Appendix 7

(Chapter 7-Stop Payment)

1. Article by Preston McDaniel, SCTLA Bulletin, Spring 1999.

SOME NUTS AND BOLTS CONCERNING INJURY BY ACCIDENT, NOTICE OF INJURY, STOP PAYMENT AND MEDICAL CAUSATION

INTRODUCTION

This presentation will seek to give some insight into three of the issues that practitioners regularly deal with in the workers' compensation setting. The first of those is Injury by Accident and basically this presentation will seek to give some insight into what you need to be ready to prove under current law to have your injured worker be declared entitled to benefits. The second concerns an ever re-occurring nasty defense, notice of injury, that will be raised where the injured worker is anything other than taken by ambulance from the scene and will give the practitioner some insight into what the case law allows you to use to establish that notice of the injury was made. The third concerns the new stop payment statute S.C. Code §42-9-260 and encompasses issues that should be raised to avoid having your client's benefits stopped. The fourth concerns medical causation after Tiller v. National Health Care.

I

INJURY BY ACCIDENT

In 1988 and 1990 I was fortunate enough to argue Stokes v. First National Bank 298 S.C. 13, 377 S.E.2d 922 (S.C. App. 1988) Aff. 306 S.C. 46, 410 S.E.2d 248 (1991). In the Court of Appeals, the issue was and the Court held that mental-mental cases are compensable applying the heart attack standard to determine compensability of such injuries. The specific issue upon which certiorari was granted, however, and which the Supreme Court decided was, what is the definition of injury by accident. Finally, we had a gradual or repetitive or non-specific injury which had been determined to constitute compensable injury and upon which our Supreme Court would now confirm whether or not such constituted compensable injury.

In addition to the briefs of the parties, amicus briefs were submitted by two insurance groups for the defendants and by the South Carolina Trial Lawyers Association (SCTLA) and the Association of South Carolina Claimant Attorneys for Workers' Compensation (ASCCAWC) on behalf of the claimant's position.

The Supreme Court noted the position of the parties,

> "One line of cases holds that it is not necessary that there be some fortuitous or unusual and unlooked for mishap to establish an accident, if there has been an unexpected injury occurring while the employee is performing his usual duties in his customary manner. The other line holds that there must be some fortuitous or unusual and unlooked for mishap resulting in injury for it to be an accident."

Actually that is not a quote from Stokes, although it precisely summarized the position of the parties, but is a quote from Layton v. Hammond-Brown-Jennings Co. 190 S.C. 425, 3 S.E.2d 492 (1939) wherein the Court thought it had laid to rest the argument over the definition of injury by accident. The Court reasserted its holding in Layton in Hiers v. Brunson Construction Co. 221 S.C. 212, 70 S.E.2d 211 (1952) which the Court has repeatedly cited as the controlling case on injury by accident. The Court cited Hiers in Stokes and just as it had some fifty one years before held that,

> "The South Carolina Workers' Compensation law states that 'injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of employment...' (emphasis added).[1] S.C. Code Ann. §42-

[1] Note the Court in Stokes recognized and emphasized the words from the statute, "injury by accident". This is important because as I point out to my law clerks, the statute does not say **an** injury by accident only, "injury by accident". Our Court has recognized just as Professor Larsen does in his

1-160 (1976). This general definition of 'injury by accident' was amplified by the Court in Hiers v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211 (1952), as follows:

> The term...'injury by accident'...has been construed to mean not only an injury the means or cause of which is an accident, but also an injury which is itself an accident; that is, an injury occurring unexpectedly from the operation of internal or subjective conditions, without the prior occurrence of any external event of an accidental character. As stated in some cases, an injury, to be accidental, need not have been created by would or external violence. 58 Am.Jur., Sec. 195, pp. 704, 705.
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> ...
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> In the majority of jurisdictions, no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident.

Hiers, 221 S.C. at 231, 70 S.E.2d at 220.

> **In determining whether something constitutes an 'injury by accident' the focus is not on some specific event, but rather on the injury itself.** Hiers v. Brunson Construction Co., supra.

