Chapter 3

MEDICAL TREATMENT & CHANGE OF CONDITION

§ 3.01 Medical Treatment In General.

Section 42-15-60 governs medical treatment in general. It 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. When controversy arises the commission has the discretion to order further necessary treatment. If the employer fails to provide medical care the commission may order the employer to pay for emergency treatment.

In total and permanent disability cases the injured employee is entitled to all reasonable and necessary medical care and treatment for life. In Munn v. Nucor Steel, 336 S.C. 28, 518 S.E.2d 289 (S.C. App. 1999) it was held that this treatment must be causally related to the original injury. In permanent partial disability cases, the injured employee is entitled to lifetime prosthetic devices for as long as they are necessary.

Regulation 67-509 provides that the employer's representative chooses an authorized health care

provider and pays for authorized treatment. Expenses incurred in receiving medical treatment are reimbursable to the claimant by the employer's representative and are listed in regulation 67-1601. The consequences of any malpractice by a physician furnished by the employer are deemed part of the injury resulting from the accident and the employer is liable for full compensation pursuant to section 42-15-70.

§ 3.02 "Tend to Lessen the Period of Disability."

Section 42-15-60 requires the employer to furnish medical treatment beyond the initial ten week period so long as the treatment "will tend to lessen the period of disability." Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646 (1974). Disability means the incapacity because of injury to earn the wages that the employee was receiving at the time of the injury in the same or any other employment. Williams v. Boyle Construction Co., 252 S.C. 387, 166 S.E.2d 550 (1969). Treatment or devices to reduce pain may tend to lessen the period of disability if pain is an obstacle to obtaining or maintaining employment. Rice v. Froehling & Robertson, Inc., 267 S.C. 155, 226 S.E.2d 705 (1976); Dykes v. Daniel Construction Co., supra.

In the Dykes case, the claimant was found to have sustained a total loss of vision. The medical testimony indicated that the claimant would require continued medical treatment to relieve pain and pressure in the eye. Although the claimant was employed at that time, the commission found, and the court affirmed, that without continuing treatment, the claimant would sustain a loss of earning capacity. As a result, further medical treatment would tend to lessen the period of disability within the meaning of the statute.

The Rice case involved a quadriplegic claimant seeking continued medical treatment after the maximum allowable compensation had been paid. (The injury in this case occurred before section 42-15-60 was amended to require lifetime medical treatment in total and permanent disability cases.) The supreme court upheld the commission's finding that although the claimant's condition as a paraplegic would not change, various recommended treatments, including surgical implantation of a dorsal column stimulator to reduce pain and a bladder stimulator to control the bladder, would tend to lessen the period of disability, as they would assist the claimant in regaining economic self sufficiency. The court also made it clear that a

guarantee of the efficacy of the proposed treatment is not required. The only thing that is required is that the treatment will "tend" to lessen the period of disability. Based on the court's definition of "tend," this threshold is quite low.

§ 3.03 Drafting the Order.

The order of the commission should include a finding of fact that the treatment ordered will tend to lessen the claimant's period of disability. This is a question of fact to be determined by the commission and failure to address this in the order could result in an appealable issue resulting in remand to the commission for such a determination. Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646 (1974); Sanders v. Litchfield Country Club, 297 S.C. 339, 377 S.E.2d 111 (S.C. App. 1989); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (S.C. App. 1999)

Claimants' attorneys want the order to make the carrier's obligation broadly inclusive, yet specific enough that there is no question as to the carrier's obligation. However, it is important that the order of the commission in regard to continuing medical treatment not be too general. In Rice v. Froehling & Robertson, Inc., supra, an order obligating the defendants to pay "for such medical costs as will hereafter be incurred by claimant for medical services rendered by the Durham Rehabilitation Center" was found to be too general. The future medical treatment of the claimant, a paraplegic, could be far reaching, said the court, and therefore, the defendants were entitled to a more definitive order. This case was contrasted to Dykes v. Daniel Construction Co., supra., in which the defendants were ordered to pay for further medical care as necessary. In Dykes, the proposed treatment related solely to an eye injury, thus, the scope of the treatment was sufficiently narrow that the employer had not been prejudiced by the failure to make a more definitive award.

§ 3.04 Prosthetic Devices.

Section 42-15-60 was amended in 1980 to provide that in cases of permanent partial loss of use (disability), prosthetic devices shall be furnished during the life of the injured employee or so long as they are necessary. In Smith v. Eagle Construction Co., Inc., 282 S.C. 140, 318 S.E.2d 8 (1984), this amendment was held to be remedial in nature and therefore given retroactive effect. This section entitles the claimant to lifetime prosthesis repair and replacement.

