Chapter 5

IMPAIRMENT AND DISABILITY

§ 5.01 Impairment.

The term impairment is not defined in the workers' compensation act. It appears in regulations 67-1101 and 67-1105. According to the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition, "'[I]mpairments' are defined as conditions that interfere with an individual's 'activities of daily living.'" Guides, p.1. A percentage of impairment derived by means of the Guides is intended to be an informed estimate of the degree to which an individual's capacity to carry out daily activities has diminished.

The Guides go on to state, *"It must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities."* Guides, p. 5 (emphasis in original). The Guides also state, "The physician performing an impairment evaluation must provide more than a number or a percentage. The physician should provide as comprehensive a medical picture of the patient as possible, using the Report of Medical Evaluation form (p. 11) as an outline." Guides, p.5.

The AMA Guides are quoted as a frame of reference. Their use is not mandated in South Carolina. Physicians are free to base impairment ratings on their own clinical judgment.

§ 5.02 Disability.

The AMA Guides distinguish between impairment and disability, which "may be defined as an alteration of an individual's capacity to meet personal, social, or occupational demands, or statutory or regulatory requirements, because of an impairment. Disability refers to an activity or task the individual cannot accomplish. A disability arises out of the interaction between impairment and external requirements, especially those of a person's occupation." Guides, p.2.

In section 42-1-120, "disability" is defined as "[I]ncapacity because of injury to earn the wages which the employee was receiving at the time of injury at the same or any other employment." This definition applies to general disabilities (sections 42-9-10, and 42-9-20) as opposed to specific (section 42-9-30).

§ 5.03 Loss And Loss of Use.

Section 42-9-30 and regulation 67-1101 provide for compensation for the loss, and loss of use of, various parts of the body. Section 42-9-30(18) provides for compensation for "partial loss of or for partial loss of use of" the various parts of the body. "Loss of use" is not defined in the Act, however, it is defined by case law. "'Loss of use' and 'partial loss of use' are simple, everyday, unambiguous words, and are to be given their ordinary generally accepted meaning." Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52, 54 (1957).

The terms loss of use and disability are frequently used interchangeably. An award of compensation for permanent partial loss of use does not depend upon actual wage loss. The fact that the claimant is earning the same or greater income is immaterial. G.E. Moore Company v. Walker, 232 S.C. 32, 120 S.E.2d 106 (1958).

One of the first cases dealing with loss of use was Dickey v. Springs Cotton Mills, 209 S.C. 204, 39 S.E.2d 501 (1946). The treating physician "recommended that claimant be allowed 25% permanent total disability." 39 S.E.2d at 503. The commission awarded 80% loss of use of the right leg and 50% loss of use of the left leg. 39 S.E.2d at 502. The South Carolina Supreme Court affirmed. The court did not address the meaning of loss of use. However, it held that there was sufficient evidence to support the award. "The hearing commissioner saw her walk and observed the use she has of her legs; which, coupled with the other evidence, is sufficient to warrant the commissioner and later the commission as a whole in finding that claimant is entitled to an award for 80% loss of the right leg and 50% loss of the left leg and for disfigurement." 39 S.E.2d at 503 (emphasis added). The "other evidence" referred to in the decision includes testimony that the claimant could no longer do mill work, could not be on her feet more than 30 minutes, had to use crutches almost constantly, etc.

The court in Dickey went on to state "It is not necessary that claimant show the extent of disability with mathematical exactness and direct evidence of the percentage of a permanent partial loss of normal efficiency is not essential to the determination of such percentage; and it is not essential that a percentage of disability be specified by any witness; but such award must be based upon evidence which fairly proves the extent or percentage of disability." 39 S.E.2d at 503. In Dickey the court was already using disability and loss of use interchangeably and, even though they do not explicitly say so, seem to view the terms as encompassing more than just impairment.

Three months after Dickey the court revisited the "loss of use" question in Ripley v. Anderson Cotton Mills, 209 S.C. 401, 40 S.E.2d 508 (1946). Ripley involved an award for "functional loss of use" of both eyes. There does not appear to have been any sort of impairment rating. There was medical testimony of some degree of permanent injury. There was also testimony that the claimant's vision loss would affect his ability to do his job. The court upheld the

award without defining loss of use. (They also dispensed with the defendant's contention that proof of diminished earning capacity was required for a claimant to recover for loss of use.)

In Roper v. Kimbrell's of Greenville, supra, the court upheld an award of 40% loss of use of the left arm and 15% loss of use of the right arm. The treating orthopedic surgeon said he "would rate the disability at five percent to the right shoulder and ten percent to the left shoulder." 99 S.E.2d at 55. The claimant testified regarding serious limitations he had in doing his job. He said that he could do 30 to 35% of what he had done before the injury. His supervisor put this in the range of 25 to 35%. Once again, the court seemed to feel that loss of use embodies more than physical impairment.

