An Anatomy of the 2006 Legislative Effort to Reform Workers' Compensation
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For a decade or more, South Carolina employers experienced rather stable workers' compensation insurance premium rates that were some of the lowest in the country. While indemnity and medical expenses steadily increased during this period, overall system expenses were held in check by a declining accident rate.

The system reached a tipping point, however, in the last few years. The reasons vary, but the bottom line for business owners is that premium rates increased by 17.5% in 2003 and 11.4% in 2004. In July 2005, the National Council for Compensation Insurance, the statutory rate-making organization for workers' compensation insurance carriers, filed a 32.9% rate increase with the South Carolina Department of Insurance. The increase was denied by DOI Director Eleanor Kitzman and is currently pending before the Administrative Law Court.

As if the prospect of a 61.8% rate increase over three years was not enough to get the attention of the business community, the state's Second Injury Fund announced that its 2005 assessment would almost double from the previous year—from$130 million to $253 million. Such a significant and unexpected increase in assessment rates jeopardized the cash reserves of several self-insurers and created additional, unforcasted liabilities for all underwriters.

In response to the growing unrest in the business community over the cost of workers' compensation insurance, Governor Mark Sanford created the Governor's Workers' Compensation Reform Task Force by executive order on July 26, 2005. Composed of business and insurance company executives, physicians, and attorneys, the Task Force was directed to study the current workers' compensation system and report back to the Governor by January 1, 2006.

The call for reform grew even louder the following month as representatives from the South Carolina Chamber of Commerce, the South Carolina Manufacturers Alliance, the Carolinas Associated General Contractors, the National Federation of Independent Businesses and others joined together at a Statehouse news conference to call for an end to the Second Injury Fund and for comprehensive reform of the workers' compensation system. Many of these associations and similar organizations and trade groups joined together to form the Civil Justice Coalition, the business community's lead lobbying organization for workers' compensation reform.

For the next several months, the Governor's Task Force and the Civil Justice Coalition, working independently of one another, studied the pertinent issues. From an initial list of sixty-seven issues, the task force worked diligently to identify recommendations that would respond to the biggest cost drivers in the system. Weeks before the beginning of the 2006 legislative session, the task force issued its final report to Governor Sanford. Among the most pressing issues identified for reform by the task force was the need to abolish the Second Injury Fund, a recommendation to add four commissioners to the current seven and

create a separate, exclusive panel to hear appeals, require the use of the American Medical Association's Guide to Physical Impairment and require awards above the medical impairment rating to conform to strict guidelines, limit claims for repetitive trauma injuries, and eliminate the presumption that an impairment rating greater than 50% to the back automatically qualifies for total and permanent disability. In addition, the task force recommended that the state's insurance fraud provisions be strengthened and that an advisory committee be reconstituted and given oversight powers over the operations of the Workers' Compensation Commission. Finally, the Governor's Reform Task Force identified three South Carolina Supreme Court decisions that needed a statutory redress: *Tiller v National Health Care* (expert testimony and burden of proof), *Brown v BiLo* (an employer's access to an injured workers' medical records), and *Dodge v Bruccoli* (future medical benefits).

Closely following the release of the Governor's Workers' Compensation report, the Civil Justice Coalition unveiled its legislative reform package. Introduced in the House as H 4427 on January 12, 2006, the twenty-one page bill became the main vehicle for legislative action. Many provisions in the bill addressed the concerns articulated by the Governor's Task Force, but H 4427 also included a number of other reform initiatives such as the elimination of concurrent jurisdiction between the state's Workers' Compensation Act and similar federal provisions for Longshore and harbor workers, exempting professional athletes from workers' compensation mandatory coverage, excluding claims caused by the use of alcohol or illegal drugs, redefining and restricting occupational disease claims as another way to address repetitive trauma, and limiting fees for attorneys representing injured workers.

House Bill 4427 was referred to the Labor, Commerce and Industry Committee and assigned to the Labor and Commerce Subcommittee for consideration. Subcommittee Chairman Converse Chellis conducted numerous hearings over the next several weeks before the bill was scheduled for a vote. While the Coalition's bill was adopted almost in its entirety by the subcommittee, two significant amendments were approved. First, the section proposing to close the Second Injury Fund was modified to allow the fund to remain open but only consider claims limited to a pre-existing loss of a foot, leg, arm, hand, loss of sight in one or both eyes, and a ruptured intervertebral disc. Second, the section limiting the fees of attorneys representing injured workers was expanded to include a cap on all attorney fees regardless of the client.

