Workers' Comp News

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Department cries foul

Audit Council slams insurance department

In its recently reported review of how the state insurance department regulates workers' compensation insurance, the South Carolina Legislative Audit Council said 97% of the rate filings it reviewed had missing information, and in many cases it could not tell whether "the appropriate analysis or any analysis was conducted by the department."

The Audit Council also reports that South Carolina is unusual, if not unique, in allowing insurance companies to use any year's loss cost data when calculating rates. This enables insurance companies to use older loss costs to manipulate rates. "An NCCI official was unaware of any other state that did not require companies to adopt the current year's loss cost," the Audit Council said.

The agency also noted "when addressing our audit objectives, we used information from several of DOI's information systems. We could not audit or verify all of the information obtained from these systems, and we concluded that it may be unreliable."

The South Carolina Legislative Audit Council conducts independent, objective performance audits of state agencies and programs, as requested by the General Assembly and mandated by law. The agency audited the insurance department's performance at the request of Sen. Glen McConnell, President Pro Tempore South Carolina Senate. The request reflected concerns in the General Assembly over South Carolina's rapidly rising workers' compensation insurance rates.

The Audit Council noted that as recently as 1998 South Carolina had one of the lowest rates in the country but by 2008 rates in South Carolina were among the highest. Indeed, between calendar years 2006 and 2008, South Carolina slipped from 25th place to 12th on the widely reported rankings list compiled by the Oregon Department of Consumer & Business Services.

In 2008, North Carolina had the 22nd lowest rates in the country, while Georgia ranked 25th. Workers' compensation rates were highest in Alaska and Montana, ranked number 1 & 2.

In its rebuttal to the audit findings, the insurance department said the Audit Council's report does not put matters in the proper time frame or context. "As a result, people reading the report may mistakenly conclude that the issues cited are more pervasive than they are," it said.

For instance, the department said it was unfair of auditors to report information was missing from 97% of the files they reviewed because in more than half of those cases insurers were not required to submit the information. Back then South Carolina did not regulate rates. State law has subsequently been changed.

In fact, the insurance department said, if auditors had focused only on the filings in which insurers were required to submit complete information they would have found the following:

- Documentation pertaining to the Second Injury Fund was missing in only 31% of the filings
- Financial exhibits were incomplete in only 35% of the filings
- Information pertaining to Approved Date/Status was missing in 14% of the cases
- The Effective Date Change was missing in 14% of the cases.

The department also noted that in many instances information missing from the files was merely "a checklist or other summary documentation that described the review of the file." As regards insurers using outdated loss costs data, the department said it had recommended the appropriate change to the General Assembly in 2008 and had drafted legislative language to that effect. ■

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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:

- A Form 25-S (certificate of insurance) with a blank "Description of Operation" box and with expired coverage dates does not constitute proper documentation of a subcontractor's insurance coverage for purposes of transferring liability to the Uninsured Employer's Fund. *Hopper v. Terry Hunt Construction* [Supreme Court].

- The phrase "engaged to perform work" in the statute allowing a transfer of liability for the claims of employees of uninsured subcontractors means each time a subcontractor is actually hired to perform work. Thus, if a contractor enters into a contract to hire a subcontractor for one job in January and then enters into another contract to hire the subcontractor for a second job in February, the contractor should verify that the subcontractor still has insurance coverage at the time of the February hiring. *Hardee v. McDowell* [Supreme Court].

- A review of the common law factors – right or exercise of control, method of payment, furnishing of equipment and right to fire – led the Supreme Court to reverse the decision of Court of Appeals and find that the claimant's decedent, a truck driver, was an independent contractor at the time of his fatal accident. *Wilkinson v. Palmetto State Transportation Company* [Supreme Court].

- Substantial evidence did not exist to support the Appellate Panel's finding that the claimant's alleged neck injury arose out of and in the course of his employment. *McCuen v. BMW* [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. ■

David Keller

President's Column

Of this and that

Things have been relatively quiet on the workers' compensation front for most of 2009. Nonetheless, your association had one of its most successful Members' Only Conferences in May. Actually, both the content and the attendance were noteworthy.

