

End of May

Commission moving to Main Street

The South Carolina Workers' Compensation Commission will move to 1333 Main Street (5th floor) towards the end of May 2009. The move is tentatively planned for May 28 & 29.

"We are working through the logistics of the move," says Gary Cannon, executive director at the Commission. "We may be closed for business for a short period of time during the actual move, but the telephone system won't be offline at all. Also, all telephone numbers and email addresses will remain the same," he adds.

The agency will occupy less office space in its new location – about 28,000 square feet versus the 32,000 square feet it now occupies – but all employees would be on one floor and the hearing room will be larger, Mr. Cannon says. Parking will be a little different at the new location. Spaces will be available behind the building, however visitors will have to pass through a security gate and expected to park only in designated spaces.

"We have been assured adequate number of spaces in the surface lot, and any overflow can be accommodated in the nearby parking garage," Mr. Cannon says. The move to the new location is expected to save the agency over \$587,000 over seven years.

Even small savings would be a big blessing at the financially strapped Commission. Like almost all state agencies, the Commission has endured budget cuts since the start of the current fiscal year on July 1, 2008. The 21.2% cut in the budget means the agency is unable to fill five open positions. On the bright side, that has enabled the Commission to avoid laying off or terminating employees.

"We think we will be okay if we don't have to face any more cuts.

And we do expect to see additional revenue from the recent increase in fines and penalties," Mr. Cannon says. The agency anticipates raising approximately \$800,000 from the new penalties that went into effect April 1, 2009.

Fines for late filings have increased from \$100 to \$200 per occurrence, while the

fine for carriers that fail to provide notice of final payment increased from \$25 to \$50. Failure to provide a report of coverage to the commission within 30 days of the inception date of the coverage now incurs a minimum fine of \$100 and a maximum fine of \$250.

Apart from the impending move and coping with the impact of budget cuts, the agency is concentrating on scanning and digitizing its files, which will eventually reduce its need for storage space. Mr. Cannon says he is also looking into cross-training agency employees so they can fill a variety of roles.

"You have to adjust your business processes to adapt to the resources. All organizations today have to be flexible and nimble," he says.

A graduate of the University of North Carolina at Chapel Hill, where he earned a Master's in Public Administration, Mr. Cannon previously worked as a lobbyist for the Municipal Association of South Carolina. He also served stints as a city manager for Beaufort and Camden.

Since joining the agency in March 2009, Mr. Cannon says he has been focusing on improving internal communications at the agency. He has met with all the commissioners in one-on-one sessions and groups of employees by division. "I want to know what are the opportunities and what are the challenges we face at the Commission. If anyone has a better way of doing things we want to know about it," he says.



Gary Cannon

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APPEALING* RESULTS

By Sam Painter

Listed below are brief summaries of points of law made by South Carolina appellate courts in recent decisions that are of general interest to workers' compensation self-insurers:

- Where a single commissioner had found that left hip symptoms were not work related and there was no appeal, res judicata barred a later change of condition claim alleging the same symptoms. *Mead v. Jessex, Inc.* [Court of Appeals].
- Form 25-S must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured. *Barton v. Higgs* [Supreme Court].
- An appellate panel's finding that a truck driver's heart attack was not induced by unexpected strain or overexertion of the duties of his employment or by unusual and extraordinary conditions of employment, was supported by substantial evidence. *Jordan v. Kelly Company, Inc.* [Supreme Court].
- Substantial evidence in the record supported the Commission's denial of a special education teacher's claim of panic attacks and post traumatic stress disorder allegedly due to unusual and extraordinary conditions of her employment. *Tennant v. Beaufort County School District* [Supreme Court].
- The mere fact that a carrier was also engaged in an administrative proceeding regarding the experience modifier did not divest the circuit court of its power to hear the carrier's claims for breach of contract and fraud against its insured. *Capital City Insurance Company v. BP Staff, Inc.* [Court of Appeals].
- Workers' compensation as an exclusive remedy is an affirmative defense that must be stated in the defendant's answer or it is waived. *Dillon v. Frazer* [Supreme Court].
- An appellate panel is the ultimate fact finder, and when facts conflict, the findings of the appellate panel are conclusive. *Bartley v. Allendale* [Court of Appeals].
- When a lifetime benefit recipient died of unrelated causes after 274 weeks, [and the

