who relies on another for the reasonable necessities of life. Adams v. Texfi Industries (S.C. 1995) 320 S.C. 213, 464 S.E.2d 109.

Persons conclusively presumed wholly dependent under Code 1962 Section 72‑161 are not entitled to take entire benefits to exclusion of others wholly dependent upon deceased, but must share benefits equally with those wholly dependent in fact upon deceased at time of accident. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

Where widow wanted periodic payments commuted to a lump sum payment and the employer of her deceased husband approved it, the Commission erred in granting the request without taking into consideration the interest of a two year old daughter and by not appointing a trustee to receive the funds. Brown v. Plowden Co. (S.C. 1949) 216 S.C. 114, 57 S.E.2d 29.

2. Construction with other laws

This section [Code 1962 Section 72‑163] and Code 1962 Sections 72‑161, 72‑162, and 72‑180 relate to the same subject matter, are in pari materia and must be construed together, keeping in mind the legislative intent. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

**SECTION 42‑9‑140.** Payment when deceased employee leaves no dependents or partial dependents.

 (A) If the deceased employee leaves no dependents, the employer shall pay the commuted amounts provided for in Section 42‑9‑290 for whole dependents, less burial expenses which must be deducted from those commuted amounts, to his surviving nondependent children.

 (B) If the deceased employee leaves no dependents or nondependent children, the employer shall pay the commuted amounts provided for in Section 42‑9‑290 for whole dependents, less burial expenses which must be deducted from those commuted amounts, to his father and mother, irrespective of age or dependency.

 (C) If the deceased employee leaves a partial dependent or dependents as defined in Section 42‑9‑120, the employer shall pay compensation to those dependents, in accordance with Section 42‑9‑290, and the remainder of the commuted amounts provided for in Section 42‑9‑290, less burial expenses, which must be deducted from the commuted amounts, to his nondependent children. If no children survive the deceased employee, then the remainder must be paid to his father and mother, irrespective of age or dependency.

 (D) If the deceased employee leaves no dependents or nondependent children or mother or father, then his employer shall pay to the deceased’s personal representative the actual costs for burial expenses and the administration of the deceased’s estate, and to the commission the commuted amounts provided for dependents under Section 42‑9‑290, to be expended in accordance with Section 42‑9‑400.

 (E) If the deceased employee leaves partial dependents as defined in Section 42‑9‑120 and no children or mother or father, then his employer shall pay to that partial dependent in accordance with provisions found in Section 42‑9‑290 and shall pay to the deceased’s personal representative the actual cost of burial expenses and the administration of the deceased’s estate, and to the commission the remaining compensation, commuted as provided under Section 42‑9‑290, to be expended in accordance with Section 42‑9‑400.

 (F) If amounts are payable to the mother and father of the deceased employee pursuant to subsections (B) and (C), upon the motion of either parent or any other potential party of interest based upon the decedent having died intestate, the commission may deny or limit either or both parent’s entitlement for a share of the benefits if the commission determines, by a preponderance of the evidence, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 63‑5‑20 and did not otherwise provide for the needs of the decedent during his or her minority.

 (G) Payment as prescribed in this section releases the employer from all death benefit liability.

HISTORY: 1962 Code Section 72‑165; 1952 Code Section 72‑165; 1942 Code Section 7035‑43; 1936 (39) 1231; 1944 (43) 1299; 1955 (49) 459; 1972 (57) 2339; 1974 (58) 2237; 1989 Act No. 58, Section 1, eff April 26, 1989; 1996 Act No. 370, Section 2, eff May 29, 1996.

Library References

Workers’ Compensation 420.1 to 420.52.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 290 to 292, 294 to 320.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:16, No Dependents.

Modern Workers’ Compensation Section 107:19, to Whom Payments Are Made.

Modern Workers’ Compensation Section 107:23, Burial Expenses.

Modern Workers’ Compensation Section 321:15, Death Benefits.

NOTES OF DECISIONS

In general 1

Construction and application 2

1. In general

Natural father’s abandonment of his son did not disqualify him from being a “father” entitled to death benefits under Workers’ Compensation Act. Adkins v. Comcar Industries, Inc. (S.C. 1996) 323 S.C. 409, 475 S.E.2d 762, rehearing denied. Workers’ Compensation 420.39

A father was entitled to receive half of the workers’ compensation benefits awarded for the death of his son although the father had minimal contact with his son while the son was living where no legal action was ever taken to formally establish that the father had abandoned his son nor had the father’s parental rights been terminated. Adkins v. Comcar Industries, Inc. (S.C.App. 1994) 316 S.C. 149, 447 S.E.2d 228, rehearing denied, certiorari granted, affirmed 323 S.C. 409, 475 S.E.2d 762. Workers’ Compensation 420.36

The claim of the personal representative and sole heir at law of a deceased employee had abated where the employee, who had injured her back while working and filed a Workers’ Compensation claim, was killed in a nonwork‑related auto accident prior to its adjudication, and at the time of her death the employee’s heir, who had been substituted as the claimant in the proceeding, was not dependent on the employee for support; since the Workers’ Compensation Act provides for nonwork‑related deaths, the general survival statute, Section 15‑5‑90, was inapplicable. Estate of Covington by Montgomery v. AT & T Nassau Metals Corp. (S.C. 1991) 304 S.C. 436, 405 S.E.2d 393.

A niece of a deceased employee may ordinarily qualify for compensation as a dependent. The Worker’s Compensation Act does not define dependency, does not list who may be dependents, and only designates those persons who are conclusively presumed to be wholly dependent upon a deceased employee. The 1972 amendment of Section 72‑165, which is now Section 42‑9‑140, merely eliminated payments to certain next of kin; it in no way restricted the class of persons who could claim as dependents. South Carolina Second Injury Fund v. Young (S.C.App. 1990) 301 S.C. 524, 392 S.E.2d 807.

Funds remaining following payment of death benefits to granddaughter to whom deceased employee had contributed 50 percent of his wages were properly payable to the second injury fund. South Carolina Second Injury Fund v. Rabb (S.C. 1975) 265 S.C. 36, 216 S.E.2d 761.

Where the claimant was awarded the maximum allowance and he was thirty‑two years of age and was not dependent upon his father, the deceased, it was contended under a construction of this section [Code 1962 Section 72‑165] that in the event of liability on the part of appellants, he should have been awarded only one half of the commuted amount of future installments of compensation as determined by the Commission. The court held that, under this section [Code 1962 Section 72‑165], as amended, the award should be for the full commuted amount for “whole dependents,” less burial expenses. Holly v. Spartan Grain & Mill Co. (S.C. 1947) 210 S.C. 183, 42 S.E.2d 59.

An award to the widow constitutes a vested interest which passes at her death, insofar as the unpaid installments are concerned, to her estate. Salley v. Hamilton Veneer Co. (S.C. 1942) 201 S.C. 473, 23 S.E.2d 385.

It is clear that if a deceased employee leaves dependents, such dependents would take in preference to the next of kin, but this section [Code 1962 Section 72‑165] does not relate solely to nondependent next of kin, and if the dependents are the next of kin then they would be eligible to the highest award available to either class. Cokeley v. Robert Lee, Inc. (S.C. 1941) 197 S.C. 157, 14 S.E.2d 889. Workers’ Compensation 430.3; Workers’ Compensation 911

It would be unnecessary for a claimant to elect whether to proceed on the basis of dependency or that of next of kin, as dependent next of kin could take the highest award available to the dependents or to the next of kin. Cokeley v. Robert Lee, Inc. (S.C. 1941) 197 S.C. 157, 14 S.E.2d 889.

But within the provisions of this section [Code 1962 Section 72‑165] and Code 1962 Section 19‑53, an illegitimate half sister of the deceased is entitled to receive the award as next of kin. Coakley v. Tidewater Const. Corp. (S.C. 1940) 194 S.C. 284, 9 S.E.2d 724.

Father, mother, widow, child, brother or sister comprehends only legitimate relationships and such as the law recognizes as “father, mother, widow, child, brother or sister,” and does not include illegal relationships. Coakley v. Tidewater Const. Corp. (S.C. 1940) 194 S.C. 284, 9 S.E.2d 724.

2. Construction and application

Plain and ordinary language of workers’ compensation death benefits statute, providing that if deceased employee leaves no dependents or nondependent children, employer shall pay commuted amounts for all dependents, less burial expenses, to father and mother, irrespective of age or dependency, does not provide a basis for apportioning benefits between parents other than on an equal basis. Adkins v. Comcar Industries, Inc. (S.C. 1996) 323 S.C. 409, 475 S.E.2d 762, rehearing denied. Workers’ Compensation 430.6

While the Workmen’s Compensation Act should be liberally construed, words should be given their established legal meaning, or the meaning which the legislature intended. Thus, in the absence of some express or clearly implied provision in the statute to the contrary, the term “child,” as used in the Workmen’s Compensation Act, includes only legitimate children. Coakley v. Tidewater Const. Corp. (S.C. 1940) 194 S.C. 284, 9 S.E.2d 724. Workers’ Compensation 53

**SECTION 42‑9‑150.** Employees with permanent disability or injury from service in Armed Forces or previous employment; entitlement to compensation; additional benefits.

 If an employee has a permanent disability or has sustained a permanent injury that resulted from serving in the United States Armed Forces or in another employment other than that in which he receives a subsequent permanent injury by accident, such as specified in Section 42‑9‑30 or the second paragraph of Section 42‑9‑10, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed, except that such employee may receive further benefits if his subsequent injury qualifies for additional benefits under Section 42‑9‑35.

HISTORY: 1962 Code Section 72‑166; 1952 Code Section 72‑166; 1942 Code Section 7035‑36; 1936 (39) 1231; 1974 (58) 2235; 2007 Act No. 111, Pt I, Section 21, eff July 1, 2007, applicable to injuries that occur on or after that date.

CROSS REFERENCES

Second Injury Fund, see Sections 42‑7‑310, 42‑9‑400.

Library References

Workers’ Compensation 552 to 563.1, 1030.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 366 to 372, 374, 1592 to 1600.

NOTES OF DECISIONS

In general 1

1. In general

The determination of Workers’ Compensation Commission that the claimant was already permanently and totally disabled prior to his accident was unsupported by the evidence, in view of the fact that the claimant was able to return to work and perform his job prior to the accident. Stephenson v. Rice Services, Inc. (S.C.App. 1994) 314 S.C. 287, 442 S.E.2d 627, rehearing denied, certiorari granted, reversed 323 S.C. 113, 473 S.E.2d 699.

Claimant, who had previously suffered a series of lower back injuries, was not precluded from receiving workers’ compensation benefits for a back injury allegedly sustained during the course of her employment as a cashier, despite a contention that she made a false statement on her job application when she checked “No” in response to the question “Do you have any physical disability which would limit your ability to perform the job for which you are applying?” since the language on the application did not require disclosure of all health problems. Wilbanks v. Kentucky Fried Chicken/Holt Industries (S.C.App. 1993) 312 S.C. 131, 439 S.E.2d 300.

Employee who suffers second injury is entitled to recover full compensation benefits even though employee recovered benefits after first injury, and employee may qualify for compensation even if employer is not entitled to reimbursement from Second Injury Fund because of employer’s failure to maintain proper records, as written record requirement in Section 42‑9‑400(c) was condition of employer’s eligibility to recover from Second Injury Fund. Wyndham v. R.A. & E.M. Thornley and Co. (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

Where claimant at time of his employment signed statement to the effect that he had a 40 per cent disability in one arm, such statement, when attacked by claimant, is evidence to be taken into consideration in conjunction with all the other evidence in the case, and claimant is not bound thereby as a matter of law but the force and effect of such statement is to be determined by the fact‑finding body unless such is prohibited by Code 1962 Section 72‑131. Mason v. Woodside Mills (S.C. 1954) 225 S.C. 15, 80 S.E.2d 344. Workers’ Compensation 1531.6; Workers’ Compensation 1716

Compensation must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto. Hopper v. Firestone Stores (S.C. 1952) 222 S.C. 143, 72 S.E.2d 71.

A claimant, who has a pre‑existing total loss of a right leg and sustains a subsequent injury which occasions additional amputation thereto is not entitled to be compensated as if he were previously unimpaired. Hopper v. Firestone Stores (S.C. 1952) 222 S.C. 143, 72 S.E.2d 71.

**SECTION 42‑9‑160.** Amount of compensation for employee injured while drawing compensation for previous disability in same employment.

 If an employee receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in Section 42‑9‑30 or the second paragraph of Section 42‑9‑10, but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this title.

HISTORY: 1962 Code Section 72‑167; 1952 Code Section 72‑167; 1942 Code Section 7035‑37; 1936 (39) 1231.

Library References

Workers’ Compensation 865.4.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 624 to 625.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 116:26, Concurrent Benefits.

**SECTION 42‑9‑170.** Permanent injury after sustaining another permanent injury in same employment; entitlement to compensation; extension of period of payment.

 (A) If an employee receives a permanent injury as specified in Section 42‑9‑30 or Section 42‑9‑10(B) after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer’s liability is for the subsequent injury only, except that the employee may receive further benefits as provided by Sections 42‑7‑310, 42‑9‑400, and 42‑9‑410 if his subsequent injury qualifies for additional benefits provided in those sections. This subsection is effective until June 30, 2008.

 (B) If an employee receives a permanent injury as specified in Section 42‑9‑30 or Section 42‑9‑10(B)after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer’s liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42‑9‑35. This subsection is effective on July 1, 2008.

HISTORY: 1962 Code Section 72‑168; 1952 Code Section 72‑168; 1942 Code Section 7035‑38; 1936 (39) 1231; 1974 (58) 2235; 2007 Act No. 111, Pt I, Section 22, eff July 1, 2007, applicable to injuries that occur on or after that date.

Editor’s Note

Subsection (A), as amended by 2007 Act No. 111, Part I, Section 22, is effective until June 30, 2008, and subsection (B), added by that same provision, is effective on July 1, 2008.

Library References

Workers’ Compensation 865.4.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 624 to 625.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 116:26, Concurrent Benefits.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law: Workers’ compensation law. 43 S.C. L. Rev. 210 (Autumn 1991).

