S.C. Defense Trial Attorneys' Association

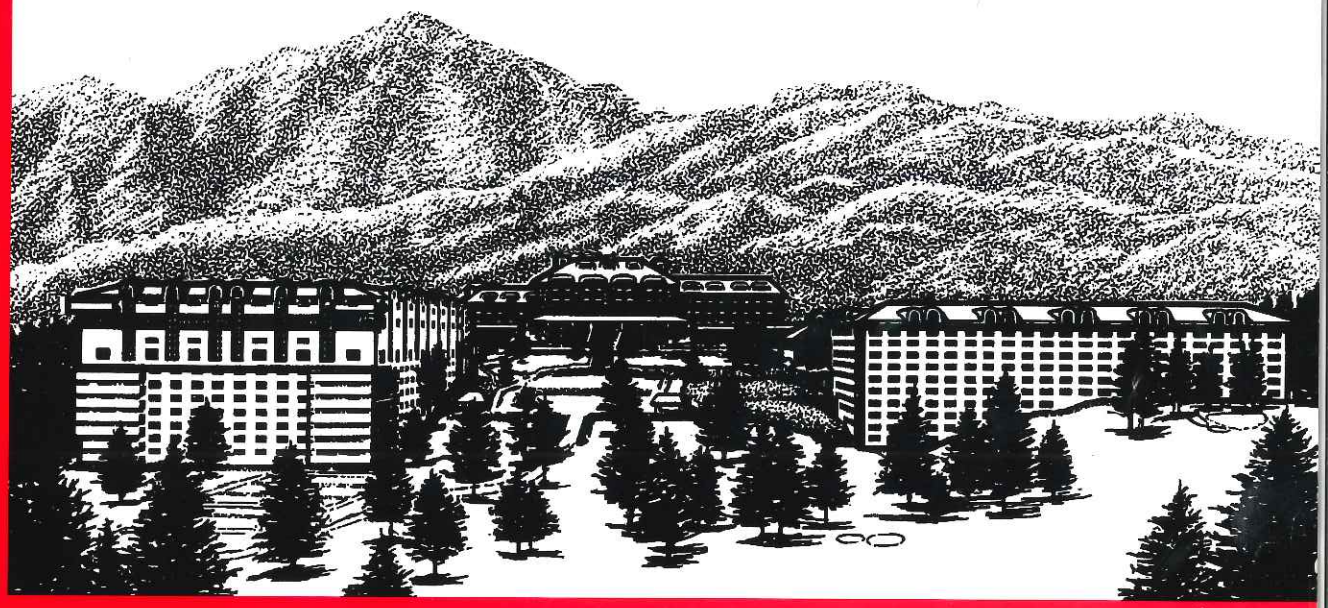
Volume 24 Number 3 • Summer, 1996

The DefenseLine

Joint Meeting

GROVE PARK INN, ASHEVILLE, NC

July 25-27



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A FRESH PERSPECTIVE

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Ten Years Ago

Under the leadership of our President, T. EUGENE ALLEN, III, THERON COCHRAN, Chairman of the Long Range Planning Committee, reported on their first meeting. In addition to President ALLEN, were former presidents, JIM ALFORD, BOB CARPENTER, BARRON GRIER, GRADY KIRVEN, BEN MOORE, DEXTER POWERS, and President-Elect THERON COCHRAN. Plans were being made for the Joint Meeting of the Defense Attorneys and Claims Managers at Asheville, North Carolina July 24-26. HUGH MCANGUS, Membership Chairman, reported 104 individual members and 448 firm members made up of 33 firms. GLEN BOWERS and TIM BOUCH reported that our Association was to jointly sponsor a video/CLE seminar entitled "Practical Products Liability". THERON COCHRAN, President-Elect, reported on the National Conference of State and Local Associations which meeting was held in Orlando, Florida April 23-26. Our Association was again presented with DRI's prestigious Exceptional Performance Award.

Twenty Years Ago

The late C. DEXTER POWERS, our president in 1976, announced that the Joint Meeting of Defense Attorneys and Claims Managers would be held August 20-21 at the Landmark Hotel in Myrtle Beach. An outstanding program was in prospect. DR. EARL WATLEY, Department of Education at USC made a presentation, "Success Through People". DAVID HINKLE, Vice-President of Crawford Company, made a presentation, "Handling Claims in the Swinging Seventies". JIM ALFORD and ED MULLINS, JR. made a presentation on Product Liability Claims, Investigation and Handling. The late T.M. "BABE" NELSON shared the work comp spotlight with the Honorable DAWSON ADDIS and Honorable SARAH LEVERETTE. Finally, there was a panel on Company/Attorney Relationships and Problems moderated by President DEXTER POWERS, panel members G. DEWEY OXNER, GERALD GARNETT of the Farm Bureau, and RALPH BARTON of State Farm.