Section 42-15-65 provides compensation for damage to prosthetic devices, eyeglasses, or hearing aids as a result of an injury by accident arising out of and in the course and scope of employment. This section was added in 1992. Previous case law held that damage to prosthetic devices was not an injury under section 42-1-160 and therefore was not compensable. Lail v. Richland Wrecking Co., Inc., 280 S.C. 532, 313 S.E.2d 342 (S.C. App. 1984)

§ 3.05 Refusal of Medical Treatment.

Section 42-15-60 provides that if an employee refuses to accept any medical, hospital, surgical or other treatment when provided by the employer or ordered by the commission, compensation is suspended until such refusal ceases, and no compensation shall be payable during the period of refusal unless the commission determines that the refusal was justified under the circumstances. Incarceration on unrelated criminal charges has been held to be justified refusal. Last v. MSI Construction Co., 305 S.C. 349, 409 S.E.2d 334 (1991). Other health conditions, age, chances of successful outcome, and risk factors may justify a claimant in refusing further medical treatment or surgery. Scruggs v. Tuscarora Yarns, Inc., 294 S.C.47, 362 S.E.2d 319 (S.C. App. 1987). When the employer is not providing treatment and the claimant obtains his own medical care, the refusal to proceed with further treatment at his own expense does not bar the claimant from benefits under this section as it is not a refusal of treatment furnished by the employer. Ferguson v. State Highway Department, 197 S.C. 520, 15 S.E.2d 775 (1941).

§ 3.06 Refusal of Evaluations.

Section 42-15-80 requires an employee, after an injury and as long as he claims compensation, at the request of the employer or by order of the commission, to submit to examination at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the commission. Section 42-15-80 would apply to situations where only an evaluation, or what is euphemistically called an independent medical examination (IME), is authorized, rather than to actual treatment. The employee has the right to have at his own expense a physician or surgeon of his choice present at the examination. The facts learned at such an examination are not privileged. Refusal to submit to the examination or obstruction of the examination will result in the suspension of the employee's right to benefits and right to prosecute any action under the Act

until refusal ceases. No compensation is payable for the period of suspension unless the commission determines that the refusal or obstruction was justified under the circumstances. In a death case, an autopsy may be required at the expense of the person requesting it.

An employee has been held to be justified in refusing an examination requested by the employer when the employee had already been examined by and cooperated with three physicians who had testified to different ratings. Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960).

In Wardlaw v. J. G. Ridgeway Construction Co., 212 S.C. 116, 46 S.E.2d 662 (1948), an employee's explanation for his refusal to submit to a diagnostic spinal puncture was found not to be credible and compensation was suspended. However, in a later case, a claimant was found to be justified in refusing to submit to a spinal myelogram by the employer selected physician. Ward v. Dixie Shirt Co., 223 S.C. 448, 76 S.E.2d 605 (1953). At present, it is generally accepted that a claimant may justifiably refuse invasive diagnostic procedures, just as it is generally held to be justified when a claimant refuses surgery on the basis of various relevant factors.

A more controversial question is what type of examination the claimant must submit to under section 42-15-80. The statute requires the employee to submit to examination by a "duly qualified physician or surgeon." In Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994), the South Carolina Supreme Court interpreted Rule 35, SCRCP, which permits the circuit court to require a party to submit to "physical or mental examination by a physician..." (emphasis added in court opinion). The court held that under the rules of statutory construction, the plain and ordinary meaning of Rule 35 does not authorize the court to order a mental examination by a clinical psychologist, as a clinical psychologist is not a physician. By analogous interpretation, the plain language of section 42-15-80 should preclude a claimant from having to submit to an examination by anyone who is not a physician or surgeon. Arguably, claimants may refuse examinations by psychologists, vocational experts, rehabilitation nurses and others who are not physicians or surgeons without losing the right to compensation. Note, however, that the treatment statute, section 42-15-60, has broader language than section 42-15-80, the examination statute. Section 42-15-60 has a catchall "other treatment" provision regarding treatment the employee cannot justifiably refuse, while section 42-15-80 narrows its application to examination

physicians and surgeons.

Should a claimant ever refuse to undergo an evaluation? In certain situations a refusal may, for strategic reasons, be worth the risk. For example, in denied cases the defense will frequently schedule the claimant for an eleventh hour examination with a defense oriented doctor. In such cases it may be better to refuse the examination pending a decision on compensability.

§ 3.07 Treatment After MMI, Sought Prior to Final Order.

