COMPNEWS

A Publication of the South Carolina Self-Insurers Association, Inc. | Winter 2013

Second Injury Fund

The end draws near

The state Budget and Control Board has invited representatives from the insurance industry and the South Carolina Self-Insurers Association to a focus group meeting on Feb. 15 to hammer out a plan for paying the Second Injury Fund's liabilities after it closes on June 30.

The group will review actuarial findings by KPMG and as many as five options for paying the fund's projected unfunded liabilities. The goal is to have a consensus recommendation from the focus group for consideration by the Budget and Control Board at its March 5 meeting.

Stephen Elliott, interim director of the Second Injury Fund, has also invited representatives from the State Accident Fund, the SC Department of Insurance, and the SC Workers' Compensation Commission. The self-insurers board has selected the following representatives:

- David Benenhaley, director of risk management, Piggly Wiggly
- Heather Ricard, director of risk management, Municipal Association of South Carolina
- Clif Scott, senior staff attorney, SC Association of Counties
- Brian Teusink, president & CEO, PHT Services, Ltd.

Reimbursements from the Second Injury Fund agency are averaging less than 50% of what they have been in recent years. For the first six months of fiscal 2013, which started July 1, monthly reimbursements have been averaging $3.8 million, compared to about $8.5 million per month in each of the previous three years.

In the past three years, total reimbursements over a 12-month period have been averaging around $101.5 million. Over the first six months of the current fiscal year, reimbursements have totaled only $22.9 million.

SMART Act aims to ease Medicare disputes

Insurers, self-insurers, and healthcare providers are pleased President Barack Obama recently signed into law the Strengthening Medicare and Repaying Taxpayers (SMART) Act, which had passed Congress with bipartisan support.

"This commonsense legislation, which passed as part of H.R. 1845, the Medicare IVIG Access Act, makes it more efficient for patients, healthcare providers, and insurers to settle disputes and lawsuits," says Sen. Rob Portman (R-Ohio), who introduced the legislation in 2011 with Sen. Ron Wyden (D-Or). The Congressional Budget Office estimates the act will save taxpayers $45 million over ten years.

The SMART Act addressed several problems in the Medicare Secondary Payer system. For one, the federal government did not provide Medicare repayment amounts until after parties had settled their disputes or lawsuits. Coupled with complicated reporting and reimbursement obligations, this inefficiency made it difficult for parties to reach a settlement.

continued on page 4

INSIDE THIS ISSUE

Mental stress claims

Will the floodgates open in South Carolina? Employers may see more claims if a proposed bill becomes law. It would do away with the requirement an employee must show employment conditions were extraordinary and unusual in order to recover for a mental-mental injury.

• **Page 2**

Comp and healthcare reform

Can workers' comp stay untouched by healthcare reform? Can we continue to have a two tier-system, one for comp and one for everyone else? These are some of the issues we will explore in our conference, set for April 10-12.

• **Page 3**

Members-Only Forum 2013

Registration is open, and vendors are welcome. If you have not received the program announcement please contact Moby Salahuddin, executive director, at msalahuddin@sc.rr.com .

Judicial Notes by Mike Chase

Mental stress claims

Will the floodgates open in South Carolina?

South Carolina employers may see more mental-stress claims if a proposed bill becomes law. H-3147, initiated by Rep. Tommy Pope, would do away with the requirement an employee must show employment conditions were extraordinary and unusual in order to recover for a mental-mental injury.

Purely mental-mental claims do not involve any physical injury, but instead result solely from a mental stimulus. Examples might include something sudden, such as suffering PTSD after witnessing a tragic accident, or gradual, such as developing depression over time from working a regular job, which by nature is inherently stressful.

H-3147 comes on the heels of what some have described as a directive from the state Supreme Court to the Legislature to weaken the standard for awarding compensability in mental-mental cases. In *Bentley v. Spartanburg County*, 730 S.E. 2d 296 (2012), the Court affirmed the denial of benefits to a Spartanburg County Sheriff's deputy who developed psychological symptoms after he shot and killed a suspect who had attempted to assault him.

