Collins & Lacy
ATTORNEYS AT LAW

Workers' Compensation Quarterly

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Dates to Remember

October 21-24, 2007
S.C. Workers' Compensation Educational Conference
Myrtle Beach, SC

February 24-26, 2008
Workers' Compensation Medical Seminar
Myrtle Beach, SC

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S.C. GOVERNOR SIGNS EXECUTIVE ORDER REQUIRING USE OF OBJECTIVE STANDARDS IN WORKERS' COMPENSATION RULINGS

On September 20, 2007, South Carolina Governor Mark Sanford signed Executive Order 2007-16, requiring the S.C. Workers' Compensation Commission and each of its individual commissioners, "…in all contested cases to strictly apply either AMA Guides or any other accepted medical treatise or authority in making their injury compensation determinations and for the Commission and each of its individual commissioners, on a quarterly basis beginning on January 1, 2008, to provide written confirmation to the Office of the Governor that they have used, for the immediately preceding quarter, such objective standards in making such compensation awards." The order notes 32 states in the country require the use of objective medical standards. It states workers' compensation awards in South Carolina are currently 181% of the medical guidelines used by those states, and that workers' compensation premiums in South Carolina have increased by 66% since 2000, the highest rate in the Southeast and outpacing all other states but one. The press release accompanying the order indicates that in 2000, South Carolina ranked 49th in the nation for workers' compensation premiums and has now jumped to the 25th highest premium in the nation. The implication of the order during the press conference was that awards for disability were expected to be limited to the impairment ratings provided by the AMA Guide or some other accepted medical treatise. Business interests attempted to get similar provisions inserted into the changes made to the S.C. Workers' Compensation Act, which became effective on July 1, 2007 but failed.

The question remains as to what impact the executive order will have on rulings from the Commission. The South Carolina Workers' Compensation Act provides that commissioners are to make awards of disability. Numerous South Carolina appellate court decisions applying the Act provide that disability is not limited to the physical impairment, but is to include such factors as an employee's age, education and transferable job skills. ***(Cont. p. 3)***

Taylor Joins C&L Workers' Compensation Team

Collins & Lacy is pleased to announce the addition of Aisha Grant Taylor to its workers' compensation team. Taylor is a 2002 graduate of the University of South Carolina, where she was a four-year SEC Scholar Athlete Award recipient and a team captain of the 2002 NCAA Women's Track & Field Championship team. She earned her law degree from the University of South Carolina School of Law in 2006. While in law school, Aisha received the CALI Award in Race, Education, and the Constitution in the Spring of 2005. She was also a semi-finalist in the 2006 Thurgood Marshall Mock Trial Competition. She served as President of the Sport & Entertainment Law Society and Recording Secretary for the Black Law Students Association. Prior to joining Collins & Lacy in 2007, Aisha served as a judicial law clerk for the Honorable Brooks P. Goldsmith of South Carolina's Sixth Judicial Circuit. ***(Cont. p. 3)***

Case Law Update

Board Trustee Not Employee

Shuler served on the Board of Trustees for Tri-County Electric Co-op, Inc. Although his attendance was not mandatory, and he was not a voting delegate at the meeting, the Co-op approved his request to attend the National Rural Electric Cooperative Conference in Texas. Shuler was injured in an automobile accident while driving to Texas and filed a workers' compensation claim. The Co-op denied the claim, contending Shuler was not an employee.

The Court of Appeals reviewed the Workers' Compensation Act, the Electric Cooperative Act (ECA), and the Co-op's by-laws in deciding Shuler v. Tri-County Bec. Co-op, Inc.. While the Workers' Compensation Act required the court to construe the statutes liberally in favor of coverage, the same was not true in the interpretation and construction of the ECA and the Co-op's by-laws, where the Court applied more general rules of construction.

In interpreting the ECA, the court held that although the plain language of § 33-49-630 allowed a rural electric cooperative to provide for the compensation of trustees "for actual attendance upon activities authorized by the board," this language did not mandate the compensation or employment of a trustee, nor did it create in the trustee a right to demand payment – an essential element to the establishment of an employment relationship. In interpreting the Co-op's by-laws, the court held that although the by-laws permitted compensation on a per diem basis, provided for trustees to be reimbursed for actual expenses incurred, and allowed other benefits, when read as a whole the by-laws did not create an employment relationship. Rather, these benefits and compensation constituted gratuitous payments allowed in the board's discretion and were not compensation for services rendered.

Accordingly, the court held Shuler was not an employee of the Co-op and thus was not entitled to coverage under the Act.

