

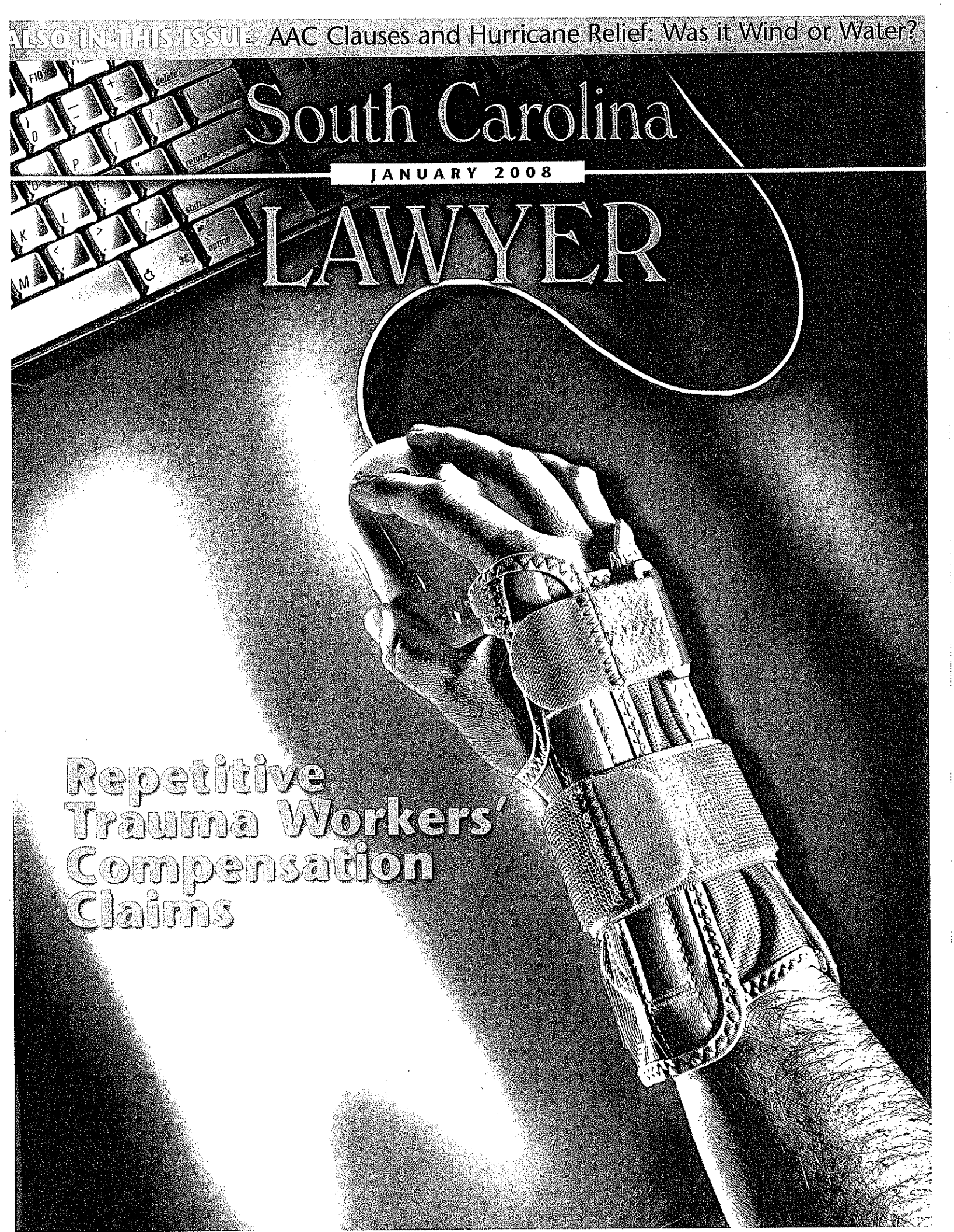
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# South Carolina

