

COMPNEWS

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SIF to assess \$60 million for 5 years

Under a plan approved by the Budget and Control Board on May 9, the unfunded liabilities of the Second Injury Fund, slated to close June 30, would be paid off by assessments of \$60 million each for the next five years.

The board would commission an actuarial valuation after the first year and subsequently to ensure it is collecting enough funds. Earlier in the year an actuarial study by KPMG calculated as of June 30, 2013 the Fund would have unfunded liabilities of \$346.3 million and cash balance of nearly \$91.7 million.

The plan adopted by the Budget and Control Board mirrors the consensus among a panel invited in February to advise the Fund on paying off its liabilities. The panel consisted of representatives from the insurance industry, the South Carolina Self-Insurers Association, the State Accident Fund, the SC Department of Insurance, and the SC Workers' Compensation Commission.

Legislation passed in 2007 stipulates the Second Injury Fund will be closed as of July 1, 2013, when all remaining obligations and residual activity will be transferred to the Budget and Control Board for an orderly winding down. The self-insurers association was prominent among those agitating for the Fund's closure. But opposition to the Fund was widespread in the business community and reached a high point in 2005 when the Fund levied assessments totaling \$253.3 million.

Under the plan recently approved by the Budget and Control Board, the share of the \$60 million to be paid by insurers and self-insurers would be based on the

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Road deaths increased in 2012

Road deaths claimed 34,080 lives in 2012, an increase of 5.3% over 2011 and the first year-to-year increase in traffic fatalities since 2005, according to the National Highway Traffic Safety Administration.

Traffic fatalities had been declining in recent years since reaching a near-term high in 2005. Traffic deaths decreased by about 26% between 2005 and 2011, recording a 60-year low in 2011.

Not surprisingly, traffic accidents are a leading cause of high-severity injuries in workers' compensation. Moreover, they are pervasive; a study by NCCI published in December 2006 noted even the clerical classification has surprisingly high exposure to traffic accidents. Among the key findings:

- Motor vehicle accidents are more likely to result in multiple claims, and severity is higher for motor vehicle claims from multiple-claim events.
- Claims from motor vehicle accidents are more severe than the average workers' compensation claim; top diagnoses include neck injuries; duration is more than a third longer; subrogation is significant; and attorney involvement is greater.

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Judicial notes

The South Carolina Supreme Court recently issued two opinions regarding brain injuries which heighten an employee's burden of proof in claiming lifetime benefits. If these cases stand, *Sparks and Crisp* will change the way employers, adjusters, attorneys, and commissioners view "brain injury claims."

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Planning next year's conference

We are looking for topics and speakers for our 2014 Members-Only Forum. In particular, we are interested in what changes, if any, you are seeing as a result of the Affordable Care Act. Contact msalahuddin@sc.rr.com

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Older workers are younger now

Employers need not worry older workers will raise their workers' compensation costs, according to an update from the National Council on Compensation Insurance. Research shows physical and mental performance indeed deteriorate with age, but less so than many think.

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Judicial Notes by Mike Chase

Brain Injuries

Lifetime benefits limited to severe cases

The South Carolina Supreme Court recently filed two opinions regarding brain injuries which heighten an employee's burden of proof in establishing entitlement to lifetime benefits. In *Sparks v. Palmetto Hardwood, Inc.* (Op. 27229 March 6, 2013), the court limited awards of lifetime benefits in brain injury claims to only those where the physical brain injuries are "both permanent and severe." This rule was reaffirmed and further explained in *Crisp v. SouthCo., Inc.* (Op. 27230 March 6, 2013).