Housing is an ordinary necessity of life

S.C. Code Sec. 42-15-60 clearly requires an Insurer to pay for necessary costs to make a home handicapped-accessible for a claimant made handicapped during the course and scope of his employment. However, the claimant in Pressley v. REA Construction Company sought guidance from the Court regarding whether the Insurer must provide the base cost of handicapped-accessible housing to a claimant. After a review of South Carolina and North Carolina case law, the Court of Appeals determined "the base cost of providing an injured employee housing is an ordinary necessity of life which the statutory substitute for wages should be utilized by the employee to obtain." Therefore, while a carrier may be required to modify a home, it is not required to provide the base cost of a home.

Enabling Legislation to the Reform Bill is Strictly Applied

With the adoption of the comprehensive workers' compensation reform, many questions have arisen due to the enacting language contained in the statute. The enacting provision states " . . . this act takes effect July 1, 2007 . . . and applies to *injuries* that occur on or after this date." This raised the question as to where to appeal if the decision of the full Commission is issued after July 1, 2007 but the claim deals with an injury prior to the effective date of the legislation.

In Pee Dee Regional Transportation v. S.C. Second Injury Fund, the Supreme Court stated that the change regarding the appeal procedure ". . . like all other provisions of the Act, is only applicable to Workers' Compensation Cases in which the injury occurred on or after July 1, 2007." Therefore, appeals on claims with a date of accident prior to July 1, 2007 will continue to be heard in the Circuit Court.

With this decision, the Supreme Court clearly indicated its intent to strictly apply the provisions of the enacting legislation. This is a harbinger to the Commission that none of the procedural changes (such as approval of clincher agreements by one commissioner) may be applied to any case with a date of injury prior to July 1, 2007.

When Does an Employer "Regularly Employ" Four or More Employees?

It is the threshold question in determining whether an employer is subject to the Act. The first step is to decide what time period to use for counting employees. Our Court of Appeals recently offered some guidance on this fact-intensive analysis in Hernandez-Zuniga v. Tickle, 374 S.C. 235, 647 S.E.2d 691 (Ct. App. 2007). Claimant was injured in May 2003 when he fell from a ladder. He had been working for the employer for about a month prior to his injury for eight hours per day and some weekends. He worked on three projects for the employer: one project painting beach chairs and two house-painting projects.

Because the employer's mode of operation was "project to project," the Court determined the relevant time period for determining the number of regularly employed workers began when the claimant started work on the chairs project and ended shortly after the injury when the employer stopped operations. During this period, the workers did three projects. Two people worked on the first project painting beach chairs. Three people worked on each of the two houses. Allegedly, a fourth person named Franklin came on to finish work on the first house while the others moved to the next project. The Court found the two employees who worked every weekday plus some weekends, and who expected their employment to continue, were "regularly employed." Franklin was found not to be a regular employee. The Court declined to determine the status of the third employee because, even if he were considered a regular employee, the employer would not have the requisite four employees to bring him under the act.

Lacy Named To 'Best Lawyers in America'

Collins & Lacy, PC is pleased to announce that firm founder Stanford E. Lacy has been selected for inclusion in the 25th anniversary edition of *The Best Lawyers in America*.

Published biennially since 1983, *The Best Lawyers in America* is widely regarded as the definitive referral guide to the legal profession in the United States. The Best Lawyers lists, representing 78 specialties in all 50 states and Washington, DC, are compiled through an exhaustive peer-review survey in which thousands of leading lawyers in the U.S. confidentially evaluate their professional peers. The current, 13th edition of Best Lawyers (2007), is based on more than two million detailed evaluations of lawyers by other lawyers.

Lacy has been selected for his work in workers' compensation law. This is the third time Lacy has appeared in the publication. "Again, it is an honor to be listed. The workers' compensation bar in South Carolina is a very special group of people and I am fortunate to be associated with them," Lacy said.

Taylor Joins C&L, *cont. from p. 1*

Aisha joined Collins & Lacy as an associate in 2007. She is a member of the Richland County Bar Association as well as the American Bar Association.

Aisha enjoys spending time with her husband and step-daughter. An all-around sports enthusiast, Aisha enjoys working out and traveling to sporting events across the country. She is dedicated to her volunteer work with the Richland County CASA - Guadian Ad Litem program and is also an active member of Alpha Kappa Alpha Sorority, Inc.

C&L Luau 2007

Pictured above, Felicia Lucas and Sylester Billie; Pictured to the right, Wanda Jefferson, Kim Hudson and Christian Boesl.

S.C. Governor, *cont. from p. 1*

To the extent the executive order seeks to limit the Commission to only the physician's rating, the order is in conflict with years of South Carolina appellate court decisions.

