

Workers' Compensation Quarterly

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Dates to Remember

March 9 - 11, 2007

28th Annual
Workers' Compensation
Medical Seminar
Charlotte, NC

March 30, 2007

Collins & Lacy Founders' Day
Celebration
Columbia, SC

April 25-27, 2007

Self Insurers' Conference
Litchfield, SC

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Boesl, Kirkland Join C&L Workers' Compensation Team

Collins & Lacy is pleased to announce the addition of two lawyers to its Workers' Compensation team.

Christian E. Boesl joined the firm in 2003 with a focus on employment law; however, Christian recently expanded his practice to include workers' compensation. Christian graduated from Brigham Young University in 1999. He earned his law degree from the University of Arkansas at Little Rock in 2003. While in law school, Christian was an Honor Council Justice, 2002 intraschool Moot Court Champion, and 2003 finalist at the Weschler National Criminal Law Moot Court Competition.



Christian Boesl

Christian joined Collins & Lacy as a law clerk in 2002 and was admitted to practice in South Carolina in 2003. Christian made his workers' compensation debut as the "Rookie" in Stan Lacy's most recent film at the South Carolina Workers' Compensation Educational Conference. His practice focuses primarily on employment law and workers' compensation.



Rebecca Kirkland

Rebecca C. Kirkland joined the firm as an associate in the Fall of 2006. Rebecca is a 2001 graduate of the University of North Carolina, where she received her bachelor's degree in journalism and public relations. She earned her law degree from the University of South Carolina School of Law in 2006. In law school, Rebecca served as Justice of Fundraising and Alumni Relations for Moot Court Bar, as legislative councilwoman for the Student Bar Association and as President of Phi Delta Phi.

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Employer/Employee Relationship: Right to Control

In [Wilkinson v. Palmetto State Transportation Company](#), the Court of Appeals affirmed the decisions below to award benefits to the surviving spouse after the death of her husband because an employer/employee relationship existed between the decedent and the employer at the time of his death. The court also affirmed the decedent's occupational disability policy was a collateral source, making it unavailable to offset the workers' compensation benefits.

Wilkinson, a transfer truck driver, suffered fatal injuries in an accident. Palmetto argued he was an independent contractor at the time of the accident, thus his spouse was not entitled to workers' compensation benefits. A workers' compensation award is only granted when an employee/employer relationship exists between the parties at the time of the accident. To determine if a worker is an employee or an independent contractor,

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Method and Theory in Evaluating Shoulder Injuries

In Therrell v. Jerry's Inc., Claimant suffered a torn rotator cuff. The effect on Claimant was a loss of use of her arm. The actual site of the injury was the rotator cuff (shoulder), defined in the case as a group of muscles, ligaments and cartilage attaching the humerus to the chest.

Claimant argued the shoulder was an unrated member under § 42-9-30(20). Defendants argued because the functional impairment was to the arm, this was an "arm case" and should be limited to recovery under § 42-9-30 and Singleton. The two positions were identified by Chief Justice Toal as:

- (a) **Claimant's position: the situs of the injury controls whether it is an arm case or an injury to an unrated body part;**
- (b) **Defendant's position: the functional impairment (loss of arm) determines that it is an arm case.**

After some analysis, Chief Justice Toal stated that the South Carolina statute requires the Commission and courts follow the situs of the injury approach rather than the functional impairment approach. In Ms. Therrell's case, the situs of the injury was the shoulder and not the arm, thus the Commission would be required to evaluate her injury as one to an unrated body part under § 42-9-30(20).

The approach allows the claimant to avoid the limitation under Singleton (236 SC 470) for a single-member injury (maximum for arm = 220 weeks). However, the case contains no guid-

ance from the Supreme Court as to what shoulder cases are worth. Chief Justice Toal simply encouraged the Commission to adopt some method to assign a value to the shoulder as it relates to a whole-man impairment.

Case Management Pointer: At the October 2006 South Carolina Workers' Compensation Educational Conference, Commissioner Andrea Pope Roche responded to Justice Toal's opinion in this case. She stated the majority of commissioners were informally using a value of 180 weeks for a shoulder. This comes from the following analysis based on the AMA Guide and the presumption the whole person = 500 weeks, which is debatable:

Upper extremity = 60% of whole person, therefore,
 $.60 \times 500 = 300$ weeks

Shoulder = 60% of upper extremity, therefore,
 $.60 \times 300 = 180$ weeks

This was a pronouncement only and has no force and effect of law. No regulation has been adopted, and it may be the disagreement among the various commissioners on this point is so strong that a new regulation will not be forthcoming soon.

For now, be prepared that commissioners may consider shoulder cases that do not result in wage loss to be worth a maximum of 180 weeks. However, it is important to note claimants can now argue wage loss with a lone shoulder injury—a big change in the law.

Unsigned Certificate of Insurance Meets Requirements of § 42-1-415

In Barton v. Higgs, the Supreme Court affirmed the Full Commission and Circuit Court's decision that an unsigned Certificate of Insurance meets the requirements of S.C. Code § 42-1-415 to transfer liability to the S.C. Uninsured Employers' Fund for benefits owed by an uninsured employer.

Encourage your general contractors to obtain Certificates of Insurance from their subcontractors and keep them on file for five years.

Barton, an employee of Lyanel who served as a subcontractor for Total Home Exteriors, Inc., was injured when he fell from a roof. He filed a workers' compensation claim against Lyanel, his direct employer, and Total Home Exteriors,

Inc. as a statutory employer under S.C. Code § 42-1-410. The single commissioner found that Total Home Exteriors, Inc. was a statutory employer under § 42-1-410 but had no ultimate liability because it relied in good faith on a Certificate of Insurance provided by the direct employer, Lyanel.