When the Stokes decision came down we were recognized as the conquering heroes. The general opinion and feeling was that finally we had a decision by the Supreme Court in a gradual or repetitive or indefinite trauma situation that the definition of injury by accident, that being the unexpected result from the work activity, applied to these types of injuries. Since the Stokes decision it has been cited by the Supreme Court and the

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treatise on Workers' Compensation that the insertion of this word into the statute which is not there (nor was it in the original English Statute) has resulted in wrong interpretations by some Courts, much controversy and a requirement of a singular event that is simply not required by the statute.

Court of Appeals repeatedly as setting out the definition of injury by accident.

In Fox v. Newberry County Memorial Hospital 316 S.C. 537, 451 S.E.2d 28 (Ct. App. 1994) then acting Judge Howard cited Stokes stating that the Supreme Court had, "recognized proof of a 'causative event' is not required to establish injury by accident." He also cited to Sigmon v. Dayco Corp., 316 S.C. 260, 449 S.E.2d 497, 498 (S.C. App. 1994). Clearly, the Court of Appeals appeared to be recognizing the lack of a requirement of any specific event under the Supreme Court decisions.

Recently in one of my cases before the Workers' Compensation Commission, the defendants took the position in their Form 51, response to our Form 50 claim, that my client's injury, "carpal tunnel syndrome" due to repetitive trauma did not constitute compensable injury under the Act. When I argued at the Hearing that repetitive trauma constituted compensable injury under South Carolina Law, the Hearing Commissioner interrupted and said "Mr. McDaniel I do not think that's really being contested by the defendants and very few people I know continue to raise that issue as I am certainly of the opinion that repetitive trauma is compensable." With the Commissioner's statement it was very instructive to watch the defendants' reposturing as to what they were trying to say at that point.

To the contrary, in another recent case before the Commission, I represented a client on a repetitive trauma injury wherein she had to squeeze a clamp, pliers or screwdriver over four hundred (400) times per hour. The Hearing Commissioner awarded this injury on the basis that, "repetitive trauma," constituted compensable injury by accident. However, on appeal to the Full Commission three other Commissioners held that since we had not proved, "a specific event" this did not constitute compensable injury. On Appeal to the Circuit Court in that case by the time it was heard the Supreme Court's decision in Clade v. Champion Laboratories and Continental Insurance Co. 330 S.C. 8, 496 S.E.2d 856 (1998) had come out and the Circuit Court reversed finding that the evidence established as a matter of law compensable injury by accident under the definition as applied by the Supreme Court.

In Clade the Supreme Court instructed the Court of Appeals that it's focus in its decision in Clade that the injured worker had failed to, "prove a specific causal event" was misplaced. Instead, the focus should have been on whether she proved a "causal relationship." As the Supreme Court stated in Clade: "This language which requires an injured employee to identify a specific event for an injury to be compensable contradicts the established law of this State. See Stokes v. First National Bank 306 S.C. 46, 49, 410 S.E.2d 248, 250 (1991) ('.., the

unexpected result or industrial injury is itself considered a compensable accident') ...

> Injured employees **are not required to prove their injuries were caused by specific events** in order to recover workers' compensation benefits."

Again in Clade the Supreme Court was stating that the unexpected result from the work activity constitutes compensable injury by accident under our law. In the Clade decision in discussing the facts, the Court noted that the claimant had offered proof by her treating physician that her injury was aggravated by driving a forklift but he never specifically determined that her injury was caused by driving the forklift. The Supreme Court affirmed the Court of Appeals and the Commission decision denying benefits because there was unfortunately substantial evidence to support that decision. However, by quoting this particular factual scenario the Supreme Court clearly was indicating that had the treating physician stated that in his medical opinion her injury was caused by driving the fork lift that the claimant would have met her burden.

Thus, we have the Supreme Court again clearly stating that there is no requirement for specific injury and indicating that if the claimant proves that the injury was as a result of the work activity or a work activity that it is compensable. We also have the Court of Appeals in several cases saying that

there is no specific event requirement and being reminded by the Supreme Court that, no "specific incident" is required. We have some Commissioners making that decision initially and others being told by the Circuit Courts on appeal that such injuries are compensable. Therefore, it would appear that the Supreme Court and Court of Appeals have established that gradual or repetitive or nonspecific injury by accident where the unexpected result is as a result of some work activity is compensable. You would think that the matter has been laid to rest. Wrong!

