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Workers' Compensation Commission

July 11, 2023

VIA EMAIL: RolandFranklin@schouse.gov

The Honorable Chris Wooten
Vice-Chair, House Legislative Oversight Committee
Room 228 Blatt Building
P.O. Box 11867
Columbia, SC 29201

RE: Response to follow-up from the June 6, 2023 Subcommittee Meeting

Dear Representative Wooten:

Attached please find the response to questions contained in your letter to me dated June 29, 2023 as follow-up from the June 6, 2023 Subcommittee Meeting.

I believe the responses address the issues clearly and concisely. The Commission stands ready to provide clarification to any question at the Subcommittee meeting on July 19.

In the meantime, please feel free to contact me if you need additional information. The Commission staff looks forward to meeting with Subcommittee on the 19th to finish the public presentation about our agency.

With Kindest Regards,

Gary M. Cannon
Executive Director

Cc: Scott Beck, Chairman

SC Workers' Compensation Commission
Response to the questions from HLOC Subcommittee
July 12, 2023

Coverage and Compliance

1. Over 58,000 compensation claims were filed in fiscal year 2022. Of this total 24,000 cases were created, 31,000 were reported as Minor Medical and 2,500 were reopened cases. If coverage is located, a claim number is assigned. If no coverage is located, the claim is assigned to the Commission's Compliance Division.

   Response:

   All claims filed with the Commission are reviewed first by Coverage and Compliance to determine if the employer has coverage. If coverage is located, the claims is processed. If coverage is not located the Coverage and Compliance Division initiates an investigation.

   - How may claims were denied in FY22?

     Response:

     During FY2021-22 the Commission received 6,325 Notices of Denial from insurance carriers. When a denial letter is received, the Commission notifies the claimant by letter that the carrier has denied the claim and informs them to contact the Commission if they wish to pursue their claim further. `

   - How many claims did the Commission assign to the Compliance Division in FY22 and how does that number compare to the prior five fiscal years?

     Response:

     Below is a five-year history of the number of claims filed, the number of investigations initiated which include the number of uninsured claims, DEW files and stakeholder submissions; and the number of investigations closed by the Coverage and Compliance Division.

SC Workers' Compensation Commission				
Claims Filed and Non-Coverage Investigations				
FY2018-FY2022				
		Investigations Initiated		
Fiscal Year	Claims filed	Uninsured Claims	DEW files and stakeholder inquiries	Investigations Closed
FY2018	67,255	266	1,766	1,804
FY2019	65,827	245	1,989	1,940
FY2020	66,825	252	1,048	1,687
FY2021	58,327	198	1,513	1,630
FY2022	57,986	243	1,220	1,397

2. If the Commission determines an employer does not provide coverage, a fine is assessed.

   - Is the fine a fixed penalty or does it vary depending on the employer?
     Response:
     Under §42-5-40, An employer required to maintain coverage but neglects to do so shall be "punished" by a fine of $1 for each employee, but not less than $10 dollars nor more than $100 for each day of neglect. Additionally, under §42-3-105, an employer found to be in violation of the Act, is assessed a penalty. The minimum penalty assessed is $750 a year, the maximum penalty assessed is $1,000 a year.

3. South Carolina does not have an official coverage exemption form. Compared to other states, is the lack of a coverage exemption form unique to South Carolina?
   Response:
   The Act presumes all employers in the state are subject to the Act and should maintain coverage. S.C. Code Ann. § 42-1-310 (presumption employer subject to Act); § 42-5-20 (requirement to secure payment of compensation).

   The Workers' Compensation Act and Administrative Procedures Act do not permit the Commission to declare an individual employer is not subject to the Act without first holding a hearing. The Commission cannot determine the rights, duties, or privileges of a party without first holding a contested case hearing. *See* S.C. Code Ann. § 1-23-310(3). Whether a business meets the definition of an "employer" under § 42-1-140 that is carrying on an employment under § 42-1-150 is a question of fact and law. The Commission has no way to decide this question without holding a hearing. Likewise, whether a business meets any exemptions under § 42-1-360 is a question of fact and law that can only be decided after a hearing. The Commission is without authority to issue advisory opinions.

   a. Would the availability of a standard coverage exemption form benefit employers and the Commission?
      Response:
      A standard coverage exemption form would not benefit employers and/or the Commission. Each employer who submits an exemption form would need to be investigated and their exemption status verified for validity daily. This would not be practical. Additionally, it would put injured workers at risk of not being covered.