President's Column

Recession's uneven impact



David Keller

You don't need me to tell you that the current recession is playing havoc with lives, careers, and fortunes all over the country. Virtually every sector of the economy has felt the tremors. Indeed, some of our most fundamental and iconic institutions have been shaken to the foundations.

The South Carolina Self-Insurers Association is also seeing the impact of the recession. We have fewer registrations for the upcoming Members Only Forum than usual. But, given the breadth of the economic woes in America, the association is doing surprisingly well.

We have almost as many sponsors for this year's conference as we had last year, and, the same number of exhibitors. I also anticipate we will pick up additional registrants for the conference as we get closer to the event.

The program for this year's Members-Only Forum is one of the best, if not the best, we have ever had. Our speakers will

discuss winding down of the Second Injury Fund, Medicare Set-Asides and Medicare's new reporting requirements, labor law changes, wellness programs, and the new imperatives for risk management. I have also asked our legal advisor to update the association on a new Department of Revenue case which may have far reaching implications on appellate practice.

In addition, we will have an informative session with Commission Chair Andrea Roche and a panel of commissioners. Also back by popular demand: guitarist-singer Bil Krauss and chefs Hugh McAngus and David Benenhaley.

We are grateful to our speakers for making the conference a success, and we very much appreciate the support of our sponsors and exhibitors. You make it possible for the South Carolina Self-Insurers Association to be the employers' advocate in workers' compensation. If you haven't already signed up for the conference, please strongly consider it. I guarantee you will not be disappointed. ■

carrier voluntarily agreed to pay the widow the unpaid balance of 500 weeks less credit for a previously paid attorney's fee] the employee's widow was not entitled to the unpaid balance of an award based on the claimant's life expectancy, and the carrier was entitled to credit for an attorney's fee already paid from the end of the lifetime award. *Floyd v. C. B. Askins & Co.* [Court of Appeals].

*And sometimes not so appealing. These points of law are presented subject to the following disclaimer: Fairly summarizing a point of law in a sentence or two is often difficult. Sometimes it is impossible. Before relying on any of the points of law discussed, you should review the entire decision, and check to see if the case has been subject to further appeal. ■

Fee schedule dispute

Commission, surgery centers feud now in third year

Surgery centers have been fighting the Commission's new Medicare plus 40% payment system from the moment the agency announced it in October 2006. Several court fights later, the surgery centers remain victorious, and continue to charge what they were charging before the new payment system became effective.

The successful litigation to date has likely netted the surgery centers millions of dollars in charges they would have lost had they accepted the Commission's payment system. Another way of looking at it is to note, as the Commission does, that employers and carriers would have saved nearly \$4.4 million per year had the payment system applied to the surgery centers.

The Commission maintains the new payment system is necessary because both inpatient and outpatient charges in South Carolina were going through the roof.

Specifically, from 2000 to 2006, the number of workers' compensation cases seen by ambulatory surgery centers increased 64%, while total charges increased 324%.

The surgery centers have maintained in court they were denied due process when the Commission implemented its new system. Speaking broadly, under the new system providers can charge no more than 140% of what Medicare would pay for the service. That is, if Medicare would have paid \$100 for a procedure, providers can charge \$140 for treatment provided workers' compensation cases.

Earlier this year, Judge John M Milling, presiding judge Fifth Judicial Circuit, ruled the surgery centers were denied due process. The court said before making changes to the payment system, the Commission should have promulgated a new regulation and had it approved by the General Assembly. This process would have given involved parties

appropriate notice and warning of impending changes.

