COMPNEWS

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SC adopts mediation

Mediation in workers' compensation received a big boost in recent weeks when the General Assembly approved regulations submitted by the workers' compensation commission, and the agency published the regulations in the State Register, signaling they are effective immediately.

The purpose of the regulations is to help resolve disputes without the necessity of a hearing. The regulations grant wide powers to the commission, specifying "a Commissioner has the discretion to order mediation in any pending claim before the Commissioner and to select a duly qualified mediator."

Mediation is required for certain claims. "It is ordered by the Commission that claims arising under Section 42-9-10, or claiming permanent and total disability pursuant to Section 42-9-30 (21), occupational disease cases, third-party lien reduction claims, contested death claims, mental/mental injury claims, and cases of concurrent jurisdiction under the South Carolina Workers' Compensation Act and the Federal Longshore and Harbor Workers' Compensation Act must be mediated prior to a hearing."

The parties may consent to use any mediator certified as a mediator per the certification process established by the South Carolina Bar Association. If the parties cannot agree on a mediator, the commission will appoint one for them.

According to the regulations, "all communications and statements that take place within the context of mediation shall be confidential and not subject to disclosure," and may not be used as evidence in any proceeding. The mediator's notes shall not be placed in the Commission's file, shall not be subject to discovery, and shall not be used as evidence in any proceeding.

NCCI

Combined ratio dropped six points

The workers' compensation calendar-year combined ratio was 109 in 2012, a six-point decrease from 2011 and the first decrease since 2006, according to the National Council on Compensation Insurance.

"By many measures, the industry condition is indeed improving," said NCCI President and CEO Steve Klingel. "While we are pleased to see that the positives are beginning to outweigh the negatives, there remains great opportunity for improvement. Our optimism is tempered by knowing that external forces such as the economy, healthcare reform, and new legislation may still negatively affect the market. But for now, we view the overall industry condition as encouraging."

NCCI reports premiums grew for the second consecutive year, and claims-frequency declined significantly for the first time since 2009. But the industry still suffers from poor underwriting results, low investment yields, and continued uncertainty regarding the impact of the Affordable Care Act.

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Judicial Notes by Mike Chase

New mediation legislation approved

The South Carolina General Assembly has approved the proposed Regulations (R. 4286) requiring mediation in some Workers' Compensation claims. The new Regulations became effective on June 28, 2013 when they were published in the State Register.

The Commission has begun notifying parties of claims subject to the new regulations for July and August hearings.

The regulations require mediation in admitted claims involving an allegation of permanent and total disability, occupational disease, third party lien reduction, mental/mental injury, and concurrent jurisdiction under the SC Workers' Compensation Act and the Federal Longshore and Harbor Workers' Compensation Act. Specifically included are severe back injuries under section 42-9-30 (21) where there is a claim of permanent and total disability based on an award of 50% or higher permanent partial disability.

The regulations also require mediation of contested death claims and any claims where multiple employees allege injuries with the same employer. There is a separate provision which gives a Commissioner the authority to order mediation for any claim and select the mediator if the parties cannot agree on one.

As always, the parties can agree to voluntarily mediate any claim. By checking the appropriate box on newly revised Forms 21, 30, 50, 51, 52, 53, 54, 58, and also on new Form 22 (Claimant's Answer to Request for hearing (F21)), the parties can notify the other side and the Commission of this preference. These Forms have been approved and are now available on the Commission's website.

The parties must act in good faith while participating in mediation. This includes a provision that representatives for each party must have the authority to enter into negotiations, in good faith, to resolve the issues in dispute. Failure to do so may result in fines and penalties up to the actual cost of the mediation. Parties can file for a rule to show cause hearing to enforce this provision.

Only duly qualified mediators may be used. Mediators must be certified by the SC Bar Association following completion of a 40 hour training program. A list of available workers' compensation mediators has been developed by the South Carolina Workers' Compensation Educational Association (SCWCEA), and is available on their website.

All parties are waiting to see exactly how the Commission interprets and implements the regulations. For employers, these regulations will require early investigation, strategy planning and action on all workers' compensation claims, because once a hearing has been requested, a mediator must be selected within 10 days of filing the Form 51 (Employer's Response to Request for Hearing) or the Form 22 (Claimant's Answer to Request for Hearing).

