

COMP NEWS

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SC Self-Insurers Seek New Identity

The board of the South Carolina Self-Insurers Association is proposing to change the name of the association to the South Carolina Employers' Advocacy Association, and to allow all employers subject to the Workers' Compensation Act to become members, instead of limiting membership to employers self-insuring their workers' compensation obligations.

The board approved the changes at its September meeting, and association members will vote on them at the November 3 General Membership Meeting at Seawell's in Columbia. The association's bylaws specify that changes to the bylaws must be approved by a majority vote of members present at an association meeting.

"We believe the proposed adjustments will enable us to attract members from a much broader base," notes Brian Teusink, president of the self-insurers association. He adds the board deliberated quite a bit before settling on the proposed new name and other changes to the by-laws.

"We ultimately decided that, as with our current name, the absence of the words "Workers' Compensation" do not hinder our ability to fulfill our mission. We also felt that other alternatives which we considered were too similar to other organizations, like the South Carolina Workers' Compensation Education Association, so part of what we are attempting is to differentiate ourselves through the name," he added.

The board also adopted the following vision and mission statements:

- **Vision:** To be the workers' compensation advocate for South Carolina employers.
- **Mission:** We represent, educate, and network to ensure employers are actively engaged in workers' compensation.

A copy of the proposed bylaws, which will be presented at the November meeting, was sent to members in late September. The bylaws specify and explain the South Carolina Employers' Advocacy Association will have various purposes, including, but not limited to:

- To be the employers' voice in workers' compensation matters in South Carolina by advocating for employers before the Workers' Compensation Commission, the General Assembly, and other venues as appropriate.
- To educate and inform association members about legislative and regulatory issues, as well as about other issues and trends in and affecting workers' compensation.
- To work and cooperate with other organizations which have similar interests.

The bylaws also note that in addition to the powers and authority now or hereafter granted by law to nonprofit corporations by the State of South Carolina and subject always to these limitations, the specific objectives and purposes of the association and the powers which it may exercise remain as follows:

- a. To invest and reinvest all or any part of the association's assets in any property, wherever located, including but not limited to, bonds, debentures, notes, secured or unsecured, stocks of corporations regardless of class, or real estate.

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Judicial Notes

Disability benefits

SC Self-Insurers File Amicus Brief

The South Carolina Self-Insurers Association has filed an amicus brief asking an appellate court to overturn a commission ruling which awarded the claimant permanent partial disability benefits far in excess of that permitted by statute.

The case is *Adickes v. Philips Healthcare* and involves a claimant who was injured in a car accident in March 2011 when his car veered off the side of a mountain. He sustained compensable injuries to his head, neck, and bilateral shoulders.

Brooke Payne, a partner with Lueder, Larkin & Hunter, who argued the case before the Commission notes the case has major implications for South Carolina employers as the Full Commission awarded the claimant permanent partial disability benefits commencing nearly three years from his date of accident and continuing for a period of 340 weeks.

Thus, she argues, the claimant is being permitted to receive permanent partial disability benefits up through 487 weeks from his date of accident, even though the applicable statute states “in no case shall the period covered by such compensation be greater than 340 weeks from the date of accident.”

She says “we are dealing with an issue of application of the plain language of the statute, not one of statutory interpretation, and it is our position that the Full Commission Order is in contravention of same. By misapplying the plain language of SC Code § 42-9-20, the SCWCC is continuously exposing Employers and Insurers to significantly higher payouts than our legislature intended.”

To illustrate the significance of this misapplication: under the Full Commission Order as it stands, the Claimant has been awarded **\$239,672.80** in permanent partial disability benefits. Applying the statute properly, with his benefits commenced as of the date he reached permanency (MMI) and limited to 340 weeks from his date of accident (9/26/17), the Claimant would be awarded **\$99,393.72** in wage loss benefits, amounting to a difference of around **\$140K**.

The self-insurers’ amicus brief was prepared by Grady Beard, Nicolas Haigler, and Gibbs Leaphart of Sowell, Gray, Stepp & Laffitte. The brief also argues the Commission did not comply with Section 42-9-20 and, further, did not explain its reasoning for doing so.

“The Commission’s flawed interpretation of Section 42-9-20 produces the inevitable opportunity for an award under this statute to greatly exceed an award of permanent and total disability under § 42-9-10 or § 42-9-30. For example, a Claimant could receive TTD for 499 weeks and then be found entitled to a wage loss award of a “new” 340 weeks. Under this scenario, the Claimant would ultimately receive a total of 839 weeks of benefits - 339 weeks greater than the maximum allowed under the Act for permanent and total disability,” the brief argues.

The self-insurers also caution the appellate court about the slippery slope which will be created by affirming the Commission’s decision, specifically the likelihood that partial disability benefits will routinely exceed permanent and total disability benefits. Worse yet, the consequences of the Commission’s interpretation reach farther, the group contends in its brief.

“There is no incentive for an employer to bring a Claimant back to work after a period of temporary disability if the employer does not reap any financial benefit from doing so and, in reality, may be subjected to higher exposure than if the Claimant were simply found totally and permanently disabled. One can see easily how this is neither good for the employee nor the employer, and surely is not what our legislature envisioned or intended. Thus, the public policy of our State should encourage, not discourage, the ability to have employees return to work from injuries whenever possible,” it adds.



