

*At Seawell's*

## General Membership Meeting set for Nov. 2

At least three employer-sponsored groups are eager to push for workers' compensation reform when the General Assembly convenes in January 2007. Join us for our General Membership meeting on Nov. 2 to learn about these initiatives, along with receiving updates from the Second Injury Fund and the Workers' Compensation Commission.

"Workers' compensation in South Carolina is drawing unprecedented attention because of rising costs and recent unfavorable Supreme Court decisions," says Jerry Johnson, AIC, ARM, president of the South Carolina Self-Insurers Association, Inc. He notes that in the past few months, the governor has weighed in on the issue, as have state legislators and even the Chief Administrative Law Judge.

"Perhaps we are poised for major changes. If so, we certainly need employers to be active in our association so we can safeguard their interests in the upcoming legislative session. Our General Membership meeting is an excellent opportunity for members to network with peers and exchange news and views about emerging developments," he says.

The Nov. 2 meeting will last from 9:30 a.m. - 12:00 p.m (registration at 9:00 a.m.). The registration fee of \$40 covers refreshments and lunch. Among the topics on the agenda:

- *Workers' compensation reform issues and efforts for 2007*  
Clif Scott, SC Association of Counties,

- board member self-insurers association
- *Impact of the Commission's new hospital payment system on employers and providers*  
Gary Thibault, executive director, SC Workers' Compensation Commission
- *Is the Second Injury Fund healing itself?*  
Eddie Gunn, interim director, Second Injury Fund, and Mike Harris, deputy director
- *What did the Supreme Court determine in Therrel vs. Jerry's, Inc.?*  
Sam Painter, legal advisor, SC Self-Insurers Association
- *Election of board officers and directors*

Although workers' compensation reform efforts did not make much headway in the General Assembly last year, employers remain determined to press the issue again in 2007. Apart from the self-insurers association, the South Carolina Civil Justice Coalition and the National Federation of Independent Business/South Carolina are also agitating for reform. The three groups share many of the same concerns, but differ somewhat as to the best means for achieving their ends.

The self-insurers association is interested in repealing three court decisions it considers unfavorable to employers – *Brown v. Bi-Lo*, *Tiller v. National Healthcare*, and *Dodge v. Bruccoli*. The association is also in favor of an orderly dissolution of the Second Injury Fund.

In the *Brown* decision, the court ruled an employer cannot discuss an injured worker's status with a healthcare provider

without written permission from the worker. In *Tiller*, the court held that a claimant is not required to provide expert witness testimony to prove causation in a medically complex case. In *Dodge*, the South Carolina Court of Appeals held that the Workers' Compensation Commission has jurisdiction to order the payment of future medical benefits in any non-settled case when, in the judgment of the commission, such benefits would tend to reduce the claimant's disability. As a practical matter, this means that a future award of additional medical benefits is possible in any claim that is not settled by a clincher. This increases an employer and carrier's potential liability in all non-settled claims and increases the costs of clincher settlements.

Perhaps some of the inflationary pressure on workers' compensation costs will be moderated by the recently implemented payment system for healthcare  
*continued on page 2*

### What's Inside

Appealing Results	2
President's Column	2
Commission to pay for mediation	3
Calendar	4

## APPEALING RESULTS

By Sam Painter

Listed below are brief summaries of points of law made by South Carolina appellate courts in recent decisions that are of general interest to workers' compensation self-insurers:

- The proper course in cases involving injuries to the rotator cuff is to proceed pursuant to SC Code Ann. Section 42-9-30(20) and use the AMA Guides or "any other accepted medical treatise or authority" to convert the injury to the rotator cuff into a percentage of impairment to the whole person. *Therrell v. Jerry's Inc.* [Supreme Court].
- The "situs of injury" approach focuses on the injured body part in determining how the injury is properly compensated. ... We hold that South Carolina's statutory scheme best complies with the situs of injury approach. *Therrell v. Jerry's Inc.* [Supreme Court].
- It was a reversible error for the Commission to base a portion of an impairment rating under S.C. Code Ann. 42-9-30 on "a potential need for surgery." *Sanders v. Meadwestvaco Corp.* (Court of Appeals).
- Where delay in scheduling a hearing fell squarely on both parties, substantial evidence did not support the Commission's refusal to credit the employer for payment of temporary total paid past the date of maximum medical improvement. *Sanders v. Meadwestvaco Corp.* (Court of Appeals).

\*And sometimes not so appealing. These points of law are presented subject to the following disclaimer: Fairly summarizing a point of law in a sentence or two is often difficult. Sometimes it is impossible. Before relying on any of the points of law discussed, you should review the entire decision, and check to see if the case has been subject to further appeal.

