Chapter 2

COMPENSABILITY OF SPECIAL CASES

§ 2.01 Heart Attacks and Strokes.

A heart attack or stroke suffered by an employee constitutes a compensable injury within the meaning of the Workers' Compensation Act if it is induced by unexpected strain **or** over-exertion in the performance of the duties of the employment **or** by unusual or extraordinary conditions in the employment. Kearse v. S.C. Wildlife Dept., 236 S.C. 540, 115 S.E.2d 753 (1964); Walker v. City of Columbia, 247 S.C. 241, 146 S.E.2d 856 (1966); McWhorter v. S.C. Dept. of Ins., 252 S.C. 90, 165 S.E.2d 365 (1969); Canady v Chas. Co. School Dist., 265 S.C. 21, 216 S.E.2d 755 (1975); Cline v. Nosredna Corp. Inc., 291 S.C. 75, 352 S.E.2d 291 (SC App. 1986); Brown v. LaFrance Industries, 286 S.C. 3189, 333 S.E.2d 348 (S.C. App. 1985). Defense attorneys attempt to portray every case as an unusual or extraordinary conditions case, because it is difficult for a claimant's attorney to prove the existence of unusual or extraordinary conditions. It cannot be overemphasized that there are three, possibly four, distinct ways that on-the-job heart attacks or strokes are compensable: (1) "**unexpected strain**," Walker, supra; (2) "**over-exertion**," McWhorter and Walker, supra; (3/4) **unusual or extraordinary conditions of employment,** Kearse and Cline, supra.

In considering the over-exertion and unexpected strain bases for compensability, the Supreme Court has ruled that exposure to dust, which caused fits of coughing, leading to increased blood pressure and ruptured blood vessels in the brain, was compensable. Riley v. South Carolina State Ports Authority, 253 S.C. 621, 172 S.E.2d 657 (1970). In another case the

court found a compensable injury when the deceased employee's heart attack was caused by lung impairment (byssinosis) resulting from years of exposure to cotton dust. Marquard v. Pacific Columbia Mills, 278 S.C. 323, 295 S.E.2d 870 (1982).

The court also upheld a finding of compensability when the worker died from a heart attack induced by extremely high heat. The case was awarded even though this was a part of the employee's regular job duties. The Court of Appeals made it clear in its ruling that the extreme heat caused the compensable injury. Holley v. Owens Corning Fiberglass Corp., 301 S.C. 519, 392 S.E.2d 804 (S.C. App. 1990); cert. granted, opinion adopted, 302 S.C. 518, 397 S.E.2d 377 (1990).

The central issues in heart attack and stroke cases are legal and medical causation. Both must be established by at least a preponderance of the evidence to prove compensability.

When possible, medical causation should be established by an expert witness. However, expert testimony is not required to prove causation. Tiller v. National Health Care, 334 S.C. 333, 513 S.E.2d 843 (1999). The commission has discretion to weigh all evidence, lay and expert, in deciding causation. If the evidence would lead an unprejudiced observer to conclude that the injury was caused by accident, causation is established. One reason Tiller is particularly helpful is that most experts in this area are reluctant to give legal opinion statements. Another reason is that many cases will have such strong factual evidence that a finding of medical causation may be compelled without an expert opinion. With that said, although a medical expert opinion is not required, the stronger the opinion evidence the stronger the case.

Finally, many, if not most, heart attack cases involve some pre-existing condition or disease. Therefore, as in other types of cases involving pre-existing disease, if the medical testimony establishes that unexpected strain, over-exertion, or unusual or extraordinary conditions of the employment was most probably a triggering cause, contributing cause, aggravating cause or accelerating cause of the heart attack, the injury is compensable. Gordon v. E.I. DuPont deNemours, 228 S.C. 67, 88 S.E.2d 844 (1955); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Arnold v. Benjamin Booth Co., 257 S.C. 337, 185 S.E2d 830 (1971).

§ 2.02 Mental and Nervous Disorders.

