

# South Carolina Law Review

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Volume 44  
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

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Article 20

Fall 1992

## Workers' Compensation Law

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### Recommended Citation

Julie A. Oswald & Brian W. Bennett, Workers' Compensation Law, 44 S. C. L. Rev. 179 (1992).

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# WORKERS' COMPENSATION LAW

## I. INCARCERATION DOES NOT PRECLUDE CLAIMANT FROM RECEIVING WORKERS' COMPENSATION AWARD

In *Last v. MSI Construction Co.*<sup>1</sup> the South Carolina Supreme Court held that a claimant's imprisonment does not preclude him from receiving workers' compensation benefits that arose before the incarceration.<sup>2</sup> The *Last* court adopted the approach of the majority of courts that have addressed this issue.<sup>3</sup>

Last was injured in an on-the-job accident on October 8, 1987. Last's employer, MSI Construction Company ("MSI"), provided him temporary total benefits and medical treatment under the company's workers' compensation insurance. In December 1987, Last was incarcerated for a crime unrelated to his accident. Because of his imprisonment, Last missed a scheduled medical treatment. After MSI's workers' compensation insurance carrier discovered that Last was in prison, the carrier stopped payment of benefits on Last's claim. The carrier subsequently filed a stop-payment application with the Workers' Compensation Commission ("Commission"), but the Commissioner ruled that Last was entitled to benefits.<sup>4</sup> On appeal, the full Commission allowed the termination of benefits because the Commission found that Last's inability to work was caused by his incarceration, not the work-related injury.<sup>5</sup> The circuit court reversed the full Commission and reinstated the ruling of the single Commissioner.<sup>6</sup> Both the carrier and MSI then appealed to the supreme court.

On appeal, the appellants first argued that Last was not entitled to receive temporary total benefits because the incarceration, not the work-related injury, impaired his ability to earn wages.<sup>7</sup> However, the court rejected this argument and declared "the fact that a claimant is unemployable for reasons other than his injury is not dispositive. The issue is

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1. 305 S.C. 349, 409 S.E.2d 334 (1991).

2. *Id.* at 351, 409 S.E.2d at 336.

3. See *infra* notes 19-23 and accompanying text for a discussion of the majority and minority approaches.

4. *Last*, 305 S.C. at 350, 409 S.E.2d at 335.

5. *Id.* at 351, 409 S.E.2d at 336.

6. *Id.*

7. *Id.*

whether a claimant has suffered some loss of earning capacity as a direct result of his work-related injury.”<sup>8</sup>

Secondly, the appellants argued that under South Carolina law the claimant was not entitled to workers’ compensation benefits because no statutory provision specifically grants prisoners the right to receive such benefits.<sup>9</sup> However, the court noted that the entitlement to workers’ compensation benefits constitutes a property interest<sup>10</sup> and that the South Carolina Constitution prohibits the automatic forfeiture of property rights upon conviction.<sup>11</sup> Accordingly, the court refused to construe section 42-1-470 to “unconstitutionally deprive an inmate of a property interest without due process of law.”<sup>12</sup>

The appellants also argued that termination of Last’s benefits was justified because substantial evidence showed that the claimant had refused medical care.<sup>13</sup> An employee’s refusal to accept medical treatments bars recovery of compensation during the period of refusal.<sup>14</sup> However, the court found no evidence in the record that Last had refused medical treatment after the Commissioner designated a physician for the claimant.<sup>15</sup>

Finally, the appellants contended that the carrier was entitled to stop payment of benefits because the claimant had refused employment. The court noted that section 42-9-190 of the South Carolina Code “bars an employee from compensation if he refuses employment procured for him that is suitable to his capacity and approved by the Commission.”<sup>16</sup> Moreover, under Workers’ Compensation Commission Regulation 67-

8. *Id.* (citing *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 211 S.E.2d 220 (1975) (allowing employee’s temporary total benefits because the claimant’s work-related injury, not his full-time school attendance, caused his loss of earning capacity)); *cf.* *Tallini v. Martino & Son*, 448 N.E.2d 421 (N.Y. 1983) (holding that a claimant who is voluntarily committed to a mental institution is entitled to continued compensation for his work-related permanent partial disability).

