

MG&C NEWS

Winter 2002

McAngus, Goudelock & Courie Attorneys at Law



ATTORNEYS AT LAW

Dear Friends and Clients:

It is hard to believe another year has passed. We certainly enjoyed seeing many of you at the North Carolina Workers' Compensation Conference, the South Carolina Workers' Compensation Educational Conference, our seminars in Atlanta and Charlotte, and our holiday party in Columbia. We sincerely hope you found these events both fun and educational.

The coming year promises to be a busy one. We will continue to be a sponsor of the Run for Peace marathon in Charlotte on January 18, 2003. The race is a very worthwhile event, and the proceeds go to the Charlotte Shelter for Battered Women and Family Center.

We are pleased to announce our involvement with the Wills for Heroes program. The project started shortly after 9/11 to provide free wills to firefighters, law enforcement personnel, emergency medical technicians, and other first responders. Lawyers and paralegals from MGC will work with the downtown Charleston fire station to prepare free wills for the firefighters. This program has received national attention, and we are pleased to be associated with it.

We are also pleased to welcome five new attorneys to our firm. Mark Allison, Jason Lockhart, and Mary Margaret Hyatt joined the Columbia office, practicing in the area of workers' compensation. In Charlotte, Lauren Citrano joined our workers' compensation and employment law practice, and J. Wiley McKeown joined our general liability team.

We certainly hope all of you had an enjoyable holiday season. Thank you for your continued support and friendship in 2003. Best wishes for a happy and prosperous new year.

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South Carolina Update

From the Courts

Contract Law

Enforceability of Arbitration Clause under the Federal Arbitration Act

The South Carolina Court of Appeals held an otherwise unenforceable contractual provision compelling arbitration under South Carolina law was enforceable because the transaction at issue involved interstate commerce. As such, the Federal Arbitration Act applied and preempted the notice provision of S.C. Code Ann. §15-48-10(a) (1976).

Blanton vs. Stathos, 570 S.E.2d 565 (S.C. Ct. App. 2002)

Insurance

Meaningful Offer of Underinsured Motorist Coverage

Despite its failure to offer amounts less than the minimum liability limits carried by the insured, the South Carolina Court of Appeals held the insurer made a meaningful and effective offer of UIM coverage. The insurer presented the insured with a Commission-approved form which listed optional UIM coverage in five different amounts, included a blank line for the policyholder to write in any amount, and explained the policy holder had the right to purchase UIM coverage.

Burch v. S.C. Farm Bureau Mut. Ins. Co., 569 S.E.2d 400 (S.C. Ct. App. 2002)

General Liability

Independent Contractor

In an unpublished decision, the South Carolina Court of Appeals deemed a truck driver an employee entitled to workers' compensation benefits. The Court based its decision on the trucking company's right to hire, fire, and control the driver's work activities, including prohibiting him from driving for others. It is important to note the Court reached this decision despite the truck driver's enrollment as an independent contractor with two trucking groups that provided benefits for independent contractors. This decision likely undermines the trucking industry's efforts to avoid liability, whether under the Workers' Compensation Act or otherwise, by hiring truck drivers who hold themselves out as independent contractors.

Wilson v. Lewis Truck Lines, Inc. (S.C. Ct. App., No. 2002-UP-511).

Workers' Compensation

No entitlement to Setoff where Compensation Paid Under Salary Continuation Plan

The South Carolina Court of Appeals held the employer was not entitled to a setoff from the workers' compensation award for compensation paid to the claimant under the employer's salary continuation plan. The Court concluded the intent of the salary continuation plan was to provide a benefit to employees who became disabled rather than provide workers' compensation benefits. In order for payments to be deductible from a workers' compensation award, the payments must have been made with reference to liability under the provisions of the Workers' Compensation Act and intended to be in lieu of compensation.

