COMPNEWS

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Opt-out comes to South Carolina

A Texas-based organization supported by Walmart, Best Buy, Lowe's, and other multistate employers, is exploring pushing for legislation in South Carolina to allow employers to opt out of the workers' compensation system.

The Association for Responsive Alternatives to Workers' Compensation (ARAWC) held an exploratory meeting in March in Columbia, and has also met with the South Carolina Workers' Compensation Commission. At this point there are more questions than answers about how the opt-out plan could work, according to Commission chairman Scott Beck.

ARAWC was among those pushing for an opt-out provision in Tennessee this year. The bill failed to pass but got some attention from supporters and critics. To date, only Texas and Oklahoma allow employers the option of not carrying state-mandated workers' compensation coverage.

ARAWC has said it sees several southeastern states as fertile territory receptive to its opt-out alternative. The group is a trade association of employers who've opted out in Texas and Oklahoma and want to do the same elsewhere.

According to media reports, ARAWC is also supported by Safeway, Macy's, Kohl's, and Sysco Food Services, among other large employers. The group's members include broker AmWins Group, Great American Insurance Group, and Sedgwick. ARAWC offers various levels of membership, ranging from Full Member ($25,000 annual dues) to Friends of ARAWC ($1,000 annual dues).

Opt-out provisions recently received harsh treatment from **Mother Jones**, the liberal but well-regarded publication. It noted 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.

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.

The Center for Justice & Democracy at New York Law School also noted the enormous discretion employers enjoy under opt-out plans: An employer can decide whether a worker qualifies for any benefits. It can refuse to approve any treatment. It can completely deny compensation for certain kinds of disability.

"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.

Legislation introduced in Tennessee this year specified the following minimum benefits:

- Medical expenses for up to 156 weeks or three years, up to $300,000 per employee (amended to $500,000).
- Temporary disability starting on the fourth day of disability of at least 70% of the employee's average weekly wages but up to 110% of the state's average weekly wage for at least 156 weeks.
- Death and scheduled dismemberment benefits up to $300,000 per employee.
- A combined single limit that is at least $750,000 per employee and $2 million per occurrence.

The bill allowed workers to sue for higher benefits, including economic and non-economic damages.

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Re-Hearing allowable

The South Carolina Supreme Court recently reversed the Court of Appeals decision that motions for rehearing are not permitted before the appellate panel of the Commission on review of a single commissioner's decision.

In the case of Rhame v. Charleston County School District, Op. No. 27516 (S.C. Sup. Ct. filed April 22, 2015) Rhame filed for workers' compensation benefits. The single commissioner found the claim compensable. The School District sought review before the appellate panel of the Commission and they reversed denying Rhame's claim.

Rhame filed a motion for rehearing before the Appellate Panel of the Commission. The Appellate Panel ultimately denied his motion for rehearing and Rhame then filed his notice of appeal with the Court of Appeals. The Court of Appeals dismissed Rhame's appeal claiming his notice was not timely made pursuant to Rule 203 of the South Carolina Appellate Court Rules as it was filed more than thirty days after the Appellate Panel's "initial" denial of the claim.

Rhame appealed to the South Carolina Supreme Court arguing that section 1–23–380(1) of the South Carolina Code affords him the right to seek rehearing before the Appellate Panel of the Commission following review of a single commissioner's decision. Since the Workers' Compensation Commission is a "creature of statute" it has only the authority granted to it by the South Carolina Legislature. The Supreme Court, in this case was tasked with interpreting section 1-23-380(1) to determine whether the Legislature intended to grant the Commission the authority to entertain motions for rehearing.

Section 1–23–380(1) provides: "Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, ***if a rehearing is requested***, within thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency and all parties of record." (Emphasis Added).

It has long been the law in South Carolina that "when a statute's terms are "clear and unambiguous on their face there is no room for statutory construction and a court must apply the statute according to its literal meaning." The Supreme Court found the language of section 1–23–380(1) to be clear and unambiguous concluding that the Legislature, by including the phrase ***"if a rehearing is requested,"*** intended to allow motions for rehearing before all administrative agencies governed by the Administrative Procedures Act (APA), including the Workers' Compensation Commission.

The Court cited the case of Lark v. Bi-Lo, Inc., 276 S.C. 130 (1981), noting that the purpose of the APA was "to provide uniform procedures before State Boards and Commissions." This type of uniformity if favored as it promotes judicial economy by giving administrative agencies the chance to correct their mistakes before cases have to go to court.

The Court noted that while recognizing the right to file a motion for rehearing to an Appellate Panel, it is not mandatory in order to exhaust administrative remedies. The Court also relied on Chapter 67 of the South Carolina Code of Regulations in support of its decision. Under the Commission regulations, merit-based motions (such as a motion for rehearing) are specifically not allowed before a single commissioner. Whereas, the regulations contain no provision which disallows merits-based motions to the Appellate Panel. An Appellate Panel is considered the ultimate fact finder.

Mike Chase
Legal Advisor, SCSIA

Finally, the Court opined that the regulations of the Commission clearly must envision a procedure for seeking rehearing before the Appellate Panel because it expressly incorporates Rule 203(b)(6), SCACR titled "Appeals from Administrative Tribunals" and which provides the notice of appeal shall be served "within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the

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President's note

Val Rosser
President

A new venue for 2016

Almost everyone who completed the evaluation sheet we handed out at the end of our recent Members-Only Forum said it was an outstanding conference. We were especially pleased to hear from newcomers that they felt welcome and at home.

