Chapter 11

DEFENSES AND RELATED ISSUES

§ 11.01 McDevitt-Street Defense.

The case of Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E. 2d 833 (1973) held that an employee who misrepresents his physical condition on his job application by concealing a prior injury or disability may be barred from receiving compensation for a new injury that is causally related to the prior injury. In order to raise the defense successfully, all of the following elements must be present:

1. The employee must have knowingly and willfully made a false representation about his physical condition.
2. The employer must have relied upon the false representation, and this reliance must have been a substantial factor in the hiring.
3. There must have been a causal connection between the false representation and the injury.

In Givens vs. Steel Structures, Inc., 279 S.C. 12, 301 S.E.2d 545 (1983) the court held that the causal connection criteria was established by proof that the claimant injured the same part of his back and by medical evidence that the claimant's injury was the cumulative effect of successive injuries.

In McLeod vs. Piggy Wiggly Carolina Co., 280 S.C. 466, 313 S.E.2d 38 (1984) the employee lied about a birth defect, prior back injuries and prior receipt of compensation. Despite the misrepresentations on the application the court affirmed the award of compensation because there was no causal connection between the misrepresentation and the injury. The claimant had done heavy work for three years for Piggy Wiggly without injury and had only one minor back problem in the past ten years while doing heavy work.

Ferguson v. Moore Construction Co., 298 S.C. 457, 381 S.E.2d 496 (1989) held that an employee has no affirmative duty to disclose a prior injury or disability. Judge Gardner also noted that the defense was inapplicable to the facts of that case because the employer had failed to prove reliance on the alleged misrepresentation and had failed to show a causal connection between the alleged misrepresentation and the subsequent injury.

In Vines vs. Champion Building Products, 315 S.C. 13, 431 S.E.2d 585 (1993) the court held that the causal connection was not made because there was no evidence that the claimant's previous injury had contributed to the occurrence of the accident. The physician in Vines testified that the accident alone, without any prior injury, would have been sufficient to cause the injury.

Section 102(c)(2) of the Americans with Disabilities Act, 42 U.S.C. § 12101, et.seq., prohibits a potential employer from making any pre-offer inquiry concerning the existence or severity of an applicant's disability. This prohibition includes a request that an applicant mark on a list of potentially disabling ailments any such problems he has suffered in the past. The employer can ask pre-offer questions designed to determine if the applicant can perform the requirements of the job. For instance, the employer cannot ask, "Do you have a visual impairment?" He can ask, "Do you have a driver's license," if driving is a part of the job. The employer can describe the job and ask the applicant if he can perform the job with or without accommodation. (Once the decision to hire is made conditionally, the employer can send the applicant for a medical evaluation, if he sends all conditional hires for such evaluations.)

If employers cannot ask questions about disability during the pre-offer stage of the hiring process, then one may argue on behalf of a claimant that the McDevitt & Street defense no longer exists. The claimant did not conceal information, he simply obeyed federal law. However, the argument may be more effectively made to the General Assembly that to continue this bar to recovery in light of federal policy is grossly unfair to claimants with disabilities. A court may well say that the claimant's remedy for improper pre-offer questioning is under the ADA, and not under workers' compensation.

§ 11.02 Employee v. Independent Contractor.

The Workers' Compensation Act only applies to employees and statutory employees. Independent contractors are not employees. The statutory definition of employee, section 42-1-130, includes minors, aliens, legal and illegal employees, unelected state and municipal workers, National Guardsmen and business owners who, although normally exempt, have elected to be covered.

The test for determining whether a person is an independent contractor or employee is whether the worker has the right to perform his job without being subject to the control of his employer, except as to the result of his work. Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971). The issue is not the actual control exercised, but whether the employer has the right and authority to control and direct. Thorpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 394 (1970). The courts have developed a four factor test to determine whether an employer has the requisite right of control: (1) direct evidence of right to or exercise of control; (2) method of payment; (3) furnishing of equipment; and, (3) right to fire. Crim v. Decorator's Supply, 291 S.C. 193, 352 S.E.2d 520 (S.C. App. 1987).

The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor would have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract. See Thorpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970).

Some employers devise elaborate schemes to set up employees as independent contractors and thereby avoid compliance with the Workers' Compensation Act. This can be done, even though an employment contract is unfair to a worker and a "studied attempt" to avoid the Act. These employment contracts are entitled to some weight in determining the relationship of the parties. Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969). However, the commission is not bound by agreements purporting to set up a worker as an independent contractor. Kilgore v. South Carolina Employment Security Commission, 313 S.C. 65, 437 S.E.2d 48 (1993).

§ 11.03 Casual Labor.

Section 42-1-130 provides that workers who are both casual and not employed in the trade, business, profession or occupation of the employer are not covered by the act. See also §42-1-360.

Smith v. Coastal Fire & Auto Service, 263 S.C. 77, 207 S.E. 2d 810 (1974) holds that casual means irregular, unpredictable, sporadic and brief.

MacMullen v. South Carolina Electric & Gas, 312 F. 2d 662 (4th Cir. 1963), cert. den. 373 U.S. 912, 10 L.Ed.2d 413, 83 S.Ct. 1302 states that sporadic, irregular work must have some reasonably direct relationship to performance of work by the employer.

§ 11.04 Exemptions and Exceptions.

Section 42-1-360 exempts casual employees, employers with less than four employees, Textile Hall, county fair associations and agricultural employees. For purposes of section 42-1-360, the four employees must be regularly employed in the same business within the state. See Deanhardt v. Deanhardt, 298 S.C. 244, 379 S.E.2d 726 (S.C. App. 1989). However, statutory employees may be counted. Ost v. Integrated Products, 296 S.C. 241, 371 S.E.2d 796 (1988). Other exceptions include section 42-1-350 (Railroads); section 42-1-370 (Agricultural salesmen); and section 42-1-375 (Real estate sales persons).