President's Letter

I hope you are all planning to join your fellow Defense Attorneys and the South Carolina Claims Managers in Asheville, North Carolina on July 25-27, for the Annual Joint Meeting. Frankie Marion and Jim Nance have planned a wonderful program. We have structured the program to include both regular CLE hours and ethics.

The Annual Meeting will be November 7-10, 1996, at the Ritz Carlton, Buckhead. Please put these dates on your calendars and plan to come and enjoy Atlanta.

The legislative session is now over and was very busy. Judicial selection reform is now a reality. The bill which passed makes important changes in the process. There was comprehensive reform of the South Carolina Workers' Compensation laws both procedurally and substantively. These changes affect the calculation of average weekly wage, codify the criteria for awarding claims based upon mental stress, allow a carrier to start payment of compensation and to continue these benefits for up to 150 days and then stop these payments without a hearing, and eliminate the right of a business to opt-out of the Workers' Compensation Act. The South Carolina Defense Attorneys as an organization, with the assistance of many of our members, actively worked on behalf of these bills. Susan Lipscomb worked and chaired a committee devoted to judicial selection. Will Davidson chaired the Legislative Committee. Michael Ey of the McNair Firm registered as a lobbyist for the association this session. We will discuss these bills as part of our Asheville meeting.

I was pleased to attend, as a guest of the South Carolina Bar, the South Carolina Bar Convention. I am excited about the law office management project which is being headed up by Steedley Bogan. This project will offer to firms a variety of services aimed at reducing legal malpractice claims and providing clients quality legal services. Attorney Bogan is very knowledgeable about the available computer software and hardware and will also be available to review and make recommendations. He will focus on conflicts of interest, calendaring and docketing, and case management applications.

SCDTAA and CMASC

1996 Joint Meeting Schedule of Events

THURSDAY, JULY 25

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 7:00 p.m.	Registration
6:30 to 8:00 p.m.	Welcome Cocktail Reception
	DINNER ON YOUR OWN

FRIDAY, JULY 26

8:00 am to 12 noon	Registration
8:15 to 8:45 a.m.	Coffee Service
8:15 to 8:30 a.m.	***Welcome*** *SCDTAA President and CMASC President*
8:30 to 9:00 am	***Ethical Considerations Involved in Taking an Adverse Position Against the Insured***
9:00 to 10:00 am	***Reconstructing Accidents, Both Automobile and Industrial***
10:00 to 10:15 am	Coffee Break
10:15 to 12:15 p.m.	***Head Trauma Damage Claims*** *David Price, PH.D. and Dr. William Brannon*
10:15 to 12:15 p.m.	***Workers Compensation Breakout***
12:15 to 1:15 p.m.	Beverage Break
12:15 to 6:00 p.m.	White Water Rafting Trip
12:30 p.m.	Golf Tournament, *David Rheney, Chair*
2:15 p.m.	Tennis Tournament
6:30 to 10:00 p.m.	Children's Program and Dinner at Grove Park
6:30 to 7:00 p.m.	Cocktail Reception - Deerpark Restaurant
7:00 to 8:00 p.m.	Buffet Dinner - Deerpark Restaurant
8:00 to 9:30 p.m.	Entertainment at Deerpark Restaurant
8:00 to 9:30 p.m.	Optional ***Behind the Scenes*** First Time Glimpse Guided Candlelight Tour

SATURDAY, JULY 26

8:00 to 8:30 a.m.	Coffee Service
8:00 to 8:30 a.m.	***SCDTAA Business Meeting***
8:00 to 8:30 a.m.	***CMASC Business Meeting***
8:30 to 9:00 a.m.	Ethical Issues Which May Arise in Mediation
9:00 to 10:00 a.m.	***The Do's and Don'ts in Presenting Your Insured's Position at a Mediation***
10:00 to 10:15 a.m.	Coffee Break
10:15 to 11:15 a.m.	***The Mysteries of Computer Research Revealed!***
11:15 to 12:15 p.m.	***"State-of-the State" of the Insurance Industry***
12:15 to 1:15 p.m.	Beverage Break

Joint Meeting in Asheville, North Carolina

The 29th Joint Meeting between the South Carolina Defense Trial Attorneys' Association and the Claims Management Association of South Carolina has been set for July 25 through 27, 1996, at the Grove Park Inn in Asheville, North Carolina. The programs will be informative and entertaining. The social activities will simply be fun.