Corbin v. Kohler Company, 571 S.E.2d 92 (S.C. Ct. App. 2002)

Repetitive Trauma Compensable

The South Carolina Supreme Court affirmed the Court of Appeals in holding repetitive trauma injuries are compensable under the Workers' Compensation Act. The Claimant suffered bilateral carpal tunnel syndrome arising from work-related duties, and the employer unsuccessfully argued the injury was neither unexpected nor definite in time. The employer was also unsuccessful in arguing repetitive trauma should be compensated as an occupational disease rather than an injury by accident.

Pee v. AVM, Inc., 2002 WL 31641841 (S.C. 2002)

Statute of Limitations in Repetitive Trauma

The South Carolina Supreme Court reversed the Court of Appeals and held the statute of limitations begins to run on the last day of exposure for repetitive trauma injuries rather than when the Claimant first discovered he had a work related injury. The Claimant, a fireman, had notice of his noise-induced hearing loss in 1996, but he continued to work for several years before filing a workers' compensation claim. The Court cited prejudice to the Claimant if the statute of limitations ran from the date of first exposure to the trauma.

Schurlknight v. City of North Charleston, 2002 WL 31641843 (S.C. 2002)

From the Legislature and Workers' Compensation Commission

Litigation

Representation of a Corporation or Partnership in Magistrate's Court (Act No. 201)

This Act adds S.C. Code Ann. § 33-1-103 which allows a corporation or partnership to designate an employee or principal of the corporation or partnership to represent it in Magistrate's Court. The designation must be in writing and must be submitted to the Magistrate at the time the initial pleading is filed.

Structured Settlement Protection Act (Act No. 252)

This Act provides procedures to regulate the transfer of structured settlements, including provisions requiring court or administrative authority approval in advance for the transfer of structured settlement payment rights.

Insurance

Captive Insurance Companies (Act No. 188)

This Act adds S.C. Code Ann. § 38-90-175 which establishes the Captive Insurance Regulatory and Supervision Fund. The Act also amends S.C. Code Ann. § 28-90-10 to provide a definition for "Special Purpose Captive Insurance Company" and S.C. Code Ann. § 38-90-20 to provide that a Special Purpose Captive Insurance Company may only insure the risks of its parent.

Workers' Compensation

Filing Fee for Hearing Request

The Amendment proposed to the Annual Appropriations Bill to allow the Workers' Compensation Commission to charge a fee of \$25.00 for every hearing requested was not approved.

Exempt Employees from the Workers' Compensation Act

Bill H.5034 to amend the Workers' Compensation Act to exempt employees covered by the Federal Employers' Liability Act, Longshore Act, or Jones Act from workers' compensation laws failed to become law in the last legislative session.

North Carolina Update

From the Courts

Premises Liability

Landlord's Responsibility for Tenant's Dog

Although the landlord's rental agent knew the tenant's dog had vicious propensities, the North Carolina Court of Appeals held a landlord cannot be held liable for a dog bite to a visitor. The dog previously bit and lunged at several individuals. However, the fact the landlord owned the property and had knowledge of the dog's vicious propensities was not sufficient to hold the landlord liable because it had not assumed any measure of control over the animal. In a dissenting opinion, one judge concluded the lease provision allowing the landlord to remove the dog if it became a nuisance constituted control over the animal, thereby making it a "keeper" of the dog and subject to liability.

Holcomb v. Colonial Associates, 570 S.E.2d 248 (N.C. Ct. App. 2002)

Open and Obvious Condition

The North Carolina Supreme Court held a Plaintiff who broke her arm after she tripped in a hole while searching for her car in a parking lot had no premises liability claim. The Court determined the hole was an open and obvious condition, and the Plaintiff's view was unobstructed. Therefore, she had a duty to see the hole and avoid it. The Plaintiff testified she was looking for her car, and nothing in the parking lot prevented her from seeing the hole. The Court concluded her failure to see the open and obvious condition was contributory negligence as a matter of law. The Court declined to find a hole in the middle of an open parking lot constituted a dangerous condition which required the Defendant to warn the Plaintiff.

