

COMP NEWS

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Defunct insurers press claims against SIF

The Second Injury Fund is under pressure from Reliance and Legion to settle approximately 300 claims going back several years when the insurers were active in South Carolina.

The state agency maintains the insurers are not entitled to any reimbursements because they quit paying assessments when they went into liquidation in 2001 and 2003, respectively. Section 42-7-310(d) of the South Carolina Code of Laws, amended in 2003, states employers or insurance carriers who fail to pay assessments “shall be barred from any recovery from the fund on all claims without exception.”

Dan Addison of Hedrick Gardner in Columbia, who is representing the insurers, argues the statute should not be applied retroactively. He says his clients are entitled to recoveries for accidents during the years when they were paying into the fund.

“We have been litigating this issue for almost six years. We have won at every level in every case,” he says. Specifically, Mr. Addison says, the Full Commission has ruled in his clients’ favor on some of the cases, as has the Circuit Court.

Although the claims being pressed by Reliance and Legion cover a number of issues, the central dispute between the parties is whether or not the 2003 statute applies retroactively. Mr. Addison says he requested the South Carolina Supreme Court to step in and settle the matter and the court accepted cert last year.

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SC Second Injury Fund

Assessment will be \$102 million

Second Injury Fund assessments this year will total \$102,016,441, slightly higher than the roughly \$89 million projected earlier in the year.

Reimbursements in May 2011 amounted to \$15 million, almost double the monthly average, reports Mike Harris, deputy director of the South Carolina Second Injury Fund. Under legislation passed in 2007, employers had until June 30 this year to perfect claims against the fund.

The Fund anticipates it will have made a decision on all pending claims by end of September or mid-October 2011, well in advance of the December 31 deadline. The Fund is scheduled to close on July 1, 2013, when all remaining obligations and residual activity will be transferred to the Budget and Control Board which will wind down the agency.

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Judicial Notes by Mike Chase

Martinez v. Spartanburg County

Court: South Carolina Court of Appeals

Citation: Op. No. 4839, 2011 WL 2447081 (S.C. Ct. App.)

Filing Date: June 15, 2011

Judges: Williams (author), Short concurred, Chief Justice Few concurred in a separate opinion.

Lawyers: For Claimant/Respondent: Chadwick Pye of Spartanburg and Kevin Smith of Charleston.

For Defendants/Appellants: Richard Kale, Jr. of Greenville.

Question Presented: Did the Circuit Court err in ruling that the claimant experienced an unusual or extraordinary condition of employment? Was the order of the Single Commissioner sufficiently detailed to allow appellate review?

Case Overview: Claimant, a 28-year veteran of the police force, was a master deputy forensic investigator with the Spartanburg County Sheriff's Office. Claimant's job required her to investigate, collect evidence, and take photographs at crime scenes. On April 4, 2005, the Claimant investigated the home of a former co-worker because of the death of the former co-worker's child. The child was accidentally killed when the former co-worker backed his patrol car out of the driveway. Approximately four months thereafter, Claimant's father found Claimant in bushes near the Claimant's home where she was talking about an imaginary little girl. Shortly before the Claimant's mental breakdown, Claimant had abruptly stopped taking Xanax. Subsequently, the claimant "filed a Form 50 claiming she experienced a mental breakdown as a result of the April 4, 2005 investigation."

Procedural History:

Commissioner (Bass): Single Commissioner (Lyndon): Claimant did not experience an unusual or extraordinary condition since these types of traumatic crime scenes were part of her daily work.

Commission Appellate Panel (Huffstetler, Barden, and Roche): Affirmed the Single Commissioner

Circuit Court (Judge Hayes): Reversed and concluded that the Single Commissioner's order was not sufficiently detailed to allow appellate review.

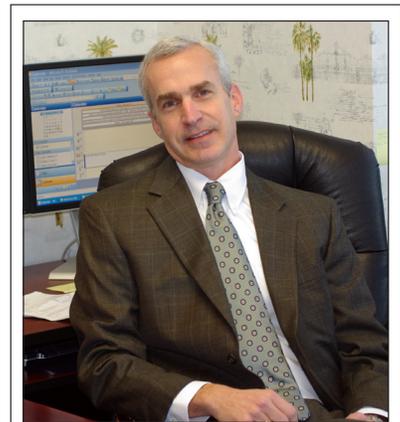
Court of Appeals Ruling: In South Carolina, a "mental-mental" injury is only compensable if it arose from an unusual or extraordinary condition of employment. However, the Court held that the Claimant's April 4, 2005 investigation was not an unusual or extraordinary condition of her employment. Additionally, the Court held that the Single Commissioner's order was sufficiently detailed to allow appellate review because the order provided a basis for enough findings of fact to support the Single Commissioner's decision.

The court reasoned that the Claimant investigated approximately 100-150 death cases, some involving children and teenagers, and that the Spartanburg County Sheriff's Office had no policy preventing employees from investigating crime scenes involving acquaintances. While the Claimant testified that she never investigated a crime scene of someone she knew, the court focused on the fact that the Claimant and deceased child's father were not close friends but merely former co-workers. Therefore, the Claimant's

April 4, 2005 investigation was not an unusual or extraordinary investigation. Because this was not an unusual or extraordinary condition, the court did not have to analyze whether the investigation was the proximate cause of her breakdown.