Roper also makes it clear that compensation is payable for loss of use of a part of the body not physically injured in the accident, so long as the loss of use flows proximately from the initial injury. The court stated, "Nothing in § 72-153 (now section 42-9-30) or elsewhere in the statute relating to workmen's compensation suggest restriction of their meaning to such total or partial loss of use as has resulted from a direct injury to the member itself." 99 S.E.2d at 54. In Roper, the physical injury had been to the ribs and AC joint, however the award was to the arm.

In Dykes v. Daniel Construction Co., 262 S.C. 98, 202 S.E.2d 646 (1974), the court focused its inquiry on "loss of use" and how the "impairment" or functional loss had affected the usefulness of the body part in question in performing employment duties. Dykes had been awarded 100% loss of use of his left eye. In affirming the award the court stated:

> *'Total loss of vision' means for Workmen's Compensation purposes, and does not necessarily mean complete loss of visual perception. If sight is destroyed to the extent that there remains no vision useful in performing any employment available to the claimant, there is a 'total loss of vision' in the eye even though some sight remains. 262 S.C. at 107 (emphasis added).*

The court went on to state that the claimant's visual problems "are such as to render sight in the eye so unreliable as to destroy its usefulness for any industrial purpose." 262 S.C. at 108-109 (emphasis added). The doctor in Dykes had rated the claimant's visual impairment at 23%.

In Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985), the court affirmed an award of total disability based on a finding of a 50% permanent loss of use of the back. Defendants had argued that claimant should be limited to the 30% impairment rating. The court did not delve into the meaning of "loss of use" but simply stated, "After considering the medical testimony, as well as that of the claimant and the vocational expert, we conclude that the finding of 50% loss of use is supported by substantial evidence." 332 S.E.2d at 212. Linen is also important because, in dicta at least, it validates the relevance of vocational expert testimony in assessing loss of use. It also validates the use of the claimant's own testimony about his opinion of his degree of loss of use.

In Cropf v. the Pantry, 289 S.C. 106, 334 S.E.2d 879 (S.C. App. 1986), the court of appeals reinstated a full commission award of 30% permanent loss of use of the back. The circuit court had attempted to reduce the award to 15%. Two orthopedic surgeons had opined that the claimant had no permanent impairment. A chiropractor had indicated that she had a 15% permanent impairment to her neck. The court of appeals pointed out, "The Circuit Court overlooked the limitations her injury has placed on her ability to perform the type of work she was doing at the time of injury, i.e., clerking in a convenience store." 334 S.E.2d at 879. The claimant testified that she could no longer perform the work required by a convenience store clerk.

According to the court of appeals, "The Circuit Court implicitly holds that the degree of disability found by the Industrial Commission can be no greater than the degree of disability established by expert medical testimony." 334 S.E.2d at 880-881. The court disagreed, citing Professor Larson:

> *As to issues touching disability, it has been held that the fact-finders may find disability when the medical testimony denies its existence, or may find a degree of disability different from any degree supported by medical testimony. 3 A. Larson, The Law of Workmen Compensation Section 79.52(c) N.33 at 15-426.126 15-426.127 (1983). 344 S.E.2d at 881.*

The court went on to state, "Professor Larson's views find expression in Linen v. Ruscon." 334 S.E.2d at 881.

In Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966), the circuit court reversed a commission award of 50% permanent partial loss of use of the claimant's right arm. The medical impairment rating was 20% and the circuit court held that the commission had erred in exceeding that rating. The court said, "Unless the question of permanent partial loss of use under § 72-153 (now section 42-9-30) is so technically complicated as to require, exclusively, expert professional testimony, medical or otherwise...lay testimony is of course admissible. Nor need the extent of such impairment of use be shown with mathematical exactness...but the award may not rest on surmise, conjecture or speculation; it must be founded on evidence of sufficient substance to afford a reasonable basis for it." 151 S.E.2d 437, 441.

In light of Tiller v. National Healthcare, 334 S.C. 333, 513 S.E.2d 843 (1999), it is extremely doubtful that any question concerning partial loss of use will require expert professional testimony exclusively, no matter how technically complicated it might be. In Tiller the supreme court, in addressing the issue of medical causation, pointed out that in Smith v. Michelin Tire Corp., 320 S.C. 296, 455 S.E.2d 96 (S.C.. App. 1995), the court of appeals had held, "[I]f the claimant is attempting to establish causation of a medically complex condition, however, expert testimony is required." 513 S.E.2d at 846. The supreme court said, "The rule stated in Smith has some merit. In fact, this court suggested a similar rule in dicta...(citations omitted). However, our case law does not support application of this rule in workers' compensation cases." 513 S.E.2d at 846. The court went on to state:

> *Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. (Citation omitted). Indeed, "medical testimony should not be held conclusive irrespective of other evidence." (Citation omitted).*
>
> *Expert testimony is designed to aid the commission in coming to the correct conclusion; therefore, the commission determines the weight and credit to be given to the expert testimony (Citations omitted). Once admitted expert testimony is to be considered just like any other testimony. (Citations omitted). 513 S.E.2d at 846.*

§ 5.04 Permanent Partial Disability.