Pursuant to § 42-1-415, the Commission transferred

responsibility for Barton's benefits to the S.C. Uninsured Employers' Fund. The Fund appealed on the grounds the Certificate of Insurance received by Total Home Exteriors, Inc. was unsigned, and, therefore, did not meet the requirements for documentation of insurance.

In rejecting the Fund's argument, the Court reviewed the terms of § 42-1-415 and noted the statute does not require a signature on the Certificate of Insurance. Rather, it requires ". . . a standard form acceptable to the commission." The Fund asserted the requirements of Regulation 67-415(A) which states "[t]he Certificate of Insurance must be dated, signed and issued by an authorized representative of the insurance carrier for the insured." In rejecting this argument, the Court noted a signed, dated and properly issued Certificate will be always accepted by the Commission. However, the Court stated the Appellate Panel has the authority to find ". . . other documentation acceptable."

Case Management Pointer: Encourage your general contractors to obtain copies of Certificates of Insurance from their subcontractors and keep them on file at least five years.

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The Straw That Broke the Camel's Back

In Ellison v. Frigidaire Home Products, Claimant was working full-time when he fractured his left leg. This was clearly an injury to a single scheduled member. However, Claimant had numerous preexisting physical conditions, including hypertension, diabetes, sleep apnea, prostate cancer and congestive cardiac disease. These conditions did not aggravate the leg injury. Even so, the combination of the preexisting problems and the new leg injury left Claimant physically unable to work.

The Commission found Claimant permanently and totally disabled as a combined effect of his preexisting conditions and leg injury pursuant to § 42-9-400, which sets forth the procedure for Second Injury Fund reimbursement. The Circuit Court affirmed. The Court of Appeals reversed, finding Claimant was limited to scheduled recovery for the leg pursuant to Singleton v. Young Lumber Company. They reasoned Claimant could not recover total disability no matter how disabled he was because there was no causal connection between the preexisting conditions and the leg injury. Our Supreme Court granted certiorari to decide whether the Court of Appeals erred in holding Claimant's preexisting conditions should not be considered in determining disability. The Court analyzed the facts of the case alongside §§ 42-9-400(a), (d), which provide that if an employee who has a permanent physical impairment incurs a subsequent disability from a compensable accident, resulting in greater compensation and/or medical payments for disability

that are substantially greater because of the **combined effects** of the preexisting impairment and the subsequent injury OR because of the aggravation of the preexisting impairment than would have resulted from the injury alone, the carrier will be reimbursed by the Fund. The Court distinguished Singleton by noting that Singleton did not argue any condition other than the leg injury contributed to the disability. Rather, Claimant argued the leg injury was so disabling he should be deemed permanently and totally disabled.

Employers have traditionally relied on Singleton and its progeny to argue claimants are limited to scheduled recovery when a compensable injury affects only one body part. The Court took this opportunity to clarify this line of cases: "Singleton stands simply for the proposition that impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute." Ellison is significant because it was undisputed the leg injury did not aggravate the preexisting conditions, and vice versa. The two were completely separate; yet their combination rendered him permanently and totally disabled.

Case Management Pointer: Unfortunately, the carrier is liable for the entire disability. The Court implies, however, the Second Injury Fund must also reimburse for the whole award and can no longer parse out how much disability is attributable to the preexisting conditions.

Certificate *(cont. p. 2)*

This is a valuable defense to a claim of statutory employment under the S.C. Workers' Compensation Act provided the upstream contractor has some proof of insurance from his subcontractors. Also, the best practice is to make sure the subcontractor himself/herself is covered by the policy. Otherwise the subcontractor may try to prove he is an "employee" and not an independent contractor.

Team *(cont. p. 1)*

Rebecca joined Collins & Lacy in May 2005 as a law clerk. After graduation from school, Rebecca clerked exclusively in the area of workers' compensation. Rebecca was admitted to practice in South Carolina in November 2006. Her practice focuses exclusively on workers' compensation.

We are thrilled to have Christian and Rebecca on our team, and we know you will enjoy working with them.



In addition to Workers' Compensation and Employment Law, Collins & Lacy offers a wide range of legal services, including:

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Employer/Employee (cont. from page 1)

the court examines whether the employer **“has the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment.”** S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 3030 (1995). The four factors which determine right to control include: “(1) direct evidence of right to or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire.”

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Wilkinson, 638 S.E.2d 109 (S.C. App. 2006). Evidence of only one of these factors is sufficient to prove an employee/ employer relationship exists. The Court determined an employer/ employee relationship existed because Palmetto controlled the loads Wilkinson carried, supplied his trailer, prohibited him from using his tractor for other companies, and possessed the right to fire him unconditionally.

Palmetto further argued workers' compensation benefits should be offset by benefits paid to the surviving spouse from his occupational disability policy. Pursuant to the collateral source rule, “compensation from an independent source will

not reduce the payment for which another party is liable to the injured party.” Id. Wilkinson had an occupational disability policy for which he made payments. Despite Palmetto's argument it should receive credit for any payments made by that policy to Wilkinson's surviving spouse, the court determined **the occupational disability policy was a collateral source and thus not available for offset.** The court reasoned Wilkinson, not Palmetto, paid for the occupational disability policy, therefore Palmetto would not receive credit for the payments.

2007 Maximum Compensation Rate:
\$645.94

The maximum weekly compensation rate for all accidents occurring on or after January 1, 2007 is \$645.94. The 2007 maximum compensation rate is \$29.46 higher than the 2006 rate of \$616.48, which coincides with a 4.7% increase.