COMPNEWS

A Publication of the South Carolina Self-Insurers Association, Inc. | Fall 2012

SC tackles drug repackaging

Employers nationwide are concerned about the high cost of repackaged drugs dispensed by physicians but only a handful of states, among them South Carolina, have taken action to curb the practice.

"Physician dispensing was on the cusp of getting out of control in South Carolina. But now the Commission has put walls in place," notes Paige Bowling, director of corporate accounts at Corporate Pharmacy, Inc. She served recently on the pharmacy fee advisory committee convened by the SC Workers' Compensation Commission to address the problem of repackaged drugs.

South Carolina's new regulations don't ban physician dispensing but do target the financial incentives to repackage drugs. The regulations specify if the drug filled has a re-packaged National Drug Code, the biller must submit the NDC of the original manufacturer of the drug for payment purposes.

Also, if the original NDC number is not provided or is unknown, the payer may select the most reasonable and closely associated AWP to use for reimbursement. Most telling, the regulations specify "in no case shall the re-packaged drug price exceed the amount otherwise payable had the drug not been re-packaged."

The mark-up for repackaged drugs is considerable, as evident from the examples below:

Drug	Standard AWP	Repackaged AWP
Tramadol 50 mg #120	$104.95	$207.80
Naproxen 500 mg #60	$76.55	$146.72
Cymbalta 60 mg #60	$439.88	$1,177.58

.

Second Injury Fund

Finally a slowdown in payouts

The much-anticipated winding down at the Second Injury Fund appears to have begun as the agency reports it is paying out $3.9 million or so per month in fiscal 2013, which began July 1, compared to monthly payouts of about $8.5 million in each of the previous three years.

"The fund is finally in its run-off stage. There can't be that much left," says Mike Harris, deputy director at the Second Injury Fund. The agency will soon commission an actuarial study to determine the best way to pay off its remaining obligations.

Under legislation adopted in 2007, the Second Injury Fund will be terminated on July 1, 2013. The last day for the fund to accept a claim for reimbursement was December 31, 2011. The legislation directs the State Budget and Control Board to provide for an orderly winding down.

INSIDE THIS ISSUE

Judicial Notes

Is a decision by the Circuit Court reversing the Commission's denial of compensability directly appealable? Oral arguments in *Bone v. U.S. Food Service* are set for Nov. 13, 2012 at 9:30 A.M. at the South Carolina Supreme Court.

• **Page 2**

SC improves ranking

South Carolina moved up four places on the 2012 Oregon Workers' Compensation Premium Rate Ranking. It was the state's first improvement since 1998, when South Carolina had the lowest workers' compensation premium rates in the country.

• **Page 3**

Worsening comp environment in SC

Accident year combined ratios in SC have been deteriorating rapidly over the past three years, slipping from 100% in 2008 to 107% in 2009 to 124% in 2010, according to the National Council on Compensation Insurance.

• **Page 3**

Judicial Notes by Mike Chase

Bone v. U.S. Food Service

Is court decision directly appealable?

Court: South Carolina Supreme Court

Citation: Op. No. 27153 (S.C. Aug. 1, 2012)

Lawyers: Mike Chase and Sam Sammataro for defendants/appellants; Bill Smith and Blake Hewitt for claimant/respondent.

Question Presented: Whether a decision by the Circuit Court reversing the Workers' Compensation Commission's denial of compensability is directly appealable.

Analysis: In *Bone v. U.S. Food Service*, Claimant alleged she injured her back on June 26, 2007 while lifting two pallets inside a trailer to clean under them. Instead of reporting the alleged injury immediately, she waited almost a week until July 3, 2007. When reporting the alleged injury to her supervisor shortly upon arriving at work on July 3, she also reported she had a flat tire on the way into work and had to stop to change it. Defendants denied Bone's claim, contending that the injury occurred when she changed her tire on July 3.

SCWCC: Commissioner Susan Barden found Bone failed to meet her burden of proving a compensable injury. In doing so, she specifically found that the claimant's testimony was not credible in regards to the allegation that her injury resulted from cleaning a trailer June 26 as opposed to changing her tire on the way to work on July 3. On appeal, an appellate panel of the Full Commission unanimously affirmed the denial (Commissioners Williams, Lyndon, and Huffstetler), citing the inconsistent testimony and evidence presented by Claimant.

Circuit Court: Judge G. Thomas Cooper, Jr. concluded that Bone had sustained a compensable injury, and therefore reversed and remanded the matter to the Commission "for further proceedings consistent with this determination."

S.C. Court of Appeals: The court dismissed Defendants' appeal of the circuit court's order on the basis that it was interlocutory (not final). They stated that orders of the circuit court remanding a case for additional proceedings before an administrative agency are not directly appealable.

S.C. Supreme Court: *Cert.* was granted by the court to review the decision of the court of appeals. The court affirmed the dismissal of this appeal by the court of appeals on the basis that the circuit court order awarding benefits is not a final order. However, it was not a unanimous decision:

Mike Chase
Legal Advisor, SCSIA

The Opinions:

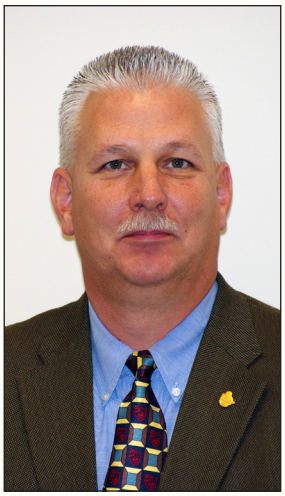
The majority (Beatty, A.J., Pleicones, A.J., Toal, C.J.): Writing for the three-member majority, Justice Beatty recognized the "lingering confusion" stemming from prior precedent applying the final judgment rule, confirmed the rule that the APA governs appellate review in compensation matters, and undertook an analysis of controlling authority to support his opinion that the *Bone* order was not subject to immediate appellate review. In the majority's view, it seems, no agency decision is subject to immediate review where the case is remanded for any purpose. The majority has essentially created a new and different standard in administrative cases to the ostensible end that agency authority will be preserved and appellate efficiency enhanced. In summary, the majority affirms the definition of "final judgment" set forth in the Charlotte-Mecklenburg case: "[i]f there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory[,]" and extends its applicability to any appeal arising under S.C. Code Ann. § 1-23-390.

