

Workers' Compensation

Collins  Lacy SM QUARTERLY
ATTORNEYS AT LAW

Summer 2008

One Size Does Not Fit All



As counsel in workers' compensation and employment matters, we are often confronted with requests by our clients to close the workers' compensation or employment matter with a separation or termination agreement. Clients request a generic "one size fits all" separation agreement. Just as every workers' compensation claim and employment matter is different from the next, so are separation agreements. What may be appropriate in terms of the separation agreement for a twenty-two-year-old male would not be appropriate for a fifty-two-year-old male. For example, when contemplating whether a separation agreement is appropriate for someone over the age of forty, specific time frames carved out by Congress under the Age Discrimination Employment Act (ADEA) must be taken into account. If an employer is asking an employee to give up any and all future rights, either known or unknown, against an employer, including a possible ADEA claim, then the employer must comply with certain congressional requirements. In issuing a separation agreement for a twenty-two-year-old male, the proper agreement would most likely take into account a time period of seven to ten days for the employee to seek legal counsel before executing the document. The separation agreement might also give a two to three day revocation period in which the employee, after signing the agreement, could revoke the agreement and retain his legal rights.

Unlike a separation agreement for a twenty-two-year-old male, if the employee was a fifty-two-year-old male, the employer should seek protection from a future claim of discrimination under the ADEA. To meet congressional requirements, the employee must be given a twenty-one day minimum period of time to review the separation agreement with counsel. Unlike the separation agreement for the twenty-two-year-old male, the separation agreement giving up a claim under the ADEA **must also** give an employee a minimum of seven days to revoke the agreement even after signing the agreement and disbursement of any separation funds.

The reviewing and revoking periods under the ADEA are only one illustration of why one size does not fit all in separation agreements. Each separation agreement must take into account the facts of the employment situation, the catalyst for the separation, and the rights the employee gives up as a result of the agreement. Although many separation agreements are drawn up and executed without the assistance of legal counsel, the value spent and consideration given in connection with the separation agreement may be lost when the employee inevitably challenges the separation agreement for failing to comply with congressional and interpretive case law requirements. The best advice is to seek legal counsel when navigating the tumultuous seas of employment law.

IMPORTANT DATES

South Carolina Workers' Compensation
Educational Association Conference
October 19–22, Hilton Head Island

INSIDE THIS ISSUE

South Carolina Case Law Updates	2
Form Tips	3
Firm Announcements	4

South Carolina Case Law Updates

Going & Coming Rule— Exception

Joey D. Horton v. Pyramid Masonry Contractors, Inc., 2008-UP-208, illustrates an exception to the going and coming rule, which was initially outlined in Eadie v. H.A. Sach Co. In Horton, the employer hired Foreman to supervise masons and laborers on construction sites. Foreman was paid \$23.00 an hour as well as a truck allowance of \$150.00 per month. Foreman was also authorized to hire brick masons and laborers to work on the job sites he supervised. Acting within the scope of his authority to hire, Foreman hired Horton as a mason, a job which would pay him \$18.00 per hour. Throughout the course of Horton's employment, Foreman and Horton always traveled to and from work together as Horton had no other form of transportation and had no South Carolina driver's license. One morning while Foreman, Horton and another employee were traveling to work in Foreman's vehicle, they were involved in a collision, which caused injuries to Horton's head, back, heart, spleen, pelvis, left leg and various other injuries.

Horton filed a Form 50 Request for Hearing requesting workers' compensation benefits, which was denied by the employer based on the going and coming rule. At the initial hearing, both Horton and his mother testified that when Foreman hired Horton, Horton informed Foreman he did not have transportation to and from work and did not possess a South Carolina driver's license. Horton also said Foreman told him the company would provide transportation to and from work. The employer testified Foreman's alleged statement was outside the scope of Foreman's authority and was not in line with company policy.