Permanent partial disability is not defined in the Act. The term is customarily used to refer to loss of use of a specific part of the body compensable under section 42-9-30. (It could also be used to refer to a permanent partial loss of earning capacity under section 42-9-20.)

§ 5.05 Total Disability.

Section 42-9-10 allows compensation for total disability. "Disability" as defined in section 42-1-120 means "incapacity...to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Emphasis added.) Unlike specific disabilities, total disability is purely a wage loss question. Complete helplessness is not required. "The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E.2d 43, 44 (1965).

Section 42-9-10 also provides for automatic total disability if the claimant loses "both hands, arms, feet, legs, vision in both eyes, or any two thereof." Under the Second Injury Fund statutes, both of these losses need not have occurred in the same accident, or in an accident at all. Section 42-9-400 provides:

> *If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title.*

The statute further provides that the employer or its insurance carrier shall be reimbursed from the Second Injury Fund pursuant to the provisions of the statute.

Section 42-9-30(19) provides that a claimant with a 50% loss of use of the back "shall be deemed to have suffered total and permanent disability and compensated therefor under paragraph two of § 42-9-10." However, a claimant need not be totally disabled to receive

such an award. See Bateman v. Town & C untry Furniture Co., 287 S.C. 158, 336 S.E.2d 890 (S.C. App. 1985).

The only provision for lifetime compensation benefits is found in the third paragraph of section 42-9-10 where it is provided that, "[a]ny person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damages is not subject to the five hundred week limitation and shall receive the benefits for life." In Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699, 701 (1996), Justice Toal writing for the court states:

> *Like the concept of disability generally, the concept of total disability has been influenced both by the medical model and the earning capacity model. There are two situations in which the commission can find a claimant totally disabled. First, for certain conditions resulting from work-related injuries, a claimant is deemed totally disabled and need not demonstrate loss of earning capacity to recover workers' compensation benefits. See e.g., S.C. Code Ann. § 42-9-10 (Supp. 1994) (classifying loss of certain limbs and body parts as total disability as a matter of law; classifying as total disability paraplegia, quadriplegia, and physical brain damage resulting from compensable injuries); see also S.C. Code Ann. § 42-9-30 (1985) (where compensable injury results in fifty percent or more loss of use of the back, person deemed totally disabled); Lyles v. Quantum Chemical Company, 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (recovery for total disability allowed where statutes specifically provided particular injury constitutes total disability, notwithstanding claimant's continued earning capacity), Cert. denied (1994).*

Clearly a claimant can be awarded total disability under section 42-9-30 (19), notwithstanding the fact that he continues to earn wages. The provision for paraplegia, quadriplegia and physical brain damage falls under section 42-9-10 and states in part that "[a]ny person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, quadriplegic, or who has suffered physical brain damage" is not subject to the 500 week limitation and section 42-9-10 is a loss of earnings statute. Defense lawyers take the position that a total loss of earning capacity must be shown to obtain lifetime benefits in these cases. Note that the preceding paragraph says, for example, that loss of both hands "constitutes" total disability. Also note that the statute does not say, for example, that physical brain damage alone "constitutes" total disability, but this condition does remove the 500 week limit. Despite the language in Stephenson, there is an argument that total loss of

earning capacity must accompany one of these conditions in order to obtain lifetime benefits. As a result, a claimant seeking lifetime benefits should attempt to prove a loss of earning capacity if at all possible.

In Lyles, supra, the claimant was awarded total disability based upon 50% or more loss of use to the back. He continued to work. The claimant testified that despite his pain he was able to work because he was allowed to alternate three days on the job with three days at home. The court said:

> *Under Section 42-9-30 a claimant may establish permanent and total disability by demonstrating impairment to a scheduled body member. Compensation is based on the character and extent of injury and not whether the claimant has lost earnings or is otherwise employable in another occupation. In including specific body members within this section, the legislature presumes a claimant has lost earning capacity to a degree which corresponds to the claimant's degree of impairment. (Citations omitted). 434 S.E.2d at 295.*

In Medlin v. Greenville County, 301 S.C. 411, 392 S.E.2d 192 (1990), the claimant had previously been awarded total disability under § 42-9-10 and §42-9-30(19). He returned to work and sustained a second injury to his back and sought additional permanent and total disability benefits. The Supreme Court said:

> *Under Section 42-9-30(19) an employee who sustains more than a fifty percent loss of use of the back does not have to show a loss of earning capacity under 42-9-10 to recover permanent total disability. Bateman v. Town & Country Furniture Company, 287 S.C. 158, 336 S.E.2d 890 (Ct. App. 1985). Once the employee has established the loss of more than fifty percent of use of the back he is entitled to the award of 500 weeks of compensation. Under Section 42-9-10 five hundred weeks is the maximum compensation period allowed unless an individual is a paraplegic, quadriplegic or has sustained physical brain damage. 392 S.E.2d 411 at 412.*

The court went on to say that since the claimant had already recovered 500 weeks for total disability he could not recover further disability benefits for his back.

