COMPNEWS

A Publication of the South Carolina Self-Insurers Association, Inc. | Summer 2015

NCCI files for 1.9% increase

The National Council on Compensation Insurance has filed for a 1.9% loss costs increase in South Carolina, effective September 1, 2015.

The requested increase for South Carolina is the highest among 12 southeastern states. NCCI has filed for loss cost decreases everywhere in the region, except for Virginia, where it filed for a 0.9% increase. The group filed for loss costs decreases of 3.4% in North Carolina, a decrease of 3.3% in Georgia, and a decrease of 8.2% in Tennessee.

Loss costs have fluctuated in South Carolina in recent years, decreasing 7.4% in 2014, and preceded by increases of 1.1% in 2013 and 3% in 2012. NCCI reports combined ratios for insurers in South Carolina improved to 100% in 2013, compared to 104% in 2012 and 114% in 2011.

According to separate measures employed by the Oregon department of Consumer and Business Services, South Carolina seems to have stabilized its position against other states in the nation after rapid deterioration between 2002 and 2006. Still, as of January 2014, Louisiana and South Carolina have the highest premium rates in the southeast at $2.23 and $2.00 per $100 of payroll.

Nationwide, the workers' compensation market has been improving steadily. NCCI reports the calendar year combined ratio for private carriers was 98% in 2014, a four-point improvement from 2013 and a 17-point improvement since 2011. "The most recent results show that 2014 was a good year for the industry—and that follows solid results in 2013," reports NCCI President and CEO Steve Klingel.

In other workers' compensation developments, a coalition of large employers headed by Walmart, Lowe's, and Best Buy, among others, is pushing legislation that would allow employers to opt out of the workers' compensation system to create a benefits system more to their liking. The employers are members of the Texas-based Association for Responsible Alternatives to Workers' Compensation (ARAWC), which has said it sees several southeastern states as fertile territory receptive to its opt-out alternative.

To-date, only Texas and Oklahoma allow employers the option of not carrying state-mandated workers' compensation coverage. Opt-out bills were introduced this year in Tennessee and South Carolina, but the proposed legislation did not get very far in Tennessee and was introduced very late in the legislative session in South Carolina. Media reports indicate ARAWC has hired a lobbyist in North Carolina as well, but the group's website only highlights its efforts in Tennessee and South Carolina.

The group says its goal is not to do away with workers' compensation protections but to give employers an alternative to state-mandated coverage, thereby introducing competition which would bring down costs. Indeed, recent opt-out legislation introduced in Tennessee and South Carolina emphasizes that injured workers would receive benefits comparable to what they currently receive under state-mandated coverage.

But as critics have pointed out, such assurances barely cover the tremendous implications of a system expressly set up by employers according to their preferences. **Mother Jones**, the liberal but well-regarded publication, pointed out that although employers are still required to provide some semblance of workers' compensation, they can write their own rules governing when, for how long, and for which reasons an injured employee can receive medical benefits and wages.

continued on page 4

INSIDE THIS ISSUE

Judicial Notes

Exotic Dancing creates employee/employer relationship

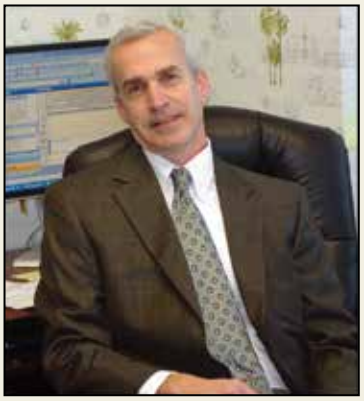
The state Supreme Court recently ruled that LeAndra Lewis, a topless dancer, was an employee at Studio 54 Boom Boom Room (the Club), rather than an independent contractor, and thus eligible for workers' compensation benefits. Lewis v. L.B. Dynasty, d/b/a Boom Boom Room Studio 54 and S.C. Uninsured Employers' Fund 770 S.E.2d 393 (2015).

The Supreme Court based its determination on the extent of control exercised by the Club over the manner in which she performed her work. Lewis was severely injured when struck by a stray bullet resulting from a gun fight at the Club. She traveled throughout the Carolinas performing at different establishments and performed at the Club on three occasions.

In reaching its decision the court focused on four factors previously established by the court: (1) right to or exercise of control; (2) furnishing of equipment; (3) method of payment; and (4) right to fire.

First, the court determined the right of control factor favored a finding of an employment relationship. Justices rejected the Court of Appeal's reasoning that because Lewis choreographed her own routine, the Club did not control her work. Instead, the court relied on facts which included that prior to performing, Lewis was required to pay a tip-out fee, undergo a search, and review the Club's rule sheet. They also pointed to the facts that during her shift, the Club chose all music, dictated the rotation of dancers, directed when Lewis had to appear on stage, and determined her level of nudity.

The club also set a minimum price for V.I.P dances, and collected a percentage of these fees. The Club did not allow the performers to leave before their shift had ended, and created a dancing schedule allotting times when each dancer was to perform. The court ruled that the Club exercised significant control over Lewis's performance.



Mike Chase
Legal Advisor, SCSIA

Second, the court found the Club furnished all the equipment used by Lewis to perform her work, thus establishing an employee relationship. The court found that the Club, rather than Lewis, bore the risk of the capital investment in the equipment used, such as the stage, pole, tables, and a sound system while Lewis provided no equipment other than her costume. For purposes of its analysis, the court did not find that Lewis's body was equipment.

Third, and conversely, the court determined that the method of payment weighed in favor of an independent contractor relationship. The court noted that the Club exerted some control over her payment by setting the tip-out fee and minimum for V.I.P dances. However, Lewis was not directly paid by the hour, day or week for her performances by the Club, but was paid in tips from customers. Thus, the Club had less of an interest in the efficiency of her performance and less control over the manner in which the job was performed.