In its analysis of the evidence presented at the hearing below, the Court of Appeals enumerated the five exceptions to the going and coming rule: 1) the employer provides the means of transportation or pays travel time; 2) the employee performs duties during his commute; 3) the

route used is inherently dangerous; 4) the place where the injury occurred is in such proximity to the work place that it is brought within the scope of employment; and 5) the injury occurs while the employee is on a special errand for the employer. The court held exception number one applied to this case because the employer provided the means for the employee's transportation through apparent authority and the claim was held compensable.

Citing Eadie, the court stated the doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. In this case, the court held while Foreman's offer of transportation may have exceeded the scope of the actual authority employer conferred upon him, Horton and his mother could have reasonably believed Foreman, as employer's agent, had the authority to negotiate all of the terms of employment, including employer's provision of employee's transportation to work.

Corrective Lens Interpretation

In Johnson v. Beauty Unlimited Landscape, the Claimant challenged an award of benefits for an 8.5% loss of vision. The Court of Appeals affirmed the ruling the term "corrective lenses" does not include implanted lenses. In so ruling, the court considered the permanence of the implanted lenses, citing the appellate panel's reasoning a removable lens is distinctly different from a complex invasive surgery that permanently restructures and repairs one's vision.

The court commented the role of the courts to evaluate the evidence in the light most favorable to a claimant does not empower the courts to employ semantics to stretch the Act or its attendant regulations and benefits to persons who no longer suffer a disability. When Claimant recuperated without bearing the cost of his recovery, the Act served its purpose by ensuring a sure, swift recovery and by providing for future needs in accordance with the actual diminution experienced.

Extraordinary Work Conditions

Jane Doe v. SCDDSN, involves a claim for mental or nervous disorders as a result of unusual or extraordinary conditions of employment. In this case, Claimant worked as a nurse. Claimant's initial job duties were to give basic patient care and administer medications to higher functioning and less aggressive patients. Due to the department downsizing, the patient population in Claimant's unit changed from being a passive group to a mixed group of passive and aggressive patients. Claimant testified the level of noise and violence in her unit increased dramatically, and patient and staff injuries increased significantly. Claimant began suffering from depression, which required her to receive psychiatric care, including medication, electroconvulsive treatment and hospitalization. Claimant resigned from her position and filed a claim for workers' compensation benefits alleging a stress-related mental injury.

Mental and nervous disorders are compensable pursuant to S.C. Code Ann. § 42-1-160 provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. *The standard usually applied in this analysis is whether the work conditions at issue are, unusual compared to the particular employees normal strains.*

Here, the Supreme Court determined the mix of passive and aggressive patients was an extraordinary and unusual condition in Claimant's employment, which caused Claimant's stress. Because Claimant had never before worked with a mix of passive and aggressive patients and was never faced with the behavior problems associated with such a mix, the change in Claimant's work environment was a direct cause of her stress-related injury. Accordingly, the Court found there was no substantial evidence in the record to support the Commission's denial of benefits. The case was remanded to the Commission to award benefits based on Claimant's disability arising from her mental injury.



Form Tips

BEWARE OF THE FORM 50

Everyone is familiar with the Form 50. The Form 50 is the one document the claimant can submit during the course of a claim. It is used for either one of two purposes: Claimant can put the Commission on notice of a claim or can request the Commission schedule a hearing to resolve issues the parties cannot resolve by themselves. What some adjusters don't realize, however, is a Form 50 always triggers some affirmative action by the adjuster. Knowing what to do when you're served with a Form 50 - and doing it - can save time, fines and embarrassment. When the Form 50 is received, there are three questions the adjuster must ask.

1. Does the Form 50 ask for a hearing?

The bottom of the Form 50 lists items 13(a) and 13(b). The claimant is required to select one of these two items. If 13(a) is checked, the claimant is using the Form 50 simply to file a claim. No hearing is requested and there is no need to involve defense counsel at this time. If, however, item 13(b) is checked, a hearing is requested and a response (a Form 51) must be filed and served within 30 days of service of the Form 50. Failure to timely file a Form 51 will result in the claim going into default. Default means the adjuster may tie the hands of her attorney by waiving all affirmative defenses such as statute of limitations, intoxication, and notice. The only defense available is a general denial.

