

## A surprisingly tame report from the Legislative Audit Council

Governor-elect Nikki Haley has called for folding the South Carolina Workers' Compensation Commission into the state insurance department. Business groups have raised questions why South Carolina, which once had the third-lowest workers' compensation rates in the country, is steadily losing ground to other states (see p. 4).

The recently released report from the state Legislative Audit Council sheds no light on either of those concerns. The strongest finding from the audit of the Commission seems to be that for five weeks, the Commission held on to checks from fines and assessments that should have been immediately deposited. Commission staff made the deposit within three days of being notified by the audit council.

"From May 1, 2010, through June 4, 2010, the Commission had assessed fines against South Carolina employers and carriers and collected checks totaling more than \$244,000. These checks were not deposited in state accounts," the audit council reports, in violation of state law.

Commission staff planned to deposit the checks in July, at the beginning of the new fiscal year, so the agency would not lose the funds in case the General Assembly prohibited agencies from keeping unexpended funds

at the end of the fiscal year. Staff apparently misunderstood orders from commissioners who had voted unanimously in April 2010 to defer the collection of fines for the months of May and June 2010 until July 1, 2010.

Other than the issue of untimely deposit of checks, the Legislative Audit Council's report covers the following issues:

- Duties of the Commission's ombudsman
- Identifying uninsured employers
- Referring claimants to vocational rehab
- Informal conference process
- Contested case files.

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The Audit Council specified it would review a sample of contested cases to determine what types of benefits are sought by injured workers; the amounts of attorneys' fees requested by claimants' attorneys and approved by the commission; the attorneys' fees of employers; and the general compliance of files with state laws and regulations.

The Audit Council also said it would "determine the Commission's compliance

with approving attorney fees and costs. Also, compare attorney fees and costs to those allowed in other states." Further, the audit will "compare South Carolina's method of determining disability (including AMA impairment ratings, age, occupation, restrictions of injured workers, etc.) to those of other states."

But in the final report, released November 23, the audit council specifies "we did not examine the amount attorneys may charge claimants in South Carolina as compared to other states. Also, we did not compare the method of determining disability in this state, including the use of American Medical Association impairment ratings, to those in other states."

Asked about the discrepancy, Thomas Bardin, director of the audit council, said "all I can tell you is that maybe I did not express myself very clearly" in the earlier letter to the commission.

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## Self-insurance declines, but holds its share of the market

**T**he number of individual self-insurers in South Carolina declined to 99 earlier this year, the lowest number in at least 25 years, according to the South Carolina Workers' Compensation Commission.

At its peak in 1996 or so, the self-insurance market in the state had 197 individually self-insured employers and 17 self-insured funds. Currently there are 9 self-insured funds active in the state.

Despite the decline in numbers, self-insurance retains almost 28% of the total workers' compensation market in South Carolina, compared to about 32% of the share in the heydays of self-insurance.

"The sharp drop in numbers is not because self-insurance is not an attractive option. It is because we have fewer employers. South Carolina, like the rest of the country, has lost so many manufacturing jobs," notes W.C. Smith, director, self-insurance at the Commission.

The U.S. Department of Labor reports that over the last decade the U.S. has lost nearly 32% of manufacturing jobs. For example, South Carolina has lost 18 of 21 individually self-insured textile manufacturers due to closures. "There is very little new industry coming into the state. Manufacturers are offshoring, consolidating, merging, and downsizing, if they are not going out of business," Mr. Smith says.

The long, ongoing soft market in workers' compensation appears to be playing only a negligible role. Mr. Smith says a hard market is more of a stimulus than a soft market – few employers drop self-insurance in a soft market but more employers look to self-insure when commercial rates go up. ■

### *President's Column*

## Farewell and hello

**T**his is my final column as President of the South Carolina Self Insurers' Association. It hardly seems like it has been two years since I was elected as your President. My tenure has, gratefully, been both quiet and productive. The big changes to Title 42 came in mid-2007 and since then the legislature has been unwilling to take up any workers' compensation issues.

It appears to me this trend will continue, as it is likely the budget deficit and redistricting will keep the General Assembly totally occupied for the 2011 session. The big issues for us will likely be funding concerns involving the Commission, the orderly closing of the Second Injury Fund and appointments to the Commission by Governor-elect Haley.

As I leave the office of President, I can step back and look at our Association with continuing pride. The Self Insurers' has always been a vibrant group and an important part of the Workers' Compensation system. I believe that role is bigger and better now than it has ever been. We have had excellent Members' Only conferences for the last several years and outstanding General Membership meetings. The planning for the 2011 Members' Only is well underway and promises to be better than ever.

We have a positive bank balance and a certificate of deposit set



*David Keller*

aside for a "rainy day". We have an incredibly hard working Board which is committed to the interests of self insurers and the smooth and fair operation of the Compensation system. We have a good working relationship with the Commissioners and employees of the Commission. In short, I believe your Association is in great condition and we are ready and prepared to deal with any emergency that might arise in the system.

Under a bylaw change passed three years ago, I will remain on the Board as Immediate Past President for two years. I look forward to the opportunity to continue to serve you and to be associated with each of you, individually and as the South Carolina Self Insurers' Association. Thanks to you for the chance you gave me to serve. ■

*James v. Anne's, Inc.*

# A limited holding with unintended consequences

By Kirsten Barr

Many in the legal community were stunned by the unanimous decision issued by the South Carolina Supreme Court on October 25, 2010 in the case of *James v. Anne's Inc.* (Opinion No. 26762). However, careful consideration reveals that this case does not fundamentally alter workers' compensation law, or otherwise expand the powers of the South Carolina Workers' Compensation Commission.

