

Supreme Court steps in to resolve Sanford vs Commission

At the urging of both Gov. Mark Sanford and the South Carolina Workers' Compensation Commission, the state Supreme Court has accepted original jurisdiction in *Sanford v. Commission*. The court is expected to take up the matter perhaps as early as this spring.

Gov. Sanford petitioned the court in January 2008 to compel the commission to follow his executive orders issued late last year. Put simply, the orders directed the commission to strictly apply the AMA Guides and submit reports to the governor quarterly, revealing the impairment rating given the claimant by the physician and as modified by the commission. However, in a unanimous ruling in October 2007, the commission concluded it cannot apply the AMA Guides as directed because that would be contrary to statutes adopted by the General Assembly and contrary to interpretations by state courts.

The commission did agree to submit reports to the governor, as he had specified, on all contested cases beginning January 1, 2008. But on December 27, 2007 claimants' attorney Kathryn Williams won an injunction in federal district court in Anderson enjoining the commission from submitting the information requested by the governor. Among various grounds, Ms. Williams argued the governor's executive orders violate the due process and equal protection provisions of the state and federal constitution.

The governor subsequently petitioned the state Supreme Court and urged it to accept original jurisdiction to speedily resolve the controversy and, the governor

added, to avoid the risk of having "a federal court render a decision that is inconsistent with established state law or sound state public policy."

Each party frames the dispute differently. The governor argues that

all that is at issue is the "power of the Governor to request information from an administrative agency" and this power is firmly established under the state constitution, South Carolina Code, and court decisions. He specifically points out that under state code, state agencies are required to "immediately furnish to the Governor, in such form as he may require, any information desired by him in relation to their respective affairs or activities." Thus, in the governor's view, his executive orders "simply direct the Workers' Compensation Commission to perform its administrative duties and tasks."

THE HEART OF THE DISPUTE

Perhaps it is striking that nowhere does the governor expressly and specifically mention that in Executive Order 2007-16 – the heart of this dispute – he directed the commission to strictly apply the AMA Guides. The words "AMA Guides" do not appear in his petition. The way the governor puts it, the executive order in question asked the commission to "provide the Governor with written information concerning its awards in compensation

cases and the statistical data relevant thereto."

In its counterclaim, the commission paints the dispute in much grander terms, apart from its assertion that ordering commissioners to strictly apply the AMA

Guides is contrary to state law and established practice. The commission argues that the executive order in question, along with others, violates "the separation of powers guarantee" provided under the state constitution and would compel commissioners to "violate their duties to be independent, impartial and

faithful to the law under the Code of Judicial Conduct."

The commission's fundamental argument is that commissioners "acting in their adjudicative capacity are judicial officers" and thus not subject to the executive branch. This sentiment is expressed perfectly in the agency's

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Gov. Mark Sanford

faithful to the law under the Code of Judicial Conduct."

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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:

- An illegal alien worker may receive benefits under the South Carolina Workers' Compensation Act. *Curriel v. Environmental Management Services* [Supreme Court].
- Denial of a claim was affirmed where a finding that the injury was proximately caused by cocaine intoxication was based upon substantial evidence. *Jones v. Harold Arnold's Sentry Buick* [Court of Appeals].
- Convenience store clerk's injury in the parking lot outside the store arose out of and in the course of his employment. *McGriff v. Worsley Companies, Inc.* [Court of Appeals].
- Claimant's failure to give timely notice of a third party action pursuant to Section 42-1-560 did not act as a bar to her workers' compensation claim where the third party action was voluntarily dismissed without prejudice. *Callahan v. Beaufort County School District* [Supreme Court].
- The issue in a change of condition claim is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based. *Robbins v. Walgreens* [Court of Appeals].
- The change in appellate procedure, like all other provisions of Act No. 111 of 2007, is only applicable to cases in which the injury occurred on or after July 1, 2007. *Pee Dee Regional Transportation v. SC Second Injury Fund* [Supreme Court].
- The base cost of providing an injured employee housing is an ordinary necessity of life which the statutory substitute for wages [i.e., compensation benefits, but

President's Column

Best-ever annual conference

We are putting the finishing touches to the program for our Members Only Forum, set for April 23-25 at Litchfield Beach & Golf Resort. Here are four reasons why this conference promises to be a memorable one:

- An outstanding program
- Outstanding golf tournament
- Seafood dinner cooked by David Benenhaley (of The Pig fame) and yours truly
- Entertainer One L Bil (Bil Krauss), known for his singing and wit and humor



Hugh McAngus

We hope you will make a special effort to attend and show your support for our association. Income from registration and sponsorship fees goes a long way in helping us meet our budget, modest as it is. As many of you are

aware, for more than 30 years the South Carolina Self-Insurers Association has represented the interests of self-insured employers in South Carolina, advocating and educating and lobbying on their behalf. If you are an employer, you can add your voice to our efforts for a mere \$350 per year.

Our annual conference is an excellent venue for TPAs, lawyers, and rehab companies and others to network with employers and learn about emerging developments in the industry. Membership dues for our associate and supporting members are \$450-\$475 per year. We appreciate the loyalty of these members as they truly make it possible for us to continue our mission and traditional role.

Looking forward to seeing you in Litchfield. ■

not medical benefits under the medical statute] should be utilized by the employee to obtain. *Pressley v. REA Construction Company* [Court of Appeals].

- "Regularly employed", as used in the statute providing that only employers who regularly employ four or more employees within the state are subject to the Workers' Compensation Act, means "employment of the same number of persons with some constancy throughout a relevant time

period". *Hernandez-Zuniga v. Tickle* [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. ■

New payment system

Surgery centers reap benefits of litigation delay

No immediate resolution is in sight in the ongoing dispute between the South Carolina Workers' Compensation Commission and the South Carolina Ambulatory Surgery Center Association and several member centers.

