

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Governor Mark Sanford.....Petitioner,

South Carolina Workers' Compensation Commission;
and David W. Huffstetler, Avery B. Wilkerson, Jr., Thomas
Scott Beck, Susan S. Barden, G. Bryan Lydon, Andrea
Pope Roche, and Derrick L. Williams in their official
capacities as members of the South Carolina Workers
Compensation Commission,

and

Susan Monaco, James Collins, Deborah Rowell,
Thomas Sanford, Keny Foster, Michael Hatch,
and Elaine Hodge.....Respondents.

JOINT MOTION TO ADOPT AND APPROVE AGREEMENT AND STIPULATIONS
BETWEEN THE GOVERNOR AND THE WORKERS' COMPENSATION
COMMISSION AND MOTIONS TO DISMISS

This action was brought by way of a Petition for Original Jurisdiction by the Honorable Mark Sanford, Governor of South Carolina (hereinafter "Governor"), against the South Carolina Workers' Compensation Commission and seven individual Commissioners (collectively hereinafter the "Commission"), alleging that Respondents failed to provide certain information as directed by the Governor in violation of South Carolina law. In return to the Governor's Petition, Respondents asserted, and the Governor agrees, that Respondents have never contested the right of the Governor to obtain the requested information and the sole reason the information requested was not produced was due to a Temporary Restraining Order ("TRO") issued by United States District Judge G. Ross Anderson enjoining Respondents from delivering the information to the Governor. Monaco v. South Carolina Workers' Compensation Commission, et al., (D.S.C. December 27, 2007). The temporary

restraining order in the federal court has now expired. However, the Governor has agreed not to demand the information requested from the Commission until this Court adjudicates all claims before it with finality. In their Return to the Governor's Petition, the Commission joined in the Governor's request for original jurisdiction and asserted counterclaims before this Court. The Commissioner's counterclaims challenge whether certain executive orders issued by the Governor are consistent with State and Federal law and the Commissions' duties under the Code of Judicial Conduct.

The Supreme Court granted the Governor and the Commission's request for original jurisdiction on January 28, 2008, over all claims. Subsequently, seven Claimants with pending matters before the Commission -- Susan Monaco, James Collins, Deborah Rowell, Thomas Stanford, Keny Foster, Michael Hatch, and Elaine Hodge (hereinafter "Intervenors") -- moved to intervene in this action involving the Governor and the Commission. This motion was granted without objection, and additional counterclaims, crossclaims, and a Reply and further counterclaims have been pled.

The Governor and the Commission, subject to the Court's adoption and approval, now present the following agreement and stipulations and joint motion for this Court's consideration and approval:

1. The Governor and the Commission recognize that the Governor has the right to request and obtain information and records under the Governor's authority granted in Article IV, Section 17 of the South Carolina Constitution and S.C. Code § 1-3-10 subject, where applicable, to privacy rights under state and federal law. The Governor and the Commission have explored the issue of providing the Governor with information without undue burden upon the Commission. As such, the

Governor will issue a new executive order, thereby superseding Executive Orders 2007-16, 2007-19, 2007-20, 2008-02 and the letters, forms and directives issued in conjunction with these executive orders. The new executive order will request the quarterly production of Decisions and Orders of Single Commissioners and Orders of Appellate Panels, including all Orders with regard to attorneys' fees, in all contested cases arising under S.C. Code § 42-9-30. (See, Exhibit A, Governor's Executive Order.) Nothing in this agreement waives the rights of the Governor under Article IV, Section 17 of the South Carolina Constitution and South Carolina Code Section 1-3-10 or the Commission's right to contest any future record request on the basis of privacy interests or any other grounds. The Governor and the Commission further agree that should any information or records be produced to the Governor by the Commission, pursuant to the Governor's authority under Article IV, Section 17 of the South Carolina Constitution and/or S.C. Code § 1-3-10, that contain confidential, private and/or nonpublic information, the Governor will have the same legal duty as the Commission to protect the confidential, private and/or nonpublic status of such records or information.

2. The Governor and the Commission recognize that the Workers' Compensation Commissioners are subject to the Code of Judicial Conduct and have the duty to be independent, impartial, and faithful to the law and not consider communications made to Commissioners outside the presence of the parties concerning a pending or impending proceeding unless authorized to do so by law.