Now enter a Court of Appeals opinion in dicta which again muddies the water. Quoting the Court of Appeals in the case of Reese v. CCI Construction Co. S.C. Ct. App. Opinion No: 2948 Filed February 22, 1999 written by Judge Huff and concurred in by now Chief Judge Hearn and Judge Conner:

> "To date, our Courts have not decided whether repetitive trauma, like carpal tunnel syndrome, is compensable, and if so, as an accident or occupational disease."

For the purpose of reviving this, thought to be dead horse, the Court of Appeals cited the Supreme Court decision in Rodney v. Michelin Tire Corp. 320 S.C. 515, 466 S.E.2d 357 (1996). In support of the purpose of its citation by the Court of Appeals in the Rodney case, a very able defense lawyer against a pro se litigant had tried to boot strap these issues into the appeal.

However, Chief Justice Elect Toal writing for the Supreme Court found that the issues that Rodney, the pro se litigant, attempted to raise and the defense attorney sought to use, had not been preserved for appeal. The Court then made it's decision on the basis that there was conflicting evidence on the issue of whether or not the injury arose out of and as a result of the work of the injured worker and since there was conflicting evidence, held there was substantial evidence to support the Commission's decision denying this worker benefits. Thus, the Supreme Court in Rodney did not address repetitive trauma as an issue but instead based its opinion on substantial evidence. However, did the Court again tell us its opinion?

In Rodney Chief Justice Elect Toal wrote,

> "an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is being performed and the resulting injury".

Based on that quote and the reading by this author of the Rodney decision it does not stand for the proposition for which the Court of Appeals cites it but in fact it does support the proposition that repetitive trauma is compensable under the general definition followed by the Supreme Court. Obviously though in at least the minds of some of the Judges of the Court

of Appeals the issue of whether or not repetitive trauma is compensable has not been laid to rest.

Based on all of this where are we? This author would submit that the Supreme Court has clearly held that gradual or repetitive or nonspecific injuries which it is established are the unexpected result of a work activity or the work activity are compensable injuries under South Carolina Law. The Court of Appeals on the other hand varies or at least some members feel that this issue is still open.

As far as your position before the Commission representing injured workers this author would submit that you should take the position in any repetitive, gradual or nonspecific trauma situation that such constitutes injury by accident under South Carolina Law citing Stokes, Clade and even Rodney. You should also cite Strawhorn v. J. A. Chapman Construction Co. 202 S.C. 43, 24 S.E.2d 491 (1949) (a case wherein a painter developed lead poisoning after being repetitively exposed to lead over a months period); Sturkie v. Ballenger Corp. 268 S.C. 536, 235 S.E.2d 120 (1977) (a case wherein a gentleman was driving a truck for a three to four month period in Puerto Rico and was repetitively exposed to heat, high humidity and dust inhalations.) and Grayson v. Gulf Oil Co. 292 S.C. 528, 357 S.E.2d 479 (S.C. App. 1987) (in Grayson the claimant, as a result of repetitive inhalations of gas fumes, finally as a

result of what should have been a minor inhalation became totally disabled as a result of the cascading effect from all of the traumatic exposures).

What you should be ready to prove and which seems to be the real lynch pin at least as far as the Supreme Court is concerned as indicated in the Clade decision, is whether or not the claimant has proved that the compensable injury resulted from an identified work activity or activities or condition of employment. Remember that the Court stated in Clade very emphatically that the claimant's doctor did not state that in his opinion that the injury was caused as a result of the work activity of driving the fork lift. Therefore, if you can establish that a specific work activity has resulted in compensable injury the Supreme Court in all probability will find that to be compensable.

Under our definition of injury by accident the question for the Supreme Court is simply a matter of causation. Did the compensable injury stem from the work activity. In other words the questions you should be prepared to ask your client and witnesses are, "did a work activity and what work activity caused injury", and the medical providers involved, "Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not a work activity or the work activity or activities caused or resulted in the compensable injury?" If

the answer to those questions are yes then you have established causation and having established causation the Supreme Court is going to find under our definition of injury by accident compensable injury.