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# LAWYER

Repetitive  
Trauma Workers'  
Compensation  
Claims



# REPETITIVE TRAUMA WORKERS' COMPENSATION CLAIMS IN SOUTH CAROLINA

By Leslie M. Whitten

## I. The evolution of repetitive trauma law

Traditionally, an employee injured on the job in South Carolina must demonstrate an "injury by accident" that arises "out of and in the course of employment." S.C. Code Ann. § 42-1-160 (1976). South Carolina workers' compensation law has generally interpreted an "injury by accident" as a specific causative event. However, this definition has been expanded by case law to include injuries that occur over time, which are referred to as repetitive trauma claims. This expanded definition of "injury by accident" has created numerous issues, including exactly when an injury occurs for purposes of the statutory requirement that a claimant provide notice of an injury within 90 days of an accident. See S.C. Code Ann. § 42-15-20. The legislature recently addressed these issues, but the act only applies to dates of injury after July 1, 2007. See Act of June 20, 2007, pt. 1, 2007 S.C. Act 111; see also, *Pee Dee Reg'l Transp. v. S.C.*

*Second Injury Fund*, 2007 WL 2416228 (S.C. Aug. 24, 2007).

The definition of "injury by accident" was first expanded by the S.C. Supreme Court in *Hiers v. Brunson Construction Co.*, 221 S.C. 212, 70 S.E.2d 211 (1952). In the *Hiers* case, the claimant became ill with pneumonia and died some time after repairing a roof at work during a particularly cold and rainy period. Although the evidence indicated that this exposure to the elements was the cause of the claimant's illness, and ultimately, his death, the Court determined that it was a compensable injury by accident within the meaning of the statute. The Court held that "no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident." *Hiers*, 221 S.C. at 231, 70 S.E.2d at 220.

Almost 40 years later, in *Stokes v. First National Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991), a claimant was working for First National Bank approximately 45 hours per week

when the bank decided to merge with another bank. In preparation of the upcoming merger, the claimant was required to nearly double his workload. The claimant worked 16 to 18 hours a day; he suffered a nervous breakdown and had to be hospitalized. In finding the nervous breakdown a compensable injury, the Court held that "in determining whether something constitutes an injury by accident the focus should not be on some specific event, but rather on the actual injury itself." *Stokes v. First National Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991). The focus, therefore, emphasized the unexpected nature of the resulting injury, and not the unexpected event causing injury.

The seminal case addressing modern repetitive trauma claims is *Pee v. AVM*, 352 S.C. 167, 573 S.E.2d 787 (2002). *Pee* was the first case to hold that a repetitive trauma injury meets the definition of an "injury by accident." In *Pee*, the claimant developed carpal tunnel syndrome in her both wrists. The parties agreed that the repetitive nature of the claimant's work caused the carpal tunnel syndrome, but the employer denied that this scenario met the definition of "injury by accident." The Supreme Court sided with the claimant and held that a repetitive trauma injury may be compensable under the Workers' Compensation Act. The employer argued that repetitive trauma was not an injury by accident because it is not unexpected and lacks definiteness in time. In the alternative, the employer argued that the repetitive trauma is only compensable as an occupational disease.

Citing *Stokes v. First National Bank*, supra, the Court held that only the injury itself must be unexpected; the cause need not be unexpected. Because there was no evidence that the claimant intended or had expected to be injured as a result of her repetitive work activity, it qualified as an injury by accident. Also, the Court held that an accident need not have definiteness in time when the injury results from a natural and unavoidable accident.

