

## Senate Bill 332

# Déjà vu All Over Again: SC legislators take up workers' comp reform

**A** Senate judiciary subcommittee is holding hearings on S.332, an omnibus bill that addresses more than a dozen aspects of South Carolina's workers' compensation system. The bill is favorable to employers and faces opposition from claimants' attorneys, much as was the case in 2006 when proposed workers' compensation legislation failed to gather traction in the General Assembly.

"One development very much in this bill's favor is that legislators are under intense pressure to do something about rising workers' compensation premiums in South Carolina," notes Hugh McAngus, president of the South Carolina Self-Insurers Association, Inc. The association's legislative committee members and lobbyist Russell Munn have been meeting with key legislators to press issues of concern to self-insured employers.

At the January 31, 2007 subcommittee hearing, Butch Bowers, legal counsel to the South Carolina Civil Justice Coalition, testified the proposed legislation was "on balance, a very good bill." The coalition includes representatives from employer, business, and insurance groups. At the same hearing, Kathryn Williams and David Pearlman, two prominent claimants' attorneys, took issue with many of the bill's provisions and said there is no evidence the proposed measures would reduce workers' compensation premiums.

S.332 addresses the following, among other items:

- Defines fraud and prescribes attendant penalties
- Requires the claimant to establish with "medical evidence stated to a reasonable degree of medical certainty" that the injury arose out of employment
- Tightens definition of repetitive trauma injury to establish that it is compensable when it arises out of and in the course of employment, and results directly and naturally from exposure to hazards peculiar to the particular employment
- Establishes statute of limitations for repetitive trauma and occupational disease claims
- 50% of the back rule ("deemed" changed to "presumed")
- Puts limits on commissioners' discretion. "The disability award cannot be in excess of ten percent greater than the impairment rating except in extraordinary circumstances."
- Requires employers to provide medical treatment as long as it is reasonable to assume the treatment would lessen permanent impairment
- Establishes that a claimant who seeks treatment for a workers' compensation injury "shall be considered to have given his consent for the release of medical records."
- Second Injury Fund - Assessments reduced to 135%, threshold increased to 104 weeks, arthritis deleted from list of 33 conditions
- Stipulates that claims against the SIF must be made within 180 days after the employer or carrier receives notice of the claim. "In addition, an employer or his carrier must perfect its claim with the Second Injury Fund within ninety days after the final determination of the underlying claim."

"We like the bill, but there is nothing in it to address *Ellison v. Frigidaire* and something must be done about this ruling," says Clif Scott, chairman of the association's legislative committee and senior staff attorney at the South Carolina Association of Counties. He says the state Supreme Court's decision in *Ellison v. Frigidaire* changes "what everybody thought was established law. We don't know where *Ellison* leaves us."

In *Ellison v. Frigidaire*, the single commissioner hearing the case found that petitioner Ronnie 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. Mr. Ellison also had pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease which, in combination with his workplace injury, rendered him physically unable to return to work after his accident. The single commissioner found petitioner permanently

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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.

- 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* [Supreme Court].
- The existence of an independent contractor agreement was not determinative of the issue of whether or not a truck driver was an employee or independent contractor. *Wilkinson ex rel. Wilkinson v. Palmetto State Transportation* [Court of Appeals].
- An employee who settles a third party claim against a third party without notice to the workers' compensation carrier has elected his remedy and is barred from claiming workers' compensation benefits. *Kimmer v. Murata of America* [Court of Appeals].
- The South Carolina Workers' Compensation Commission does not have jurisdiction over fee disputes relating to fees charged by out-of-state medical providers for services performed outside of South Carolina relating to an injury occurring in South Carolina. *Doctors Hospital of Augusta, LLC v. CompTrust AGC* [Supreme Court].
- The term "paraplegic" as used in the lifetime benefit provision of S.C. Code Ann. Section 42-9-10 includes incomplete paraplegia. *Reed-Richards v. Clemson University* [Court of Appeals].
- The medical statute, Section 42-15-60, gives an appellate panel the discretion to order treatment, when necessary, from medical providers who were not previously authorized by the employer or carrier. [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*

### Interest in comp reform is at an all-time high

**A**s we have reported extensively in these pages, in recent months virtually every branch of government in South Carolina has taken a position on workers' compensation and several interest groups are currently lobbying and counter-lobbying the General Assembly for reform.

A subcommittee of the Senate is holding hearings on S 332, which proposes widespread changes. Gov. Mark Sanford has said "workers' compensation rates in South Carolina are on their way to scaring off business investment." Last October, in a hotly contested rate filing case, Chief Administrative Law Judge Marvin Kittrell concluded "all the actuarial testimony reflected that an increase was justified" but he approved an 18.4% increase in loss cost levels, instead of the 32.9% increase sought by NCCI.