9. *Last*, 305 S.C. at 352, 409 S.E.2d at 336.

10. *Id.* (citing *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987)).

11. *Id.* (citing *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 122 S.E. 586 (1924) (applying S.C. CONST. art. I, § 4)).

12. *Id.* Section 42-1-470 of the South Carolina Code provides: “Except as otherwise specifically provided in this article, this Title shall not apply to State, county or municipal prisoners and convicts.” S.C. CODE ANN. § 42-1-470 (Law. Co-op. 1976).

13. *Last*, 305 S.C. at 352, 409 S.E.2d at 336-37.

14. *Id.* at 352, 409 S.E.2d at 337 (citing S.C. CODE ANN. § 42-15-60 (Law. Co-op. 1976)).

15. *Id.*

16. *Id.* at 353, 409 S.E.2d at 337 (applying S.C. CODE ANN. § 42-9-190 (Law. Co-op. 1976)).

506, "an employer may file a stop payment application if an employee refuses a suitable job *after his health care provider reports he has reached maximum improvement*."<sup>17</sup> The court concluded that, because the record did not indicate that Last had reached maximum medical healing, the Commission erred in finding Last had refused employment.<sup>18</sup>

The majority of jurisdictions that have addressed the issue have held that incarceration does not terminate workers' compensation benefits.<sup>19</sup> For example, the Court of Appeals of Arizona held that a claimant's incarceration does not terminate his workers' compensation benefits because these benefits are a property right.<sup>20</sup> The Arizona court noted that there is no legislation that specifically provides for suspension or termination of benefits during the claimant's imprisonment.<sup>21</sup>

On the other hand, a minority of jurisdictions have held that workers' compensation benefits are terminated or suspended upon imprisonment.<sup>22</sup> The Supreme Court of Georgia specifically held that when "an employee is charged with a crime while receiving [workers' compensation] benefits, . . . the proper time of termination of benefits is the date of adjudication of guilt."<sup>23</sup>

17. *Id.* (citing S.C. CODE REGS. 67-506 (1990)).

18. *Id.*

19. *See, e.g.,* United Riggers Erectors v. Industrial Comm'n, 640 P.2d 189 (Ariz. Ct. App. 1981); Foraker v. NVF Co., 358 A.2d 730 (Del. Super. Ct. 1976); Forshee & Langley Logging v. Peckham, 788 P.2d 487 (Or. Ct. App. 1990); Spera v. State *ex rel.* Wyoming Worker's Comp. Div. (*In re* Injury to Spera), 713 P.2d 1155 (Wyo. 1986); *cf.* Baskerville v. Saunders Oil Co., 336 S.E.2d 512 (Va. Ct. App. 1985) (holding that incarceration does not terminate benefits when the loss of earning power is caused by temporary or permanent total disability, but that incarceration does terminate benefits for temporary partial disability). *See generally* Noralyn O. Harlow, Annotation, *Workers' Compensation: Incarceration as Terminating Benefits*, 54 A.L.R.4TH 241, 245 (1987).

20. *United Riggers*, 640 P.2d at 192-93.

21. *Id.* at 193. A number of states have enacted legislation in this area. *See, e.g.,* State *ex rel.* Ashcraft v. Industrial Comm'n, 517 N.E.2d 533 (Ohio 1987) (*per curiam*). The South Carolina Workers' Compensation Act, S.C. CODE ANN. §§ 42-1-10 to 42-19-50 (Law. Co-op. 1976 & Supp. 1991), does not address this issue. However, the *Last* court left open the possibility of a future statutory measure providing for the suspension or termination of benefits upon incarceration.

22. *See, e.g.,* Packard v. Donald Sperry & Sons, 331 N.Y.S.2d 126 (App. Div. 1972) (*mem.*); State *ex rel.* Grennan v. Barry, 594 N.E.2d 51 (Ohio Ct. App. 1991) (citing State *ex rel.* Ashcraft v. Industrial Comm'n, 517 N.E.2d 533 (Ohio 1987) (*per curiam*)). *See generally* Harlow, *supra* note 19, at 245.

