

COMP NEWS

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Feds slam SC OSHA State cries foul

South Carolina's OSHA program needs significant improvements and "increased Federal oversight and technical assistance may be needed to improve South Carolina's performance," says federal OSHA in its recent evaluation of the state-run program.

Among the problems cited by the U.S. Department of Labor's Occupational Safety and Health Administration:

- Case file documentation is largely absent. South Carolina relies on checklists and fill-in-the blank forms without any supporting detail.
- Fatality cases have minimal if any narrative descriptions. Employee interviews are not documented and sometimes not conducted when language is a barrier.
- High severity serious violations are misclassified as low.
- Employer abatement verification is not required for cases settled at informal conference.
- Penalty policies result in multiple reductions which lead to very low average penalties for serious violations.

For instance, federal OSHA says, South Carolina gives a 15 percent penalty reduction for abatement of serious violations during inspection, even if only interim abatement measures are taken. Also, the state provides a 60 percent reduction under the "Employer Penalty Option" policy, even in fatality cases, in return for promise of general safety and health actions. —continued on page 4

SC Second Injury Fund

Steady reduction seen in assessments

Second Injury Fund assessments, which totaled around \$89 million this year, are likely to drop to about \$77 million next year and decline similarly in subsequent years, says Mike Harris, deputy director of the fund.

His assessment is at sharp variance with that of public actuary Marty Simons, ACAS, MAAA, FCA whose recent report to the fund foresees sharp spikes and declines in assessments. Mr. Simons also calculates that as of December 31, 2009, the Second Injury Fund has total liabilities of \$295 million.

In his report *Analysis of Liabilities and Estimate of future liabilities And assessments Of The South Carolina Second Injury Fund*, Mr. Simons foresaw assessments of nearly \$106 million in 2010, followed by assessments of \$44 million or so in 2011, only \$1 million in 2012, and rising to about \$15 million in 2013.

The Second Injury Fund commissioned the actuarial report at the request of state legislators.

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Case Law Update

Long v. Sealed Air Corp. will result in increased time and expense for employers, argues Mike Chase, the association's legal advisor. Employers will be forced to return to the Commission whenever a lower court remands a case for further proceedings.

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Annual Conference

Motivational speaker Fred Broder, PhD, will open this year's Members-Only Forum with a stirring presentation on how to tap your unrealized potential. The self-insurers' annual conference is set for April 13-15 at the Litchfield Beach & Golf Resort.

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Commission News

The South Carolina Workers' Compensation Commission is convening an ad hoc committee to advise the agency on what should be the maximum allowable payment to healthcare providers for surgical implant devices.

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Judicial Notes by Mike Chase

Long v. Sealed Air Corporation

Court: South Carolina Court of Appeals

Citation: Op No. 4783, 2011 WL 292167 (S.C. Ct. App.)

Filing Date: January 26, 2011

Judges: Chief Justice John C. Few authored the opinion. Justice Thomas E. Huff concurred; Justice John D. Geathers dissented.

Lawyers: For Claimant/Respondent: R. Scott Dover of Pickens. For Defendants/Appellants: Jeffrey S. Jones of Greenville.

Question Presented: Did the lower court err in holding that the claimant provided sufficient 90 day notice of the accident pursuant to § 42-15-20?

Case overview: The claimant alleged an injury by accident to her cervical spine. Defendants asserted her claim was barred by the ninety (90) day notice requirement found in § 42-15-20.

Procedural History:

Single Commissioner (Huffstetler):

The claim is barred by the ninety (90) day notice requirement.

Full Commission Panel (Bass, Lyndon, Williams): Affirmed the Single Commissioner's decision.

Circuit Court (Judge Thomas A. Russo): Initially, the circuit court affirmed the Appellate Panel, but after reviewing the claimant's motion for

reconsideration, the circuit court determined that the claimant had complied with the notice requirement and remanded the case for "further investigation."

Appellate Court Ruling: In a split decision, a panel of the South Carolina Court of Appeals dismissed the case, with the majority opining that the circuit court's order was interlocutory (not immediately appealable). In doing so they indicated "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable."

On the other hand, Judge Geathers issued a lengthy dissent in which he disagrees with the majority. He reasons that the circuit court decision touches upon the "merits" and therefore constitutes a final judgment for purposes of jurisdiction over a Workers' Compensation appeal: "The circuit court's decision that Claimant gave timely notice of her accidental injury to Employer is the type of judgment that is an ultimate decision on the merits because it finally determines some substantial matter forming a defense available to Sealed Air."

Impact: The majority ruling prevents an appeal from a lower court where the order below remands the case to the SCWCC for further proceedings, no matter whether a

final decision has been made on the merits. Although the dissent makes what appear to be valid arguments to the contrary, this is a final decision, as the defendants have opted not to appeal to the S.C. Supreme Court (accurate at press time).