II

NOTICE OF INJURY

Client No. 1 comes to you about six months after the injury and tells you that he hurt his back while carrying an air conditioner but did not miss any work at first. When he continued to hurt, he then went to a doctor of chiropractic for about six weeks to two and one-half months but still did not miss any work. Just before coming to see you he had just started missing time from work because his condition had gotten so bad that he saw an orthopedic surgeon who told him that he had a herniated disc, needed to be out of work and needed to have surgery. Client No. 2 comes into your office six months after having gone out of work on disability due to the severe condition of her hands from squeezing a pair of pliers or clips repeatedly about four hundred times an hour. Over the last two years she had continued to work until finally the condition became so bad that the doctor took her out of work. The company then agreed with the doctor that she is totally disabled and placed her on long-term disability due to the severe arthritic condition in her hands. The doctor, however, has just for the

first time told her that the work activity has caused the problem and so she came to you.

You file your Form 50 in both of these cases and the Form 51 comes in, which is your standard, "shotgun" Form 51 denying even the existence of the employer/employee relationship. You assume that the real issue is whether or not the person has sustained injury by accident. A Hearing is set in each case and you then get the Form 58 (Pre-Hearing Brief) from the defense lawyer and there is a cursory statement that the claimant didn't give notice of the injury. When you get to the hearing and are prepared on the "real" issues you learn that the entire defense of the case is based upon the defense that the claimant did not give notice of the injury within ninety days of the occurrence. Of course, at this point, if this is the situation you are in, you are at the point of a potential heart attack but try to scrape together enough evidence to hopefully defeat this defense. This is a gut wrenching feeling win or lose.

The practitioner in the workers' compensation area must realize that this sneaky little defense is out there with which you must be prepared to deal; is something that the insurance carrier's attorney is going to raise; and depending upon the particular view of the Commissioner involved could very well result in you losing the case. Therefore, the practitioner needs to be aware of this issue, the case law in this area and

be prepared for it unless it is clearly not an issue. (Never Assume it is not!).

S.C. Code §42-15-20 sets forth the requirements for notice of injury by accident:

> "Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practical, give or cause to be given to the employer a notice of the accident... (1)unless it can be shown that the employer, his agent or representative, had knowledge of the accident or (2)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. No compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, (3A)unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and (3B)the Commission is satisfied that the employer has not been prejudiced thereby."

When this defense arises, you should first remind the Commissioner that the Supreme Court has held that the notice provision shall be liberally construed in favor of the claimant. Mintz v. Fiske-Carter Construction Co. 218 S.C. 409, 63 S.E.2d 50 (1951). However, be aware that there are limitations upon the Rule and that the statutory requirements cannot be disregarded all together. The required notice is not to be treated as a mere formality or technicality and dispensed with as a matter of course according to the Supreme Court.

Of course, the first and best way to meet the notice provision is to establish that the employer and/or its insurance carrier had actual or constructive notice of the injury.

Because there is an almost limitless number of variations in the factual situations that can occur the practitioner should look to the case notes and the cases found under §42-15-20 concerning notice for insight into what has been found to constitute actual or constructive notice. However, some facts to look for are:

1. The employer or supervisory personnel of the employer observed or knows the claimant is having problems with a particular area, body part or organ and knows of casual relationship to the job or a job activity,

2. Sees or knows the claimant is taken for or takes the claimant to medical attention or directs that the claimant go to company medical.

3. Knowledge that the claimant was reporting having problems after doing a particular work activity and subsequently calling in and advising that they were going to the doctor for example back problems.

4. long term or short term disability forms or other required benefits or employment documents indicating both the necessity of being out for disability and the source of that disability.

All of these go to establishing either actual or constructive notice. The bottom line is that you should first look for any type of evidence that would establish actual or constructive notice.

If you fail in that regard, the Statute still allows for notice to be waived and the injured worker to obtain benefits where it is established that there is reasonable excuse made to satisfaction of the Commission for not giving such notice <u>and</u>

the Commission is satisfied that the employer and it's insurance carrier have not been prejudiced thereby. Note this is a two-pronged requirement. There must be both reasonable excuse and lack of prejudice. Note also, however, that the Supreme Court has held on the issue of the, "lack of prejudice", that the burden of proof to establish that there is prejudice to an employer and it's insurance carrier for the failure of an employee to properly report an accident is on the employer and it's insurance carrier not the injured worker. Mize v. Sangamo Electric Co. 251 S.C. 250, 161 S.E.2d 846 (1968); Dawkins v. Capital Construction Co. 252 S.C. 536, 167 S.E.2d 439 (1969).