The Court held it was bound by law to deny benefits because the act of drawing his service weapon and shooting a dangerous suspect was clearly within the normal duties of Bentley's job. Therefore, killing a suspect was not extraordinary and unusual under the statute. Under current SC code section 42-1-160(B), stress or mental illnesses/injuries arising out of or in the course of employment, that are unaccompanied by a physical injury, are not considered a personal injury, unless the employee can show that the employment conditions were extraordinary and unusual compared to normal working conditions.

Mike Chase
Legal Advisor, SCSIA

In calling for change, the Court noted advances in medical science make it easier to diagnose and verify the validity of mental-mental injuries, reducing the potential for increased fraudulent claims. As the court pointed out, historically mental-mental injuries have been viewed as easier to falsify than physical injuries.

The Court doesn't think removing the extraordinary and unusual requirement in South Carolina will increase litigation to the extent suffered by California (7-fold increase that raised costs, burdened the courts, and unduly interfered with the hiring and firing of workers) because our statute will still require the claimant prove causation to the job. The court said the extraordinary and unusual requirement should only remain for normal employer/employee personnel relations such as disciplinary actions, work evaluations, demotions, terminations, etc.

However, the Court seems to miss the point of why the requirement of extraordinary and unusual was implemented (first by case law and later codified). It had nothing to do with the diagnosis and verification of an injury, or causation to the job, but instead added a limitation to the breadth of coverage for this type of injury under workers' compensation.

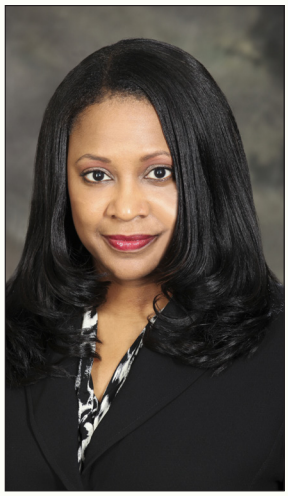
Removing the extraordinary and unusual requirement would expand coverage for mental-mental injuries to normal working conditions. For example, depression, anxiety, and other symptoms resulting from the stress of normal job activities could become compensable injuries. Even where the stressful normal working conditions were known or anticipated at the time of hiring, employees could claim the conditions caused a compensable mental injury, and they are entitled to comp benefits.

As conceded by the Court, should South Carolina make this change we would join a minority of 5 states (Hawaii, Michigan, New Jersey, New York, and Oregon) who do not require the unusual and extraordinary condition for a claim to be found compensable.

H-3147 also deletes the requirement that causation between the job stress and the mental injury be proven by medical evidence. This would be a big change. Will subjective testimony such as what was initially allowed in California be enough? Could a claimant simply testify about his or her feelings that the normal working conditions were stressful? Any personal injury lawyer worth his salt will be able to create an argument that any regular job has stress, and therefore may result in a compensable mental-mental injury.

All indications are should this bill become law employers will likely see a large increase in mental-mental claims, as virtually no normal work activity would be off limits for a stress claim.

President's note



TOSCA WALLS
President

Lowering the bar on stress claims

House bill 3147 threatens to rock South Carolina employers because it would lower the bar on mental stress claims, as explained so ably by our legal advisor elsewhere in this newsletter. The South Carolina Self-Insurers Association is opposing this ill-considered measure which, as of now, appears to be on a fast track.

Employers should ponder the implications of this bill. As experienced comp lawyer Stan Lacy puts it on his firm's blog, "any employee who is unhappy in his job can claim mental injury and, if he can find a psychologist or psychiatrist to agree, compensation could go on for 500 weeks. New employees with pre-existing mental illness can claim the employment caused their condition to become symptomatic."