President's note

BRIAN TEUSINK
President

A new path forward

Readers of this newsletter will note we are seeking to rebrand the association by giving it a new name which will help us in broadening our membership base. After extensive strategic planning sessions conducted by the board, we have settled on a new name for the association: the South Carolina Employers' Advocacy Association.

As we reported earlier, we are aggressively challenging the status quo and redefining almost every aspect of the association. Perhaps the most significant change, even beyond the name change, is that we are proposing expanding the eligibility for membership to all employers in South Carolina who are subject to the Workers' Compensation Act. We see our evolving role and mission as serving the broader workers' compensation marketplace, not limiting ourselves to those organizations who are self-insured.

Separate work groups have been evaluating the association's bylaws, vision and mission, website, and social media presence. We will be sharing more details to members at the November 3 General Membership Meeting in Columbia.

All members of the association should have received a copy of the proposed, revised, by-laws, wherein many of the changes being proposed are codified. If you have not received a copy, or if you would like to receive a copy of the existing by-laws, with proposed changes shown in redline format, please contact me directly at bteusink@phts.com

We look forward to seeing you at the General Membership Meeting on November 3.

Until next time,

Brian

Opt-Out Fizzles Out

Oklahoma was the only state in the union which allowed employers to opt-out of the workers' compensation system and there too opt-out has suffered a stinging defeat. In September, the Oklahoma Supreme Court ruled opt-out plans are unconstitutional because they treat one group of injured workers differently from all other injured workers in the state.

The court noted, for instance, most Oklahoma workers have 30 days to report an injury and can request a hearing before a judge. But Dillard's, which opted-out, requires its employees to report injuries by the end of the workday. Employees who disagree with Dillard's about whether or not an injury is compensable must appeal in writing to a committee made up of people picked by the company.

The court used severe language to note opt-out plans give employers a free hand in designing their own workers' compensation system. It said "the clear, concise, unmistakable, and mandatory language of the Opt Out Act provides that, absent the Act's express incorporation of some standard, such employers are not bound by any provision of the Workers' Compensation Act for the purpose of defining covered injuries, medical management; dispute resolution or other process, funding, notices, or penalties."

Over the past couple of years few issues in workers' compensation caught the imagination of the comp community like opt-out plans pushed by the Association for Responsive Alternatives to Workers' Compensation, a Texas-based organization supported by Walmart, Best Buy, Lowe's, and other multistate employers. Legislation was floated in South Carolina, Georgia, Tennessee, Mississippi, West Virginia, Wisconsin, and Illinois, and the concept of opt-out was discussed at numerous state and national forums.

But the hype always exceeded the reality as no state, other than Oklahoma, adopted opt-out legislation.



Calendar

- November 3, 2016** General Membership Meeting,
SC Self-Insurers Association.
Seawell's, Columbia.
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- March 29-31, 2017** Annual Conference,
NC Association of Self-Insurers.
Holiday Inn Resort, Wrightsville Beach.
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- April 5-7, 2017** Annual Conference,
SC Self-Insurers Association.
Hilton Myrtle Beach Resort.

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- b. To acquire by lease, option, purchase, gift, devise, or conveyance, or otherwise to hold, enjoy, possess, pledge, mortgage, encumber, rent, lease, sell or dispose of real property or any interest therein or do any acts incidental to or necessary to the accomplishment of any of the above as may be deemed to be in the interest of the association.
- c. To acquire by lease option, purchase, gift, devise, or conveyance, or otherwise to, hold, enjoy, possess and pledge as security, sell, lease, transfer, or in any manner dispose of personal property of any class or description whatsoever; to retain any property, investments or securities originally received by the association or thereafter acquired by it so long as the directors of the association shall consider the retention thereof desirable.
- d. To borrow money and to encumber mortgage or pledge any asset of the association in connection with the exercise of any power vested in the association.
- e. To do and perform all other acts and things which may be necessary or appropriate for the accomplishment of any of the stated purposes of the association.

MEMBERS OF THE ASSOCIATION

Classes of Members. There shall be three classes of members: regular, associate, and supporting. Any issue as to a member's classification will be decided by the board of directors.

- a. Regular members: Any person, firm, corporation, political subdivisions or other entity which, as an employer of individuals working in South Carolina, is subject to the provisions of the South Carolina Workers' Compensation Act (the "Act"). This includes any self-insurance fund, which is defined as any group of organizations which have come together to jointly and severally self-insure their workers' compensation obligations under the Act. Individual members of a self-insurance fund are also eligible to participate as regular members.
- b. Associate members: Any person, firm, corporation, or other entity providing services in South Carolina, the purpose of whose services are to prevent workers' compensation claims or mitigate the cost of workers' compensation claims which do occur.
- c. Supporting members: Any organization, the primary purpose of which is to insure the workers' compensation obligations of other organizations through a commercial insurance transaction.

Supporting members shall not be allowed to vote or serve on the Board of Directors.

Any organization desiring to become a member of the association shall apply for membership and, by a majority vote of the board of directors, shall be granted membership as a Regular, Associate, or Supporting member as designated by the board of directors.