The amended bill was sent to the full House Labor, Commerce and Industry Committee where it was debated robustly over the course of several meetings. On a motion by the committee's chairman, Rep. Harry Cato, the language recommended by the subcommittee was struck in its entirety and replaced with a limited number of new or revised sections. It was the collective opinion of the chairman and a majority of the committee that the original bill was more ambitious and far-reaching than the House members were prepared to debate.

The version of H 4427 sent to the House floor contained the following pertinent sections: a preamble that gives the courts guidance concerning the purpose of the act as a way of promoting strict judicial construction, the subcommittee's recommendation that claims for Second Injury Fund reimbursement be limited rather than eliminating the Second

Injury Fund entirely, fraud, repetitive trauma, expert medical evidence in response to *Tiller*, access to medical records in response to *Brown*, and a new section that required that an actuary to document a cumulative cost savings of ten percent or more before the provisions of the bill could become effective. Gone from the Coalition's original proposal were sections addressing caps on attorney fees, the 50% rule for the back, the required use of AMA Guides to limit discretion, *Dodge*, professional athletes, Longshore and harbor workers, and working under the influence.

On Wednesday, April 5, after a five hour debate on thirty-six amendments, the House gave second reading to H 4427. On a vote of 92-16, the House reported out a bill which was a cross between the Coalition's original bill and the strike and insert amendment approved by the Labor, Commerce and Industry Committee (LCI). A section by section summary on the House's final Workers' Compensation Reform bill follows.

Section 1	A preamble addressing the intent of the Workers' Compensation Act as added by the LCI Committee
Section 2	Exempts employees covered under the Longshore and Harbor Workers Act, Jones Act or Federal Employers' Liability Act from coverage under the South Carolina Workers' Compensation Act. This provision was in the original bill, but removed by LCI.
Sections 3 and 4	Define and exempt professional sports team players from the Workers' Compensation Act. This provision was in the original bill, but removed by LCI.
Section 5	This was the LCI version of reducing the pre-existing conditions of the Second Injury Fund to amputated foot, leg, arm, hand, loss of sight of one or both eyes, and ruptured intervertebral disc and not the complete elimination of the SIF as proposed by the Civil Justice Coalition.
Section 6	This section was in response to *Tiller v National Health Care Centers* and survived intact from the original bill and the LCI amendment. However, the language in this section may be at odds with the language in Section 10.
Sections 7, 8, and 9	Toughen fraud penalties and language per the original bill and the LCI version.
Sections 10 and 11	Section 10 substantially rewrote the definition of an accident, set burden of proof as preponderance of the evidence, allowed for the consideration of lay testimony, and recognized injuries that occur gradually over time. Section 11 removed constant exposure in the occupational disease section from precluding a qualifying condition. If this were to pass, repetitive trauma injuries would be recognized by statute.

<u>Sections 12 and 13</u>	Address the restrictions in *Brown v Bi-Lo* per the original bill and the LCI amendment; one of the few sections that was not challenged.
<u>Section 14</u>	Severability clause.
<u>Section 15</u>	This was a new section that was not in either version. It required a Commissioner to state in the order the AMA impairment rating he or she relied on to make their final award. It did not require that the impairment rating equal the award, but established a benchmark for analyzing the difference between the final award and the impairment rating.
<u>Section 16</u>	Another new section required the General Assembly to screen, nominate, and elect Commissioners in the same manner as Employment Security Commissioners beginning with terms ending after January 1, 2007. There was almost unanimous support for this measure as the members refused to table it by a vote of 13-97.
<u>Section 17</u>	The provisions of this bill would take effect upon signature of the Governor, except for Sections 3, 7, and 8, which would take effect October 1, 2006. The Department of Insurance must contract for an actuarial study to determine cost savings from January 1, 2007 to December 31, 2012 and report back to the General Assembly with any recommendations for further cost savings. This was not a trigger clause as proposed in the LCI amendment.

H 4427, as amended, was sent to the Senate and referred to the Judiciary Committee, but the battle to reform workers' compensation during the 2006 session was lost as soon as the final House vote was cast. The amendments added in the House, particularly sections 10 and 11, caused the Coalition and other proponents of the bill to withdraw their support and actually work against any further consideration of H 4427. With sine die, H 4427, in all of its various transformations, was cleared from the House and Senate calendars forever. H 4427 fell victim to competing agendas, an overly broad reach, a complex and arcane system that is difficult to explain and even more difficult to understand, a knowledgeable, well-prepared, and well-financed opposition, and a legislative agenda that was already crowded with difficult and contentious issues.

A new legislative session begins in January, and already those working to change the workers' compensation system are preparing their agenda. Given the level of interest and attention that this issue generated last session, there is every reason to believe that next year's legislative debate will be just as hotly contested.