Carriers often claim that they are not responsible for medical treatment after the claimant reaches maximum medical improvement. An employer may be liable for future medical treatment if it tends to lessen the claimant's period of disability, despite the fact that the claimant has returned to work and has reached maximum medical improvement. In Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (S.C. App. 1999), the court of appeals made it clear that "'Maximum medical improvement' is a distinctly different concept from 'disability.'" The court noted that section 42-15-60 refers specifically to disability and makes no mention of maximum medical improvement. The employer is liable for medical treatment beyond the initial ten weeks that, in the judgment of the commission, will tend to lessen the period of disability. Disability is the incapacity because of injury to earn the wages that the employee earned at the time of the injury. Therefore, section 42-15-60 makes the employer liable for medical treatment that will tend to lessen the time that the employee is unable due to the injury to earn the wages that the employee earned immediately before the injury. Thus, a finding of maximum medical improvement does not mean the claimant's right to medical treatment must end. The claimant is entitled to treatment or medication, without which clamant would become more disabled. An award could cover pain medication and various maintenance type treatments, provided the commission makes a finding that they will tend to lessen the period of disability. This could have important ramifications for settlement purposes in many cases.

§ 3.08 Change of Condition.

South Carolina Code Ann. § 42-17-90 governs change of condition. It provides that the commission, upon its own motion or upon the application of any party in interest may review any award for a change in condition. On such review the commission may make an award ending,

diminishing, or increasing the compensation previously awarded. The review cannot affect moneys paid on a prior award. Although the statute says that no review shall be made after twelve months from the date of the last payment of compensation pursuant to an award, this has been interpreted as requiring the application for review to be filed within one year of the last payment of compensation and the commission has jurisdiction to actually hear the claim after the expiration of the one year. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960).

A condition which is not causally connected to the original claim, or which constitutes a separate injury, or which could have been included in the original claim but was not, cannot be considered a change in condition. However, a causally connected, newly manifested symptom of an original injury can constitute a change in condition. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 482 S.E.2d 577 (S.C. App. 1997). Estridge involved a change in condition claim for psychological injury in a case where the original compensable injuries were physical. The commission had held that the psychological problems could not be considered because they were not included in the original claim for benefits and/or were barred by res judicata. The circuit court affirmed, but the court of appeals reversed and remanded the case to the commission for a determination of whether the psychological problems were causally related to the original injuries on which the award was made.

A change of condition claim may also be based on a previously undiagnosed condition. See Brayboy v. Clark Heating, 306 S.C. 56, 409 S.E.2d 767 (1991).

Note that the change in condition statute says nothing about the commission's authority to order medical treatment. It addresses only "compensation." Medical treatment is, however, routinely ordered in change in condition claims. The basis for further medical is section 42-15-60, which gives the commission authority to order further medical that will tend to lessen the period of disability. This raises the question of whether medical is subject to the one year statute of limitations in change in condition claims, which will be discussed below.

§ 3.09 Treatment More than 1 Year After Last Payment.

A distinction should be made between a change in condition claim and a claim for adjudication of

further or final benefits. When temporary total has been paid and permanency has never been addressed, a request for a determination of permanency more than 12 months after the last payment of temporary total is not barred by section 42-17-90. Halks v. Rust Engineering Co., 208 S.C. 39, 36 S.E.2d 852 (1946). This would be an adjudication of further benefits under a lawfully constituted and pending claim, rather than a change in condition. Under this same reasoning, where permanency has never been addressed, further medical treatment should be available as further benefits under a pending claim at any time, even more than one year after the last payment of compensation, as long as it tends to lessen the period of disability. A signed Form 17 does not terminate a claim or affect the employee's right to apply for future benefits, including medical treatment. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (S.C. App. 1999).

When a claim is filed on a long dormant case, carriers will often argue that they have a Form 19 and their file is closed. However, without a Form 16 or commission award adjudicating permanency, that is only a clerical/administrative closing of the file. It has no legal effect on the claim. Theoretically, the doctrine of laches notwithstanding, where permanency has never been addressed, a claim could go on forever. This argument is sometimes persuasive to get reasonable clinchers on zero rating cases.

However, even when permanency has been addressed, medical benefits are theoretically available after one year. This is because the change of condition statute addresses the commission's power to review an award to end, diminish or increase compensation within one year of the last payment of compensation. It says nothing about medical treatment. The argument can be made that the one year limitation of section 42-17-90 applies only to compensation and not to medical treatment. Section 42-17-90 places no limitation on the commission's authority to order additional medical treatment more than one year after the last payment of compensation, so long as the treatment tends to lessen the period of disability as required by section 42-15-60. There is no statute of limitations in section 42-15-60. Ostensibly, every claimant is entitled to lifetime medicals that will tend to lessen the period of disability. It might be argued that if that were the case, it would not have been necessary for the statute specifically to provide lifetime medicals for total and permanent disability. To the contrary, in cases of total and permanent disability, treatment need only be "reasonable and necessary," rather than tending to lessen the period of disability.