2. Was a Form 12A filed?

When a Form 50 is received, whether it requests a hearing or places the carrier on notice of a claim, the Commission requires a Form 12A, First Report of Injury, be in their file. The adjuster must take affirmative action to insure the Form 12A is completed and filed with the Claims Department. Normally, Forms 12A are prepared by the employer, but often, when the Form 50 is your first notice of a claim, the adjuster must take the initiative and prepare the first report of injury. **THIS IS IMPORTANT.** Failure to file a Form 12A will result in a fine. Ironically, it does not matter if the Form 12A is accurate in all particulars. Even if you only know a few facts, file it.

3. Has a Form 20 been filed?

The Commission requires a Form 20, Statement of Earnings of Injured Employee, also be filed. When a Form 50 is received, look to see if the employer has sent you a Form 20. If not, take immediate steps to get it. Like the Form 12A, the employer is the person who should have the information necessary to complete the form. But employers are frequently unreliable when it comes to completing and submitting forms, especially when they imagine the effort is greater than it really is. You should call the employer and explain the importance of the form and how easy it is to complete. If the employer still won't respond, have your attorney subpoena the records from the Employment Security Commission and use them to complete the Form 20 or at least make a fair estimation of average weekly wage.

At the Commission, forms are important. The Commission wants them completed and filed timely and fines result when they are not. Beware the Form 50! When the Commission receives it, they will examine the file. If the Form 12A or the Form 20 is not there, you could be fined. It is better if you get there first.

South Carolina Workers' Compensation Commission
 1612 Marion Street • Post Office Box 1715
 Columbia, South Carolina 29202-1715
 (803) 737-5723
 www.wcc.sc.gov

WCC File #: _____
 Carrier File #: _____
 Carrier Code #: _____
 Employer FEIN #: _____

Claimant's Name: _____ SSN: _____ Employer's Name: _____
 Address: _____ Address: _____
 City: _____ State: _____ Zip: _____ City: _____ State: _____ Zip: _____
 Home Phone: () - _____ Work Phone: () - _____ Insurance Carrier: _____
 Preparer's Name: _____ Law Firm: _____ Preparer's Phone #: () - _____

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds: Date of Injury or Illness: _____
 Injury Illness Repetitive Trauma

1a. The claimant sustained an injury to _____ (Part(s) of Body Injured) on _____ (Month/Day/Year) in _____ county, state of _____.
 1b. Body part(s) affected are: _____
 Briefly describe how the accident occurred: _____

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 3. The relationship of employer and employee existed at the time of injury.
 4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
 5. Notice of the accidental injury was given to the Employer on _____ (Month/Day/Year) in the following manner: _____

6. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: _____
 (b) additional medical examination and treatment for: _____

7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: _____

8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total (2) Specific Disability: Total Partial
 (3) Wage Loss Partial Partial

9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of: _____

10a. At the time of the injury, the Claimant was paid weekly wages of \$_____, and demands accounting of days worked and wages earned as provided by law.
 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident: _____
 11a. Further grounds or unusual aspects of claim: _____
 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident: _____
 11c. To the best of your knowledge, did you have any prior permanent disability? _____
 If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

13a. I am filing a claim. I am not requesting a hearing at this time.
 13b. I am requesting a hearing. A \$25 fee is required.
 14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature _____ Title _____ Email _____ Date _____
 Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.
WCC Form # 50
 Revised 9/07

50

Employee's Notice of Claim and/or Request for Hearing



Olympic Trivia

- 1.) What are the only two Olympic sports where men and women compete against each other?
- 2.) Who holds the record for the most gold medals awarded in one Olympic games prior to 2008?
- 3.) What do the five Olympic rings represent?
- 4.) In what year were the Olympics first covered by U.S. television?
- 5.) Of what type of metal are gold medals made at the present time?
- 6.) When was the opening procession first introduced to the Olympic games?