3. The Governor and the Commission recognize that the Commission and individual Commissioners acted lawfully and ethically in the act of issuing the *En Banc* Order of October 25, 2007 (See, Exhibit B, October 25, 2007, *En Banc* Order). The Governor is satisfied that the Commission's interpretation of the Workers' Compensation Act as set forth in its October 25, 2007 *En Banc* Order is consistent with state statutes and South Carolina Supreme Court precedent. The Governor agrees not to initiate any challenge to the *En Banc* Order in any future case or appeal in the absence of a constitutional amendment, statutory change, or judicial opinion that materially affects the *En Banc* Order.
4. The Governor and Commission recognize that the statutes and regulations of South Carolina cannot be changed without satisfying the requirements of the adoption or the amendment of laws contained in the United States Constitution, the South Carolina Constitution, and the South Carolina Code of Laws and the Regulations promulgated pursuant thereto.
5. The Governor and the Commission recognize and agree that an award of attorneys' fees under the Workers' Compensation Act is subject to the requirement of "reasonableness", as more precisely defined under Rule 1.5 of the Rules of Professional Conduct, pursuant to S.C. Code Ann. § 42-15-90 and S.C. Code Reg. 67-1205(B).
6. The Governor and the Commission agree that the Commission has and individual Commissioners have the sole authority to determine, in accordance with the law, the

substance, language, timing, and content of any Order issued by the Commissioners in their quasi-judicial capacity, subject to review by the Appellate Courts.

7. The Commission and individual Commissioners have not been intimidated or coerced by any of the Executive Orders of the Governor, as reflected by the unanimous issuance of the *En Banc* Order of October 25, 2007, and the Commission and individual Commissioners have faithfully applied the law as set forth in the *En Banc* Order.
8. The Governor and the Commission agree not to act in a manner inconsistent with the terms of this agreement and these stipulations in the future.

In light of the above agreement and stipulations, the Governor and the Commission jointly move that this Court adopt and approve this agreement and these stipulations, finding that same adequately and properly address the rights and interests of litigants in the workers' compensation system under statutory, Constitutional, and the common law. In addition, the Governor and the Commission move that this Court retain jurisdiction over all issues arising out of this agreement and these stipulations.

Accordingly, based on the above stipulations and agreement, the Commission moves to dismiss any and all claims asserted against it in this action with prejudice. In addition, the Governor moves to dismiss any and all claims asserted against him in this action with prejudice.

Respectfully submitted,

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Attorneys for the South Carolina Workers'
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Columbia, South Carolina

July ____, 2008.

EXHIBIT A

WHEREAS, since September of 2007, Executive Orders 2007-16, 2007-19, 2007-20, 2008-02 and the directive contained in the letter dated November 14, 2007 have been issued by the Office of the Governor to the South Carolina Workers' Compensation Commission ("Commission"); and

WHEREAS, the Governor issued the above Executive Orders to ensure that the Commission faithfully adheres to the Workers' Compensation Act pursuant to Article IV, Section 15 of the South Carolina Constitution, which provides that "the Governor shall take care that the laws be faithfully executed"; and

WHEREAS, the Governor is satisfied that the Commission's interpretation of the Workers' Compensation Act as set forth in its October 25, 2007 *En Banc* Order is consistent with state statutes and South Carolina Supreme Court precedent; and

WHEREAS, the Governor has the right to request and obtain information and records under the Governor's authority granted in Article IV, Section 17 of the South Carolina Constitution, S.C. Code § 1-3-10, and Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997); and

WHEREAS, pursuant to S.C. Code § 42-3-80, the executive director of the Commission is charged with the duty to "[c]ompile all statistics and reports concerning the administration of workers' compensation laws and the disposition of claims related thereto;" and

WHEREAS, pursuant to S.C. Code § 1-23-140(3), administrative agencies shall "[m]ake available for public inspection all final orders, decisions and opinions except as otherwise provided by law."

NOW, THEREFORE, the Governor hereby orders the Commission, the Executive Director of the Commission, or any appropriate designee to produce to the Office of the Governor the Decisions and Orders of Single Commissioners and Orders of Appellate Panels, including all Orders with regard to attorneys' fees, in all contested cases arising under South Carolina Code Section 42-9-30. Such production shall be on a quarterly basis, but in no event shall any such production occur until the South Carolina Supreme Court has ruled on all claims pending in the matter of Governor Mark Sanford, Petitioner, vs. South Carolina Workers' Compensation Commission, et al.

FURTHER, this Order supersedes Executive Orders 2007-16, 2007-19, 2007-20, 2008-02 and the letters, forms and directives issued in conjunction with these executive orders.

EXHIBIT B

BEFORE THE STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
EN BANC

Martha Jones, Employee)
)
 Claimant,)
)
 v.)
)
 Department of Disabilities)
 and Special Needs, Employer)
)
 and)
)
 State Accident Fund, Carrier)
)
 Defendants.)
 _____)

W.C.C. File No: 0403547

Jack D. Conway, Employee,)
)
 Claimant,)
)
 v.)
)
 Daryl Jones d/b/a Jones)
 Enterprises, Employer)
)
 and)
)
 Legion Insurance Company)
 in Liquidation through SCPCIGA,)
 Carrier)
)
 Defendants.)
 _____)