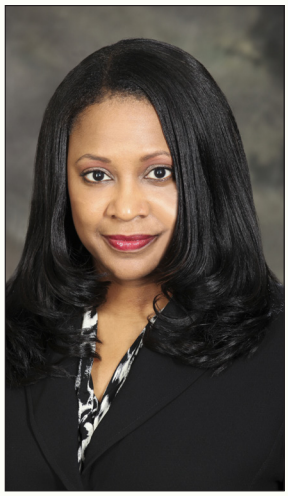
MIKE CHASE
Legal Advisor, SCSIA

In addition, mediation must be completed within 60 days or the case will be re-set for a hearing in the normal course of docket scheduling. Therefore, it is imperative that discovery, IME's, vocational evaluations, MSA proposals, surveillance efforts, etc. occur early so the claim is properly prepared for mediation, and in the event an impasse occurs, is ready for a hearing.

The Commission will hold a series of workshops beginning in September to review the regulations and administrative procedures.

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

President's note



TOSCA WALLS
President

Off to a good start

Kudos to the SC Workers' Compensation Commission for the smooth rollout of its mediation initiative, reported in a couple of places in this newsletter.

By the time the General Assembly approved the measure in late May, it was hardly news as the commission had laid the groundwork for it several months in advance and built a broad consensus for it among all the stakeholders. This is a promising development for South Carolina's workers' compensation system and we applaud too the commission's announcement it will hold workshops in September to go over the new regulations.

Requiring mediation at this point in time is not a radical innovation, as the drift has been in that direction for quite some time. Even then, South Carolina's comp system has an enviable history of adapting to new initiatives and working things out.

We wish some of this amity would rub off on the national stage where, more than three years after healthcare reform was signed into law, it is still not a done deal. So many of us are waiting for it all to fit into place.

Until next time,

Tosca

Comp not paying for ER care

Employers and workers' comp insurers often suspect employees foist healthcare treatment on workers' comp that should be covered by their health insurance. New research suggests the opposite may also be true.

Nearly 40% of work-related injuries and illnesses seen in U.S. emergency rooms are not billed to workers' compensation but paid by private insurance or Medicare or Medicaid, according to researchers with CDC's National Institute for Occupational Safety and Health.

The report by Groenewold and Baron was published online in May in the journal **Health Services Research** and titled *The Proportion of Work-Related Emergency Department Visits Not Expected to Be Paid by Workers' Compensation: Implications for Occupational Health Surveillance, Research, Policy, and Health Equity.* The authors say their research has important policy implications because, for one, looking at who pays for emergency care systematically underestimates frequency of work-related injuries.

The research was highlighted recently in a blog by Dr. Celeste Monforton, affiliated with the George Washington University School of Public Health and Health Services. She reports the analysis involves four years of data from the National Hospital Ambulatory Medical Care Survey, a representative sample of U.S. emergency room visits.

One reason injuries coded as work-related are not paid for by workers' compensation is that not all workers are covered by workers' comp. Dr. Monforton notes domestic and agricultural workers and often the self-employed are among those not covered. But this does not entirely explain why so many work-related injuries are not paid for by workers' comp.

Dr. Monforton points to research which suggests some workers may avoid filing a claim for a work-related injury because they fear disciplinary action, denial of overtime or promotion opportunities, stigmatization, drug testing, harassment, and even job loss. Another reason cited by researchers is the workers' comp system is probably frustrating and obscure, especially for first-time users.

Employees who don't report work-related injuries are harming the system because this practice may allow unsafe practices to continue, and it may give an unfair advantage to employers by keeping their mod rates artificially low.

Calendar

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.
April 2-4, 2014	Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort.

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New accounting rules may have broad impact

The Financial Accounting Standards Board has proposed new rules for insurance accounting that are expected to have an impact beyond the insurance industry, according to the **New York Times**.

"Some of the largest protests might come from companies that until now have thought insurance accounting rules did not apply to them. The new rules would cover any company that issues contracts that are seen as insurance, or similar to insurance," the newspaper reports.

"Insurance is defined as "accepting significant risk" from another party–the insured policyholder–by agreeing to pay compensation "if a specified uncertain future event adversely affects the policyholder." That could include product warranties issued by third parties, mortgage guarantees and residual value guarantees. Most banks would have at least some products subject to the insurance rules," the **Times** added.

FASB chairwoman Leslie Seidman said in a news release "the proposed standard is intended to bring greater consistency and relevance to the accounting for contracts that transfer significant risk between parties." The accounting standards board is seeking comments by October 25.

"One of the most significant changes is that the guidance in the proposed Update would require contracts that transfer significant insurance risk to be accounted for in a similar manner, regardless of the type of institution issuing the contract. In other words, the contractual features of the contract–not the type of insurer–would determine whether it is insurance. Consequently, the proposed standard would apply to banks, guarantors, service providers and other types of insurers, in addition to insurance companies," FASB said.

FASB is the designated organization in the private sector for establishing standards of financial accounting and reporting. Those standards govern the preparation of financial reports and are officially recognized as authoritative by the Securities and Exchange Commission and the American Institute of Certified Public Accountants.