

Governor spars with Commission over disability awards

On September 20, 2007 the governor signed an executive order during a press conference in Columbia directing commissioners to “strictly apply either AMA Guides or any other accepted medical treatise or authority in making their injury compensation determinations.” The governor also directed the Commission to submit quarterly reports to his office beginning January 1, 2008 confirming that commissioners are indeed following his directions.

It was widely assumed at the time by the Commission and others that the governor meant the commissioners should not inflate the impairment rating given by a physician to an injured worker to compensate for the worker’s lack of education or advanced age or prospects for future employment. In other words, if using the widely respected AMA Guides a physician determined that a worker had suffered 20% impairment to the thumb, then the Commission’s award should be “strictly” limited to that and not adjusted upwards to compensate for other considerations.

The difficulty is that the AMA Guides specifically say “impairment percentages derived from the Guides should not be used as direct estimates of disability. . .The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability.” Given the apparent contradiction, the Commission wrote to the governor seeking clarification and pointing out that commissioners in fact “strictly apply” the Guides because in awarding compensation they consider the

impairment rating to be only one factor, as per the Guides. Commissioners also noted that the state’s Workers’ Compensation Act does not require them to limit disability awards to the impairment rating. To compel them to do otherwise might be a violation of the Code of Judicial Conduct, the commissioners said.

While the Commission concluded that the executive order does not require it to change its practice, Joel Sawyer, a spokesman for the governor, said the order clearly calls for a change in practice. He was quoted in the The State newspaper as saying “if the commissioners believe that this order means for them to keep conducting business as usual, they need to re-read it.”

On October 2, the Commission voted to retain outside counsel as the agency explores how best to respond to the governor. Several prominent legislators have been quoted in the press as saying they do not think the governor has the authority to compel this change. The South Carolina General Assembly considered requiring use of impairment ratings in the omnibus workers’ compensation reform bill it eventually passed but the measure was taken out because it was seen as too divisive.

Sen. Larry Martin, R-Pickens, who promoted the legislation in the Senate, says the governor can’t require use of the AMA Guides on his own. If it had been that easy, legislators would have saved themselves a lot of effort and relied on executive fiat, he says.

Insurers and business leaders in South Carolina have long been agitating for strict use of impairment ratings in awards by the commission, arguing that most states have adopted an “impairment system” and that is why their workers’ compensation costs are lower than states, such as South Carolina, which have a “disability system.” According to Charles Potok, president, Companion Property & Casualty, “here is how the difference plays out in practical terms. In states which have adopted an impairment system, workers’ compensation payments to injured workers consist of Medical Costs + Wage Loss. Wage Loss, as a multiple of weekly earnings, includes non-medical factors such as age, education, and vocational history. In South Carolina, which has a disability system, workers’ compensation payments include Medical Costs + Wage Loss + Commissioner’s Add-on. The Commissioner’s Add-On results in additional compensation for non-medical factors because these are already accounted for in Wage Loss,” he argues.

The governor criticized commissioners’ subjective considerations

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APPEALING* RESULTS

By Sam Painter

The National Council of Compensation Insurance has estimated that workers' compensation rates in South Carolina could be reduced by 9 per cent if permanent awards were made on the basis of functional impairment and not on the basis of disability.

Governor Mark Sanford issued Executive Order 2007-16 directing the Workers' Compensation Commission "to strictly apply either AMA Guides or any other accepted medical treatise or authority in making their injury compensation determinations."

At this writing, the Workers' Compensation Commission is interpreting this order as requiring no change in its current practice, which is take the physicians' ratings of functional impairment as a "first step", and then make awards for higher percentages of loss on the basis of disability.

The Governor's office believes its order mandates a change.

Why is there such confusion? Part of the problem is a lack of understanding of what the AMA Guides are, how they are used in actual practice, and what they are intended to do. The AMA Guides are intended to be guides to enable medical experts to measure impairments. The Executive Order, however, seems to direct commissioners to use the Guides to make awards. This is not what commissioners have done in actual practice in the past, nor is it the intent of the authors of the Guides [committees of doctors] to create a "guide book" for commissioners and judges to use to determine the amounts of their awards.