In Pearson v. JPS Converter and Industrial Corporation, 327 S.C. 393, 489 S.E.2d 219 (1997), the commission found the claimant was totally and permanently disabled as a result of physical brain damage he suffered in a work related injury. The employer conceded that the claimant was totally disabled, but argued that the record did not sufficiently support a finding

that his total disability was solely the result of physical brain damage. The employer maintained that the disability was a combination of psychological problems and some brain damage. The court said that the record overwhelmingly supported the commission's finding that the claimant was totally and permanently disabled as a result of physical brain damage. However, the court said that, "We agree with the circuit court's interpretation that Section 42-9-10 does not require the total and permanent disability to be *solely* the result of physical brain damage. The statute only requires that a claimant be totally and permanently disabled and suffer physical brain damage as a result of the injury." 489 S.E.2d at 222.

§ 5.06 Disability Issues & The Singleton Case.

One of the most problematic cases ever decided by our supreme court was Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960). Singleton severely injured his right leg. The single commissioner found him to be completely disabled because of his inability to perform the physical activities required by a laborer. The supreme court reversed, saying:

> *The finding of the Commission in this case was that 'It is only the leg which makes up the claimant's present disabling conditions.' Therefore, the injury to the respondent is confined to a scheduled member of the body. Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity. To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected. 114 S.E.2d at 845.*

Thirty years after Singleton was decided the South Carolina Supreme Court decided Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990). From Fields comes the often quoted language concerning when a claimant may proceed under sections 42-9-10, 42-9-20 and/or 42-9-30:

> *Under our Worker's Compensation Act, a claimant may proceed under § 42-9-10 or § 42-9-20 to prove a general disability; alternatively, he or she may proceed under § 42-9-30 to prove a loss, or loss of use of, a member, organ, or part of the body for which specific awards are listed in the statute. It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute*

> *does not require such a showing, Roper v. Kimbrell's of Greenville, Inc., 231 S.C. 453, 99 S.E.2d 52 (1957). The commission may award compensation to a claimant under the scheduled loss statute rather than the general disability statutes so long as there is substantial evidence to support such an award....*
>
> *An award under the scheduled loss statute, however, is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific 'member, organ, or party of the body'. 393 S.E.2d 172, 173.*

In Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (S.C. App.1990), a claimant was required to elect between pursuing his claim under section 42-9-20 or section 42-9-30. A proper exception was not taken to this ruling. However, the court did comment that the ruling was in error and in Footnote 2, immediately following this observation, the court said in part:

> *The Supreme Court did not hold that the remedies afforded by these sections were mutually exclusive. In fact, the implication is that the remedies available under §42-9-30 are also available under §42-9-10 or §42-9-20. To recover under the general disability sections, however, the claimant must prove a loss of earning capacity, while recovery under the schedule loss statute does not require such a showing. 427 S.E.2d at 687.*

In Brown v. Owen Steel Co., Inc., 316 S.C. 278, 450 S.E.2d 57 (S.C. App.1994), the court stated:

> *The policy behind allowing a claimant to proceed under the general disability §42-9-10 and §42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater that the presumptive disability provided for under the scheduled member section. See A. Larson. The Law of Workmen's Compensation, §58.21 (1992). When, however, a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive. See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), 450 S.E.2d at 58.*

In cases where a scheduled injury, such as the back, has caused the claimant to sustain a loss of earning capacity and an attempt is being made to obtain benefits under section 42-9-10 or section 42-9-20, some defense lawyers take the position that in order to escape the limits of section 42-9-30 there must be an impairment rating to another part of the body. The case law simply does not support this proposition. One of the most helpful cases on this issue is Morgan v. JPS Automotives, 321 S.C. 2012, 467 S.E.2d 457 (S.C. App. 1996). The claimant

suffered two injuries to her right arm while working for her employer and developed reflex sympathetic dystrophy with dystonia. The single commissioner had found that the claimant had suffered a one hundred percent permanent disability to her right arm under section 42-9-30. On appeal the claimant argued that the single commissioner and the full commission had erred in failing to make specific findings of fact concerning her physical difficulties and impliedly rejecting her contention that she suffered a total disability. In the order of the single commissioner it was noted that the claimant often had severe pain, that the pain affected her ability to sleep, that she would need Botox injections on a regular and recurring basis to control the tremor in her arm and had difficulty even performing simple household tasks. The hearing commissioner, however, did not make any findings as to whether or not she was entitled to recover for an impairment of the whole person. The court states:

> *Where an injury is confined to a scheduled member and there is no impairment to any other part of the body, the employee is limited to the scheduled compensation for that body part. Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d, 837 (1960); Brown v. Owen Steel Co., 316 S.C. 278, 450 S.E.2d 57 (Ct. App. 1994). The Single Commissioner failed to make any findings regarding Morgan's claim that her disability extended beyond the disability to the scheduled member. Thus, we remand this issue for the Commission to make specific findings of fact as to whether Morgan was entitled to recover for an impairment to the whole person. 467 S.E.2d 457, 459.*

The inference is, of course, that the problems that the claimant was having, for example, loss of sleep, pain, tremors, can meet the test that "[I]f the effects of the loss of the member extend to other parts of the body and interfere with their efficiency, the claimant should have the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." 467 S.E.2d at 459.

