

COMPNEWS

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SC eyes wider mediation

Commissioners should have the authority to order mediation in any workers' compensation case they deem appropriate, says Commissioner Derrick Williams, who is working with attorneys from both sides to prepare regulations to that effect.

Mediation, for the most part, would be non-binding and non-mandatory, and both parties from the outset would have the right to consent or opt out of mediation, he told the audience at a recent meeting of the South Carolina Self-Insurers Association. Regulations would set guidelines for mediation, which is widely used by courts at almost every level.

"As a general rule, we will make the parties split the cost," he said, adding if the parties can't agree on a mediator the commission would appoint one from a list of certified mediators knowledgeable about workers' comp.

Commissioner Williams said mediation may be made mandatory in complex cases, such as those involving catastrophic trauma, multiple employers, third-party lien cases, and contested death and mental-mental cases. He said the commission would track mediations to see how well they are working to settle cases.

He added he expects to have draft legislation worked out early in the year, and commission-ordered mediations may become common in the fiscal year starting July 1, 2012.

NCCI sees deterioration

Accident year combined ratios in South Carolina continue to deteriorate, and the state is also seeing an increase in claims frequency, NCCI reported at its October 25 State Advisory Forum in Columbia.

Combined ratios have slipped from 94 in 2007 to 124 in 2010. South Carolina's average lost-time claims frequency is 930 claims per 100,000 workers, compared to 761 in NC, 745 in Georgia, and 780 in Alabama. Tennessee's rate is 1,011 per 100,000 workers.

NCCI representatives highlighted the widespread problem of physician-dispensing which is increasing drug costs. According to NCCI, in 2007 pharmacy dispensed drugs in South Carolina accounted for \$227 per medical claim, while physician-dispensed drugs accounted for \$20.

The following year the figures were \$256 and \$55, respectively. In 2009, the latest year for which figures are available, pharmacy dispensed drugs accounted for \$257, while physician-dispensed drugs accounted for \$93.

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The full commission has final authority in reviewing a single commissioner's decision as to the facts, not the appellate courts, the South Carolina Court of Appeals ruled in *Potter v. Spartanburg School District 7*.

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Judicial Notes by Mike Chase

Potter v. Spartanburg School Dist. 7

Court: South Carolina Court of Appeals

Citation: Op. No. 4890

Filing Date: September 14, 2011

Judges: Konduros, Short, Geathers

Lawyers: Andrew N. Poliakoff for the claimant/appellant; Michael Allen Farry for defendants/respondents.

Question Presented:

Whether the lower courts erred in determining Claimant did not suffer from physical brain damage based on medical testimony from Dr. Waid.

Case Overview:

Claimant fell 12-14 feet while on a ladder, suffering injuries to his right femur, right leg, a cut above his eye and loss of consciousness for a few minutes. Claimant alleged permanent brain damage as a result of psychological overlay. However, the authorized treating physician did not include brain damage in his report of injured body parts. Claimant then sought an opinion from Dr. Waid, a clinical psychologist, regarding Claimant's brain damage, who opined Claimant sustained brain damage as a result of psychological overlay.

Procedural History:

Single Commissioner (David W. Huffstetler): The single commissioner found Dr. Waid was not qualified to render his opinion concerning alleged brain damage because it was beyond his area of expertise, and therefore greater weight was given to the authorized physician with respect to the body parts involved in the claim, which did not include brain damage.

Circuit Court (Roger L. Couch, Spartanburg County): Affirmed.

Court of Appeals Ruling:

The Court of Appeals held the appellate panel of the Commission has the discretion to weigh and consider all evidence and as the fact finder, it may disregard testimony if other pertinent evidence is presented. Further, the appellate panel is the ultimate fact finder. The appellate panel is not bound by the opinion of medical experts, and can disregard medical opinion if the record contains other competent evidence. Therefore, the decision was affirmed that claimant did not suffer physical brain damage as a result of the accident.

Impact: When other pertinent evidence is presented, the commission has the discretion to weigh and consider all evidence and disregard certain testimony. Further, the full commission has final authority in reviewing a single commissioner's decision as to the facts, not the appellate courts.

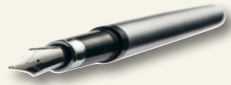
Comments: Please e-mail any comments to Mike at mchase@turnerpadget.com.



MIKE CHASE
Legal Advisor, SCSIA

* Disclaimer—This case law summary is not intended as legal advice. Contact your lawyer with questions regarding the potential impact upon your particular claim or situation.



President's note

DAVID BENENHALEY
President

A brick through the window

The modest proposal from the state labor department to do away with the workers' compensation commission in its present form has attracted little attention so far, but perhaps all that will change after our spotlight in this issue.