An emotional or psychological injury sustained in connection with a physical injury by accident has long been held compensable. The claimant must, however, prove a causal connection. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963); S.C. Dept. Hwy. Pub. Trans. v. Higgins, 284 S.C. 359, 326 S.E.2d 425 (S.C. App. 1985). If a mental injury is connected with or flows from a compensable physical injury, it is not necessary that it be caused by unusual or extraordinary conditions of employment. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 482 S.E. 2d 577, (S.C. App. 1997); Getsinger v. Owens-Corning Fiberglass Corp., 335 S.C. 77, 515 S.E.2d 104 (S.C. App. 1999).

Emotional or psychological disorders without physical injury by accident (also called "mental-mental" cases) are compensable if the disorder was caused by emotional stimuli or stressors that are incident to or arise from unusual or extraordinary conditions of employment. Powell v. Vulcan Material Co., 299 S.C. 325, 384 S.E.2d 725 (1989); Stokes v. First National Bank, 298 S.C. 13, 377 S.E.2d 922 (S.C. App. 1988), affd., 306 S.C. 46, 410 S.E.2d 248 (1990).

After the Stokes and Powell decisions, the legislature in 1996 amended S.C. Code Ann. § 42-1-160 to "codify" Stokes. In reality, the codification is an attempt to further limit emotional disorder claims. Because our appellate courts have consistently construed the Act liberally, or in favor of awarding benefits to the injured worker, it is unclear how successful this attempted restriction will be. Equal protection challenges to this separate treatment of emotional disorders have met with little success in other states.

The codification of Stokes consists of two paragraphs. The first paragraph specifies that "mental-mental" cases are to be treated differently from other types of "injury by accident" cases. It also sets out a possible "comparison" to be made. In these cases and heart cases, as part of the burden of proof for compensability, one of the questions that must be answered is whether the conditions of employment were unusual or extraordinary. The question is, unusual or extraordinary compared to what conditions? Should the comparison be made to conditions in the claimant's employment, employment in general or to life in general? These are the three recognized comparisons that have been made by various appellate courts across

the United States. The majority view is that the comparison should be made to conditions of employment in general.

Whether the language of the new statute will be interpreted by our courts to limit police, fire, and emergency personnel or other high stress jobs from receiving benefits because of the "normal" conditions in their employment, while granting benefits to people employed in less stressful occupations under the same facts, is yet to be determined. Examples would be the DSS and factory shootings in Aiken. Would emergency personnel responding to those shootings be denied benefits, while the DSS and factory workers would be awarded benefits because of what their "usual and ordinary" job duties involved? Or, would the emergency personnel receive benefits because shootings are so "infrequent" as to be considered unusual and extraordinary conditions in even their employments? How often does a condition have to happen to become ordinary?

The second paragraph of the codification deals with limitations on "mental-mental" claims arising out of "normal employer/employee relations" and excludes certain specific personnel actions, including disciplinary, evaluation, or termination matters. These actions are not compensable unless they are "taken in an extraordinary and unusual manner." While our appellate courts have not addressed what constitutes unusual and extraordinary actions under this new section, in all probability, the courts will follow the same factual criteria they have in the past in deciding physical and mental claims, and will find "mental-mental" claims compensable. [Powell, supra, (abusive confrontation); Linnen v. Beaufort County Sheriff's Dept., 305 S.C. 341, 408 S.E.2d 248, (S.C. App 1991), cert. denied, (deputy called in, berated, fired)]. Claims for emotional injury resulting from firing, without more, will be difficult to win, particularly when met with the standard defense that "the claimant was terminated in our usual manner." See A. Larson, The Law of Workers' Compensation, § 43.23.

§ 2.03 Occupational Diseases.

