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Workers' Compensation Commission

Report of the Presiding Officer, Chairman T. Scott Beck Proposed New Article 18 on Mediation Document No. 4286 May 29, 2012

Pursuant to Section 1-23-111 of the SC Code of Laws, 1976 the following is a report subsequent to the Public Hearing on May 28, 2012 at which time and place the Commission received public comment on the proposed new Article 18 on Mediation, Regulation 67-1801 through Regulation 67-1809. This report includes the findings as to the need and reasonableness of the new regulations.

Background

The Commission is proposing to amend Chapter 67 of the Regulations of South Carolina Workers' Compensation Commission by adding Article 18 for the purposes of establishing a defined mechanism to resolve disputes pursuant to Title 42 of the SC Code of Laws without the necessity of a hearing.

The Proposed Regulations:

ARTICLE 18

MEDIATION

67-1801. Mediation.

A. This mediation regulation is established to resolve disputes without the necessity of a hearing. The purpose is to afford a meaningful opportunity to the parties to achieve an efficient and a just resolution of their disputes in a timely and a cost-effective manner.

B. A Commissioner has the discretion to order mediation in any pending claim before the Commissioner and to select a duly qualified mediator.

(1) A Commissioner must retain jurisdiction of the claim solely for those issues being mediated.

(2) A Commissioner does not retain jurisdiction of the claim for the life of the claim, unless the Commissioner so chooses, only until those pending issues are resolved.

(3) A Commissioner's authority to order mediation in any pending claim is not limited by claims listed in Section 67-1802.

67-1802. Mediation Required with Certain Claims.

A. Claims arising under Section 42-9-10, or claiming permanent and total disability pursuant to Section 42-9-30 (21), occupational disease cases, third-party lien reduction claims, contested death claims, mental/mental injury claims, and cases of concurrent jurisdiction under the South Carolina Workers' Compensation Act and the Federal Longshore and Harbor Workers' Compensation Act must be mediated prior to a hearing.

(1) In contested death claims, a Commissioner must still make a finding that a good faith dependency investigation has been completed.

(2) Except for contested death claims, all claims listed in this section would apply only to claims where compensability of the accident is admitted by the employer/carrier.

(3) Claims involving multiple employees arising out of employment with the same Employer, whether or not compensability has been admitted, shall be subject to a scheduling order and shall be mediated prior to a hearing. Participation in mediation in no way constitutes an admission of compensability at any subsequent proceeding.

(4) Unless an unrepresented claimant requests that the claimant's case be mediated, the Commission shall enter an order dispensing with mediation.

67-1803. Mediation Requested by Parties.

The parties may request mediation by the proper submission of a Form 21, Form 50, Form 51, or the response to the Form 21, indicating a request for mediation. Except as provided in section 67-1802 A, either party may object to mediation by the proper submission of the Form 21, Form 50, or the response to the Form 21. If the parties do not agree to mediation, pursuant to this section, then the case shall be set by the Judicial Department in the normal course of the docket scheduling.

67-1804. Selection of Mediator and Required Schedule.

A. The parties may consent to use any mediator who is duly qualified. The mediator must be certified as a mediator per the certification process established by the South Carolina Bar Association.

B. The parties must select a mediator within ten days of the filing of the Form 51 or the response to the Form 21, and must promptly notify the Commission of the mediator and proposed mediation date.

C. The mediation must be completed within sixty days of the filing of the Form 51 or the response to the Form 21, unless otherwise agreed to by the parties. If the mediation is not completed within the sixty day timeframe then the case shall be set by the Judicial Department in the normal course of the docket scheduling.

D. If the parties cannot agree on a mediator, the Commission shall appoint a duly qualified mediator for them.

67-1805. Parties Represented.

In addition to their attorney being present, each party shall provide a representative, who shall attend the mediation in person or via telephone. The representative shall have authority to enter into negotiations, in good faith, to resolve the issues in dispute. If the representative attends via telephone, they shall be available by telephone for the duration of the mediation. Reasonable notice shall be provided to the opposing party concerning attendance via telephone, prior to the mediation. This regulation does not prevent a claimant from proceeding pro se.

67-1806. Mediation Communications Confidential.

A. All communications and statements that take place within the context of mediation shall be confidential and not subject to disclosure. Such communications or statements shall not be disclosed by any mediator, party, attorney, or attendee and may not be used as evidence in any proceeding. An executed agreement resulting from mediation is not subject to the confidentiality requirements described above.