Of course, if because of mental or physical impairment the claimant is unable to give notice, the requirement of reasonable excuse will be met. Ricker v. Village Management Corp. 231 S.C. 47, 97 S.E.2d 83 (1957).

The case of Dawkins v. Capital Construction Co. supra. is instructive on what the Court may find to constitute reasonable excuse under a factual situation similar to the example set forth above concerning the back injury. In Dawkins, the employee had an injury but did not report it within the required thirty-day period applicable at that time. The employer in that case admitted the accident but the accident was not thought to be major by either the employee or the employer and no medical care was required for months afterward. The Supreme Court found

reasonable excuse as a matter of law and sustained the Commission's decision as a matter of fact because of the lack of severity of the Claimant's problems initially following the injury. As the Court stated:

> "What neither employer nor employee then knew, and did not actually discover until a long time thereafterwards, was that the injury would later result in disablement...The Commission has found as a fact that there was a reasonable excuse for the Claimant not having given written notice within thirty days and we conclude that such finding was amply supported by the evidence...
>
> Assuming that the failure to seek earlier medical attention worked to the prejudice of the employer, there is no evidence, we think, in the record tending to prove that such resulted from the failure to give the written notice within thirty days. <u>It resulted rather from the failure</u> of both the employer and employee <u>to apprehend the need for any prompt medical attention and their failure to appreciate that the injury, which caused no appreciable disability within the thirty day period, would prove several months after the expiration of such period to have disabling results</u>."

Clearly, if the injured worker and/or his employer do not think that the injury is serious and therefore the worker does not report the injury, the question will be whether or not you can submit sufficient evidence to convince the Commission as to this being a reasonable excuse in that type of situation. [Note: This could also be applied in the situation where for example an employee is having a health problem or injury to a member, organ or bodily part but does not realize that it is work related until he is told it is work related by his treating physician.

By analogy see: Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992).]

On the second prong of the test "establishing prejudice", remember that it is the burden of the employer and it's insurance carrier to establish such prejudice if they are claiming lack of notice as a defense. Therefore, you should be prepared to rebut this evidence if it is put up by the insurance carrier. Note from the Mize and Dawkins decisions that the Supreme Court has recognized that one of the reasons that an employer can use to establish prejudice is that the employer could have provided earlier medical attention. However, where the employee did not discover the disabling quality of the injury for a long period after the accident, the Supreme Court has held that the ability to provide prompt medical attention is not a grounds for prejudice to the employer because no one could have known of the need for that medical attention.

In any event, the practitioner should first attempt to establish actual notice and if not actual notice then constructive notice of the injury on behalf of the supervisory staff, the employer and/ or it's insurance carrier. [Remember: The report of injury must be to management and the necessary level of management will probably relate to the level of employment of the claimant]. Of Course, physical or mental incapacity or fraud should be asserted if such exists. Failing

actual or constructive notice or physical or mental incapacity or fraud, the practitioner should seek to establish reasonable excuse for failure to give notice such as lack of knowledge of the significance of the injury or lack of notice that the injury was in fact work related and should put the employer to it's burden of proof that the failure to give notice has resulted in prejudice.

III

STOP PAYMENT PROCEDURES

INTRODUCTION

Currently there are two different stop payment procedures that apply under the new version of S.C. Code §42-9-260 and the new Commission Regulations 67-502 through 506. The first procedure applies during the first 150 days after benefits have been started. The second procedure for stop payment applies to a claimant who has received over 150 days of compensation and is basically the traditional stop payment procedure that we have all lived with during the last several decades under old §42-9-260, Commission Rule 67-507 and its Predecessor Commission Rule 67-10. These two separate procedures will be discussed in separate sections as different methods for opposing stop payment of benefits under those Sections apply.

A.

STOP PAYMENT PROCEDURES DURING THE FIRST 150 DAYS

As you are aware, under the new version of S.C. Code §42-9-260 and the new Commission Rules, during the first 150 days except in very specific situations benefits can be stopped without a Hearing. A Hearing is then only held if it is requested by the Claimant or the Claimant's attorney. In representing an injured worker in this situation, there are several different types of issues that should be raised:

First, in the opinion of this writer and a position that I hope all Claimant's lawyers will take is that the new Statute, SC Code §42-9-260 (eff. 6/18/96) and the Rules adopted thereunder are unconstitutional as violating the provisions of fundamental due process and equal protection as established by the United States Constitution, our South Carolina Constitution and our South Carolina Administrative Procedures Act.