Occupational diseases are compensable under sections 42-11-10 through 42-11-200. In order to be successful, the claimant must show that his working conditions caused the occupational disease. See, Mohasco Corp. Dixiana Mill Div. v. Rising, 289 S.C. 130, 345, S.E.2d 249 (SC App. 1986); reversed 292 S.C. 489, 357 S.E.2d 456 (1987). In Mohasco, the court of appeals

outlined the elements of proof the claimant must establish in order to receive benefits for an occupational disease, but reversed and remanded the award because the order did not contain an explicit finding on one of the necessary elements. The supreme court reversed and reinstated the award, basically saying that a hazard, or a condition of employment is peculiar to the occupation if the commission says it is. The Mohasco decisions, when read together, provide an excellent checklist of what the claimant must prove in order to obtain an award for an occupational disease. The elements are as follows:

1. A disease. Examples: chronic obstructive pulmonary disease, contact dermatitis, hepatitis, lead poisoning, latex allergy, occupational asthma.
2. The disease must arise out of and in the course of the claimant's employment.
3. The disease must be due to hazards in excess of those ordinarily incident to employment.
4. The disease must be peculiar to the occupation in which the claimant was engaged.
5. The hazard causing the disease must be one recognized as peculiar to the particular trade, process, occupation or employment.
6. The disease must directly result from the claimant's continuous exposure to the normal working conditions of a particular trade, process or occupation.

It is imperative that an occupational disease award state that the claimant meets all six of these conditions. In Fox v. Newberry County Memorial Hospital, 319 S.C. 278, 461 S.E.2d 392 (1995), the supreme court reversed in part and remanded on the basis that the order did not address the six elements and noted that the circuit court and court of appeals had gone too far in finding that the elements were implicitly addressed in the order. The court stated that the six elements should be clearly stated and addressed.

One question the practitioner will have to deal with regularly is whether the injury or condition is due to injury by accident, occupational disease, or both. In presenting the case the claimant is not required by law to elect between occupational disease or injury by accident theories, but can proceed on both and let the commission decide on which basis to award the claim. (Note: The current Form 50 asks this question, but it is recommended that no election be made.) In Marquard v. Pacific Columbia Mills, 278 S.C. 223, 295 S.E.2d 870 (1982), the claimant died of a heart attack at work. His dependents alleged it was caused by stress placed

on the heart as a result of byssinosis. The employer contended that the claimant had to elect between the occupational disease and accidental injury theories. The supreme court held that an employee would not be deprived of rights under the Act for failing to choose the right portion of the Act under which to make his claim, citing S.C. Code Ann. § 42-11-110. Marquard was awarded as "injury by accident." Therefore, if there is support for both theories no election should be made.

As with injury by accident cases, occupational disease cases require proof on fundamental issues such as notice, statute of limitations, and entitlement to benefits. However, the law applicable to many of these issues is different in occupational disease cases. There are also some special pitfalls and benefits that the practitioner must be aware of in occupational disease cases.

No specific code section within the occupational disease chapter of the Act deals with notice. The supreme court has indicated, however, that it will apply S.C. Code Ann. § 42-15-20 concerning notice, but will apply a special rule in occupational disease cases. "An employee must give notice of an occupational disease claim within ninety days after the date he becomes disabled and could discover with reasonable diligence that his claim is compensable" Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987). The court of appeals in Hanks v. Blair Mills Inc., 286 S.C. 378, 335 S.E.2d 91 (S.C. App. 1985) held further that in an occupational disease case where the employer had knowledge of the employee's medical and work history the company had sufficient notice to meet the requirements of the Act.

South Carolina Code Ann. § 42-15-40 provides that in an occupational disease case the two-year statute of limitations does not begin to run until the claimant is definitively diagnosed with an occupational disease and is notified of the diagnosis. Remember that the claimant must be both diagnosed with an occupational disease and told that he has an occupational disease. In Blair, supra, the court refused to allow the employer to raise a statute of limitations defense. Although the claimant was told that he had chronic obstructive pulmonary disease, this information did let him know that he had an occupational disease. The court indicated that the education and life experience of the claimant should also be considered.

A claimant suffering from an occupational disease may elect to claim benefits under either the occupational disease chapter or the injury by accident chapter.

Section 42-11-20 defines "total" and "partial" disability. While there are no cases on point under the chapter, it can be assumed that the same test for total disability that applies under sections 42-9-10 and 42-1-120 would apply to an occupational disease claim. See Colvin v. E.I. DuPont de Nemours and Co. 227 S.C. 465, 88 S.E.2d 581 (1955).