NOTES OF DECISIONS

In general 1

1. In general

Employer was not entitled to a credit for all benefits permanently disabled claimant received from past workers’ compensation injuries; there was no evidence claimant ever sustained a previous permanent injury or received any permanent benefits for such an injury, and there was no evidence claimant was still receiving or entitled to compensation for his previous hernias. Eaddy v. Smurfit‑Stone Container Corp. (S.C.App. 2003) 355 S.C. 154, 584 S.E.2d 390, rehearing denied. Workers’ Compensation 934.4

An employee was not entitled to recover compensation for a second back injury where the employee’s first back injury, which was sustained while he was working for the same employer, resulted in a recovery for total and permanent disability under Sections 42‑9‑10 and 42‑9‑30(19). The employee was limited to a recovery for successive injuries to 500 weeks under Section 42‑9‑170, and, having received that recovery from the first injury, he had no basis to recover for the second injury. Medlin v. Greenville County (S.C.App. 1990) 301 S.C. 411, 392 S.E.2d 192, affirmed as modified 303 S.C. 484, 401 S.E.2d 667.

**SECTION 42‑9‑190.** No compensation to injured employee refusing suitable employment.

 If an injured employee refuses employment procured for him suitable to his capacity and approved by the commission he shall not be entitled to any compensation at any time during the continuance of such refusal.

HISTORY: 1962 Code Section 72‑170; 1952 Code Section 72‑170; 1942 Code Section 7035‑35; 1936 (39) 1231.

Library References

Workers’ Compensation 900.3.

Westlaw Topic No. 413.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 200:32, Refusing Suitable Work.

NOTES OF DECISIONS

In general 1

Questions of fact 2

Sufficiency of evidence 3

1. In general

Employer, which had been paying workers’ compensation claimant temporary partial compensation, was required to pay temporary total compensation to claimant after terminating claimant’s employment for sleeping while at work; employer had earlier voluntarily agreed that claimant was disabled and signed consent order requiring that it pay claimant disability compensation, Workers’ Compensation Commission found that claimant did not refuse employment when she fell asleep and thus was not prohibited from receiving benefits, and employer refused to provide alternative employment. Davis v. UniHealth Post Acute Care (S.C.App. 2013) 402 S.C. 541, 741 S.E.2d 770. Workers’ Compensation 880.20(5); Workers’ Compensation 880.25

Statute precluding workers’ compensation claimant from receiving benefits when claimant refuses employment procured for him and suitable to his capacity did not apply to claimant, and thus payment of temporary total disability payments could not be terminated; claimant had not refused to return to work after back injury, but rather returned to work and was unable to continue work after one day. Martin v. Rapid Plumbing (S.C.App. 2006) 369 S.C. 278, 631 S.E.2d 547, rehearing denied. Workers’ Compensation 880.24; Workers’ Compensation 2003

An injured worker was entitled to workers’ compensation benefits for his work‑related injury where he was injured in an on‑the‑job accident, but was incarcerated on unrelated criminal charges 2 months later; although Section 42‑9‑190 and Reg. 67‑506 provide that benefits may be stopped if the employee refuses employment suitable to his capacity, the record did not show that the employee had reached maximum medical healing, and thus would have been required to accept employment. Last v. MSI Const. Co., Inc. (S.C. 1991) 305 S.C. 349, 409 S.E.2d 334.

2. Questions of fact

Under workers’ compensation statute prohibiting compensation to claimants who refuse suitable employment, the question of whether a claimant refused employment is a question of fact for the Workers’ Compensation Commission to decide. Davis v. UniHealth Post Acute Care (S.C.App. 2013) 402 S.C. 541, 741 S.E.2d 770. Workers’ Compensation 1723

3. Sufficiency of evidence

Evidence supported Workers’ Compensation Commission’s finding that claimant did not constructively refuse light duty employment when she fell asleep at work for less than one minute, and thus claimant was not prohibited from continuing to receive temporary disability compensation; evidence indicated that claimant fell asleep due to a combination of exhaustion and medication or that she took a nap while on break. Davis v. UniHealth Post Acute Care (S.C.App. 2013) 402 S.C. 541, 741 S.E.2d 770. Workers’ Compensation 880.20(5); Workers’ Compensation 880.25

**SECTION 42‑9‑200.** Dates on which compensation commences.

 No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in Section 42‑15‑60; but, if the injury results in disability of more than fourteen days, compensation shall be allowed from the date of the disability.

HISTORY: 1962 Code Section 72‑171; 1952 Code Section 72‑171; 1942 Code Section 7035‑31; 1936 (39) 1231; 1937 (40) 613; 1953 (48) 103; 1974 (58) 2265.

Library References

Workers’ Compensation 1014.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 725.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 200:45, Waiting Period.

Attorney General’s Opinions

Vacation leave with pay is an accrued, earned benefit to the employee. 1962‑63 Op.Atty.Gen., No. 1553, p 123, 1963 WL 8304.

Hence, employee who has sustained an injury on the day prior to the closing of an industrial plant for a paid vacation period, and is paid during such vacation period, nevertheless is entitled to benefits; if the disability continues for a period in excess of twenty‑eight (now fourteen) days, compensation shall be allowed from the date of injury. 1962‑63 Op.Atty.Gen., No. 1553, p 123, 1963 WL 8304.

For which no credit should be allowed the employer. See 1962‑63 Op.Atty.Gen., No. 1553, p 123, 1963 WL 8304.

**SECTION 42‑9‑210.** Deduction from compensation of payments made by employer when not due and payable.

 Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

HISTORY: 1962 Code Section 72‑172; 1952 Code Section 72‑172; 1942 Code Section 7035‑45; 1936 (39) 1231.

Library References

Workers’ Compensation 1044.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 1584.

NOTES OF DECISIONS

In general 1

1. In general

Employer was entitled to credit for overpayment of temporary total benefits; the delay in having a timely hearing fell on both employer and claimant, since each had requested rescheduling of the hearing. Sanders v. MeadWestvaco Corp. (S.C.App. 2006) 371 S.C. 284, 638 S.E.2d 66, rehearing denied, certiorari granted, certiorari dismissed as improvidently granted 381 S.C. 208, 672 S.E.2d 785. Workers’ Compensation 934.4

Employer was not entitled to a credit for any short‑term or long‑term disability benefits paid to workers’ compensation claimant since record was devoid of evidence suggesting any short‑term or long‑term disability benefits received by claimant were made with reference to liability under workers’ compensation law and in lieu of compensation. Smith v. NCCI, Inc. (S.C.App. 2006) 369 S.C. 236, 631 S.E.2d 268, rehearing denied. Workers’ Compensation 934.9

Employer was not entitled to setoff from workers’ compensation award for compensation paid to claimant under employer’s salary continuation plan; salary continuation plan was set up internally by employer and intent of plan was to provide benefit to certain employees who became disabled and was not connected to workers’ compensation benefits. Corbin v. Kohler Co. (S.C.App. 2002) 351 S.C. 613, 571 S.E.2d 92. Workers’ Compensation 934.3

Employer was not entitled to a credit against workers’ compensation benefits awarded to claimant for short term and long term disability benefits paid to claimant under its group benefit plan, where claimant had contributed to group benefit plan premiums and employer had denied that claimant’s injuries were compensable. Muir v. C.R. Bard, Inc. (S.C.App. 1999) 336 S.C. 266, 519 S.E.2d 583, rehearing denied, certiorari denied. Workers’ Compensation 934.9

In order for payments to be deductible from award of workers’ compensation benefits, they must have been made with reference to liability under the provisions of the Workers’ Compensation Act and intended to be in lieu of compensation. Muir v. C.R. Bard, Inc. (S.C.App. 1999) 336 S.C. 266, 519 S.E.2d 583, rehearing denied, certiorari denied. Workers’ Compensation 934.1

Since only those payments which are made in contemplation of the legal obligation of the employer to pay compensation to a disabled employee are deductible from award of workers’ compensation, the intent with which such payments are made becomes important. Muir v. C.R. Bard, Inc. (S.C.App. 1999) 336 S.C. 266, 519 S.E.2d 583, rehearing denied, certiorari denied. Workers’ Compensation 934.6

In a workers’ compensation proceeding, the employer and its carrier were not entitled to credit for temporary total disability benefits paid to the employee after the date he reached maximum medical improvement, pursuant to Section 42‑9‑210, since a finding of maximum medical improvement did not establish that the employee was no longer disabled, and without such finding, his disability was presumed to continue. Swinton v. South Carolina Dept. of Mental Health (S.C.App. 1994) 314 S.C. 202, 442 S.E.2d 215.

Approval of Commission for deduction is required by this section [Code 1962 Section 72‑172], and its conclusions thereabout are binding on appeal unless there is absence of competent evidence to support them. Brittle v. Raybestos‑Manhattan, Inc. (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884. Workers’ Compensation 1939.1

Payments to be deductible must have been made with reference to liability under provision of this Act and intended to be in lieu of compensation. Brittle v. Raybestos‑Manhattan, Inc. (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884.

Amount of credit is amount of compensation due for the particular week and not amount of wages paid. Brittle v. Raybestos‑Manhattan, Inc. (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884.

Payments must be made in contemplation of legal obligation of employer and fact that voluntary payments made by employer were less than amount of compensation which would have been due is strong evidence that such payments were made gratuitously and without reference to provisions of this Act. Brittle v. Raybestos‑Manhattan, Inc. (S.C. 1962) 241 S.C. 255, 127 S.E.2d 884.

Employer can make no deduction under this section [Code 1962 Section 72‑172] without the approval of the Commission. Wall v. C. Y. Thomason Co. (S.C. 1957) 232 S.C. 153, 101 S.E.2d 286.

And approval of Commission must be sought before the final award, for an award unappealed from is conclusive not only of the issues actually decided, but also of those that might have been raised before the Commission. Wall v. C. Y. Thomason Co. (S.C. 1957) 232 S.C. 153, 101 S.E.2d 286.

**SECTION 42‑9‑220.** Manner in which compensation paid.

 Compensation under this title shall be paid periodically, promptly and directly to the person entitled thereto, unless otherwise specifically provided.

HISTORY: 1962 Code Section 72‑173; 1952 Code Section 72‑173; 1942 Code Section 7035‑21; 1936 (39) 1231.

Library References

Workers’ Compensation 1003, 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 718, 1578 to 1583.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, workers’ compensation law. 40 S.C. L. Rev. 275 (Autumn 1988).

NOTES OF DECISIONS

In general 1

1. In general

The award directed payment of over $300.00 to the claimant, a minor under eighteen, but the final report showed payment to father of claimant, which was a nullity; therefore the proceeding had not been terminated. Gilliard v. Victor‑Monaghan Co. (S.C. 1947) 211 S.C. 68, 44 S.E.2d 109.

A careful examination of this chapter reveals a primary purpose and general scheme to pay compensation at intervals corresponding to the time the employee would have received his wages had he not been injured. Undoubtedly it was intended that periodical payments should be the rule and lump sum settlements the exception. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

Where obligations arise on the part of municipalities under the Compensation Act, they are to be met by the proceeds of the sources of income provided for municipalities by other legislation. Brown v. Town of Patrick (S.C. 1943) 202 S.C. 236, 24 S.E.2d 365.

**SECTION 42‑9‑230.** Date on which compensation payable under agreement becomes due.

 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, on which date all compensation due must be paid. Thereafter, compensation must be paid in installments weekly, except when the commission determines that payment in installments should be made monthly or at some other period.

 Installments paid weekly must be paid on the same day of the week, installments paid monthly must be paid on the same day of the month, and installments paid on some period other than weekly or monthly must be paid on the same day of each period.

HISTORY: 1962 Code Section 72‑174; 1952 Code Section 72‑174; 1942 Code Section 7035‑21; 1936 (39) 1231; 1989 Act No. 59, Section 1, eff April 24, 1989.

Library References

Workers’ Compensation 1003, 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 718, 1578 to 1583.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, workers’ compensation law. 40 S.C. L. Rev. 275 (Autumn 1988).

**SECTION 42‑9‑240.** Date on which compensation payable under award becomes due.

 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, on which date all compensation then due shall be paid, including interest from the original date of the award at the maximum legal rate. Thereafter compensation shall be paid in installments weekly, except when the commission determines that payment in installments shall be made monthly or in some other manner.

HISTORY: 1962 Code Section 72‑175; 1952 Code Section 72‑175; 1942 Code Section 7035‑21; 1936 (39) 1231; 1972 (57) 2135.

Library References

Workers’ Compensation 1003, 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 718, 1578 to 1583.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, workers’ compensation law. 40 S.C. L. Rev. 275 (Autumn 1988).

NOTES OF DECISIONS

In general 1

1. In general

An award of interest on workers’ compensation claimant’s lump‑sum award was appropriate against the Property and Casualty Insurance Guaranty Association because, after the first round of appeals was abandoned, and liability for the lump‑sum award was conclusively established, the subsequent failure of the Association to timely pay the lump‑sum award could only be attributed to its own conduct, and did not arise from a “covered claim.” Hudson ex rel. Hudson v. Lancaster Convalescent Center (S.C. 2014) 407 S.C. 112, 754 S.E.2d 486, rehearing denied. Workers’ Compensation 1041

**SECTION 42‑9‑250.** Payment of compensation monthly or quarterly authorized.

 The commission, upon application of either party, may in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly.

HISTORY: 1962 Code Section 72‑176; 1952 Code Section 72‑176; 1942 Code Section 7035‑46; 1936 (39) 1231.

Library References

Workers’ Compensation 1003, 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 718, 1578 to 1583.

**SECTION 42‑9‑260.** Notice to commission when payments have begun; suspension or termination of payments.

 (A) When an employee has been out of work due to a reported work‑related injury or occupational disease for eight 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 without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

 (B) Once temporary disability payments are commenced, the payments may be terminated or suspended immediately at any time within the one hundred fifty days if:

 (1) the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments must be resumed immediately; or

 (2) the employee agrees that he is able to return to work and executes the proper commission form indicating that he is able to return to work; or

 (3) a good faith investigation by the employer reveals grounds for denial of the claim; 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, as provided in Section 42‑15‑60, or refuses an examination or evaluation, as provided in Section 42‑15‑80, and the termination or suspension of benefits continues until the refusal ceases or the commission determines the refusal is justified pursuant to either Section 42‑15‑60 or 42‑15‑80.