W.C.C. File No: 9914871

James Collins, Employee)
)
 Claimant,)
)
 v.)
)
 Milcon Systems, Employer)
)
 and)
)
 St. Paul Fire & Marine Insurance)
 Company, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0206522

Harold Simmons, Employee)
)
 Claimant,)
)
 v.)
)
 Universal Maritime, Employer,)
)
 and)
)
 Insurance Company of the State)
 of Pennsylvania, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0315479

Rogelio Garcia, Employee)
)
 Claimant,)
)
 v.)
)
 Mitzila Santos d/b/a M&S)
 Roofing, Employer,)
)
 and)
)
 Liberty Mutual Insurance)
 Corporation, Carrier,)
)
 Defendants.)
 _____)

W.C.C. File No: 0501290

indicated that it was to supplement and clarify his previous Executive Order, which was to remain in effect. Because the Commission must give ten days notice to all parties regarding any pending motions, the Commission will address only Executive Order 2007-16 at this time. S.C. Reg. 67-215. The Commission may consider any motions regarding Executive Order 2007-19 should they subsequently be filed.

When Workers' Compensation Commissioners adjudicate the rights of litigants under the South Carolina Workers' Compensation Act, they are judicial officers subject to Code of Judicial Conduct. S.C. Code § 42-3-250. The Code of Judicial Conduct imposes significant duties upon Commissioners which are essential to uphold respect and public confidence in the adjudicative work of the Commission. Judicial officers must be independent, impartial and "faithful to the law." S.C. App. Ct. Rule 501, Canons 1, 3. Judicial Officers "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ibid., Canon 2(A). Judicial officers must act "without fear or favor" and "shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment." Ibid., Canon 2(B). Judicial officers "shall not be swayed by partisan interests, public clamor, or fear of criticism." Ibid., Canon 3(B)(2). Further, as judicial officers, Commissioners should not "consider. . .communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. . . ." Ibid., Canon 3(B)(7).

The Commission is in receipt of Executive Order 2007-16, signed by the Honorable Mark Sanford, Governor of South Carolina, on September 20, 2007. The Commission and "each of its individual Commissioners" are directed in Executive Order 2007-16 "in all contested cases to strictly apply" either the Guides to the Evaluation of Permanent Impairment (5th Ed. 2001) (hereafter "AMA

Guides”) or “any other accepted medical treatise or authority in making their injury compensation determinations. . . .” The Commission and individual Commissioners are further directed by the Executive Order “to provide written confirmation to the Office of the Governor” on a quarterly basis that they have adhered to this legal standard.

The directives contained in Executive Order 2007-16, read in a reasonable fashion utilizing the plain and ordinary meaning of the words, require the use of legal standards that are contrary to the statutes adopted by the South Carolina General Assembly and interpreted by the South Carolina Appellate Courts. Executive Order No. 2007-16 requires the strict application of the AMA Guides “or similar medical treatise or authority” in “all contested cases.” Section 42-1-120 defines “disability” as “incapacity because of injury to earn wages the employee was receiving at the time of the injury in the same or any employment.” This statutory definition allows in appropriate cases an examination of the loss of earning capacity as a result of a work related injury in claims arising under Sections 42-9-10 and 42-9-20. These factors, in addition to the use of the AMA Guides, include the claimant’s education, vocational history, vocational training, age, preexisting conditions and other factors relating to a claimant’s alleged loss of earning capacity. E.g., Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664, 666 (2006); Stephenson v. Rice Services, 323 S.C. 113, 473 S.E.2d 699, 702 (1996). Requiring disability determinations to be made “strictly” upon the AMA Guides or other medical treatises or authorities, without regard to other potentially probative evidence regarding the loss of earning capacity, would be inconsistent with the clear and settled law of South Carolina.

Executive Order 2007-16 further impacts matters arising under Section 42-9-30. Although the Commission is required to process claims under Section 42-9-30 under the “medical model,”

South Carolina appellate courts have long held that evidence of disability under Section 42-9-30 may come from a variety of sources, including medical experts, lay testimony, and vocational experts. E.g., Linen v. Ruscon Construction Co., 332 S.E.2d 211-212 (S.C. 1985); Lyles v. Quantum Chemical Co., 434 S.E.2d 292, 295 (S.C. App. 1993); Cropf v. The Pantry, Inc., 344 S.E.2d 879, 880-881 (S.C. App. 1986). As the South Carolina Court of Appeals recently stated in Sanders v. Mead Westvaco Corp., 638 S.E.2d 66 (S.C. App. 2006):

We do not agree that a determination of impairment under [Section 42-9-30] mandates only medical evidence be considered by the Commission in determining the degree of disability. . . . Further, the Appellate Panel is not bound by the opinion of medical experts and “may find a degree of disability different from that suggested by expert testimony.” Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion. Unless the question of the extent of partial loss of use under § 42-9-30 is so technically complicated as to require exclusively expert testimony, lay testimony is admissible.