Instead, the Supreme Court merely reaffirmed the Commission's role as a fact-finder under S.C. Code § 42-3-180 and the Commission's authority to calculate the commuted value of future installments of compensation under § 42-9-301. The Supreme Court was careful to emphasize that S.C. Code Ann. § 42-9-10 restricts the future value of most awards to 500 weeks of compensation at the established compensation rate.

However, the Supreme Court recognized that some claimants wish to prorate the maximum future award over their statutory lifetime, so as to avoid application of the Social Security Disability offset. In such cases, the Commission is authorized to calculate the commuted value of future installments of the award over the claimant's statutory lifetime.

Consider a 50 year old man with a \$500.00 compensation rate who wishes to

have his award of 500 weeks paid in a lump sum. The Commission would make a finding of fact that he is entitled to 500 weeks of compensation at the rate of \$500.00

per week; however, he is not entitled to a \$250,000 lump sum payment.

Instead, the accounting mechanism established in S.C. Code § 42-9-301 and S.C. Code Reg. 67-1605 requires that the Commission apply a 5% per annum discount rate to the 500 week stream of benefits and as a matter of law that the lump sum award is \$204,147.85.

However, if he so requests, the Commission may make a finding of fact that the future value of his total disability award (\$250,000) should be allocated over his statutory lifetime: 1,517.36 weeks (29.18 years) at the rate of \$164.76 per week. Application of the accounting mechanism established in S.C. Code § 42-9-301 and S.C. Code Reg. 67-1605 to such a finding of fact (i.e., a 5% per annum discount for a period 29.18 years) results in a lump sum award of \$136,589.72 as a matter of law.

As noted by the Supreme Court, the future value of the award (\$250,000.00)

remains unchanged; only the Commission's calculation of the lump sum payment changes because of the Commission's finding of fact that the period covered by the award extends over the claimant's statutory lifetime, not just the balance of 500 weeks.

Because the Commission is not at liberty to disregard the plain terms of either S.C. Code §§ 42-9-10 or 42-9-301, a claimant who wishes to prorate his workers' compensation award for a period greater than 500 weeks should understand that the value of his lump sum payment must decrease proportionately with the

length of the requested proration period.

Not even the Workers' Compensation Commission's "beneficent purpose" can change simple arithmetic or the 5% per annum discount rate and the *James v. Anne's, Inc.* decision should not be interpreted as permitting the Commission to make its findings of fact inconsistent with its conclusions of law under § 42-17-40.

As noted by Justice Beatty, it is "simply a mathematical calculation," and in this case, simple math may result in unintended consequences for claimants wishing to thwart application of federal law. ■

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*Kirsten Barr, an associate at Trask & Howell, notes she frequently lectures on the esoteric nuances of workers' compensation law, occasionally by invitation. She graduated with honors from the University of South Carolina School of Law.*

## CALENDAR

January 19, 2011	NCCI's South Carolina State Advisory Forum. Columbia Metropolitan Convention Center.
April 13-15, 2011	Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort
May 15, 2011	RIMS 2011 Annual Conference & Exhibition. Vancouver

### *Are the 2010 Oregon comp premium rankings credible?*

**T**he South Carolina Chamber of Commerce is among the critics noting South Carolina has the 12th highest workers' compensation premium rates in the country, citing the 2010 Oregon Workers' Compensation Premium Rate Ranking.

Oregon's department of consumer and business services releases the widely reported study every two years. South Carolina has been losing ground essentially in every report since at least 2000, when only two states had lower workers' compensation premium rates.

According to the 2010 rankings, 38 states had lower comp premium rates than South Carolina. But the 2010 snapshot was taken as of January 1, 2010, and does not reflect the 9.8% overall rate decrease in workers' compensation loss costs approved by the South Carolina department of insurance, effective July 1, 2010.

Given that in the most-recent rankings South Carolina is one of 20 states with a premium rate index of \$2.00-\$2.49 per \$100 of payroll, a small change in calculations could mean a big difference. Nevertheless, the trend over the past several years is unremittingly unfavorable to South Carolina.

In 2002, only 9 of 51 jurisdictions in the U.S. had lower workers' compensation premium rates than South Carolina (the Oregon report includes the District of Columbia). In 2004, 12 states had lower

premium rates than South Carolina and two years later 25 states had an advantage. In 2008 and 2010, 38 states had lower comp premium rates than South Carolina. In 2000, only Indiana and Virginia had lower premium rates than South Carolina, according to the Oregon rankings. ■

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### **A surprisingly tame report from the Legislative Audit Council**

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The audit council was directed to audit the Commission by a dozen or so state senators. In a letter posted on the website of the South Carolina Civil Justice Coalition, the senators specified "we desire an inquiry into the operations, systems and management practices of the WCC as they relate to the consistency of workers' compensation awards and the reasonableness of attorneys' fee awards."

During her campaign earlier this year, governor-elect Haley said she would appoint commissioners who "will have committed to awarding damages consistent with the American Medical Association (AMA) guidelines. Once the board has been balanced through gubernatorial appointments, the WCC should be folded into the Department of Insurance to ensure greater accountability in the process and remove the political obstacles to a business-friendly WCC." ■



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