Second, the fundamental legal principle of workers' compensation as established by our Supreme Court is that the Workers' Compensation Act shall be liberally construed in favor of benefits to the injured worker. Therefore as to the defendant seeking to stop benefits the contrary is true: the Act must be strictly construed against the carrier and against stopping benefits. These principles must be applied to this

procedure, to the construction of the Statute and Regulations, to what the Defendant's must show to sustain their position; and to what we as Claimants' attorneys' must show to defeat stop payment in these situations.

Third, the efforts we should take to insure that benefits are restored to our client at or before a hearing or as soon thereafter as possible.

1. CONSTITUTIONALITY

Concerning the constitutionality of the S.C. Code §42-9-260 (eff. 6/18/96) the basic memorandum of our office, (attached as Appendix A), sets forth the basis for the arguments that this Statute is unconstitutional as violating fundamental due process and the equal protection clauses of both our United States and South Carolina Constitutions; that it is violative of the Administrative Procedures provision of the South Carolina Constitution; and that it is violative of the Administrative Procedures Act. I believe that this memorandum or one that is similar should be filed in every case concerning stop payment of benefits without a hearing under the 150-day period provision. In an outrageous stop payment situation which affects the safety and well-being of a South Carolina family, a Writ in the original jurisdiction of the Circuit Court (such as a Writ of Prohibition), prohibiting the Commission from enforcing the

Statute on these constitutional and statutory grounds should be filed along with an injunction pending resolution of the Writ.

2. LIBERAL CONSTRUCTION FOR CLAIMANT/STRICT CONSTRUCTION FOR DEFENDANTS

Concerning the compliance of the Defendants with the dictates of the Statute and Rules, we must demand and point out to the Commission that absolute strict compliance is required. It is a fundamental provision of the Workers' Compensation Act that the Statute shall be liberally construed in favor of benefits to the injured worker. That principle and a line of cases that holds that this is the fundamental construction principle of Workers' Compensation is as follows:

> "Compensation Laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents; and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted and to avoid any incongruous or harsh results".

Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941); Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1938); Phillips v. Dixie Stores, Inc., 186 S.C. 374, 195 S.E.2d 646 (1938); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Carver v. Bill Pridemore and Co.,

278 S.C. 235, 294 S.E.2d 419 (1982); Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 922 (S.C. App. 1988).

Since the Act shall be liberally construed in favor of benefits to the injured worker, the contrary is true in any effort by the Defendants to stop payment of benefits, meaning that there must be strict compliance with the statutory and regulatory provisions.

Generally our experience is that the Commissioners are limiting the hearings that are requested on these 150-day stop payment situations strictly to the issues set out on the Form 15 as the basis for stopping benefits (unless there is an agreement by the parties to the contrary).

Under the current practice by the carriers under the new statute and regulations there is no way of knowing exactly what the carrier has to support it's position for stop payment because all you receive is a Form 15 with an appropriate block checked. There is no attached documentation. As finally approved by the Legislature, Rule 67-504 requires that the basis for the stopping of benefits **must** be attached to the Form 15. If the documentation is not attached, this should be your first line of defense at the hearing. Also, I would recommend a letter to the Commission with a short proposed order requiring the defendants to restart benefits for non-compliance with the Regulation. [If they can stop benefits without a due process

hearing - shouldn't the Commission be able to restart benefits without a hearing?]

Next, assuming the defendants have not set forth the basis for stopping benefits, you must get that information as soon as possible in order to prepare your case for reinstatement; including failure of the Defendants to strictly comply with the statute and regulation. One way to obtain this information is to immediately subpoena the information from the defendants. If the basis is a medical reason, this is another reason to update your medicals regularly.

Once you know the basis for the grounds for stop payment, the Commissioners are requiring strict compliance and holding the Defendant's feet to the fire. If the defendants fail to comply in any way, generally the Commissioners will reinstate benefits.

3. PREVENTING STOPPING OR REINSTATEMENT OF BENEFITS ASAP

What procedural steps can you take to insure that benefits are not stopped? As noted above, the Commissioners are currently limiting these reinstatement hearings strictly to the issue as to whether or not there is evidence to support the grounds upon which the carrier stopped benefits. If the carrier did comply with the statutory and regulatory requirements the Commissioners are upholding the stop payment of benefits.