In response to the executive order, the seven Commissioners wrote a letter on September 24 to the Governor seeking clarification. The letter states in part, "As we read the Order, it appears to formalize our current process of applying impairment ratings from the AMA Guidelines as **a part** of the process in determining the extent if disability." The letter points out that Section 1.8 of the AMA Guidelines is clear in stating that its impairment ratings are not to be used as disability ratings but rather as an important first step in process of deciding disability." In fact, the Guide to Evaluation of Permanent Impairment, Fifth Edition, specifically defines impairment as a "loss, loss of use, or derangement of any body part, organ system, or organ function" and defines disability as "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment." The letter notes members of the Commission are subject to the Code of Judicial Conduct, and that the Commissioners must be "faithful to the law." It goes on to point out that the law in this case is the Act and the case law flowing from it, and that if the Order is intended to require them to limit awards to impairment ratings, the decisions may constitute a violation of the Code of Judicial Conduct. The letter asks the Governor to indicate, in writing, whether the commissioners are to limit awards to the impairment ratings in the AMA Guidelines, or whether the ratings are to be simply one of the factors in making the disability determination. The Commission cancelled appellate panel hearings set in September in which the issue was the amount of permanent disability suffered by an employee.

Governor Sanford responded on September 27. His letter indicated that the commissioners' letter referenced only a brief section of the Guide, and that their "…charge is, of course, to apply the Guide or any other accepted medical treatise or authority in their entirety." The letter also states the Executive Order does not conflict with any law, but simply directs better adherence to the law. The letter reminds the commissioners the Order applies to contested cases, not approval of settlement agreements or other uncontested matters. The letter closes by noting that the Governor looks forward to receiving the commissioners' reports on January 1, 2008.

This Order should be viewed in the current political climate in South Carolina. There is presently an impasse on certain non-workers' compensation issues between the legislature and the Governor. It is possible the Order could become the subject of a lawsuit by the South Carolina Senate. Even if the Order results in the Commission limiting awards to the impairment ratings provided by the physician, it will not affect total or partial wage loss cases, which can be made by a claimant when an injury affects more than one body part. Additionally, it seems likely that employers and carriers can expect more IMEs, as this would provide the Commission with the ability to award a higher rating. This may result in more depositions of physicians. We will update you as the effect of the Order, if any, becomes known.

Collins & Lacy
ATTORNEYS AT LAW

PO Box 12487
1330 Lady Street, Sixth Floor
Columbia, SC 29201

Phone: 803-256-2660
Fax: 803-771-4484
www.collinsandlacy.com

Workers' Compensation Practice Group

Ellen M. Adams	803-255-0416
Christian E. Boesl	803-255-0453
Suzy Boulware	803-255-0473
Pete Dworjanyn	803-255-0404
Rebecca K. Halberg	803-255-0456
Stanford E. Lacy	803-255-0434
Aisha G. Taylor	803-255-0480
Donald L. VanRiper	803-255-0455

Workers' Comp Message Board

Q: I have an admitted claim where John Claimant sustained a significant injury to his right hand. Claimant was continuing to treat and was close to reaching MMI when he unexpectedly suffered a stroke and consequently died unrelated to his work accident. Claimant's dependents now seek permanent partial disability benefits for his right hand, causally related medical expenses, unpaid mileage expenses, and temporary total disability benefits from the date of death until the approximate theoretical date of maximum medical improvement. Does South Carolina law require me to satisfy their requests?

A: Workers' compensation benefits accrue along a time continuum with temporary total disability benefits being paid from the date of accident or disability until the date of MMI; while disability benefits following MMI are awarded as either permanent or total disability benefits or permanent partial disability benefits. Hendrix v. Pickens County, 335 S.C. 405, 517 S.E.2d 689 (Ct. App. 1999). An award of permanent disability is inappropriate until an injured worker has reached maximum medical improvement. Smith v. S.C. Dept. of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999). South Carolina case law is clear that an award of permanent disability may not rest on surmise, conjecture, or speculation. A finding of permanent disability must be found on evidence sufficient to afford a reasonable basis for the award. Bundrick v. Powell's Garage & Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966).

Although no specific South Carolina case law addresses this particular issue, it does support the proposition that Claimant must reach MMI before a finding of permanency can be awarded. If Claimant has failed to reach MMI before his death, a commissioner would not be able to render a finding of permanent disability from the underlying workers' compensation claim. Even if Claimant's counsel attempts to show through testimony of the treating physician or others Claimant would have an estimated impairment rating of X, this testimony should not support a finding of permanency. South Carolina requires a finding of permanent disability be found on evidence of sufficient substance to afford a reasonable basis to support the award. It is not enough to surmise what the claimant may have received as an impairment.

Therefore, Claimant's dependents would not be able to recover permanency and/or temporary total disability; however Claimant's dependents would be entitled to all causally-related medical bills through the date of Claimant's death, including but not limited to mileage reimbursement as governed by Section 42-15-60.