

COMP NEWS

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NCCI sees 7.3% increase

The National Council on Compensation Insurance is seeking a 7.3% loss cost level increase in South Carolina, effective July 1, 2012. The state department of insurance will have the final say over the filing, and may modify it as it sees fit.

NCCI cites deteriorating claims experience in 2008 and 2009 and an increase in claims frequency as the primary drivers for the loss cost increase. Combined ratios in South Carolina deteriorated from 94% in 2007 to 100% in 2008 and 107% in 2009, and jumped to 124% in 2010.

“This is the first filed increase in South Carolina since the filing effective in July 2008,” NCCI said in an accompanying statement. “Since that time there have been three implemented loss cost level decreases with a cumulative impact of -13%. Assuming this filing is approved as proposed, the cumulative impact of loss cost level changes since 2009 will be -7.1%,” it added.

Observers note that while rates may be firming generally across the country, they are not expected to increase by double digits, which is one definition of a hard market. The current soft market in workers’ compensation is believed to be the longest in recent history.

Even small rate increases are worth cheering, writes respected consultant Joseph Paduda on his blog Managed Care Matters. “For TPAs, many of whom have been hanging on by a thread while waiting for employers to once again look hard at self-insurance, this couldn’t have come any sooner,” he writes.

Uptick in payments at SIF

Contrary to expectations, monthly reimbursements at the South Carolina Second Injury Fund are almost as high as they were five years ago.

In January 2012, payouts for the month totaled \$9.3 million, compared to \$9.7 million in December. So far in fiscal 2012, which started last July, the fund has paid out \$65.3 million. The fund paid out a total of about \$118 million for all of fiscal 2007.

“It’s baffling me as much as anybody. I thought it would go down,” says Mike Harris, deputy director at the agency.

The Budget and Control Board has said it plans to have an actuarial analysis done this year to determine the fund’s liabilities and how to fund them. An actuarial analysis posted on the fund’s website calculated as of December 31, 2009 its total liabilities were \$295 million.

The same study also foresaw assessments of about \$44 million in 2011, and only \$1 million in 2012. Actual assessment by the Second Injury Fund amounted to \$102 million in 2011.

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SCWCC proposes mediation regulation

Commissioner Derrick L. Williams recently led a committee in drafting a proposed regulation to codify the Workers' Compensation Commission's authority to order mediation in any pending claim before the Commission. The committee included claimant's and defense attorneys, insurance adjusters, employers, certified mediators and state agency staff.

While parties can agree to engage in mediation for any claim, the committee's proposed regulation requires mediation in any admitted claim where the claimant is pleading permanent and total disability under § 42-9-10 or a back injury under § 42-9-30 (21), as well as occupational disease cases, third-party lien reduction claims, mental/mental injury claims, and cases involving the Federal Longshore and Harbor Workers' Compensation Acts.

The regulation also requires mandatory mediation in contested death cases and claims where multiple workers allege injuries with the same employer.

The parties can agree to use any qualified mediator, and if they cannot agree within ten days, the Commission will appoint one. The mediation must occur within sixty days of filing the answer to the request for hearing. Attorneys for both parties must be present at the mediation, as well as a representative, either in person or via telephone, who has authority to resolve the disputed issues.

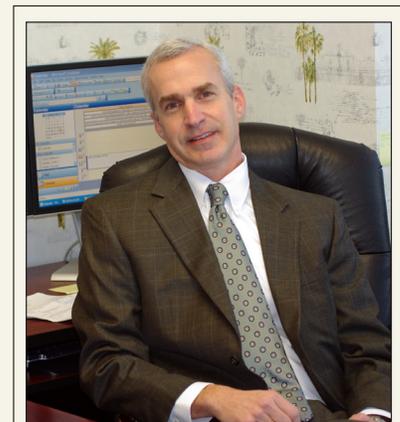
The parties will share mediation costs equally, unless otherwise agreed by the parties or ordered by the Commission.

All communications that take place in the course of the mediation will be confidential. The mediator's notes will not be in the Commission's file, are not subject to discovery, and cannot be used as evidence in any subsequent proceeding.

Cindy Dooley, a shareholder with Turner, Padgett, Graham & Laney, who practices workers' compensation defense and is a certified mediator, served on the committee. "This regulation keeps the power to get the claim resolved in the hands of the parties, instead of relying on a Commissioner's decision. Mediation allows a just resolution of the workers' compensation dispute in a cost-effective and efficient manner," she reports.

If a settlement is not reached, the parties can request a hearing before a single commissioner.

