Handling the Workers' Compensation Case From Start to Finish

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Handling the Workers' Compensation Case From Start to Finish

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February 19 - Greenville

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February 23 - Charleston

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Overview of Laws and Concepts

Submitted by David H. Keller

I. OVERVIEW OF LAWS AND CONCEPTS

A. State and Federal Workers' Compensation Laws

1. Scope of Employer Liability

Title 42 of the South Carolina Code of Laws, The Workers' Compensation Act, covers all employments/businesses in South Carolina which have four or more employees regularly employed in the same business or occupation. §42-1-360. All employment, of every type or kind, including illegal employment, is covered by Title 42, unless specifically exempted.

The employments exempted by §42-1-360 are as follows:

1. Casual Employees as defined by §42-1-130;
2. State and County Fair Associations;
3. Agricultural Employees;
4. Railroad Employees;
5. Agricultural Product Salespersons;
6. Licensed Real Estate Salespersons;
7. Federal Employees;
8. Truck Drivers with sales-purchase contracts.
9. Elected Officials.

Volunteer Firemen, members of local Rescue Squads and volunteer deputy sheriffs/constables are also covered, but at a statutorily set/reduced rate regardless of their actual income. §42-7-65. The Act also covers students who are on work-study programs and Vocational Rehabilitation clients who are being paid during job training or job assessment programs. Other individuals who are not covered include the actual owner of a non-incorporated business and contractors who are sole proprietors.

The Workers' Compensation Act covers three basic categories of loss. First, an injured employee receives all reasonable and necessary medical care and treatment which ***"will tend to lessen the period of disability."*** § 42-15-60. This includes all medical, surgical, hospital and other treatments, reasonably required to affect a cure or give relief to the Claimant. Id. Essentially anything which is reasonable, in the opinion of the Commission, must be provided by the employer/carrier, at no charge to the injured employee. In all cases of Permanent Total Disability and in some Partial Disability cases, casually related medical treatment may be provided for the life of the Claimant.

Second, the Claimant receives temporary compensation during any period he/she cannot work during due to an on-the-job injury. This may be Temporary Total Disability Compensation, which is paid at a rate equaling 2/3 of the Claimant's Average Weekly Wage (§42-9-10) or Temporary Partial Disability Compensation. Equaling 2/3 of the difference between what the employee was earning pre-injury, vs. his post injury wage. (§42-9-20)

Third, the employee *may* be entitled to permanent disability, either partial or total, once the Claimant has been released by his physician at ***Maximum Medical Improvement.*** Permanent partial benefits are governed by §§42-9-20 and 30. Permanent Total benefits are governed generally by §42-9-10 and are capped at a maximum of 500 weeks of combined partial and total disability benefits. For Total Disability which results from serious physical brain damage, paraplegia or quadriplegia, *only,* the Claimant receives both life-time medical care and life-time indemnity benefits.

2. Who is Covered?

Every "Injury by accident arising out of and in the course of employment" is covered under Title 42. §42-1-160. Repetitive Motion injuries (e.g. carpal tunnel) are covered as separate class of injuries under §42-1-172 as are mental injuries under §42-1-160 (D) and heart attacks/strokes under §42-1-160 (C). Occupational diseases are covered under Chapter 11 of Title 42 (§§42-11-10 to 200) and ionizing radiation injuries under Chapter 13.

For most "garden variety" injuries, expert testimony is not required to establish causation. See, e.g., Clade v. Champion Laboratories, 330 SC 8, 496 SE2d 856 (1999). Certain other injuries have been held to require a greater degree of proof such as complicated back injuries, McLeod v.Piggly Wiggly Carolina, 280 SC 466, 313 SE2d 38 (Ct.App. 1984) and other injures which are so complicated as to require more than a lay person's understanding to make the link between the injury and the employment. §42-1-160 (E). Carpal tunnel injuries require a greater burden of medical proof under §42-1-172.

The issue of what constitutes an injury by accident arising out of and in the course of employment has been complicated in recent years by case law. Prior to 1991 the generally recognized definition of an injury by accident was a sudden, untoward and unexpected event. See, e.g., Hiers v. Brunson Construction Co. 221 S.C. 212, 70 SE2d 211 (1952). However, in the case of Stokes v. First National Bank, 306 SC 46, 410 SE2d 248 (1991) the Supreme Court expanded the definition of an injury by accident to include mental – mental injuries within the scope of the Workers' Compensation Act. In doing so, the Court expanded the definition of an "event" to include a series of events resulting in a disabling condition. (This case law was subsequently codified in §42-1-160 (D).)

In the case of Sigmon v. Dayco Corp., 316 SC 260, 449 SE2d 497 (Ct. App. 1994), the Court of Appeals, citing Stokes stated an injury by accident does not necessarily require a specific individual cause or event. However, the Court was clear that there must be evidence "that the employee's work activity caused the employee's injury." Sigmon at 449 SE2d 498.

The Court further discussed the issue of injury by accident in the case of Creech v. Ducane Co., 320 SC 559, 467 SE2d 144 (Ct. App. 1996). In Creech the Court further stated an injury by accident includes not only an injury, the means or cause of which is an accident but also an injury that occurs unexpectedly from the operation of internal or subjective conditions. Once again, however, the burden remains on the claimant to prove the condition complained of is part of the employment and not from some other cause. Sigmon; Herndon v. Morgan Mills,

Inc., 246 SC 201, 143 SE2d 376 (1965). This principal has also been expanded by both the Legislature and the Courts.

Initially in the case of Tiller v. National Healthcare Center of Sumter, 334 SC 333, 513 SE2d 843 (1999) the Court held expert testimony is not necessary to establish an injury by accident even to a complicated area of the body. As a result, in 2007 the Legislature amended §42-1-160 to require, in medically complex cases, that the employee must prove causation by a reasonable degree of medical certainty.

3. Compensability? Injuries and Occupational Diseases

Contrary to popular belief, a Workers' Compensation claim does have elements which must be proved. First is an Employer/Employee relationship. This is the key element which must exist to give the Workers' Compensation Commission subject matter jurisdiction. Hamilton v. Daniel Intern. Corp., 273 SC 409, 257 SE2d 157 (1979). Even if an Employer/Employee relationship exists, a case cannot be brought in South Carolina unless the Employee was injured in South Carolina, was hired in South Carolina or his employment is located in South Carolina. §42-15-10.

Whether someone is injured here is usually very straight forward. However, the issue of hiring and job location can get muddled and confusing. For instance, if an employee is hired by telephone for an out of state job, by an out of state employer he is still deemed to have been hired in South Carolina, if he was here when he answered the phone. O'Braint v. Daniel Const. Co. 279 SC 274, 305 SE2d 752 (1983). Likewise, one does not need to come to, or be present in South Carolina for his employment to be located here. If an Employee lives and works in another state, but gets his job assignments telephonically from the Employers' office in South Carolina, that is sufficient for his employment to be located here. Voss v. Ramco, 325 SC 560, 482 SE2d 582 (1997).

Next, there must be an "injury by accident". §42-1-160. An injury by accident can run the gamut from the obvious, like a slip and fall, to the less obvious, like carpal tunnel syndrome from repetitive trauma. Under §42-1-160, stress, mental injuries and mental illness must be based on unusual or extraordinary conditions of employment and must be proved, generally, by expert medical testimony, "to a reasonable degree of medical certainty". By case law, emanating from §42—1-160, heart attacks and strokes are governed by the same standard. Jordan v. Kelly Co, 381 SC 483, 674 SE2d 166 (2009). Also, technically, repetitive motion injuries are not injuries by accident under §42-1-160, but are governed by their own statute, §42-1-172, and must be proved by expert medical testimony. The benefits under either statute are the same, however.

Next, the injury by accident must arise and of and be in the scope of employment. These are two separate elements and each must be proved individually. The term "arising out of" refers to the nature of the accident. The accident must be part of the work and not something that is common to the public in general. An accident arises out of the employment when it is apparent to a rational mind that there is a casual connection between the injury and the work being performed. Osteen v. Greenville County School Dist., 333 SC 154, 519 SE2d 21 (1998); Hicks v. Piedmont Cold Storage, 335 SC 46, 515 SE2d 532 (1998). Hicks presents a clear example of

what "arising out of" means. Hicks was an employee of Piedmont Cold Storage. On his day off he went to the plant to do some repair work on his employers car, which was not part of his job or part of the business of Piedmont. He was paid separately for this work by the manager. He was killed when the auto collapsed on him and crushed his chest. The Supreme Court held the accident did not arise out of the employment because the work he was doing was neither part of Piedmont's business nor part of his job description, and the company derived no benefit from what he was doing.

"In the course" means the injury must occur during the time of employment, at a place where the employee is supposed to be and under circumstances that clearly relate the injury to the job. An injury occurs in the course of employment when it occurs within the period of employment, at a place where the employee is supposed to be while he is fulfilling his actual job duties or something clearly incidental thereto. Baggott v. Southern Music, Inc., 330 SC 1, 496 SE2d 852 (1998). While the two concepts overlap, nonetheless they are separate elements of a compensation claim which must both be proved. Houston v. DeLoach & DeLoach, 378 SC 543, 663 SE2d 85 (Ct.App. 2008).

Finally there must be a causal connection between the injury complained of and the actual job being performed. Pierre v. Seaside Farms, Inc., 386 SC 554, 689 SE2d 615 (2010). For instance, when an employee is assaulted on the job by a paramour, over a dispute resulting from their personal relationship, there is no casual connection between the employment and the injury. Stone v. Traylor Brothers, Inc., 360 SC 271, 600 SE2d 551 (Ct.App. 2004).

Occupational Diseases are covered as a separate Chapter of Title 42. Chapter 11 defines the compensability of Occupational diseases. Essentially an Occupational Disease is something which first meets all the requirements of a regular injury (arising out of, in the course, etc.) but is due to the hazards of an occupation which are in excess of those ordinarily incident to employment and are peculiar to the particular occupation. §42-11-10. A condition is NOT considered an Occupational Disease if it (1) is something which is not directly related to the occupation, (2) results from exposure to outside climatic conditions, (3) is a contagious disease to which members of the general population are equally even if it is contracted from exposure to co-workers, (4) is an ordinary disease of life, (5) is any cardiac, pulmonary or circulatory disease which does not result directly to exposure to something hazardous at work, or (6) is a chronic disease of the joints.

4. Affirmative Defenses.

There are basically four affirmative defenses. These defenses must be raised on the Form 51/Employers' Answer to Request For Hearing, or they are waived. Reg. 67-603. The affirmative defenses are:

§42-9-60—Injury caused by intoxication or willful intention of the employee to injure himself to another.

§42-15-20—90 days' notice of an injury.

§42-15-40—Two-year statute of limitations.

§42-17-90—One year change of condition.

There are other special or affirmative defenses in Chapter 11 (Occupational Diseases) and Chapter 13 (Ionizing Radiation). These relate, generally, to contraction of the disease or condition and time at which the disease/condition was diagnosed or contracted after alleged exposure.

5. Extraterritorial Application of State Laws.

§42-15-10 allows a claimant to file a claim in the State where (1) the injury occurred, (2) where the claimant was hired or (3) where the employment is located. The issue of where the injury occurred is usually fairly "cut and dried". The other two issues can get more complicated.

Generally, if a claimant and his potential employer are physically present in South Carolina at the time of the hiring, then the hiring occurs here. However, our Courts have held that one can he hired in South Carolina when he was hired over the phone to work in a distant state when he was physically present in South Carolina when he took the phone call, even though the employer and the job were in another state. O'Briant v. Daniel Construction Co., 279 SC 254, 305 SE2d 241 (1983). However, in order for this principle to apply, the distant employer must also have four or more employees in South Carolina. Deanhardt v. Neal C. Deanhardt Masonary Contractors, 298 SC 244, 379 SE2d 726 (Ct.App 1989); Nolan v. National Sales Co. Inc., 292 SC 1, 345 SE2d 575 (Ct.App 1987).

An employee's employment is normally located where he/she reports for duty, receives assignments and where personnel and payroll records are maintained, regardless of where the actual work is performed. Holmon v. Bulldog Trucking Co., 311 SC 341, 428 SE2d 889 (Ct.App. 1995). Importantly, where the employee resides or is domiciled is NOT a consideration. Id. The Supreme Court has held that employee who had never been to South Carolina, was hired in Texas and was injured in Washington State had his employment located in South Carolina because he occasionally made phone calls to his employer in Travelers Rest. Voss v. Ramco, Inc., 325 SC 560, 482 SE2d 582 (1997).

6. Non-Occupational Disability Benefit Laws

Disability benefit laws are covered by Statutes governing the Department of Insurance. Many Companies, however, have disability benefits some of which are employer paid and some of which are paid for by the employee, such as AFLAC. These benefits are generally held to be above and beyond the benefits provided by the Workers' Compensation Act and the Commission will not give a credit to the employer for disability or unemployment benefits paid, even if they were received by the claimant stating the injuries he/she received were not work-related.

Overview of Laws and Concepts

Submitted by Benjamin T. Cruse

Scope of Employer Liability

Any employer who regularly employs four or more workers full-time or part-time is required to have workers' compensation insurance. There are some exceptions, including agricultural employees, railroads, and railway express companies and their employees, and employers who had a total annual payroll during the previous year of less than $3,000, regardless of the number of workers employed during that period. Also exempt are Textile Hall Corporation and certain commission paid real estate agents. Although most employers must purchase workers' compensation insurance, any employer may purchase coverage.

Workers' compensation pays for a portion of lost wages and medical care provided to employees who are injured on the job. Workers' compensation also compensates employees who suffer permanent disability or disfigurement. It is a no-fault approach which limits the employer's liability to those benefits provided by the Workers' Compensation Act. It is an inclusive remedy for on-the-job injuries.

The employer's first obligation is to make sure the employee receives medical attention. The employer is also required to report the injury to the insurance carrier, which reports it to the Commission. Minor injuries, as defined by the Commission, do not have to be reported.

The employer's direct liability is insulated through the exclusivity provision. Section 42-1-540 of the Workers' Compensation Act is an exclusivity provision, disallowing tort suits against the employer and limiting the injured employee's rights and remedies to those provided by the Workers' Compensation Act. "The rights and remedies granted by this title to an employee . . . shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service[,] or death. S.C." Code Ann. § 42-1-540 (2015). However, by its terms, the exclusive remedy provision of the Workers' Compensation Act limits the employee's remedy only "as against his employer." Thus, where the injury is due to a third party's negligence, a plaintiff may collect workers' compensation benefits and sue the third party responsible for causing the injuries.

Who is Covered

The definition of an employee is quite broad. It includes full-time and part-time workers, adults and minors, undocumented workers, and others who have been hired to do certain jobs. The critical test is the degree of control the employer exercises over the worker. The law also recognizes "statutory employees." These are employees who work for a subcontractor who may be working for a business or another contractor. Employers should inquire whether a subcontractor working for them has workers' compensation insurance, regardless of the number of employees employed by the subcontractor. If the subcontractor does not, the subcontractor's injured employees would be covered under the employer's workers' compensation insurance.

Whether a worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles. "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Young v. War*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). The Young Court stated,

> An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work. Where one who performs work for another represents the will of that other, not only as to the result, but also as to how the result is accomplished, he is not an independent contractor but an agent. Id. at 189, 165 S.E.2d at 802.

There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment. *Tharpe v. GEE. Moore Co*., 254 S.C. 196, 174 S.E.2d 397 (1970).

For the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all. 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 61.04 (2000).

Unpaid volunteers are considered to be gratuitous employees, and are not subject to the Workers' Compensation Act. Organizations that utilize volunteers can obtain coverage/insurance for volunteers.

Sole proprietors and partners are considered owners of the business and are not automatically included under workers' compensation insurance. They may elect to be covered if they are active in the business and have duly informed their insurance carrier. When a sole proprietorship or partnership incorporates, all employees are automatically covered, including the owners if they are also employees of the corporation.

Compensability of Injuries and Occupational Diseases

Section 42-1-160 defines "injury" and "personal injury" as meaning only "injury by accident arising out of and in the course of employment." The phrase "arising out of" in the Workers' Compensation Act refers to the injury's origin and cause. For an injury to "arise out of employment, the injury must be proximately caused by the employment." Therefore the employee must be injured while fulfilling work-related duties or engaging in something incidental to those duties *Ardis v. Combined Ins. Co*., 669 S.E.2d 628, 380 S.C. 313 (Ct. App. 2008). *Broughton v. South of the Border*, 520 S.E.2d 634, 336 S.C. 488 (Ct. App. 1999). The phrase "in the course of the employment" which refers to the time, place, and circumstances under which the accident occurred. *Owings v. Anderson County Sheriff's Dep't*, 315 S.C. 297, 433 S.E.2d 869 (1993). Therefore, the injury must "occur within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something

incidental thereto." Broughton v. South of the Border, 520 S.E.2d 634, 336 S.C. 488 (Ct. App. 1999). *Baggott v. Southern Music*, Inc., 330 S.C. 1, 496 S.E.2d 852 (1998).