 (C) An employee whose disability payments have been terminated or suspended pursuant to this section may request a hearing to have the payments reinstituted. The hearing must be held within sixty days of the date of the employee’s request for a hearing.

 (D) If an employee has been declared as having reached maximum medical improvement, the employer may request a hearing to address the termination of temporary disability payments. The hearing must be held within sixty days of the date of the employer’s request for a hearing.

 (E) An employer may request a hearing at any time to address termination or reduction of temporary disability payments.

 (F) After the one‑hundred‑fifty‑day period has expired, the commission shall provide by regulation 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 Section 42‑9‑260(B)(1) or (B)(2) 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.

 (G) 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 violation of this section, and the amount of the penalty must be paid to the employee in addition to the amount of benefits withheld. However, the penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage.

HISTORY: 1962 Code Section 72‑177; 1952 Code Section 72‑177; 1942 Code Section 7035‑21; 1936 (39) 1231; 1974 (58) 2265; 1982 Act No. 415; 1988 Act No. 410, eff March 28, 1988; 1996 Act No. 424, Section 6, eff June 18, 1996.

Editor’s Note

1996 Act No. 424, Section 13, provides, in part, as follows:

“Section 13. Employers who have filed with the Workers’ Compensation Commission a notice to reject the provisions of Title 42 before the effective date of the 1996 amendment will have until July 1, 1997, to comply with the provisions of the 1996 amendment relating to insuring their workers’ compensation liabilities. Any employer who has rejected the terms of this title prior to approval of the 1996 amendment and has procured another form of employee benefits insurance shall comply, not later than July 1, 1997, with the provisions of the 1996 amendment relating to the insuring of its workers’ compensation liabilities. Furthermore, nothing in the 1996 amendment shall affect or alter any cause of action, right, or claim accruing before the effective date of the 1996 amendment; however, any such cause of action, remedy, or claim accruing before the effective date of the 1996 amendment shall be governed by the law prior to the effective date of the 1996 amendment”.

CROSS REFERENCES

Postponement or adjournment of the scheduled hearing, see S.C. Code of Regulations R. 67‑613.

Terminating payment of temporary total or temporary partial compensation during the first one hundred fifty days after employer’s notice of the accident, see S.C. Code of Regulations R. 67‑504.

Library References

Workers’ Compensation 1029, 1990, 2002 to 2013.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1588 to 1589, 1619, 1634 to 1652, 1687 to 1689.

Attorney General’s Opinions

A physical disability does not render a person ineligible for public office. S.C. Op.Atty.Gen. (July 1, 2011) 2011 WL 3346423.

The twenty‑five percent penalty provided by Section 42‑9‑260 should be paid to the Workers’ Compensation Commission in accordance with the penalty distribution provision in Section 42‑3‑220. 1987 Op.Atty.Gen., No. 87‑37, p 99, 1987 WL 245446.

NOTES OF DECISIONS

In general 1

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Resumption of benefits 3

Sufficiency of evidence 9

Termination of benefits 2

1. In general

Receipt of compensation form, which clearly stated that workers’ compensation claimant had not given up the right to further compensation, did not have the effect of terminating claim. Hamilton v. Bob Bennett Ford (S.C.App. 1999) 336 S.C. 72, 518 S.E.2d 599, rehearing denied, certiorari granted in part, affirmed as modified 339 S.C. 68, 528 S.E.2d 667. Workers’ Compensation 1131

The Workers’ Compensation Act did not bar an action against a workers’ compensation insurance carrier brought by a hospital to recover for medical services provided to an injured worker on the basis of representations allegedly made by the carrier, since the allegations of the complaint indicated that the carrier “guaranteed” payment of the worker’s hospital expenses, and the complaint contained sufficient facts to establish contract claims regardless of any other party’s claims under workers’ compensation law. Baker Hosp. v. Firemans Fund Ins. Co. (S.C. 1994) 314 S.C. 98, 441 S.E.2d 822.

2. Termination of benefits

Employer was permitted under workers’ compensation statute to terminate temporary benefits for any cause, including fraud, after expiration of 150 days from first report of claimant’s injury, so long as Workers’ Compensation Commission approved termination of benefits in an evidentiary hearing, even though regulations governing suspension and termination of benefits after 150 days and request‑for‑hearing form did not list employee fraud as possible ground for termination of benefits. Fredrick v. Wellman, Inc. (S.C.App. 2009) 385 S.C. 8, 682 S.E.2d 516, rehearing denied, certiorari denied. Workers’ Compensation 2003

Even if employer could have stopped workers’ compensation claimant’s temporary total disability benefits after claimant was cleared by orthopedic surgeon to return to work without restrictions, employer failed to follow procedures for stopping benefits; employer did not file and serve Form 15 for at least 18 days after compensation was terminated, and employer failed to attach supporting documentation to form. Martin v. Rapid Plumbing (S.C.App. 2006) 369 S.C. 278, 631 S.E.2d 547, rehearing denied. Workers’ Compensation 2016; Workers’ Compensation 2021

Employer need not offer or procure suitable employment for workers’ compensation claimant before stopping compensation benefits; all statute provides is that if employer offers claimant position consistent with claimant’s physical capacity, claimant is not entitled to benefits for period during which he refuses employment. Smith v. South Carolina Dept. of Mental Health (S.C.App. 1997) 329 S.C. 485, 494 S.E.2d 630, rehearing denied, certiorari granted, affirmed 335 S.C. 396, 517 S.E.2d 694. Workers’ Compensation 1990

Once carrier was ordered to make compensation payments, carrier could not legally terminate payments except by order of Industrial Commission, because in absence of employee waiver, compensation payments can be terminated only after evidentiary hearing. Hardee v. Bruce Johnson Trucking Co. (S.C.App. 1987) 293 S.C. 349, 360 S.E.2d 522. Workers’ Compensation 1999

3. Resumption of benefits

Employer, which had been paying workers’ compensation claimant temporary partial compensation, was required to pay temporary total compensation to claimant after terminating claimant’s employment for sleeping while at work; employer had earlier voluntarily agreed that claimant was disabled and signed consent order requiring that it pay claimant disability compensation, Workers’ Compensation Commission found that claimant did not refuse employment when she fell asleep and thus was not prohibited from receiving benefits, and employer refused to provide alternative employment. Davis v. UniHealth Post Acute Care (S.C.App. 2013) 402 S.C. 541, 741 S.E.2d 770. Workers’ Compensation 880.20(5); Workers’ Compensation 880.25

Statute allowing termination of workers’ compensation claimant’s temporary total disability benefits when claimant has returned to work without restrictions did not apply to claimant, and thus employer was required to resume payment of benefits after claimant left work after returning to work, although claimant returned to work without restrictions; statute required claimant to remain at work for minimum of 15 days, and claimant did not remain at work for 15 days. Martin v. Rapid Plumbing (S.C.App. 2006) 369 S.C. 278, 631 S.E.2d 547, rehearing denied. Workers’ Compensation 2003

4. Penalty

Appropriate period for penalty for improper termination of workers’ compensation claimant’s temporary total disability benefits was from date on which benefits began being withheld until date when employer resumed paying benefits. Martin v. Rapid Plumbing (S.C.App. 2006) 369 S.C. 278, 631 S.E.2d 547, rehearing denied. Workers’ Compensation 1042.9

5. Maximum medical improvement

Single commissioner and, ultimately, Appellate Panel of Workers’ Compensation Commission (WCC) implicitly held, in context of claims for temporary and permanent disability benefits, that claimant had reached maximum medical improvement (MMI) for his back, where single commissioner agreed with physician’s 0% impairment rating and concluded that claimant had a 0% disability to his back, and single commissioner concluded as a matter of law that based on physician’s testimony, no further medical treatment would lessen claimant’s period of disability. Cranford v. Hutchinson Const. (S.C.App. 2012) 399 S.C. 65, 731 S.E.2d 303, rehearing denied. Workers’ Compensation 1755

Employer was entitled to a credit for temporary total disability (TTD) benefits paid during period between the date that claimant reached maximum medical improvement (MMI) and the date of the Worker’s Compensation Commission’s order finding that claimant had reached MMI; under regulation then in effect, employer was not required to show that claimant was able to return to work without restriction in order to discontinue TTD benefits after MMI. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 1043; Workers’ Compensation 1990

Under workers’ compensation law, the concepts of maximum medical improvement (MMI) and permanent impairment are not mutually exclusive; simply because a claimant suffers a permanent impairment does not preclude him from reaching MMI. Hendricks v. Pickens County (S.C.App. 1999) 335 S.C. 405, 517 S.E.2d 698, rehearing denied. Workers’ Compensation 840.7; Workers’ Compensation 870.4

Employer was entitled to cease payment of temporary benefits upon establishing that workers’ compensation claimant reached maximum medical improvement (MMI). Smith v. SC Dept. of Mental Health (S.C. 1999) 335 S.C. 396, 517 S.E.2d 694, rehearing denied. Workers’ Compensation 870.5

The rationale for ceasing temporary benefits to workers’ compensation claimant upon a finding of maximum medical improvement (MMI) is to permit entry of a permanent award. Smith v. SC Dept. of Mental Health (S.C. 1999) 335 S.C. 396, 517 S.E.2d 694, rehearing denied. Workers’ Compensation 870.4

If a workers’ compensation claimant has reached maximum medical improvement (MMI) and remains disabled, then his injury is permanent; this is precisely the reason to terminate benefits in favor of permanent benefits upon a finding of MMI. Smith v. SC Dept. of Mental Health (S.C. 1999) 335 S.C. 396, 517 S.E.2d 694, rehearing denied. Workers’ Compensation 870.4

6. Justiciability

A hospital that provided medical services to an injured worker, allegedly in reliance on representations made by the workers’ compensation insurance carrier, did not have standing to seek redress before the Workers’ Compensation Commission. Baker Hosp. v. Firemans Fund Ins. Co. (S.C. 1994) 314 S.C. 98, 441 S.E.2d 822. Workers’ Compensation 1191

7. Defenses

Employer’s compensability defense against workers’ compensation claimant seeking treatment for cervical problems was barred by the doctrine of waiver and laches, where employer knew of its defense on the date of claimant’s accident, yet paid and continued to pay claimant disability compensation, and did not assert the defense until at least 450 days after claimant’s accident. Jervey v. Martint Environmental, Inc. (S.C.App. 2012) 396 S.C. 442, 721 S.E.2d 469, rehearing denied, vacated in part 406 S.C. 210, 750 S.E.2d 90. Workers’ Compensation 1114; Workers’ Compensation 1199.4

Employer was not prohibited from asserting its compensability defense against worker’s compensation claimant seeking treatment for cervical problems, even though employer accepted the claim and paid claimant temporary total disability payments beyond the 150‑day time limit established in the suspension or termination of payment statute, where the same statute permitted an employer to terminate benefits for any cause after the expiration of the 150 days, and employer’s compensability defense was properly before the commissioner. Jervey v. Martint Environmental, Inc. (S.C.App. 2012) 396 S.C. 442, 721 S.E.2d 469, rehearing denied, vacated in part 406 S.C. 210, 750 S.E.2d 90. Workers’ Compensation 1114; Workers’ Compensation 2016

Workers’ compensation claimant was provided ample notice that employer intended to raise a fraud defense at hearing before single commissioner concerning termination of temporary benefits, and thus the fraud defense was properly before the single commissioner, though employer initially omitted the fraud defense from its form requesting the hearing; employer’s prehearing brief, filed almost two months before the hearing, gave claimant advance notice that employer was seeking to assert a fraud defense, and counsel for both parties and the commissioner discussed employer’s assertion of a fraud defense more than one month prior to the hearing. Fredrick v. Wellman, Inc. (S.C.App. 2009) 385 S.C. 8, 682 S.E.2d 516, rehearing denied, certiorari denied. Workers’ Compensation 2024

8. Presumptions and burden of proof

Regulation setting forth procedure by which employer could terminate workers’ compensation benefits did not alter burden of proof, but merely set forth alternative criterion which could be attached to a medical certificate in support of employer’s application to terminate benefits. Smith v. SC Dept. of Mental Health (S.C. 1999) 335 S.C. 396, 517 S.E.2d 694, rehearing denied. Workers’ Compensation 1991

9. Sufficiency of evidence

Substantial evidence supported Workers’ Compensation Commission’s finding that claimant was terminated for cause and, therefore, claimant’s inability to earn wages was not due to or because of a work‑related injury; claimant, who never received temporary total disability (TTD) benefits, was accommodated by employer within his light duty work restrictions, claimant was permitted to remain in his position, subject to the 15‑pound lifting restriction, and claimant violated company policy by not reporting accident involving the company vehicle, and this led to his termination. Pollack v. Southern Wine & Spirits of America (S.C. 2013) 405 S.C. 9, 747 S.E.2d 430. Workers’ Compensation 880.7

**SECTION 42‑9‑270.** Notice of final payment; penalty for failure to give notice.

 Within sixteen days after final payment of compensation has been made the employer shall send to the commission a notice, in accordance with a form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death and the date to which compensation has been paid. If the employer fails to so notify the commission within such time, the commission shall assess against such employer a civil penalty in the amount of twenty‑five dollars.

HISTORY: 1962 Code Section 72‑178; 1952 Code Section 72‑178; 1942 Code Section 7035‑21; 1936 (39) 1231.

Library References

Workers’ Compensation 1042.1, 1042.17.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1616 to 1618.

**SECTION 42‑9‑280.** Payment of unpaid balance of compensation when employee dies.

 When an employee receives or is entitled to compensation under this title for an injury covered by the second paragraph of Section 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. But if the death is due to a cause that is compensable under this title and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine.

HISTORY: 1962 Code Section 72‑179; 1952 Code Section 72‑179; 1942 Code Section 7035‑40; 1936 (39) 1231.

Library References

Workers’ Compensation 460.2.

Westlaw Topic No. 413.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 200:44, Death.