638 S.E.2d at 70. Limiting determinations under S.C. Code § 42-9-30 to a “strict” application of “AMA Guides or other accepted medical treatises or authority” would be violative of the settled law of South Carolina, as interpreted by the South Carolina Supreme Court and the South Carolina Court of Appeals.

A legal standard similar to that contained in Executive Order 2007-16 was proposed as an amendment to House Bill 4427 by on the floor of the House on April 5, 2006. 2006 House Journal (April 5, 2006), www.scstatehouse.net/scss/116/2005-2006/hjo6/20060405.htm at 33. The Amendment provided that the Commission rely exclusively on the American Medical Association Guides and stated that “other factors including, but not limited to, age, education, and vocational history, may not be considered in determining benefits provided by this schedule.” The Amendment

was debated and a motion to table the amendment was adopted by the full House by a vote of 57-35. The South Carolina Supreme Court has held that a proposal “explicitly rejected by the Legislature” provides evidence of legislative intent. Gilstrap v. Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101, 104 (S.C. 1992). The South Carolina General Assembly’s rejection of the 2006 Amendment is further evidence that the General Assembly did not intend to limit determinations under the Workers’ Compensation Act strictly to an application of the AMA Guides.

The General Assembly has mandated that “all questions arising” under the Workers’ Compensation Act “shall be determined by the Commission. . . .” S.C. Code § 42-3-180. Executive Order 2007-16, which presumes to direct the legal standards to be applied under the Workers’ Compensation Act in pending adjudicative matters before the Commission, creates a real and substantial controversy that has a potential material impact on the legal rights and claims of parties in these matters before the Commission. The matter is squarely before the Commission; the parties have ably briefed the question, and the interests of justice and judicial economy require action on these matters at this time by the Commission.

These motions arise in the course of adjudicative proceedings within the Judicial Department of the Commission. S.C. Code § 42-3-10. The Commission is mindful that the South Carolina Constitution places specific requirements on “judicial or quasi-judicial decision[s] of an administrative agency,” including the provision that the liberty or property rights of a citizen cannot be adjudicated “unless by a mode of procedure prescribed by the General Assembly.” S.C. Constitution Article I, § 22. Through the adoption of the Workers’ Compensation Act, the General Assembly has established an elaborate statutory scheme for adjudicating the rights of workers and employers arising out of allegedly work-related injuries. The Commission is bound by the statutory

laws of the South Carolina, State Constitution, Code of Judicial Conduct and Commissioners' oath of office to uphold and be faithful to these laws.

The Commission has the utmost respect for the Office of the Governor and recognizes the Governor's broad authority to supervise and direct the administrative functions of the Executive Branch. Executive Order 2007-16, however, directs action by Commissioners sitting as judicial officers subject to the Code of Judicial Conduct. S.C. Code § 42-3-250. Commissioners, sitting in their judicial capacity, are mandated by the Code of Judicial Conduct to be "independent," "impartial" and "faithful to the law." Canons 1, 3. The Commission does not have the authority to follow the directives of Executive Order 2007-16 relating to the legal rights of litigants in matters pending under the Workers' Compensation Act that are contrary to the statutes of South Carolina as adopted by the General Assembly or decisions issued by the South Carolina Appellate Courts.¹

The Commission has no interest in injecting itself into any public controversy and takes no position on any public policy issues regarding existing or proposed changes in the Workers' Compensation Act. The Commissioners' duty, sitting as judicial officers, is to address independently and impartially "all questions" that come before them under the Workers' Compensation Act. 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. Canon 3(B)(2) and 3(B)(7).


Public trust and confidence in the independence and impartiality in the work of the Commission are essential to the effective operation of the Workers' Compensation System. It is the


¹The Commission renders no opinion concerning whether Executive Order 2007-16 is in any way unconstitutional since that matter would more appropriately be addressed by the courts.

hope and expectation of the Commission that this Order, signed by all Commissioners, will assure all litigants and the general public that adjudications under the Workers' Compensation System will be conducted with impartiality, independence, and in accord with the rule of law. The Commission will continue to apply the standards set forth in the Workers' Compensation Act and the case law interpreting the same. Having addressed these consolidated motions, these matters are now before the individual Commissioners and Panels from which they arose for disposition on the merits.


AND IT IS SO ORDERED.


Commissioners of the South Carolina
Workers Compensation Commission

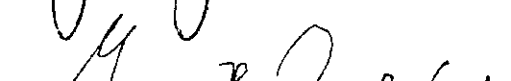

David W. Huffstetler, Chairman


J. Alan Bass, Commissioner


G. Bryan Lyndon, Commissioner


Derrick L. Williams, Commissioner


Susan S. Barden, Commissioner


George N. Funderburk, Commissioner


Andrea P. Roche, Commissioner

October 25, 2007