WORKERS' COMP NEWS

A Publication of the South Carolina Self-Insurers Association, Inc.

Spring 2007

Workers' comp reform

House picks up where Senate left off

At press time, the House Labor, Commerce and Industry Committee was expected to vote on an amended version of S. 332, the nearly 45-pages long workers' compensation bill passed by the Senate in early April 2007. On several issues of major interest to employers, the House version is much more friendly than the Senate's, but the Senate version is not without its merits.

"All indications at this stage are that House leaders are earnest about moving the bill along, and the final version may well be decided by a conference committee of the two chambers," notes Clif Scott, board member of the South Carolina Self-Insurers Association and chairman of its legislative committee. A subcommittee of the House LCI committee approved an amended version of S. 332 on May 2 and the full committee was expected to take up the matter on May 8.

Clif Scott

"It is critical that employers take a close look at both the Senate and the House version. Both versions have their strengths, and each one has some areas of concern to us," he adds. Mr. Scott is senior staff attorney at the South Carolina Association of Counties.

State legislators are under pressure to fix workers' compensation because of outcry from employers and business groups over rapidly rising costs. South Carolina, which long ranked among states with the lowest premium rates, is losing that distinction, almost with each passing year. In 2000, South Carolina ranked 49 on Oregon's widely reported annual Workers' Compensation Premium Rate Rankings (only Indiana had lower premiums than South Carolina). By 2002, South Carolina had slipped to 42 in the rankings and by 2004 it had fallen to 39. In 2006, South Carolina was ranked 25th on the Oregon premium rate rankings, a stunning deterioration which has drawn the attention of Gov. Mark Sanford, and of employers, self-insurers, and professional associations representing insurers and self-insurers vowing reform in the 2007 legislative session.

Employers and insurers attribute rising workers' compensation costs to high assessments from the Second Injury Fund and to injudicious appellate court rulings, among them *Ellison v. Frigidaire, Brown v. Bi-Lo, and Dodge v. Bruccoli.* Fortunately, there is consensus among both Senate and House leaders that the Second Injury Fund should be abolished or curtailed severely. The Senate bill firmly shutters the Second Injury Fund on December 31, 2011 and says the fund shall not accept a claim for an injury that occurs on or after July 1, 2008. The House bill severely limits SIF-eligible conditions and would eliminate the fund if payouts in 2012 exceed $8 million.

In any event, the era of rising SIF assessments seems to be over because of the abolishment of the unknown condition clause. SIF assessments in 2007 are likely to be in the $100 million range, a far cry from the $253 million assessed in 2005.

Similarly, both the Senate and House satisfactorily address the implications of the 2006 Supreme Court finding in Ellison that "a claimant may recover for greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment." Petitioner Ellison was working full-time when he fractured his left leg in an on-the-job forklift accident. He was given a 20% permanent impairment rating to the leg. But because he also had hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease, the commission found that the cumulative effect of the workplace injury and pre-existing conditions rendered him permanently and totally disabled. The case went all the way to the South Carolina Supreme Court, which ruled in favor of Mr. Ellison.

Employers, who have been up in arms over the decision ever since, are pleased that S. 332 and the House version of it specify that "if the subsequent injury is limited to

(Continued on page 3)

What's Inside

Workers' Comp News

APPEALING RESULTS

By Sam Painter

The usual format of this column has been to summarize the results of recent appellate court cases that are of interest to Self-Insurers. Because, however, of the current interest of our members in workers' compensation reform, I have decided to depart from that format this quarter and present instead the results of some of the cases that are often cited as showing a need for reform.