Also, Lacy continues, "employers could become liable for an employee's depression, psychoses, and phobias. Does this sound like the no-fault system envisioned to compensate employee for injuries by accident arising out of and in the course of employment?"

On a separate note, we hope you are making plans to join us at our Members-Only Forum in Litchfield Beach from April 10-12. You will hear more about any pressing legislative issues and a good deal about the sweeping changes in healthcare coming our way.

Until next time,

Tosca

Members-Only Forum 2013

Comp and healthcare reform

This is the year when the nation wakes up to the realities in the 2010 Affordable Care Act. Some are predicting workers are likely to wake up with a roar when their employers drop health insurance, and when the workers realize they must purchase coverage on their own or pay a fine.

A business that drops health coverage can avoid paying any penalties if it has fewer than 31 full-time employees. Lots of small-business employers are figuring how to replace full-time employees with part-timers, *Fortune* says.

Insurance coverage is only one broad area undergoing a transformation. Another startling development is the exodus of physicians from private practice to hospital employment. As recently as 2005, more than two-thirds of medical practices were physician-owned. The consulting firm Accenture forecasts by the end of 2013 the reverse will be true - only 36% of physicians will be in private practice.

Analysts also foresee fewer hospitals. "We probably have about 30 percent more capacity than we need, and that's being liberal. If you were being very aggressive, you'd push that to maybe as much as 40 percent," Paul Keckley, executive director of the Deloitte Center for Health Solutions, recently told *Hospitals & Health Networks*.

Above all, there is the reality the U.S. cannot afford its healthcare system. It is unclear what will happen first: fixed payments to hospitals under a pay-for-performance model, a shift to a single-payer system, or a move towards a restrictive healthcare system with payment guaranteed only for evidence-based measures. Some analysts would say the correct answer is: all of the above.

Can workers' comp stay untouched by these powerful developments? Can we continue to have a two tier-system? These are some of the issues we will explore in our annual conference. "This is a part of the program the audience really enjoys because they typically see three or four negotiating styles. I hope they take away useful pointers on how to organize their thoughts and plan their strategy," he adds.

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

SMART Act aims to end Medicare disputes

continued from page 1

As various observers have reported, the SMART Act does the following:

- Establishes a 3- year statute of limitations for Medicare conditional payment claims;
- Allows parties to obtain a final conditional payment claim amount prior to a settlement, judgment or award;
- Removes the requirement for social security numbers for Section 111 Reporting;
- Provides a right of appeal for insurance companies and self-insureds or conditional payment claims/liens;
- Makes issuance of Section 111 penalties discretionary; and
- Establishes minimum thresholds for Medicare to seek recovery.

The American Health Lawyers Association notes the SMART Act will streamline the process because of better reporting and reimbursement requirements, and focuses on strengthening tools for determining liability for conditional payments made by Medicare. The group adds among other provisions, the SMART Act:

- Accelerates the processing of Medicare conditional payment reimbursement by requiring the Centers for Medicare & Medicaid Services to provide the Medicare reimbursement amount within 65 days of a request (though a 30-day extension applies at the Secretary's discretion).
- Removes the automatic imposition of a $1,000-per-day civil monetary penalty for non-compliance, and instead vests the Secretary with discretionary authority to impose a penalty "up to" that amount.
- Requires the Secretary to establish a website through which beneficiaries and plans can access up-to-date Medicare claims and payment information and download a "statement of reimbursement amount" on payments for MSP claims. A statement of reimbursement obtained from the website during a "protected period" can be relied upon by the beneficiary/plan as the final conditional amount subject to recovery by CMS.
- Requires the Secretary to modify MSP reporting requirements to provide that "applicable plans" are permitted but not required to access or report beneficiary social security numbers or health identification claim numbers.

The American Health Lawyers Association concludes "on the whole, the SMART Act appears to improve MSP efficiencies and has the potential to improve the predictability of MSP liabilities by ensuring that affected parties have accurate, up-to-date information and limiting the number of years Medicare can look back to achieve MSP recoveries."