The vast majority of states do not follow the Singleton rule. Most jurisdictions now hold that the scheduled member section of the code is not exclusive and that a scheduled loss may be treated as a partial or total disability of the body as a whole, thus allowing access to the loss of earning capacity sections where established by confident proof. 1C Arthur Larson, The Law of Workers' Compensation § 58-23 (1987). The South Carolina Supreme Court frequently follows North Carolina in interpreting our Act, however, the court has not done so with reference to Singleton. In the case of Gupton v. Builders Transport, 320 N.C. 38, 357 S.E.2d

674 (1987), the North Carolina Supreme Court rejected the Singleton approach. Until our supreme court overrules Singleton, it remains extremely important to fully assess the overall physical and psychological impact of a claimant's scheduled member injury and to establish in the record how that injury has affected the claimant's overall ability to function when the injury and its effects have caused a total or partial loss of earning capacity.

§ 5.07 Proof of Impairment - Treating Physicians.

Proof of impairment generally comes from the treating physician, the claimant's physician, and the claimant's testimony. Practitioners frequently overlook the treating physican as a source of proof of impairment. The best way to develop such proof is to go talk to the doctor. It will be harder for the doctor to say bad things about your client to your face. Many doctors would probably be more sympathetic if they knew more about workers' compensation and how little most people receive. Even the most conservative doctors can sometimes be reached by a visit from the claimant's attorney. Even if the doctor is known to be conservative, he can sometimes be persuaded to make his rating in accordance with the AMA Guides or the old Orthopedic Surgeon's Guide. Although the ratings in these publications are not liberal, they are sometimes more reasonable than the company doctor's rating.

Many physicians claim to use the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, in determining impairment ratings. These claims are frequently not true. It is very important for the claimant's attorney to study and learn as much as possible about the Guides in order to use them to the claimant's benefit whenever possible. Frequently, the Guides provide for alternative methods of rating impairment to a body part. These methods may yield widely divergent numbers.

With some doctors, it may be more effective not to ask what impairment rating he would assign, but rather what limitations or restrictions he feels the claimant will have. It is not unusual for a doctor to place significant limitations on a person but assign a minimal rating. Many attorneys have devised their own Physical Capacities Evaluation forms for this purpose. See Appendix 5.

For some reason, doctors often sign credit disability, short term disability, long term disability, and other forms for patients that contradict or supplement their records. Clients should be advised to bring copies of all such forms to the lawyer.

Another way to document a claimant's limitations is through the use of a functional capacity evaluation (FCE). The treating physician will sometimes order an FCE at the suggestion of the claimant's attorney. If the authorized treating physician orders the evaluation, the carrier must pay for it. However, the attorney must be cautious in suggesting FCE's. If the claimant does not give a full effort, the results of the FCE may be quite damaging. Evaluators frequently refer to "symptom magnification" by the claimant. This general term can refer to conscious exaggeration or unconscious magnification due to fear of pain or psychiatric problems. Unfortunately, the carriers, and more importantly the commission, generally assume that it means conscious magnification or malingering.

§ 5.08 Proof of Impairment - Second Opinions.

Over the years, claimants attorneys have used second opinions to enhance impairment ratings, and hence loss of use awards. It is doubtful that the present commission pays much attention to reports from "liberal" doctors. Use of a moderate physician may yield better results in the long run, and may enhance the credibility of the evidence and of the attorney.

§ 5.09 Proof of Impairment / Loss of Use - Lay Testimony.

A claimant's testimony can often offer convincing proof of impairment and loss of use. Questions dealing with the claimant's ability to move, bend, stoop, reach, etc. go to impairment. Questions dealing with the way these physical limitations affect the claimant's ability to perform a given task, and particularly his or her customary job, go directly to the issue of loss of use.

Before the hearing the claimant should be carefully interviewed and prepared to give complete testimony regarding his/her limitations in performing vocational activity as well as other life activities. The claimant should be questioned in detail about his or her educational level, past work history, and the physical requirements of his or her present and prior jobs. Testimony

regarding length of service, failed work attempts, and other jobs sought should also be elicited. When an employer has either terminated the claimant or failed to provide work consistent with his limitations, it is very important for the claimant to consult Job Service and to review other employment offerings such as the classified ads. The claimant should be instructed to keep a record of when calls are made regarding employment opportunities interviews that are granted, and results of those interviews. A record of numerous attempts to obtain employment that is specific as to date, time and prospective employer can be very dramatic and convincing. Evidence of this type was substantially relied upon by the court in Coleman, supra.