This case will result in increased time and expense in first returning to the SCWCC whenever a lower court remands a case for further proceedings, despite an appealable final decision being made on the merits.



MIKE CHASE
Legal Advisor, SCSIA

** Disclaimer—This case law summary is not intended as legal advice. Contact your lawyer with questions regarding the potential impact upon your particular claim or situation.*



President's note



New year, new look



DAVID BENENHALEY
President

Alert readers will have noticed several changes in this issue of *Comp News*. We have updated the layout and design and given a slightly new name to the publication to better reflect its focus. We welcome any comments and suggestions you may have on how we can make this newsletter more useful.

More substantively, we have revamped our case law column under the direction of Mike Chase, our

recently appointed legal advisor. Mike replaces Sam Painter, who retired last year after decades of service to our association. Mike and his law firm, Turner Padgett Graham & Laney, have long been our enthusiastic supporters and it is a pleasure for me to present Mike in this issue.

Don't miss this year's annual conference, set for April 13-15 at Litchfield Beach. For the first time ever, we will open the proceedings with a motivational talk by professional speaker Fred Broder of Atlanta. Look for the program announcement and registration details in the next couple of weeks. We have plenty of room for sponsors and exhibitors.

Until next time,

David

Fred Broder to highlight conference

Motivational speaker Fred Broder, PhD, will open this year's Members-Only Forum with a stirring presentation on how to tap your unrealized potential. The self-insurers' annual conference is set for April

13-15 at the Litchfield Beach & Golf Resort.

"My goal is to motivate people to take a second look at how they approach work and relationships. I believe it is indeed possible to have a better tomorrow."

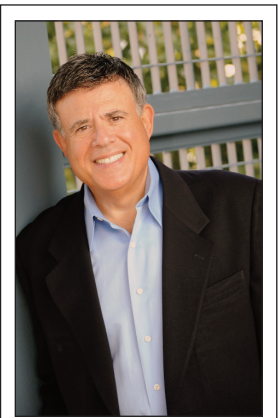
Fred Broder, PhD

The popular speaker has carried his uplifting but down-to-earth message to audiences at Bank of America, Kaiser Permanente, Allstate Insurance Company, Bayer Corporation, and Holland

America Cruise Lines, among others. "My goal is to motivate people to take a second look at how they approach work and relationships. I believe it is indeed possible to have a better tomorrow," he says.

With a doctorate in curriculum development and instruction, Dr. Broder had a successful career as an educator and, later, as director of sales training for a division of a Fortune 500 company. Encouraged by his audiences' response to his message and delivery style, he eventually developed a career as a professional speaker. For more background, visit www.fredbroder.com

We will send you the conference program and registration details in the next couple of weeks.



FRED BRODER
Motivational Speaker



Calendar

- March 23-25, 2011** Annual Conference, North Carolina Association of Self-Insurers. Holiday Inn Resort, Wrightsville Beach, NC.
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- April 13-15, 2011** Members-Only Forum, SC Self-Insurers Association. Litchfield Beach & Golf Resort, SC.
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- May 15, 2011** RIMS 2011 Annual Conference & Exhibition. Vancouver

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SC OSHA — from page 1

South Carolina also gives a 60 percent standard penalty reduction for small employers (81 percent of inspections are of small employers.)

State officials counter they are baffled by federal OSHA's overall dismal assessment since for the previous five years federal officials had told South Carolina the state was doing a satisfactory job. In their written response to federal OSHA, state officials acknowledge they may be remiss here and there.

But, they say, in many cases what seem like shortcomings are simply an alternative way of doing things, or the perceived weaknesses are due to lack of resources. For instance, South Carolina responds, the state does not always conduct interviews with workers involved in serious or fatal incidents because South Carolina employs fewer than 40 persons trained in OSHA compliance and "we cannot translate the wide variety of languages that are used on worksites in the state."

As regards South Carolina's policy of not citing employers if they correct deficiencies during OSHA's inspection, state officials say this is actually a smart way of extending their limited resources. "This practice allows South Carolina to reduce the time to write and process reports and, in that way, to inspect a higher percentage of employers in the state."

Federal OSHA conducted a special evaluation of state-run occupational safety and health programs last year after numerous construction-related fatalities in Las Vegas. Nevada and South Carolina are among the 27 states and territories that run their own occupational safety programs. The report on South Carolina is available at <http://www.osha.gov/dcsp/osp/efame/southcarolina.html>

State-run programs must be at least as stringent as federal OSHA and must stay abreast of improvements in the federal program.

Relief for hospitals on implants?

The South Carolina Workers' Compensation Commission is convening an ad hoc committee to advise the agency on what should be the maximum allowable payment to healthcare providers for surgical implant devices.

On February 24, the agency sent out letters to about 25 groups, including the self-insurers association, inviting them to name their representatives on the committee.

The committee is expected to meet in early April, at which time it would map out the course of its work and outline the pro forma financial analysis needed to make a recommendation to the commission.