There is, however, no reason why the Workers' Compensation Commission "must" interpret the specific member statute, SC Code Ann. Section 42-9-30, as requiring the Commission to make awards on the basis of disability rather than on medical impairment. Indeed, In *Wigfall v. Tideland Utilities*, 354 S.C. 100, 580 S.E.2d 100 (2003), the South Carolina Supreme Court recognized that an

President's Column

A new vision of the self-insurers association

As reported elsewhere in this newsletter and in other announcements, the South Carolina Self-Insurers Association plans to amend its by-laws to so that companies who are commercially insured but have a high deductible/self-insured retention are also eligible to join the association. Such companies would join the association as "regular members," and along with "associate members" would be eligible to have their representatives serve on the association's board of directors. Given the ongoing decline and stagnation in the numbers of self-insured employers in South Carolina, we must broaden our membership base to accommodate the new realities.

We are also exploring the feasibility of having vendor booths at our annual Members Only Forum, set for April 23-25, 2008 at Litchfield Beach & Golf Resort. As many of you are aware, we have had sponsors for the past several years but we have never had

vendor booths at our annual conference. Several of our supporting members have indicated they would appreciate the opportunity to put up booths and of course this would help us raise revenues from the event.

These are only two of several steps we are pondering to ensure the self-insurers' association remains an active force in the state. Early in 2007 we launched a new website and, like so many associations and other companies and organizations, plan to rely more and more on the web for updating our members.



Hugh McAngus

The move to electronic communications will save us considerable printing and postage costs, and we plan to devote some of those savings to enhance our website.

Readers of this newsletter need hardly be told of the ongoing upheaval in the state's workers' compensation system. Please continue to support us and help us draw more employers so our association can remain a force for stability and common sense. ■

award of permanent partial disability benefits for loss of a scheduled body member should be based on the "medical impairment" of that body member, as opposed to alleged loss of earning capacity, age, lack of training or other factor.

How should Executive Order 2007-16 have read so as to avoid the current confusion? Language to this effect would clarify the intent:

The Workers' Compensation Commission shall make awards for losses under the specific member

statute on the basis of the degree of impairment as determined by medical experts in strict accordance with the AMA Guides or other accepted medical treatise. The Workers' Compensation Commission shall discontinue the practice of increasing awards to injured workers under the specific member statute on the basis of alleged higher degrees of disability.

Perhaps a further clarification will come. It is not too late. ■

General Membership Meeting

By-laws change would open membership to companies with large deductible/retention

The board of directors of the South Carolina Self-Insurers Association is recommending changes to the association's by-laws, to be taken up at the General Membership Meeting on November 1, 2007 at Seawell's in Columbia. Essentially, the intent of the proposed changes is to allow employers who are not self-insured but have a large deductible/large self-insured retention to be eligible to be members of the association and to have a representative serve on its board of directors.

A majority vote of those present and voting is required to pass the changes. Members have been mailed a copy of the

proposed changes. The changes affect only Article V. – Members of the Corporation, subparagraph 5.1 – Classes of Membership. The wording changes are specified and underlined in the box below.

The proposed changes would:

1. Clarify that any questions as to a member's classification will be decided upon by a majority vote of the board of directors.
2. Authorize the membership of organizations which are insured but retain a high deductible or high self-insured

retention. This recognizes that a company with a high retention is essentially self-insured for the majority of their risk.

3. Authorizes the board of directors to determine the appropriate threshold for a high deductible/high self-insured retention organization to qualify for membership.
4. Clarify the status of self-insurance funds as being eligible for membership as regular members.
5. Clarify that organizations serving the needs of self-insurance funds, as opposed to individually self-insured employers, also qualify as associate members. ■

MEMBERS OF THE CORPORATION

§ 5.1 Classes of Members. There shall be three classes of members: regular, associate, and supporting. Any issue as to a member's classification will be decided by a majority vote of the Board of Directors.

a. Regular members: Any person, firm, corporation, political subdivision or other entity being permissibly self-insured under the South Carolina Workers' Compensation Act [and such employers which are insured but have a large deductible/large self-insured retention, at a threshold amount to be determined by the Board of Directors] shall, by majority vote of the Board of Directors, be eligible for regular membership in the Corporation. This includes any self-insurance fund, which is defined as any group of organizations which have come together to jointly and severally self-insure their workers' compensation obligations under the Act.

b. Associate members: Any person, firm, corporation, or other entity not meeting the qualification for regular membership and specifically in business to administer or represent self-insured programs under the provisions of the South Carolina Workers' Compensation Act shall, by majority vote of the Board of Directors, be eligible for associate membership in the Corporation. These include, but are not limited to:

1. Attorneys and law firms who represent self-insured employers or funds; and
2. Claim administrators who represent self-insured employers and/or self-insurance funds.