It is unclear, however, what benefits are payable for partial disability under the occupational disease chapter. South Carolina Code Ann. § 42-9-20 deals with partial loss of earning capacity resulting from injury by accident. A claimant is entitled to two-thirds of the difference between pre-injury wages and post-injury earning capacity. Bowen v. Chiquola Manufacturing Co., 238 S.C. 322, 120, S.E.2d 99 (1961) is the seminal case for understanding how to calculate section 42-9-20 cases. In such situations, if there is no partial loss of earning capacity there is no award. However, section 42-11-20 defines partial disability under the occupational disease chapter as the "physical inability to continue to work in such employment only". (emphasis added). Thus, the argument can be made that when a claimant is disabled from his occupation because of the character of the injury, he should be entitled to an award for his compensation rate times 340 weeks. In other words, the statute defines the award to be made when the claimant cannot return to his regular occupation. This makes sense because the inability to continue in one's occupation is devastating to earning capacity. Further, it can be argued that the drafters of the occupational disease chapter were trying to establish an award for the character of the injury, much like an award for 50% loss of use of the back under section 42-9-30(19).

In addition to awards for total disability and partial disability (loss of earning capacity), awards can be made under the injury by accident section of the Act, including section 42-9-30 dealing with permanent partial loss of use (disability) of various parts of the body. Defense attorneys sometimes argue that a claimant cannot receive compensation for permanent partial loss of use under the occupational disease statutes. However, sections 42-11-40 and 42-11-50 seem to allow such awards. Section 42-11-40 clearly states that occupational diseases are to be treated as injuries by accident.

However, section 42-11-60 strictly prohibits awards under section 42-9-30 in certain lung cases. (The fact that the legislature saw fit to limit partial loss of use of awards in such cases supports the argument that they are available in other types occupational disease claims.) Because of that limitation, and the set off provisions of section 42-11-90 in such cases, when possible, a repetitive trauma theory of injury by accident under section 42-1-160 should be urged to obtain benefits for a scheduled member injury. See, for example, Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977).

Section 42-11-30 sets out a special benefit for impairments or injury to firefighters caused by heart or respiratory disease resulting in total or partial disability or death. It should be remembered that this section applies not only to respiratory disorders but also to heart disease. In meeting the special requirements for benefits of the section a written pre-employment physical examination must have been performed. To meet this requirement the testimony of the claimant that a pre-employment test was taken and filed with the department should be sufficient to meet the claimant's burden of proof.

Sections 42-11-70 through 42-11-100 are limitations on the right to benefits under the Act. These sections should be read by the practitioner, as they will be raised by the defendants when possible. It should be noted that under section 42-11-90, if the defendants are claiming the benefit of the set off it is their burden to establish the percentage of the disability that they claim is attributable to a noncompensable cause.

Sections 42-11-120 through 42-11-180 concern the reference of certain questions to a medical board or a medical advisory panel. The commission has no medical board in place at this time and thus a reference cannot be made. However, the practitioner must always be aware that the defendants will try to raise such issues in the defense of an occupational disease claim. Where such a defense is raised, the practitioner should note and submit to the commission that a medical examination as provided for in section 42-11-185 can be conducted in lieu of the board. The practitioner should also note that section 42-11-185 is, in theory, a way to have a medical examination performed at no expense to the claimant. Under that section, if the claimant requests such a medical examination the commission bears the expense if the claimant loses, but if the claimant prevails, the defendants have to pay for the examination; a no lose situation.

§ 2.04 Hernias.

Section 42-9-40 outlines the requirements for a compensable hernia case. The elements are:

1. An injury resulting in hernia or rupture.
2. Sudden appearance of the hernia or rupture.
3. Pain.
4. An accident immediately followed by the hernia or rupture.
5. Absence of hernia or rupture before the accident.

The hernia must be repaired surgically. The Workers' Compensation Act dictates treatment in hernia cases.

The statute also provides that if a claimant dies as a result of the repair operation, his beneficiaries are paid compensation pursuant to §42-9-290. This section provides for payment of compensation for death due to compensable accident.