Supreme Court steps in

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counterclaim that "Executive Order 2007-20 invades the judicial authority of Workers' Compensation Commissioners in directing judicial officers regarding the content of their judicial orders." Executive Order 2007-20 directed commissioners to issue a written order when approving attorney fees, to effectively ensure that the fees are reasonable.

In addition to rebutting the specific charges contained in the governor's petition, the commission is asking the court to specifically rule on the appropriateness and correctness of its actions. For instance, the agency wants the court to rule whether commissioners are expected to follow the Code of Judicial Conduct. If the commission believes an executive order is contrary to state law, is the agency required to reject the order? Should commissioners, as judicial officers, ignore directives from the governor requiring them to utilize a particular legal standard? Do the governor's orders violate the right of workers' compensation claimants to due process and/or equal protection under the law?

The stakes are high for both parties. A rebuke from the court could be publicly embarrassing for the governor and may well serve to inhibit his powers. If the commission loses, it will likely embolden critics who want tighter controls over the agency.

The surgery centers have won temporary injunctions and the commission is pushing to have the case heard on its merits in Circuit Court.

The surgery centers sued the commission in September 2006 to block implementation of the agency's new payment system, which would have limited hospitals and ambulatory surgery centers to 140% of Medicare charges (40% more than what Medicare pays for similar services).

A hearing was held on the motion in October 2006. In March 2007, the Circuit Court issued a preliminary injunction, which was subsequently upheld by a single judge of the Court of Appeals and then by the full three-judge panel.

The upshot is that surgery centers continue to be paid as much as 88% of their charges, while implants are reimbursed at 120% of invoice cost. According to the commission, since 2000 the number of workers' compensation cases treated at surgery centers have increased 121% and charges have increased 314%.

The injunctions cover only surgery centers since they were the ones who brought the lawsuit. Hospitals are being paid under the new payment system that went into effect October 1, 2006.

The commission estimates the new fee schedule will save employers as much as \$60 million per year. A December 2007 report from the National Council of Compensation Insurance warns "the rising cost of medical care is the major issue facing workers compensation stakeholders, now and for the foreseeable future." Medical losses accounted for 45% of total workers' compensation losses in 1986, 52% in 1996, and nearly 60 percent in 2006.

NCCI favors the use of fee schedules in controlling healthcare costs and concludes "the most effective fee schedules are those that set maximum allowable fees that are no more than 40% above Medicare."

The group calculated that among the 22 states that report to the NCCI, South Carolina's reimbursement rates were the 8th lowest – 7 states paid less and 14 states paid more. Six states don't have a fee schedule.

www.scselfinsurers.com

Annual conference set for April 23-25, 2008

The Members Only Forum of the SC Self-Insurers Association is set for April 23-25, 2008 at the Litchfield Beach & Golf Resort on Pawleys Island (800-845-1897). We will mail you the program announcement and registration details over the next few weeks, along with information about sponsorship opportunities and exhibition booths.

As in years past, the conference will begin with registration and a reception on Wednesday, April 23. The educational programs will last from 9:00 a.m. - 12:00 p.m. on April 24 & 25. A golf tournament is scheduled for Thursday afternoon. Be sure to join us for a reception and group dinner on Thursday evening at the beach club. Singer Bil Krauss will be back by popular demand.



CALENDAR

- April 23–25, 2008* Members Only Forum, SC Self-Insurers Association, Inc., Litchfield Beach & Golf Resort
- November 6, 2008* General Membership Meeting, SC Self-Insurers Association, Inc. Seawell's, Columbia.



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Remember the Second Injury Fund?

Assessments are lower, payouts remain the same

Last year's Workers' Compensation Reform Act provides that the Second Injury Fund will be terminated on July 1, 2013 and specifies a number of critical dates associated with the dissolution of the fund. Specifically:

- July 1, 2008 – no reimbursement for injuries occurring on or after this date
- December 31, 2010 – last date for submitting notice of a new claim
- December 31, 2011 – last date for submitting a claim

After 2013, all remaining Fund obligations will be transferred to the Budget and Control Board.

Employers and insurance carriers were up in arms in 2005 and 2006 when

assessments totaled \$253 million and \$188 million respectively. These assessments were later reduced to \$177 million for 2005 and \$94 million for 2006.

The reduction in assessments is the result of lower payouts from the fund on eligible claims.

As illustrated here, total payouts have declined from a high of \$167 million in fiscal year 2004 to \$118 million in 2006. Many attribute the decline in claims and payouts to the elimination of the unknown condition in 2003, and the annualized projection for payouts from the fund in the 2008 fiscal year is approximately \$112 million. ■

Painter, Wilkerson nominated to Commission

Gov. Sanford has nominated Columbia lawyer Sam Painter and Cayce Mayor Avery Wilkerson to the Workers' Compensation Commission. If approved by the Senate, their terms would begin June 30, 2008 and expire June 30, 2014.

REIMBURSEMENT HISTORY

	TOTAL	MONTHLY AVERAGE
FY 2003	\$ 111,146,547.00	\$ 9,262,212.00
FY 2004	\$ 116,616,089.00	\$ 9,718,007.00
FY 2005	\$ 166,947,142.00	\$ 13,912,262.00
FY 2006	\$ 147,814,312.00	\$ 12,317,859.00
FY 2007	\$ 118,223,848.00	\$ 9,851,987.00
FY 2008** As of 1/31/2008	\$ 65,305,288.00	\$ 9,329,327.00

**Will be updated Monthly

*Source: The Second Injury Fund.