

# Workers' Comp Quarterly

**Volume 2, Issue 1**

**Winter/Spring 2008**

**Important Dates**

C&L Founders' Day Party  
 Jillian's in Columbia, SC  
 April 4, 2008

Self-Insurers Association  
 Members Only Forum  
 Litchfield Beach & Golf Re-  
 sort April 23-25, 2008

SCVCEA  
 Educational Conference  
 October 19-22, 2008

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## Collins & Lacy Opens New Office in Greenville

Collins & Lacy is pleased to announce it has opened an office in Greenville, South Carolina. Greenville is located in the northwestern corridor of South Carolina along I-85. The area, commonly referred to as the upstate, is located between Charlotte and Atlanta.

Pete Dworjany, a partner with Collins & Lacy, explained the reason for the firm's move. "Collins & Lacy has always had a statewide practice; however, the demand for our services in the upstate led us to conclude we could better serve our clients by opening an office in Greenville. The upstate has been experiencing tremendous growth and there is a great deal of manufacturing, with companies such as BMW, Michelin North America, Hitachi, Fluor and Bowater."

Suzy Boulware Cole, a senior associate attorney, and Donald Van Riper, a former South Carolina Workers' Compensation Commissioner who is Of Counsel, are the first two workers' compensation attorneys in the office. Their combined knowledge and experience will enhance Collins & Lacy's ability to effectively and efficiently represent upstate employers. Litigation attorneys will also be practicing from the office.



Downtown Greenville, South Carolina.

Our office is located at 37 Villa Road, Greenville, South Carolina 29615. The mailing address is P.O. Box 5819, Greenville, South Carolina 29606. You may reach Suzy at (864) 282-9102 and Rip at (864) 282-9103.

## A Discussion of Executive Orders issued by SC Governor Mark Sanford By Donald Van Riper

On September 20, 2007, South Carolina Governor Mark Sanford signed Executive Order 2007-16, directing the South Carolina Workers' Compensation Commission and its individual commissioners to "strictly apply either AMA Guides or any other accepted medical treatise or authority in making their injury compensation determinations" in contested cases. Also contained within is a requirement beginning on January 1,

2008, that the South Carolina Workers' Compensation Commission and its individual commissioners are to provide written confirmation on a quarterly basis, to the Office of the Governor, that they have used such objective standards in rendering compensation awards in the preceding quarter. Shortly after the Order's issuance, the SC Workers' Compensation Commission by letter requested the Governor clarify the requirements in the Order.

On October 24, 2007 Governor Sanford issued two additional Executive Orders. The first stated it was to clarify his original Order regarding the Commission's use of American Medical Association (AMA) guidelines or other objective standards in determining disability judgment. This "clarifying order" maintained the original requirements that the medical model be used; however it

*(Continued on page 3)*

# Case Law Updates

## *McGriff v. Worsley*, Court of Appeals



*McGriff* stands for the proposition that a convenience store worker who was hit by a car after crossing the parking lot to chat with a friend about the friend's application to work for the store is entitled to compensation since he was acting in the interest of his employer when he left the store's premises.

The single commissioner found the respondent had sustained a compensable injury as his actions were not a substantial deviation from his employment and because he was acting in the interest of his employer when he left the store's premises. The single commissioner's award was affirmed by both the Appellate Panel and the Circuit Court.

The Court of Appeals held the record contained ample evidence substantiating the causal connection between the conditions under which

Claimant's work was required to be performed and his resulting injury. As evidenced by the record, the Court of Appeals held that: 1) at the time the respondent entered the road to engage in conversation with the prospect, he was allowed and expected to be outside; 2) the respondent was allowed and expected to solicit new employees; 3) he was allowed and expected to communicate inquiries to the store manager regarding employee prospects; and 4) he was acting in good faith and in the interest of his employer when he entered the road to discuss employment with the prospect.

Thus, while the claimant may have deviated slightly from the general location of his job responsibilities, the record supports that such deviation was not so substantial as to remove him from the course and scope of his employment.

**“dissallowing  
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## *Curiel v. Environmental Management Services*, Supreme Court

*Curiel* addressed the issue of whether the Immigration Reform and Control Act (IRCA) prohibits an illegal immigrant from recovering workers' compensation benefits. The Supreme Court determined that the IRCA does not prohibit receipt of such benefits.

Claimant is an admitted illegal alien. He used fraudulent documents regarding his legal status when seeking employment with the insured.

IRCA prohibits the hiring of illegal aliens and the use of fraudulent documents to obtain employment. Employer argued that “the policy of IRCA prohibiting the hiring of illegal aliens con-

flicts with, and therefore preempts, state law allowing such payments.”

The Court looked to S.C. Code 42-1-130, which defines employee as “every person engaged in employment. . . whether lawfully or unlawfully employed. . . .” The Court determined allowing benefits did not conflict with the IRCA. “To the contrary, disallowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers.



## *Dew v. Santee Cooper*, Court of Appeals

*Dew* stands for the proposition that a worker who was injured when his knee gave out can recover benefits despite having been diagnosed with knee problems just days before the accident.

The single commissioner concluded Claimant was totally and permanently disabled under § 42-9-10 and § 42-9-30 of the South Carolina Code. This award was affirmed by both the Appellate Panel and the Circuit Court.

In its appeal, the employer disputed the causation of Claimant's knee injury by noting Claimant was treated for knee pain prior to the accident. The Court of Appeals cited S.C. precedent

for the proposition that a latent or quiescent weakened, but not disabling, condition resulting from disease or previous accidental injury that is aggravated, accelerated, or activated within the course of employment may result in a compensable disability. It adopted the Appellate Panel's Decision and Order which stated, “The Claimant's accident aggravated his pre-existing condition to his knee. Although the knee would have required surgery even without the accident, the fact is that everyone reasonably believed on the date of injury the Claimant was able to work with no restrictions.”