23. Scott Hous. Sys., Inc. v. Howard, 353 S.E.2d 2, 3 (Ga. 1987); *see also* Mize v. Cleveland Express, 392 S.E.2d 275 (Ga. Ct. App. 1990).

The South Carolina Supreme Court in *Last* appears to agree with the majority view that allows for the continuation of benefits upon imprisonment. The court, however, left open the possibility of terminating benefits during the claimant's imprisonment if the claimant has reached maximum medical healing.<sup>24</sup>

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## II. EMPLOYEE'S ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NOT BARRED BY WORKERS' COMPENSATION ACT

In *McSwain v. Shei*<sup>25</sup> the South Carolina Supreme Court held that the exclusivity provision of the Workers' Compensation Act<sup>26</sup> did not bar an employee's common-law action against her employer for intentional infliction of emotional distress.<sup>27</sup> The court extended the rule established in *Stewart v. McLellan's Stores Co.*<sup>28</sup> that the Workers' Compensation Act does not bar an employee's common-law action against an employer for assault and battery.<sup>29</sup> However, the *McSwain* court cautioned that it expressed no opinion concerning the application of the exclusivity provision to other intentional torts.<sup>30</sup>

McSwain sued her employer, Shei, for intention infliction of emotional distress. McSwain alleged that Shei forced her to perform group exercises that caused her to lose bladder control even though Shei knew that McSwain's physician had advised against the exercises.<sup>31</sup> Shei moved for summary judgment on the ground that the circuit court lacked subject-matter jurisdiction because the Workers' Compensation Act provided the exclusive remedy for McSwain's claim. The circuit court denied Shei's motion, and Shei appealed.<sup>32</sup>

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24. See *Last v. MSI Constr. Co.*, 305 S.C. 349, 353, 409 S.E.2d 334, 337 (1991).

25. 304 S.C. 25, 402 S.E.2d 890 (1991).

26. S.C. CODE ANN. § 42-1-540 (Law. Cō-op. 1976) (providing that an employee's rights and remedies under the Act preclude all common-law rights and remedies against employer).

27. *McSwain*, 304 S.C. at 30, 402 S.E.2d at 893.

28. 194 S.C. 50, 9 S.E.2d 35 (1940).

29. *McSwain*, 304 S.C. at 29-30, 402 S.E.2d at 892 (citing *Stewart*, 194 S.C. 50, 9 S.E.2d 35).

30. *Id.* at 30, 402 S.E.2d at 892.

31. *Id.* at 27, 402 S.E.2d at 890-91.

Upholding the lower court's denial of summary judgment, the supreme court relied heavily on its decision in *Stewart v. McLellan's Stores Co.*,<sup>33</sup> which created an exception to the exclusivity of the Workers' Compensation Act.<sup>34</sup> The *McSwain* court initially noted that an employee's common-law action against an employer is barred if the employee suffers an "injury by accident arising out of and in the course of employment."<sup>35</sup> In *Stewart* the court excepted from this general rule an employee's injury resulting from an employer's intentional act that resulted in no physical disability.<sup>36</sup> In *McSwain* the court rejected Shei's argument that *Stewart* is limited to actions involving assault and battery when the employer suffers no physical disability. The court reasoned that this exception is based upon the nature of the act that caused the employee's injury, *i.e.* whether the act was intentional or accidental.<sup>37</sup>

The court noted that the workers' compensation laws govern only injuries "caused by an 'accident'" and that an "employer will not be heard to allege that the injury was 'accidental' . . . when he himself intentionally committed the act."<sup>38</sup> The *McSwain* court expressly extended *Stewart* to include intentional infliction of emotional distress, but did not express an opinion about the rule's application to other intentional torts.<sup>39</sup> The court held that, because *McSwain* alleged facts sufficient to prove the common-law elements of intentional infliction of emotional distress,<sup>40</sup> a question of fact existed for the jury; therefore, the lower court properly denied Shei's motion for summary judgment.<sup>41</sup> The court stressed, however, that an employee may not recover both at common law and under the Workers' Compensation Act.<sup>42</sup>

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33. 194 S.C. 50, 9 S.E.2d 35 (1940).

