

Workers' Compensation Quarterly

Volume 1, Issue 3

Summer 2007

Dates to Remember

August 16, 2007

*Collins & Lacy and
American Rehab Luau
Za's
Columbia, SC*

October 21-24, 2007

*S.C. Workers'
Compensation
Educational Conference
Myrtle Beach, SC*

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Workers' Compensation Reform in South Carolina

The South Carolina General Assembly has passed a comprehensive Workers' Compensation Reform Bill, S.332, which was ratified by the Governor on June 25, 2007. This is a major event in the evolution of workers' compensation law in South Carolina.

The new bill applies to claims in which the employee was injured on or after July 1, 2007. As such, attorneys and carriers will need to know and be able to apply both the old laws and the new changes.

The most significant changes to workers' compensation law are as follows:

- The Second Injury Fund is terminated as of July 1, 2013 with a number of deadlines between now and then for reporting and reimbursing claims. June 30, 2008 is the last date on which an accident can occur for it to be considered by the SIF.
 - Appeals from Full Commission go directly to the Court of Appeals. Circuit Courts are eliminated from the process.
 - False statements made by employers and carriers can now be punished under the Insurance Fraud Act.
 - In medically complex cases, the employee must establish injury is job related with medical evidence, which means expert opinion to a reasonable degree of medical certainty.
- (Continued, p. 3)*

The Next Generation of Workers' Comp Reform

by Donald Van Riper



It is with some interest that I note the passage and signing of the workers' compensation reform bill. On the insurance defense side we are all hopeful for a reduced exposure to our clients.

That being said, the insurance defense side should not rest in its efforts to pursue further reform of the workers compensation system in South Carolina. There are many facets to this problem, and I would like to discuss one here.

The largest obstacle for reform is political. When an insurance carrier administers its South Carolina claims from, say, Helena, Montana, its adjusters, case managers and administrators do not vote in this State and are not involved in local politics. Their salaries are not tied to the size of the awards are made by the commission.

(Continued, p. 3)



Case Law Update



Base of Operations Rule

Oxendine v. Johnny Davis Constr. Co.

Employer was based in SC, and nearly all of Claimant's work was performed in SC. Claimant was always accountable to Employer. Employer offered Claimant a job framing a house in Ocean Isle, NC. While working in NC, Claimant was injured when he fell and sustained an ankle fracture. Claimant was denied workers' compensation coverage in NC. Claimant then filed in SC.

The primary issue was whether Claimant met the statutory requirement for filing a worker's compensation claim in SC; specifically, whether he was hired, injured, or employed in SC.

In order to determine where a claimant's employment is located, SC has adopted the "base of operations rule." Under the base of operations rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments, and from which he starts his road trips, regardless of where the work is performed." The focus is on the employer instead of the employee.

Claimant's situation does not fit squarely within the base of operations test. However, the court found following factors are illustrative: (1) Claimant regularly worked in SC during warm months for a number of years; (2) Claimant went to Employer's home/office in SC on occasions to be paid, including at least once during the last interval of his work; (3) Claimant often met co-workers at the place of employment to go to jobs; (4) Claimant performed work at Employer's home immediately before his injury; (5) Claimant was taken to Employer's home/office in SC immediately following his injury.

Based on these factors and the control Employer exerted over Claimant, the Court found Claimant's employment was located in SC.

Hill v. Eagle Motor Lines

Claimant, a SC resident, completed an application for employment as a truck driver with Eagle Motor Lines. Eagle's recruiting manager telephoned Claimant at his home in SC and requested Claimant travel to Employer's headquarters in AL to complete an employee screening process, including orientation, driving tests and drug tests. Claimant's driving route traversed several states along the east coast.

Claimant suffered a disabling brain injury and a broken rib when his truck overturned while driving through VA. Carrier initially paid Claimant's medical bills and disability benefits, but terminated benefits after Claimant suffered a stroke allegedly caused by a confrontation with a nurse handling Claimant's workers' compensation case.

The primary issue in this claim is whether Claimant is a SC employee. The Supreme Court found that under the base of operations rule Claimant's employment was located in SC. Because Claimant received his work assignment from dispatch at his SC home; started his road trips from his home; used drop yards in SC; kept his truck at his home on the weekends; and received his paycheck at his home, his base of operations and employment were located in SC.