### President's Column

## Employers, pay attention to South Carolina

As the cover story in this issue of *Workers' Comp News* makes clear, workers' compensation promises to be in play again when the South Carolina General Assembly convenes in January. Will self-insured employers sit on the sidelines?

Have three recent developments taken the sting out of rising workers' compensation costs? In early October 2006, Chief Administrative Law Judge Marvin Kittrell announced the National Council on Compensation Insurance was entitled to no more than an 18.4% increase in voluntary loss costs, instead of the requested 32.9% increase. Also in October, the South Carolina Workers' Compensation Commission began implementing its new hospital payment system, which is expected to save employers up to \$60 million annually. And, the Second Injury Fund says that thanks to repeal of the "unknown condition" clause it is seeing fewer claims and expects the trend to continue.

These are promising beginnings but it would be naïve to assert South Carolina has turned the corner. Judge Kittrell



noted in his recent *Jerry Johnson, ARM, AIC* ruling that South Carolina had the lowest workers' compensation rates in the US in 1998 but would have become 23rd in the nation if he had approved the 32.9% increase the NCCI and insurers say they need to write business in South Carolina. It is not clear whether Judge Kittrell said no to unnecessary profiteering or to necessary rate increases. I guess we will know a year from now when NCCI files its next rate increase.

If you have data or experiences that can shed light on what's happening in workers' compensation in South Carolina, please share it with us. Given the current keen interest in the issue, your contribution could make a significant difference.

## General Membership Meeting set for Nov. 2

(continued from page 1)

facilities. The Commission, which adopted the new payment system on October 1, 2006, estimates it will save employers in South Carolina up to \$60 million a year. Healthcare providers are not pleased with the decision, and a group of ambulatory surgery centers is seeking an injunction to delay implementation of the new payment system. Mr. Thibault will update association members on recent developments.

There is good news from the Second Injury Fund also. Officials there say claims are – at last - declining because a few years ago the state did away with the so-called "unknown condition" clause. It is an open

question whether this will mute calls for the fund's dissolution.

Finally, the self-insurers' legal advisor will brief members on implications of *Therrell vs. Jerry's Inc.* In August 2006, the South Carolina Supreme Court affirmed the workers' compensation commission's decision to award recovery for a torn rotator cuff as a scheduled loss for the loss of an arm. Mr. Painter says it is not clear whether this is bad news or good news, inasmuch as there are implications in both directions.

To register for the General Membership Meeting, please contact Moby Salahuddin, executive director, at 803-794-2080 or [msalahuddin@sc.rr.com](mailto:msalahuddin@sc.rr.com).

## Pilot Program

# Commission to pay for mediation services

In an effort to reduce backlog of appeals before the Full Commission, the South Carolina Workers' Compensation Commission has hired mediator Ginger Crocker to resolve disputes between employers and workers. Ms. Crocker will mediate cases that have been heard by a single commissioner - and are on their way to the Full Commission - in hopes she can persuade the parties to settle the matter and save them the expense and trouble of pursuing the appeal to the Full Commission.

Ms. Crocker does not expect it to be a stroll in the park. "Workers' compensation cases can be very emotional. You are talking about issues that affect people's livelihood and health, and that can make a difference in their relationships at work," she says, speaking from her experience as a commissioner from 1984-1992.

She says she is drawn to mediation because it is an imaginative way to bridge differences. In a court of law and before the Commission, typically there are only winners and losers. One party prevails and the other feels empty-handed. "But through mediation, we can often effect a compromise - nobody gets everything they wanted and nobody is completely rejected. A major challenge before the mediator is to help each side see the other party also has a point, and merits consideration," she says.

Ms. Crocker brings outstanding credentials to the job. In addition to receiving mediation training from the South Carolina Bar in civil and family cases, she can draw on her broad experience in government, politics, healthcare, education, and community affairs. She served in the SC House of Representatives from 1978-1984 and subsequently was director of intergovernmental affairs for Gov. Jim Hodges. She has served as director of special projects at Presbyterian College, and on the boards of Richland Memorial Hospital,



*Ginger Crocker*

Community Mediation Center, and Central Midlands Habitat for Humanity.

Her experience of how things work in the real world is one asset she brings to the table. "I know the process, and I have an understanding of what each party can expect when they go before the Full Commission. Most important of all, as a mediator it is not my job to make a decision or rule who is right or wrong. My job is simply to help the two sides reach an understanding," she says.

Her selection as a mediator is an inspired choice, says prominent Columbia attorney F. Earl Ellis, former president of the SC Self-Insurers Association and the South Carolina Bar. "Ginger has the background, the zeal, and the personality to make mediation work. Personal traits are critical - to be successful a mediator must be patient, have a sense of humor, and it doesn't

hurt to be knowledgeable about workers' compensation and related issues," he says.