In many of these cases, the carriers are filing for stop payment in situations where they have sent the employee only to a company doctor or a company doctor and a company specialist. First, you should make sure that your clients keep you up to date on their medical care. As soon as they feel like or they know that the carrier's doctor(s) is releasing them or is advising them to return to work, you must be prepared to request further medical care and/or a second opinion from the carrier. This request may be oral or in writing but a written confirmation should be sent with a copy to the Commission. You should be prepared to file a Form 50 at that point for such medical if the request is denied. You can then ask that the Form 50 be merged for hearing with the reinstatement hearing so that hopefully you can have your request for additional medical care before the Commission at the same time that the Commissioner is deciding whether or not the carrier can stop payment.

Because of the filing requirements of the Form 50 and the responsive Form 51, this must be done as soon as possible if there is any hope of having this set at the same time as the reinstatement hearing. Therefore as soon as you think a stop payment is coming you should be prepared to make the request and file a Form 50. You may want to consider sending a letter, with a copy to the Commission, to the insurance carrier's attorney

along with your Form 50 asking them to immediately file a Form 51 and waive any Notice requirements so that your request for medical can be merged for Hearing at the same time as the reinstatement hearing. This will place the Defense attorney on their heels when it comes to the reinstatement Hearing.

Of course, if there is any way possible to get another opinion, if one is refused, such as through health insurance, the client's own funds or otherwise this would help in establishing that disability payments should be reinstated and that further medical care is necessary.

Finally, the following are defenses based on strict compliance with the regulation that we or other attorneys have successfully raised in getting benefits reinstated:

A. The Claimant had not actually returned to work for fifteen days.

B. The Defendants failed to prove a good faith investigation.

C. The medical statement or records relied on contained restrictions.

D. An effective offer of employment had not been made.

E. The limited or light duty made available was not consistent with the doctor's restrictions.

B.

STOP PAYMENT PROCEDURES AFTER THE FIRST 150 DAYS

After 150 days, stopping benefits is controlled by S.C. Code §42-9-260 (F) and Regulations 505 and 506. S.C. Code §42-9-260 (F) requires a hearing before benefits can be stopped except in two limited situations: where the employee has actually returned to work or has agreed he is able to return to work.

SUSPENDING BENEFITS

Regulation 67-505 governs the suspension of benefits and much like its predecessors former Regulation 67-504 and 67-10 it allows for suspension of benefits for a fifteen calendar day (15) trial work period. However, there is a major difference in that after 15 days, benefits are not automatically required to be resumed. In fact, if the carrier refuses rightfully or wrongly to restart benefits the claimant must request a hearing! Further, if the claimant cannot complete (15) calendar days at work, the carrier may still file a Form 21. Finally the regulation also specifically refers to both S.C. Code §42-15-60 and 80 as a grounds for stopping payment for refusing medical treatment or evaluation and allows for the suspension of payments while waiting for a Form 21 Hearing.

Based on these changes from a practice standpoint, the practitioner should be even more cautious about a premature return to work. You should work close with medical providers to

be very explicit as to restrictions and require written documentation from defense representatives or employers that jobs and job duties offered are within those restrictions. You should also be vigilant not to give the defendants a basis to stop payment for refusing medical care. The grounds for any refusal or what may be argued is a refusal should be explained in written form with a copy to the Commission.

STOPPING BENEFITS

Regulation 67-506 governs the termination of benefits after the first 150 days.

The very first thing that should be noticed about this Regulation under Subsection A is the departure from the statutory commitment to "disability". Lip service only is given to this fundamental basis for the payment of compensation during disability. The regulations adds to the presumption that disability is presumed to continue until the claimant returns to work, the phrase "except as provided herein". Disability is then not mentioned again in the remainder of the regulation. This in large measure guts the presumption.

Under Subsection (B) there is a striking provision wherein if benefits have been suspended under Regulation 67-505 they do not have to be reinstated. The drafters obviously forgot that S.C. Code §42-9-260 (F) says benefits cannot be <u>suspended or terminated</u> before a hearing and Commission approval. Also, and

probably more importantly, from a practice standpoint, there is no requirement for the defendants to show that the disability has ended, only that the claimant has reached maximum medical improvement. Since this provision is identical to the former provision under former Regulation 67-507 (C)(3)(A) of only having to have a statement of MMI, probably 99% of stop payments not suspended under Regulation 67-505 will be filed under this subsection. The same arguments that applied to former regulation 67-507 and its conflicts with our statutes and case law will apply.