In most cases, if the injured employee is disabled after the operation, compensation for this disability shall be paid in accordance with the provisions of the statute. South Carolina Code Ann. § 42-9-30 provides for awards for scheduled members. Under subsection (20), the commission is authorized to promulgate regulations covering the total or partial loss of or loss of use of a member or bodily part not listed. The subsection provides that in the regulation listing additional organs, members or bodily parts the commission shall prescribe the ratio that the partial loss or partial loss of use of a particular member or bodily part bears to the whole man, basing these ratios on accepted medical standards. Pursuant to this authority, the commission adopted Regulation 67-1101. Under subsection B of that regulation the value of an organ, member or bodily part that is not listed in the regulation may be determined in accordance with the American Medical Association's Guides to the Evaluation of Permanent Physical Impairment, or any other accepted medical treatise or authority. The AMA Guides 4th Edition has a section dealing with impairment due to hernias. See AMA Guides, 4th Edition, page 247. Clearly an award can be made if, after examination performed pursuant to section 42-15-80, it is determined that the claimant has some permanent impairment resulting

from the hernia or rupture. Regulation 67-1101 and the AMA Guides help establish compensability.

Of course, if a claimant is totally disabled as a result of his hernia, he is entitled to compensation for total disability. While there are no reported cases dealing with an award for partial loss of earning capacity under section 42-9-20 in a hernia case, there is no reason to believe that such an award could not be made. In Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43 (1965), a hernia case in which the claimant was unable to return to his job as a heavy equipment operator or to return to any job in which he had a background or experience, the claimant was allowed to continue on temporary total disability at the time of the hearing on the basis that the disability continued. Under the facts of the Coleman case, the claimant could go back to doing certain types of work, but such work was not made available to him and he had not been able to find other suitable work. In Coleman the court also recognized in reference to this hernia case that the disability in compensation cases is to be measured by the loss of earning capacity. In making this finding the court cited its previous decision in Keeter v. Clifton Manufacturing Co., 225 S.C. 389, 82 S.E.2d 520 (1954). The Keeter case was a partial disability case. Finally, section 42-15-80 only refers to disability, not to total, partial or specific disability. The Act requires only that there is a disability shown to exist after a special examination. As a result, it appears the statutes and our supreme court would support an award for a partial loss of earning capacity due to hernia or rupture under section 42-9-20.

§ 2.05 Repetitive Trauma.

While the opinions of our supreme court have repeatedly hinted that injuries sustained through repetitive trauma are compensable, the court has never directly addressed this issue. As a result, the question of compensability of repetitive trauma cases continues to arise from time to time. In Clade v. Champion Laboratories and Continental Insurance Co., 330 S.C. 8, 496 S.E.2d 856 (1998), the supreme court found error with the court of appeals' conclusion that the injured worker had failed to "prove a specific causal event" leading to her workers' compensation claim. 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)("[N]o 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.")…….*
>
> *Accordingly, the opinion of the Court of Appeals is affirmed but modified because injured employees are* ***not required to prove their injuries were caused by specific events*** *in order to recover workers' compensation benefits. (Emphasis added).*

In Rodney v. Michelin Tire Corporation, 320 S.C. 515, 466 S.E.2d 357 (1996), Justice Toal stated the time-honored maxim for compensability: "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 resulting injury." Rodney, 466 S.E.2d at 358.

These decisions simply reaffirm the definition of injury by accident that the court has applied since 1939.

In two decisions the supreme court has referred to minor traumas, or repetitive trauma, in situations that lead to the conclusion that the court considers repetitive trauma compensable. In the case of Sturkie v. Ballenger Corp. 268 S.C. 536, 235 S.E.2d 120 (1977) Justice Littlejohn in his dissent specifically stated that the court considered repetitive trauma to be compensable. He disagreed with the finding of a compensable injury because the claimant's condition was not the result of a specific event or "the result of a cumulative effect of a series of minor incidents occurring during employment." Sturkie, 235 S.E.2d at 124 (emphasis added).

Again in Richardson v. Wellman Combing Company, 233 S.C. 454, 105 S.E.2d 602 (1958), the supreme court, in denying benefits, stated that the claimant's varicose veins were not an injury by accident because the Claimant had failed to prove that his condition was "...the result of the cumulative effect of a series of minor accidents occurring during his employment." Richardson, 105 S.E.2d at 604.