In this innovative pilot project, which is expected to continue for at least six months, the Commission will pick up the tab for Ms. Crocker's services. Currently, it takes about four months for an appeal to be set and heard before a Full Commission panel. The delays persist even though commissioners are devoting four days each month for Full Commission review, instead of the traditional three days. The agency hopes that adding a mediator will help in settling some cases that might otherwise go before the Full Commission.

The new service is different from mediation-type services performed by Deputy Commissioner Laverne Spry. Mr. Spry conducts informal conferences before cases go to individual commissioners, while Ms. Crocker would mediate cases that have been heard by a single commissioner and would otherwise be appealed to the Full Commission.

Ms. Crocker, who joined the Commission as a temporary employee on October 1, will function "independently" of the Commission in the sense that the Commission will write to attorneys to explore their interest in mediation, interested attorneys would then contact her directly. "I will set up the mediation and review only the information the parties wish to share with me. There will be no correspondence or records submitted to the Commission other than the "form" from me stating the outcome of the process.

*continued on page 4*



*Earl Ellis*

## CALENDAR

<i>October 22 – 25, 2006</i>	30 <sup>th</sup> Annual Educational Conference on Workers' Compensation. Hilton Head Marriott Beach & Golf Resort, Hilton Head. Hosted by the SC Workers' Compensation Educational Association.
<i>November 2, 2006</i>	General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia.
<i>November 8, 2006</i>	Palmetto Chapter, RIMS. Seawell's, Columbia. At noon. <i>Danger! Avian Flu Risk Management.</i>
<i>March 9-11, 2007</i>	28th Annual Workers' Compensation Medical Seminar. Omni Hotel Charlotte. Hosted by the SC Workers' Compensation Educational Association

### Commission to pick up tab for mediator Ginger Crocker

*(Continued from page 3)*

This system will prevent any documentation from inadvertently being included in the Commission file," she says.

If mediation fails, both parties can pursue appeals unhindered. Whatever was discussed and offered and conceded to in the failed mediation talks cannot be brought before the Commission or a court of law. If mediation is successful and the parties reach an agreement, then the settlement becomes a legal document and is binding.

She notes "there is no downside to this service. The Commission will pay for mediation, so it won't cost employers or workers anything. And if there are several cases I can mediate in Greenville or Charleston or Florence, I'll go where the parties are," says Ms. Crocker, who lives in Columbia. She can be reached at 803-738-9322 or 803.238.7898 (cell) and [ginger@gingercrocker.com](mailto:ginger@gingercrocker.com)

Mediation is growing by leaps and bounds in workers' compensation for the simple reason it works. "About 80% of cases that come to mediation are settled by the parties themselves. Hardly any mediation takes longer than a day, and most are concluded within 5-6 hours," Mr. Ellis says. Nearly one-third of his practice is now

devoted to mediation, and he says he has mediated about 250 cases in the past few years.

It is easy to grasp the attraction of mediation. It takes place in a relaxed setting (more informal than a court), there are no rigid rules or formalities, and each party has ample opportunity to say what it wishes to say. "Sometimes people are so mad they have to fuss at the other side before they are ready to settle. We let them. Sometimes the parties want something they can't get in court. It may be that what the injured worker wants most of all is an apology, or his job back, or some provision made for his children's education. A competent mediator can help the parties figure out a way to address those concerns," Mr. Ellis says.

He notes, "It is not the mediator's job to decide the case, or determine who is right or wrong. The mediator's job is to help the parties come to a settlement. Sometimes the best thing a mediator can do is get out of the way. The mediator cannot hurt you – what you say is held in confidence. I usually ask the parties open-ended questions to move them towards an agreement. What do you see as the strengths of your case? If you hit a home run, what do you get? What is the likelihood of your losing? What is the most payout you'd have to make?"



Workers' Comp News  
is published quarterly  
by the  
South Carolina  
Self-Insurers Association, Inc.

#### EDITORIAL BOARD

**Jerry Johnson**  
**Brian Teusink**

#### EDITOR & WRITER

**Moby Salahuddin**  
**215 Holly Ridge Lane**  
**West Columbia, SC 29169**

[msalahuddin@sc.rr.com](mailto:msalahuddin@sc.rr.com)

**Telephone: 803-794-2080**  
**Fax: 803-939-8366**

As every experienced person knows, litigation takes its toll on both plaintiffs and defendants. "It is usually the last thing you think of at night and the first thought that comes to you when you wake up," Mr. Ellis says. "So there are reasons to settle a case beyond 'am I going to win or am I going to lose?' Mediation gives people a sensible, a nice way to resolve their differences quickly. Most of the time they leave happy," he says.