NOTES OF DECISIONS

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1. In general

Workers’ Compensation Commission was required to pay any unpaid balance of deceased claimant’s lump‑sum award to her dependent grandchildren rather than to her sons as beneficiaries of claimant’s estate, where claimant died from cancer, a cause unrelated to the left knee injury for which claimant was entitled to workers’ compensation benefits. Hudson v. Lancaster Convalescent Center (S.C.App. 2011) 393 S.C. 1, 709 S.E.2d 65, rehearing denied, affirmed in part, reversed in part 407 S.C. 112, 754 S.E.2d 486. Workers’ Compensation 460.2

Widow was not entitled to the full balance of compensation remaining on workers’ compensation claimant’s lifetime award, after claimant died from a cause unrelated to his work injury; statute governing payment of unpaid compensation only provided for inheritability of full awards for loss of use of a scheduled member or loss of both hands, arms, feet, legs or vision in both eyes, and claimant’s award had instead been based on serious brain injury. Floyd v. C.B. Askins & Co. Contractors (S.C.App. 2009) 382 S.C. 84, 675 S.E.2d 450, certiorari denied. Workers’ Compensation 911

Statute governing payment of unpaid compensation when workers’ compensation claimant dies did not provide for inheritability of benefits paid under first paragraph of statute governing amount of compensation for total disability, which concerned wage loss, and thus claimant’s widow was not entitled to receive unaccrued benefits after claimant’s death, which occurred due to causes unrelated to compensable injury; statute governing payment of unpaid compensation only provided for inheritability of awards for losses of scheduled member and for losses covered by second paragraph of statute governing amount of compensation for total disability, which concerned physical loss. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 460.4; Workers’ Compensation 1169

1.5. Due process

A posthumous award to workers’ compensation claimant’s estate did not violate employer’s due process right to conduct full discovery, to present and cross‑examine witnesses, and to introduce evidence; employer never deposed or examined the witnesses who would have knowledge of claimant’s condition and treatment, claimant’s wife testified as to his work history, education, and transferable skills, and employer chose not to cross‑examine wife. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1687

2. Limitation of actions

Doctrine of laches did not bar employer and insurance carrier’s statute‑based defense to dependency claim that was made by workers’ compensation claimant’s widow to obtain claimant’s unaccrued benefits, although proceeding concerning claimant’s benefits continued after claimant’s death; employer and carrier raised effect of claimant’s death at first available opportunity, which was hearing before full commission’s appellate panel concerning claimant’s benefits, and employer and carrier also raised effect of claimant’s death at next opportunity, which was in response to widow’s request for dependency hearing. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 1114

The claim of the personal representative and sole heir at law of a deceased employee had abated where the employee, who had injured her back while working and filed a Workers’ Compensation claim, was killed in a nonwork‑related auto accident prior to its adjudication, and at the time of her death the employee’s heir, who had been substituted as the claimant in the proceeding, was not dependent on the employee for support; since the Workers’ Compensation Act provides for nonwork‑related deaths, the general survival statute, Section 15‑5‑90, was inapplicable. Estate of Covington by Montgomery v. AT & T Nassau Metals Corp. (S.C. 1991) 304 S.C. 436, 405 S.E.2d 393.

3. Estoppel

Doctrine of collateral estoppel did not bar employer and insurance carrier’s statute‑based defense to dependency claim that was made by workers’ compensation claimant’s widow concerning unaccrued benefits, although proceeding concerning claimant’s benefits continued after claimant’s death; widow’s entitlement to benefits following claimant’s death was neither actually litigated in first action nor was entitlement issue necessary to resolution of amount‑of‑benefits dispute. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 1791

Doctrine of res judicata did not bar employer and insurance carrier’s statute‑based defense to claim that was made by workers’ compensation claimant’s widow at dependency hearing for payment of claimant’s unaccrued benefits, although proceeding concerning claimant’s benefits continued after claimant’s death; parties in proceedings were different since neither widow nor claimant’s estate was ever substituted as party, and issue concerning dependency claim was not amount of compensation due, but rather whether right to compensation survived claimant’s death. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 1792

4. Waiver

Employer and insurance carrier did not waive right to contest workers’ compensation claimant’s widow’s right to continuation of benefits at hearing before full commission’s appellate panel concerning claimant’s benefits; only issue before panel was amount of benefits to which claimant was entitled, and in light of commission’s ruling, employee and carrier did not, and could not, litigate applicability of statute governing payment of unpaid compensation when claimant dies. Stone v. Roadway Express, Employer (S.C. 2006) 367 S.C. 575, 627 S.E.2d 695, rehearing denied. Workers’ Compensation 1114

5. Review

Circuit court’s award to workers’ compensation claimant’s widow of a limited balance of 500 weeks on claimant’s lifetime award, after claimant died from a cause unrelated to his work injury, was the law of the case and was to be affirmed on appeal, where employer’s insurer did not appeal the award. Floyd v. C.B. Askins & Co. Contractors (S.C.App. 2009) 382 S.C. 84, 675 S.E.2d 450, certiorari denied. Workers’ Compensation 1964

6. Permanent and total disability

Statute which provided for the payment of the unpaid balance of workers’ compensation benefits to a claimant’s estate after the claimant died from a cause other than the injury for which he was entitled to compensation allowed for a posthumous adjudication of a workers’ compensation claimant’s permanent disability; employer had accepted claimant’s claim and admitted claimant had suffered from a work‑related injury prior to his death. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1687

Evidence supported finding that workers’ compensation claimant was totally and permanently disabled, and thus claimant’s estate was entitled to be paid the unpaid balance of claimant’s permanent and total disability benefits, after claimant died of a heart condition that was not related to his work injuries; claimant’s treating physician examined claimant, ordered X‑rays, an magnetic resonance imaging (MRI), a computerized tomography (CT) scan, and a duplex scan, and he concluded claimant was totally disabled and assigned a 54% impairment rating to his whole person pursuant to the American Medical Association (AMA) guidelines. McMahan v. S.C. Department of Education‑Transportation (S.C.App. 2016) 417 S.C. 481, 790 S.E.2d 393, rehearing denied. Workers’ Compensation 460.2; Workers’ Compensation 1646.9

**SECTION 42‑9‑290.** Amount of compensation for death of employee due to accident.

 (A) If death results proximately from an accident and within two years of the accident or while total disability still continues and within six years after the accident, the employer shall pay or cause to be paid, subject, however, to the provisions of the other sections of this title, in one of the methods provided in this chapter, to the dependents of the employee wholly dependent upon his earnings for support at the time of the accident, a weekly payment equal to sixty‑six and two‑thirds percent of his average weekly wages, but not less than seventy‑five dollars a week so long as this amount does not exceed his average weekly wages; if this amount does exceed his average weekly wages, the amount payable may not be less than his average weekly wages nor more than the average weekly wage in this State for the preceding fiscal year, for a period of five hundred weeks from the date of the injury, and burial expenses up to but not exceeding twelve thousand dollars. If the employee leaves dependents, only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid must equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependence bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents begins from the date of the last of such payments but does not continue more than five hundred weeks from the date of the injury. Compensation under this title to aliens not residents (or about to become nonresidents) of the United States or Canada is the same in amount as provided for residents, except that dependents in any foreign country are limited to a surviving spouse and child or children or, if there be no surviving spouse or child, to a surviving father or mother whom the employee has supported, either wholly or in part, for a period of three years before the date of the injury, and except that the commission may, at its option, or upon the application of the insurance carrier, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one‑half of the commuted amount of future installments of compensation as determined by the commission.

 (B) The provisions of this section may not be construed to prohibit lump‑sum payments to surviving spouses. Provisions for lump‑sum settlement may be retroactive.

 (C) Any death benefits to which a child through the age of eighteen years of an employee is entitled under this section vest with the child at the date of death of the employee and continue to be paid to the beneficiary subject to the five‑hundred‑week limitation regardless of his age.

 (D) If at the date of death of the employee, the employee has a child nineteen years of age or older enrolled as a full‑time student in an accredited educational institution, the child is entitled to death benefits in the same manner as though he were under nineteen and shall receive benefits, subject to the five‑hundred‑week limitation, until the age of twenty‑three. However, if a student’s enrollment ends, except for normal breaks and vacations in accordance with schedules of the school, the child no longer is considered a dependent. When all the deceased employee’s children are no longer dependent, the remainder of that portion of the award must be paid to a surviving spouse or other full dependent, or if there be none, the remainder of that portion of the award must be paid in the same manner as provided in this section for cases where the employee is survived by no full dependents.

 (E) Any dependent child mentally or physically incapable of self‑support must be paid benefits for the full five‑hundred‑week period regardless of age.

 (F) In cases where benefits are payable to a surviving spouse and dependent children, the surviving spouse shall receive not less than one‑half of the benefits paid if there are two or more children.

HISTORY: 1962 Code Section 72‑180; 1952 Code Section 72‑180; 1942 Code Section 7035‑41; 1936 (39) 1231; 1937 (40) 613; 1953 (48) 103; 1955 (49) 462; 1967 (55) 894; 1972 (57) 2339; 1974 (58) 2265; 1976 Act Nos. 532 Section 5, 560 Section 2; 1982 Act No. 294; 1984 Act No. 390; 1988 Act No. 390, eff March 21, 1988; 1989 Act No. 57, Section 1, eff April 24, 1989; 1989 Act No. 58, Section 2, eff April 26, 1989; 1990 Act No. 517, Section 1, eff May 30, 1990; 2017 Act No. 38 (H.3879), Section 1, eff May 10, 2017.

Effect of Amendment

2017 Act No. 38, Section 1, inserted the paragraph identifiers, and in (A), in the first sentence, substituted “twelve thousand dollars” for “twenty‑five hundred dollars”.

CROSS REFERENCES

Definition of “average weekly wages”, see Section 42‑1‑40.

Library References

Workers’ Compensation 450.1 to 450.3, 460.2, 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 285 to 288, 718.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:2, Death Resulting from Injury or Disease.

Modern Workers’ Compensation Section 107:3, Death Remote in Time from Injury or Disease.

Modern Workers’ Compensation Section 107:8, Children.

Modern Workers’ Compensation Section 107:14, Nonresident Dependents.

Modern Workers’ Compensation Section 107:15, Partial Dependents.

Modern Workers’ Compensation Section 107:20, Benefit‑Ending Events.

Modern Workers’ Compensation Section 107:23, Burial Expenses.

Modern Workers’ Compensation Section 321:15, Death Benefits.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Workmen’s Compensation. 30 S.C. L. Rev. 177.

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1. In general

The reference in this section [Code 1962 Section 72‑180] made to one half of the commuted amount relates solely to aliens. Holly v Spartan Grain & Mill Co. (1947) 210 SC 183, 42 SE2d 59. Ashley v Ware Shoals Mfg. Co. (1947) 210 SC 273, 42 SE2d 390.

Evidence supported finding that putative wife was not involved in a common law marriage with workers’ compensation claimant, and thus did not qualify as a surviving spouse; putative wife did not learn that claimant was not divorced from his first wife when he married her, and thus putative wife did not know of the impediment to marriage and could not recognize it and agree to continue the relationship once it was removed. Thomas v. 5 Star Transp. (S.C.App. 2015) 412 S.C. 1, 770 S.E.2d 183, rehearing denied, certiorari denied. Workers’ Compensation 1474

Where employee while working inhaled chlorine gas on December 27, 1940 and continued to work with slight interruptions until July 2, 1941, and thereafter quit his job and moved out of State and his death occurred October, 1943, there could be no recovery on a claim instituted before the Commission on March 30, 1944 because death did not result “while total disability still continued.” McWilliams v. Southern Bleachery & Print Works (S.C. 1949) 216 S.C. 121, 57 S.E.2d 26.

Under the definition of Code 1962 Section 72‑8 funeral expenses are to be included in determining the total compensation allowed under this section [Code 1962 Section 72‑160]. Alewine v. Tobin Quarries (S.C. 1945) 206 S.C. 103, 33 S.E.2d 81.

In order to ascertain the correct weekly compensation for partial dependents, under this section [Code 1962 Section 72‑180], it is necessary to determine: (1) the amount of the weekly payment for persons wholly dependent upon the deceased employee; (2) the amount contributed annually to the support of such partial dependents by the deceased employee; (3) the annual earnings of the deceased at the time of his injury. Cokeley v. Robert Lee, Inc. (S.C. 1941) 197 S.C. 157, 14 S.E.2d 889. Workers’ Compensation 927

To constitute total dependency it is not necessary that the dependent be supported wholly out of the wages of the employee’s employment. Cokeley v. Robert Lee, Inc. (S.C. 1941) 197 S.C. 157, 14 S.E.2d 889.

A claimant is not to be deprived of the benefits of a wholly dependent person, when otherwise entitled thereto, on account of temporary gratuitous services rendered by others, occasional financial assistance received from other sources, existence of other possible sources of support, minor considerations or benefits which do not substantially modify or change the status of the claimant, some slight savings of his own, some other slight property, mere physical ability to work in the past, present or future, or the mere ability to earn something in any manner by his own services. Cokeley v. Robert Lee, Inc. (S.C. 1941) 197 S.C. 157, 14 S.E.2d 889. Workers’ Compensation 410.10

2. Construction with other laws

This section [Code 1962 Section 72‑180] and Code 1962 Sections 72‑161, 72‑162 and 72‑163 relate to the same subject matter, are in pari materia and must be construed together, keeping in mind the legislative intent. Bush v. Gingrey Bros. (S.C. 1957) 232 S.C. 20, 100 S.E.2d 821.

3. Limitation of actions

Son of employee killed on the job was not entitled to recover that portion of workers’ compensation death benefits that would have been awarded to his mother and brother had their claims not been barred by statute of limitations; mother and brother could not be said to have waived their rights to death benefits because they had no legal right to benefits. Steele v. Self Serve, Inc. (S.C.App. 1999) 335 S.C. 323, 516 S.E.2d 674. Workers’ Compensation 911

This section [Code 1962 Section 72‑180] is not a statute of limitations. Gunnells v. Raybestos‑Manhattan, Inc. (S.C. 1973) 261 S.C. 106, 198 S.E.2d 535.