Impact: The Court provided helpful jurisprudence relating to when a "mental-mental" injury will be compensable. The injury will be compensable only if it was caused by a situation that is unusual or extraordinary in the Claimant's particular job. Thus, if the claimant has a particularly traumatic job, it will take an even more unusually or extraordinarily traumatic experience to allow compensation for any "mental-mental" injury.

Comments: Please e-mail any comments to Mike at mchase@turnerpadget.com.



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* Disclaimer—This case law summary is not intended as legal advice. Contact your lawyer with questions regarding the potential impact upon your particular claim or situation.



President's note

DAVID BENENHALEY
President

An unexpected wrinkle

Those of us who thought the South Carolina Second Injury Fund was winding down in expected fashion were surprised to learn two defunct insurers are pursuing claims against the agency. The eventual outcome could have implications for participants in the Fund.

As we report on page one of this newsletter, the Fund is under pressure from Reliance and Legion to settle approximately 300 claims going back several years when the insurers were active in South Carolina. Reliance went into liquidation in 2001 and Legion in 2003.

The South Carolina Self-Insurers Association is talking to all parties to learn more about this development. Members of our board have been briefed by Eleanor Kitzman, the departing head of the Budget and Control Board, and by Dan Addison of Hedrick Gardner, who is representing the insurers.

We will keep you updated.

Until next time,

David

Improving orthopedic care

Timely intervention by an orthopedist can speed recovery of an injured worker. But cost-conscious employers often end up adopting a penny wise pound-foolish approach, says AnnMargaret McCraw, CEO at Midlands Orthopaedics in Columbia.

“We believe with a little bit of insight, employers can save money and improve care for injured workers,” she says. One useful tip employers should keep in mind is that not all MRIs are the same. “Most orthopedists believe that to produce quality images an MRI scanner must be at least 1 Tesla-unit strong. Yet, we routinely receive poor images because workers are directed to facilities with weaker MRIs,” she says. The result is that MRIs are routinely re-done to capture appropriate images. “The duplication is unnecessary. It delays treatment and increases expense,” Ms. McCraw notes.

She says injured workers require complex surgical repair, and orthopedists often see workers who’ve been injured before. “Repair is always more difficult the second or third time. It is in everyone’s interest to get it right the first time,” she says.

That means employers should consider carefully whether the first referral of an orthopedic injury should be to a primary care physician or to an orthopedist. “Perhaps this is a tough call. But our experience is that when workers with orthopedic injuries are seen by primary care physicians they are often prescribed inappropriate therapy. In many cases it may be as long as a month before the injured worker is referred to an orthopedist. Routinely, ortho referral reveals need for surgical repair that could have been performed 30 days earlier,” Ms. McCraw says.

She cites the example of an 55 years-old man who fell down a bankment. He was referred to primary care and treated there for one month but still could bear no weight. On referral to an orthopedist an MRI was done and revealed ruptured quadriceps that could have been diagnosed at time of injury. “Surgery was performed at five and a half weeks. But surgery within seven days would have produced the best results,” she says.

She adds that poor coordination of care and unnecessary duplication of services and records are a pervasive problem in healthcare, and to that workers’ comp adds some unique challenges. For one, there are numerous parties: the injured patient, adjuster, nurse case manager, defense attorney, patient’s attorney. It is not unusual for orthopedists to receive frequent requests from all parties for the same information.



Calendar

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| October 25, 2011 | NCCI's 2011 State Advisory Forum.
Columbia Metropolitan Convention Center. |
| November 3, 2011 | General Membership Meeting, SC
Self-Insurers Association. Seawell's. |
| 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. |

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NC passes comp reform

North Carolina governor Bev Perdue signed into law on June 24 extensive revisions to North Carolina's workers' compensation act. Despite initial deep differences, the opposing parties showed an impressive willingness to compromise. Among the highlights of this landmark legislation:

- Temporary total disability benefits will be capped at 500 weeks (approximately 9.5 years)
- Injured workers may be able to petition for extra temporary total disability benefits of another 425 weeks
- Partial disability benefits increase from 300 weeks to 500 weeks
- Death benefits to family members of workers killed on the job also increase from 400 weeks to 500 weeks
- When workers reach a threshold known as "maximum medical improvement," the definition of what will then constitute "suitable employment" will change. Some observers define it as a job the injured employee is capable of performing taking into account the worker's physical limitations, education, experience and vocational skills.

Defunct insurers

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But, he adds, at almost the last minute the Second Injury Fund agreed to settle the case that was due for a hearing by the high court, thus preventing a ruling that might have resolved the dispute. Mr. Addison points out that in the 2006 *Layman v. State* decision, the South Carolina Supreme Court ruled the provisions of the Teacher and Employee Retention Incentive Program ("TERI") created a binding contract that could not be altered by a subsequent statutory enactment.

Any monies the Second Injury Fund pays the defunct insurers would have to be made up by higher assessments against active employers, insurers, and self-insurers, and that includes the State Accident Fund. Apart from Reliance and Legion, the South Carolina Property and Casualty Insurance Guaranty Association is also pursuing recoveries for claims it paid on behalf of the two insurers.

Mr. Addison says earlier this year a single commissioner ruled in his favor on 26 cases, 16 affecting Reliance and 10 cases affecting Legion.