<u>Self-Insurance</u>

4. Over the last ten years, how many self-insured employers have been unable to cover their claims?
   Response:
   Over the past ten years, no self-insured employer was unable to pay the benefits afforded the injured by the Act. If the employer was unable to pay claims related expenses, the Commission would implement statutory provisions to draw on the employer's surety to pay the claims related expenses. To prevent this from occurring, the Commission requires the self-insured employers to maintain a certain level of financial resources to pay medical and

compensation costs related to the claim. The Self-Insurance Division reviews each employer's application to become self-insured to verify that they have the financial stability to pay claims related expenses. Once the employer is approved to be self-insured, the Self-Insurance Division conducts an audit every two year of each employer's financial condition to ensure they maintain the required resources to pay claims related expenses. Upon the completion of the audit, the Self-Insurance Division may require an employer to change the amount of their surety that is retained to maintain an adequate level of resources.

Claims

5. The Claims Department issues roughly 3,600 fines annually to insurance carriers for failure to respond to requests for information. This results in $731,000 in annual revenue. Is this amount turned over to the State, or is it utilized by the Commission?
   Response:
   The Commission is permitted to assess fines and penalties against an employer or insurance carrier who refuses to submit required forms, records, and reports. S.C. Code Ann. § 42-19-30. Such fines and penalties shall be used for the purpose of paying salaries and expenses of the commission. S.C. Code Ann. § 42-3-220.

6. If an employee files a claim for benefits and the employer does not contest the claim, how soon will the claimant begin receiving compensation benefits?
   Response:
   "No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in Section 42-15-60; but, if the injury results in disability more than fourteen days, compensation shall be allowed from the date of disability." S.C. Code Ann. § 42-9-200 (1976, as amended).

   If an employee is injured and unable to work due to the injury, no compensation is paid for the first seven days. On the 8th day, the employee is entitled to start receiving disability benefits. However, if the employee is out of work for greater than 14 days, the employer must back-pay the compensation for the first 7 days. Medical benefits under Section 42-15-60 are available from the first day. No benefits of any kind are due until the employee provides the employer notice of the injury. *See* S.C. Code Ann. § 42-15-20(A).

7. An employee files a claim and the claim is contested by the employer. The employee ultimately prevails, but only after an appeal to the appellate courts. Must all appeals be exhausted before the employee receives benefits? If so, assuming the employee prevails, is payment of those benefits retroactive to the date of the injury?
   Response:
   If the employee prevails and employer appeals to the courts, the employer/carrier must provide weekly compensation payments and ordered medical treatment during the pendency of the appeal. If the employee's award is upheld by the courts on appeal, the employee will be entitled to benefits retroactive to the date the commission found the period of disability began. If the employer prevails before the commission and the employee

appeals to the courts, the employee is not entitled to benefits during the pendency of the appeal. If the courts award the employee benefits, the matter will be remanded to the commission to award benefits retroactive to the date the disability began.

If the employee prevails and employer appeals to the courts, the employer/carrier must provide weekly compensation payments and ordered medical treatment during the pendency of the appeal. If the employee ultimately prevails, it will be up to the Commission to decide the period in which the employee is entitled to benefits, including retroactive benefits. In most cases, an employee will be awarded temporary disability benefits for all periods in which the employee was unable to work because of the injury, and permanent disability, if any, beginning at the date of maximum medical improvement.

"In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title." S.C. Code Ann. § 42-17-60.

8. Are there circumstances whereby an employee who has been paid benefits is later found not entitled to those benefits? If so, is the employee liable for the amounts paid?