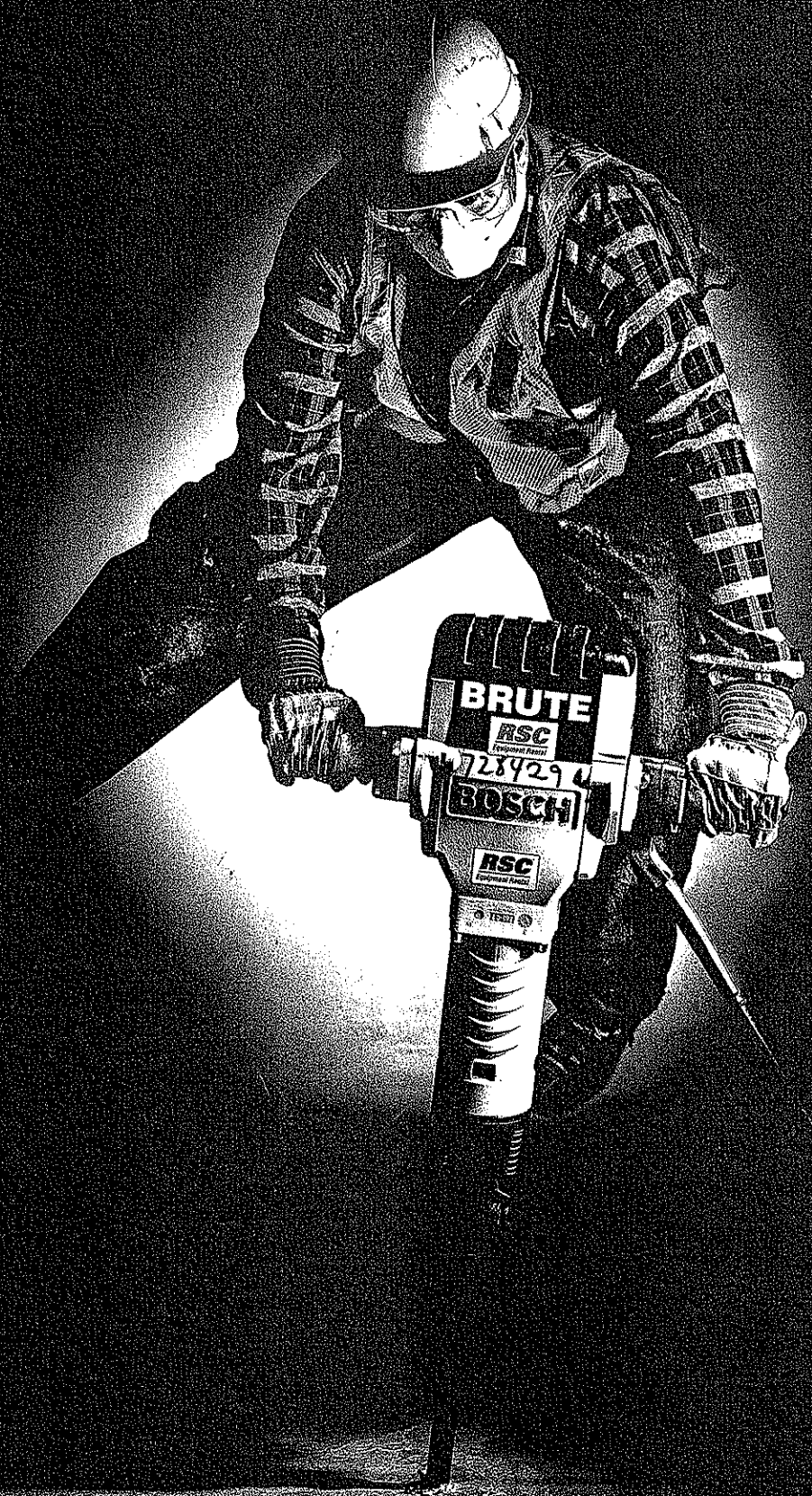
The Court did not address the occupational disease issue. Instead, the Court simply stated that "it is not clear that proof of a repetitive trauma injury as an occupational disease would be a more onerous burden than proving it as an injury by accident." *Pee v. AVM*, 352 S.C. 167, 174, 573 S.E.2d 787, 789 (2002).