It is not too early to "save the date" for the 2010 conference, set for April 21 to 23, 2010 at Litchfield. The conference committee has already begun planning and will meet on August 20 to get the program rolling.

There have been a lot of changes at the Commission, including the elimination of the agency's legal department and a move to Main Street—sadly no more free parking. At the close of the legislative session, the Commission also sent proposed regulations mandated by the Workers' Compensation Reform Act of 2007 to the Senate for approval. These include rules on Nurse Case Managers/Rehabilitation Professionals and consultations with doctors and medical providers by defendants.

These rules were not heavy handed in any way, and the self-insurers' association had no major objections to them. However, the plaintiff's bar objected to them and they were tabled, and thus killed until at least next year. The plaintiff's bar remains a powerful force in state politics, and we must therefore remain vigilant ourselves. To that end, I have also convened a meeting of the Strategic Planning Committee in August to address how the association should be structured to best respond to the future.

As an aside, I represented the association at the National Council of Self Insurers' annual meeting. Two major issues of concern at that meeting were implementing the new requirements of Medicare set-aside funding and the move by the current administration to "nationalize" workers' compensation.

I suspect Medicare issues will continue to be on the front burner for a long time to come. Medicare is facing deficits that were undreamed of when the program became law in 1965. A study from the 1970's predicted Medicare would have a $6 billion deficit by 2010. The current projections are for a $60 billion deficit by 2010 and bankruptcy by 2013 unless things change. Medicare intends to recover what it can from workers' compensation and liability settlements.

So, while things have been relatively quiet on the workers' compensation front, big challenges are looming. Now is the time for us to become more of a voice both in South Carolina and nationally.

Finally, on a personal note, if you have any suggestions for speakers for the 2010 Members Only, please contact me, Moby or any board member. ■

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Insurers wary

Hospitals press for money for implants

The South Carolina Hospital Association is pressing the Workers' Compensation Commission to revise the way it pays for implants, even as a major insurer group cautions South Carolina is already paying too much.

In a letter to the Commission, J. Thornton Kirby, SCHA president & CEO, says injured workers who need high-cost implants may be turned away by hospitals because the facilities lose money on the procedures. "Hospitals face mounting pressure to discontinue non-emergent services where the level of reimbursement is not sufficient to cover the hospital's costs. Workers' compensation cases involving high-cost implants are one such category of care," he wrote.

The SCHA suggests the following way out:

- **Option A** 140% of the Medicare DRG payment, with no additional payment for implantable devices (current system)
- **Option B** 125% of the Medicare DRG payment, plus the actual cost of implantable devices. Hospitals would decide on a case-by-case basis how they should be reimbursed.

SCHA says most workers' compensation cases would fall under the first category, but hospitals need the proposed flexibility for cases in which high-cost implantable devices are used. Texas is one state that employs the dual-payment option.

But in a letter to the Commission, the Property Casualty Insurers Association of America notes the Medicare DRG payment system includes the cost of implantables. To pay hospitals separately for the cost of the implant may be paying them too much, the group says.

PCI says South Carolina's current reimbursement – i.e. 140% of what Medicare would pay - is "more than adequate and is a higher rate of reimbursement than that paid by other private or public insurance mechanisms." The group directs the Commission to a study conducted in California by RAND which concluded that even a payment of 120% of Medicare is "adequate or more than adequate" for complex spinal fusion.

RAND noted that about 50% of Medicare's payment is for the cost of the implant. In California, at least, "passing through this amount on top of 120% of the Medicare payment system results in excessive allowances for inpatient spinal surgeries and creates incentives for unnecessary surgery," RAND said.

...A number of states require hospital invoices to reflect the actual cost of implants to the facility...

PCI argues "it is unlikely the costs of South Carolina hospitals are higher than those of California hospitals" and urges the Commission to not allow for double payment for implants.