While the diagnosis is easy, treatment is problematic. Granted, South Carolina must find a way to moderate workers' compensation costs. What is the best way to achieve that end?



Hugh McAngus

Our association believes the most likely route to success lies in following a two-pronged strategy. One, we will continue to support efforts of the South Carolina Civil Justice Coalition and the South Carolina Chamber of Commerce and of other business groups seeking broad changes to the state's workers' compensation system. Two, we plan to open a dialog with the opposition to determine if we can reach a middle ground, a compromise that yields us our most cherished objectives. Given the extraordinary time and energy legislators have devoted to workers' compensation reform over the past 15 months or so, this year may well be our last chance to see meaningful changes. The General Assembly is unlikely to touch this issue again for several years.

We would be delighted to hear from you. Please share your ideas and suggestions with me or our executive director. We will keep you updated on our efforts and will report in detail at our Members Only Forum, set for April 25-27, 2007 at Litchfield Beach & Golf Resort. ■

## Annual conference set for April 25-27

The Members Only Forum of the S.C. Self-Insurers Association is set for April 25-27, 2007 at the Litchfield Beach & Golf Resort on Pawleys Island (800-845-1897). The popular annual event is open only to members of the association. We will mail you the program announcement and registration details over the next few weeks, along with information about sponsorship opportunities.

As in years past, the conference

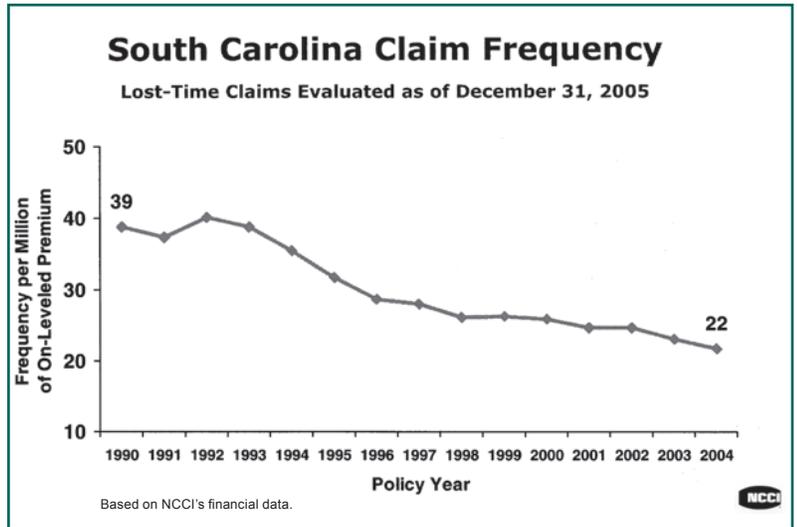
will begin with registration and a reception on Wednesday, April 25. The educational programs will last from 9:00 a.m. - 12:00 p.m. on April 26 & 27. A golf tournament is scheduled for Thursday afternoon. One change this year is that we won't have our traditional group dinner on Thursday because of ongoing difficulties in securing the beach club for the event. Instead, we plan to host a cocktail party Thursday evening after everyone has had dinner on their own.

*Workers' comp in South Carolina*

## Doing better and feeling worse

**W**ork sites in South Carolina, like work sites across the country, continue to become safer and safer with each passing year. That seems to be small consolation to South Carolina employers who continue to be burdened with double-digit increases, unlike employers in the Southeast and across the country.

The following graphs from the National Council on Compensation Insurance were presented at NCCI's state advisory forum in Columbia on January 30, 2007.



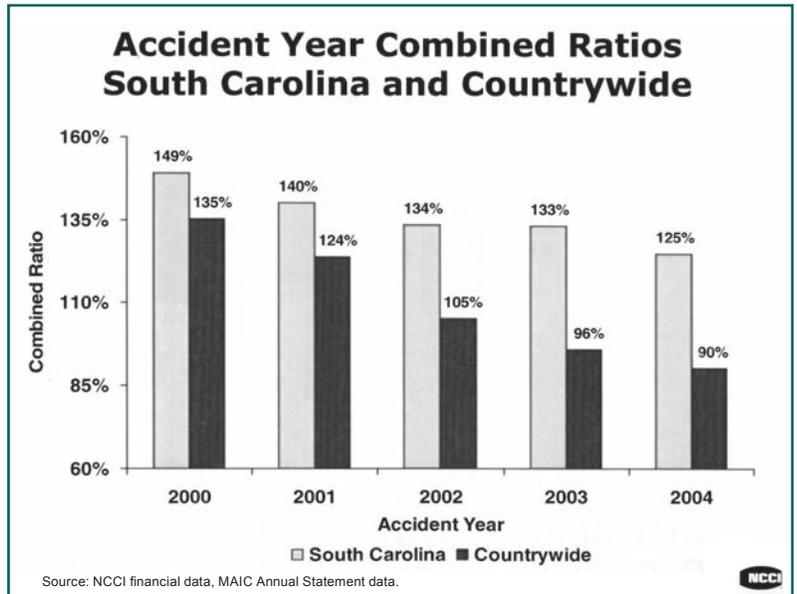
## Chamber warns comp bills would devastate employers