Once the Supreme Court established repetitive trauma as a legitimate workers' compensation claim, the issue as to how to determine the date of accident arose. In South Carolina, a claimant has two years from his date of injury to file a claim. Thus, the date a claimant in a repetitive trauma situation became injured needed to be determined. The Supreme Court addressed this issue almost immediately in the case of *Schurlknight v. City of North Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002). In *Schurlknight*, the claimant filed a workers' compensation claim against his employer claiming his hearing loss was caused by repetitive trauma. The claimant had worked as a fireman and was constantly seated in the fire truck next to the siren. In May of 1995, the claimant was diagnosed with bilateral loss of hearing. In February of 1996, he was again diagnosed with hearing loss, and the report stated that extended exposure to loud noises may make the problem worse. The claimant left the department in August of 1997, and in December of 1997 a private physician found that the claimant had experienced a 12.5 percent hearing loss in both ears. The claimant filed a Form 50 in May of 1998, claiming noise-induced hearing loss in both ears.

The Supreme Court noted that "it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." *Schurlknight*, 352 S.C. at 178, 574 S.E.2d at 195. The Court then held that the date of injury in a repetitive trauma claim, for purposes of the statute of limitations, was the last day of exposure to the repetitive trauma risk. In other words, the claimant would not be required to file a repetitive trauma claim until two years after he was no longer exposed to the cause of the injury.

The Court of Appeals further developed the definition of repetitive trauma and clarified the statute of limitations period in the case of *White v. MUSC*, 355 S.C. 560, 586 S.E. 2d 157 (2003). In *White*, the claimant was an operating room nurse and his job included moving heavy equipment, emptying trash cans from the operating rooms and lifting and moving patients. He began experiencing low back pain in 1997 and reported his problems to his supervisor. The claimant continued to treat on his own until April of 2000 when an orthopaedic surgeon diagnosed a herniated disc. On December 6, 2000, the claimant filed a claim with the Workers' Compensation Commission seeking medical benefits and temporary compensation. His claim was denied on the basis that it had not been filed within two years of his injury. The Court of Appeals held that the claimant's injury was caused by repetitive trauma but that the statute did not begin to run until April of 2000. The Court reasoned that, although the claimant complained of back pain in 1997, the injury did not take him out of work at that time, nor did it warrant any change to his job duties. As the years went by and the claimant continued to lift heavy equipment and patients, his back got worse until he had a herniated disc and had to stop working in April of 2000. The *White* case is unique in that it involves a repetitive trauma claim for a herniated disc. Up until 2003, repetitive strain injuries had been typically caused by repetitive motion or exposure, such as carpal tunnel syndrome or noise induced hearing loss.

The Court of Appeals addressed the issue of notice in a repetitive trauma claim in *Bass v. Isochem*, 617 S.E.2d 369 (S.C. Ct. App. 2005). In *Bass*, the claimant worked as a truck driver, delivering drums weighing between 100 and 500 pounds. She alleged that she began noticing problems with her arms in January of 2001, but she did not inform anyone about the problem because she thought it would go away. However, she stated that she did tell



her employer about these problems, though she was unable to recall an exact date. The employer did not recall any mention of problems until November of 2001.

The Court of Appeals noted that under *Schuriknight*, the statute of limitations does not begin to run until the last date of exposure. However, it recognized that the claimant is still required to provide notice. The Court held that, in an occupational disease claim, the "accident" occurs when the employee becomes disabled and could, through reasonable diligence, discover that his condition is compensable. After reviewing this rule, in conjunction with the laws in several other jurisdictions, the Court determined that "[n]otice begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable." *Id.* at 379, 383. The Court found in *Bass* that the claimant's injury was not disabling until November of 2001, when she first went to a doctor.