34. *Id.* at 55-56, 9 S.E.2d at 37.

35. *McSwain*, 304 S.C. at 28, 402 S.E.2d at 891 (quoting S.C. CODE ANN. § 42-1-160 (Law. Co-op. 1976)).

36. *Stewart*, 194 S.C. at 55-56, 9 S.E.2d at 37. In *Stewart* the employee who was slapped in the face was "greatly humiliated, . . . and embarrassed," but otherwise suffered no physical disability compensable under the workers' compensation scheme. *Id.* at 52-53, 9 S.E.2d at 35-36.

37. *McSwain*, 304 S.C. at 29, 402 S.E.2d at 892.

38. *Id.* (quoting 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.11 (1989)).

39. *Id.* at 29-30, 402 S.E.2d at 892.

40. See *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (enumerating the four common-law elements of intentional infliction of emotional distress in South Carolina), cited in *McSwain*, 304 S.C. at 28, 402 S.E.2d at 891.

41. *McSwain*, 304 S.C. at 30, 402 S.E.2d at 892-93.

42. *Id.* at 30-31, 402 S.E.2d at 893.

In extending the *Stewart* rule, the supreme court followed the generally accepted principle that the intentional acts of an employer acting in person rather than through an agent will support an action at common law.<sup>43</sup> However, the common-law liability of the employer does not include the intentional acts of an employee who merely supervises the claimant.<sup>44</sup> In *McSwain* the president and managing officer of the company performed the alleged intentional acts. This situation is clearly within the bounds of the general principle. However, the situation in *Stewart*, the case upon which the *McSwain* court relies, is not as clear.

In *Stewart*, the manager of the defendant employee's store committed the assault and battery upon the employee.<sup>45</sup> Although the *Stewart* court justified its decision by stating that the manager was an "alter ego" of the employer,<sup>46</sup> the assailant's status as a store manager is more like that of an agent.<sup>47</sup> The *Stewart* opinion stretched the limit of the "alter ego" analysis to its extreme probably because the employee would have had no other recourse against the employer.<sup>48</sup> Although the supreme court's decision in *McSwain* is sound, the court should have explained the *Stewart* court's apparent misapplication of the facts. Nevertheless, the *McSwain* court's extension of *Stewart* is difficult to reconcile with the general view that an employer is not vicariously liable at common law for the intentional acts of its agents and employees.

43. See generally 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.11 (1992).

44. *Id.* § 68.00. In South Carolina assault and battery by a supervisor against another employee arising "out of and in the course of employment" is governed exclusively by the workers' compensation laws. See, e.g., *Thompson v. J.A. Jones Constr. Co.*, 199 S.C. 304, 19 S.E.2d 226 (1942).

45. *Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 51-52, 9 S.E.2d 35, 35 (1940).

46. *Id.* at 55-56, 9 S.E.2d at 37.

47. In fact, the very treatise that the *McSwain* court cited in support of its decision criticizes the *Stewart* decision. In criticizing *Stewart*, Larson states that:

having worked itself up into a state of moral indignation against the assailant, the court then — imperceptibly and without a word of justification — transfers this entire flood of indignation from the actual culprit to the innocent employer, whose only connection with the intentional wrong is the most artificial and fictitious kind of technical vicarious liability.

LARSON, *supra* note 43, § 68.21.

48. When *Stewart* was decided, an injured employee could recover from workers' compensation only if there was a physical disability. See *Stewart*, 194 S.C. at 55, 9 S.E.2d at 37. But see *Stokes v. First Nat'l Bank*, 298 S.C. 13, 377 S.E.2d 922 (Ct. App. 1988) (holding that an employee can recover under the Workers' Compensation Act for purely mental injury without accompanying physical injury), *aff'd*, 306 S.C. 410, 410 S.E.2d 248 (S.C. 1993).

general view that an employer is not vicariously liable at common law for the intentional acts of its agents and employees.