Comp Rate: Exceptional Circumstances

Forrest v. A.S. Price Mechanical & O'Steen Adjusting Serv.

Claimant sustained injuries from a work-related accident while employed by A.S. Price Mechanical. A.S. Price admitted the claim but thought the Commission erred in computing Claimant's compensation rate. Claimant worked multiple seasonal jobs. He was injured at one of his employers and as a result became a paraplegic. His compensation rate was based on his earnings from that employer. The Full Commission determined his compensation rate should be based on his year-round salary, and his weekly allotment was increased. The primary issue in this case was whether the amount could be adjusted after a Form 15 and 19 had been filed.

The Commission found that neither Form 15 nor a Form 19 were final judgments, thus they could be modified. In increasing the award, the Commission found that the following "exceptional circumstances" justified deviation from the usual statutory method of average weekly wage computation: (1) Claimant's young age of twenty-four years; (2) Claimant's interest, aptitude, ability, work ethic, and work history to be both a welder or maintenance worker; (3) Claimant's year-round work history; (4) the severity of his injury; and (5) Employer's knowledge Claimant regularly worked full-time and part-time for multiple employers. The Court found the rate of compensation determined by the Commission was consonant with the statutory scheme, as well as a fair rate to both parties.

Subcontractor Insurance MUST be SC

Hopper v. Terry Hunt Constr. Co.

Claimant suffered an injury while working for Hunt Construction Company in Greenwood, SC. At the time of the accident, Hunt was performing work as a subcontractor for the GC Kajima. Both companies are based in Georgia, and at the time of the accident, Hunt did not have workers' compensation insurance coverage in SC. However, prior to Claimant's injury, Hunt presented a certificate of workers' compensation insurance to Kajima. Claimant sought workers' compensation benefits from Kajima and its workers' compensation carrier. In response, Kajima sought to transfer liability to the SC Uninsured Employers' Fund pursuant to § 42-1-415.

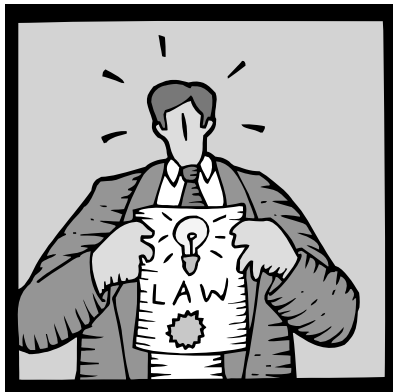
The primary issue in this claim is whether a higher-tiered contractor can be indemnified when one a subcontractor presents proof of workers' compensation insurance but the proof of insurance turns out to be from a state other than SC.

42-1-415 provides when a subcontractor represents to a higher contractor that he has workers' comp insurance, the higher contractor is relieved of liability. If the subcontractor is uninsured, the higher contractor is liable, but may petition the Commission to transfer liability to the Uninsured Employers' Fund. In order to obtain reimbursement, the higher contractor must collect documented proof of insurance from the subcontractor at the time the subcontractor begins to work and it must be turned over to the Commission at the time the claim is filed.

Kajima argued as long as a subcontractor provides a general contractor with proof of workers' compensation insurance in any state, the general contractor is relieved of its duty, irrespective of whether the subcontractor has coverage in SC. The Fund argued there must be SC coverage for § 42-1-415 to apply. **(Cont. p. 3)**

Workers' Compensation Reform *(Continued from p. 1)*

- Truckers who are owner/operators of their rigs are now independent contractors under 42-1-360.
- Adjusters may be penalized for failing to provide medical treatment set forth in an Order by the Commission, including payment of attorney's fees and costs and fines up to \$500 a day. Commission must also notify the Department of Insurance of the failure to provide medical treatment. If there is a pattern of not providing benefits and it was intentional, the insurer's license may be revoked.
- The shoulder is worth 300 weeks and the hip is worth 280 weeks.
- 50% to the back is presumed permanent and total disability, but the presumption is rebuttable.
- In repetitive trauma cases, notice must be given to the employer within 90 days of the date the employee discovered, or should have discovered by exercising reasonable diligence, that his condition is compensable.
- Doctors may now discuss an employee's medical history, treatment, causation, and diagnosis with Carriers and Defense Attorneys; however, the employee must be notified of the meeting, have an opportunity to attend, be advised of the nature of the meeting, and be given a copy of any written questions prior to the meeting.