- An injury to a single body member may be the source of a total disability award if the injury combines with pre-existing conditions so as to render the claimant totally disabled. *Ellison v. Frigidaire,* 371 S.C. 159, 638 S.E.2d 664 (2006).
- The Workers' Compensation Act authorizes communication between health care providers and employer representatives by written reports only. *Brown v. Bi-Lo,* 354 S.C. 436, 581 S.E.2d 836 (2003).
- The claimant does not have to provide expert testimony to prove causation in medically complex cases. *Tiller v. National Health Care Center,* 334 S.C. 333, 513 S.E.2d 843 (1999).
- The defendants may be liable for continued medical treatment after an employee has reached maximum medical improvement if, in the discretion of the Workers' Compensation Commission, such treatment would tend to lessen the period of disability. *Dodge v. Bruccoli, Clark, Layman, Inc.,* 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999).
- The claimant's own testimony as to the extent of impairment may be considered in determining the extent of loss or disability. *Cropf v. The Pantry*, 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986); *Linen v. Ruscon,* 286 S.C. 67, 332 S.E.2d 211 (1985).
- Where an employee sustains both a scheduled loss and psychological problems due to the injury, an award for loss of earning capacity under S.C. Code Ann. Section 42-9-20 is appropriate. *Bass v. Kenco Group*, 366 S.C. 450, 622 S.E.2d. 577 (Ct. App. 2005).
- A written agreement that the decedent was an independent contractor was not determinative of the issue of employment. The test to be applied is the right of control. This is determined by a four factor test (Right of Control, Furnishing Equipment, Right to Fire, Method of Payment). *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2d 110 (2002); also see, *Wilkinson ex rel. Wilkinson v. Palmetto State Transportation*, 371 S.C. 365, 638 S.E.2d 109 (2006).
- Carpal tunnel syndrome is a compensable injury by accident. *Pee v. AVM*, 352 S.C. 167, 573 S.E.2d 785 (2002).
- Where a claim is brought for "repetitive trauma to the back," the statute of limitations does not begin to run until the last day worked. *White v. MUSC,* 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003).
- An employee who is found to have sustained a 50% or more loss or disability to the back is deemed to be totally disabled regardless of the fact that the employee may have returned to work. *Bateman v. Town & Country Furniture, Co.*, 287 S.C. 158, 336 S.E.2d 890 (Ct. App. 1985) S.C. Code Ann Section 42-9-30 (19).

***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

Will 2007 be the year of reform or regrets?

As this issue of **Workers' Comp News** was going to press, the Senate had passed a nearly 45-pages long workers' compensation bill and the House Labor, Commerce and Industry committee was expected to act on the House version of S. 332. A bill of this size and magnitude is bound to have something in it to displease somebody. But kudos to the five-member judiciary subcommittee for the toil and trouble they took to grapple with a complex issue.

Hugh McAngus

Virtually all observers were impressed with senators Glen McConnell, Brad Hutto, Joel Lourie, Larry Martin, and Jim Ritchie. Perhaps rarely has a panel worked so assiduously to deal with a volatile issue of far-reaching import for employers and employees.

The Senate Judiciary subcommittee held a number of hearings in summer and fall of 2006 and during the 2007 legislative session. It is fair to say that the panel accommodated virtually any group that had something to say about problems in and solutions to South Carolina's workers' compensation problems. The bill we got out of the Senate is the best one we could get given the political realities of that chamber and the strength and clarity of our message.

The House is poised to take up workers' compensation reform. Whatever measure is passed this year, it will likely do for a number of years, as state legislators will be loath to tackle such a complex issue again. Will employers look back to 2007 as a year of reform or a year of regret? ■

WORKERS' COMP NEWS

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(Continued from page 1)

a single body part or member scheduled in Section 42-9-30, except for total disability to the back as provided in Section 42-9-30(19), the subsequent injury must impair or affect another body part or system in order to obtain benefits in addition to those provided for in Section 42-9-30." This appears to be a reasonable fix for *Ellison*, Mr. Scott says.

As regards *Brown* and *Dodge*, in each case the House version is much more acceptable to employers. In the Brown decision, the court ruled an employer cannot discuss an injured worker's status with a health care provider without written permission from the worker. The Senate bill makes the situation worse, by specifying and limiting the questions an employer may ask of a treating health care provider and by codifying a whole new set of rights and obligations. For instance, the bill says "the employee must be provided with a copy of the written questions at the same time the questions are submitted to the health care provider. If it is not practicable to provide the employee with a copy at the same time as the health care provider, the employee must be provided with a copy of the questions within two business days after submission of the questions to the health care provider. The employee must also be provided with a copy of the response by the health care provider."

Mr. Scott notes "the House version clearly establishes the right of the employer or its representative/insurance carrier to communicate with the treating provider. We believe the language in the House LCI subcommittee's version is an effective fix for *Brown v. Bi-Lo*."

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.