In *Dickert v. Metropolitan Life Insurance Co.*<sup>49</sup> the South Carolina Court of Appeals held that the intentional acts of a company sales manager against a subordinate employee were governed exclusively by the Workers' Compensation Act.<sup>50</sup> The *Dickert* court distinguished both *McSwain* and *Stewart* by noting that those cases involved the employer's direct liability.<sup>51</sup> Nevertheless, it is difficult to distinguish between the store manager in *Stewart* and the sales manager in *Dickert*. Although the employees in both cases were agents of their employers, the *Stewart* court held that the Workers' Compensation Act did not control;<sup>52</sup> however, the *Dickert* court held that the Act did control.<sup>53</sup> The *Dickert* court properly distinguished *McSwain*, but the court's attempt to distinguish *Stewart* is not persuasive.

The *McSwain* decision raises another interesting issue. Clearly, if *McSwain* prevails at common law, she would be barred from recovery under the Workers' Compensation Act.<sup>54</sup> However, if *McSwain* is unsuccessful in her action for intentional infliction of emotional distress, it is unclear whether she would then be able to bring a workers' compensation action claiming that she was injured by an "accident."

South Carolina courts have not addressed this election of remedies question;<sup>55</sup> however, the majority rule is that an unsuccessful common-law damages suit does not bar a subsequent workers' compensation claim.<sup>56</sup> The rationale of the majority rule is that an election between a common-law remedy that ultimately fails and a possible statutory remedy is not an election at all. In other words, the common-law remedy that fails is nonexistent.<sup>57</sup>

General case law in South Carolina concerning election of remedies suggests that the South Carolina courts would follow the majority

49. 411 S.E.2d 672 (S.C. Ct. App. 1991) (per curiam).

50. *Id.* at 677.

51. *Id.* at 677-78.

52. *Stewart*, 194 S.C. 50, 9 S.E.2d 35.

53. *Dickert*, 411 S.E.2d 672.

54. *See* S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1976).

55. However, courts have addressed the issue of an injured employee who brings a common-law action against a third party rather than the employer. In these cases, election of remedies issues are addressed by the Workers' Compensation Act and common law. *See, e.g.,* *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 370 S.E.2d 104 (Ct. App. 1988); *Fisher v. South Carolina Dep't of Mental Retardation*, 277 S.C. 573, 291 S.E.2d 200 (1982).

56. *See generally* LARSON, *supra* note 43, § 67.31.

57. *Id.*  
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approach. In *Save Charleston Foundation v. Murray*<sup>58</sup> the South Carolina Court of Appeals stated that “[t]he doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury.”<sup>59</sup> The court noted that the doctrine was intended to prevent double recovery by the plaintiff. When a plaintiff has a choice of remedies, “[a] suit upon the remedy first invoked [which reaches] the stage of final adjudication” bars a subsequent suit on another remedy.<sup>60</sup>

In contrast, an employee who is injured by an accident in the course of employment has no choice of remedies because the Workers’ Compensation Act provides the exclusive remedy.<sup>61</sup> When an employer acts intentionally and in person, there is no “accident” for purposes of workers’ compensation, and the employee’s only remedy for injury is at common law.<sup>62</sup> If *McSwain*’s common-law claim fails, it would probably be because of her mistaken belief that *Shei*’s actions were intentional. A mistaken pursuit of a nonexistent remedy should not bar *McSwain* from seeking recovery before the Workers’ Compensation Commission.

In *McSwain*, the supreme court properly applied the generally accepted principle that an employer acting in person should not be able to use the Workers’ Compensation Act to limit the employer’s liability for intentional torts. However, the *McSwain* court expressly refused to extend this exception beyond assault and battery and intentional infliction of emotional distress.

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58. 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985).

59. *Id.* at 175, 333 S.E.2d at 63 (citations omitted).

60. *Id.* at 176, 333 S.E.2d at 64 (citations omitted). For example, when a plaintiff recovers under a claim submitted to arbitration and the claim is fully adjudicated in that forum, the plaintiff is barred from seeking recovery on the same claim under a different theory in a different forum. *Id.*

61. See *Dickert v. Metropolitan Life Ins. Co.*, 411 S.E.2d 672 (S.C. Ct. App. 1991).

62. *McSwain v. Shei*, 204 S.C. 251, 402 S.E.2d 890 (1991).