This is a compliment we receive every year: outside speakers and first-timers all comment on the camaraderie and graciousness that distinguishes our conference from others. We hope we can keep intact this traditional charm, along with making the necessary adjustments to make our conference more meaningful to our members.

Litchfield Beach & Golf Resort, where we have been convening for more than 25 years, recently informed us our traditional meeting rooms won't be available next year because of extensive construction. We are considering moving the conference to Pawleys Plantation. The catch there is Pawleys is not large enough and may not be able to accommodate all of us, unless we can figure out how to make the best use of their two-bedroom and three-bedroom units.

We are working on it, and will let you know once we've sorted out all the details.

Until next time,

Val

OSHA, major publications slam workers' comp

Even as employers are convinced they are paying too much for workers' compensation, two powerful reports conclude employers are not paying nearly enough and, in fact, are shifting their costs to injured workers, their families, and to safety net programs paid for by taxpayers.

Earlier this year, ***National Public Radio*** and ***ProPublica***, a highly respected news outlet, created a sensation in the workers' compensation industry with an in-depth look at the nuances of workers' comp across the country. The title of the series - *The Demolition of Workers' Compensation* – says it all and ***ProPublica*** spells it out:

"Over the past decade, states have slashed workers' compensation benefits, denying injured workers help when they need it most and shifting the costs of workplace accidents to taxpayers. The changes, often passed under the banner of "reform," have been pushed by big businesses and insurance companies on the false premise that costs are out of control," the publication said.

Robert Hartwig, president of the Insurance Information Institute, aptly responded the media outlets had created a sensation because their report was sensational. He points out workers' comp insurers provide nearly $40 billion in benefits annually to injured workers, hardly an indication of a demolished program, and, thanks to insurers and employers, the workplace has never been safer.

He took the media to task for using inflammatory language to describe cost-control measures such as managed care, formularies of approved drugs, and reduced benefits for workers injured because of intoxication. To describe these measures as "slashing benefits" paints a misleading picture of complex realities, Dr. Hartwig noted.

He also refuted the assertion employers and insurance companies have made up the part about costs being out of control. In fact, between 1991-2009, workers' comp medical costs increased by 277%, while healthcare costs in general rose 100%, and the overall consumer prices rose 56%.

The National Academy of Social Insurance, a nonprofit, nonpartisan organization, also weighed in with a judicious response. "In 2012, the most recent year for which data are available, workers' compensation *benefits* rose by 1.3 percent to $61.9 billion, while employer costs rose by 6.9 percent to $83.2 billion," the group noted.

However, it added, "workers' compensation benefits and costs tend to be pro-cyclical, that is, increasing in periods of expansion (as employment grows) and decreasing in periods of recession (as employment contracts). In examining trends over time, therefore, the Academy considers benefits and costs as a share of total wages. Between 2006 and 2012 benefits per $100 of wages were, in fact, lower than at any time since 1980-81."

Dr. John Burton, one of the most widely respected authorities in workers' compensation, said as much: "The recent changes

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Calendar

November 5, 2015 General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia

Mar. 30– Apr.1, 2016 NC Association of Self-Insurers' Annual Conference. Holiday Inn Resort, Wrightsville Beach

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decision granting or denying that motion."

Based on these conclusions the Supreme Court ultimately found that Rhame's motion for rehearing to the Appellate Panel was proper and stayed the time for filing his notice of appeal for thirty days from receipt of the decision denying the motion.

In a well-written dissent, Justice Pleicones disagreed with the majority citing several reasons. First he believes the majority's reliance on Lark v. Bi–Lo, Inc. is misplaced. It is his opinion that the uniformity addressed in Lark relates to the judicial review of an agency decision rather than establishing procedures applicable in the practice before every administrative agency.

Additionally, he notes that the majority's interpretation of section 1–23–380(1) conflicts with "agency-specific" statutes and regulations setting forth individualized procedures for different agencies. Other agencies, such as the Department of Consumer Affairs and DHEC have specific regulations that grant them authority to rehear decisions.

Yet, there is no such statute or regulation granting that specific authority to the Workers' Compensation Commission. Because the Commission is a "creature of statute," Justice Pleicones believes the absence of such specific statute or regulation is indicative of the Legislature's intent NOT to grant the Commission the authority to entertain petitions for rehearing.

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.

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are "unprecedented in the history of workers' comp. I think we're in a pretty vicious period right now of racing to the bottom."

Perhaps the most surprising observations came from OSHA, in its report titled *Adding Inequality to Injury*. "The costs of workplace injuries are borne primarily by injured workers, their families, and taxpayer-supported components of the social safety net. Employers now provide only a small percentage (about 20%) of the overall financial cost of workplace injuries and illnesses through workers' compensation."

Most astonishing is the agency's conclusion that when researchers have matched injuries recorded by employers on OSHA logs with treatments rendered in emergency rooms or elsewhere, they've found a sizable proportion of injured workers received no benefits through the workers' compensation system.

"For example, a review of all recordable work-related amputations in Massachusetts found that less than 50 percent of the cases received any workers' compensation benefits. A similar California study found that one-third of workers who had amputations that were recorded by their employers had not received workers' compensation benefits," according to OSHA.