While this author still believes that since benefits are paid under S.C. Code §42-9-10 for, "total disability", the defendants to stop benefits should have to prove that the, "total disability", has ended as defined by the Supreme Court in Colvin v. E. I. DePont De Nemours and Co., 227 S.C. 465, 88 S.E.2d 581 (1955), this argument and the commitment by the Supreme Court to disability as being the important factor was dealt an apparent death blow in the Court's opinion in Alphonso Smith v. S.C. Dept. of Mental Health opinion No. 24959, filed 6/28/99, holding that all the insurance carrier has to prove is MMI by their paid doctor to stop benefits. Petition for Rehearing has been filed.

Subsection (C) is the same provision that is found in our statutes (S.C. Code § 42-9-190) and regulations (former 67-507

and 67-10) wherein if a doctor says the claimant can return to work but the claimant refuses, benefits may be stopped. From a practice standpoint, obviously if the claimant has not returned to work the claimant must feel that he or she continues to be disabled. You should take that position and if applicable that further medical care is needed.

Subsection (D) is what I will refer to as the Young vs. Singleton section. If you look at the subsection and its requirements if you can get outside of a single scheduled member, the only award that can be made under the subsection and the Supreme Court decisions in Colvin v. E.I. DePont De Nemours and Co. and Stephenson v. Rice Services, Inc. is a total disability award. From a practice standpoint, if this is the basis for the filing get outside of a single member.

Subsection (E) is simply the filing requirements section of the Regulation.

Subsection (F) is the filing requirements where compensation has been suspended. Remember! S.C. Code §42-9-260 says compensation **cannot** be suspended or terminated before a Hearing except (1) where the claimant agrees and signs a 17 that he or she can return to work **or** (2) where he or she has returned to work. Subsection (E) of the Regulation by its requirements clearly agrees with the statute that if benefits have been suspended, they must be reinstated and brought current before a

hearing will be set which would apply to a subsection (F) situation as well. Also under Regulation 67-505 which is the basis for the application of this subsection, the Regulation provides that if the claimant, "is unable to complete fifteen calendar days at work temporary disability payments must be resumed." **<u>Note! The statute says work not calendar days</u>**.

Also note that the refusal of medical care is also referred to in § 42-9-260 (B)(6) as a grounds for stopping benefits. However, that grounds is not referred to in Subsection (F) which applies to stopping benefits after 150 days.

Finally under the Rules of Statutory Construction, a regulation cannot add to, alter, or change the statutory requirements upon which it is based. Further, if there is a variance between the statute and the regulation, the statute controls. Therefore, we should compare the regulation to the statute in every situation to insure that the regulation does not alter or change the statutory requirements and to insure strict compliance with the statute.

IV.

NEED FOR MEDICAL CAUSATION

How many times has the practitioner heard when they went before the Commission that if you don't have a statement from a medical doctor stating to a reasonable degree of medical

certainty that most probably the injury was caused by work-related injury by accident. While the law has been very clear that the only time that you had to establish causation by medical opinion evidence which met the medical opinion evidence standard was in a case where you relied solely and only on medical opinion evidence establishing that the injury was caused by a work-related accident.

The Supreme Court in the case of Tiller v. National Health Care, Supreme Court opinion no. 24915, filed March 8, 1999, in reality simply reaffirmed that such medical opinion evidence is not needed and that the Commission is free to give discretion to the weight and consider all the evidence both lay and expert when deciding whether causation has been established. Note from the Tiller case the Supreme Court cited two 1946 cases, Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946) and Poston v. SouthEastern Construction Co., 208 S.C. 35, 36 S.E.2d 858 (1946) in reaching this conclusion. The Tiller case is attached and is self-explanatory and will be further discussed at the seminar. However the reality is that while the defendants have over the years browbeat the Commission with the idea that there must be a medical causation statement this has never been the case. Hopefully, with the Tiller decision Commissioners will not make the same requirements and base their decisions upon the totality of the evidence.