The minority (Hearn, A.J., Kittredge, A.J.): In her strongly worded, 11 page dissent, Justice Hearn would hold that *Charlotte-Mecklenburg* is inapplicable in this case and that Section 1-23-390 absolutely

continued on page 4

* 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

Goodbye, and hello

This is my last column as president of the South Carolina Self-Insurers Association. My two-year term expires at the end of December, when I will hand over the responsibilities to Tosca Walls, our incoming president.

Although I will step down from my present position, I am pleased to report I will continue to serve on the association's board of directors for the next four years, along with David Keller, Hugh McAngus, Jerry Johnson, and Ted Contos, among others. All of the colleagues mentioned here also served as president and agreed to stay on for additional service.

Although there is considerable value in preserving a sense of continuity and tradition on the board, we also need new people, younger people, and more diverse candidates for the board. In particular, we need more representation from employers self-insured for workers' compensation.

Please drop us a line if you are interested in serving on our board of directors or know someone who would be an appropriate candidate.

Until next time,

David

NCCI: Worsening comp environment

Accident year combined ratios in South Carolina have been deteriorating rapidly over the past three years, slipping from 100% in 2008 to 107% in 2009 to 124% in 2010, according to the National Council on Compensation Insurance.

At the South Carolina State Advisory Forum in Columbia on August 28, NCCI also reported spikes in lost-time claims frequency in South Carolina, describing it as a key cost –driver in the state. The group had filed for a 7.3% loss cost increase effective July 1, 2012 and settled for a 3% increase effective September 1, after the SC Consumer Advocate opposed the request.

2012 Oregon Rankings

SC improves ranking

South Carolina moved up four places on the 2012 Oregon Workers' Compensation Premium Rate Ranking. It was the state's first improvement in the rankings since 1998, when South Carolina had the lowest workers' compensation premium rates in the country.

According to the 2012 rankings, 34 states and the District of Columbia have lower rates than South Carolina. Two years earlier, 39 jurisdictions had lower rates, according to the widely read Oregon rankings.

South Carolina had been slipping steadily. In 2000, only two jurisdictions in the country had lower rates; by 2004, 12 jurisdictions had lower rates; by 2008, 39 jurisdictions had lower rates.

Even with the most-recent improvement, workers' compensation premium rates in South Carolina are higher than in Virginia, North Carolina, Georgia, Alabama, and Florida. Nationwide, rates are highest in Alaska, and lowest in North Dakota.

Calendar

March 20-22, 2013	NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach.
April 10-12, 2013	Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort.

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

Bone v. U.S. Food Service

continued from page 2

permits an appeal from a final decision involving the merits of a substantial issue in the case. Like Justice Beatty, Justice Hearn traces the evolution and application of the "final judgment" rule in administrative cases pursuant to Section 1-23-390 and concludes (correctly in our view) that the test for immediate review is "whether the order finally determines an issue affecting a substantial right on the merits." She further argues that *Charlotte-Mecklenburg* is inapplicable because that case involved a different statute and a different stage of the proceedings where there had been no determination of the primary substantive claim at issue. After exposing the irrationality of applying *Charlotte-Mecklenburg* to affirm dismissal in this case, Justice Hearn spends considerable effort to cogently highlight this case as a prime example of the inefficiency that will result from multiple ping-pong appeals between the agency and the appellate courts: "[i[f accepted, the majority's position could leave cases trapped in a never-ending cycle of remands for years so long as some other non-ministerial determination needs to be made." Essentially, Justice Hearn believes that "the question of compensability - one of U.S. Food Service's main defenses - was decided with finality as there was nothing more the commission could do regarding that issue."

Rehearing: The court has granted defendant's petition for a rehearing. In addition to the main issue of whether the case was wrongly decided, the rehearing may also result in practical guidance to the bar regarding issue preservation, ministerial versus substantive tasks to be completed at the Commission level, and the like. Sam Sammataro, appellate defense counsel for U.S. Food Service and their carrier, stated "the impact of the *Bone* decision on claimants, employers and carriers alike is immeasurable in terms of time and resources the parties will expend to obtain appellate review of Commission decisions. Our hope in seeking rehearing is that the Court will fashion a more equitable and workable rule that will afford everyone timely and meaningful review." The South Carolina Defense Trial Attorneys' Association (SCDTAA) has filed an amicus brief on behalf of Defendants in favor of the Supreme Court vacating the Bone decision and issuing a decision holding the scope of appealable interlocutory orders should include orders determining compensability, especially when the order reverses the decision of the Commission. Attorneys Grady Beard and Kirsten Barr argue on behalf of the SCDTAA, "[i]t would be illogical to suggest the circuit court's order on the merits of an appeal is not a 'final judgment' on that appeal simply because the circuit court has not addressed issues which may or may not arise between the parties in the future. Clearly, the circuit court's appellate jurisdiction is limited to a determination of whether the Commission's decision is either supported by substantial evidence or controlled by some error of law."

Oral argument on the rehearing is set for Nov. 13, 2012 at 9:30 A.M. at the South Carolina Supreme Court.