WORKERS' COMP NEWS

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SC Passes Reform Legislation

After several years of pushing for reform, South Carolina employers won a number of concessions in the recently passed Senate bill 332, which is expected to usher in the most sweeping changes to the state's workers' compensation system in a decade.

The legislation touches almost every aspect of the existing law, including persons covered/exempted, specific injuries, available defenses, occupational diseases, practice and procedures in claims handling, employee benefits, fraud, as well as eliminating the Second Injury Fund. The bill, signed into law by Gov. Mark Sanford on June 25, 2007 has been hailed as pro-business by employer and insurer groups.

"Is it reform? Yes, because it will likely improve many aspects of the system. Will it lower costs? That depends on how the law is interpreted and administered, and on other unknowns," notes Ted Contos, president, Walker Hunter & Associates, which administers the Palmetto Timber Fund.

Brian Teusink, senior executive vice president at PHT Services, Ltd., which administers Palmetto Hospital Trust, says, "there is no question legislators responded to employers' concerns. I think the net effect is a gain for employers that is somewhere between small to moderate."

Double-digit rate increases have been the norm in South Carolina for several years. Early in 2007, the National Council on Compensation Insurance requested a 23.7% increase in loss costs for the voluntary market, effective December 1, 2007. In December 2006, an administrative law judge approved an 18.4% increase. NCCI had asked for a 32.9% increase. Even then, it was the third consecutive double-digit rate increase for South Carolina, as the insurance department had approved rate increases of 11.4% in 2004 and 17.5% in 2003.

A Slip in rankings

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). But by 2006, South Carolina had slipped to 25th on the Oregon premium rate rankings, a stunning deterioration which drew the ire of employers, insurers, self-insurers, and various associations vowing reform in the 2007 legislative session.

Sen. Larry Martin Played key role in reform legislation

One early and firm consensus was that the state must close down the Second Injury Fund. Employers and insurers had been up in arms since 2005 when the South Carolina Second Injury Fund levied a nearly 100% increase in assessment, from $127 million in 2004 to $253 million. Senate bill 332 shutters the Fund on July 1, 2013 and specifies that the last date for injuries to be eligible for SIF reimbursement is June 30, 2008.

The bill also lowers the SIF assessment to 135% (from 175%) of total disbursement made from the Fund during the preceding year and eliminates arthritis and "catch-all" claims as of July 1, 2007. According to the Legislative Audit Council, arthritis is the most common disability for which the SIF provides reimbursement, cited in 80% of claims over the past three years.

The recent legislation also addresses several court decisions agitating employers, namely, *Ellison v. Frigidaire*, *Brown v. Bi-Lo, Tiller v. National Healthcare*, and *Dodge v. Bruccoli*. In *Ellison*, the South Carolina Supreme Court held 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. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition."

Senate Bill 332 addresses this by providing that the "the employee shall establish by a preponderance of the evidence, including medical evidence, that:

(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2)the preexisting condition or the permanent physical impairment aggravates the subsequent

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What's Inside

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APPEALING* RESULTS

By Sam Painter

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

- To satisfy the requirements of S.C. Code Ann. Section 42-1-415, and thereby allow transfer of liability to the Uninsured Employers' Fund for a statutory employment claim brought by an uninsured contractor's employee, a certificate of insurance (Form 25-S) previously obtained from the contractor need not be signed. *Barton v. Higgs* [Court of Appeals].

- But such a certificate of insurance must show coverage for South Carolina. *Hopper v. Terry Hunt Construction* [Court of Appeals].

- Where an employee's successive injuries were covered by different carriers, the "last injurious exposure rule", rather than apportionment, applies. *Geathers v. 3V, Inc.* [Supreme Court].

- Injury that occurred while corporate officer was removing debris from a roadway leading to the site of a corporate meeting did arise out of and in the course of employment. *Grant v. Grant Textiles* [Supreme Court].

- Commission's adjusted computation of a seasonal worker's average weekly wage and compensation rate was within its broad discretion. *Forest v. A. S. Price Mechanical* [Court of Appeals].

- Where a truck driver made the initial telephone call from South Carolina to a trucking company's recruiter in Alabama, such a contact was sufficient to make South Carolina the state of hiring and to confer jurisdiction on the South Carolina Workers' Compensation Commission to award the driver benefits as the result of a Virginia truck accident. *Hill v. Eagle Motor Lines* [Supreme Court].

- Where a home builder employee had done nearly all of his work on houses in South Carolina, the fact that he happened to be injured while working on a house in North Carolina at the time of injury did not divest the South Carolina Workers' Compensation Commission of jurisdiction because of the "base of operations rule". *Oxendine v. Davis* [Supreme Court].

- A trustee of an electric co-operative who claimed workers' compensation benefits after being injured in an automobile accident on the way to a national convention was not an employee of the electric co-operative under the applicable statutes and under the co-operative's bylaws. *Shuler v. Tri-County Electric Co-operative, Inc.* [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

Association achieved all but one of its goals

No issue in recent years has received greater attention from the South Carolina Self-Insurers Association than improving the state's workers' compensation system. The association was active in working towards the recently passed workers' compensation reform, with several board members lobbying and making appearances before key legislators along with the association's full-time lobbyist.

Hugh McAngus

We are pleased to report that we achieved all but one of our objectives. We did not succeed in winning strict construction/interpretation of the Workers' Compensation Act, but other than that Senate bill 332 reflects all the changes we were pushing for: orderly dissolution of the Second Injury Fund, stricter definition of repetitive trauma, 50% to the back, addressing *Ellison v. Frigidaire.*

Of course, the self-insurers association was not the only group agitating for reform or the only one with a specific agenda. Claimants' attorneys were busy too as was a broad coalition of employers and commercial insurers. The upshot of all this was that the ensuing compromise legislation includes provisions of interest to all parties, including some provisions we are not thrilled about; namely, the new provision which adds shoulder and hip to the list of scheduled injuries, with the shoulder now worth 300 weeks and the hip 280 weeks. But perhaps some form of compromise is inevitable in securing reform legislation.