**T**he SC Chamber of Business warns that legislation recently introduced by Senate Minority Leader John Land and Republican Sens. John Hawkins, Luke Rankin, and Jake Knotts would significantly raise the cost of workers' compensation premiums. S.382, for instance, provides for total and permanent disabilities to be considered lifetime injuries, rather than following the current law, which allows a maximum of 500 weeks for disability payments. The bill essentially means that workers' comp benefits could have no end, ultimately making workers' comp a retirement system.

Other bills introduced by the senators could also significantly damage South Carolina's competitiveness. S. 383 provides that employees who appeal workers' compensation rulings should receive, not only their extra wages after appeals, but also the interest from awards above the initial ruling. S.384 veers from current law by making it possible for employees to select their own physician rather than visiting one of the physicians selected by the employer. S.385 stretches the appeals process for a change in condition from 12 months to two years. S.386 and S.390 each allows an employee to claim workers' comp, even if workplace safety regulations were not followed by the injured employee. The bill does not consider an employee's failure to follow safety standards when ruling on damages.

Another bill (S.387) changes the average weekly wage definition to include the cost of health, life, and disability insurance premiums and retirement contributions.

Finally, S.388, deletes the requirement and length of time permitted for a patient to receive vocational rehabilitation services for radiation exposure.



### Voluntary Market Loss Cost/Rate Level Changes—Southeastern States

|                |         |        |
|----------------|---------|--------|
| South Carolina | 12/1/06 | +18.4% |
| Georgia*       | 3/1/07  | +11.7% |
| North Carolina | 4/1/07  | +7.3%  |
| Tennessee      | 3/1/07  | +1.4%  |
| Arkansas       | 7/1/06  | -0.5%  |
| Louisiana      | 5/1/06  | -0.6%  |
| Mississippi*   | 3/1/07  | -1.5%  |
| Alabama        | 3/1/07  | -5.5%  |
| Virginia       | 4/1/07  | -7.9%  |
| Kentucky       | 10/1/06 | -9.3%  |
| Florida        | 1/1/07  | -13.5% |

\* Pending

## CALENDAR

|                   |   |
|-------------------|---|
| March 7, 2007     | Breakfast with Legislators. Room 221 Blatt Building.  |
| March 9-11, 2007  | 28th Annual Workers' Compensation Medical Seminar. Omni Hotel Charlotte. Hosted by the SC Workers' Compensation Educational Association |
| April 25-27, 2007 | Members Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort, Pawleys Island.                                       |
| November 1, 2007  | General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia.  |

## SC legislators take up workers' comp reform

(Continued from page 1)

and totally disabled. The commissioner's order was affirmed by the full commission and the circuit court. Frigidaire Home Products appealed to the Court of Appeals which reversed the commission's order. The Court of Appeals held petitioner's recovery was limited to the 20% impairment to his leg.

The Supreme Court reversed that

decision and concluded "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."

"I don't know of any employer or defense attorney who is not concerned about the potential impact of this sweeping decision," Mr. Scott says. "It seems to us that under this court decision even a seemingly minor injury could expose the employer to huge losses. Should employers think twice now before hiring someone with a pre-existing condition?"

Mr. Scott says legislators are beginning to become aware of the implications of *Ellison*, which was decided in late November 2006.

Apart from not addressing *Ellison*, another weakness in S.332 is that it does not eliminate the Second Injury Fund. "The bill eliminates arthritis as a pre-existing condition, and that should reduce the number of claims against the Second Injury Fund, but that is not enough. Most employers would like to see the SIF dissolved or restricted much more substantially than allowed for in S.332," Mr. Scott says.

### Breakfast with legislators on March 7

**J**oin us for our annual breakfast with state legislators. The event is scheduled for Wednesday, March 7 in Room 221 of the Blatt Building from 8:00 a.m. - 9:30 a.m. The Blatt Building is on the state capitol grounds.

Please let us know if you are planning to come so we can give an accurate count to the caterer.

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



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