Section 42-1-160 defines an injury by accident as a condition that is unexpected in the context of work duties, as such the worker would not view the resulting condition as a normal consequence of work. South Carolina Courts affirm this definition stating "An injury is accidental in that it is unforeseen and unexpected" or that the injury was unexpected and resulted from the normal performance of his duties. *Ellis v. Spartan Mill*s, 277 S.E.2d 590, 276 S.C. 216 (1981). Further, a, fall or other fortuitous event or accident in the cause of the injury is required" is not required rather "the unexpected result or industrial injury is itself considered the compensable accident." *Stokes v. First National Bank*, 410 S.E.2d 248, 306 S.C. 46 (1991).

Occupational Disease

Occupational diseases are covered under Section 42-11-10 et seq. Occupational diseases are treated as a compensable injury where (1) there is a disease which (2) arose out of claimant's employment (3) due to hazards more than those normally incident to employment (4) the disease is peculiar to the job (5) the hazard is peculiar to the job, and (6) directly resulted from claimant's continuous exposure to the hazard.

Affirmative Defenses

An affirmative defense represents a new fact or set of facts that operate to defeat a claim even if the facts supporting the claim are true. Regulation 67-603 provides that the defense must timely respond to Claimant's Form 50 hearing request or lose the ability to set forth affirmative defenses including the following:

> **42-9-60 - Injury or death occasioned by intoxication or willful 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 willful 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.

42-15-20. Notice to employer of accident or repetitive trauma.

(A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

(C) In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

42-15-40 - Time for filing claim; filing by registered mail.

The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from the accident, within two years of the date of death. However, for occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitively as having an occupational disease and has been notified of the diagnosis. For the death or injury of a member of the South Carolina National Guard, as provided for in Section 42-7-67, the time for filing a claim is two years after the accident or one year after the federal claim is finalized, whichever is later. The filing required by this section may be made by registered mail, and the service within the time periods set forth in this section constitutes timely filing. For a "repetitive trauma injury" as defined in Section 42-1-172, the right to compensation is barred unless a claim is filed with the commission within two years after the employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure. This section applies regardless of whether the employee was aware that his repetitive trauma injury was the result of his employment.

42-17-90 - Review of award on change of condition.

(A) On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. An award is subject to the maximum or minimum provided in this title, and the commission immediately shall send to the parties a copy of the order changing the award. The review does not affect the award as regards any monies paid and the review must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title.

(B) A motion or application for change in condition involving a repetitive trauma injury must be made within one year from the date of the last compensation payment for the repetitive trauma injury. Any filing not made within this one-year period shall be considered untimely and shall not be reviewed.

(C) A motion or application for change in condition involving an occupational disease must be made within one year from the date of the last compensation payment for the occupational disease. Any filing not made within this one-year period shall be considered untimely and shall not be reviewed.

Types of Benefits

The South Carolina Workers' Compensation system pays benefits to employees who have suffered wage loss because of a workplace injury. Benefits can be classified into the following five areas of cash benefits and wage replacement benefits based on the severity of injury and subsequent level of disability.

Temporary Total Disability

An employee is eligible for temporary total disability when he is unable to perform suitable employment on one or more calendar days following the day of injury. An employee who due to a compensable injury remains unable to earn wages after the first seven days of disability, is entitled to weekly benefits equal to two-thirds of his average weekly wage up to the maximum compensation rate. If the disability exceeds 14 days, the employee is entitled to receive compensation for the first seven days of disability. Temporary total disability benefits can continue for up to 500 weeks. Benefits terminate when the employee returns to work or when the employer provides credible evidence to the South Carolina Worker's Compensation Commission that the employee is no longer disabled.

Temporary Partial Disability

An employee is eligible for temporary partial disability when he can work but at a lesser rate of earnings than that of his average weekly wage of his occupation at the time of the accident. Temporary partial disability benefits provide compensation equal to two-thirds of the difference between the post-injury and pre-injury average weekly wages, so long as the amount does not exceed the statutory maximum weekly benefit. Temporary partial disability benefits may not continue beyond 340 weeks, and any number of weeks wherein temporary total disability benefits were paid will be deducted from the 340-week maximum.

Permanent Partial Disability

An employee who at the end of the healing period, also known as maximum medical improvement, is left with complete loss or loss of use of any member or part of the body may receive permanent total disability benefits notwithstanding his ability to earn wages. The rate of compensation is determined from the use of medical evidence which provides an opinion as to the percentage disability rating (loss of function) for the affected body part with 100% representing a total loss of function and 0% representing full functioning. The percentage disability rating is then compared to one of the body parts listed in the schedule of injuries contained in Section 42-9-30. Under the schedule of injuries, each body part is assigned a specific number of weeks of benefits.

Total Disability

Permanent total disability benefits are available to an employee who suffers a complete and permanent total incapacity from following any gainful occupation. Section 42-1-120 defines incapacity as an inability "to earn the wages which the employee was receiving at the time of injury in the same or other employment." South Carolina Courts treat total disability as an "inability 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." However, this does not require "not complete physical helplessness." *Coleman v. Quality*

Concrete Products, 245 S.C. 625, 142 S.E.2d 43,44 (1965). *Koon v. Spartan Mills*, 332 S.E.2d 544, 286 S.C. 190 (Ct. App. 1985).

Section 42-9-10 also provides that "The loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two thereof, constitutes total and permanent disability."

Death Benefits

Section 42-9-290 provides death benefits shall be paid 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," for a period of five hundred weeks from the date of the injury, and burial expenses up to but not exceeding twenty-five hundred dollars. Section 42-9-290 further provides "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."

Medical Compensation

Injured employees subject to certain condition are entitled to medical treatment for compensable injuries. Section 42-15-60 provides that "medical, surgical, hospital and other treatment, including reasonably required supplies, shall be furnished by the employer for a period not exceeding ten weeks from the date of injury to effect a cure or give relief, and for such additional time as will tend to lessen the period of disability." The South Carolina Worker's Compensation Commission may in its discretion order further necessary treatment.

For injuries resulting in total and permanent disability the injured employee is entitled to all reasonable and necessary medical care causally related to the original injury for life. *Munn v. Nucor Steel*, 336 S.C. 28,518 S.E.2d 289 (S.C. App. 1999)

Preparing Your Case:
Procedures for Claimant and Defendant

Submitted by Blakely Bellamy

Handling Workers' Compensation Claims from a Defense Perspective

Blakely M. Bellamy

I. Receipt of File

Typically, files are referred to defense counsel when action needs to be taken. Most commonly, this is one of the following:

- Respond to Form 50, Employee's Request for Hearing
- File Form 21, Employer's Request for Hearing
- Negotiate settlement with a *pro se* claimant
- Prepare clincher agreement

Though less common, files are sometimes referred for purposes of conducting a deposition of a claimant or a treating physician or responding to a Form 27 Subpoena for a claimant's personnel file. As soon as a new file is referred to defense counsel, letters of representation should be send out to the carrier, employer and opposing counsel, as well as putting the South Carolina Workers' Compensation Commission on notice of representation through eCase.

Upon receipt of new file materials, it is important to make sure you have as much information from the carrier and employer as possible. It is absolutely necessary to have Claimant's birthdate or social security number, WCC file number, correct carrier and employer information, and contact information for the employer representative. If not included in the initial file materials, ask the adjuster for the following documents:

- Form 12A, First Report of Injury
- Claim notes
- ISO Claim search (if performed)
- Recorded statement
- Communications with employer, claimant or opposing counsel prior to referral
- Surveillance footage

- Form 20, Statement of Wages of Injured Employee
- Form 50 (if filed)
- Updated Form 18 (if Form 21 is to be filed)
- Medical Records
- Final medical narrative (if Form 21 is to be filed)
- Form 14B (if claimant is *pro se*)
- Operative reports
- Any forms filed with the WCC (15, 17, 18, 19)

Additional documents should also be requested from the employer, even if a subpoena from opposing counsel is not pending. Documents that can be helpful to claim handling include:

- Complete personnel file
- Application for employment
- Background check
- Interview notes
- Interviewer contact information
- Letter offering employment
- Job description
- Payroll records
- Time cards
- W-2 or 1099
- Disciplinary records
- Accident reports
- Witness statements
- Witness contact information
- Security camera footage
- Work status notes
- Light duty offers

- Termination paperwork
- Short-term disability paperwork
- Unemployment records

If the employer responded to a subpoena from opposing counsel prior to referral of the file to defense counsel, request the responsive documents submitted and supplement with additional documents if necessary for compliance.

II. Investigation

Following receipt of a new claim, it is necessary to investigate the claim and conduct discovery. Initial investigation may include obtaining a LexisNexis Comprehensive Persons Report, which often identifies prior employers, criminal history, aliases, and civil actions. Because the information contained within this report is not always reliable, it is important to conduct follow up discovery in the form of subpoenas for the claimant's personnel files and records from the South Carolina Department of Employment and Workforce, as well as requests for the claimant's driving history from the Department of Motor Vehicles and arrest record from the South Carolina Law Enforcement Division. It may also be helpful to search for all criminal and civil filings and convictions on the SC Courts Website through the Case Records Search option.

In light of the prevalence of Social Media, researching the claimant on social media platforms such as Facebook, Twitter and Instagram is often the best way to gather information at the outset of the claim. In the event Social Media research shows the claimant is working for a new employer or participating in activities beyond their physical restrictions, private investigation may be beneficial.

Perhaps the most common form of investigation is through discovery request for medical records. If the adjuster and employer authorize discovery, subpoenas for medical records should be sent not only to the treating providers, but to any additional providers referenced in the medical records, in claimant's recorded statement or in their social media profiles.

It is also important to investigate the procedural posture of the claim, especially if common WCC forms are not contained in the initial file materials. A review of eCase should reveal which forms have been filed prior to referral of the claim to defense for handling. If those forms are not contained within the file materials, they should be requested from the adjuster. Alternatively, you may request a copy of the entire file from the South Carolina Workers' Compensation Commission for a fee.

III. Case Preparation and Claim Handling

Immediately upon receipt of new file materials, it is important to docket deadlines for any responsive pleadings, such as a Form 51, Employer's Answer to Request for Hearing. Within thirty (30) days of receipt of new file materials, an initial claim evaluation should be prepared and sent to the adjuster. The employer representative should also be copied at their or the adjuster's request. The initial claim evaluation should include an overview of the claim, the procedural posture, results of initial investigation or discovery, date of pending hearing (or estimated date), recommendations for further defense action and litigation budget.

Throughout the claim handling process, it is important to comply with carrier guidelines and prepare periodic reports. These should include claim status, results of recent activity and recommendations for further defense action. In between periodic reports, frequent communication with the adjuster and employer is necessary to keep them informed of pending discovery efforts, action taken by opposing counsel, and the claimant's medical and work status.

Often, an adjuster or employer's consent is required prior to noticing the claimant's deposition. If the claimant's deposition has not been taken at the time a hearing is requested, it is necessary to notice the deposition immediately in order to allow time to conduct follow up discovery. Following the deposition, a formal report should be prepared summarizing the claimant's testimony, the impression of the witness and recommendations for further defense action. In addition, it may be necessary to issue

additional subpoenas for any medical providers or previous employers referenced by the claimant during their deposition testimony.

It is also necessary to prepare a formal report regarding exposure once the claimant reaches maximum medical improvement and prior to a hearing or mediation. This report should include a complete overview of the claimant's medical treatment, procedural posture, an evaluation of the total exposure for medical and indemnity benefits and a recommendation for settlement authority. It can often take up to a month for a carrier to obtain settlement authority; therefore, it is necessary to ensure any evaluation for exposure is prepared well in advance of the time when settlement authority is needed.

Preparing Your Case: Procedures for Claimant and Defendant

Submitted by Benjamin T. Cruse

Taking time to spend with the prospective client during the initial interview is a crucial first step to efficient and effective representation. This first step allows the attorney an opportunity to assess the claim, assess the prospective client, investigate the issues, educate the client and set client expectations.

Assessing the claim means asking simple questions to determine the viability of a claim with basic initial information. Of course, every case will be different and could have many variables that may not become known until much later in the claim, but taking the time to assess the basics of the claim during an initial interview should give the attorney a good idea whether the facts as set forth by the prospective client represent a viable claim. Determining whether there is a viable claim early is not only important to the attorney but beneficial to the client as well. Determining whether the claim is viable early on will prevent wasted time spent on the file by the attorney, but will also allow the prospective client the opportunity to find alternative counsel and help to avoid any negative impact on the client's claim by the passage of time. It is useful to have a set checklist or questions to ask each prospective client that covers the basics of each claim to ensure the relevant information is obtained.

Assessing the prospective client is a little more nuanced than assessing the factual aspects of the claim. Clients come in all shapes and sizes. Some red flags may be overt; others subtle. Some prospective clients may know more than you do about the law and how to handle their claim. Others will have an overbearing spouse who tries to assert themselves in every conversation. Some clients have ulterior motives that can become clear during the initial interview. For instance, a prospective client who was recently terminated and now seeks representation on an accident that occurred well before their termination may be a red flag to avoid. Often employment disputes arise and consume the underlying workers' compensation issues. What may otherwise be a minor injury or issue could erupt into a lengthy power struggle between employee and employer over issues not relevant to the underlying claim. Or the client may feel they were wrongfully terminated and think bringing a workers' compensation is their best recourse. Some clients may be working in a job they simply do not like and want to get out of it. These real-world factors come into

play during the claim and by identifying them early you can either avoid them altogether or be prepared to manage them according.

Investigating the issues means more than just the basics of the claim as set forth above. I always ask my clients what they feel are the issues in the claim or what do they feel like needs to be done in their claim. This is sometimes a risky question, but I have found it often sheds light on assessing the client's motives and credibility and allows some insight into looking at the claim through the client's eyes. Sometimes what is most important to me after an initial interview may not be what the client is most concerned about. This allows me valuable insight to ensure the client feels they are being heard and their concerns are being addressed quickly.

For many prospective clients this is their first interaction with a lawyer or first workers' compensation claim. Educating your client and setting reasonable expectations during the initial interview will certainly pay dividends through the life of the claim. Each client needs to be made aware of the basic functions of what you can do for them. Often, clients think lawyers can handle all their problems in every aspect of their life. It needs to be made clear you are representing them in their workers' compensation claim and not the purchase of their home, or their eviction, or a divorce, or business deal, or a labor dispute. It also needs to be made clear what benefits are available under the Act. Most clients feel that they should get paid for the pain and suffering they have been through even when there is little if any permanent disability. Be very clear early on about what disability benefits are and that they do not include pain and suffering. Explain temporary disability and when that applies as well as the idea of permanent disability. A claim may not be ready to discuss settlement or permanent disability for months or years after this initial interview, but by explaining the concept at the outset of a claim the client is not blindsided by the information when they are preparing to settle. This conversation will help set the client's expectations as well and should attempt to ground any expectations. Clients often talk about ads they have seen on tv about large settlements, or know a friend or relative who recovered big bucks after their settlement, and may think their claim will surely land them a large recovery. Explaining to the client early on that each claim is different and rests on its own

merits will help them focus on their claim and realistically assess the damages they may recover. This is often a difficult conversation but will pay off when discussing settlement value with the client months down the road.

After the initial interview it is important to immediately begin your investigation. Workers' compensation benefits are predicated largely on medical evidence so begin by requesting medical records from all known providers. Also, send your subpoena to the employer for the client's personnel file including any wage records, disciplinary actions, accident reports, written statements etc. Locate any potential witness who may be useful and interview them. The objective is to get your ducks in a row early. Keep investigating. Just because the initial phase of the claim is over, and you may have your subpoenas and request out doesn't mean the job is over. Issues will arise that require additional investigation and often questionnaires are needed to address these issues. Get your questionnaire early and send it to defense or the adjuster. You may want to discuss the claim with an employer representative which can be accomplished with a Rule 30(b)(6) deposition.

All your prior action, from initial interview through investigation, will help prepare the claim in the event litigation is necessary.