The Commission plans to hold a public hearing before approving the final language and submitting the regulation to the General Assembly. If the General Assembly does not take action within 120 legislative days, the regulation will be automatically approved.



MIKE CHASE
Legal Advisor, SCSIA

President's note

DAVID BENENHALEY
President

Mediation moves forward

As reported elsewhere in this newsletter, draft regulations approved by the SC Workers' Compensation Commission give commissioners the authority to order mediation in any case, and specify cases which must be mediated before any hearing on the claims.

Mediation is common and popular in workers' compensation. But the parties have been using mediators informally. The proposed regulations seek to establish a formal process, and give commissioners explicit authority to order mediations.

Our thanks to Commissioner Williams for spearheading this initiative. And, now that mediations and negotiations will be all the vogue, we are pleased to highlight our upcoming workshop on the art and science of negotiating. Please read below for details.

We are looking forward to seeing you at our annual conference in Litchfield Beach. There is plenty of room for sponsors and exhibitors and golfers. Don't miss the fun.

Until next time,

David

The art of the deal

If you fancy yourself a shrewd negotiator, you'll have a chance to go head to head with Mac McCarley, former City Attorney for Charlotte, at our Members-Only Forum. The conference is set for April 11-13 at Litchfield Beach & Golf Resort.

Mr. McCarley will present a 90-minute workshop on the art and science of negotiating. It is a popular presentation, one he has delivered 30-35 times before audiences from coast to coast.

"My goal would be to cover three broad areas: tips on how to prepare for negotiating; how to recognize and counter common tricks; and how to move the negotiation towards what you want," he says.

A partner at Parker Poe in Charlotte, Mr. McCarley previously served as City Attorney for Charlotte for 17 years. He received his undergraduate and law degrees from the University of North Carolina at Chapel Hill.

"Most of negotiating is a matter of common sense, and using your instincts. But it doesn't hurt to be aware of some of the tricks of the trade," he says. These include the time-worn good cop/bad cop, higher authority, feigned emotions, and nibbling the deal.

A highlight of the workshop will be a demonstration of negotiating skills, in which Mr. McCarley will negotiate one-by-one with three contestants selected by the audience. He sweetens the exercise by awarding the winner a popular gadget such as an Ipod or a Garmin GPS or \$200.

"This is a part of the program the audience really enjoys because they typically see three or four negotiating styles. I hope they take away useful pointers on how to organize their thoughts and plan their strategy," he adds.



MAC MCCARLEY



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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Top ten comp decisions in 2011

Listed below in chronological order are the top ten workers' compensation decisions from 2011, courtesy of Collins & Lacy.

1. *Murphy v. Owens Corning*, March 2011 – Affirmation of a full Commission determination that claimant provided proper notice of her repetitive injury many years following its onset when she reported the injury only after her neurologist causally related her condition to her work activities.
2. *Tims v. JD Kitts Construction*, June 2011 – The carrier is responsible for all foreseeable consequences including heat stroke when claimant's caregiver left him unattended in a car.
3. *Martinez v. Spartanburg County*, June 2011 – In mental/mental cases, the Commission should look at what is typical for the job being performed by the Claimant to determine if the unusual and extraordinary condition is met, not whether the particular Claimant had ever encountered the event before.
4. *Rabon v. Arrow Exterminating*, July 2011 – Although an employee who makes a false statement in his job application regarding his physical condition may be barred from recovery, there is no affirmative duty on the part of an employee to disclose prior injuries.
5. *Langdale v. Harris Carpets*, July 2011 - Withholding of workers' compensation premiums for an independent contractor by an employer may bind a carrier to coverage.
6. *Allison v. W.L. Gore & Associates*, August 2011 – The 14 day time period to seek review of the full Commission Order is jurisdictional.
7. *Wise v. Richard Wise d/b/a Wise Services*, August 2011 – A claimant cannot recover against an employer in both a workers' compensation action and a civil action. Claimant is barred under the Act from recovering in workers' compensation if he already recovered from his tort action.
8. *Skinner v. Westinghouse Electric Corp.*, September 2011 - Without wage loss, you may not recover permanency under the occupational disease statute for a pulmonary condition.
9. *Potter v. Spartanburg School Dist. 7*, September 2011 - The Commission's determination that Randy Waid, Ph.D. is not qualified to render an expert opinion on physical brain injury was upheld.
10. *Michau v. Georgetown County*, November 2011 – In repetitive trauma cases, medical opinions regarding causation must expressly be stated to a reasonable degree of medical certainty, most probably to meet the requirements of the repetitive trauma statute.