4. Sufficiency of evidence

Substantial evidence supported the application, by the Workers’ Compensation Commission in a proceeding for workers’ compensation death benefits, of the presumption that when an employee is found dead at a place where his employment reasonably required him to be, his death arose out of and in the course of the employment, where (1) the employer was in the business of selling used cars and used parts, (2) the decedent and others often removed parts themselves without knowing that only 2 employees were allowed to do so, thereby reasonably believing that they had such authority, (3) the decedent arranged to purchase a transmission for his girlfriend’s car and the employer arranged to have the girlfriend’s car towed to the premises, (4) the employer told the decedent’s mother that the decedent was going to get the transmission, (5) the decedent was last seen heading into the premises during working hours, and (6) the decedent was found dead with a company jack and jack stand, which were usually locked up after hours, beside him. Davis v. By‑Pass Auto Parts, Inc. (S.C.App. 1991) 304 S.C. 75, 403 S.E.2d 133.

Substantial evidence supported the application, by the Workers’ Compensation Commission in a proceeding for workers’ compensation death benefits, of the presumption that the unexplained failure to call a material witness under a party’s control raises adverse inferences, where the decedent’s mother testified that the employer told her that the decedent was going to remove the transmission of the car which was found on top of the decedent’s body and the employer, who was the only other person present during this conversation, was not called to rebut her testimony. Davis v. By‑Pass Auto Parts, Inc. (S.C.App. 1991) 304 S.C. 75, 403 S.E.2d 133.

The evidence was sufficient to support a commissioner’s determination that a child was the illegitimate child of a deceased worker and therefore was conclusively presumed “to be wholly dependent for support” on the deceased under Section 42‑9‑110 so as to be entitled to workers’ compensation benefits, even though the child’s mother was married to another man at the time of the child’s birth, where the husband was incarcerated at the time of the child’s conception and the mother testified that she engaged in sexual intercourse with the worker during the period the child was conceived. Palm v. General Painting Co., Inc. (S.C.App. 1988) 296 S.C. 41, 370 S.E.2d 463, affirmed as modified 302 S.C. 372, 396 S.E.2d 361. Workers’ Compensation 1478

**SECTION 42‑9‑301.** Lump‑sum payments.

 Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the commission, but in no case to be less than ninety percent of, nor to exceed, the commutable value of the future installments commuted so as not to exceed six percent nor to be less than two percent. The commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the commission but in no case to be less than ninety percent of, nor to exceed, the commutable value of the future installments which may be due under this title. Upon a finding by the commission that a lump sum payment should be made, the burden of proof as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal proceedings.

HISTORY: 1983 Act No. 92 Section 5.

Editor’s Note

Prior Laws: Former Section 42‑9‑300 was titled Lump‑sum payments, and had the following history: 1936 (39) 1231; 1937 (30) 613; 1942 Code Section 7035‑47; 1952 Code Section 72‑181; 1962 Code 72‑181; repealed by 1983 Act No. 92, Section 6..

CROSS REFERENCES

Authority of trustees to administer lump‑sum settlements, see Section 42‑9‑310.

Provisions applicable in cases of total disability, see Section 42‑9‑10.

Library References

Workers’ Compensation 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 718.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:4, Lump Sum Payments.

Modern Workers’ Compensation Section 205:6, Lump Sum Payments‑Grounds for Commutation.

Modern Workers’ Compensation Section 205:7, Lump Sum Payments‑Computation of Award.

Modern Workers’ Compensation Section 205:8, Lump Sum Payments‑Approval Procedure.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, workers’ compensation law. 40 S.C. L. Rev. 282 (Autumn 1988).

1978 Survey: Administrative Law: Workmen’s compensation; lump‑sum payment. 29 S.C. L. Rev. 11.

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1. In general

There was no abuse of discretion in ordering a lump sum payment under this section where the claimant needed the lump sum award to do major repair work on his house, he would have to expend much larger sums later if these repairs were not done in a timely fashion, and he demonstrated an ability to manage large sums of money in a prudent fashion, whereas the sole evidence to the contrary was an affidavit by the local manager of the insurance carrier stating that his company depended on the investment income from the funds it held to pay benefits. Cox v. Mills (S.C.App. 1985) 286 S.C. 226, 332 S.E.2d 562. Workers’ Compensation 1013

General statutory scheme for periodic income benefits can be changed to lump sum payment only in unusual cases because income‑protection is best accomplished through periodic income payments, and because benefits received are substitute for wages of the injured employee, to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760.

Industrial Commission abused its discretion in granting application for lump sum payment where periodic payments, combined with social security income, were sufficient to pay, on monthly basis, debts which survivor wished to discharge and were, in fact, only $92 less per month than the gross monthly income of the employee at the time of his death. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760.

Desire to pay debts is not regarded as a sufficient ground to justify commutation of compensation payments, and Commission abused its discretion in commuting payments where record fails to disclose that relief accorded thereby would not be temporary only, bringing about greater economic trouble in the future. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760.

Record failed to show that widow would profit, with regard to interest, by discharging her indebtedness and investing balance of lump sum payment in savings and loan association, relative to receiving periodic payments. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760.

Commission abused its discretion in commuting periodic payments to lump sum payment on ground, inter alia, that employer was unable to offer absolute assurance of its future financial capacity to make all the future payments, and that survivors would be better protected by having balance of the award invested in a federally‑insured institution; there is nothing to show that employer is in danger of insolvency, and court must assume that, if such were indicated, Commission would take immediate remedial steps. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760.

Acceleration or commutation of weekly compensation is permitted only “in unusual cases,” as it was evidently recognized by the legislature that there might be individual cases where justice would be promoted by a deviation from the principle of periodical payments, and it was desired to authorize the Commission to allow lump sum settlements in exceptional instances. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

The principle underlying this statutory provision is that commutation is the substitution of another form of compensation for the weekly compensation. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

Commutation under this section [Code 1962 Section 72‑181] may be allowed where from the circumstances it may be reasonably found that total disability will continue for a definite period of time. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

This section [Code 1962 Section 72‑181] contemplates that the situation and conditions must be such that the present value of future payments may be arrived at on some basis with an approximate approach to certainty and fairness. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

This section [Code 1962 Section 72‑181] is not construed as requiring that a settlement be to the best interests of both parties. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

If the total disability of an employee is such that it is reasonably certain to continue during the maximum period fixed by the Act and his physical condition is such that, according to the usual methods of determining life expectancy, he will live for that length of time, the liability for weekly compensation may be commuted without doing an injustice to the employer or carrier. On the other hand, if the total disability is such that there may be a change of condition or if a serious question is presented regarding the likelihood of the employee’s living the length of time required to complete the installment payments, the allowance of a lump sum settlement over the objection of the employer or carrier would constitute an abuse of discretion which the appellate courts are empowered to review. If the foregoing requirements are met, it does not necessarily follow that the Commission should commute periodical payments into a lump sum payment. It must further appear that there are unusual circumstances which would make a departure from the principle of periodical payments “to the best interest of the employee or his dependents.” Here again no inflexible rule can be laid down but there should be something taking the case out of the ordinary rule to justify the Commission in ordering a lump sum settlement. It was the purpose of the statute to provide for particular and exceptional instances. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

The payment of attorneys’ fees for services in procuring the award is a proper element to be considered in passing upon a petition for the allowance of a lump sum settlement. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390. Workers’ Compensation 1020

Undoubtedly it was intended that periodic payments should be the rule and lump sum settlements the exception. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

It was manifestly not the intention of the legislature in amending this section [Code 1962 Section 72‑181] to authorize the redemption of the liability for weekly compensation in the “usual cases” and thereby destroy the general scheme of the section establishing periodical payments. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

2. Construction and application

It is clear that the only purpose of the 1937 amendment was to substitute the words “where the employee applies and requests” for the words “where the parties agree” as contained in the original section, and to change the rate of discount to be used in arriving at the commuted value of future payments; and that no other changes in the original section were contemplated. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

3. Construction with other laws

Where it was contended that this section [Code 1962 Section 72‑181] did not apply to Code 1962 Sections 72‑151 and 72‑152, because such awards are not for a definite sum of money payable in all events over a definite period of years and months but are contingent in nature, it was held that the terms of this section [Code 1962 Section 72‑181] are very broad and that the Industrial Commission is empowered under certain circumstances to authorize a lump sum settlement of weekly compensation awarded for total disability. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

It was not intended by this section [Code 1962 Section 72‑181] to materially affect the liability of the employer as fixed by the preceding sections of the Act. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

4. Notice

An order for commutation may not be made without notice to the carrier and employer as these parties have definite rights involved in such an application and are entitled to notice of such proceedings and an opportunity to be heard. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390. Workers’ Compensation 1011

5. Presumptions and burden of proof

Burden of showing facts sufficient to justify lump sum payment of compensation rests upon deceased employee’s dependents. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760. Workers’ Compensation 1019

The burden of showing facts sufficient to justify a lump sum settlement is on the claimant. Ashley v. Ware Shoals Mfg. Co. (S.C. 1947) 210 S.C. 273, 42 S.E.2d 390.

6. Sufficiency of evidence

Evidence supported Workers’ Compensation Commission’s finding that allowing partial lump sum payment from lifetime benefits to build house was in claimant’s best interest; evidence indicated that home that claimant was renting at time of accident that resulted in paraplegia was not intended to be permanent home, claimant and his family had saved money for new home, and children would attend better schools as result of moving to new home. Thompson v. South Carolina Steel Erectors (S.C.App. 2006) 369 S.C. 606, 632 S.E.2d 874, rehearing denied, certiorari denied. Workers’ Compensation 1005

7. Review

Circuit Court’s finding that the issue of whether workers’ compensation claimant’s lump‑sum award abated upon her death was unpreserved became the law of the case when employer and Property and Casualty Insurance Guaranty Association appealed the order but later withdrew their appeal. Hudson ex rel. Hudson v. Lancaster Convalescent Center (S.C. 2014) 407 S.C. 112, 754 S.E.2d 486, rehearing denied. Workers’ Compensation 1951

Workers’ Compensation Commission did not abuse its discretion in awarding claimant a lump‑sum payment; financial distress caused by employer’s cessation of payments prior to the workers’ compensation hearing caused claimant to be close to losing his house and required him to get food stamps and beg for money to support his family. Swilling v. Pride Masonry of Gaffney (S.C.App. 2012) 401 S.C. 178, 736 S.E.2d 672. Workers’ Compensation 1005

Court of Appeals would review for abuse of discretion Workers’ Compensation Commission’s decision to make lump sum payment from lifetime benefits of claimant, who suffered work‑related injury that resulted in paraplegia, so that claimant could build new home. Thompson v. South Carolina Steel Erectors (S.C.App. 2006) 369 S.C. 606, 632 S.E.2d 874, rehearing denied, certiorari denied. Workers’ Compensation 1939.11(9)

In determination of applications for lump sum payments, court is empowered to review the record and determine whether the action of the Commission constituted an abuse of discretion. Woods v. Sumter Stress‑Crete, Inc. (S.C. 1976) 266 S.C. 245, 222 S.E.2d 760. Workers’ Compensation 1028

**SECTION 42‑9‑310.** Trustees may administer lump‑sum settlements.

 Whenever the commission considers it expedient, any lump sum subject to the provisions of Section 42‑9‑301 must be paid by the employer to some suitable person or corporation appointed by a court of competent jurisdiction in the county wherein the accident occurred, as trustee, to administer it for the benefit of the person entitled thereto, in the manner provided by the commission. When the amount to be paid under this section is in excess of one hundred dollars, the trustee is required to give sufficient bond approved by the probate court or clerk of the court of common pleas. The receipt of the trustee for the amount as paid discharges the employer or anyone else who is liable therefor.

HISTORY: 1962 Code Section 72‑182; 1952 Code Section 72‑182; 1942 Code Section 7035‑48; 1936 (39) 1231; 1988 Act No. 313, Section 1, eff February 24, 1988.

Library References

Workers’ Compensation 1005.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 718.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:9, Lump Sum Payments‑Payment of Award.

NOTES OF DECISIONS

In general 1

1. In general

Where widow wanted periodic payments commuted to a lump sum payment and the employer of her deceased husband approved it, the Commission erred in granting the request without taking into consideration the interest of a two year old daughter and by not appointing a trustee to receive the funds. Brown v. Plowden Co. (S.C. 1949) 216 S.C. 114, 57 S.E.2d 29.

**SECTION 42‑9‑320.** Persons who may receive and receipt for payments; discharge of liability of employer on receipt.

 Whenever payment of compensation is made to a surviving spouse for her or his use or, for her or his use and the use of a child or children, the written receipt of the surviving spouse shall acquit the employer.

 Whenever payment is made to any person eighteen years of age or over, the written receipt of the person shall acquit the employer. When an infant or minor under the age of eighteen is entitled to receive not more than ten thousand dollars as compensation for injuries, or as a distributive share by virtue of this title, the father, mother, or natural guardian upon whom the infant or minor is dependent for support may receive and receipt for the monies to the same extent as a guardian of the person and property of the infant or minor duly appointed by the court and the release or discharge of the father, mother, or natural guardian is a full and complete discharge of all claims or demands of the infant or minor.

 Whenever any payment of over ten thousand dollars is made to a minor under eighteen years of age, it must be made to some person or corporation appointed by the probate court as a guardian and the receipt of the guardian shall acquit the employer.

HISTORY: 1962 Code Section 72‑183; 1952 Code Section 72‑183; 1942 Code Section 7035‑50; 1936 (39) 1231; 1962 (52) 1697; 1979 Act No. 36; 1983 Act No. 92 Section 2; 1985 Act No. 16, Section 3, eff March 19, 1985.

CROSS REFERENCES

Lump sum payment in a claim involving a fatality, see S.C. Code of Regulations R. 67‑1606.

Library References

Workers’ Compensation 1005, 1042.14.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Section 718.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:13, Acceptance of Payment; Receipts.

Modern Workers’ Compensation Section 205:14, Minors or Incompetents.

Attorney General’s Opinions

An 18‑year‑old beneficiary may receive death payments without the benefit of guardianship. 1974‑75 Op.Atty.Gen., No 4007, p 79, 1975 WL 22305.

NOTES OF DECISIONS

In general 1

1. In general

Where widow wanted periodic payments commuted to a lump sum payment and the employer of her deceased husband approved it, the Commission erred in granting the request without taking into consideration the interest of a two year old daughter and by not appointing a trustee to receive the funds. Brown v. Plowden Co. (S.C. 1949) 216 S.C. 114, 57 S.E.2d 29.