WORKERS' COMPENSATION CLIENT INFORMATION FORM

Appointment Date: _____ **STATUTE DATE:** _____
Type of Accident: _____ **Date of Accident:**

A. Client Information:

Name: _____ SSN: _____ DOB: _____

Address: _____

Home Phone: _____ Mobile Phone: _____ Work Phone: _____

Email Address: _____

Mailing Address: (If different) _____

Marital Status: Single Married Separated Divorced Widowed

Spouse's Name: _____

Prior Attorney: Yes ___No___ If Yes, Name and Number: _____

Previous Claims or Injuries? Yes _____ No_____ When: _____Suits: _____

B. Alternate of Emergency Contact:

Name, Address, Phone Number of nearest friend/relative **NOT LIVING WITH YOU**:

Name: _____ Relationship: _____

Address: _____ Phone: _____

If minor, name and phone number of **parent or legal guardian**: _____

C. **Lost Wages:** Have you missed work due to this accident? Yes _____ No _____

Employer at Time of Accident: _____**«F16»**_____

Address: _____

Phone: _____ Length of Employment: _____

Occupation: _____ Average Weekly Wages: _____

Job Description: _____Name of Supervisor: _____

Current Employer: _____

Address: _____

D. Client's Health Insurance:

Group: _____Medicare: _____ Medicaid: _____Worker's Comp: _____

ID/Group #: _____

E. Accident Information:

Date of Accident: Day: _____ Time: _____AM/PM

Accident Location: _____«F12»_____

Owner of Premises Where Injured: _____

Person in Charge: _____

Witnesses: _____

Description of Accident:

«F13»

F. Client's Injuries:

Describe Injuries:

Medical Treatment Since Accident: **«F15»**

Did you take an ambulance? Yes_____ No_____

If Yes, which Ambulance Service? _____

Hospital (s): _____
Name Address Phone Date of Visit

Doctor(s): _____
Name Address Phone Date of Visit

When did you first seek medical treatment for your injuries? _____

Did you go on your own? _____ If no, who sent or took you there? _____

What was the diagnosis? _____

_____

Were you X-rayed? _____ Findings? _____

Describe treatment, if not set out above: _____

What other medical care have you received for injuries received in this accident: _____

_____

Describe medical care you are presently receiving: _____

_____

Do you know if you will need further treatment, surgery or hospitalization? _____

G. **SUBCONTRACTOR / INDEPENDENT CONTRACTOR**

If you were a subcontractor or independent contractor, how and when were you paid? _____

_____

Was compensation insurance taken out on you? _____

Who provided tools? _____ Name of supervisor: _____

_____ Did supervisor/boss have right to control you? _____

_____ How? _____

1. **CO-EMPLOYERS**

Were you employed by anyone else at the time this injury occurred? _____

Where? _____ Rate of Pay: _____

Position: _____ Hours worked: _____

Did you report this to employer: (insurance carrier) when hurt? _____

2. **PRIOR INJURIES**

Were you ever injured before this accident? _____ When? _____

Where? _____

Doctor: _____ Extent of disability: _____

Was a lawsuit or worker's compensation claim filed? _____ If yes, name of lawyer (if applicable), and results? _____

Prior Disability:

At the time of this accident, were you suffering from any disability, limitation or impairment from a prior injury or condition? _____

If so, describe: _____

_____

_____

H. **PRE-EMPLOYMENT PHYSICAL**

When you were hired, were you given a physical? _____ When? _____

Did you fill out a health questionnaire? _____

Did you answer honestly regarding prior injuries, accidents or disabilities? _____

If no, describe: _____

I. THIRD PARTY LIABILITY

Was your injury caused by any faulty equipment? _____ If yes, detail, giving manufacturer, purchase data, malfunction, cause, etc.: _____

_____

Was your injury caused by someone other than a fellow employee or employer's negligence? _____ If yes, please detail: _____

Preparing Your Case:
Procedures for Claimant and Defendant

Submitted by Erroll Anne Y. Hodges

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MCANGUS GOUDELOCK & COURIE
MGCLAW.COM

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Receipt of the File, Investigation and Case Preparation

Erroll Anne Y. Hodges

McAngus Goudelock & Courie

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Receipt of the File

- Initial referral letter from adjuster
- Identify referral purpose:
  - Settlement
  - Investigation/Defense
  - Subpoena response
- Conflict check
- Initial letters of representation
  - Commission
  - Opposing Counsel
  - Insured

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Initial File Handling Regardless of Purpose

- Assess forms and filings to avoid fines
  - Form 12A
  - Form 18's, 15's
  - Form 17
  - Form 19
  - Form 50
- Assess compensability and medical records
- Make contact with Claimant or representative

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Files Referred for Settlement

- Assess facts, compensability, medical records.
- Assess employment status
  - If no longer employed- typically clincher
  - If still employed- typically Form 16A
- Make initial recommendations to adjuster on:
  - Permanency, back TTD, or back TPD exposure
  - Future medical value
  - Settlement document
  - Defense costs

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Files Referred for Settlement – Continued.

- Obtain Form 14B or most recent medical notes
- Request Clincher Conference or Informal Conference
  - Clincher Conference- Commissioner
  - Informal Conference- Deputy Commissioner
- File Form 21 (if needed)
  - Establish timeline for resolution
  - Establish claim to any credit for overpayment

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Files Referred for Settlement- Continued

- Obtain authority to resolve the claim
- Negotiate settlement if feasible
- Prepare MSA's/ensure client has sent to vendor
- Mediation if necessary
  - Mediation briefs and documents
- If the matter will not resolve prior to a hearing:
  - Schedule depositions
  - Assess need for surveillance
  - DEW checks, SLED checks, social media checks

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Investigation/Defense Files- What Claimant Must Show Injury by Accident

- Disabling Injury - requires an inability, because of injury, to earn same wages as before
- Accidental in character - unexpected event or result
- There is no requirement for a specific/traumatic event or injury
- Injury from performing normal job duties without a specific accident can be compensable

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Investigation/Defense Files- What Claimant Must Show
Injury by Accident
Repetitive Trauma Claims

- "Requires an injury which is the result of a series of events of a similar or like nature occurring regularly, continuously, or at frequent intervals over time.
  - Requires medical evidence of a causal connection between the injury and the employment.
  - *Presumably*, the injury must still be accidental, in that the result of the repetitive trauma is not foreseen.

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Investigation/Defense Files- What Claimant Must Show
Compensability

- **"Employment Relationship"**
  - Must be an employee
  - Must be earning income - no volunteers
  - Independent contractors and other business owners are not employees without electing
  - Employees of independent contractors working for you are deemed your "statutory employees" unless the sub-contractor has own insurance coverage

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Investigation/Defense Files- What Claimant Must Show Compensability

- **"Arising out of Employment"**
  - Causation - the injury must be caused by the work being performed
- **"In Course of Employment"**
  - Time and place - the injury must occur while at work
  - Going to and coming from work are not covered except under special circumstances

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Investigation/Defense Files- What Claimant Must Show Notice and Statute of Limitations

- **Time Requirements for both:**
  - Notice to employer - 90 days
  - Time for filing claim - 2 years
  - There are several exceptions under SC law for the 2 year statute of limitations including special rules regarding repetitive trauma.

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Investigation/Defense Files- What Claimant Must Show Compensability

- Special Injuries – "unusual and extraordinary circumstances" standard
  - Heart attacks
  - Strokes
  - Mental-mental
  - Hernias: 42-9-40: must meet all factors to be compensable: injury, appeared suddenly, accompanied by pain, immediately followed an accident, did not exist prior

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Procedures for Investigation/Defense Referral

- Identify the "red flags"
  - Mechanism of injury
  - Time of reporting (near threat of firing, etc.)
  - Length of employment
  - Prior claims
  - Pre-existing conditions
  - Recent non-work related accidents
  - Obtaining a lawyer while all benefits being given
- Formulate defense strategy with adjuster
- Obtain authority to proceed
- Assess nuisance value settlement/possibility

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Procedure for Investigation/Defense Referral

Depending on the red flags, there are several investigative steps possible:

- Depositions
- Witness statements
- Site visits
- Subpoenas for medical records/medical chronology
- ISO Claim searches
  - And subsequent follow up
- SLED checks
  - Felonies within last 10 years admissible; older crimes of dishonesty for information purposes.
- DEW reports

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Procedure for Investigation/Defense Referral

- Ergonomic expert opinions
  - Repetitive trauma cases
  - Injury cases
- IME's
  - Pre-existing conditions
  - Re-evaluation of any films/prior reports
  - Medically complex cases
- Surveillance
  - If claimant continued working, possible employer cameras
  - Independent surveillance

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Procedure for Investigation/Defense- Continued

- Questionnaires to experts
  - Simpler issues, small amounts of accompanying evidence, follow ups on depositions
  - Reasonable degree of medical certainty
- Expert depositions
  - More complex issues, causation and pre-existing conditions
  - Where there is impeachment evidence for the Claimant- prescription fraud, misrepresentations of pre-existing conditions
  - Problems reaching MMI.

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Procedures for Investigation/Defense – Continued

- Subpoenas to pharmacies
  - Not common. Usually where there is prescription fraud.
- Social media
  - Snapshot of non-work related activities
  - Violations of restrictions
  - Returning to work at another employer
  - Other impeachment evidence

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Procedures for Investigation/Defense- Continued

- Request prior SSD applications
  - Gives a good picture of the prior disability
  - Lists other treating doctors for subpoenas
  - May identify other expert depositions necessary

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Investigation/Defense Files- Pre-hearing Requirements Mediations

- S.C. Reg 67-1802
- All claims arising under 42-9-10, or claiming permanent and total disability under 42-9-30(21), occupational disease, third party lien, contested death, mental/mental, and any claims with concurrent jurisdiction with the Federal Longshore Act MUST be mediated prior to a hearing.
- Only applies where compensability is admitted (except for contested death claims).
- Pro Se Claimants are exempt from the mediation process unless they desire to go through mediation.

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Investigation/Defense Files- Pre-hearing Requirements Mediations

- If not mandatory, either party can request mediation on Form 50, 51, 21 or 22
- If not mandatory, the other party can object to mediation
- If required, mediation must take place within 60 days of Form 51 or Form 22
- Mediation costs to be split equally between parties

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Investigation/Defense Files- Pre-hearing Requirements Mediations

- If the parties are at all close in negotiations, attempt settlement pre-mediation
- If that fails, prepare mediation brief
- Obtain authority to settle
- Prepare client for telephonic or in person appearance

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Investigation/Defense Files- Pre-hearing Requirements

- Pre-hearing briefs
- Preparation of exhibits
- Attempts to settle, if applicable

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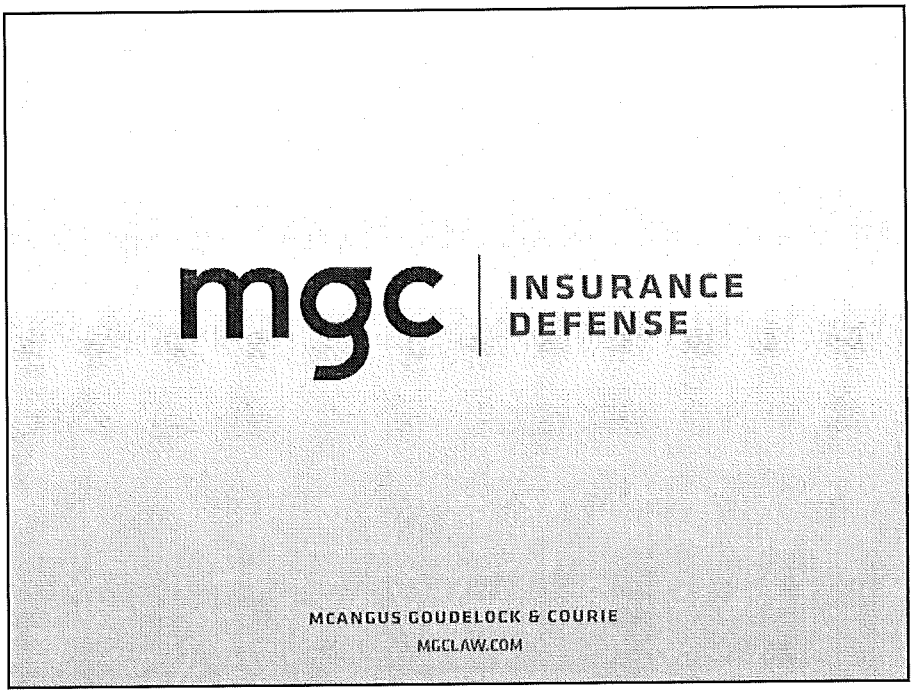
Subpoena Response Files

- Read and analyze subpoena
  - Not every initial subpoena requests the same information.
- Communicate with insured regarding documents necessary
  - Not every insured stores documents the same way.
  - Not every insured keeps all the documents requested
  - Frequent misunderstanding regarding wages- not just a Form 20; but the actual wage statements/paystubs
- Read and analyze all materials to preserve privileged documents/work product.
- Respond with documents and any privilege log.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Determining the Value of the Claim

Submitted by Erroll Anne Y. Hodges

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Assessing the Claim Value

Presented by:
Erroll Anne Y. Hodges
McAngus Goudelock & Courie

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Estimating Exposure

SC Law provides three types of benefits:

1. Medical Benefits
2. Temporary Indemnity Benefits
3. Permanent Indemnity Benefits

All three types of benefits must be considered when evaluating exposure.

The accuracy of the estimate in any given case improves the nearer the claimant is to MMI.

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Estimating Exposure

Medical Benefits

1. Nature/ severity of injury and treatment.
2. Need for ongoing/ future medical treatment.
3. Varies from doctor to doctor.

This component of estimating exposure is highly speculative prior to the Claimant reaching MMI. Prior to MMI, the claimant's medical condition can change at any time. After MMI, future medical can be estimated based on physician's response on Form 14B.

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Estimating Exposure

Medical Benefits

1. Identify finite medical expenses and indefinite expenses.
2. Cost of medical benefits limited to fee schedule.
3. Post-MMI, obtain Form 14B from all doctors.

Finite medical expenses occur when a claimant will need a future medical procedure such as revision surgery, replacement of arthrodesis, or hardware removal, for example. The cost of these benefits can be found in the fee schedule. Indefinite medical expenses, such as pain management and medications, are harder to estimate.

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Estimating Exposure

Medical Benefits

1. Medicare Set-Aside allocation.

Medicare's interest must be considered in any worker's compensation settlement. Medicare must approve the clincher of future medical treatment under certain circumstances. These claims require an MSA, which is usually non-negotiable and forms an excellent estimate of exposure for future medical treatment. Non Medicare-covered medical expenses must also be considered.

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Estimating Exposure

Temporary Benefits

1. Nature/ severity of injury and treatment.
2. Availability of light duty/ salary in lieu of compensation.
3. Difficulty of employment.
4. Disability from concurrent employment.
5. Restrictions and disability will vary by doctor.

Estimating TTD benefits is speculative for the same reason as medical treatment; temporary disability varies from doctor to doctor and from employment to employment.

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Estimating Exposure

Temporary Benefits

1. Identify proper average weekly wage.
2. Consider employer's return to work program.

Many employers struggle with preparing an accurate Form 20. The best estimate of TTD exposure considers the severity of the injury and anticipated medical treatment, along with the availability of light duty employment to arrive at a rough estimate of exposure.

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Estimating Exposure

Permanent Benefits

1. Scheduled member disability versus wage loss.

Are the claimant's injuries limited to a single scheduled member without affecting another body part? If so, the claimant is limited to compensation under scheduled member statute. If injury is to body part not listed in scheduled member statute, or if injury affects more than one body part, total or partial wage loss must be considered.

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Estimating Exposure

Scheduled Member Disability

1. Impairment rating is important but not determinative.
2. Permanent restrictions.
3. Ability to maintain same type of employment.
4. Claimant credibility.
5. Doctor credibility.
6. Age
7. Transferable skills
8. Assigned hearing commissioner.

The WCC will consider all relevant factors, including numbers 1-7 above, in determining partial permanent disability.

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Estimating Exposure

Scheduled Member Disability

1. Doctor's ratings and restrictions, treating doctor versus IME doctor.
2. If claimant still works for employer.
3. If claimant does not work for employer.
4. Adjust estimates up or down based on other factors.

Doctor credibility is very important when using the impairment rating to estimate exposure. The WCC often knows the reputations of the doctors and assigns weight to their opinions based on their perception of that doctor. The opinion of a credible authorized treating physician typically is accorded more weight than the opinion of an IME doctor, no matter who arranged the IME.

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Estimating Exposure

Partial Wage Loss

1. Applies when injury affects multiple body parts.
2. Permanent restrictions and vocational outlook important.
3. Vocational history of claimant.
4. Educational level of claimant.
5. Age of claimant.

The WCC repeatedly indicates a willingness to entertain partial wage loss arguments. There must be a readily-available job market for the claimant to return to. A partial wage loss evaluation typically requires a vocational evaluation and labor market survey.

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Estimating Exposure

Partial Wage Loss

1. Two-thirds difference between pre- and post- injury earning capacity over 340 weeks.

For the WCC to make an award of partial wage loss, a vocational evaluation and labor market survey is typically necessary. To estimate exposure in absence of vocational evidence, look to see the extent to which permanent restrictions differ from former job requirements.

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Estimating Exposure

Total Wage Loss

1. Similar analysis to partial wage loss.
2. Permanent restrictions and vocational outlook important.
3. Ongoing/ future medical treatment.
4. Vocational history of claimant.
5. Educational level of claimant.
6. Age of claimant.

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Estimating Exposure

Total Wage Loss

7. Rebuttable presumption if 50% or greater PPD to back.
8. Loss of both hands, arms, shoulders, feet, legs, hips, vision in both eyes, or any two thereof.

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Estimating Exposure

Total Wage Loss

1. Maximum award of 500 weeks of benefits.

With the exception of claims where claimant suffers significant permanent impairment to the back, this analysis is similar to the analysis for partial wage loss. The WCC will look to the same factors to determine whether a labor market exists for the claimant to return to. Of note, the WCC can disregard ongoing employment if deemed make-work.

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Estimating Exposure

Lifetime Benefits S.C. Code Ann. 42-9-10

1. Physical brain injury combined with permanent and total disability.
2. Paraplegia and quadriplegia.

These categories constitute an exception to the 500 week limitation on benefits. No total lump sum payment may be ordered by the SCWCC in any case under this section where the injured person is entitled to lifetime benefits. Attorneys' fees and partial lump sum benefits can be awarded.