"The House version is much more stringent in specifying the conditions that must be present before awarding additional medical benefits once the injured worker has reached maximum medical improvement. This is especially true where the award is less than permanent and total," Mr. Scott says. The Senate version is problematic because it says the "employer must provide medical, surgical, hospital, and other treatment . . . as recommended by the authorized treating physician as being medically necessary or **prudent**" (emphasis added).

"We believe this sets the bar too low for comfort. 'Prudent care' could cover a very large – and expensive – territory," Mr. Scott says.

As regards repetitive trauma, another issue of keen interest to employers, the House version is preferable because it requires that repetitive trauma be proven by a preponderance of the medical evidence. The Senate version required only that the causal connection be "supported by medical evidence." However, employers are likely to be pleased with the language in the Senate bill requiring an employee to give due notice. Specifically, the Senate version says "the right to compensation is barred unless a claim is filed with the commission within two years after employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure. This section applies regardless of whether the employee was aware that his repetitive trauma injury was the result of his employment."

In addition to the issues highlighted above, the self-insurers association will be paying close attention to how legislators deal with mental injuries and awards for the hip and shoulder. The Senate version exposes employers to picking up the tab for treating pre-existing mental stress and injuries if "noted in a medical record or report of the **employee's physician** (emphasis added) as causally related or connected to the injury or accident."

Other potentially costly changes include the fact that the hip and shoulder, previously unscheduled body parts, would now be scheduled at 280 and 300 weeks, respectively. If passed, S.332 could make a permanent and total injury to the shoulder worth 520 weeks because the shoulder would be worth 300 weeks and the arm, rendered incapacitated by a permanently disabled shoulder, is worth an additional 220 weeks. A permanent and total disability to the entire person is worth only 500 weeks under current South Carolina statute. ■

WORKERS' COMP NEWS

CALENDAR

May 24, 2007	Claims Administration Made Easy. Hosted by the SC Workers' Compensation Commission. Embassy Suites, Columbia.
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.

NCCI files for a 23.7% increase in loss cost level

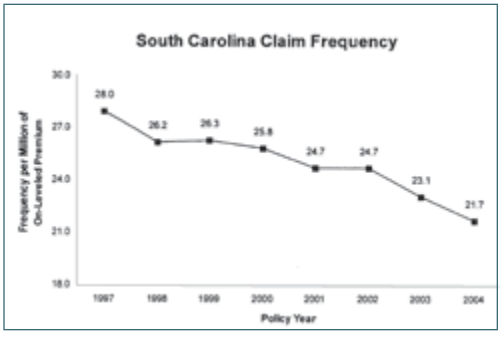
The National Council on Compensation Insurance, which serves as South Carolina's rating bureau, has asked the Department of Insurance for a 23.7% increase in loss cost level to be effective December 1, 2007.

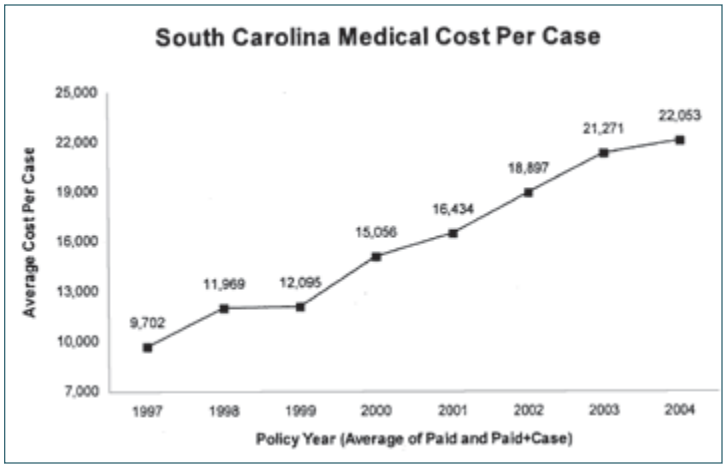
NCCI's last such request was in 2005 when it asked for a 32.9% increase. However, after an outcry from business and consumer groups, an administrative law judge approved only an 18.4% increase, effective December 1, 2006.

Here is how the NCCI spells out the reasons for the requested increase:

Key Components	**Percentage Change**
Experience, Trend, and Benefits	+9.1%
Loss Adjustment Expense	0.0%
Impact of eliminating unknown condition from Second Injury Fund reimbursements	13.4%
=	23.7%*

(*NCCI explains the changes are applied multiplicatively)





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