Answers: 1.) Equestrian & Sailing; 2.) Mark Spitz who won seven gold medals in the 1972 Summer Olympics; 3.) The five continents of Europe, Asia, Africa, Australia and North America; 4.) The 1960 Olympics held in Rome; 5.) Medals are sterling silver on the inside with a thin layer of pure gold on the outside; 6.) 1908 in London

COLUMBIA

P.O. Box 12487
1330 Lady Street • (29211)
Columbia, SC 29201
P•803.256.2660
F•803.771.4484

GREENVILLE

P.O. Box 5819
37 Villa Road, Suite 500 (29615)
Greenville, SC 29606
P•864.282.9100
F•864.282.9101

www.collinsandlacy.com

**Workers' Compensation
Practice Group**

Ellen M. Adams.....	803.255.0416
Christian E. Boesl.....	803.255.0453
Suzy Boulware Cole.....	864.282.9102
Peter H. Dworjanyan.....	803.255.0404
Rebecca K. Halberg.....	803.255.0456
Stanford E. Lacy.....	803.255.0434
Aisha G. Taylor.....	803.255.0480
Donald L. Van Riper.....	864.282.9103

Collins & Lacy News

Joel Collins Selected for Inclusion in Corporate Counsel Edition of *Super Lawyers* 2008

Founding partner, Joel W. Collins, Jr., has been selected for inclusion in the Corporate Counsel Edition of *Super Lawyers* 2008. *Super Lawyers* features attorneys who are selected through a process of considerable polling, detailed research, and peer evaluations based on peer recognition and professional achievement.



Jack D. Griffeth Named To 'Best Lawyers in America'

Jack D. Griffeth has been selected for inclusion in the 25th anniversary edition of *The Best Lawyers in America*. Published biennially since 1983, *The Best Lawyers in America* is widely regarded as the definitive referral guide to the legal profession in the United States.



Collins & Lacy Announces Winner of Children's Logo Art Contest

Children of the firm's employees were invited to submit artwork reflecting their interpretation of the Collins & Lacy logo. Patrice Broadnax, daughter of Gail Broadnax, Paralegal, was the recipient of the "Best Overall" award in the Collins & Lacy Children's Logo Art Contest. Miss Broadnax's entry depicted an abstract drawing of the firm's logo of a palmetto tree with the legal scales in soft pastel watercolors.



**South Carolina
Workers' Compensation
Commissioners Update**

The South Carolina Workers' Compensation Commission is comprised of seven commissioners appointed by the Governor with the advice and consent of the Senate. Each Commissioner serves a term of six years. Please take a moment to get to know our two newest Commissioners who were appointed on July 1, 2008.

Scott Beck

Scott Beck is originally from Hollidaysburg, PA. He graduated from Penn State with a degree in criminal justice in 1981 and served as a police officer in both Tyrone, PA and Bellwood, PA. In December 1983, he moved to South Carolina to work as a law enforcement officer at the Savannah River site. He previously served on the North Augusta City Council and then successfully ran for the SC House (District 83) in 1996. Commissioner Beck also enrolled in USC Law School in 1996 and graduated in 1999. He worked with the SC Attorney General's office prior to his appointment to the Commission. Commissioner Beck is married and his wife, Marilyn, is an account representative for Delta Com. They have two adult children, "AJ" and Nicole, and 4 grandchildren.

Avery Wilkerson

Avery Bland Wilkerson, Jr. was born in North Augusta and finished high school in West Columbia. He graduated from Newberry College in 1978 and went to work for the Industrial Commission as a claims examiner. Later he became an adjuster for Fred S. Jones and eventually became president of Keenan Insurance and Financial Services. He lives in Cayce, where he previously served as mayor. Avery is married to Kim, who is the president of Bank of America of SC. Avery and his wife have two sons: Bland, who works at SCB&T and is married to Katie, a school teacher; and Alan, who is a rising junior at Wofford. Commissioner Wilkerson enjoys golf, hunting and fishing.