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Estimating Exposure

General Considerations

1. Overpayment or underpayment of benefits.
2. Discount for payment of benefits as lump sum.
3. Compensation for waiver of change of condition.
4. WCC will scrutinize unrepresented clincher.
5. James v. Anne's, Inc. language.

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Estimating Exposure

Conclusion

Estimating exposure in any given case cannot be based on a purely mathematical formula but requires careful consideration of all available evidence with thought toward how the evidence will be evaluated by a commissioner. In general, impairment ratings, permanent restrictions, and ongoing/ future medical treatment are of primary importance, but credibility of medical providers, the claimant, and other experts or witnesses must be considered.

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Assessing the Claim Value

Presented by:
Erroll Anne Y. Hodges
McAngus Goudelock & Courie

Medical Issues During the Claim

Submitted by Thomas M. Gagne

Workers' Compensation From A-Z

Selected Medical and Procedural Issues

By

Thomas M. Gagne, Esq.

Greenville, South Carolina

November 24, 2017

Good morning. I'd like to take this opportunity to thank the fine folks at the National Business Institute for making this CLE possible.

Today I'll be reviewing the concepts of masking symptoms and differential diagnosis as well as the features of several common injuries you'll have to deal with as personal injury attorneys practicing workers' compensation law.

Along the way, we'll touch on a few ancillary, yet critical topics: discovery challenges you'll face as you construct your case, the claimants' rights to a second opinion, her duties to comply with authorized treatment and the consequences of failing to do so, independent medical evaluations, what they are and when to use them, crafting compelling medical interrogatories, what functional capacity evaluations and how to deploy them, and lastly, the role vocational rehabilitation.

My goal is not to examine the leaves on the trees of all these topics, as such a lecture would necessarily exceed the time allowed, but I do hope that after my talk you will have a bird's eye view of the features of the medical evidentiary and procedural challenges you'll likely encounter.

I've designed this presentation for those attorneys just starting out in their practice and for those with less than five years handling workers' compensation cases. But I hope that attorneys with more experience may also pick up a few things that would prove helpful to their practice. My analytical vehicle will be a case study based on an actual case I handled a few years ago. The names of the *dramatis personae* have been changed of course.

So, let's jump right in. Adrian Phillips, a new workers' compensation client, was twenty minutes late for his initial interview with me. He finally appeared with his wife, sauntering into my office, ostensibly without a care in the world. He smelled like a combination of cigarette smoke and marijuana. But his thoughts were lucid, and he spoke clearly. I concluded he understood his rights and possible remedies we would pursue, so I proceeded with the interview.

Adrian is a 42 years old male, Caucasian, standing d six feet-four inches and weighing 165lbs -- underweight for his height. His medical chart noted an impressive 117 over 70 blood pressure.

Large veins traced intricate designs on sinewy forearms. Richly burned by the Carolina sun, you could tell Adrian worked outside a lot. Adrian's handshake was firm and absent was any overt display of the power you knew lay in those arms.

It was easy enough to sense the years of hard work to which Adrian's leathery hand had been subjected, a tough hand which tapered into long, nicotine stained fingers. His small finger curled at an odd angle, as if he'd once fractured it, but decided it wasn't worth the trouble and expense to treat.

Adrian claimed he drank 1-2 beers a day and was a moderate marijuana user, but never drank nor used at work and never partook when operating a car or heavy machinery. He had fallen into the marijuana habit in the early nineties as a teenager when the main recreation for his peer group was smoking pot while listening to grunge.

He had dropped out of high school at 17 "because he wasn't learning anything anyway", but, prompted by his wife Rita, whom he met and fell for at 24, he completed his GED just fine, receiving the highest score in his class. His favorite subject was math. He had no vocational training, picking up the skills he did possess OTJ. Despite a good mind, Adrian was still only an assistant manager in the warehouse he'd worked in for the last 18 years. He earned 19 dollars an hour.

Adrian's driving record was clean, but his RAP sheet revealed a typical hell raiser – a kid who failed to grasp the seriousness of the trouble he courted, a kid raised on Star Wars movies that features as one it's heroes Han Solo, a self-confessed thief and swindler, that is, a typical male example of his generation who grew up too late and thought movies and television were an accurate reflection of reality and proper human behavior.

His most serious charge was possession with intent to distribute crack cocaine at 21 for which he received a five-year sentence, suspended to one with four years' probation accompanied by alcohol and drug counseling, but he had been arrested several times since for simple assault, a few fraudulent checks and once for receiving stolen goods. It had not been an easy road for Adrian; and no doubt contributed to making the road harder than it needed to be.

These criminal shenanigans occurred in his late teens and early twenties. But now he truly appeared to be a dedicated worker and faithful husband, ready to lend a hand to a newbie employee brave enough to breach Adrian's quasi- ersatz fearsomeness to ask for guidance.

Now, Adrian always "took a rain check" when the guys invited him for a "few pops" at the local strip club. He liked to get home, see Rita, fix old cars – his second love, and rummage around junk yards on weekends for car parts, occasionally rescuing a serviceable kid's bicycle save a missing part or two-- bikes which he would then refurbish and donate to a nearby home for parentless kids. Rita knew about the bikes, but only Adrian and the staff at the local SPCA knew he would donate a 20-pound bag of kibble on most Fridays, usually his first purchase after cashing his paycheck. He never talked about the dog food, and it never occurred to him to claim it as a deduction on his tax return.

Adrian and Rita were in significant financial distress, Rita having lost her job several months previously due to the stagnant economy. According to them, their monthly income had fallen by at least 60%, and the fact that Adrian had not received any TTD (temporary total disability) since his accident despite a note from the doctor excusing him from work meant that financial collapse was imminent as the couple lived from paycheck to paycheck and had no savings.

Apart from the injuries due to the accident, Adrian had no pre-existing conditions or chronic conditions save one. He had suffered 2 herniated discs in his cervical region when he was 31 resulting from a motorcycle accident. He underwent several ESI treatments (a process we'll cover later) and had not complained of cervical pain since the wreck.

On October 27, 2015, Adrian suffered an injury arising out of and in the course of employment. As mentioned, Adrian was a warehouseman, employed in Shipping and Receiving for a company called International Automotive Parts, based in Easley, South Carolina.

Delivery trucks routinely backed up into one of Shipping and Receiving's 14 loading/unloading docks. Standard operating procedure required the trucks to "hook onto" a ramp that connected the rear of the truck with the warehouse, so workers could use forklifts and other heavy transportation devices to deliver the pre-fabricated parts to stations within the Easley plant where they were counted, verified for quality and then entered into a database before being transferred for final assembly.

Adrian had worked in Shipping and Receiving at for the last eighteen years, had had a few "write ups" for being late and belligerent, but he was generally liked by management and co-workers.

Adrian stated he didn't like one of his supervisors and that he was out "to get him" for some off-color comment Adrian denied making. Adrian had not risen in the organization as quickly as he and Rita had hoped, most likely a result of his truncated education and sheer lack of ambition, an early casualty of chronic THC use.

As Adrian told his story, I noticed he nurtured a permanent frown, as if he was mad at the whole world, but nevertheless told his accident story clearly, succinctly, while generally omitting the usual recriminations about fellow employees and management. In fact, Adrian rarely digressed from his tale. Unfolding it in a calm, articulate, deliberate manner. His nervousness was betrayed only by the fact that he continuously rubbed his hands together.

The facts of the accident were as follows: as Adrian unloaded a 250-lb. piece of equipment at approximately 1100 a.m. on a Tuesday, he stepped onto the ramp connecting the truck to the bay. The ramp, apparently unable to bear the weight of the load and himself collapsed along Adrian.

On the way down Adrian's right upper extremity, right shoulder and the temporal part of his skull severely impacted the truck's bumper.

He lay on the ground for about 5 minutes, stunned, breathless, and confused. Shards pf pain coursed down his right arm -- from his shoulder to his hand. His neck pulsed with pain.

Co-workers who witnessed the accident notified the safety manager, Shirley Jenkins. Upon arrival, Shirley was more interested in how the accident happened instead of how Adrian felt, completing all the fields of the incident report form --- information supplied by employees, some of whom had failed to actually see the accident but nevertheless felt compelled to get in on the action. Apparently, it was better to rubberneck an accident scene than work.

Th injury scene looked gorier than it had a right to be as most of the blood resulted from Adrian's head wound as the skull is vascular-rich.

Although meticulous, Shirley neglected to take Adrian's statement. Nor did she give him a copy of the report. She called the head office that called the nearest hospital which dispatched an ambulance to the scene.

At the ER, Adrian complained of pain in his right arm and neck which led the ER physician to the preliminary diagnosis of cervical radiculopathy. Dr. Fleming, the authorized neurologist, employed by the company's workers' compensation carrier, and to whom Adrian was subsequently referred ordered a series of MRIs which disclosed two bulging discs in Adrian's neck accompanied by spinal cord impingement, resulting in ***radiculopathy*** which would account for his arm pain.

As we're getting in to diagnostic and anatomical terms, let's take this opportunity to discuss the human spine.

Of all the pathologies we face as personal injury lawyers, few are as common as pathologies to the spine. The spine and spine related disorders due to some type of trauma is the bread and butter of our practice. You'll find that most motor vehicle accidents, or MVA's, and Worker's Compensation cases involve spinal injuries – from its most common form, soft tissue sprain and strain to major multilevel nerve compromise requiring invasive procedures and long-term treatment.

So, let's get acquainted with our friend and foe -- the human spine. See **Exhibit lateral view of the human spine.** The terminology and concepts I'll be using will become second nature to you very soon. So, relax. It'll come, if not via diligent study then through intellectual osmosis.

The human spine is composed of five distinct parts: the cervical section, or neck, the thoracic section forming the middle of the spine, the lumbar section forming the lower section which together with the cervical section presents the most problems, the sacrum, this flat piece of here, and the coccyx, the last set of vertebrae representing the vestiges of our ancient ancestor's tails. Although the coccyx is vestigial, injuring what is commonly called our tailbone is quite painful as anyone here can attest to who has fractured, bruised or otherwise injured his or her "butt-bone". The whole area is obviously nerve rich.

The spine, along with the brain. forms ***the central nervous system***. **See Exhibit , Central nervous system.** The spine connects to the brain via the brainstem and the medulla oblongata, **See Exhibit , Closeup of brainstem and medulla oblongata.** The nervous system is a vast network of nerve cells sending electrical signals, many automatic, some voluntary, between different corporeal destinations, up through the spine and into the corresponding parts of the brain and back again. A huge enclosed organic circuit, breathtaking in its complexity and capabilities, a masterpiece of evolution, responsible for finest poetry as well as the basest instincts.

Now, the spine itself is composed of bony structures called ***vertebrae*** which, amongst many other functions, forms the skeletal architecture of the spine. Each section of the spine has a specific number of vertebra – the cervical contains 7, the thoracic 2, and the lumbar 5. Injuries to the sacrum and coccyx exist of course, but within the scope of this module I'm going to omit a discussion of the disorders of these body parts.

Tubular spaces run throughout the spinal vertebrae, called foramina, through which the spinal cord, a complex bundle of nerves, flows, itself branching into lesser and lesser branches throughout the body called the peripheral nervous system. See **EXHIBITS , Diagram of foramina and the peripheral nervous system.**

Other foramina dot the edges of the vertebrae allowing ligaments and other soft tissue structures to access the spinal column supplying support as well as supplying it with blood and oxygen. As you can see every vertebra share structural similarities but can dramatically differ depending on their placement in the spinal structure.

The vertebrae are dynamic, meaning they allow us to twist, turn, bend, reach and so forth – necessary functions in our daily life, and if injured can significantly affect a person's livelihood, especially if her job if it is mainly physical.

Nature has provided us with shock absorbers between the vertebrae preventing them from mutual impact as we move, called ***intravertebral disc's,*** and therein lies the rub (excuse the pun) of most spinal pathologies. **EXHIBIT. DISC**

Intervertebral discs are circular structures within which rest the ***nucleus pulposes***, a soft, spongy tissue surrounded by tougher tissue called the ***annular fibrosis***, the tough outside of donut, if you will. Intervertebral discs are elastic, compressing or expanding depending on the upright or supine position of the client and account for a quarter of the length of the spine

When these structures tear, they allow the nucleus pulposes to ***herniate*** and ***impinge*** upon the spinal cord, that vast bundle of nerves running up and down and through the spinal column – the body's information superhighway. This impingement in turn usually results in pain down ***the extremities***, i.e., the arms and legs. If the herniation is serious enough it can affect bowel and bladder function. The most serious derangements can result in ***permanent paralysis.***

Now, MRIs are your best bet in detecting herniations. They are the gold standard test in this area even if the basic technology is about 40 years old. The radiating pain is medically referred to as ***radiculopathy,*** and we saw it in Adrian's presentation of pain in his right arm.

If the pain's locus lies in neck and the upper extremities, cervical herniation is the likely culprit. Radiculopathy in the lower extremities results from a lumbar herniation. Radiculopathy in the

Lower spine radiating into the extremities is commonly referred to as ***sciatica***. Keep in mind also that the patient may be suffering from multiple herniations. The classical symptoms or signs of radiculopathy include numbness, tingling and pain within the extremity often coupled with a loss in range of motion ***(ROM).*** **EXHIBIT Rad**

It's important to note the difference between a disc bulge and a disc herniation. An MRI may reveal several disc bulges, and yet the patient remains asymptomatic. This is generally because the herniation has yet to impinge on , i.e. contact, the spinal cord to such an extent as to generate radiculopathy. Vertebral bulging absent impingement on the spinal cord usually presents no problem. However, if the bulge ***does*** impinge upon the spinal cord, pain, at times quite severe, accompanied by numbness and tingling in one or both upper extremities may point to a serious tort case if the impingement is a proximate result of negligence or a job injury. **EXHIBIT . Herniated Disc impinging on spinal cord.**

Moreover, bulging discs do not respect age. I've seen clients in their 20s test positive for disc bulges, but which were asymptomatic. Most people by their mid to late 30s experience some bulging discs, even multi-level bulging, so if your MRI reports notes disc bulging absent the word impingement or words to that effect, especially if the client does not report pain, don't get too excited as this is probably unrelated to the type of disc herniation resulting in radiculopathy which might require more radical intervention.

Also, the herniation's severity in individuals depends on the person's genetics, lifestyle, and job duties. For example, smoking can aggravates discopathologies, and a person with a desk job might not experience the same level of pain as a construction worker.

I have also encountered cases where the client exhibits radiculopathic herniations by the age of 25. I have seen older patients, well into the 50's, who exhibit minimal bulging with no impingement and are entirely asymptomatic. This despite similar types of work, lifestyles, education, socioeconomic status. In short, no absolute litmus test in this medical area.

Herniated discs are neuro - orthological in their nature. In my experience, defense counsel has never objected to my introducing medical evidence based orthological rather than neurological opinion or vice versa, although I tend to employ neurological experts. The key to prevailing in the choice of medical experts lies in their experience, board certification, and reputation in the legal and medical community. I've seen an instance where a credibility issue ensued over whether the examining physician was board certified or not. So, obviously, try to employ a board-certified specialists for serious spinal injuries, which, by the way are not easy to come by.

A short aside, arthritis is a “cousin” to disc degeneration. Spinal pain can at first appear neurological in its origin when in fact it’s etiology is most likely arthritic. The test is the absence or presence of radiculopathy.

For some reason many of my assistants, beginning attorneys and paralegals, upon first interviewing a client fail to ask the simple question of whether the client’s pain is radiating into the extremities, or is localized, a fundamental question you should ask in your initial interview. It’s an easy enough concept to grasp and can be integral to your medical theory especially when helping your treating physicians locate the most likely source of the offending pathology.

As far as arthritis goes, as we age, assuming all other systems are healthy, osteoarthritis rears it’s painful head as cartilage articulations separating bony structures degenerate – cartilage separates bones and when it deteriorates bone begins to rub on bone generating a full spectrum of pain. Traumatic injury proximately causes, aggravates or accelerates osteoarthritis, even if the arthritis was asymptomatic before the traumatic event. Car wrecks, slip and falls, and job injuries fall into this category. Don’t let the defense try to sell you the idea that your damages are weak because of pre-existing arthritis. I’ll show you how to counter this ploy in a few minutes using an independent medical evaluation.

So, just because osteoarthritis is a natural occurrence does not mean that it’s a pre-existing condition severing proximate causation. Another source of arthritis is rheumatoid arthritis but a discussion of this is beyond the scope of this module, but I strongly suggest your studying this disease independently.

Now, having filed the Form 50 in Adrian's case, it was time to begin discovery. I always prepare my cases as if they are headed for litigation, despite the fact that 90% of my cases settle. So let's talk discovery tools.

When preparing for adjudication, there are two mistakes a budding attorney can make regarding her subpoena power. One is to underutilize it, and the other is to abuse it. As I told new attorneys who worked for me: you have subpoena power. Don't come to me and say this or that person, this or that professional is ignoring you. If you take one thing away from today regarding discovery, it's this: ***use your subpoena power*** even if the penalty for failing to comply with a workers' compensation subpoena is a misdemeanor fine of two hundred dollars. **See CITE.**

Of course, if the opposing party attempts to enter the subpoenaed, yet undisclosed material into ***its*** case, one remedy is to move to exclude. Another one is to appeal the issue should you, because of the missing evidence, fail at the Single Commissioner level. Yet another remedy is to seek substitute evidence.