Please note this article provides only a highlight of the Workers' Compensation Reform Bill.

Collins & Lacy has prepared a presentation on the new bill and new cases decided in the last year. It runs for approximately one to two hours and highlights the changes to law and the significances. We have submitted the presentation to the North Carolina Department of Insurance

for CEU certification. Our attorneys are available to present the presentation at your office. Please contact us to schedule a presentation—it is a great opportunity to earn CUE credit and obtain useful materials reflecting the new law.

Next Generation *(cont. from p. 1)*

On the other hand, the trial lawyers live in South Carolina and intimately know the state's political landscape. Every dollar a workers compensation claimant's lawyer makes is contingent on an award from the workers' compensation commission. These lawyers contribute the maximum in hard money to their candidates on each election cycle. They contribute hundreds of thousands of dollars more in soft money to other causes controlled by politicians.

The recipients are not strictly Democrat or Republican. Trial-lawyer friendly senators and representatives can be found on both sides of the aisle. It is hard to find a politician who feels obligated to an insurance company for anything.

A good measure of reform will take place when the amount of money flowing out of the system is reduced. This reduction would require that the definition of an injury by accident is changed. It may require an end to contingency fees. No thought is more frightening to a trial lawyer. Many would be prepared to spend a hefty six figure sum to defeat any candidate whose efforts might produce such results. Such changes would wipe out the very livelihood of a trial lawyer.

In order to produce the political muscle to make a real reform, the insurance industry needs a massively funded PAC with the ability to strongly influence local elections. An orchestration using paid campaign workers, TV media adver-

tising and grass roots organization in each local state house race will effectively counter the trial lawyers. People at the local level who are knowledgeable about workers compensation need to be galvanized. Our side needs to be empowered with money and political muscle to influence the legislature. Unfortunately the political involvement of the defense side to date has been anemic.

South Carolina legislators fear treading on SC Citizens for Life, the NCAAAP and the NRA. Let's make it so for our interests as well.

Subcontractor Insurance *(cont. from p. 2)*

The Court found the Fund's argument persuasive because to find otherwise allow contractors to turn a blind eye to their subcontractors' workers' compensation documents. The Court further noted their ruling did not put an extra duty upon the general contractor to inquire into the validity of the subcontractor's coverage. However, a general contractor cannot expect to turn a blind eye to the subcontractor's obvious lack of coverage in SC and have the State shoulder that burden. A determination of what type of conduct constitutes an obvious lack of coverage in SC will have to be settled on a case-by-case basis.



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Medical Message Board

Dear Collins & Lacy,

Dr. Diagnosis of Workers' Comp Orthopaedics has requested Charles Claimant undergo an MRI, myelogram and CT-Scan of his lumbar spine to test for the presence of a herniated disc. Can you please explain these tests and the pros and cons of each?

Thank you, Curious Adjuster

Dear Adjuster,

MRI (Magnetic Resonance Imaging) is a non-invasive procedure that uses a magnetic field, radio waves and a computer to create images of the body. The MRI provides clear images of ligaments, bone, joints, and soft tissue. It does not use any radiation; however, it is not recommended for people with metal in their bodies because of the reaction with the magnetic field.

A **myelogram** is an invasive procedure that uses dye and an X-ray or CT Scan to view the parts of the spine. The dye is actually injected into the spinal canal with a thin needle. The dye moves through the spine so the nerve roots and spinal cord may be clearly seen in the photographs. A myelogram is beneficial because it allows a doctor to see more details of the spine, which helps with diagnosis. Unfortunately, it can be very painful and cause headaches, nausea and seizures.

A **CT-Scan (Computed Tomography)** is a non-invasive procedure that uses X-Ray beams to take detailed pictures of the

spine. During the procedure, an X-Ray tube rotates around the body and takes many photographs of the body. The images are then blurred with a computer to produce a cross-section of the body. The test is most helpful for observing bones and acute bleeding. An MRI will provide more information about the spinal discs. Unfortunately, it is created using radiation, which may increase a patient's risk of developing cancer.

Sincerely, Collins & Lacy

(See www.webmd.com for additional information)



Suzy Boulware and Rebecca Halberg of Collins and Lacy celebrate with Jason Lee of House of Raeford at the S.C. Poultry Federation Convention in Hilton Head on July 13, 2007.