Any questions as to whether an applicant qualifies as an associate member or as a supporting member may be resolved by a majority vote of the Board of Directors.

c. Supporting members: Any other individuals, firms, corporations, or other organizations, the majority of whose business involves the defense and/or administration of workers' compensation claims and interested in the principles of sound and conservative self-insurance shall, by a majority vote of the Board of Directors, be eligible for supporting membership in the Corporation.

Supporting members shall not be allowed to vote or serve on the Board of Directors.

General Membership Meeting set for Nov. 1

Focus will be on reform legislation

The South Carolina Self-Insurers Association will hold its annual General Membership Meeting on Thursday, November 1, 2007 at Seawell's in Columbia, from 9:30 a.m. – 12:00 p.m. Our theme this year is Implications of Reform: Four Perspectives and we are focusing nearly the entire program on the recently passed workers' compensation reform legislation in South Carolina.

Our speakers include:

- David Huffstetler, chairman, SC Workers' Compensation Commission
- F. Earl Ellis, of Ellis, Lawhorne & Sims
- David Pearlman, The Steinberg Law Firm
- Clif Scott, SC Association of Counties

Also on the agenda are proposed changes to by-laws (as explained in a separate story elsewhere on this website) and board elections.

Registration fee is \$45 per person (covers lunch). Please make check payable to SC Self-Insurers Association. Return to: Mobashir Salahuddin, Executive Director, 215 Holly Ridge Lane, West Columbia, SC 29169.

CALENDAR

- October 21–24, 2007* 2007 Annual Meeting, South Carolina Workers' Compensation Educational Association. Myrtle Beach Resort at Grande Dunes.
- November 1, 2007* General Membership Meeting, SC Self-Insurers Association. Seawell's Columbia.
- April 23-25, 2008* Members Only forum, SC Self-Insurers Association, Inc., Litchfield Beach & Golf Resort.

Commission broadens scope of its mediation services

The South Carolina Workers' Compensation Commission is encouraging claimants' and employers' attorneys to avail its mediation services which are free and can help bring about a speedy resolution, particularly in cases with multiple parties or where the employer-employee relationship is not clearly established.

In the past few months, the Commission's mediator and judicial director Virginia Crocker has successively mediated about 150 cases stemming from a plant closing in the coastal region, and is working on resolving approximately another 100 cases under similar circumstances in a nearby county. "Mediation can be very effective in situations where you have a large number of cases arising from one incident – a plant closing or a catastrophic accident – or in situations where several parties are involved and it is not obvious who is responsible for covering a work-related injury," Ms. Crocker says.

A former workers' compensation Commissioner, Ms. Crocker joined the Commission last fall as a mediator and subsequently was named judicial director. Initially she mediated only cases on appeal before the Full Commission, but now the agency is encouraging mediation at any level. Mediation has won many converts from among both plaintiffs and defendants

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 affect a compromise – no one gets everything they wanted and nobody is completely rejected. It truly is a win-win situation," she says. ■

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in his September 20 media release, stating "workers' compensation rulings in South Carolina have varied wildly, averaging 81 percent higher than awards made in other states that follow similar guidelines." He added that whereas in 2000 only one state had lower workers' compensation premium rates than South Carolina, the state has been losing ground rapidly almost every year and now "South Carolina has the 25th highest premium in the nation – jumping 24 spots in just six years."

The governor signed the executive order at Columbia's Flag and Banner shop on Huger Street. The low-key media event lasted about 20 minutes was attended by about 50 representatives, mostly from business, insurance, and worker'

compensation groups. The governor said requiring commissioners to use objective standards would ensure that a worker injured in Spartanburg would receive no more and no less than his cousin who happened to be injured in Charleston. He said under the current system, what workers receive in awards from the commission depends upon whether they have the "right lawyer with the right connection."

Almost from the hour the governor signed the executive order there has been widespread speculation that the order would be challenged in court. Asked at his press conference if he anticipated a legal challenge, the governor said "we'll take that as we get to it." ■



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