That said, like most powers, subpoena power is circumscribed. The party upon whom the subpoena is served can move to quash it. In the workers' compensation context, there exists no statute or regulation governing quashing subpoenas. If the legality of compliance becomes an

issue, the subpoenaed party may file a motion with the Commissioner hearing the case and argue standard objections via counsel. Traditional rationale for noncompliance can be found in Rule ___, The South Carolina Rules of Civil Procedure. These include undue burden, privilege, etc. and is divided into required and permissive bases to quash. I'll leave it to you to read the details of the statute.

Deposing physicians, who function as expert witnesses in workers' compensation cases, can be challenge. At my shop, we try to build upon the relationships we've carefully developed with the physician's administrative staff when scheduling a deposition. It's only after we've diligently attempted to informally schedule the depo do we resort to issuing a subpoena, and we make the depo site my office. This usually gets the attention of the doctor, to say the least, and we usually get a depo scheduled at the doctor's office at his earliest convenience -- which we were trying to do in the first place.

The moral: nurture your relationships with outside support staff. They hold the keys to the kingdom and can either guide you to fertile valleys or desolate plains. This is a fundamental rule of business etiquette, but you'd be surprised how many experienced attorneys neglect this nostrum. Don't make that mistake in your practice.

If you're seeking information from a doctor's office regarding your client, make sure you spell out , in a letter, the body parts involved, the date of accident, and what other records have disclosed as a preliminary diagnosis.

Clients suffer other conditions affecting other body parts and systems, and the last thing you want are reams of irrelevant, expensive, medical records. On the other hand, don't totally tie their hands. Word the letter to assure the staff that they may look for other pathologies you may have missed which are nonetheless related to the accident.

Now, if you're seeking answers to specific legal questions that doctor's usually do not address in their notes, such as proximate cause, and for some reason you can't depose her, send her a Medical Interrogatory. They're not as exact as depositions since the attorney cannot easily ask follow up questions, but they do rather well in a pinch.

What's a Medical Interrogatory? It's a tool, a document containing specific questions to be completed by the authorized or unauthorized physician. Remember that the employer enjoys the right of choosing the treating physician and overall course of care in a workers' compensation case, while the employee has the right to procure a second medical opinion. I usually send the MI only to the unauthorized doctor from whom I'm seeking a second opinion, as I'm not in the business of making my opponent's case. However, like anything else, there are exceptions.

The MI helps crystalize the salient medical/legal points you need to make to support a prima facia case against the carrier. So rather than have the Commissioner fish for the information she needs, I make it easy for her and try to wrap everything I can into a single medical document. See Exhibit , example of medical Interrogatory.

Follow the SOAPPI method when crafting your MI questions. Ask the doctor what symptoms the client complains of, what objective tests, if relevant, he's undergone, what the diagnosis (es) most probably is, what the treatment plan is, future meds, whether the accident proximately caused the injury, whether the patient has reached maximum medical improvement, and what the impairment rating for the body part may be according the AMA Guidelines for Permanent Impairment. I also ask what the probability is of the client's condition worsening within one year. Remember, that this is a right that must be negotiated during settlement by clincher discussions, as a properly executed clincher agreement between the parties extinguishes this right, and you want some consideration for your client.

Also note that it can be difficult for an examining physician to determine if an injury is pre-existing if he does not have a prior MRI or other test to compare it to. Therefore, collect such prior objective testing, as well as other pertinent records and forward to your expert along with

the MI and cover letter. I usually just send an entire copy of my medical file to the retained doctor which is complete by the time my expert makes an appearance.

Be sure to send the MI to the ***correct*** unauthorized doctor, usually a specialist, i.e., don't send an eye case to an orthopedic surgeon. Simple enough point but you'd be surprised the number things that are "common sensical" get passed over. The unauthorized physician must also know ***how*** to evaluate a client for permanent impairment, that is, know how to apply the AMA Guidelines to Permanent Impairment.

Moreover, specify whether you want an evaluation or an evaluation plus treatment. And make sure the retained doctor actually physically examines your client and doesn't simply consult the other physicians' medical notes.

So let's return to our case study. After filing the Form 50, the carrier filed its response in the Form 51, denying liability. In other words it filed a demurrer, which is a perfectly reasonable thing to do in the initial phases of case since the defense is stuck with any admission and doesn't want to discover later it was the wrong move .

Additionally, the carrier hired Dr. Fleming, a neurologist, to handle the medical case. Based on a cervical MRI which showed possible impingement, he opined that Adrian was suffering from a cervical herniation at C-4 scheduled a series of corticosteroid injections (CSI's) – a procedure whereby steroid therapy reduces the inflammation of the disc, alleviating the pressure on the spinal cord and hence the pain.

CSI's can be squirrelly procedures. Sometimes one round of injections work miracles. The pain just never returns, and for all intents and purposes, the client is "cured". In most cases,

however, CSI'S ultimately fail, providing relief for a short period of time only for the pain to return within a few weeks.

Unfortunately, Adrian fell into the second class of clients. After two sets of CSI's his pain had not abated. The thought of his malingering began to seep into my judgement after recalling his criminal past, but I felt it was out of character given his performance in the last ten years. Moreover, there was no basis for retaliation or other motive of which I was aware.

I called him to request a follow up office meeting. As we reviewed his symptoms he off-handedly mentioned that his pain radiated upwards from his wrist into the shoulder. I thought he had misspoken, and he stated his pain usually radiated down from his shoulder through his arm to his hand, but he reiterated that on this day the pain radiated upward from the wrist to the shoulder. I had stumbled upon a ***symptomological anomaly***.

As I've mentioned, cervical radiculopathy flows from the neck down the arm -- southward as it were. Adrian was reporting this but also reporting pain flowing northward from his wrist. Either my medical theory was wrong, the radiologist had misread the MRI or Adrian was malingering.

It didn't help that I'd had never seen such a symptomatology in my twenty years of practice. Which I have a feeling really isn't saying all that much. I could probably practice fifty years and encounter disorders I'd never seen before, such is the complexity of medicine. But it was obvious that the physician and I had to now engage in differential diagnostic analysis.

I called a neurologist I work with and explained the facts of the case to her. She agreed that the symptoms were inconsistent. What was left? Applying the process of ***differential diagnosis***, we kicked around the possibility that Adrian could be suffering from an ulnar neuropathy which

consists of either carpal tunnel or cubital tunnel syndrome, or, on the darker side of the spectrum, what I referred to as Adrian's northward upper extremity pain could be signaling a case of ***complex regional pain syndrome***, a somewhat mysterious and disconcerting ailment which in its nastier manifestations could mean years of pain management.

We also discussed the possibility that the previous cervical corticosteroids injections may have masked the northward symptoms and may have accounted for the late reporting. But it was also within the realm of reason that Adrian, once he realized that the more injuries he claimed, the greater the compensation he'd probably receive, was simply malingering.

After further discussion with the neurologist, I decided referred him for nerve conduction study. Perhaps Adrian was suffering simultaneously from multi-level cervical radiculopathy as well as **ulnar neuropathy** – a condition which expresses itself in **carpal tunnel** or **cubital tunnel syndrome**—with the ulnar neuropathy flowering only when the CSI reduced the cervical inflammation. Let's take a few minutes to discuss some features of these pathologies.

The ulnar nerve runs medially down the upper extremity. **See Exhibit Diagram of ulnar nerve**. Its location makes it liable to entrapment or pinching. One of the easiest way to determine if a client suffers from ulnar nerve entrapment is difficulty forming the OK sign, which is a common symptom of ulnar nerve entrapment pain. This pain usually begins at the wrist and may travel up as far as the shoulder.

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The major culprit of cubital tunnel syndrome is the humerus bone compressing the ulnar nerve. **Exhibit. Diagram of Humerus Bone**. As the ulnar nerve passes through a tunnel-like structure near the humerus, it can become compressed for a variety of reasons: excessive exercise and

sleeping with the affected arm behind the head are common causes. Many times, the cause is ***idiopathic,*** meaning that we cannot tell what's causing the compression**.**

Cubital tunnel syndrome is not to be confused with **tennis elbow** – the former being neurological while the latter is a soft tissue condition resulting from the over use of the involving the muscles and ligaments associated with the elbow.

Carpal tunnel syndrome was another candidate possibly responsible for the character of Adrian's upper extremity pain. This condition also involves the medial nerve as it passes through a tubular like structure in the wrist aptly called the **carpal tunnel**. Like ulnar neuropathy or cubital tunnel syndrome pain results if this nerve is compressed and in many cases the pain shoots upward into the upper extremity.

The last condition I considered was the least likely cause of Adrian's complaints, but it is quite serious and deserves at least a rudimentary explication -- namely **complex regional pain syndrome, CRPS,** formally referred to as a **reflex sympathetic dystrophy** or **RSD**.

The symptoms of CRPS are vary between individuals and can be quite cruel. One of the ironies of CRPS is that the symptoms usually bloom near or at the site of minor injuries. In my experience CRPS usually attacks the upper extremities.

Symptoms include severe swelling, reduced temperature at the injury site, discoloration with where the skin exhibits a purplish hue, severe pain in the form of and stabbing, burning and throbbing pain coupled with an intense sensitivity to touch. **EXHIBITS Photo of CRPS Symptoms.**

Treatment includes various of neurological exercises, medications, even amputation of the offending limb. The pain is continuous but varies in severity, and symptoms can respond well to treatment and simply cease. Future medical costs for chronic CRPS can be astronomical, that is, a very serious and expensive case.

CRPS remains a mystery disease, no consensus yet exists as to its etiology, although there exist a number of theories.

Now, as I noted, we ruled out CPRS as Adrian exhibited none of the symptoms I just described except for the pain, and his pain was not severe enough to signal a provisional diagnosis of CRPS. Therefore, we thought that the best course of action at this point was to run a nerve conduction study, or NCS, which is a neurological procedure measuring the amount of electromagnetic energy flowing through the suspected compressed nerve. The less energy, the more the likelihood of compression.

The NCS report disclosed medial nerve compression at the cubital tunnel. The surgeon performed a nerve release, and the patient reached maximum medical improvement within a few weeks for both the cubital tunnel and his cervical neuropathy.`

The attorneys clinched the case soon after MMI, and Adrian is back at work before and most of his original duties. The physicians thought it prudent to limit his weight lifting to 30 pounds for the next six months in order not to reactivate or aggravate the conditions. And to everyone's satisfaction we haven't heard from him since.

Although Adrian's case did not require a functional capacity evaluation, I'd like to talk about this with you for a few minutes, as well as the topic of vocational rehabilitation. In order to do this, we must back up a bit to discuss the theories behind a claimant's right to receive worker's comp benefits.

Two basic theories exist.: the medical theory and the loss of earning capacity theory. In a nutshell, the medical theory supposes that an injury to a body part or parts proximately resulting in full or partial permanent impairment justifies, in and of itself, compensation. In my experience, the medical theory is the most common justification for compensation. It recognizes that an injured worker not only loses the use, or partial use, of a body part or parts as it affects his ability to work, but also loses its use vis-a vis other areas of life, i.e., relationships, hobbies, hygiene and so forth. This articulation of the "why" of damages therefore more closely resembles classical tort damages theory. It recognizes that a person is more than just a worker, an object that merely produces goods and services. It is , therefore, in theory, the most humane justification for damages.

Loss of earning capacity, on the other hand, posits that compensation should be based on the extent to which the injured body part diminishes an employee capacity to earn. The question then becomes, how is loss of earning capacity measures and then translated into dollars and cents.

South Carolina worker's compensation law specifically lays out for you a way to calculate damages based on LOEC. See SC Code of Laws .

This calculus unfolds as follows: Once a claimant reached maximum medical improvement, claimant's attorney refers his client to a vocational expert who examines him and opines, in writing, probable loss of salary as a proximate result of his injury. The difference between claimant's former salary and his diminished post-injury salary is multiplied by two-thirds and then that product is multiplied by the statutory multiplier for that particular body part or parts.

For those of you who like the elegance of mathematical notation, the equation for loss of earning capacity is:

$$2(S1 - S2)/3 \times SM = \text{indemnity}$$

Where S1 = the pretax preinjury salary per week; S2 = the pretax postinjury salary per week; and SM= the statutory multiplier. (Note that SM does not include ancillary damages such as past and future medical specials, out of pocket expenses, mileage, etc. Nor does SM account for the value of the claimant's right to file a worsening of condition within one year of the original Order.)

The functional capacity evaluation, or FCE, is merely another tool the vocational expert may use to determine loss of earning capacity. The body part in question is tested for strength, range of motion, ability to repeat a motion and a variety of other variables. The defense usually employs FCE's in a bid to counter the claimant's vocational expert's opinion, o to counter a claim for permanent and total disability. Therefore, I use an FCE to block the defense somewhat, hoping that "my FCE" aligns, and enhances, other parts of my damages theory.

Now, one of the problems with the FCE is the examiner's subjective opinion of whether the claimant is fully exerting herself in the various physical tests administered. The test is, in my opinion, too prone to mistake, and can transform a negative opinion regarding exertion into a wider, otherwise unwarranted full-scale credibility attack upon your client.

If I seem to be biased against the loss of earning capacity theory, I'm not. In fact, in cases involving high compensation rates, I run the indemnity numbers under both methods, and, everything else being equal, use the method which yields the best outcome for my client.

I'd also like to point out to you that vocational rehabilitation is free to South Carolina residents. The fine folks down there will test your client's various mental and physical vocational abilities and train her in another field if warranted. In many cases, vocational rehabilitation will unearth capabilities your client never knew existed, ushering in a phase of self-discovery and possibly a better standard of living for your client. It's a great benefit our state provides and you should seriously discuss the option with your client.

A final takeaway for today. Legal rules are more than just the "rules of the game." This is a facile observation. Rather, regard rules and doctrine as weapons, tools of leverage, in your quest to vouchsafe your client's interests. Deploy them strategically, and if appropriate, in number to establish the strongest bargaining position possible for you and your client at the time of negotiation and resolution.

I hope these few remarks on some of the medical and discovery aspects of workers' compensation practice has highlighted the amount of legal and medical information a PI lawyer must master before he can consider himself competent. Try to stay up to date with all the legal and medical developments in our field. Restoring and maintaining our clients' physical and financial well-being is a serious and I would argue noble life pursuit. And the more you put into it, the more it will reward not only your client, but you.

Thank you for your kind attention.