**Practice Tip: THE COST OF AN MSA IS PART OF TOTAL MEDICAL BENEFITS PAID**

A prime consideration in all settlements is the need for a Medicare Set-Aside trust (MSA). Depending upon the size of the settlement, the age of the claimant, and/or whether claimant has or will qualify for Medicare in the near future, it may become necessary to establish a MSA to pay for future medical expenses related to the accident which would otherwise be covered by Medicare. In a "clincher" situation, the money required to fund the MSA is frequently regarded as part of the consideration for the Settlement Agreement.

The question becomes how should the funding of the MSA be treated on the Form 19? There are two possibilities. On line 5, there is a space in which the parties list the consideration for the Agreement and Final Release. The second possibility is line 6 which is for Total Medical Benefits Paid.

Many practitioners consider the funds for the MSA to be part of the consideration for the settlement and include it in the consideration under the Agreement and Final Release. The Commission, however, recently took a contrary view and now

considers the cost of the MSA to be part of the medical benefits paid. When preparing an Agreement and Release in which a MSA is funded as part of the settlement, do not add the cost of the MSA to the indemnity. Identify the values separately. When completing the Form 19, include the cost of the MSA in line 6, Total Medical Benefits Paid. Only payment of the indemnity or other consideration should be included in line 5, Agreement and Final Release.



Compensation Paid:	Number of Weeks	From (m/d/yyyy)	To (m/d/yyyy)	Amount
1. Number of Weeks T.T.	_____	_____	_____	\$ _____
2. Number of Weeks T.P.	_____	_____	_____	\$ _____
3. Number of Weeks P.P.	_____	_____	_____	\$ _____
4. Disfigurement	_____	_____	_____	\$ _____
5. Agreement and Final Release	_____	_____	_____	\$ _____
<b>Total Compensation Paid</b>				\$ <b>0.00</b>
6. Total Medical Benefits* Paid	_____	_____	_____	\$ _____
7. Funeral Benefits	_____	_____	_____	\$ _____

**A Discussion, by Donald Van Riper**

(Continued from page 1)

deleted reference to case law. Sanford's second Executive Order also addressed attorneys' fees. The Order requires the Commission utilize the Code of Professional Responsibility to determine the reasonableness of any fees. The Governor is prevented from real attorney fee reform because of a statute which requires any change in the regulations be approved by the legislature.

On October 25, 2007, the Commission met en banc to consider motions by various claimants' lawyers relating to the Governor's three Workers' Compensation Executive Orders. All seven Commissioners signed a "procedural order" which contains the following statement: "Because Executive Order 2007-16 sets forth standards contrary to the law of South Carolina, the Commission cannot apply or consider such standards in adjudicating matters pending before the Commission." Although the "procedural order" was nine pages long, the effect was that it rejected outright the medical model mandated by the Governor's order.

Shortly after Christmas in 2007, claimant's attorney Kathryn Williams filed an action in US District Court seeking a temporary injunction against the SCWCC from being subject to the above-referenced Executive Orders. Judge G. Ross Anderson issued a temporary restraining order pending a hearing on January 7, 2008 to consider the merits of the case. The Governor of South

Carolina was not named as a defendant in the action filed by Ms. Williams. At this writing the matter has been postponed for consideration so the Governor may intervene. The Governor is also seeking a declaratory judgment as to whether he has the authority to constrain the Commission as set forth in his original order.

Presently it is business as usual at the Commission. Commissioners are not subject to the Governor's Order until the temporary restraining order by Judge Anderson is lifted (if it ever is). Additionally the prevailing opinion is that the SC Supreme Court will declare the Executive Orders invalid. However the Commission has clearly "read the tea leaves" that there is substantial sentiment in favor of lower, predictable awards. While ignoring the requirement of the medical model, the Commission is likely a little more conservative than before. There is always the possibility the Governor's orders would be upheld.

If Sanford has the executive authority to restrict awards, then businesses and the insurance industry are also subject to a subsequently-elected Governor issuing his or her own new Executive Order tripling the awards under some different theory. Pressure on the legislature to enact meaningful reforms is a better route. Real reform will occur when the burden of proving an accident is strengthened, when the definition of an injury by accident is limited, and when attorney's fees are reduced.



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#### Let Collins & Lacy Assist You

In addition to Workers' Compensation and Employment Law, Collins & Lacy offers a wide range of legal services, including:

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Class Action	Pest Control
Commercial Litigation	Premises Liability
Commercial Real Estate	Products Liability
Commercial	Professional Liability
Transportation	Retail
Construction	White Collar Crime
Financial Institutions	Taxation/Estate Planning
Health Care	

Call us or visit our website at [www.collinsandlacy.com](http://www.collinsandlacy.com) for additional information and assistance.

### C&L Announcements

- ◆ Firm Founder Stanford E. Lacy has been elected to serve on the Board of Directors for the SC Workers' Compensation Educational Association. Stan has been very involved with SCWCEA and previously served as President 1997-1999.
- ◆ Suzy Boulware married Derham Cole, Jr. on January 5, 2008 in Sumter, South Carolina. Derham is an attorney with the firm Parker Poe Adams & Bernstein. The couple now resides in Spartanburg, South Carolina.

### 2008 Maximum Compensation Rate

The maximum weekly compensation rate for all accidents occurring on or after January 1, 2008 is \$661.29. The 2008 maximum compensation rate is \$15.35 higher than the 2007 rate of \$645.94, which coincides with a 2.4% increase.