When the claimant is a minor under eighteen and the payment over $300.00, the father of the minor has no right under the statute to receive funds and acquit the employer unless he is appointed guardian. The proceeding without a guardian is a nullity and the claimant is not bound by any payment until he is properly brought before court, even though he waits until after he is twenty‑one to assert his claim. Gilliard v. Victor‑Monaghan Co. (S.C. 1947) 211 S.C. 68, 44 S.E.2d 109.

**SECTION 42‑9‑330.** Exercise of rights for incompetent or infant employees.

 If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this title, his guardian, trustee or committee may in his behalf claim and exercise such right or privilege.

HISTORY: 1962 Code Section 72‑184; 1952 Code Section 72‑184; 1942 Code Section 7035‑51; 1936 (39) 1231.

Library References

Workers’ Compensation 1190.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 928 to 931.

**SECTION 42‑9‑340.** Effect of payment in good faith to junior dependents.

 Payment of death benefits by an employer in good faith to a dependent subsequent in right to another dependent shall protect and discharge the employer, unless and until such dependent prior in right shall have given notice of his claim. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the commission to decide between them.

HISTORY: 1962 Code Section 72‑185; 1952 Code Section 72‑185; 1942 Code Section 7035‑50; 1936 (39) 1231.

Library References

Workers’ Compensation 450.1 to 450.3, 1043.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 285 to 288, 726.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 107:19, to Whom Payments Are Made.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Workmen’s Compensation. 30 S.C. L. Rev. 177.

NOTES OF DECISIONS

In general 1

1. In general

Parents who were not entitled to payment at all under pertinent provisions of Workmen’s Compensation Act were not dependents subsequent in right to another dependent under Section 42‑9‑340. Airco, Inc. v. Hollington (S.C. 1977) 269 S.C. 152, 236 S.E.2d 804.

Defense of good faith payment provisions of Section 42‑9‑340 was not intended to afford protection to employer and carrier against valid claim, where employer and carrier have not shown that they exercised reasonable diligence in investigating prior to making payment of compensation benefits to persons not entitled thereto. Airco, Inc. v. Hollington (S.C. 1977) 269 S.C. 152, 236 S.E.2d 804. Workers’ Compensation 1043

**SECTION 42‑9‑350.** Payment of compensation of employee working for several employers at time of injury.

 Whenever an employee for whose injury or death compensation is payable under this title shall, at the time of the injury, be in joint service of two or more employers subject to this title, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee. But nothing in this section shall prohibit any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation.

HISTORY: 1962 Code Section 72‑186; 1952 Code Section 72‑186; 1942 Code Section 7035‑53; 1936 (39) 1231.

Library References

Workers’ Compensation 201, 1003.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 143, 149 to 152, 1578 to 1583.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:21, Multiemployer Liability.

NOTES OF DECISIONS

Constitutional issues 1

1. Constitutional issues

Where statute containing “benefits coordination” provision allowing employers to decrease workers compensation benefits to disabled employees who were eligible to receive wage loss compensation from other employer‑funded sources did not specify whether provisions applied to workers injured prior to a defective date, to nullify State Supreme Court decision holding that provision applied to such workers, state legislature passed into law statute requiring employers to pay to disabled employees workers compensation benefits that had been recalled in an alliance on coordination statute, statute did not violate contract clause by substantially impairing obligation of employment contracts that were entered into after collective bargaining between employers and employees, nor did it, as result of retroactive payment provision, violate due process clause, since retroactive payment provision was rational means of meeting legitimate legislative purpose of correcting state court decision. General Motors Corp. v. Romein, U.S.Mich.1992, 112 S.Ct. 1105, 503 U.S. 181, 117 L.Ed.2d 328.

**SECTION 42‑9‑360.** Assignments of compensation; exemptions from claims of creditors and taxes.

 (A) No claim for compensation under this title shall be assignable and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

 (B) It shall be unlawful for an authorized health care provider to actively pursue collection procedures against a workers’ compensation claimant prior to the final adjudication of the claimant’s claim. Nothing in this section shall be construed to prohibit the collection from and demand for collection from a workers’ compensation insurance carrier or self‑insured employer. Violation of this section, after written notice to the provider from the claimant or his representative that adjudication is ongoing, shall result in a penalty of five hundred dollars payable to the workers’ compensation claimant.

 (C) Any person who receives any fee or other consideration or any gratuity on account of services so rendered, unless the consideration or gratuity is approved by the commission or the court, or who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation is guilty of a misdemeanor and, upon conviction, must, for each offense, be fined not more than five hundred dollars or imprisoned not more than one year, or both.

 (D) Payment to an authorized health care provider for services shall be made in a timely manner but no later than thirty 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 bill.

HISTORY: 1962 Code Section 72‑187; 1952 Code Section 72‑187; 1942 Code Section 7035‑24; 1936 (39) 1231; 1996 Act No. 424, Section 7, eff June 18, 1996.

Editor’s Note

1996 Act No. 424, Section 13, provides, in part, as follows:

“Section 13. Employers who have filed with the Workers’ Compensation Commission a notice to reject the provisions of Title 42 before the effective date of the 1996 amendment will have until July 1, 1997, to comply with the provisions of the 1996 amendment relating to insuring their workers’ compensation liabilities. Any employer who has rejected the terms of this title prior to approval of the 1996 amendment and has procured another form of employee benefits insurance shall comply, not later than July 1, 1997, with the provisions of the 1996 amendment relating to the insuring of its workers’ compensation liabilities. Furthermore, nothing in the 1996 amendment shall affect or alter any cause of action, right, or claim accruing before the effective date of the 1996 amendment; however, any such cause of action, remedy, or claim accruing before the effective date of the 1996 amendment shall be governed by the law prior to the effective date of the 1996 amendment.”

Library References

Workers’ Compensation 1097 to 1099, 2080, 2190.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 840 to 841, 1711 to 1715.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Assignments Section 30, Workers’ Compensation Benefits.

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:19, Assignability.

Modern Workers’ Compensation Section 205:20, Exemption.

Attorney General’s Opinions

The exemption provided for workmen’s compensation claims under this section [Code 1962 Section 72‑187] would not include an order of support directed to a husband and father who is receiving a compensation award, if the court should determine that the individual is possessed of sufficient means or is able to earn such means. 1968‑69 Op.Atty.Gen., No. 2704, p 149, 1969 WL 10703.

NOTES OF DECISIONS

In general 1

1. In general

A hospital that provided medical services to an injured worker, allegedly in reliance on representations made by the workers’ compensation insurance carrier, did not have standing to seek redress before the Workers’ Compensation Commission. Baker Hosp. v. Firemans Fund Ins. Co. (S.C. 1994) 314 S.C. 98, 441 S.E.2d 822. Workers’ Compensation 1191

The Workers’ Compensation Act did not bar an action against a workers’ compensation insurance carrier brought by a hospital to recover for medical services provided to an injured worker on the basis of representations allegedly made by the carrier, since the allegations of the complaint indicated that the carrier “guaranteed” payment of the worker’s hospital expenses, and the complaint contained sufficient facts to establish contract claims regardless of any other party’s claims under workers’ compensation law. Baker Hosp. v. Firemans Fund Ins. Co. (S.C. 1994) 314 S.C. 98, 441 S.E.2d 822.

**SECTION 42‑9‑370.** Preferences or priorities of rights of compensation.

 All rights of compensation granted by this title shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.

HISTORY: 1962 Code Section 72‑188; 1952 Code Section 72‑188; 1942 Code Section 7035‑23; 1936 (39) 1231.

Library References

Workers’ Compensation 1033.

Westlaw Topic No. 413.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 205:22, Priority; Preferences.

Modern Workers’ Compensation Section 206:18, Statutes Governing Workers’ Compensation Liens.

**SECTION 42‑9‑390.** Voluntary settlements.

 Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission.

HISTORY: 1962 Code Section 72‑191; 1952 Code Section 72‑191; 1942 Code Section 7035‑20; 1936 (39) 1231; 1986 Act No. 388, eff April 29, 1986; 2007 Act No. 111, Pt I, Section 23, eff July 1, 2007, applicable to injuries that occur on of after that date.

Library References

Workers’ Compensation 1115, 1122.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 870, 874, 876 to 877.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 204:6, Settlement Powers.

Modern Workers’ Compensation Section 204:9, Settlement Reporting/Filing.

Modern Workers’ Compensation Section 204:12, Settlements With Unrepresented Claimants.

NOTES OF DECISIONS

In general 1

Review 2

1. In general

Pursuant to Sections 42‑1‑310 and 42‑9‑390, a worker’s compensation claimant could unilaterally repudiate an offer of settlement that had been accepted by his counsel prior to approval by the South Carolina Industrial Commission, even though a Commission rule requires approval of settlement agreements involving claimants represented by legal counsel without judicial proceedings, where the closing papers reflecting the agreement of the parties had been prepared but not signed, and thus represented no more than a settlement proposal. Mackey v. Kerr‑McGee Chemical Co. (S.C.App. 1984) 280 S.C. 265, 312 S.E.2d 565.

Where a settlement has been entered into, it is a duty to file a copy of this settlement agreement with the Industrial Commission. Lowther v. Standard Oil Co. of N. J. (S.C. 1945) 206 S.C. 286, 33 S.E.2d 889.

Subject to the conditions in this section [Code 1962 Section 72‑191] and Code 1962 Section 72‑351 the Industrial Commission has the power to approve a lump sum settlement, and make it final and binding and not subject to review under any conditions. Atkins v. Charleston Shipbuilding & Drydock Co. (S.C. 1945) 206 S.C. 63, 33 S.E.2d 46. Workers’ Compensation 2068

2. Review

Employer and Property and Casualty Insurance Guaranty Association, neither of whom were aggrieved in any way by a settlement agreement between workers’ compensation claimant’s grandsons and claimant’s estate over the distribution of the unpaid balance of compensation owed claimant at the time of her death, could not properly appeal a circuit court order approving the settlement agreement; both employer and Guaranty Association conceded that they would not be harmed by the settlement. Hudson ex rel. Hudson v. Lancaster Convalescent Center (S.C. 2014) 407 S.C. 112, 754 S.E.2d 486, rehearing denied. Workers’ Compensation 1142

**SECTION 42‑9‑400.** Reimbursement from Second Injury Fund when disability substantially greater or caused by aggravation of preexisting impairment.

 (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater and is caused by aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by Section 42‑7‑310 for compensation and medical benefits in the following manner:

 (1) reimbursement of all compensation benefit payments payable subsequent to those payable for the first seventy‑eight weeks following the injury;

 (2) reimbursement of fifty percent of medical payments in excess of three thousand dollars during the first seventy‑eight weeks following the injury and then reimbursement of all medical benefit payments payable subsequent to the first seventy‑eight weeks following the injury; provided, however, in order to obtain reimbursement for medical expense during the first seventy‑eight weeks following the subsequent injury, an employer or carrier must establish that his liability for medical payments is substantially greater by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone.

 (b) If the subsequent injury of such an employee shall result in the death of the employee, and it shall be determined that the death would not have occurred except for such preexisting permanent physical impairment, the employer or his insurance carrier shall in the first instance pay the compensation prescribed by this title; but he or his insurance carrier shall be reimbursed from the Second Injury Fund created by Section 42‑7‑310, for all compensation payable in excess of seventy‑eight weeks.

 (c) In order to qualify under this section for reimbursement from the Second Injury Fund, the employer must establish when claim is made for reimbursement thereunder, that the employer had knowledge of the permanent physical impairment at the time that the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge. However, the employer may qualify for reimbursement hereunder upon proof that he did not have prior knowledge of the employee’s preexisting physical impairment because the existence of the condition was concealed by the employee.

 (d) As used in this section, “permanent physical impairment” means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.

 When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is one of the following impairments:

 (1) Epilepsy;

 (2) Diabetes;

 (3) Cardiac disease;

 (4) Amputated foot, leg, arm, or hand;

 (5) Loss of sight of one or both eyes or partial loss of uncorrected vision of more than seventy‑five percent bilateral;

 (6) Residual disability from Poliomyelitis;

 (7) Cerebral Palsy;

 (8) Multiple Sclerosis;

 (9) Parkinson’s disease;

 (10) Cerebral vascular accident;

 (11) Tuberculosis;

 (12) Silicosis;

 (13) Psychoneurotic disability following treatment in a recognized medical or mental institution;

 (14) Hemophilia;

 (15) Chronic Ostemyelitis;

 (16) Ankylosis of joints;

 (17) Hyperinsulinism;

 (18) Muscular Dystrophy;

 (19) Arteriosclerosis;

 (20) Thrombophlebitis;

 (21) Varicose veins;

 (22) Heavy metal poisoning;

 (23) Ionizing radiation injury;

 (24) Compressed air sequelae;

 (25) Ruptured intervertebral disc;

 (26) Hodgkins disease;

 (27) Brain damage;

 (28) Deafness;

 (29) Cancer;

 (30) Sickle‑Cell Anemia;

 (31) Pulmonary disease;

 (32) Intellectual disability provided the employee’s intelligence quotient is such that he falls within the lowest percentile of the general population. However, it shall not be necessary for the employer to know the employee’s actual intelligence quotient or actual relative ranking in relation to the intelligence quotient of the general population.

 (e) The Second Injury Fund shall not be bound as to any question of law or fact by reason of any compensation agreement, settlement, award, and adjudication to which it was not a party, or in relation to which it was not notified at least twenty days prior to a hearing on liability that it might be subject to liability for the injury or death.

 (f) An employer or his carrier must notify the Workers’ Compensation Commission and the Director of the Second Injury Fund in writing of any possible claim against the fund as soon as practicable but in no event later than after the payment of the first seventy‑eight weeks of compensation. This written notice must provide the:

 (1) date of accident;

 (2) employee’s name;

 (3) employer’s name and address;

 (4) insurance carrier’s name, address, and the National Council on Compensation Insurance code; and

 (5) insurance carrier’s claim number, policy number, and policy effective date. The carrier claim number is the unique identifier a carrier uses throughout the life of a claim to report that claim to the National Council on Compensation Insurance. Failure to comply with the provisions of this subsection shall bar an employer or his carrier from recovery from the fund.