## II. The new repetitive trauma statute

The South Carolina Legislature recently revised the workers' compensation notice provisions. The revisions include an entire section addressing repetitive trauma claims and making such claims a separate category of injury with its own standards for notice and the statute of limitations. See Act of June 20, 2007, pt. 1, sec. 7, 2007 S.C. Act 111 (to be codified as S.C. CODE ANN. § 42-1-172). The legislature also redefined the term "accident" so that it no longer means, as indicated in the *Pee* case, 573 S.E.2d 785 (S.C. Ct. App. 2001), "a series of events in employment." S.C. CODE ANN. § 42-1-160 (F). Instead, a repetitive trauma injury is now defined as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. CODE ANN. § 42-1-172 (A). The section of the statute, § 42-1-172, is the section of the law that determines the compensability of a repetitive trauma injury.

Unlike the prior case law, the amended statute provides a uniform rule for both notice and statute of limitations defenses in repetitive trauma cases. In both instances, the repetitive trauma injury occurs when "the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." S.C. CODE ANN. § 42-1-172(E). One issue unanswered by the amendments is when the employee "could have discovered" that the condition is compensable.

For example, suppose the Commission determines that an employee could have discovered that his condition was compensable on May 1, 2007, but he actually discovered that his condition was compensable on July 2, 2007. The amendments only apply to claims arising after July 1, 2007. The question then becomes which law will apply to this claim. The pre-§ 42-1-172 law on notice was established in the *Bass* case and indicated that the date of injury in a repetitive trauma claim, for purposes of notice, "begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable." Section 42-1-172 of the new statute deletes the requirement that the claimant provide notice within 90 days of when he became disabled.

For claims arising after July 1, 2007, a claimant must now prove that his repetitive trauma injury is compensable by a "preponderance of the evidence," and this must be "established by medical evidence" of a causal connection between the injury and the "regular duties" of the claimant's employment. S.C. CODE ANN. § 42-1-172(B). Prior to this amendment, a claimant was not required to provide any medical evidence that his claim was work-related. See, e.g., *Tiller v. National Health Care Center*, 334 S.C. 333, 513 S.E.2d 843 (1999). The new statute recognizes that repetitive trauma claims create complex causation issues and, as a result, the standard for proving these claims is higher after July 1, 2007.

Regarding the statute of limita-

tions defense, the amended law requires that the claim be filed within two years after the employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure. S.C. CODE ANN. § 42-1-172(E). This seven-year restriction applies regardless of whether the employee was aware that his repetitive trauma injury was the result of his employment. This change may eliminate claims where a claimant treats for a repetitive strain injury while working and then waits several years after working before filing a claim.

## III. A practical approach to repetitive trauma claims

For claims arising both before and after July 1, 2007, the job must fit the injury and result in lost time from work. In a traditional injury by accident claim, the only requirements for a compensable claim are an unexpected event and a resulting injury. A repetitive trauma claim is different. Under *White*, 355 S.C. 560, 586 S.E. 2d 157 (2003), a claimant needs to prove that the nature of his job and the stress of the specific activity he performed repetitively caused an injury that resulted in lost time from work. As a result, a claimant cannot simply complain of back pain due to repetitive strain and expect to have a compensable claim. A key part of the investigation of any alleged repetitive trauma injury must involve an inquiry into the job responsibilities of the claimant's position and how long he has been doing that job. This is even more crucial for claims arising after July 1, 2007. A claimant must now prove, by a preponderance of the evidence and through medical evidence, that his repetitive trauma injury resulted from his "regular [job] duties." S.C. Code § 42-1-172(B).

A claimant's job description, employment file and disability file are now more important in a repetitive trauma claim. Although for injuries arising prior to July 1, 2007, the statute of limitations does not run until the last day of injurious exposure, the Court in *White*

noted that the claimant's back problems were not significant "until he was diagnosed with a disc herniation and ordered not to lift heavy objects," thus causing him to miss work. *White*, 586 S.E.2d 157, at 160. However, assume that Mr. White had been diagnosed with a herniated disc in 1998 and placed on restricted duty. If he filed his claim at the same time, which would be more than two years after the diagnosis and work restrictions, there is an argument that the statute of limitations would have run, regardless of when he was taken out of work completely. Therefore, it is very important to obtain the claimant's complete employment file, including short and long term disability forms, to determine whether the claimant has previously been on restricted duty for the alleged work related injury or lost time from work.