Swinson v. Lejeune Motor Co., 569 S.E.2d 646 (N.C. 2002)

Arbitration

Insurance Adjuster's Presence at Mediation

In order for an adjuster to attend a court ordered non-binding arbitration, a defendant must show the adjuster possesses authority to make binding decisions on its behalf. The adjuster must present evidence of this binding authority in the form of an affidavit by either the adjuster or the insured defendant. A failure to provide this affidavit can result in the loss of the defendant's right to appeal the arbitration decision. The affidavit must set forth the nature of the representational relationship and the authority of the adjuster, and it should be presented no later than the beginning of the arbitration. Court mandated arbitration is automatically appealable and, therefore, non-binding. However, the arbitration award can become final if a party violates certain arbitration procedural rules.

Parks v. Green, 571 S.E.2d 14 (N.C. Ct. App. 2002)

Workers' Compensation

Home Healthcare Expenses

Where the Defendant failed to provide the attendant care ordered by the Plaintiff's doctor and the Plaintiff's family members were forced to perform the required attendant care services, the North Carolina Court of Appeals held the Defendant must pay the family members \$10 per hour for their services. Although attendant care services would have cost the Defendant \$15 per hour, the Court reasoned there was sufficient evidence to support such a finding where a registered nurse testified home health agencies normally charge \$14 to \$15 an hour while home health-care attendants earn \$9 to \$10 an hour.

Levens v. Guilford County Sch., 567 S.E.2d 767 (N.C. Ct. App. 2002)

Going and Coming to and from Work

Despite the fact the Plaintiff, a certified nursing assistant, traveled to her patient's home rather than report to her employer's place of business every day, her injuries sustained in an automobile accident on the way to the patient's home were not compensable. Since the Plaintiff only had one patient and worked regular hours at the patient's home, the North Carolina Court of Appeals held the "traveling salesman" exception to the going and coming rule was inapplicable. The Court noted the applicability of the "traveling salesman" exception depended upon the determination of whether the Plaintiff had fixed job hours and a fixed job location. Since the Plaintiff attended to one patient at a fixed location with fixed work hours and did not attend to several patients at differing locations, the "traveling salesman" exception did not apply.

Hunt v. Tender Loving Care Home Care Agency, Inc., 569 S.E.2d 675 (N.C. Ct. App. 2002)

Subrogation Lien

Although the Plaintiff's condition subsequently worsened and his success at a trial against the third-party tortfeasor was questionable because of alleged negligence by the treating chiropractor, the North Carolina Court of Appeals held the trial court had no authority to reduce the subrogation lien because the Industrial Commission approved the settlement agreement granting the Defendant a subrogation lien against any third-party recovery.

Holden v. Boone, 569 S.E.2d 711 (N.C. Ct. App. 2002)

From the Legislature and Industrial Commission

Maximum Compensation Rate Workers' Compensation

Medical Fees

The Industrial Commission adopted the following method of determining hospital fees in North Carolina workers' compensation cases effective July 15, 2002. Specifically, in establishing hospital fees for the remainder of 2002, the Commission stated it would continue to use the diagnostic related grouping methodology that has been in effect. The band is 77.07% to 100% of a UB92 hospital bill. Diagnostic related groupings falling within the band will be approved without modification. Those falling below 77.07% will be increased to 77.07%, and those exceeding 100% will be reduced to 100%. Finally, outpatient facility fees and outpatient ancillary charges will continue to be 95% of the charges billed.

Judgments

N.C.G.S. § 97-87 has been amended to provide that agreements, orders, and final awards under the Workers' Compensation Act may be entered as judgments by the Clerk of Superior Court. An award, as defined in this section, includes a form filed under 97-18(b) or (d), a memorandum of agreement approved by the Commission, an order or decision of the Commission, and an award of the Commission which has been either affirmed on appeal or accepted by the parties with no appeal filed.

Civil Procedure Arbitration

N.C.G.S. § 7A-37.1, controlling court ordered, nonbinding arbitration in civil actions where claims do not exceed \$15,000, has been modified to restrict jurisdiction. Specifically, subsection C of this provision has been modified to exempt "actions in which the sole claim is an action on an account, including appeals from magistrates on such actions." This change appears specifically to exempt collection and subrogation cases.