,

Preparing for and Presenting at the Hearing

Submitted by C. Daniel Vega

PREPARING FOR AND PRESENTING AT THE HEARING

C. DANIEL VEGA

CASE INTAKE

1. **Get to know your client.**
2. **Gain a complete grasp of the facts.**
3. **Gain a complete grasp of the injury.**
4. **Identify issues to be contested.**

GET TO KNOW YOUR CLIENT

1. **Do not rush through the intake**
2. **Ask personal questions:**
   a. **Married/single/divorced/children**
   b. **Education**
   c. **Social network**
3. **Must ask about:**
   a. **Prior injuries: WC/MVA/Slip and fall**
   b. **Sick leave: STD/LTD**
   c. **Unemployment**
   d. **SSDIB**
   e. **Criminal Record**

COMPLETE GRASP OF THE FACTS

1. **Allow for narrative discussion**
2. **Ask follow up questions**
3. **Understand the work history and relationship**
4. **Witnesses: Supervisors/Co-workers/Onlookers**
5. **Incident reports**
6. **Safety violations/reports (OSHA)**
7. **Current work status**
8. **Other employment**

INJURY BY ACCIDENT

Gain a complete grasp of the injury:

a. **Body parts affected**
b. **Initial medical evaluations**
c. **Description by medical providers**
d. **Denied diagnostic or medical treatment**
e. **Pre-existing medical conditions**

DISCOVERY

1. **Commission file**
2. **Medical records**
3. **Personnel file**
4. **Carrier File/Recorded Statement**
5. **OSHA: 3rd party/Subcontractor**
6. **MVA: FR-10 or TR-310**
7. **DEW: wages/unemployment**
8. **Criminal record**

LOCATING EXPERTS

1. **Emergency room**
2. **Consultative examination**
3. **PCP**
4. **Board Certified Specialist**
5. **Ergonomics**
6. **Toxicologist**
7. **Environmental Hygienist**
8. **Certified Physical Therapist**
9. **Vocational Consultant**

PREPARING YOUR EXPERT

Be straightforward with the expert:

1. **Complete grasp of the facts**
2. **Evidentiary submissions**
3. **Medical submissions**
4. **Warnings**
5. **Implications**

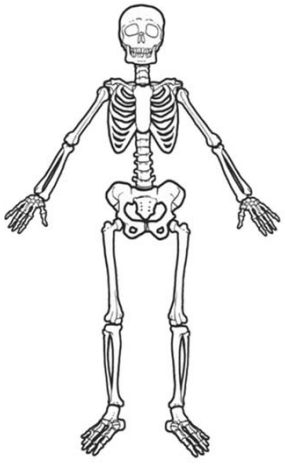
"MEDICAL EVIDENCE"

A. **Pursuant to section 42-1-160(G), "medical evidence" means expert opinion testimony stated to a reasonable degree of medical certainty, documents, records or other material that is offered by a licensed health care provider.**

B. **Pursuant to section 42-15-60(A), the employer shall provide medical, surgical, hospital, and other treatment…as may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for additional time as in the judgment of the commission…as evidenced by expert medical evidence stated to a reasonable degree of medical certainty.**

DEPOSITION

1. **Preparation**
2. **File review**
3. **Exhibits**
4. **Goal**
5. **Outline**



DEPOSITION

1. **Causation**
2. **Medical necessity**
3. **Maximum medical improvement**
4. **Impairment/Loss of use**
5. **Restrictions**
6. **Future medical care and treatment**

DEPOSITION

“reasonable degree of medical certainty”

“with as much reasonable certainty as required in the field of _____”

MEDICAL CORRESPONDENCE

1. **Identify the patient**
2. **Describe the injury by accident**
3. **Quote from the record**
4. **"Reasonable degree of medical certainty"**
   a. **Causation**
   b. **Medical necessity**
   c. **Maximum medical improvement**
   d. **Impairment/Loss of use**
   e. **Restrictions**
   f. **Future medical care and treatment**

MEDICAL NECESSITY

1. **Provide relief or effect a cure**
2. **Customary form of diagnosis or treatment**
3. **Predictability of outcome**
4. **Harmful outcome**
5. **Cost-effective method**

MEDICAL EXAMINATION

1. **Client prep-work**
2. **Circumstances**
3. **Definitions**
4. **Expectations**
5. **Q and A**

EVIDENCE ADMISSIBILITY AND SUBMISSION

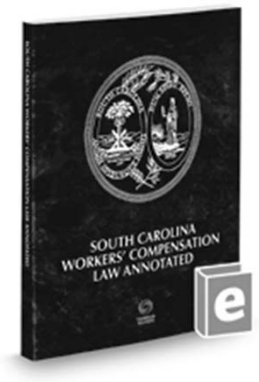
Administrative Law Court Evidence

Rule 25(B) Objections

Rule 25(C) Stipulations and Documentary Evidence

Rule 26 Admissibility of Documents

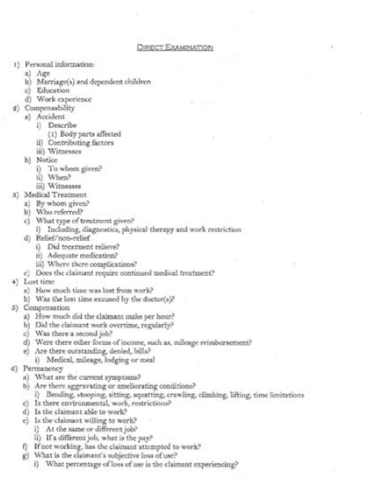
Rule 27 Pre-hearing Exchange of Evidence



DIRECT EXAMINATION

Preparation

1. **Malpractice**
2. **Explanation**
3. **Procedures**
4. **Examination questions**
5. **Objections**
6. **Cross-examination questions**



DIRECT EXAMINATION

1) Personal information:
   a) Age
   b) Marriage(s) and dependent children
   c) Education
   d) Work experience
2) Compensability
   a) Accident
      i) Describe
         (1) Body parts affected
      ii) Contributing factors
      iii) Witnesses
   b) Notice
      i) To whom given?
      ii) When?
      iii) Witnesses
3) Medical Treatment
   a) By whom given?
   b) Who referred?
   c) What type of treatment given?
      i) Including, diagnostics, physical therapy and work restriction
   d) Relief/non-relief
      i) Did treatment relieve?
      ii) Adequate medication?
      iii) Where there complications?
   e) Does the claimant require continued medical treatment?
4) Lost time
   a) How much time was lost from work?
   b) Was the lost time excused by the doctor(s)?
5) Compensation
   a) How much did the claimant make per hour?
   b) Did the claimant work overtime, regularly?
   c) Was there a second job?
   d) Were there other forms of income, such as, mileage reimbursement?
   e) Are there outstanding, denied, bills?
      i) Medical, mileage, lodging or meal
6) Permanency
   a) What are the current symptoms?
   b) Are there aggravating or ameliorating conditions?
      i) Bending, stooping, sitting, squatting, crawling, climbing, lifting, time limitations
   c) Is there environmental, work, restrictions?
   d) Is the claimant able to work?
   e) Is the claimant willing to work?
      i) At the same or different job?
      ii) If a different job, what is the pay?
   f) If not working, has the claimant attempted to work?
   g) What is the claimant's subjective loss of use?
      i) What percentage of loss of use is the claimant experiencing?

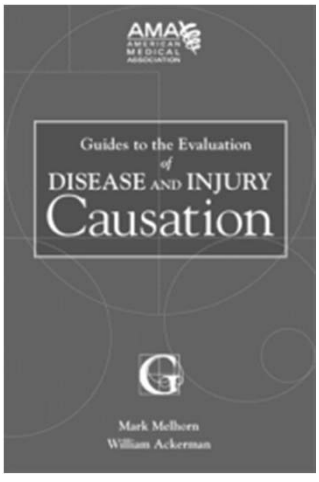
CROSS EXAMINATION

1. **Identify potential witnesses**
2. **Identify witnesses listed by opposing counsel**
3. **Schedule deposition**
4. **Do your homework:**
   a. **Personal information**
   b. **Family relations**
   c. **Friendships**

PROVING THE CAUSAL RELATIONSHIP

1. **The facts and circumstances of the injury determine whether it is compensable. Thompson v. J. A. Jones Const. Co.**
2. **Pursuant to section 42-1-160 "injury" or "personal injury" means injury by accident arising out of and in the course of employment.**
3. **Arising out of: the injury was caused by the activity or work being performed**
4. **In the course of: time, place and circumstance**

CAUSAL RELATIONSHIP



GUIDES TO THE EVALUATION OF DISEASE AND INJURY CAUSATION, Melhorn and Ackerman

CAUSAL RELATIONSHIP

1. **The causality examination consists of a review of records, interview, physical examination, test results and conclusions. Causation p. 75,**
2. **Objective/Subjective dichotomy**

DISABILITY DEFINED

Guide to the Evaluation of Permanent Impairment, 5th Ed., Cocchiarella and Anderson

DISABILITY

1. **The Guides defines "disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment. (P. 4)**
2. **Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individuals ability to perform common activities of daily living, *excluding* work. (Id.)**

DISABILITY

Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability. (P. 13)

DISABILITY

If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. (P. 8)

THE HEARING

Before you ever request a hearing you should already have:

1. **Filed LOR/Form 50 not requesting a hearing**
   a. **SOL**
   b. **Notice provision**
2. **Develop medical records**
   a. **Read review**
   b. **Causation letters**
   c. **Depositions**
3. **Conduct discovery**
   a. **Subpoena documents**
   b. **Depositions**
4. **Then and only then request hearing: 30/20 Rule**

THE HEARING

Hearing preparation:

1. **Meet with claimant and witnesses**
2. **Explain: hearings, hearing site, Commissioner, pre-hearing conference, oath, dress code**
3. **Review original statement of injury and symptoms or medical records**
4. **Review incident report, personnel file, Commission file**
5. **Provide client a copy of their depositions**
6. **Provide client a copy of witness depositions**
7. **Review opposing counsel submissions**
8. **Go over the questions, then repeat…**

DRESS FOR SUCCESS

PRE-HEARING BRIEF

Pay special attention to the pre-hearing brief:

1. **How to win before the hearing begins**
2. **15/10 day deadline**
3. **Be specific**
4. **Pay attention to previous filings**
5. **Identify factual an legal issues**
6. **Identify**
7. **Use attachments or memorandums when appropriate to summarize legal or medical issues**

THE HEARING

1. **Pre-hearing conference**
2. **Stipulations**
3. **On the record**
4. **Direct examination**
5. **Cross-examination**
6. **Issue preservation**

DRAFTING ORDERS

Pursuant to section 42-17-40 an order must be drafted and must contain a statement of findings of fact and rulings of law. Awards which fail to state findings or rulings with specificity will not survive appellate scrutiny.

ORDER INSTRUCTIONS

Matters to include in the Order:

1. **APA Submissions (if submitted)**
2. **Stipulations**
3. **Statement of the Case (contentions of the parties – stated concisely)**
4. **Evidence of the Case (synopsis of the evidence – including relevant testimony and medical reports)**
5. **Findings of Fact [numbered] (Do not delete any of the above findings.) The prevailing party may add to support the decision.**
6. **Conclusions of Law (cite applicable statutory sections and case law)**
7. **Award**
8. **<u>Do not address credibility in the Order, unless it has been addressed in the preceding Order Instructions.</u>**

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The Deposition

Depositions are one of the pre-trial discovery devices used by attorneys in a cause of action to obtain information about a claim and in anticipation of settlement or litigation. More specifically depositions are a legal tool used to obtain oral testimony, under oath, transcribed by court reporter, in anticipation of and subject to use in a workers' compensation claim. Most workers' compensation claims will involve deposing the claimant, fact witnesses and medical providers.

The importance of depositions in a workers' compensation claim can not be overstated. Many claims are won or lost at a deposition. Although each deposition has the potential to take on a personality of its own, requiring an attorney to act instinctively, there are certain learned skills that can help make each deposition a predictable success. These include: Preparation, preparation and preparation. Attorneys should prepare for depositions as if the claim depends on the outcome of the deposition.

The S.C. Rules of Civil Procedure, Rule 30, governs the taking of depositions upon oral examination. Rule 30(a) governs when a deposition may be taken and the limitations of taking depositions. Rule 30(b) governs notice of examination and general requirements. Rule 30(c) governs examination, cross examination, recording and transcript, administration of the oath and objections to the manner, evidence or conduct at a deposition. Rule 30(d) requires filing a motion upon the objecting parties terminating the examination. Rule 30(e) governs reading and signing or waiving reading and signing. Rule 30(f) governs certification and delivery by the transcribing officer. Rule 30(g) governs failure to appear and costs. Rule 30(h) governs video depositions. Rule 30(i) governs depositions of medical providers. And Rule 30(j) governs conduct during the taking of a deposition.

Preparation

The following is a helpful list of things to do in anticipation of the deposition:

1. Prior to the deposition, about a week before, call the client and remind them of the deposition. This is the first and best way to help ease your client's nerves. Remind them they have a deposition next week, ask them if they have transportation and whether they need directions. Briefly explain the general purpose for taking depositions, reassure them that you will spend time preparing them for the deposition, and remind them you will be with them the entire time.

2. Have the client meet with you an hour before the deposition. Thank them for being willing to participate. Remind them that this is an opportunity for the opposing attorney to form an impression of the claim and claimant. They will have an opportunity to share their experiences and concerns and that is a good thing.

3. Remind them they will be asked to raise their right hand and swear to tell the truth. Explain to them what it means to be under oath. Remind them that whatever they say today in the presence of the attorney can and will be used during negotiations or at a hearing. This includes things said off the record.

4. Explain to them that the other attorney will give them the following instructions: "Please allow me to finish my questions and I will allow you to finish your answer." "Please answer verbally because the court reporter can not record 'Uh-huhs' or nods of the head." "If you do not understand a question ask me to rephrase the question, otherwise I will assume you understood the question and meant to give the answer you gave." "If you need to stand, take a break or go to the restroom please let us know." Deposition rules require the attorney to give deponents these instructions. Telling your client ahead of time lets your client know, you know what you are talking about. This is a crucial step for your clients because it gives them confidence in your skills and instructions.

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5. Most importantly, in my opinion, ask the client: "If you do not know the answer then how do you answer the question?" The answer is "I do not know." The importance of this simple instruction can not be overstated. Deponents almost always feel an obligation to provide answers they do not know. It makes them anxious not to know the answer. This is especially true now that they have sworn to tell the truth. A lot of unnecessary anxiety can be avoided with this simple instruction. Remind them, guessing the answer is never an option.

6. Likewise, if they knew the answer at one time but have forgotten the answer, then it is ok for them to say, "I forgot." Reassure them they do not have to remember everything. If they think they know the answer but are not sure, they should qualify the answer by stating the answer "to the best of my recollection."

7. Any response the deponent gives should be brief. Remind them to say "yes" or "no" only, when they can. If the answer requires an explanation it should be brief and to the point.

Deposition Outline

Claimant's depositions almost always have the following format:

1. What is your name?
2. What is your date of birth?
    a. How old are you today?
3. What is your Social Security number?
4. Are you married, single or divorced?
    a. How many children do you have?
    b. What are their names and ages?
    c. Are your children dependent upon you for support?
    d. Is there another person other than your spouse or children dependent upon you for support?

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5. What is your drivers license number?
    a. Do you drive?
    b. What is the make, model, year and color of your vehicle?
6. What is your physical address?
    a. Do you live in a mobile home, brick and mortar, or apartment?
    b. Are there stairs in or around your house?
7. What is your telephone number?
8. How far did you go in school?
    a. High school?
    b. Post graduate education?
9. Did you serve in the military?
10. Describe your work history?
    a. Who have you worked for?
    b. How long?
    c. Why did you leave?
    d. Did you file a claim or have an injury while working?
11. Pre-injury medical care and treatment.
12. Prior claims:
    a. workers' compensation claims?
    b. Motor vehicle accidents?
    c. Slip, falls, trips, or negligence claims?
13. Current work related injury.
    a. Who, what, when, where, how and why?
    b. What body parts were injured?
    c. Who did you give notice of the injury?
    d. Who was the first medical provider?
    e. Who sent you to the doctor or did you go on your own?
14. Post-injury medical providers.
    a. 1st, 2nd, 3rd, medical providers?

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b. What did you tell the providers?

c. What did the providers tell you?

d. Did you have x-rays, CT scans, MRI's?

e. Do you have a referral to a specialist?

15. Post injury work history.

a. Have you returned to work?

b. Light, medium, or full duty?

c. Part-time, full-time?

d. Have you been paid benefits while out of work?

16. Payment of medical care.

a. Have all of your bills been paid?

b. Are you receiving bills for medical care related to this accident?

17. What are your current symptoms?

a. Where is your pain located?

b. What body parts do you believe have been affected by the injury?

c. Is there a psychological component? Do you feel depressed?

d. When do you experience most pain? Morning, noon, evening or night?

e. What makes you feel better?

f. What make you feel worse?

g. Are your overall symptoms improving or getting worse?

h. What do you believe will help you get better?

18. What is a typical day like for you?

a. Morning, noon, evening or night.

b. Can you do house work?

c. Can you do yard work?

d. How well do you sleep?

e. Do you have hobbies? Can you still do your hobbies?

f. Do you have or use social media such as Blogger, Facebook, Snapchat, MySpace, Instagram, or Youtube?

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19. What do you wish to accomplish with your claim?
    a. What do you feel like you need?
    b. Do you need medical care and treatment:
    c. Do you want to settle the claim?

Practice tips

The following tips will help you understand the purpose of the question, what your opponent may be thinking, and what your client may be thinking, or, in other words, why are they really asking these questions:

Name. Always ask for the deponent's full name, including nicknames. If the deponent has an unusual nickname find out how they got the nickname. Find out also all names by marriage. If there has been a recent marriage medical providers may have the claimant under a different name. This may be true as well if the claimant has treated with a provider for many years.

Date of Birth/Age. The date of birth, like the name, is an important identifier. Different people may have the same or similar name but rarely the same name and date of birth. Age is also an important factor for determining compensation. In addition to the impairment rating compensation may be payable in different degrees depending on the claimant's age, education, work history and body parts affected. What may be a scheduled member claim for a younger individual, may be a wage loss or permanent total disability claim in an older individual.

Social Security Number. Some forms of discovery require providing social security numbers. Hospitals and other medical providers require social security numbers. Ask the court reporter to redact all but the last four numbers of the social security number to protect your client since information in the deposition may become public record.

Marital status. Claimants will be asked whether they are married single or divorced. Divorces are a sore subject and many claimants do not like talking about their

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divorce. If they are divorced they may be asked the grounds for the divorce. If the grounds are marital infidelity they will most definitely not like talking about the divorce. Whatever the grounds for the divorce it will be better for the client to admit the grounds and move on.

Dependents. In addition to a spouse claimant will be asked if they have children. Whether the children are minors dependent upon them for support. In the event a divorce a claimant may be asked whether they have custody of the children, pay child support, or are behind on the child support payment.

Drivers license number. Claimants will be asked their drivers license number. Drivers license numbers can be useful in obtaining driving records and criminal background checks. In addition to the license number claimants will be asked the make, model, year and color of their vehicle. Defendants ask for this information when they wish to hire an investigator. Investigators will then tail the witness in the hopes of finding incriminating behavior.

Address. Claimants will be asked to give a physical address. Very few attorneys will settle for a post office box number. Claimants will also be asked to describe the home: Is it a mobile home, brick and mortar, apartment? This is also done in the event a party may wish to hire an investigator.