 (g) If the employee has a permanent physical impairment, as defined in this section and the prerequisites for reimbursement have been met, and if it can be shown that the subsequent injury most probably would not have occurred “but for” the presence of the prior impairment, then reimbursement will be granted as provided in this section even if the subsequent injury does not cause the employer’s liability for compensation and medical benefits to be substantially greater than that which would have resulted from the subsequent injury alone.

 (h) When a third party is deemed to be an employer for the purposes of paying workers’ compensation benefits, that third party will be entitled to reimbursement from the Second Injury Fund if either he or the employer of record have met the knowledge requirements outlined in this section, as well as all other requirements.

 (i) The Second Injury Fund is entitled to a credit for sums recovered by the employer or his workers’ compensation carrier from third parties, after the employer or his workers’ compensation carrier have been reimbursed for the monies paid out by them and not reimbursed by the fund.

 (j) The Second Injury Fund can enter into compromise settlements at the discretion of the director with approval of a majority of the Workers’ Compensation Commission, provided a bona fide dispute exists.

 (k) Any employer operating in violation of Section 42‑5‑20 is not eligible for reimbursement from the South Carolina Second Injury Fund.

 (l) As a prerequisite to reimbursement from the fund, the insurer shall be required to certify that the medical and indemnity reserves have been reduced to the threshold limits of reimbursement and report in accordance with the National Council on Compensation Insurance Workers’ Compensation Statistical Plan.

 (m) The Second Injury Fund Director must quarterly submit to the National Council on Compensation Insurance information regarding Second Injury Fund accepted claims.

 (n) The National Council on Compensation Insurance must submit a report of any discrepancies pursuant to regulations established by the Department of Insurance. The Department of Insurance is directed to establish regulations concerning Second Injury Fund discrepancies.

HISTORY: 1962 Code Section 72‑601; 1972 (57) 2578; 1974 (58) 2237; 1976 Act No. 560 Section 1; 1982 Act No. 314, Section 1A; 1982 Act No. 438, Section 1; 1988 Act No. 309, Section 1, eff February 24, 1988; 1990 Act No. 589, Section 1, eff June 12, 1990; 2003 Act No. 73, Section 22, eff June 25, 2003; 2007 Act No. 111, Pt II, Section 3, eff July 1, 2007, applicable to injuries that occur on or after that date.

Library References

Workers’ Compensation 1030.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1592 to 1600.

RESEARCH REFERENCES

Treatises and Practice Aids

51 Causes of Action 2d 291, Cause of Action for Workers’ Compensation for Heart Attack.

Modern Workers’ Compensation Section 116:2, Employment Aggravation of Pre‑Existing Condition.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, workers’ compensation law. 40 S.C. L. Rev. 270 (Autumn 1988).

The Second Injury Fund: Encouraging Employment of the Handicapped Worker in South Carolina. 27 S.C. L. Rev. 661.

Attorney General’s Opinions

The Industrial Commission has jurisdiction to entertain claims of the Second Injury Fund at Claimant v. Employer/Carrier hearings. The degree of participation by the Second Injury Fund at these hearings, in absence of statutory directives, is controlled by the procedural mandates provided in Title 42 and the Industrial Commission’s rule‑making authority provided for in Section 42‑3‑30. If the Second Injury Fund is allowed to participate in Claimant v. Employer/Carrier hearings, it is bound by the decision as to questions of law and fact and therefore in order to protect the Second Injury Fund’s rights and remedies under the Act, the Second Injury Fund must be provided an opportunity to apply for a review of the decision. 1980 Op.Atty.Gen. No. 80‑33, p 64, 1980 WL 81917.

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1. In general

The provisions of statute governing the manner in which employer or insurance carrier shall be reimbursed from Second Injury Fund when disability results from preexisting impairment and subsequent injury entitle an employer’s insurance carrier to be reimbursed by the Fund if injuries to an employee are amplified because of the employee’s pre‑existing medical conditions. Ellison v. Frigidaire Home Products (S.C.App. 2004) 360 S.C. 236, 600 S.E.2d 120, rehearing denied, certiorari granted, reversed 371 S.C. 159, 638 S.E.2d 664. Workers’ Compensation 1030.1(2)

Employer was not entitled to reimbursement of compensation payments from Second Injury Fund due to employee’s preexisting condition; employee was rendered totally disabled from his workplace accident. City of Greenville v. South Carolina Second Injury Fund (S.C.App. 2000) 339 S.C. 141, 528 S.E.2d 91. Workers’ Compensation 1030.1(3)

The Circuit Court did not err in interpreting Section 42‑9‑400 so that if a carrier incurs greater liability for compensation and/or medical payments as a result of a preexisting injury, he is entitled to reimbursement of those greater payments. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part. Workers’ Compensation 1030.1(1)

The Circuit Court erred in ordering the reimbursement of compensation payments from the Second Injury Fund where the workers’ compensation carrier did not incur greater compensation payments as a result of the accident; the accident rendered the claimant totally disabled and the claimant’s preexisting injury did not increase these payments. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part. Workers’ Compensation 1030.1(3)

The right of a claimant to secure reimbursement under the Second Injury Fund depends upon complete compliance with the requirements imposed for recovery. The success and future of the Second Injury Fund depends upon proper and careful application of these statutory requirements. American Motorists Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276. Workers’ Compensation 1030.1(1)

Employee who suffers second injury is entitled to recover full compensation benefits even though employee recovered benefits after first injury, and employee may qualify for compensation even if employer is not entitled to reimbursement from Second Injury Fund because of employer’s failure to maintain proper records, as written record requirement in Section 42‑9‑400(c) was condition of employer’s eligibility to recover from Second Injury Fund. Wyndham v. R.A. & E.M. Thornley and Co. (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

Failure to comply with SC Code Section 42‑9‑400(f) results in loss of right to reimbursement. Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund (S.C. 1982) 277 S.C. 604, 291 S.E.2d 667.

Employer’s failure to file a written record establishing knowledge of prior permanent physical impairment as required by Code 1962 Section 72‑60(c) [Code 1976 Section 42‑9‑400(c)] precluded recovery from the second injury fund. Boone’s Masonry Const. Co., Inc. v. South Carolina Second Injury Fund (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659.

Provisions of act creating second injury fund applied where disabled employee was hired prior to effective date of act, but retained in employment after said date. Boone’s Masonry Const. Co., Inc. v. South Carolina Second Injury Fund (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659.

2. Purpose of Second Injury Fund

Legislative purpose of the Second Injury Fund is to encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition. City of Greenville v. South Carolina Second Injury Fund (S.C.App. 2000) 339 S.C. 141, 528 S.E.2d 91. Workers’ Compensation 1030.1(1)

The purpose of the Second Injury Fund is to encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund (S.C. 1995) 318 S.C. 516, 458 S.E.2d 550, rehearing denied, certiorari granted in part.

One of the purposes in establishing the Second Injury Fund was to encourage employers to hire handicapped persons by providing reimbursement to the employer or insurer for compensation paid as a result of a second injury. The fund was designed to compensate handicapped workers fully for subsequent injuries without penalizing employers for hiring them in the first place. American Motorists Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

One of the purposes of the second injury fund is to encourage employers to hire handicapped people by providing reimbursement to the insurer, in certain cases, for compensation paid as the result of a second injury. Boone’s Masonry Const. Co., Inc. v. South Carolina Second Injury Fund (S.C. 1976) 267 S.C. 277, 227 S.E.2d 659. Workers’ Compensation 1030.1(1)

3. Prior impairment

Workers’ Compensation Commission clearly erred in determining that the State Accident Fund failed to establish that claimant’s preexisting diabetes resulted in substantially increased medical costs for a knee injury that resulted in knee replacement surgery, and thus the State Accident Fund was entitled to reimbursement from the Second Injury Fund for medical payments, where claimant’s work‑related knee injury most probably aggravated his diabetes and resulted in substantially greater medical costs than would have resulted from his knee injury alone. State Acc. Fund v. South Carolina Second Injury Fund (S.C. 2014) 409 S.C. 240, 762 S.E.2d 19. Workers’ Compensation 1030.1(6)

Reimbursement for increased medical payments is an important aspect of the statute governing reimbursement from the Second Injury Fund, regardless of a preexisting condition’s effect on compensation payments. State Acc. Fund v. South Carolina Second Injury Fund (S.C. 2014) 409 S.C. 240, 762 S.E.2d 19. Workers’ Compensation 1030.1(1)

Workers Compensation Commission was required to consider claimant’s pre‑existing impairment in his left eye in combination with the injury to his right eye in determining his impairment rating. Curiel v. Environmental Management Services (MS) (S.C. 2007) 376 S.C. 23, 655 S.E.2d 482. Workers’ Compensation 885.22

Workers’ compensation claimant’s present injury, a fractured leg causing 20% disability, was properly considered in combination with his preexisting impairment to determine that he was entitled to permanent and total disability benefits, under statute authorizing employer reimbursement from Second Injury Fund when disability results from preexisting impairment and subsequent injury; there was no requirement that the pre‑existing condition aggravated the injury, or that the injury aggravated the pre‑existing condition, so long as there was greater disability simply from the combined effects of the injury and the pre‑existing condition. Ellison v. Frigidaire Home Products (S.C. 2006) 371 S.C. 159, 638 S.E.2d 664, rehearing denied. Workers’ Compensation 1030.1(2); Workers’ Compensation 1030.1(3)

As matter of law, workers’ compensation insurer could only be reimbursed from Second Injury Fund for the liability proximately owed to claimant’s prior disability, and in situation where steel I‑beam fell onto claimant’s right leg and essentially amputated right leg above the knee and crushed and fractured his left leg, claimant’s preexisting diabetes acted to exacerbate the condition of his left leg and contributed to increased medical expenses, but had no impact on amputation of his right leg, and as such, insurer was entitled to reimbursement from Second Injury Fund for the left leg, but not the right leg. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 2005) 363 S.C. 612, 611 S.E.2d 297, rehearing denied, certiorari denied. Workers’ Compensation 1030.1(2); Workers’ Compensation 1030.1(3)

The State Workers’ Compensation Fund, which paid a firefighter’s claim for total disability resulting from heart disease and arteriosclerosis, was entitled to reimbursement from the Second Injury Fund under Section 42‑9‑400, since the firefighter would not have become totally disabled “but for” his prior permanent heart disease, and thus his total disability from heart disease qualified as a subsequent disability arising out of his employment. State Workers’ Compensation Fund v. South Carolina Second Injury Fund (S.C. 1994) 313 S.C. 536, 443 S.E.2d 546. Workers’ Compensation 1030.1(2)

A state employee did not suffer a “second injury,” for which his employer’s workers’ compensation carrier was entitled to be reimbursed, since the employee’s disability from heart disease and arteriosclerosis was the logical progression of the disease over the period of years he worked for the State Forestry Commission. State Workers’ Compensation Fund v. South Carolina Second Injury Fund (S.C.App. 1992) 310 S.C. 187, 426 S.E.2d 112, rehearing denied, certiorari granted, reversed 313 S.C. 536, 443 S.E.2d 546. Workers’ Compensation 563.7

A claimant’s work for a textile manufacturing company, which took place away from cotton dust which was present during previous jobs performed by the claimant, did not aggravate a preexisting condition nor did it bring about a condition which added to or combined with a previous condition to create the claimant’s disability where the claimant became totally disabled as a result of the progression of byssinosis, which was caused by the claimant’s breathing of cotton dust during his 25 years’ employment with the company in various capacities. Thus, there was no preexisting physical impairment and no subsequent or second injury, but rather, the claimant suffered a logical progression of an occupational disease indigenous to the cotton industry which he served for 25 years. American Motorists Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

A worker suffered from a preexisting permanent impairment as defined by Section 42‑9‑400(d) where she began working in cotton mills in 1943 and became totally disabled due to byssinosis, a form of chronic obstructive pulmonary disease, after working for 9 months for a subsequent employer, since a person with 31 years of exposure to cotton dust who becomes permanently and totally disabled after only 9 additional months of exposure must have had a permanent impairment at the time of employment. Springs Industries, Inc. v. South Carolina Second Injury Fund (S.C.App. 1988) 296 S.C. 359, 372 S.E.2d 915.

4. Concealment of information

Even if employer incurred substantially greater medical expenses due to employee’s preexisting injury, city failed to show that employee intentionally concealed information as to his preexisting condition, and thus employer did not qualify for reimbursement from Second Injury Fund for such greater medical expenses. City of Greenville v. South Carolina Second Injury Fund (S.C.App. 2000) 339 S.C. 141, 528 S.E.2d 91. Workers’ Compensation 1030.1(2)

In an action for reimbursement from the Second Injury Fund, the Workers’ Compensation Commission erred in finding that the claimant concealed his previous back injuries where, in response to the question “Do you have any physical condition which may limit your ability to perform the job applied for,” the claimant responded “no,” since the question on the application was very broad and the commission found that the claimant had no physical limitations which would have prevented him from performing his job when he was hired. Hartford Acc. and Indem. v. South Carolina Second Injury Fund (S.C.App. 1994) 316 S.C. 420, 450 S.E.2d 110, rehearing denied, certiorari denied.

The Second Injury Fund, as delineated in Section 42‑7‑310, provides reimbursement to employers who are unable to prove that the concealment of a preexisting condition by an employee was willful or reliance on the misrepresentation. Vines v. Champion Bldg. Products (S.C. 1993) 315 S.C. 13, 431 S.E.2d 585, rehearing denied. Workers’ Compensation 1030.1(2)

5. Notice

Cause of action for reimbursement to the Second Injury Fund accrued on date workers’ compensation insurer provided notice to the Fund, rather than on date of claimant’s injury. Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund (S.C. 2010) 389 S.C. 422, 699 S.E.2d 687, rehearing denied. Workers’ Compensation 1030.1(5)

Employer’s failure to notify Workers’ Compensation Commission of its intent to seek reimbursement from Second Injury Fund did not prejudice Commission in any way, and, thus, did not bar employer from recovering from Fund, where employer notified Fund of its claim for reimbursement and Commission received actual notice of claim through Fund. South Carolina Second Injury Fund v. American Yard Products (S.C. 1998) 330 S.C. 20, 496 S.E.2d 862. Workers’ Compensation 1030.1(4.1)

Primary purpose of statute requiring employer or insurer to notify Industrial Commission of possible claim against Second Injury Fund is to establish deadline for perfecting actual claims for reimbursement with Fund, and additional purpose is to provide notice to Fund and Commission of potential claims for reimbursement. South Carolina Second Injury Fund v. American Yard Products (S.C. 1998) 330 S.C. 20, 496 S.E.2d 862. Workers’ Compensation 1030.1(4.1)

The notice required by Section 42‑9‑400(f) is effective when it is received. Cincinnati Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 1989) 297 S.C. 372, 377 S.E.2d 130, review dismissed 301 S.C. 180, 391 S.E.2d 235.