Calendar

OF EVENTS

- January 18, 2003** "Run for Peace," Charlotte, NC
- March 6, 2003** MC&G celebrates its 8th anniversary
- March 14-16, 2003** 24th Annual South Carolina Workers' Compensation Medical Seminar, Hyatt Regency Hotel in Greenville, SC

New workers' compensation maximum compensation rates for 2003

South Carolina \$563.55
North Carolina \$674.00

Web Sites of Interest

CHECK THESE OUT!

www.searchlaw.com

This site is a great place to begin a research project, locate an attorney, or read the latest articles on important legal topics.

www.vh.org

This "virtual hospital" is a digital library of health information.

www.nolo.com

This website contains tons of useful tools, including a plain English law dictionary, legal encyclopedia, and multiple calculators.

www.refdesk.com

This site is the ultimate reference website for all of your legal (and non-legal) questions.

www.ul.com

Underwriters Laboratories Inc. is an independent, non-profit product safety testing and certification organization. Visit this web-site for the latest product safety information.

www.mgclaw.com

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News

Births

Tom and **Stefanie Chase** welcomed into their family **Taylor Chase** on October 11.

Nikki and **Jay Nicholson** welcomed **Elizabeth Noel Nicholson** into their family December 9.

Chad and **Elizabeth Abramson** welcomed **Andrew Lawton Abramson** into their family December 13.

Professional Appointments/ Awards/Recognitions:

Jay Courie has been elected Treasurer of The South Carolina Defense Trial Attorneys' Association.

Hugh McAngus was selected to once again be in the "Best Lawyers in America." He is one of the few lawyers selected in SC who practices workers' compensation defense.

Andrew Ussery is serving on the NCADA Workers' Compensation Executive Substantive Law Committee.

George Gallagher, Jay Courie, Anne Marie Hagood, Gina Campano and Bo Williams participated in the "Wills for Heros" program through the SC Bar. The program provides basic wills to firefighters, law enforcement personnel, emergency medical technicians, and other first responders free of charge.



MG&C Profile

NEW ASSOCIATES

Mark A. Allison



Born: November 11, 1976, Greenville, SC. Attended Erskine College. Graduated with a Bachelor of Arts in Behavioral Science with a minor in Biology in 1998. Graduated from University of South Carolina Law School with a JD in 2002.

Mark joined MG&C's Columbia office in September. His practice focuses on workers' compensation defense.

Lauren M. Citrano



Born: May 12, 1966, New York, NY. Attended Rutgers University. Graduated with a Bachelor of Arts degree in Political Science in 1988. Graduated from Wake Forest School of Law with a JD in 1991.

Lauren joined MG&C's Charlotte office in September. Her practice focuses on workers' compensation defense and employment law.

J. Wriley McKeown



Born: October 12, 1973, Chester, SC. Attended The Citadel. Graduated with a Bachelor of Arts in History in 1996. Graduated from Mississippi College School of Law with a JD in 1999.

J. Wriley joined MG&C's Charlotte office in September. His practice includes general liability defense, automobile negligence, and insurance.

Mary Margaret S. Hyatt



Born: October 10, 1972, Bainbridge, GA. Attended Furman University. Graduated with a Bachelor of Science degree in Health and Exercise Science in 1995. Graduated from University of South Carolina with a Masters of Public Health in 1997. Graduated from University of South Carolina School of Law with a JD in 2000.

Mary Margaret joined MG&C's Columbia office in November. Her practice focuses on workers' compensation defense.

Jason W. Lockhart



Born: April 10, 1975, Aiken, SC. Attended University of South Carolina. Graduated with a Bachelor of Arts degree in English in 1997. Graduated from University of South Carolina School of Law in 2000.

Jason joined MG&C's Columbia office in November. His practice focuses on workers' compensation defense.