Telephone number. This information is also used for identification purposes. Giving your telephone number, however, does not allow opposing counsel, nor their clients, the right to communicate with your client without your consent.

Education. Education is an important topic in workers' compensation claims. Many claimants, especially those living in rural farming communities, did not finish high school. If they finished high school ask them to specify whether they received a diploma or certificate and their age at the time of graduation. If they finished high school how

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much post graduate education do they have? College, tech school, welding certificate, trucking school, CNA, etc.

Military Service. Defendants will want to know which branch, how many years of service, billet or assignments, combat roles and type of discharge. They will also want to know whether the claimant was injured in the military and whether they receive benefits for those injuries. There are many military personnel suffering post-traumatic stress disorder. This may lead to questions about a claimant's mental health and mental health treatment. If there is a history of injury defendants will ask for a medical release in order to obtain VA medical records.

Work History. In all cases past work histories are relevant to the type of compensation claimant may receive. Defendants will ask for a chronological work history either starting from high school and moving forward or starting at the last place of employment moving backwards. Older claimants do better with the later. Claimants will be asked to give the name of the employer, job title, type of work performed and for how long. They will also be asked how much they earned for a particular employer. And, they should be asked whether they had or have a second, concurrent job at the time of the injury. This is important because compensation is calculated at the concurrent employment rate. Claimants will be asked their reason for leaving and whether they suffered an injury while working, which they reported or did not report, or for which they filed a claim or did not file a claim. The distinction is important because claimant may have had an injury and not have filed a claim. Believe it or not there may be a claim with your clients name on it, that your client knows nothing about, because someone in HR was doing their job that day and filed a claim without your client's knowledge!

Pre-injury medical history. It is extremely important that you have as complete a knowledge of the claimant's pre-injury medical history as possible. Defendants will want to know whether the claimant has had prior injuries, illnesses or diseases which required medical care and attention. They will want to know the names of medical

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providers who provided treatment for the injury, illness or disease. They will want to know about hospitalizations, ER visits, primary care physicians and family physicians. Tell your client to be candid. Many claimants withhold information if they think it will hurt their claim, when, what really hurts their claim is withholding information.

Prior claims. Claimants will be asked if they have had prior workers' compensation claims. Defendants will want to know when and where the accident occurred. What body parts were injured or affected. What type of medical care and attention did claimant receive. How much disability and compensation did claimant receive. And, whether claimant still has disability related to that injury. Claimants will be asked if they have prior litigation experience such as slip and fall, negligence claims, or motor vehicle accidents. Likewise defendants will ask about the type of injury, medical care, compensation or settlement received for each particular claim. Remind the claimant that withholding this information may have a catastrophic effect on the current claim.

Work related injury. This is the part most claimants will be eager to talk about at the deposition. Claimant should give a concise but informative explanation of the injury. You should be familiar with the facts of the injury by the time of the deposition, however, have claimant recite the facts to you again prior to the deposition. If they are long winded help them shorten their response, if they are too brief they may be leaving out important details. Consistency is key. The following details are important: How did the injury occur? What symptoms did claimant experience at the time of the injury? What body parts hurt at the time of the injury? What was the claimant doing at the time of the injury? In some cases how is what they are doing, related to work? Where were they physically located when the injury occurred? At what time did the injury occur? Who witnessed the event? Who did they first talk to after the event? Did they speak to the supervisor about the injury and when? Was there a written report generated? Is there surveillance or are there pictures?

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Post-injury medical history. Claimant should be able to give a brief outline of their medical care and treatment. Did claimant receive treatment at the employer's nurses station? Did claimant go to the ER, occupational health or their family doctor? What did claimant tell the doctor? What did the doctor tell the claimant? Did claimant receive a prescription for medicine? Did the doctor's place work restrictions on the claimant? Did claimant receive a prescription for therapy or a referral to a specialist? Claimants should be able to give a complete list of medical providers. Ultimately, however, defendants want to know what claimant's impression is of the medical care they have received. Did the medial care received help, and if not, what else can be done. If there is medical care and attention that has not been approved the claimant should ask the defense attorney to help them get it approved.

Post-injury work history. One of the most disputed issues in a workers' compensation claim is return to work. When a doctor examines the claimant they should determine whether the injury causes limitations in the claimants ability to perform work. If the doctor writes claimant out of work completely claimant should be allowed to receive weekly compensation while remaining home. On the other hand, if the doctor places restrictions on the claimant, such as light duty, then the employer will have the opportunity to return the claimant to work within those restrictions. Many disputes arise when, for example, claimant does not agree that they can return to work under restrictions, or when employers offer light duty employment that is not really light but medium or heavy. Because these issues are factually driven depositions tend to linger on this topic. Claimant will be asked what restrictions has the doctor given them? Whether they returned to work under those restrictions? Why not? Whether the employer is accommodating the restrictions? Or how is the employer not accommodating those restrictions?

Payment of benefits. Claimants who remain at work should be paid compensation on a weekly basis. Compensation represents 66 2/3% of the claimant's average weekly wage when totally disabled. Partial disability pays 66 2/3% of the wages

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earned before the injury when compared to after the injury claimant earns less. Many employers will have a limited amount of light duty and will send the claimant home early. Many defense attorneys will not know claimant is earning less. Depositions allow claimants an opportunity to express frustration when they are not paid on time or when they are earning less than they did before the accident. Claimants should bring copies of their paystubs, weekly checks and post-injury paystubs to the deposition.

Payment of medical care. Medical providers will on occasion bill claimants for medical care and treatment related to the work injury. Claimants should bring these bills to the deposition and politely ask the defense attorney whether they will be paying the bills.

Current symptoms and physical limitations. Claimants spend at times weeks and months struggling with pain and symptoms related to the injury. At times they are frustrated with the lack of medical care and attention they may be receiving. Other times they may be frustrated with the effects the pain and symptoms have on their lives and relationships. The deposition gives them an opportunity to advocate for themselves. Claimants should be ready to talk about what it means to be "me" on a daily basis. It is important that the claimant give a thorough but fair descriptions of their symptoms. Defendants will compare claimant's testimony to prior statements, statements given witnesses or co-workers, and, especially, statements given to the medical providers. When preparing, review medical records with the claimant. Read to them what they told the doctor at their last visit. Physical therapy notes also contain many statements about symptoms and physical limitations. Reviewing these statements with the claimant will help them feel confident about their testimony.

Typical day. Injuries and the limitations they produce can have catastrophic effects on claimant's daily lives. Claimants who are not able to work invariable develop new habits and routines. Defendants are curious about what the claimant may or may not be doing with their time. It is helpful to walk a claimant through a typical day during

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deposition prep time. Starting with what time to they wake up, have the claimant describe their routines. Grooming routines, breakfast routines, sleeping or napping routines. It helps to break the day into segments: Early morning, mid morning, lunch, afternoon, dinner time, evening and nighttime. Keep in mind that injuries not only prejudice claimants habits but the families as well. Claimant may not be able to cook, clean, wash, mow, cut or take out the trash. It is important for the claimant to be able to describe all of these limitations in detail.

Social media. Social media has and will continue to kill many claims. One of the first things a defense attorney will, and should do, is look for information on social media. Remind claimant anything posted on social media can and will be used in settlements or hearings. Do not be surprised if they continue to post on social medial long after you have warned them several times.

What do you want or hope to accomplish with your claim? This is an important question. It may even be a crucial point in the life of the claim. If claimant tells the attorney they need additional medical care and treatment then you know it is not time to settle. If the claimant tells the attorney "I just want to get this over with" it will become almost impossible to get additional treatment from that moment forward. Not only will you have a hard time getting medical care and attention but you may not be able to get a reasonable settlement offer. This creates a dilemma for the claimant. Usually claimants need both. They need the settlement money and additional medical treatment. They should reflect on their answer to this question before it comes up in the deposition.

5 Questions Claimants Hate

Claimants almost always are upset about the following 5 questions. Remind claimants that you cannot prevent them from being asked. Claimants need to know that a false statement will prejudice the claim. Remind claimants also that the answer to these questions can at times be found in the records, online, or with background checks and other legal searches. The best thing to do is answer the question truthfully. The reason I

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have placed these at the end of the deposition section is that these need to be the last questions you reiterate before going in the deposition.

1. Do you smoke, chew tobacco, drink alcohol and how much? This may sound like a silly question, however, your client may be a recovering alcoholic, or maybe they were intoxicated during the accident, or maybe your client was on a smoking break when the accident occurred. When reading medical records pay attention to drug test results.

2. Do you use illegal drugs or abuse prescription medication? Many clients, in particular young clients, use "recreational drugs." There is a growing number of individuals who have no moral objection to the use of illegal drugs. The hearing commissioner, however, will unlikely share the same sentiments. Remind your client they do not have to answer the question. They should simply state "I would rather not answer the question." When they do simply state on the record your client is exercising their 5th Amendment right against self incrimination.

3. What was the reason for your divorce? People hate questions about their divorce. Like I said before they need to answer the question and move on. A quick response to this question is the best way to signal you have nothing to hide.

4. Are you now or have you in the past received mental health counseling, been hospitalized for mental health reasons, or been declared incompetent for mental health reasons? People are very sensitive about mental health issues. Most attorneys will avoid asking too many questions about mental health unless the claim is for a mental health injury. If claimant is claiming a mental health injury they need to realize that past psychiatric care will be a subject of the claim.

5. Have you ever been in trouble with the law? Do you have a history of arrests or convictions? Have you pled guilty to a crime in the last ten years? Tell your client that for $25.00 anyone can get a copy of a persons criminal background records. They

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may not be proud of something they did when they were younger but now is not the time to worry about it. Give the answer and move on.

Witness Depositions

Witness depositions, whether they be witnesses for the employer or fact witnesses unrelated to the employer, should be conducted in a manner similar to and consistent with a claimants deposition. In other words, all the questions being asked of the claimant with regards to social history, education, work history, health history, history of claims or litigation, history with the current employer, and, of course, history of the injury in question. Even though your opponent may roll their eyes at you for doing this, if done in a professional tone, will impress the deponent, and, in my opinion, provide better information.

Prior to a witness deposition:

1. Review your file including medical records or documentation such as personnel records relevant to the witness.
2. Talk to your client about the deposition. Get as much information about the witness as you can from your client.
3. Determine what is the "goal" of the deposition. What information should the witness be able to provide. What information do you need to have in order to establish your contentions?
4. Once you have a goal in mind determine what questions will most likely elicit the information you are seeking. For example, you would like to establish a supervisor witnessed the event. The following questions should establish the supervisor witnessed the event:
    a. Are you a supervisor with X Co.?
    b. How long have you been a supervisor?
    c. What shift do you supervise?
    d. What are your job duties or requirements?

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e. Where at X Co. do you perform your supervisory work?
f. Have you supervised claimant?
g. Where you working on the date of the injury?
h. Were you performing your regular duties on the date of the injury?
i. Did you see claimant the day in question?
j. Did you witness claimant being injured?

If the supervisor admits "a" – "i" they should also admit "j." If they do not admit "a" – "i" they are admitting they are not doing their job. If they admit "a" – "i" but deny "j" they will not seem credible.

Doctors Depositions

Medical providers are professionals and deserve to be treated with courtesy. Doctor depositions require preparation. Review the file. Read all the medical records. Make copies of any documents you wish to present to the doctor during the deposition. Determine the "goal" of the deposition. Outline your questions. Arrive a few minutes early. Be prepared to wait – doctors are sometimes late. Do the following:

1. Introduce yourself to the doctor by stating your name and the name of your client.
2. Ask your opponent if they are willing to stipulate to doctors the expertise. If they do not stipulate to the doctors expertise you will have to get and attach a copy of the doctor's curriculum vitae (C.V.) or ask that the doctor describe the C.V. on the record.
3. Prior to the doctor being sworn in, and in the presence of your colleague, briefly explain the purpose of the deposition. "Doctor we are here to ask you questions regarding claimants injury?" "Doctor we are here to ask you questions regarding maximum medical improvement and impairment?"
4. Once the deposition commences and the doctor is sworn in:
    a. Introduce yourself for the record.
    b. Ask the doctor if they waive reading of the instructions.
    c. Ask the doctor for a description of the C.V.

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d. Have the doctor describe how the patient came to their care.
e. Ask the doctor for their impression of the patient at the first appointment.
f. Develop the record by asking the doctor to describe the patient's progress chronologically.
g. Pay particular attention to the patient's complaint and the doctors recommended treatment.

Attorneys should be prepared to ask questions regarding the following:

1. Causation: How are the injuries causally related to the accident. Did the accident cause and or aggravate a pre-existing condition?
2. Medical necessity: Is the care being provided or recommended medically necessary. What diagnostic procedures are medically necessary to determine causation or restrictions or maximum medical improvement.
3. Maximum medical improvement: when will the patient be at maximum medical improvement.
4. Loss of use: What is the degree of loss of use or impairment suffered by the patient?
5. Restrictions: Restrictions in activities of daily living and or work restrictions. Are these restrictions temporary or permanent?

Remember, pursuant to section 42-1-160(G) "medical evidence" means expert opinion testimony sated to a **reasonable degree of medical certainty**. You must ask the doctor if the opinion given is stated to "within a reasonable degree of medical certainty!" Always!

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Exhibit A

Complete files, records, and documents containing any information relating to claimant/employee's employment, his/her medical condition, and his/her workers' compensation claim, including, but not limited to, the following:

a. employment files, records and documents;
b. medical files, records, and documents;
c. insurance (any kind) files, records and documents;
d. safety files, records, and documents;
e. short term disability, files, records, and documents;
f. long term disability files, records, and documents;
g. nurse's files, records, and documents;
h. company doctor's files, records, and documents;
i. unemployment files, records and documents;
j. investigative files, records, and documents;
k. accident files, records, and documents, including OSHA 200 logs and other OSHA documents;
l. any other files, records, and documents containing information relating to claimant's employment, medical condition, and/or workers' compensation claim; specifically all amounts paid for TTD and TPD; pay verification from employer from date of accident, to today's date.
m. all wage and pay information applicable to Claimant from date of hire to present;
n. If Claimant was not employed for four (4) quarters prior to the quarter during which Claimant was injured, all wage and pay verification of a similarly situated employee for the four (4) quarters proceeding the quarter during which this accident occurred.

All files, records and documents should be produced in their original condition, with no documents removed or altered. These files and records should be produced whether in the physical possession of the employer, carrier, the attorneys of either, or any other agent or employee of the employer or carrier.

Deposition Rules

1) You are under oath. Being under oath means you are testifying as if in a court of law subject to the rules of perjury.
2) Every thing you say will be recorded by the court reporter.
3) I will be asking verbal questions and ask that you give verbal responses. If you nod or shake your head or say uh-uh or uh-hu i will ask you whether you meant to say yes or no for purposes of clarifying your answer
4) If you do not understand the question please ask me to rephrase or repeat the question otherwise we will assume you understood the question and gave the answer you intended to give
5) You can not ask your attorney to assist you with answers to the questions
6) You may ask to take a break during the deposition. If you ask to take a break we will go off of the record during the break. If you have discussions with your attorney during the break I have a right to ask you questions about your of the record discussion.
7) You must answer the questions posed to you today. Should you refuse to answer I will seek an order from the court compelling the response and or excluding your testimony at a hearing.
8) Do you have any questions about these instructions.

Properly Stating an Expert Opinion

In most civil cases, the legal requirements for stating an expert opinion is related directly to the burden of proof that exists. That burden of proof is a "preponderance of the evidence," "more likely than not," or "more than 50% likely." This is a much lesser burden of proof than the "beyond a reasonable doubt" standard with criminal cases.

The expert's opinion must satisfy the "preponderance of the evidence" burden of proof. This means that the expert must opine that it is more probable than not (there is more than a 50% probability) that his opinion is correct. Thus, an expert witness may give testimony in terms of an opinion that something could, or would, produce a certain result. The theory for admitting opinion testimony of this nature into evidence is that an expert witness's view regarding probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge.

The facts or scientific principles on which experts base their opinions must be sufficient to support reasonably accurate conclusions. Expert witnesses will not be barred from expressing opinions merely because they are not willing to state their conclusions with absolute certainty. However, expert opinions, if not stated in terms of the certain, must at least be stated in terms of the probable and not merely of the possible. The test of whether an expert witness testimony expresses a reasonable probability is not based upon the use of "magic words" but is determined by looking at the entire substance of the expert's testimony.

Although no magic words are required, certain phrases are commonly used by expert witnesses to express the idea that their opinions are based on at least a 51% probability. These phrases include:

"based on a reasonable degree of medical certainty,"

"based on a reasonable degree of scientific probability,"

"based on a reasonable degree of scientific certainty,"

"based on a reasonable degree of medical probability," and

"more likely than not."

When an expert does not express the concept that she is at least 51% sure of her opinion, the opinion might be excluded by the judge. Thus, it is important to state an opinion in a way that clearly communicates that it is based upon a reasonable degree of probability and not just a mere possibility or speculation.