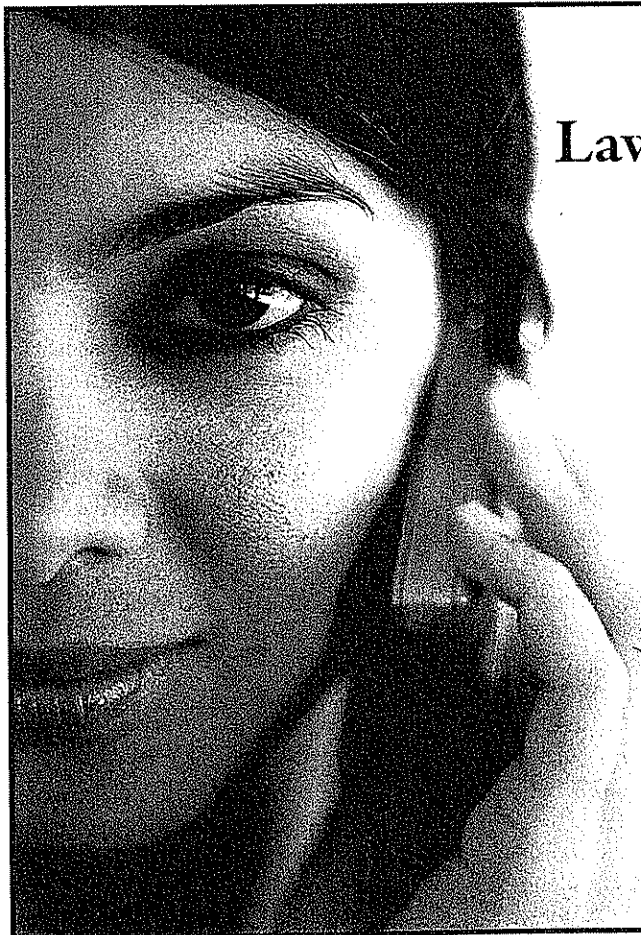
For claims arising after July 1, 2007, defending under the same facts in the above scenario is slightly different. If a claimant performs repetitive work that strains his back,

and he is diagnosed with a herniated disc, arguably the date of diagnosis should be the latest date the statute of limitations begins to run. Notice is still a viable defense in the repetitive trauma claim, regardless of the date of injury. Again, the claimant's personnel file is important to determine when the claimant was diagnosed with an injury.

The claimant's medical history is also important, specifically whether the claimant had a prior condition. Certainly, the doctor determining the causation issue should be aware of any pre-existing, similar problems. Frequently, claimants with repetitive trauma injuries will have had a prior injury or condition that makes them more susceptible to injury. The discovery of a prior injury can be useful for either defending a denied case or for Second Injury Fund purposes (at least for the time being, *See Act of June 20, 2007, to be codified as S.C. CODE ANN. § 42-9-400*). At a minimum, the carrier should obtain a claim index report prior to accepting these claims.

With the advent of the recent amendment, ergonomics evaluations in repetitive trauma claims are likely to become more important because claimants must now prove "repetitive traumatic events." *See S.C. CODE ANN. § 42-1-172 (A)*. For the typical carpal tunnel claim, the carrier should obtain an ergonomic evaluation and a video job description. These tools may prove valuable to a treating physician who is now required to determine causation. Physicians are, of course, quite busy, and any information that can be provided to make their job easier will make it more likely that they will respond to questions about causation. However, in the course of providing information to the treating physician, the carrier will need to consider *Brown v. Bi-lo*, 354 S.C. 436, 581 S.E.2d 836 (2003), and, under the new statute, S.C. Code Ann. § 42-15-95, but that is perhaps a discussion for another day.

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