Corroborating testimony from a spouse should not be overlooked. Sometimes the spouse is a much better witness than the claimant. Unfortunately, commissioners sometimes do not want to take the time to listen to the testimony of corroborating witnesses.

Occasionally, a supervisor or personnel manager will testify that the company has no jobs within the claimant's limitations. This occasionally happens because the witness feels compelled to tell the truth. More often it occurs because the company does not want the employee back. (NOTE: The carrier's wishes in this regard may be in total opposition to the employer's.) Such testimony can be very persuasive, especially when the defendant is a large company with a multitude of different jobs under its roof.

§ 5.10 Proof of Loss of Use - Vocational Evidence.

Linen v. Ruscon, 286 S.C. 67, 332 S.E. Ed 211 (1985), suggests that vocational expert (VE) testimony is relevant on the issue of loss of use. In Linen the Supreme Court upheld a finding that the claimant had sustained a 50% or more loss of use of his back and was thus entitled to an award of total disability. In support of its decision the court cited the claimant's testimony and the testimony of the vocational expert who had testified that the claimant was not employable.

Generally a vocational expert is used when an award is sought for total disability or partial loss of earning capacity. The vocational expert can render an opinion on the claimant's employability based upon his or her transferable skills, or lack thereof, and the likelihood of

the claimant being realistically employable on the open labor market. A vocational expert can provide va le information as to the physical requirements of a job and the prospective ability/inability of a person with a given set of limitations to do a particular job.

Since the vocational expert is not usually a medical doctor he cannot express an opinion on the degree of impairment. The vocational expert's primary role is to provide additional information for the loss of use equation.

Vocational expert testimony is more commonly used in cases of total disability rather than partial loss of use cases. One reason for this is that vocational expert testimony regarding transferability of skills, availability of other work within the claimant's residual functional capacity, etc., has much more relevance when the issue is total disability. If Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960) did not prohibit awards of total disability for single scheduled injuries, vocational expert testimony would be more valuable in partial loss of use cases. A second reason vocational experts are not used that often in loss of use cases is the cost.

Selection of a vocational expert should be approached in much the same manner as selection of a doctor for a second opinion. The credibility of the vocational expert is critical. If one has never used a vocational expert it is a good idea to check with other lawyers regarding experts they have used and the results they have obtained. The present commission does not want vocational experts to testify live. Therefore, the report of the vocational expert needs to be thorough but readable. The expert chosen should administer an appropriate battery of tests to assess educational level, mental capability, and functional dexterity. Some commissioners place more value on vocational testimony than others. Even if the hearing commissioner does not value this evidence, it may still be helpful on appeal.

Beware of vocational experts who render favorable opinions based in large part on the client interview. If the expert's report is not based in large part on medical limitations assigned by the treating physicians it will be easily attacked by the defense.

Some lawyers regularly refer clients to the South Carolina Department of Vocational Rehabilitation Department (Voc Rehab). There is serious disagreement as to the benefit of

making these referrals. However, attorneys should be aware that commissioners frequently ask whether claimants have been referred to Voc Rehab. Voc Rehab also maintains a special unit at the Workers' Compensation Commission.

A common problem that arises is that a client will go to Voc Rehab and the report will come back stating that the "client refused vocational services." What generally happens is the counselor asks the claimant if he thinks he can work and the claimant responds that he does not think he can. The counselor, not wanting to take on a difficult case and/or lower his statistical success rate, writes the case up as a refusal. These problems should be referred to the Voc Rehab unit at the commission, assuming, of course that the claimant did not actually refuse services.

In some cases Voc Rehab will put the claimant through a comprehensive evaluation. If they attempt and fail to help the claimant, they can be powerful witnesses in his/her favor.

The main advantage to state Voc Rehab is that it does not cost anything. Voc Rehab sometimes have funds to pay for tuition at state technical schools. However, they do not assist with living expenses while attending school.

§ 5.11 Proof of Total Disability.

A. Social Security Disability and Other Disability Benefits.

A claim of total disability can be supported with evidence of receipt of Social Security Disability and other disability benefits. Since Social Security has a different standard of disability, it can be debated whether evidence of an award of Social Security Disability is relevant in the workers' compensation setting.

However, most attorneys consider it beneficial to make such an award known to the commissioner. The simplest way is to offer a copy of the award. The defense will usually object, but even if the commissioner sustains the objection, the point has been made. The claimant can also testify that he or she is receiving disability benefits at an opportune moment.

Many companies also have short-term disability (STD) and/or long-term disability (LTD) plans. Payment of benefits under these plans may be brought to the commissioner's attention

in the manner described above. In order to receive these benefits the claimant must generally obtain a physician's statement documenting his inability to work. These forms can be obtained by subpoena and/or written authorization. In many cases the physician will be far more sympathetic in filling out one of these forms than he would in his office notes. These forms can make excellent APA submissions.