Judge Milling concluded the Commission cannot enforce the new payment system against the surgery centers until it develops a regulation that is in accordance with the Administrative Procedures Act and has been reviewed and approved by the General Assembly. "The adoption of a Regulation will afford the Plaintiffs with certain due process rights, including notice, an opportunity to be heard, and the opportunity for review and approval by the General Assembly," the judge ruled.

The Commission has appealed the judge's order before a Court of Appeals and also requested the state Supreme Court to intervene in the matter. In the meanwhile, the surgery centers can continue to bill as before. ■

A new wrinkle for HR, workers' compensation

There's no shortage of advice on how to prepare for the possibility of a severe swine flu pandemic, even as scientists are unsure whether this strain of flu will be more severe than the seasonal flu, which kills about 36,000 people in the U.S. each year.

The Risk and Insurance Management Society, among others, is encouraging employers to develop and rehearse a business continuity plan. "Consider widespread employee absenteeism, possible disruptions in third-party deliveries of goods and services, and also the inability to do business in flu-affected areas," RIMS warns.

The *HR Specialist* notes that while employers would be expected to make reasonable efforts to keep contagious workers away, "disability laws may limit your right to ask employees about their medical conditions or require them to take medical exams. In addition, you must consider employees' privacy rights and whether falsely accusing someone of having a pandemic flu could be defamatory," it adds.

"Employers must also address their legal obligations to employees who must miss work for medical reasons. You may be legally obligated to provide leave and restore employees to their jobs when they return from leave," *HR Specialist* says. Just as employers may have to take steps to keep contagious workers away, so they

may have to consider how to deal with an employee who refuses to come to work out of fear.

"In particular, OSHA law protects employees from retaliation if they refuse to work because of good-faith concerns about workplace safety," the publication notes.

The law firm of Fulbright & Jaworski recommends employers begin considering the following issues:

- ◇ Safety practice and policies
- ◇ Attendance and leave policies - anticipate significant changes

(Continued on page 4)

CALENDAR

- May 13-15, 2009* Members Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort.
- November 5, 2009* General Membership Meeting, SC Self-Insurers Association. Seawell's, Columbia.

Registration open for Members Only Forum

There is still time to register for and exhibit at the self-insurers' annual conference, scheduled for May 13-15 at Litchfield Beach & Golf Resort.

This year's Members-Only Forum promises to be exceptionally relevant given the several new issues swirling around workers' compensation. These include winding down of the South Carolina Second Injury Fund, Medicare's new reporting requirements, potential impact of swine flu on workers' compensation, and greater interest among employers in developing wellness programs.

The program includes a panel discussion with several commissioners from the South Carolina Workers' Compensation Commission.

You can see the program and registration list at www.scsselfinsurers.com ■

A new wrinkle for HR, workers' compensation

(Continued from page 3)

- ◇ Review vendor contracts with suppliers
- ◇ Consider reimbursement for workers placed in isolation or quarantine (if not addressed in sick leave policies)
- ◇ Plan for liability/immunity for volunteers providing assistance or services to persons in isolation/quarantine
- ◇ Understand HIPAA compliant exchange of protected health information

As with earlier fears about AIDS and SARS and avian flu, it is the uncertainty of what might develop that is fueling fears about swine flu. Public health authorities emphasize the situation is rapidly changing. "You don't know if this is a virus that will fizzle in a couple of weeks or one that will

become more or less virulent or severe in the diseases it causes," says Dr. Richard Besser, acting director of the Centers for Disease Control and Prevention.

On April 30, the *Los Angeles Times* reported "scientists studying the virus are coming to the consensus that this hybrid strain of influenza -- at least in its current form -- isn't shaping up to be as fatal as the strains that caused some previous pandemics.

"In fact, the current outbreak of the H1N1 virus, which emerged in San Diego and southern Mexico late last month, may not even do as much damage as the run-of-the-mill flu outbreaks that occur each winter without much fanfare," the newspaper reported. ■



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