

Commission v. Surgery Centers

SC Supreme Court to hear oral arguments

The South Carolina Supreme Court was set to hear oral arguments February 16 in the ongoing dispute between the South Carolina Workers' Compensation and the state's ambulatory surgery centers. The surgery centers contend the commission arbitrarily maxed their reimbursement at only 40% more than what Medicare would pay for the same procedures.

The disputed fee schedule would have become effective October 1, 2006 but the surgery centers immediately challenged it in court. To date, thanks to several successful court fights, the surgery centers continue to be reimbursed under the old formula, which specified only that the surgery centers were to give a 12.1 % discount off their charges.

In other words, the centers' payment for medical services for workers' compensation patients was capped at 87.9% of their charges. As the Commission states it in its brief, "this method was inherently susceptible to high fees, since the providers were free to set the fee to which the discount would apply. The Commission controlled the rate of discount, but the providers controlled the amount of the original charge to which the discount was applied."

The surgery centers contend the Commission overreached in setting the new fee schedule because they were not given notice or opportunity to present their case, even though the new fee schedule threatened to reduce their revenue by \$8 million - \$10 million per year. "The Commission failed to comply or act within

the due process standards established by the South Carolina General Assembly in the South Carolina Administrative Procedures Act for either regulations or contested cases," the surgery centers argue in their brief.

"The Commission acted without notice, hearing, evidence or written order and without conducting a contested case hearing or promulgating a regulation subject to approval by the General Assembly," they continue.

The Commission argues it took up surgery center fees under the umbrella of its Hospital Advisory Committee and that committee's work was publicized. But the heart of the Commission's position is that it has the authority under current regulations to set fees for providers and need not go before the General Assembly. The agency maintains the surgery centers have no

inherent "property interest" because they know prospectively what their fees would be and are free to decide whether or not to treat workers' compensation patients.

In 2009, Judge John M Milling, presiding judge Fifth Judicial Circuit, ruled the surgery centers were denied due process. The court said before making changes to the payment system, the Commission should have promulgated a new regulation and had it approved by the General Assembly. This process would have given involved parties appropriate notice and warning of impending changes.

Judge Milling concluded the Commission cannot enforce the new payment system against the surgery centers until it develops a regulation that is in accordance with the Administrative Procedures Act and has been reviewed and

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APPEALING* RESULTS

By Sam Painter

Listed below are brief summaries of points of law made by South Carolina appellate courts in recent decisions that are of general interest to workers' compensation self-insurers:

- The Workers' Compensation Commission does not have statutory authority to order re-allocation of an award so as to allow a claimant to avoid social security offset. *James v. Ann's Inc.* [Supreme Court].
- The appellate panel's finding that an employee's alleged injury due to perfume exposure on the job did not arise out of the employment was supported by substantial evidence. *Ervin v. Richland Memorial* [Court of Appeals].
- The appellate panel's finding that a reinstatement notice did not clearly indicate when there was a lapse of coverage (and therefore there was no lapse of coverage) was supported by substantial evidence. *Jeffery v. Sunshine Recycling* [Court of Appeals].

*And sometimes not so appealing. These points of law are presented subject to the following disclaimer: Fairly summarizing a point of law in a sentence or two is often difficult. Sometimes it is impossible. Before relying on any of the points of law discussed, you should review the entire decision, and check to see if the case has been subject to further appeal. ■

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President's Column

Some recent developments

There have been three significant events in the workers' compensation arena since the previous issue of this newsletter.

First, the South Carolina Workers' Compensation Commission has finally approved the long-awaited Medical Services Provider Manual. The updated manual is available online at the Commission's web site and will be available in hard copy shortly. The Commission intends to appoint a blue ribbon committee to make recommendations on future changes, and the self-insurers association will ask to be part of that process.

Second, the South Carolina Supreme Court ruled on January 25, 2010 the Commission does not have the authority to require defendants to place social security pro-ration language in settlement documents. Third, the federal government is suing employers, carriers, and attorneys in a "test case" in Alabama in an attempt to recoup

millions of dollars in Medicare payments after a multi-million dollar class action settlement which did not take Medicare's interests into account.

In other developments, we are looking forward to the 2010 Members-Only Forum. We will convene again from April 21-23 at Litchfield Beach & Golf Resort, in a much-improved facility. I am pleased to report we have several outstanding presentations and speakers, including the vice president of Midwestern Casualty Co., the vice president of claims for Tyson Foods in Arkansas, and several well-known local speakers.

Once again, an exceptional feature of the conference will be an open forum with commissioners on Friday morning. There will also be plenty of social time, and our renowned chefs, Hugh McAngus and David Benenhaley will prepare another Low Country haute masterpiece on Thursday evening.

See you on April 21. ■



David Keller

Increase in comp rate, decrease in mileage rate

The South Carolina Workers' Compensation Commission recently announced that for accidents that occur on or after January 1, 2010, the maximum weekly compensation rate, which according to Section 42-9-10 is to be "no more than the average weekly wage in this State for the

preceding fiscal year," will be \$689.71, an increase of \$8.35 (1%) over the 2009 rate of \$681.36.

The agency also announced that effective January 1, 2010, the mileage rate for workers' compensation will be 50 cents per mile. ■

A far-reaching probe?