   Response:

   The only manner the Act provides for an employer to recoup benefits paid to an employee when not due is to deduct the amount from compensation to be paid in the future. S.C. Code Ann. § 42-9-210. However, the deductions may only be made by shortening the period of disability, i.e. taking weeks off the back-end, and not by reducing the amount of the weekly payment. Id. The Act does not provide any mechanism for an employer to recoup funds paid to an employee who prevails at the commission level during an appeal to the courts, even if the award is ultimately reversed by the courts.

Judicial

9. What percentage of claimants appear before the Commission as *pro se* litigants? What resources are available to assist *pro se* litigants through the process?

   Response:

   For Fiscal Years 2021, 2022, 2023 the number of claims filed by claimants averaged 9,857 per year. The percent of the filings by pro se claimants was 3%.

   The Commission's staff provides assistance to pro se claimants with procedural matters (i.e. status of the claim, question about completing a form, etc.). If the case is disputed and assigned to a jurisdictional Commissioner staff refers the call to the Commissioner's office. The staff does not provide legal advice or counsel. We provide information about the SC Bar Association's website for assistance in finding an attorney.

   The Commission's website, www.wcc.sc.gov, contains a Frequently Asked Questions (FAQs) section and links to Title 42 of the SC Code, the Title 67 Code of Regulations, a link to the SC

Vocational Rehabilitation Department and other resources.

10. How long have the current filing fees for various motions and requests been in effect? Are there circumstances under which claimant filing fees are be waived?
Response:
The current $50 filing fee is authorized annually as a budget Proviso 74.2 (Part 1B SECTION 74.2 - R080). In 2018 the fee was increased from $25 to $50.

The filing fee for a party to appeal of decision and order of a jurisdictional commissioner is $150. S.C. Code Ann. § 42-17-50 authorizes the $150 fee for Commission appeals. The amount is equal to the amount charged in circuit court for the filing of a summons and complaint.

If a pro se claimant is unable to pay the filing fee, they have the right to request the fee be waived. To make the request they may file a Form 32 with their pleading. The Commission's Chair reviews the Form 32.

11. The Commission created the State's seven jurisdictional districts to evenly disburse the case load among the districts. In what year did the Commission create the current districts?
Response:
Section 42-17-20 of the Code defines where a jurisdictional hearing shall be held. Prior to 2018, this statute required the Commission to hold hearings in all 46 counties. This was impractical for multitudinous reasons. In 2018, the statute was amended to allow the Commission to conduct hearings in the district where the injury occurred, but no greater than seventy-five miles from the county seat of the county in which the injury occurred. 2018 Act No. 233, § 1. The Act fixed the districts as the seven districts in use by the Commission as of January 1, 2018. It would require a statutory amendment to change the current districts.

When and how the seven districts were determined is unfortunately lost to history. The map in use by the Judicial Department was drawn in 2001 and is based on earlier, unpreserved records. Commission staff has recollections of the current districts being in use at least as early as the 1990s.

12. Over the last five years, of the cases decided by a single commissioner, how many were decided in favor of the claimant? How many cases were decided in favor of the employer?
Response:
The Commission does not maintain a record of which party "wins" at a jurisdictional commissioners' hearing. To do so would be improper and impossible for the following reasons:

(1) Allowing the Commissioners the ability to independently determine the outcome of cases according to principles of law is essential to the independence of the judiciary. *See* Cannon 1 A of the Code of Judicial Conduct (A Judge shall uphold the integrity and independence

of the judiciary). A Commissioner should not be bound by external pressures to rule in a certain manner. Decisions should be based upon uniformly applying the law to the facts. Keeping track of the decisions in this manner could pose a threat to the judicial independence of the Commission.

(2) Whether a decision is favorable to a Claimant, or the Employer is difficult to determine. The parties frequently raise multiple issues for resolution at a hearing. A Claimant may receive the relief they requested (ie. "win") on some issues, but an Employer may also receive the relief they have requested (ie. "win") on other issues resolved at the same hearing.

(3) Our current data management system is not designed to track this metric, for the prior two reasons stated.

13. Over the last five years, of the single commissioner cases appealed to the Full Commission, how many single commissioner decisions did the Full Commission reverse? How many single commissioner cases did the Full Commission affirm?