Finally, the court found that the right to fire factor weighed in favor of an employee relationship. Whereas an independent contractor would have the legal right to complete her work, an employer in an employment relationship would have the power to fire before completion and therefore possesses the power to control. The court found that the Club did have the power to fire Lewis at any point during her work at the club.

continued on page 3

President's note

Val Rosser
President

More bad news about painkillers

Two recent items in the news should give workers' comp professionals pause because it puts them in a lose-lose position.

First, the Centers for Disease Control and Prevention reports heroin use has increased among all sectors of the population, and the people most likely to be addicted to heroin are those addicted to prescription opioid painkillers. Separately, the National Safety Council warns the widespread use of opioids among injured workers puts them at risk for addiction and fatal overdoses. Courts have ruled that in many circumstances addiction and death arising from prescribed opioids are compensable under workers' compensation.

The commonsense advice, notably from the National Safety Council, has been try ibuprofen and acetaminophen first not only to prevent addiction but also because these drugs are just as effective in controlling pain. Now it turns out the safety council and other such advocates may not know what they are talking about.

Earlier in the summer, the U.S. Food and Drug Administration warned consumers ibuprofen and other nonsteroidal anti-inflammatory drugs (Advil, Motrin, Aleve) cause an increased risk of heart attack and stroke. The clear message is there is no such thing as a safe dose: there is a higher risk of heart attack and stroke from the very start of therapy.

"Everyone may be at risk, even people without an underlying risk for cardiovascular disease," says an FDA official. Although acetaminophen is not an NSAID, there have long been concerns it causes liver damage, and last year the FDA warned consumers even two acetaminophen pills may cause serious adverse effects.

What are we supposed to do? Risk opioid addiction and worse, or risk a cardiovascular event and worse? We need specific advice, and it may take prompting from the workers' comp community.

Until next time,

Val

ICD-10 conversion set for Oct. 1

The nation's healthcare system will convert to ICD-10 on October 1, amid uncertainty and apprehensions reminiscent of fears over Y2K, when it was thought the transition from 1999 to 2000 would play havoc with software and cause massive computer failures.

In April, ***Modern Healthcare*** reported surveys by the Healthcare Billing & Management Association and the Workgroup for Electronic Data Interchange suggest not everyone is prepared for the transition. The consensus is while the bigger players will be ready from day one, smaller facilities and small physician-practices may have a tough time initially.

continued from page 2

There was a dissenting opinion from Justice Pleicones, in which he simply stated he agreed with the South Carolina Court of Appeals that the claimant was an independent contractor.

The takeaway for employers is that the court construes all four factors with equal weight when determining whether a claimant is an independent contractor or an employee. A finding either way of only one factor is not conclusive.

Comments: *This does not constitute legal advice. You should seek the counsel of your attorney concerning the application of the information in this article to your particular situation. If you have comments please contact Mike at mchase@turnerpadget.com.*

Calendar

November 5	General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia.
Mar. 30– Apr.1	NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach.

COMPNEWS

COMP NEWS
is published quarterly by the
SC Self-Insurers Association, Inc.

www.scselfinsurers.com

EDITOR AND WRITER

Moby Salahuddin
215 Holly Ridge Lane
West Columbia, SC 29169
E-mail: msalahuddin@sc.rr.com
Telephone: 803-794-2080

continued from page 1

In Texas, for instance, Walmart has written a plan that allows the company to select the arbitration company that hears claims disputes. In Oklahoma, Dillard's requires workers to report injuries before the end of their shift to be eligible for workers' comp.

Similarly, the Center for Justice & Democracy at New York Law School also noted the enormous discretion employers enjoy under opt-out plans: "Depending on the law, an employee may retain the right to sue an employer for negligence. However, as a condition of employment, the employer can force the employee to sign a contract so all cases are resolved through an employer-designed, secret arbitration system rather than in court," the center notes.

Opt-out legislation introduced in late spring in South Carolina may be instructive. House bills 4171 and 4197 are identical bills introduced by Representatives Bill Sandifer (R-Oconee), David Hiott (R-Pickens), and Craig Gagnon (R-Abbeville). H-4197 is currently in the House Committee on Labor, Commerce and Industry, chaired by Rep. Sandifer.

Brent Buchanan, a spokesperson for ARAWC, told ***WorkCompCentral*** the opt-proposal was deliberately introduced late in the session because the group wants to give stakeholders the opportunity to examine and discuss the bill in the legislative off-season before any votes are taken.

"The intention is to get the conversation started and to bring all stakeholders ... to the table throughout the summer and fall break leading into the January 2016 second half of the session," Buchanan said.

While opt-out alternatives may be attractive to employers, the proposal faces resistance in South Carolina. The Property and Casualty Insurance Association of America, Injured Workers' Advocates, and the American Insurance Association are opposed to the bill, according to ***WorkCompCentral***.

H-4197 makes it clear its intention is to set up a separate, independent workers' compensation system that would have little to do with the system in place. A employer who opts out would have considerable discretion in setting up a benefits program, and the bill specifies "except as otherwise expressly provided, an administrative agency of this state may not promulgate rules or procedures related to design, documentation, implementation, administration, or funding of a qualified employer's benefit plan."

In addition, an employer may choose when to opt-out of the workers' compensation system and when to opt in, and in any event the insurance department "shall provide the employer a reasonable time after the withdrawal or denial to secure workers' compensation insurance coverage."

The bill does not address how employees would be protected if they are injured during the period their employer is without comp coverage or in between the two systems. Indeed, it may well be practically every substantive element of the new system would have to be litigated before it is clear how its provisions and regulations would apply to workplace injuries.