Experienced observers will note the commission has fended off previous attacks on its authority and autonomy, be they from the governor or from those advocating its merger with the insurance department. Politics makes for strange bedfellows, it is said, and perhaps it is time for a new axiom: hard times makes for strange politics.

Regardless, we were pleased our recent General Membership Meeting in Columbia afforded our members the opportunity to hear of the LLR proposal, and of the commission's plans to make widespread use of mediation. Don't miss our 2012 Members-Only Forum! We are putting together an outstanding program.

Until next time,

David

Labor department seeks to swallow Commission

The state labor department plans to push for legislation that would bring the workers' compensation commission under its wing, netting the department \$1.25 million per year and hardly causing a ripple for consumers, the labor department says.

Specifically, the South Carolina Department of Labor, Licensing and Regulation aims to split the commission into an administrative arm and a judicial arm. The administrative arm would report to the LLR director but the seven commissioners would not, thus retaining their much-prized independence.

"We certainly don't want to run workers' compensation," says LLR director Catherine Templeton, who characterizes the proposal as a mere accounting move which would enable the state to draw down critically needed federal funds for its occupational safety and health program.

"You don't change anything else. Whatever happens now would happen the next day," she says. She said she has run the proposal by the governor's office, a few legislators, outside attorneys, and the Legislative Audit Council.

"Nobody sees a downside," she added, noting that in 25 states the workers' compensation agency works under the umbrella of the state labor or insurance department. (The commission has different figures, but agrees with the larger point – workers' compensation is administered by an independent agency or board in only 25 states.) Ms. Templeton says for South Carolina to use state appropriations to attract federal matching funds the workers' compensation commission and LLR must be part of the same agency.

Draft legislation to be proposed by LLR would amend Section 42-1-80 to specify the commission is "incorporated in and administered as part of the South Carolina Department of Labor, Licensing and Regulation." The executive director of the commission would report to the LLR director, and would hire and fire most personnel with the approval of the LLR head. The LLR agency head would approve all travel and expense vouchers for both the administrative and judicial departments of the commission.

The draft legislation specifies that within the administrative arm of the commission the following divisions would be established: Coverage and Compliance, Claims and Statistics, and Medical Services. "Each division shall perform such functions

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Calendar

March 28-30, 2012 NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort. Wrightsville Beach.

April 11-13, 2012 Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort.

April 15-18, 2012 RIMS 2012 Annual Conference & Exhibition. Pennsylvania Convention Center, Philadelphia.

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Labor department seeks to swallow Commission

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and duties as may be assigned to it by the director of the Department of Labor, Licensing and Regulation or his designee," the draft language reads.

The proposed change would have a major impact on commissioners and the commission, as partially noted above. The seven commissioners are the governing authority of the agency, and the commission chairman is designated the chief executive officer. The change would effectively take away the commission's administrative authority and the chairman's executive duties. The power of the purse, such as it is in state government, would also migrate from the commission chairman to the LLR head.

In his update before a recent meeting of the South Carolina Self-Insurers Association, commission chairman Scott Beck alluded to the proposal from LLR and reported representatives from the two agencies have held discussions in recent weeks. The commission has put up a position paper on its website and it sees few merits in the proposed merger.

The commission notes the driving force behind the proposed merger is LLR's fear that because of lack of state funds it may soon lose its authority to operate the state OSHA program. LLR identified \$800,000 in state funds to the commission which could be used for federal matching funds. The position paper reports LLR's view that a merger would do away with duplicative administrative functions, and additional savings would be realized by relocating the commission to state-owned space.

Whereas LLR identified \$800,000 it could use for federal funds, the commission says only \$230,832 would be available for the purpose. It also emphasizes that the two agencies are "different creatures under South Carolina law." LLR is directly under the control of the governor, while the commission is an independent agency.

LLR can simply change its regulations but the commission has to have legislative approval. "Under a combined agency, a conflict may exist regarding who has final say over the promulgation of regulations relating to the administration of workers' compensation laws," the commission notes.

Perhaps more to the point, a merger would threaten "the clear line of impartiality, provided by the Canons of Judicial Conduct," the position paper says. If the commissioners become employees of the labor department, that relationship per se might violate the code of judicial conduct. "In order to violate the canons, it is not necessary that the commissioners actually be influenced or biased by their employment relationship; the existence of a relationship where it merely appears that the commissioners' impartiality might reasonably be questioned is sufficient for a violation," the commission says.

Also, the IT department and HR staff perform specialized functions that LLR's existing staff may not be able to perform. Finally, the commission says if the two agencies are merged commissioners may have to recuse themselves from hearing workers' compensation claims filed by LLR employees, who would be their colleagues.