On Friday, the program will begin at 8:30 am, with a half-hour ethics program dealing with the ethical considerations involved in taking an adverse position against the insured. During the 9 o'clock hour, a well known accident reconstruction expert will give a nuts and bolts presentation about reconstructing accidents, both automobile and industrial.

Beginning at 10:15 am and continuing until 12:15 pm, the program will shift to focus on head trauma damage claims. We are honored to have David Price, Ph.D. an expert in neuropsychology, and Dr. William Brannon, a neurologist, as our speakers. They too plan to give a nuts and bolts presentation on how to defend and evaluate a head trauma claim.

On Saturday, the program will again begin with a 30-minute ethics presentation. The topic will address ethical issues which may arise in mediation. At 9 am, the do's and don'ts in presenting your insured's position at a mediation will be revealed by several experienced mediators.

During the 10 o'clock hour, the mysteries of computer research will not only be revealed, but topics submitted by you will be researched live! Plus, we can see what is available through on-line data bases. This will not only prove to be interesting, but may amaze some of you at what's out there.

Finally, the last hour we will hear from leading insurance executives and lobbyists as to the "state-of-the-state" of the insurance industry and what we can expect from a legislative standpoint in the near future.

Friday afternoon the usual social activities will be available: golf, tennis, rafting, etc. Friday evening, we will dine and be entertained at Deer Park on Biltmore Estates. Tickets will also be available for a special new "behind the scenes tour." This is not the same tour that was offered to our group last year.

As you can see, this proves to be an informative and fun weekend. We hope that there will be a large turnout of members from **both** organizations. We encourage you to let the Association know of claims managers who live outside of South Carolina but supervise claims in South Carolina. They will be eligible to come to this meeting. We look forward to seeing each of you there.

Call For Nominations 1996 Hemphill Award

Deadline: Noon, Wednesday, July 24, 1996

Mail to:

SCDTAA Headquarters
3008 Millwood Avenue
Columbia, SC 29205

Fax to:

SCDTAA Headquarters
1-803-865-0860

Contact SCDTAA for more information
1-800-445-8629

Trial Academy Date Set

The SCDTAA Trial Academy has been scheduled at the University of South Carolina Law School for August 14 through August 16, 1996. Several state and federal judges, as well as a South Carolina Supreme Court Justice, have committed to participating as speakers and jurists for the mock trial portion of the Academy.

Registration materials have been mailed to members. Sign up as soon as possible since the Academy is limited to 24 students, and we expect another full house, as in years' past.

August 14

Bad Faith Refusal To Pay Insurance Claims In South Carolina:

Claim Coverage v. Claim Review

Henry J. White, Sinkler & Boyd, P.A.

While it is often said that a mere breach of contract is not actionable as a tort in South Carolina, our Supreme Court has long acknowledged that "actions in tort often have their beginning in contractual matters." *St. Charles Merc. Co. v. Armour & Co.*, 156 S.C. 397, 153 S.E. 473, 477 (1930). So it is with the relatively new tort of bad faith.

In *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983), the South Carolina Supreme Court first recognized a tort action for the bad faith or unreasonable refusal by an insurance company to pay first party benefits owed under an insurance policy. The significance of *Nichols* is twofold. First, if the insured can show bad faith or unreasonable conduct, he can recover consequential damages in excess of the policy limits. Additionally, if the insured can "demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." 306 S.E.2d at 619. The lure of extracontractual and punitive damages has made bad faith a popular cause of action to allege anytime an insurance company denies a claim.

"This policy discussion and subsequent case law analysis will provide some fresh guidance about what constitutes bad faith in South Carolina."

Nichols, however, did not define what constitutes bad faith or unreasonable conduct. The Court merely concluded that "[w]e have reviewed the record and find that sufficient conflicting evidence was presented to create a jury issue." 306 S.E.2d at 619. Although the Court did not define the new tort, it gave a clear analysis of the policy reasons for creating it. This policy discussion and subsequent case law analysis will provide some fresh guidance about what constitutes bad faith in South Carolina.

Policy Rationale

The court stated that insurance policies are contracts of adhesion in which the insured has little bargaining power. The insured seeks to protect himself against some accidental or unavoidable loss, and the bad faith action was created to help the insured get the benefit of his bargain. The court reasoned that "[a]bsent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish, whether valid or not." 306 S.E.2d at 619. In short, the tort was created to prevent insurance companies from refusing to pay claims that are clearly owed.