It appears that the supreme court considers an injury caused by a series of minor traumas occurring during work to be compensable.

Finally, while there is no supreme court decision specifically addressing the issue, numerous circuit court opinions have been issued that have found repetitive trauma to be compensable. See Appendix 2.

§ 2.06 Hearing Loss.

Hearing loss is probably the most undervalued scheduled loss there is under section 42-9-30. Section 42-9-30 (17) allows for 80 weeks of compensation for total loss of hearing in one ear and 165 weeks of compensation for loss of hearing in both ears. It provides that the commission may establish a regulation to determine proportional benefits for total or partial loss of hearing. In response, the commission has enacted Regulation 67-1102. Unfortunately, it only addresses hearing impairment based on one type of testing.

Outside of the low value assigned to hearing loss by the legislature, such cases are rarely pursued for two main reasons. The first reason is that the binaural loss formula found in the regulation tends to minimize impairment ratings. The second reason is the confusion over whether such cases should be pursued as injuries by accident or occupational diseases.

As to the first of these problems, it must be remembered that the statute talks in terms of an award for "hearing loss," while the regulation references the establishment of "hearing impairment" and the calculation of a "hearing handicap." It can be argued that a commissioner can make an award for hearing loss that is greater than the hearing impairment rating, just as he could with any other scheduled member under section 42-9-30. In other words, there is not a direct one to one correlation between impairment and the award for loss of hearing. Consider, by analogy, that part of regulation 67-1101 that allows 25 to 250 weeks for partial loss of the heart. If a claimant had to have a 100% impairment of the heart in order to receive an award for 250 weeks you would have a death case. Therefore, the argument should be made that under the statute and regulation there is not a one to one relationship between hearing impairment and hearing loss.

It should also be noted that the regulation only deals with the establishment of impairments due to pure tone audiograms. In the real world the ability to hear speech and sound and to discriminate what words are being spoken is a far more accurate indicator of the true degree of hearing loss for industrial purposes. Many noise-induced type hearing loss cases involve the inability of the claimant to hear certain consonant sounds and in the inability to hear in a noisy versus a quiet room. Thus, the impairment rating based on a pure tone audiogram alone does not accurately reflect the amount of hearing loss the claimant has sustained.

Another point that should be made on hearing loss cases is that there is nothing to prevent the commissioner from making an award to each ear instead of on a binaural basis where there is a substantial difference in the hearing loss in each ear. For example, if the claimant stands next to a machine that makes a noise on his right side that results in a 90% loss of hearing in the right ear and only a 5% loss in the left ear, there is nothing to prevent the commissioner from making an award for the amount of hearing loss in the right ear and a separate award for the amount of hearing loss in the left ear. There is an assumption that the hearing loss must be based on the binaural amount of hearing impairment, which is not the case.

There are also conditions such as tinnitus (ringing in the ears), which are separately rated under the AMA Guides, which can contribute to the hearing loss and which are outside of the audiometric testing impairments and the regulation. All of these conditions should be considered in determining the award to be made for the hearing loss.

Finally, awards can be made under sections 42-9-10 and 42-9-20 if there is a total or partial loss of earning capacity due to hearing loss, providing more than one scheduled member/injury is involved. In severe hearing loss cases there is a substantial likelihood of mental or emotional problems accompanying the loss.

With regard to the proper theory under which to pursue a hearing loss case, the preferred method is to proceed as both an occupational disease and an injury by accident case whenever possible. (Remember the discussion above in section 2.03 above which suggests that you may be entitled to more benefits if the person is found to suffer partial loss of earning capacity under the occupational disease section than under the injury by accident section.) Proof of the claim under either theory should allow the claimant to received compensation for permanent

partial loss of use under section 42-9-30(17). The occupational disease theory may prove an easier route is some cases due to the more lenient notice and statute of limitations rules.

Hearing testing records for the individual employee can be obtained by an OSHA request to the employer or from the South Carolina Department of Labor. Where overall plant audiometric testing has been done, this can be obtained through the Department of Labor, Public Information Office through a Freedom of Information Act request.