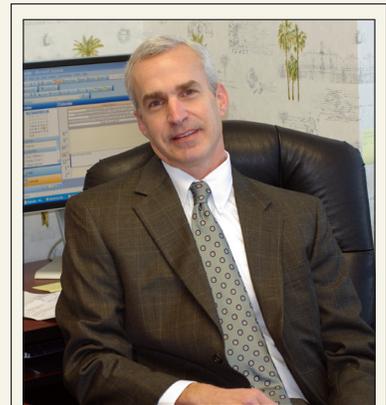
In *Sparks*, the injured employee argued he was entitled to lifetime benefits because he sustained a concussion, which by definition is a physical injury to the brain. Defendants denied his entitlement to lifetime benefits, arguing that the head injury did not rise to the level of physical brain damage as contemplated by § 42-9-10(C), the lifetime benefits statute. The issue before the court was an interpretation of the term "physical brain damage." There are three exceptions that entitle an employee who is permanently and totally disabled to lifetime indemnity benefits, as opposed to the normal limit of 500 weeks of benefits: paraplegia, quadriplegia, and physical brain damage. The court reasoned that since physical brain damage was grouped with quadriplegia and paraplegia, two permanent and severe conditions, the General Assembly likely intended that an employee's physical brain damage rise to that same permanent and severe level. The court also looked at other factors, including the term brain damage as used in the Second Injury Fund statute requires permanency, the Commission's interpretation of the statute was reasonable, and the purpose of the Workers' Compensation Act is to provide only minimal benefits.

In *Crisp*, an opinion released the same day but subsequent to the *Sparks* case, the court specifically rejected the claimant's position that the mere presence of a physical brain injury triggered entitlement to lifetime benefits. The court restated its findings in *Sparks* that the brain injury must be permanent and physical, but it also stated that "the severity of the injury is the lynchpin of the analysis" and "inherent in the requirement that the injury to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment."

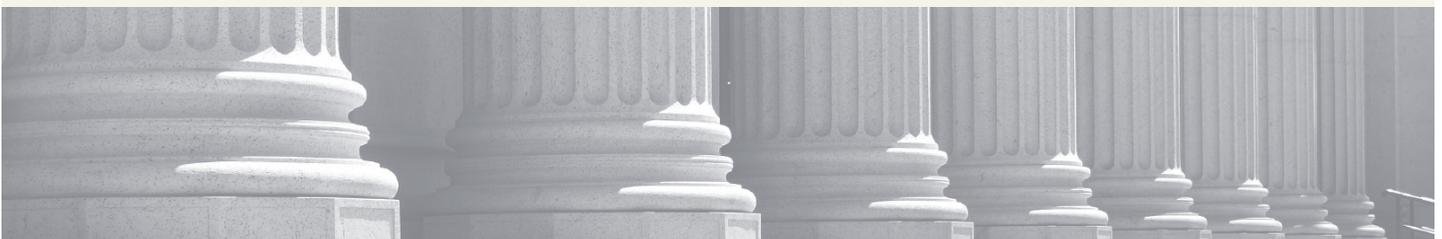
Claimant's counsel in both cases have filed for reconsideration. The Claimant's bar is arguing that the Court should adopt a definition of physical brain damage that considers whether the accident caused permanent physical damage to the brain that contributes to Claimant's permanent and total disability without using the term "severe", which excludes some mild and moderate brain injuries which still result in permanent impairments.

If these cases stand, *Sparks* and *Crisp* will change the way employers, adjusters, attorneys, and commissioners view "brain injury claims." Unlike in times past, just showing the existence of some physical brain damage will not be enough to establish entitlement to lifetime indemnity benefits. Instead, an injured employee will have to establish not only that the brain injury is (1) permanent and (2) physical in nature, but also (3) so severe that it impairs normal brain function to the extent they are unable to work.

Comments: This does not constitute legal advice. You should seek the counsel of your attorney concerning the application of these cases to your particular situation. Please e-mail any comments to Mike at mchase@turnerpadget.com.



MIKE CHASE
Legal Advisor, SCSIA



President's note

TOSCA WALLS
President

Speakers and topics for 2014

We have started planning next year's Members-Only Forum and are looking for topics and speakers from our members. If you have specific ideas, please contact me or our executive director Moby Salahuddin.

Most of our topics are covered in 30-45 minutes, and we can accommodate longer presentations as warranted. Given the sweeping changes in healthcare, we are particularly interested in learning about any issues employers might have had in finding healthcare providers for injured workers, and if employers are seeing sharp increases in charges.