It will likely be a year or so before we get any firm indications on the impact of recent changes. But thanks in part to the self-insurers association, South Carolina has taken some meaningful steps to improve our workers' compensation environment. ■

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SC passes reform legislation

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injury." The legislation also specifies that, "If the subsequent injury is limited to 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(21), 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."

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. The recent legislation establishes that an employee is considered to give consent for release of medical information related to job injury upon seeking treatment under workers' compensation. But the employee must be given notice of communication between the health care provider and interested parties (the legislation provides threshold requirements for written and oral).

In *Tiller*, the court held that a claimant is not required to provide expert witness testimony to prove causation in a medically complex case. Senate bill 332 specifies that "in medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. For purposes of this subsection, 'medically complex cases' means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x rays, or other similar diagnostic techniques."

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. The recent legislation specifies that awards must be as specific as possible regarding future medicals, but the employer is not responsible for future medicals if there is lapse of treatment of more than one year unless the order/agreement says otherwise or the employee attempted to obtain treatment but could not (through no fault of his own).

Senate bill 332 also addresses another perennial concern, namely the case of a worker who has suffered 50% or greater loss of use of the back. Under the new legislation, the worker is presumed to be permanently and totally disabled, instead of deemed to be permanently and totally disabled. Now employers can challenge the presumption that the worker is permanently and totally disabled by offering evidence to the contrary..

At the same time, the new legislation establishes new awards for injuries to the shoulder and hip; the shoulder is valued at 300 weeks and the hip at 280 weeks. "That's one area where employers may have lost some ground. I think scheduling the shoulder at 300 weeks is going to have quite an impact," says Hal Willson, a defense attorney with Willson, Jones, Carter & Baxley in Greenville.

Definitions tightened

South Carolina legislators also tightened definitions and requirements for certain claims and provided that appeals from the full Commission will now go to the Court of Appeals (instead of the circuit court). "I think we will see fewer appeals as a result and that may save time and money," says Sam Painter, legal advisor to the South Carolina Self-Insurers Association. He estimates that it costs between $500-$1,000 to appeal to the Circuit Court, whereas taking a case to the Court of Appeals may cost as much as $10,000.

One unknown at the moment is whether the changes approved recently by the General Assembly apply to all claims in the pipeline, or whether the changes apply only to injuries that occur on or after July 1, 2007, as specified in the legislation. If the new provisions apply only to injuries that occur on or after July 1, 2007 then it will likely be at least several months before there is any indication about the impact of the recent legislation because of the large number of cases already in the pipeline that would be unaffected by the reform legislation.

The interpretation makes a difference at a number of levels. For one, several defense attorneys say they are not clear whether they should appeal existing cases to the Circuit Court, as has been the practice under the old law, or whether they should take them to the Court of Appeals, as provided for in the recent legislation.

Gary Thibault, executive director of the South Carolina Workers' Compensation Commission, says the agency has been carefully reviewing the legislation and working towards drafting changes to its regulations and procedures. To assist with this effort, Commission Chairman David Huffstetler has appointed a panel to review the omnibus legislation and make recommendations to the agency. Panel members include Mr. Thibault along with Commissioners Susan Barden and Andrea Pope Roche, defense attorneys Hugh McAngus and Earl Ellis, and claimants' attorneys David Pearlman and Hood Temple.

Regarding the uncertainty whether appeals are to be filed with the Circuit Court or the Court of Appeals, Mr. Ellis says "my plan is to file an appeal with both courts and ask the claimant's attorney to file a motion to dismiss so the court can deal with the issue." ■

Additional items covered by S. 332

Apart from provisions discussed in the lead story in this issue, S. 332 covers the following items, among a host of others.

Fraud

- Expands the definition of "false statement or misrepresentation"
- Authorizes Attorney General's office to hire a forensic accountant for the Insurance Fraud Division.

Commission Forms

- Parties must be specific in completing forms (commission has standardized forms) - example: employee's notice of claim cannot declare "all body parts" unless the employee died from the accident and employer's answer cannot

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CALENDAR

September 27, 2007	Claims Administration Made Easy. Sponsored by the SC Workers' Compensation Commission. Embassy Suites Hotel, 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.

Additional items covered by S. 332

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declare "all defenses apply" unless all of them do apply.

Commission

- If there is a vacancy for 60 days or more, commission can vote on a deputy commissioner to take testimony and make a recommendation, but the commissioner makes the award.
- Commissioner must make written findings substantiating the award.

Contempt

- Commission has contempt authority if award is ignored without good cause.
- If contempt is determined, person failing to abide by award pays employee's costs for attorney and enforcement of award and may be fined up to $500 per day of violation.

Representation

- If each party is represented by an attorney, the employer must file the agreement with the commission; if the employee is not represented, a commissioner must approve the agreement.
- Uninsured Employers Fund moves to State Accident Fund on 7/1/13.

LOST COST MULTIPLIER

- Insurers must file lost cost multiplier with Department of Insurance and DOI must review the filing (provides guides as to what must be contained in filing).
- Copy of filing must be provided to Consumer Advocate at least 30 days before insurer uses new rates.
- DOI can disapprove rates if the Director or his designee determines the rates do not meet statutory requirements.
- Director or his designee must issue an annual report to the General Assembly that evaluates workers' compensation in SC. ■

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