Commission undergoing audit

At the request of state senators, the Legislative Audit Council has been conducting a pre-audit survey of the Commission preparatory to determining the eventual scope of the audit. The audit council voted in December to take up the request it had received in May 2009.

The council was directed by 13 senators last spring to conduct an official audit. "We desire an inquiry into the operations, systems and management practices of the WCC as they relate to the consistency of workers'

compensation awards and the reasonableness of attorneys' fee awards," the letter read. The senators attached a comprehensive list of areas they wish the audit council to explore.

The suggested scope of audit appears to have been suggested or influenced by the South Carolina Civil Justice Coalition. The coalition, which says it serves as the united voice for the business community on tort and workers' compensation issues, reproduces the audit request letter and the attachment shown below on its website at www.sccjc.org.

Request to the Legislative Audit Council

For each claim please determine:

- Whether a completed Form 50 (the complaint) was filed by the claimant.
 - Whether the body part(s) listed on the Form 50 was consistent with the body parts listed on the claimant's Form 58 (the pre-hearing brief) and what body part(s) was listed. If different, please list the differences.
 - Whether a completed Form 51 (answer) was filed by the employer/insurer.
 - Whether a completed Form 14B (physician's statement) was submitted listing the body parts injured and those affected; the date of MMI (Maximum Medical Improvement); AMA impairment rating(s); and whether the claimant will need future medical care.
 - Whether a Form 16 or Form 16A (informal conference settlement agreement) was filed.
 - Was the body part(s) listed on the claimant's Form 50 consistent with the body parts listed on Form 16 or Form 16A, and what body part(s) was listed? If different, please list the differences.
 - What statutory citations were listed on the claimant's Form 58 as the basis for compensation sought by the injured worker, or in other words, what type of benefits was sought? For permanent partial claims, specify if injury to more than one body part was claimed.
 - What impairment ratings were listed on the claimant's and defendant's Form 58? How did the commissioner's or panel's award compare to those ratings?
 - Is there consistency in awards among injuries that appear to be similar?
 - Whether a Form 61 (attorney fee petition) was submitted. If yes, what were the amounts of fees and costs requested and which sub-section (A,B,C or D) was used?
 - Whether the requested fee was approved or rejected? If rejected, how much was awarded?
 - What were the amounts of the attorney's fees and costs that were approved?
 - If the initial attorney's fee or costs were rejected, how did the amounts approved compare to those initially requested?
 - Whether a Form 19 (status report and compensation statement) was filed. If yes, what was the amount of attorney's fees paid by the employer, and what was the amount paid by the claimant?
- It typically takes the audit council several months to complete an audit and release a report to the General Assembly.

"We desire an inquiry into the operations, systems and management practices of the WCC as they relate to the consistency of workers' compensation awards and the reasonableness of attorneys' fee awards..."

New appointments at the Commission

Governor Mark Sanford has reappointed Commissioner Susan Barden to the South Carolina Workers' Compensation Commission. If confirmed by the Senate, her term would commence June 30, 2010, and expire June 30, 2016.

The governor has also nominated businessman Lewis Creel, Jr. of Summerville to replace Commissioner Bryan Lyndon, whose term expires June 30. If confirmed, his term on the commission would begin June 30, 2010 and expire June 30, 2016.

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CALENDAR

<i>March 24–26, 2010</i>	Annual Conference North Carolina Association of Self-Insurers. Wrightsville Beach.
<i>April 21–23, 2010</i>	Members Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort, Pawleys Island.
<i>April 25–29, 2010</i>	RIMS 2010 Annual Conference & Exhibition. Boston Convention & Exhibition Center.

Annual Conference set for April 21-23

The Members-Only Forum of the Self-Insurers Association is set for April 21-23 at the Litchfield Beach & Golf Resort on Pawleys Island. The popular annual event is open to members and exhibitors.

The conference will begin with registration and a reception on Wednesday, April 21. The educational programs will last from 9:00 a.m. - 12:00 p.m. on April 22 & 23.

A golf tournament is scheduled for Thursday afternoon, to be followed by a group dinner and entertainment at the Beach Club.

The registration fee of \$225 per individual will cover the opening-day reception, group breakfast on both days, and group dinner on Thursday. Dress for all events is business casual.

If you are interested in being an exhibitor or a sponsor, please contact Moby Salahuddin, executive director at msalahuddin@sc.rr.com

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approved by the General Assembly. “The adoption of a Regulation will afford the Plaintiffs with certain due process rights, including notice, an opportunity to be heard, and the opportunity for review and approval by the General Assembly,” the judge ruled.

The Commission appealed the ruling and requested the state Supreme Court to intervene in the matter. In the meanwhile, the surgery centers can continue to bill as before, but perhaps tempered by market forces. There is some suggestion that employers are directing injured workers to less expensive alternatives.

The Commission has previously noted South Carolina needs a new fee schedule because outpatient charges have been rising substantially. Specifically, from 2000 to 2006, the number of workers’ compensation cases seen by ambulatory surgery centers increased 64%, while total charges increased 324%. The Commission also reports that between 2006-2008, the number of cases increased an additional 25% while charges increased 45%



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