Response:

Between 2019-2022, there were 211 total appeals. The Single Commissioner was reversed or vacated in 28 claims (13%). The Single Commissioner was affirmed in 172 claims (82%). At the time these statistics were compiled, some of the claims had been appealed to the panel, but a decision was pending. There would have been no way to know the outcome at that time.

14. Over the last five years, of the cases appealed to the Full Commission, how many resulted in a decision favorable to the claimant? How many resulted in a decision in favorable to the employer?

Response:

The Commission does not maintain a record of which party "wins" at a jurisdictional commissioners' hearing. To do so would be improper and impossible for the following reasons:

(1) Allowing the Commissioners the ability to independently determine the outcome of cases according to principles of law is essential to the independence of the judiciary. *See* Cannon 1 A of the Code of Judicial Conduct (A Judge shall uphold the integrity and independence of the judiciary). A Commissioner should not be bound by external pressures to rule in a certain manner. Decisions should be based upon uniformly applying the law to the facts. Keeping track of the decisions in this manner could pose a threat to the judicial independence of the Commission.

(2) Whether a decision is favorable to a Claimant, or the Employer is difficult to determine. The parties frequently raise multiple issues for resolution at a hearing. A Claimant may receive the relief they requested (ie. "win") on some issues, but an Employer may also receive the relief they have requested (ie. "win") on other issues resolved at the same hearing.

(3) Our current data management system is not designed to track this metric, for the prior two reasons stated.

15. Over the last five years, how many Full Commission opinions were reversed by the appellate courts? How many of those reversals resulted in decisions favorable to the claimant? How many of those reversals resulted in decisions favorable to the employer?

    Response:

    For the period January 1, 2018, through July 5, 2023, 148 cases were pending before the Court of Appeals. The commission's appellate panel was reversed in 14 claims. The remaining 134 appeals were either affirmed or settled prior to the court issuing an opinion. In 10 of those 14 claims wherein, the Commission was not affirmed, the Higher Court rendered a decision that could be considered favorable to the claimant. In 2 of those 14 claims, the Higher Court rendered a decision that could be considered neutral, not favorable to either the claimant or the defendants. In the other 2 of those 14 claims, the Higher Court rendered a decision that could be considered favorable to the Defendants (employer or carrier).

16. What accounts for the 17% increase in appellate activity during FY22?

    Response:

    The Commission cannot identify a specific reason for the increase in the number of appeals for FY22. The jurisdictional commissioner's decision is rendered by applying the facts of the case to the law. The decision to appeal the jurisdictional commissioner involves many factors related to the individual parties and their attorneys.

    One could speculate the COVID-19 pandemic may be the reason for the increase in appeals from 20-21 to 21-22. Much of the nation was shut down for most of 2020. As a result, fewer claims were filed, fewer cases were tried, and fewer cases were appealed. This was a statistical anomaly caused by the global pandemic. Current appeals are on track to return to pre-pandemic numbers.

<u>Human Resources</u>

17. FY2022 saw a 20% turnover in employees. What accounts for this turnover rate?

    Response:

    The Commission has 54 funded FTE positions, with 50 FTEs positions filled. Fourteen (14) vacancies occured during FY2022. Six (6) employees moved to another state agency, 4 employees retired, 2 employees were employed in the private sector, 1 resigned for personal reasons and 1 was terminated. The 14 vacancies with 50 filled positions create a turnover rate of 28%. We were still being affected by the employment after COVID when recruitment for vacant positions in the private market increased. The increased turnover rate was the result of the macroeconomic phenomena colloquially known as "The Great Resignation". The Great Resignation is an ongoing economic trend in which employees nationwide resigned from their positions *en masse* in wake of the COVID-19 pandemic. Serenko, A. (2023)

18. As of FY2022, 25% of employees at the Commission are eligible to retire because of age or length of service. What marketing strategies does the Commission utilize to inform the

public of potential employment opportunities with the Commission?

Response:

The Commission's primary source of recruitment for vacant positions is NEOGOV, the system used by the State for all recruitments. Also, we notify professional associations, universities and technical colleges when appropriate, stakeholders and industry newsletters.