The supreme court fashioned another exception to coverage in the case of Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996). Although the employee in Stephenson was earning income, the court determined that the job he was performing was "so limited in

quality, dependability, or quantity that no reasonably stable market existed for his skills." This phrase is frequently used to define total disability. See Coleman v. Quality Concrete Products, 245 S.C. 625, 118 S.E.2d 812 (1961). Therefore, the employee, being already totally disabled, could not suffer the loss of earning capacity necessary to succeed in a general disability claim under section 42-9-10. Presumably, this employee will not even receive medical treatment or temporary compensation, since he is deemed totally disabled, despite "nominal earning capacity." This case has the effect of restricting the statutory definitions of "disability" found in section 42-1-120 and "employee" found in section 42-1-130 in general disability cases filed pursuant to sections 42-9-10 and 42-9-20. If the employee in Stephenson had suffered partial disability to a scheduled body part, or fifty percent disability of the back, loss of earning capacity would be presumed. Would he have been denied benefits under such scenarios?

In Medlin v. Greenville County, 303 S.C. 484, 401 S.E.3d 667 (1991), the supreme court held that an employee who has been previously adjudged totally disabled based upon a 50% permanent loss of use of the back under section 42-9-30 could not again be compensated for total and permanent disability due to another injury to his back. The employee could, however, receive medical treatment and temporary total compensation. In an "aside" in Stephenson, supra, the supreme court said that, although an employee like Mr. Medlin, who returned to work for years after being deemed totally disabled due to a back injury, can receive no more permanent disability, an employee who "suffers an additional work-related injury that is a scheduled injury...or that deprives her of earning capacity, ...may recover workers' compensation for that injury, notwithstanding the previous determination and award of total disability." 473 S.E.2d at 702 (footnote 2). The upshot of all of this is that if an employee is totally and permanently disabled due to injury to a particular body part, he cannot receive permanent total disability for further injury to that body part. If the same employee suffers disability of another body part, or loses earning capacity, then he can receive full benefits. Inconsistencies in the Medlin decision must still be resolved. However, the exception of Medlin is arguably limited to the situation where an employee is adjudged totally disabled based upon 50 percent or more loss of use to the back under section 42-9-30(19).

§ 11.05 Notice.

Section 42-15-20 requires that notice of an accident be given to the employer "immediately" or "as soon thereafter as practicable." The worker is not entitled to any benefits until the employer has notice or knowledge of the accident. No compensation will be paid unless the employer has notice within ninety days, unless there is a reasonable excuse for not giving notice and the employer has not been prejudiced.

Some employers develop elaborate procedures to discourage or prevent workers from giving notice or from gaining knowledge of an accident. Some carriers contend that, if a person leaves a job to go for medical treatment due to an injury, they are not liable unless the worker specifically describes an accident. Hopefully, commissioners can see through these ruses. Few workers have any working knowledge of the workers' compensation system, whereas every carrier and many employers have paid staff to administer the system.

See Chapter 2 for further discussion of notice issues.

§ 11.06 Statute of Limitations.

Section 42-15-60 requires that a claim be filed with the Workers' Compensation Commission within two years after an accident, or within two years after the date of death (if a death claim). The statute is not jurisdictional. It can be waived by the employer if not invoked at the proper state of the proceeding—by failure to plead it, for instance. An employer can also be estopped from asserting the statute if the employer misled or deceived a worker, whether intentionally or not, to believe his claim was compensable and will be taken care of without filing. See, e.g. Case v. Hermitage Cotton Mills, 236 S.C. 285, 113 S.E.3d 794 (1960). The statute will be tolled only during the time the claimant relied on the actions or representation of the employer—the "reliance period." Hopkins v. Floyd's Wholesale, 299 S.C. 154, 367 S.E.2d 447 (S.C. App. 1989), affirmed 299 S.C. 127, 382 S.E.2d 907. In Rogers v. Spartanburg Regional Medical Center, 328 S.C. 415, 491 S.C. 708 (S.C. App. 1996), the reliance period was held to end on the date benefits were last paid.

Gold v. Moragne, 202 S.C. 281, 24 S.E.2d 491 (1943) held than an agreement to pay compensation, filed with and approved by the commission, satisfied the requirement of filing a claim. With changes to the Workers' Compensation Act in 1996, the form commencing compensation is no longer signed by the worker, but it must be filed with the commission. Hamilton v. Bob Bennet Ford, 336 S.C. 72, 518 S.E.2d 599 (S.C. App. 1999).), cert. pending, has held than an "executed" Form 15 which is filed with the commission satisfies the requirements of Section 42-15-60. However, the opinion refers to the old Form 15 signed by the worker and approved by the commission. Neither of these acts is required by present regulations. Nevertheless, most courts accept as the "equivalent of a statutory claim any paper that contains the substance usually supplied by a formal claim." A. Larson, Workers' Compensation Law, § 77A.31 (1998). The decision in Hamilton is consistent with Larson and Gold.

See Chapter 2 for further discussion of statute of limitations issues.

§ 11.07 Intoxication.

Many employers require a drug test after an accident. If the test reveals the presence of alcohol or drugs, the worker will probably be denied workers' compensation benefits on the basis of section 42-9-60. However, the statute and the cases interpreting it clearly require that the employer be able to prove that the worker was intoxicated at the time of the accident and that the intoxication proximately caused the accidental injury. The typical drug test report provides no meaningful information to support a finding of intoxication. Frequently, the worker has been performing his job satisfactorily for hours before the accident. Remember that evidence of certain drugs can be found in urine or blood specimens for months after ingestion by the worker.