It remains too early to gauge the impact of the Affordable Care Act on workers' compensation. We would love to hear first-hand reports from the field.

NCCI says things are looking up for workers' compensation. Written premium for private carriers is showing a second consecutive year of growth, continuing a turnaround from several years of declining premiums. Estimated premium increased to over \$35 billion in 2012—a more than 10% rate of growth.

But combined ratios are still too high. "In 2011, for the third straight year, workers' compensation held the distinction of having the highest combined ratio of all of the major commercial lines. Our preliminary analysis indicates that the combined ratio may come down slightly for 2012. However, we are not convinced that this will indicate a meaningful improvement in underlying results," NCCI says.

Until next time,

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current formula the Fund uses to assess them. Specifically, "each would pay an amount equal to that proportion of \$60 million, which the normalized premium of each carrier, self-insurers, and the State Accident Fund bears to the normalized premium of all during the preceding calendar year."

Although it was expected monthly payouts from the Fund – and hence the assessments - would drop with the elimination of the "unknown condition" in 2003, it took almost a decade for employers to see an appreciable difference. In 2003, monthly payouts from the Fund averaged \$9.3 million; in 2008, the monthly average was \$9.4 million; in 2012, the monthly average was \$8.4 million. In the first 10 months of the current fiscal year, monthly payouts have averaged \$3.8 million.

Since 1992, legislators in 20 states or so have closed their state's second injury fund. The rationale for the existence of the funds was they would encourage the hiring of previously injured workers by absorbing the cost of a subsequent injury, thus removing a possible disincentive for employers. But it remained unclear whether the second injury funds were much of a help in this regard, and they lost even more support after enactment of the Americans with Disabilities Act.

Employers in states which have eliminated their second injury fund have to contend with a couple of implications, writes Barry Llewellyn, a senior division executive with the National Council on Compensation Insurance. These implications include the fact that employers and insurers will now be obligated to directly and fully absorb the cost of second injuries, he notes.



Calendar

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|----------------------------|--|
| October 20-23, 2013 | The 37th Annual Educational Conference on Workers' Compensation. Marriott Myrtle Beach Resort & Spa at Grande Dunes. |
| November 7, 2013 | General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia. |
| March 26-28, 2014 | NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach. |
| April 2-4, 2014 | Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort. |

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Little impact seen because of aging workers

Employers need not worry older workers will raise their workers' compensation costs, according to an update from the National Council on Compensation Insurance.

Injuries due to high-severity diagnoses have historically been more common for older workers, but those high-severity diagnoses are now becoming common in younger-age cohorts as well, the group reports. "There is growing evidence that an aging workforce has a far less negative impact on workers' compensation claim costs than might have been thought," NCCI says.

An NCCI study on the aging workforce published in 2011 concluded costs for workers in the 35-and-older-age cohorts tend to be quite similar, although higher than costs for workers in the under-age-35 cohorts. The higher costs are largely offset by higher premiums due to higher wages of older workers.

The bottom line is the distribution of diagnoses across age groups is remarkably similar, and there is little difference by age in the share of permanent partial claims across a range of leading diagnoses. "Duration, treatments per claim, benefits paid per day, and costs per treatment are all very similar for workers in the 35 and older-age cohorts and they are higher than for workers in the under-age-35 cohorts," NCCI reports.

The group notes employers are aware of the value of older workers and have adopted safety and loss control programs to reduce injuries among them. NCCI also points to research which shows that although physical and mental performance deteriorates with age, the rate of deterioration is far less dramatic than many think.

For instance, Yale economist Ray Fair calculates long distance runners lose only 27% of their capacity between ages 35 to 65; for sprinters, the loss is only 19% over 30 years, while chess players lose only 6% of their capacity between ages 35 and 65.

"I am struck by how small the deterioration rates are. Given these numbers, societies may have been too pessimistic about losses from aging for individuals who stay healthy and fit," Dr. Fair says.