B. Psychological/Psychiatric Overlays.

Although Singleton prohibits awards for total disability based on a single scheduled injury, it does not apply if the claimant has multiple disabilities. If a claimant has sufficient loss of use of two parts of his body to destroy his earning capacity, he may be awarded total disability under section 42-9-10. Likewise, if he has a single scheduled injury coupled with a causally related psychological problem he may be awarded total disability if the two combine to destroy his earning capacity. If the two combine to permanently decrease his earning capacity he may be awarded 340 weeks of benefits under section 42-9-20.

Some attorneys have attempted to get around Singleton and "total" their clients by developing evidence of a causally related psychological/psychiatric problem. If the sole evidence of a psychological/psychiatric injury is the result of a referral by the claimant's attorney, it may be difficult to convince the commission that the claimant truly has a psychological/psychiatric problem. The best scenario occurs when the treating physician notes these problems in his/her records. When this occurs, the attorney, and/or the claimant, can ask the treating physician to refer the claimant for evaluation and treatment. If the attorney begins to suspect undiagnosed psychological problems, he can instruct the claimant to discuss these problems with the treating physician. Workers' compensation carriers are very reluctant to authorize psychiatric/psychological care. Indeed, they often refuse to authorize care even if recommended by the authorized treating physician. However, the fact that the treating physician recommended follow up care can be strong evidence at a hearing before a single commissioner.

If an attorney detects signs of a psychological/psychiatric problem, he should also consider suggesting to the client that he go to the local mental health office. Mental health personnel,

particularly psychologists and psychiatrists with private practices on the side, are often helpful in making the causal connection.

§ 5.12 Permanent Partial Loss of Earning Capacity.

Section 42-9-20 provides:

> *Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than two-thirds of the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from a maximum period allowed in this section for partial disability.*

Sometimes a claimant who is drawing temporary total disability benefits will return to work prior to reaching maximum medical improvement. If the claimant is earning less than his average weekly wage at the time of injury, either from working reduced hours or from working at a lesser rate of pay, he or she is entitled to temporary partial disability benefits of two-thirds of the difference between the average weekly wage and what the claimant is earning at that time.

After the claimant has reached maximum medical improvement the question becomes what benefits the claimant is entitled to receive as a result of permanent injury or loss of earning capacity. If the injury is limited to a scheduled member with no other effects upon other body parts or systems our current law limits recover to benefits provided by section 42-9-30. If the claimant's injury, although falling under section 42-9-30, affects other parts of the body, the claimant may proceed under the general disability provisions of sections 42-9-10 or 42-9-20 and attempt to establish a disability greater than the presumptive disability provided through section 42-9-30. Brown v. Owen Steel Company, Inc., 316 S.C. 278, 450 S.E.2d 57 (S.C. App. 1994). Singleton affects the pursuit of benefits under section 42-9-20 in the same manner that it affects the pursuit of benefits under section 42-9-10.

It should be kept in mind that the word "permanent" does not appear either in section 42-9-10 or section 42-9-20. As a result, when there is an award of total disability or partial disability and that award is paid weekly, it can be reduced or eliminated at any time in the future if the claimant begins to earn wages. Notice that section 42-9-10 says that the claimant is to be paid "during the total disability"; in addition, under section 42-9-20 the statute says the claimant is to be paid "during such disability." See Section 2.03 for a discussion of the possible implications of the difference in language.

In the case of Utica-Mohawk Mills v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955), the court specifically discusses the prospective payment of a partial disability award and states that if wages are earned the award is reduced proportionally. While an award under section 42-9-20 may very well yield more money for the claimant in the long run, the claimant must be made aware that if at any time in the future he or she gets physically better and is able to return to work the award could be reduced or eliminated.

The Utica-Mohawk case is also interesting because it dealt with an award of permanent partial disability where the claimant had a back injury that required surgery. Following surgery the claimant went back to work and was initially paid slightly higher wages than before his injury, but was later put on lighter work and was not working at all at the time of the hearing. At that time the back was not a scheduled member under section 42-9-30 and the court said that the claimant had sustained a 30% disability to the body as a whole and applied this percentage to his pre-injury average weekly wage of $56.05 per week. The court said that the 30% loss of earning power would reduce his wages by $16.82 and the claimant was awarded 60% of this loss or $10.09 per week under section 42-9-20.