Medical Necessity:

Any medical intervention used to identify or treat a workers' compensation on-the-job injury or work-related illness must be medically necessary. For purpose of workers' compensation, an intervention is medically necessary when:

1. It is used for a medical condition;
2. There is sufficient evidence to draw conclusions about the intervention's effect on health outcomes;
3. The evidence demonstrates the intervention can be expected to produce its intended effects on health outcomes;
4. The intervention's expected beneficial effects on health outcomes outweigh its expected harmful effects; and
5. The intervention is the most cost-effective method available to address the medical condition.

Medical Depositions

Thank you for having provided medical care and treatment for NAME BODY PARTS AFFECTED/TREATED. I would like to ask your opinion with regards to these conditions. After reviewing the medicals please answer the following questions:

Please state to within a reasonable degree of medical certainty whether the injury by accident NAME describes, caused injury to, and or aggravated a pre-existing condition in the BODY PARTS AFFECTED/TREATED.

Please state what medical care is medically necessary to effect a cure or provide relief to the BODY PARTS AFFECTED/TREATED.

Please state whether the injury to the BODY PARTS AFFECTED/TREATED causes temporary or permanent work restrictions.

Please state whether NAME is at maximum medical improvement for the BODY PARTS AFFECTED/TREATED.

Please state whether NAME experiences a degree of impairment for each body part affected as a result of the injury.

Please state whether NAME experiences loss of use for each body part affected as a result of the injury.

DIRECT EXAMINATION

1) Personal information:
   a) Age
   b) Marriage(s) and dependent children
   c) Education
   d) Work experience
2) Compensability
   a) Accident
      i) Describe
         (1) Body parts affected
      ii) Contributing factors
      iii) Witnesses
   b) Notice
      i) To whom given?
      ii) When?
      iii) Witnesses
3) Medical Treatment
   a) By whom given?
   b) Who referred?
   c) What type of treatment given?
      i) Including, diagnostics, physical therapy and work restriction
   d) Relief/non-relief
      i) Did treatment relieve?
      ii) Adequate medication?
      iii) Where there complications?
   e) Does the claimant require continued medical treatment?
4) Lost time
   a) How much time was lost from work?
   b) Was the lost time excused by the doctor(s)?
5) Compensation
   a) How much did the claimant make per hour?
   b) Did the claimant work overtime, regularly?
   c) Was there a second job?
   d) Were there other forms of income, such as, mileage reimbursement?
   e) Are there outstanding, denied, bills?
      i) Medical, mileage, lodging or meal
6) Permanency
   a) What are the current symptoms?
   b) Are there aggravating or ameliorating conditions?
      i) Bending, stooping, sitting, squatting, crawling, climbing, lifting, time limitations
   c) Is there environmental, work, restrictions?
   d) Is the claimant able to work?
   e) Is the claimant willing to work?
      i) At the same or different job?
      ii) If a different job, what is the pay?
   f) If not working, has the claimant attempted to work?
   g) What is the claimant's subjective loss of use?
      i) What percentage of loss of use is the claimant experiencing?

DECISION AND ORDER CHECKLIST
(Circle Applicable D & O)

(Employer and Carrier) 1 1(a) 2 2(a) 3 3(a) 4 4(a) 5 5(a) 5(b)

1. WCC File Number
2. Claimant
3. Employer
4. Carrier

5a. Claimant's Attorney

5b. Defense Attorney

5c. Purpose of Hearing

5. Location of Hearing

6. Date of Hearing

7. Case Closed

8. Commissioner

9. Date of Alleged Accident

10. Dictate or write summary (do not use global search) of evidence and/or reasons

14. Average Weekly Wage Amount

15. Compensation Rate

17. Parts of the Body Affected

18. Date Disablity for Temporary Total Commenced to Date Disability for Temporary Total Terminated (if Stop Payment (5c), use only beginning date).

20. Date Medical Care Commended to Date Terminated

22. Date Maximum Medical Improvement Reached

23. Percentage of Disability to Affected Body Part

24. Part(s) of Body Awarded/Affected

25. Physician referred to for additional treatment or evaluation

33. Date Specific Disability Starts

34. Number of Weeks Awarded

35. Date Credit Against Temporary Total to Begin

36. Amount of Temporary Total Overpayment

Ethics and Professionalism

Submitted by J. Tyler Lee Jr.

Ethical Considerations in Handling Workers Compensation Cases

by

J. Tyler Lee, Jr.
McWhirter, Bellinger and Associates, P.A.

Scope of Discovery

The main source of legal authority for conducting discovery in workers compensation claims is Section 42-3-140 of the Workers Compensation Act:

> The commission or any member thereof, or any person deputized by it, may, for the purpose of this title, subpoena witnesses, administer or cause to be administered oaths and examine or cause to be examined such parts of the books and records of the parties to proceedings as relate to questions in dispute.

As officers of the court, the Commission's subpoena powers extend to attorneys practicing before it. The Commission provides a form subpoena, known as a Form 27. Subpoenas may be enforced by filing a motion to compel with the Commission. Parties opposing a subpoena may similarly file a motion to quash or modify the subpoena. The Commission will often rule on these matters without a hearing, if both sides have briefed the issues.

For the purpose of this title

Often, third-party liability issues arise in a workers compensation claim, most commonly in claims arising from motor vehicle accidents and premises liability. It benefits the claimant and defense equally for such liability to be proven, as it usually results in more money for the plaintiff, and a partial recoupment for the defense. A successful third-party recovery is truly a "win-win" situation, and both claimants' and defense counsel would be wise to work together to help make it happen.

One way to do that is by attempting to use the workers compensation discovery rules to investigate the third-party claim. Otherwise, a lawsuit must be filed to have recourse to the Rules of Civil Procedure regarding discovery. Filing lawsuits is expensive and time-consuming, and in smaller cases, or cases of questionable liability, filing suit without knowing more about the circumstances of the injury might be, at best, financially inadvisable, and at worst, unethical, as the facts as known may not support the filing of a lawsuit.

Recently, I represented an injured worker who had a potential premises liability third-party claim. The property owner refused to allow my investigator to take photographs of the scene, so I sent a workers compensation Form 27 subpoena requesting an inspection. The owner hired a lawyer who filed a motion to quash, based on an argument that my subpoena was

intended solely to investigate whether there is third-party liability. Their argument was that the workers compensation claim was accepted, i.e., there was no argument about whether the claimant was injured, or whether the injury was compensable under the Act. Therefore, my subpoena was not "for the purposes of [Title 42]," but for the purposes of furthering a civil claim.

Both I and defense counsel filed briefs in opposition, making the argument that whether third-party liability exists is eminently relevant to our workers compensation claim, because of the Carrier's subrogation rights, and we should have the right to investigate the third-party claim under Title 42. Further, the Act provides detailed rules regarding third-party actions and recoveries, in Sections 42-1-550 and -560. This argument lost and the motion was quashed. However, if the facts were different – e.g., if the mechanism of the injury were in dispute, it is likely that the Commission would have ruled otherwise.

As relate to questions in dispute

My standard practice as a claimants' attorney is to send a Form 27 subpoena out in every case, asking for my clients' payroll records, personnel file, any nurses' notes, medical records, emails, letters, witness statements, video recordings, etc., which relate to the claim. Sometimes, though rarely, claims which were accepted become "un-accepted," and a lawyer may find him- or herself in the unfortunate position of wishing these things had been requested sooner. Documents get lost; memories fade; witnesses move away, get fired, or otherwise become available. It may not be necessary to take depositions in an accepted case, but I consider doing a basic subpoena to be the exercise of basic diligence, especially in a case involving a significant injury.

Recently, much to my surprise, a defense attorney filed a motion to quash this basic subpoena, on the grounds that, because the claim was accepted, treatment being provided, etc., there were no "questions in dispute." The Commission issued a ruling limiting the scope of my subpoena to my client's payroll records and personnel file, which he would have the right to receive anyway, and quashing the rest.

Communicating With the Claimant and Medical Providers

In the workers compensation reforms of 2007, the Legislature created Section 42-15-95(B):

> (B) A health care provider who provides examination or treatment for any injury, disease, or condition for which compensation is sought under the provisions of this title may discuss or communicate an employee's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys or certified rehabilitation professionals, or the commission without the employee's consent. The employee must be:

(1) notified by the employer, carrier, or its representative requesting the discussion or communication with the health care provider in a timely fashion, in writing or orally, of the discussion or communication and may attend and participate. This notification must occur prior to the actual discussion or communication if the health care provider knows the discussion or communication will occur in the near future;

(2) advised by the employer, carrier, or its representative requesting the discussion or communication with the health care provider of the nature of the discussion or communication prior to the discussion or communication; and

(3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider. The employee also must be provided with a copy of the response by the health care provider.

Pursuant to part (C) of this Statute, any information obtained outside of this rules framework must be excluded. As a practical matter, compliance with this section is very simple. The defense must let the claimant know that a communication is going to take place. If the communication is in writing, the claimant/claimant's counsel must be copied.

In practice we see two main situations where this Section comes up. Many Carriers, especially in cases of significant injury, employ nurse case managers (NCM's) to coordinate care, by scheduling appointments, imaging studies and other tests, etc. The standard NCM practice is to send an initial letter to counsel explaining their role, and letting counsel know that they will be meeting with the doctor after the examination – which much be private if requested – and asking questions. This is allowed under this Section. Most NCM's will share their notes from these meetings with claimant's counsel, and they are discoverable.

Sometimes, defense counsel will send a questionnaire to a treating professional, asking for clarification on an issue, impairment ratings, etc. These must always be copied to claimant's counsel at the same time they are sent, for the answers to be admissible. Practice tip: if I am concerned about the potential response, I generally, at the very least, send a letter of my own to the doctor, and enclose medical records from other providers, or any other evidence which would tend to help them see things my way. Sometimes, though this happens rarely, defense counsel may present questions using biased language or based on incorrect assumptions, and it is my job to clear things up if that happens. Other options available to claimants' counsel include in-person meetings or telephone discussions with the doctor. The ultimate option is taking the doctor's deposition, if the doctor simply refuses to cooperate in any other way.

Responsibility To Be Candid With the Court

Every lawyer is required to be familiar with the principles outlined in Rule 3.3 of the Rules of Professional Conduct. You would do well to read it again. Basically:

Do Not Lie To The Court – and, if what you said previously is now untrue, correct yourself.

Do Not Mislead The Court As To The Law – if you know about a case that is adverse to your position, YOU must bring it to the attention of the Court, even if the other lawyer did not.

Do Not Offer False Evidence – however, you have to KNOW it's false. For example – if your client testifies that she fell at work, but two co-workers say she's lying – you do not know that's false. However, if there is a videotape showing that the fall never happened, you may not want to present your client's testimony in that regard.

If there is serious doubt about the correct action to take, call an ethics professor and document the conversation.

Practice tip: My personal philosophy is, even if no one else in the world believes my client, I am going to believe him or her until I am shown substantial proof to the contrary. However, if you represent claimants, you do not want to acquire a reputation for having clients who are obvious liars. If my client's story is strongly contradicted or otherwise implausible, I would consider recommending a settlement vs. going to a hearing.

Bordering On Fraud

Section 42-9-440 requires the WCC to report suspected false statements and fraud to the Insurance Fraud Division of the Attorney General's Office. As a practical matter, the Commission does not generally do this with regard to individuals' testimony, unless the false statement or fraud is egregious or absolutely incontrovertible. As noted above, I strive to avoid bringing evidence or testimony which strongly appears false before the Commission, so I have not had direct experience with this. I will caution my clients about this Section when necessary. Defense counsel should do the same, especially in the situations enumerated in Section 38-55-530(D).

Conflicts Between The Insurer And The Insured

Counsel for the Defense is generally (but not always, in the case of a self- or un-insured Employer) hired by the Carrier to defend the claim. I am not a defense attorney, but based on my readings, defense attorneys begin by reading the ABA model rules on the "Tripartate Relationship" among insurer, insured, and defense counsel. It appears that many of the potential conflicts that may arise may be dealt with by drafting an appropriate retainer agreement.

For example, if the Employer has been lying to the Carrier about aspects of its business which are material to determining the premium rates, does defense counsel have an obligation to tell the Carrier? Or, does defense counsel have an obligation to keep that information

confidential from the Carrier? This sort of issue could possibly be resolved by having a retainer agreement which specifically limits the scope of representation, per Rule 1.2, SCRCP.

Generally, an insurance contract will provide that the insurer, having the obligation to provide the defense, also has the right to control that defense. However, this does not absolve defense counsel of all responsibility to the insured. The situation may arise where the insurer restricts the efforts of defense counsel due to cost considerations, and where counsel has a legitimate concern about the impact on the insured.

There are many other conflicts that could arise between and among the members of the tripartite relationship. As above, when in serious doubt, call an expert such as an ethics professor.

Disclosure Obligations

Rule 1.6, SCRCP, states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with other law or a court order; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or

from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

As with most ethical rules, this one presents a balancing act among competing obligations – that of confidentiality to a client, vs. the attorney's obligations to society. Notice that the lawyer "may" reveal the information discussed here – it is not mandatory. In practice, if I discovered that my client was presenting a fraudulent claim, or had lied under oath, I would not consider disclosure of that fact mandatory. However, I would consider it as creating a conflict of interest, as by continuing the representation I would become complicit. Only if my withdrawal/relief were contested by the client would I then feel it warranted to disclose my basis for the conflict.

In our WC practice we often deal with clients who are under a great deal of stress about the future. Some of them will have mental health concerns which make it much harder for them to make rational decisions. In very rare cases – exceedingly rare, in my experience – such a person may present a physical threat to themselves or others. In those cases, I will take whatever action and disclose whatever information I feel is reasonably necessary to prevent bodily harm to my client or others, come what may. I have a zero-tolerance rule for threats of harm to others. If my client makes any kind of threat, even obliquely, to myself or a member of my staff, I immediately withdraw from representation and place them on trespass notice. If they threaten another attorney or judicial officer, like a Commissioner, I will notify that person of the threat and let them decide what action to take.

If a client appears to be suffering from a major mental disorder (paranoia, delusions, etc.), I will usually recommend they seek professional care, and in extreme cases, I will contact a family member with my concerns. If a client mentions wanting to harm him- or herself, I usually recommend that they seek inpatient psychiatric care, which is offered at many hospitals on a walk-in basis. I will usually ask permission to involve family members, unless I believe the threat is serious enough, in which case I will do it anyway.

Attorney's Fees

Attorney's fees in general are governed by Rule 1.5 of the Rules of Professional Conduct. Rule 1.5 requires that any fee charged by any attorney be "reasonable," and it sets forth a list of eight factors to be considered. These are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and,

(8) whether the fee is fixed or contingent.

All fees charged must be reasonable, and fees should be (but are not absolutely required to be) set out in writing before or within a short time of commencement of the representation. Best practices for any lawyer include a detailed engagement letter or fee contract, setting forth the scope of the representation and the basis for calculation of the attorney's fee. Contingency fees are always required to be set forth in writing. See Rule 1.5(C).

Article 12 of the workers compensation regulations deals with the issue of attorney's fees in workers compensation cases. Almost every fee charged by counsel for the claimant is a contingency fee of 33.3%, which is the upper limit set forth in Reg. 67-1205(C). The current practice of the Commission is to require submission of a Form 61(A) when the fee will equal or exceed $50,000.00. The 61A asks the attorney requesting approval of the fee to address the eight reasonableness factors set forth in RPC 1.5. In my own practice, I have never had a fee for more than $50,000.00 reduced by the Commission. I do, however, submit very detailed responses on my Form 61A's.

Claimant's attorneys almost universally agree to advance the costs incurred during the representation, to be paid back at the time of disbursement of the funds collected. See Reg. 67-1206. Any costs for anything besides witness fees, deposition expenses, service costs, or costs for evaluation or treatment of the client (e.g., independent medical evaluations, FCE testing, etc.) will not be approved unless the fee contract specifies those costs. See Reg. 67-1206(A)(2). This is important because a large portion of the advanced costs in a workers compensation claim are based on copies of the medical records, which are not covered by 67-1206(C)(2). A fee contract, therefore, should specify those costs in every case. The Commission in my experience will not allow reimbursement of certain costs, especially photocopies, due to their being "related to the operation of a law practice."

If multiple attorneys represent a claimant, for example via a joint representation/fee sharing agreement, as would be common when one attorney associates another to do part of the work, the combined fee charged to the claimant cannot exceed 33.3%. See 67-1205 (C)(6).

An exception to the one-third contingency fee for claimant's counsel is in death claims, and claims for lifetime compensation for paralysis or physical brain damage. If the claim involves one of these injuries, and the employer's representative does not contest liability, then the fee is capped at $2,500.00. If, however, in a death case the defense does contest liability, compensability, or counsel represents a potential beneficiary whose entitlement to compensation is disputed, the cap is lifted and a 1/3 fee is allowed -- subject, of course, to the eight

reasonableness factors. If a lifetime case is contested, the attorney's fee "shall be considered on a case by case basis." See Regs. 67-1205(C)(3) and (C)(4).

Defense counsel generally charges an hourly fee, which remains subject to a reasonableness test under Rule 1.5.

If a party refuses to sign the Form 61 agreeing to the fee charged by the attorney, and wishes to dispute the fee, the attorney should submit the unsigned 61 along with a motion requesting a hearing. The Commission will issue a hearing notice and a Commission will decide the issue.

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