B. Neither the mediator nor any third-party observer may be subpoenaed or otherwise required to testify concerning a mediation or settlement negotiation in any proceeding. The mediator's notes shall not be placed in the Commission's file, shall not be subject to discovery, and shall not be used as evidence in any proceeding.

67-1807. Expense of Mediation.

The parties shall share the cost of mediation equally, unless otherwise agreed by the parties, or as otherwise ordered by the Commission.

67-1808. Penalties.

Any party who refuses or neglects to act in good faith during the mediation may be subject to a fine not to exceed the actual cost of the mediation. Any party who believes this provision has been violated may file a Motion for a Rule to Show Cause before the jurisdictional Commissioner for purposes of assessing fines and penalties. The parties shall have the right of review and appeal as in other cases.

67-1809. Forms Required Upon Completion.

A Form 70 shall be filed by the Mediator with the Judicial Department at the conclusion of the mediation. A Form 70 shall not become a part of the Commission's file and will solely be used for tracking purposes.

Notice of Drafting

The Notice of Drafting regarding the new Mediation Regulations was published in the *State Register* on February 24, 2012. The deadline to receive comments was 5:00 p.m. on March 26, 2012. The proposed change, notice of comment period and notice of public hearing (Document No. 4286) was published in the *State Register* on April 27, 2012.

Notice of Public Hearing and Opportunity for Public Comment

The deadline to receive written comments on the proposed changes was 5:00 p.m., May 28, 2012. A public hearing was conducted on May 29, 2012 at 10:30 a.m. in Hearing Room A at the South Carolina Workers' Compensation Commission, 1333 Main Street, Columbia, SC 29201.

Findings

The Workers' Compensation Commission is the regulatory agency of the State of South Carolina responsible for overseeing and administering the South Carolina Workers' Compensation Act. SC Code Ann. § 42-1-10 et seq. (1976). The Commission has statutory and regulatory authority to promulgate rules and regulations as set forth in § 42-3-30. The purpose of the new mediation regulations is to establish a defined mechanism to resolve disputes without the necessity of a hearing. The goal is to afford a meaningful opportunity to the parties to achieve an efficient and a just resolution of their disputes in a timely and a cost-effective manner. Further the Commission finds no opposition to the proposed new mediation regulations as evidenced by no opposing written comments submitted by interested parties to the Commission by the established deadline ~~or no oral comments made at the public hearing.~~

Fiscal Impact Statement

The fiscal impact of the proposed changes to this regulation is \$0.

Statement of Need and Reasonableness

DESCRIPTION OF REGULATION: Chapter 67, Article 18. Mediation.

Purpose: The purpose of the regulation is to establish a defined mechanism to resolve disputes without the necessity of a hearing.

Legal Authority: The Commission is authorized to promulgate rules and regulations relating to the administration of the workers' compensation laws necessary to implement the provisions of this title Section 42-3-30. The regulation will cover claims pursuant to Title 42 of the SC Code of Laws.

Plan for Implementation: The proposed regulation will take effect upon approval by the General Assembly and publication in the *State Register*.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The promulgation of Regulation Chapter 67, Article 18 will provide a defined mechanism by which disputes arising out of claims made under Title 42 of the SC Code of Laws may be resolved without the necessity of a hearing.

DETERMINATION OF COSTS AND BENEFITS:

There are no additional costs to the agency related to the proposed regulation. The benefit of the new regulation is to afford a meaningful opportunity to the parties to achieve an efficient and just resolution of their disputes in a timely and a cost-effective manner.

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

None.

Statement of Rationale:

The Commission is proposing a new regulation to establish a defined mechanism to resolve disputes without the necessity of a hearing. The goal is not to mandate mediation of all cases, but to afford a meaningful opportunity to the parties to achieve an efficient and just resolution of their disputes in a timely and a cost-effective manner.

Recommendation

Pursuant to Section 1-23-111 of the SC Code of Laws, I find the proposed new Regulations on Mediation reasonable and direct staff to initiate the process of legislative review by filing the proposed change with the Editor of the State Register to include a letter to the President of the Senate and a letter to the Speaker of Representatives requesting legislative review.



T. Scott Beck, Chairman

May 29, 2012

Date