In Bowen v. Chiquola Manufacturing Company, 238 S.C. 322, 120 S.E.2d 99 (1961), the claimant sustained a back injury resulting in surgical removal of his fourth and fifth lumbar discs. After recovery from surgery the claimant went back to work with reduced earnings resulting in a wage loss of $18.22 per week. The commission awarded 60% of that amount as his partial compensation under section 42-9-20. The court said:

> *[T]he amount of post-injury wage averaged over a reasonable period of time, is not necessarily conclusive of the diminution of earning capacity. It does,*

> *however, furnish a reasonable basis for comparison with the average pre-injury wage in determining whether and to what extent there has been such diminution, assuming such variable factors as the employee's willingness to work and the availability to him of employment, within his capabilities, sufficiently regular and continuous to establish his earning capacity ... accordingly where there is medical testimony as to percentage of disability and also testimony as to average post-injury wages the Commission, in its search for a proper basis for computing reasonable compensation under Section 72-152 (§ 42-9-20) may avail itself of either. 120 S.E.2d at 102.*

Proving a diminution in earning capacity is usually accomplished in one of several ways. First, if the claimant has returned to work at a reduced rate of earnings, hopefully that rate of earnings has existed long enough to establish a presumption that he is at his maximum earning capacity. It may be reinforced by testimony of a vocational expert to the effect that, considering the claimant's limitations and lack of transferrable skills, he is earning at his maximum potential. Sometimes vocational experts will render the opinion that while a claimant is not presently working he or she retains an earning capacity at a much lower level than pre-injury earnings and, therefore, if the Singleton problem can be dealt with, an award under section 42-9-20 can be pursued.

Attorneys should be aware that some claimants can often receive substantially more under section 42-9-20 than section 42-9-30. Section 42-9-20 allows compensation at the rate of two-thirds of the difference between the average weekly wage before and after the injury. Example: Claimant had pre-injury average weekly wage of $1,000. His comp rate is $350.19. He has 50% loss of use of an arm that equals $35,090. However, his earning capacity is permanently reduced to an AWW of $300 per week. His comp rate under section 42-9-20 is $1,000 - $300 = $700 x 2/3 = $466.66. However, he would still be subject to the maximum compensation rate of $350.19. But, $350.19 x 340 weeks (instead of 110) = $119,064.60!

Be aware, however, as discussed earlier, that the "permanent partial award" is a running award and if at any time in the future the claimant goes back to work the award can be reduced or eliminated. If the facts justify the award, however, the potential increased benefits can have a beneficial effect on settlement negotiations.

§ 5.13 Miscellaneous.

A. Fingers vs. Hand, Hand vs. Arm, etc.

Under the Act, injuries to the fingers are worth very little compensation. Injuries to hands are worth considerably more. Therefore, finger injury cases should be scrutinized to determine if there is an argument to be made that the impairment, and hence the disability, is to the hand. (The same logic would apply to the hand vs. arm, foot vs. leg, etc.) Lail v. Georgia Pacific, 285 S.C.234, 328 S.E.2d 911 (1985), holds that before an award may be made to the hand instead of the fingers, medical testimony must establish "functional impairment" to a part of the hand other than the fingers alone. The same logic would apply to the hand vs. arm, foot vs. leg, etc. However, evidence of direct injury to hand is not required. Mixson v. Westinghouse, 304 S.C. 31, 402 S.E.2d 893 (S.C. App 1991). See also, Morgan v. JPS Automotives, supra, and Section 5.06 above.

B. Prosthetics and Loss of Use.

Dykes v. Daniel, supra, also stands for the proposition that loss of use is to be determined without regard to the fact that a prosthetic devise, in that case eyeglasses, would improve claimant's condition.

C. Regulations.

As indicated earlier, regulation 67-1101 supplements the scheduled injuries in section 42-9-30. Loss of use of bodily parts or systems listed in the regulation is determined in the same manner as under section 42-9-30. Regulation 67-1101(B) also provides that, in certain cases, compensation may be allowed for non-listed impairments.

A question occasionally arises regarding whether a claimant seeking compensation under this regulation may receive compensation in excess of the impairment rating given by the physician. Logically, claims under the regulation should be treated exactly the same as claims under section 42-9-30. See the discussion in Section 2.06 above.

D. Minor Psychological/Psychiatric Impairments and Chronic Headaches.

As indicated earlier, regulation 67-1101 provides that, in certain cases, compensation may be allowed for non listed impairments. But see Fields v. Owens Corning Fiberglass, 301S.C. 554, 393 S.E.2d 172 (1990) which reversed an award for a 10% psychological impairment because it was not a "member, organ, or part of the body." See also Bixby v. City of Charleston, 300 S.C. 390, 388 S.E.2d 258 (S.C. App. 1989). Under these cases, it will be difficult for a claimant to receive compensation for a psychological injury unaccompanied by other problems that permanently reduce or destroy his/her earning capacity. The best argument in such cases is that the psychological/psychiatric impairment is actually an impairment to the brain, which is a "member, organ, or part of the body" listed in regulation 67-1101.

The same argument also applies to chronic headache cases.

E. The Whole Man Myth.

Contrary to popular belief there is no such thing as an award for a "whole man" disability. See Fields, supra.

F. Hip Injuries.

In Gilliam vs. Woodside Mills, 319 S.C. 385, 461 S.E.2d 818 (1995), the supreme court held that the hip was not the same thing as the leg. The decision suggests that since the hip is not a part of the leg for workers' compensation purposes, Singleton, supra, may not apply and the claimant may be able to prove and receive compensation for total and permanent disability under section 42-9-10 or permanent loss of earning capacity under section 42-9-20.