Part of the difficulty facing the Commission is that it is not easy to determine how much to reimburse a hospital for implants. It is widely understood that hospitals charge several times more for implants than what they paid for it. For instance, Minnesota noted in October 2008 "on average, hospitals bill at 200% to 400% of the implant invoice cost."

Further, Minnesota added, "the mark up on products used in these procedures is often dramatic. A pedicle screw used in spine surgery may cost $60 or $100 to make but the discounted price hospitals pay for the product is about $1,100." Fairpay Solutions, a specialty-bill review company, makes much the same point on its website touting its services.

"Because implants are carved out of most state fee schedules and are often paid on a percentage of billed charges, hospitals bill more in order to profit more. As a result, paying hospitals or surgery centers for implants based on invoices often results in paying significantly more than necessary." Fairpay adds another problem is that a hospital's promotional discounts and/or rebates may not be reflected in the invoice.

Medtronic, a major implant manufacturer, says there are ways the Commission could determine the integrity of hospital invoices. It says a number of states require hospital invoices to reflect the actual cost of implants to the facility, including rebates, and specify financial penalties for those gaming the system. Besides, Medtronic added, there is enough competition among implant manufacturers to temper profiteering.

Implants are expensive enough and performed often enough in workers' compensation for payment changes to have a financial impact on employers and insurers. According to figures supplied by the S.C. Workers' Compensation Commission, in 2008 workers' compensation cases accounted for a total of 2,353 inpatient stays. Of these hospitalizations, 1,230 involved implants.

Total hospital charges for all workers' compensation hospitalizations amounted to $118.5 million. Of these charges, $88.9 million were for implant procedures, and $38.8 million were solely for implantable devices. It is important to note these sums are hospital charges – employers and insurers would have paid considerably less because of the state's fee schedule, and because hospitals often settle for less in return for quicker payments or a certain volume.

Commission figures show a rapid rise in average charges for workers' compensation hospitalizations. In 2000, the average hospital charge was $14,900. By 2008, the average charge had increased to $50,349.

It will likely be several months before the agency comes up with a draft recommendation and a final decision on how and what to reimburse for implants. ■

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CALENDAR

September 16–18, 2009 — RIMS 40th Southeastern Educational Conference. Wild Dunes Resort, Charleston.

October 18–21, 2009 — 33rd Annual Conference on Workers' Compensation. Embassy Suites at Kingston Plantation, Myrtle Beach.

November 5, 2009 — General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia.

April 21–23, 2010 — Members Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort, Pawleys Island.

U.S. House bill that would federalize comp picks up six co-sponsors

A bill introduced in the House early this year by Congressman Joe Baca, D-Calif., would authorize the creation of a National Commission on State Workers' Compensation Laws. H.R. 635, which recently picked up six co-sponsors, is opposed by employer groups.

The bill requires the Commission to: (1) review the findings and recommendations of the previous National Commission on State Workmen's Compensation Laws; and (2) study and evaluate state workers' compensation laws to determine their adequacy and whether additional remedies should be available to ensure the payment of benefits medical care.

Congressman Baca says "more than 35 years have passed since our government took a serious look at the effectiveness of workers' compensation laws. Access to proper benefits and medical care after on the job injuries is a right every American worker deserves. I am hopeful this legislation will bring us closer to updating and modernizing our state workers' compensation laws to ensure they remain effective in this new century."

Co-sponsors include well-known legislators Rep. Dennis Kucinich [D-OH] and Rep. Fortney Stark [D-CA]. ■

Commission close to naming legal advisor

The South Carolina Workers' Compensation Commission, which recently eliminated its General Counsel office, will outsource the job at $150 per hour.

The initial term of the agreement will be for six months, subject to renewal under the same terms and conditions. The agreement specifies that the legal advisor will not represent any client if such representation involves the South Carolina Workers' Compensation Act.

Duties of the outside counsel will include preparation of *pro se* single Commissioner Orders, assisting the agency's Compliance Department in prosecuting employer's alleged to be in violation of the insurance provisions of Title 42 of the South Carolina Code, and helping the Commission with proposed regulations and statutes, among other duties. ■

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