6. Limitation of actions

Ten‑year default statute of limitations applied to workers’ compensation insurers’ claims for reimbursement from Second Injury Fund for benefits paid to employees for their work‑related injuries; seventy‑eight week provision governing reimbursement from second injury fund in Workers’ Compensation Act was not a statute of limitation, but a notice requirement and, consequently, there was no statute of limitations in the Act that applied to claims for reimbursement. Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund (S.C. 2010) 389 S.C. 422, 699 S.E.2d 687, rehearing denied. Workers’ Compensation 1030.1(5)

The 2‑year statute of limitation for filing a workers’ compensation claim, Section 42‑15‑40, is inapplicable to claims by employers against the Second Injury Fund because the statute of limitation (1) applies to claims for compensation not reimbursement, (2) governs claims addressed to the commission as opposed to those addressed to the fund, and (3) speaks to an employee’s injury, not the employer’s notice of inquiry. Greenwood Mills, Inc. v. Second Injury Fund (S.C. 1993) 315 S.C. 256, 433 S.E.2d 846.

6.5. Presumptions and burden of proof

State Accident Fund was entitled to a presumption that workers’ compensation claimant’s listed condition of diabetes was permanent and constituted a hindrance or obstacle to his employment or reemployment, and thus State Accident Fund did not have the burden of proof on that issue on State Accident Fund’s request for reimbursement from the Second Injury Fund for benefits paid to claimant, where claimant’s employer was aware of claimant’s diabetes prior to his injury. State Acc. Fund v. South Carolina Second Injury Fund (S.C. 2014) 409 S.C. 240, 762 S.E.2d 19. Workers’ Compensation 1030.1(6)

Workers’ Compensation Commission clearly erred in determining that the Second Injury Fund rebutted the presumption that workers’ compensation claimant’s listed condition of diabetes was permanent and constituted a hindrance or obstacle to his employment or reemployment, and thus the State Accident Fund was entitled to reimbursement from the Second Injury Fund for benefits paid to claimant for knee injury that resulted in knee replacement surgery, where claimant’s diabetes caused tingling in his foot which did not subside until he removed his shoe, and claimant required special shoes and medication to control his diabetes. State Acc. Fund v. South Carolina Second Injury Fund (S.C. 2014) 409 S.C. 240, 762 S.E.2d 19. Workers’ Compensation 1030.1(6)

In determining whether Second Injury Fund rebutted the presumption that workers’ compensation claimant’s listed condition of diabetes was permanent and constituted a hindrance or obstacle to his employment or reemployment, as would entitle State Accident Fund to reimbursement from Second Injury Fund for benefits paid to claimant, the issue was whether claimant’s preexisting diabetes was a hindrance to obtaining employment, not whether it was a hindrance to claimant’s employment at the time of his injury. State Acc. Fund v. South Carolina Second Injury Fund (S.C. 2014) 409 S.C. 240, 762 S.E.2d 19. Workers’ Compensation 1030.1(2)

7. Sufficiency of evidence

Substantial evidence established that workers’ compensation claimant’s work‑related injury combined with or aggravated a pre‑existing condition to cause a substantially greater disability, and thus insurer was entitled to reimbursement from the Second Injury Fund; physician who opined that claimant’s initial work injury did not result in an impairment rating to his lumbar spine did not re‑evaluate claimant after his subsequent work injury, second physician assigned a nine percent impairment rating to claimant’s lumbar spine after the initial work injury, and third physician concluded that claimant’s second work injury, combined with the degenerative pre‑existing changes to claimant’s lumbar spine, made the impairment and disability from the second injury worse than it would have been if claimant did not have the degenerative changes from the first injury. Carolinas Recycling Group v. South Carolina Second Injury Fund (S.C.App. 2012) 398 S.C. 480, 730 S.E.2d 324. Workers’ Compensation 1030.1(6)

Substantial evidence existed to support Appellate Panel’s finding that workers’ compensation claimant did not have a greater disability as a result of the combined effects of his previous injuries to his ankle and knee and his most current injury to his back, and thus, that he could not establish total disability under statute authorizing employer reimbursement from Second Injury Fund when disability results from preexisting impairment and subsequent injury; testimony from various physicians indicated claimant’s inability to work was secondary solely to his back injury and subsequent lifting restrictions, and his knee and ankle injuries did not contribute to his disability in any way. Dinkins v. Lowe’s Home Centers, Inc.‑Sumter, SC (S.C.App. 2012) 396 S.C. 556, 722 S.E.2d 808, rehearing denied, certiorari denied. Workers’ Compensation 1030.1(6)

Evidence supported finding that employee, who died from heart attack, had no prior knowledge of his heart condition, for purposes of determining whether employer was entitled to reimbursement from the Second Injury Fund for workers’ compensation death benefits paid to the employee’s estate; employee’s wife of thirty‑four years stated neither she nor employee was aware of any significant health problems prior to the heart attack, employee’s wife further testified that employee did not have high blood pressure and related that physical examination revealed no health problems, and although employee complained of chest pain the evening before he died, employee thought the pain stemmed from job repairing an irrigation pump. South Carolina Second Injury Fund v. Liberty Mut. Ins. Co. (S.C.App. 2003) 353 S.C. 117, 576 S.E.2d 199. Workers’ Compensation 1030.1(6)

Substantial evidence supported Full Commission’s finding that employer did not incur substantially greater medical expenses due to employee’s preexisting injury, as required for employer to be entitled to reimbursement from Second Injury Fund for medical expenses, where evidence showed expenses due to employee’s preexisting condition were $500 to $600, cost of employee’s entire hospital stay due to workplace accident exceeded $150,000, and preexisting condition did not affect length of time for employee to reach maximum medical improvement. City of Greenville v. South Carolina Second Injury Fund (S.C.App. 2000) 339 S.C. 141, 528 S.E.2d 91. Workers’ Compensation 1030.1(1)

8. Review

Second Injury Fund’s arguments that the equitable doctrine of laches barred workers’ compensation insurers’ claims for reimbursement, if ten‑year default statute of limitations did not apply, was not properly before the Supreme Court, either because the issue was not preserved, or the issue was unappealed and became the law of the case. Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund (S.C. 2010) 389 S.C. 422, 699 S.E.2d 687, rehearing denied. Workers’ Compensation 1030.1(7)

Under terms of compromise agreement entered into between workers’ compensation carrier and Second Injury Fund, Fund was not obligated to reimburse carrier for expenses associated with claimant’s stroke that occurred during operation to treat work‑related back injury; the agreement indicated that the parties did not contemplate extending coverage to any causally connected injuries that might have followed back injury, and at the time of the agreement carrier knew that its liability for the stroke remained unresolved and it had ample opportunity to negotiate coverage for stroke with the Fund. State Acc. Fund v. South Carolina Second Injury Fund (S.C.App. 2010) 388 S.C. 67, 693 S.E.2d 441. Workers’ Compensation 1138

Although the transcript from the hearing before the circuit court revealed the Second Injury Fund challenged the workers’ compensation commission’s finding that employee’s preexisting heart condition was a permanent physical impairment for purposes of statute governing reimbursement from Fund, the circuit court’s order failed to address that issue, and since the Fund did not file motion requesting a ruling on this issue, the issue was not preserved for appellate review. South Carolina Second Injury Fund v. Liberty Mut. Ins. Co. (S.C.App. 2003) 353 S.C. 117, 576 S.E.2d 199. Workers’ Compensation 1030.1(7)

**SECTION 42‑9‑410.** Reimbursement from Second Injury Fund for employee who becomes totally and permanently disabled in a subsequent injury; notice of preexisting permanent impairment.

 (a) When an employee shall become totally and permanently disabled under Section 42‑9‑10, because of the loss of a hand, arm, foot, leg or the vision of an eye in a subsequent injury under Section 42‑9‑150 or 42‑9‑170, he may receive from the employer compensation and medical care provided by this title for total and permanent disability, and the employer shall be reimbursed a portion of the cost thereof from the Second Injury Fund as herein provided.

 (b) If the loss of the member or eyesight is not caused or contributed to by any of the conditions defined as “permanent physical impairment” in Section 42‑9‑400, the employer shall be responsible to pay such compensation and provide such medical care as is required by Sections 42‑9‑150 or 42‑9‑170 and 42‑15‑60, and the employer shall thereafter be reimbursed by the Second Injury Fund for the cost of such further compensation and medical care as the injured employee shall receive under this chapter.

 (c) If the loss of the member or eyesight is caused or contributed to by any of the conditions defined in Section 42‑9‑400 as “permanent physical impairment,” the employer shall pay the compensation and medical expense for seventy‑eight weeks as required by subsection (a) of Section 42‑9‑400 and thereafter the employer shall be reimbursed from the Second Injury Fund for such further compensation or medical expense as the employer shall provide for the employee under this chapter.

 (d) In order to receive additional benefits from the Second Injury Fund as permitted by Sections 42‑9‑150 and 42‑9‑170, the employer shall establish that he had knowledge of the employee’s preexisting permanent physical impairment prior to the time of the subsequent injury by accident, unless the employer can establish that he did not have prior knowledge of the employee’s preexisting physical impairment because the existence of the condition was concealed by the employee.

HISTORY: 1962 Code Section 72‑601.1; 1974 (58) 2237, 2758; 1982 Act No. 314, Section 1; 2003 Act No. 73, Section 23, eff June 25, 2003.

Library References

Workers’ Compensation 1030.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 1592 to 1600.

RESEARCH REFERENCES

Treatises and Practice Aids

Modern Workers’ Compensation Section 116:24, Subsequent Injury Funds.

NOTES OF DECISIONS

In general 1

1. In general

The Second Injury Fund, as delineated in Section 42‑7‑310, provides reimbursement to employers who are unable to prove that the concealment of a preexisting condition by an employee was willful or reliance on the misrepresentation. Vines v. Champion Bldg. Products (S.C. 1993) 315 S.C. 13, 431 S.E.2d 585, rehearing denied. Workers’ Compensation 1030.1(2)

A claimant’s work for a textile manufacturing company, which took place away from cotton dust which was present during previous jobs performed by the claimant, did not aggravate a preexisting condition nor did it bring about a condition which added to or combined with a previous condition to create the claimant’s disability where the claimant became totally disabled as a result of the progression of byssinosis, which was caused by the claimant’s breathing of cotton dust during his 25 years’ employment with the company in various capacities. Thus, there was no preexisting physical impairment and no subsequent or second injury, but rather, the claimant suffered a logical progression of an occupational disease indigenous to the cotton industry which he served for 25 years. American Motorists Ins. Co. v. South Carolina Second Injury Fund (S.C.App. 1989) 300 S.C. 17, 386 S.E.2d 276.

Employee who suffers second injury is entitled to recover full compensation benefits even though employee recovered benefits after first injury, and employee may qualify for compensation even if employer is not entitled to reimbursement from Second Injury Fund because of employer’s failure to maintain proper records, as written record requirement in Section 42‑9‑400(c) was condition of employer’s eligibility to recover from Second Injury Fund. Wyndham v. R.A. & E.M. Thornley and Co. (S.C.App. 1987) 291 S.C. 496, 354 S.E.2d 399.

**SECTION 42‑9‑430.** Workers’ compensation benefits.

 Whenever a dispute arises between two or more parties as to which party is liable for the payment of workers’ compensation benefits to an injured employee pursuant to the provisions of this title and there is no genuine issue of material fact as to the employee’s employment, his average weekly wage, the occurrence of an injury, the extent of the injury, and the fact that the injury arose out of and in the course of the employment, the hearing commissioner may, in his discretion, require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party is solely liable, at which time the liable party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate of interest provided in Section 34‑31‑20(A).

HISTORY: 1984 Act No. 276.

Library References

Workers’ Compensation 865.3.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 623 to 625.

NOTES OF DECISIONS

In general 1

1. In general

The last injurious exposure rule, which placed full liability upon insurer covering the risk at the time of the most recent injury that bore a causal relation to the disability, applied to determine which insurer was responsible to pay workers’ compensation claimant’s benefits for second injury; statute favored placing sole liability on a single insurer, and regulations instructed the Workers’ Compensation Commission to presume that the policy with a later effective date was in force when duplicate or dual coverage existed. Geathers v. 3V, Inc. (S.C. 2007) 371 S.C. 570, 641 S.E.2d 29. Workers’ Compensation 865.3

**SECTION 42‑9‑440.** Suspected false statements or misrepresentations to be reported to Insurance Fraud Division of Office of Attorney General.

 The commission shall report all cases of suspected false statement or misrepresentation, as defined in Section 38‑55‑530(D), to the Insurance Fraud Division of the Office of the Attorney General for investigation and prosecution, if warranted, pursuant to the Omnibus Insurance Fraud and Reporting Immunity Act.

HISTORY: 1994 Act No. 497, Part II, Section 31B, eff July 1, 1994.

Library References

Workers’ Compensation 771, 1090.

Westlaw Topic No. 413.

C.J.S. Worker’s Compensation Sections 531, 815 to 816, 819 to 821, 827.

**SECTION 42‑9‑450.** Employer’s representatives to pay by check or electronic payment systems.

 An employer’s representative shall make payment of compensation by means of check or electronic payment system including, but not limited to, an electronic funds transfer, a direct deposit, debit card, or similar payment system if such payments are made in accordance with the policies, procedures, or regulations as provided by the commission.

HISTORY: 2017 Act No. 24 (H.3441), Section 1, eff May 9, 2017.