The court also noted that the *Tyger River* Doctrine and the *Nichols* bad faith action "are merely two different aspects of the same duty." 306 S.E.2d at 619. The *Tyger River* Doctrine requires a liability insurer to settle the claim against its insured within the policy limits if that is the reasonable thing to do. The central point of the *Tyger River* Doctrine is that the insurance company must forego its interest in favor of the insured's interest in settling within the policy limits. If the insurance company's interest conflicts with the insured's, the company must "sacrifice its interests in favor of those of the [insured]." *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 292, 170 S.E. 346, 348 (1933).

Nichols' Progeny

Cases subsequent to *Nichols* have made clear that the insurance company must promptly and fairly investigate and handle the insured's claim for benefits. Failure to do so can result in bad faith liability. Several cases illustrate how claim handling is a key issue in determining whether bad faith exists.

Crossley v. State Farm

In *Crossley v. State Farm Mut. Auto. Ins.*, 307 S.C. 354, 415 S.E.2d 393 (1992), the plaintiff submitted an application for health insurance in which he denied having any prior medical problems. The next day he saw a doctor as a result of chest pain. He was diagnosed with coronary artery disease. State Farm denied the application because of this pre-existing condition. A jury found bad faith and awarded $30,000.00 in punitive damages. The Supreme Court reversed, finding that "State Farm followed standardized, published procedures to determine whether [Crossley's] symptoms met criteria for denying coverage based on a pre-existing condition.... If there is a reasonable ground for contesting a claim, there is no bad faith." 415 S.E.2d at 397. It was State Farm's standardized, published procedures that helped it escape bad faith liability. The insurance company in the following case had no such procedures, and a jury finding of bad faith was upheld.

Hansel v. National States

In *Hansel v. National States Ins. Co.*, 313 S.C. 266, 437 S.E.2d 159 (Ct. App. 1993), Mrs. Hansel purchased a nursing home policy from National States. The policy provided her coverage for skilled and intermediate nursing care, but not for custodial care. It defined skilled and intermediate nursing care as care involving the skills of a registered or licensed practical nurse, including physical, emotional, social and other restorative services under periodic medical supervision. In contrast, custodial care was defined as personal service care for needs such as eating, bathing, dressing, and walking. This type of care could be performed by a person without professional nursing skills or training.

Mrs. Hansel, who was 77 years old at the time, fell on her front porch and her face struck the door frame. She laid on the porch unconscious for several hours. "Her injuries included a laceration near her eye, some bruises, and a serious fracture to her shoulder." 437 S.E.2d at 160.

After being hospitalized for five days, she was transferred to the Christopher East Health Care Facility. Her admitting order to Christopher East "indicated Mrs. Hansel should be placed in the facilities skilled care section." 437 S.E.2d at 161. She remained in the skilled care section until her discharge.

A claim was submitted to National States for the treatment at Christopher East. National States first denied the claim "based on its evaluation that the care she received at Christopher East was custodial rather than skilled or intermediate." *Id.* Several months later, "National States stated it was not liable for the physical therapy Mrs. Hansel received while at Christopher East because the therapy did not start until 41 days after she was discharged from the hospital." *Id.*

Mrs. Hansel then sued, alleging causes of action for breach of contract and for bad faith refusal to pay insurance benefits. The jury ruled in her favor on both causes of action and awarded her actual and punitive damages.

On appeal, National States argued that it had reasonable grounds to contest Mrs. Hansel's claim and that the trial court should have ruled accordingly. The Court of Appeals disagreed, and in a footnote listed twenty items that indicated "National States had no reasonable basis for denying Mrs. Hansel's claim...." *Id.* n. 2. The twenty items can be divided into two general categories; (1) claim handling and (2) claim coverage.

I. Claim Handling

A. Failure to handle promptly

The Court of Appeals noted that "National States waited four months to respond to Mrs. Hansel's claim." *Id.* n. 2.1. The insurance company's delay in handling the claim can be a significant factor because it relates directly to the policy rationale articulated in *Nichols* that the tort of bad faith is designed to prevent the insurance company from denying claims with impunity and profiting from the "use of the insured's property during the period of litigation following the denial." *Nichols*, 306 S.E.2d at 619. Delay in claim processing has long been a complaint in bad faith actions. In *Tyger River*, for instance, the insured complained that for almost seven months the insurance company "dallied and delayed in making any investigation" of the claim. 170 S.E. at 347. Thus, any unexplained delay in handling the claim is a factor that can result in bad faith liability.

B. Failure to Communicate with Insured

The claim was actually filed by Mrs. Hansel's daughter, Irene Hansel. However, National States never contacted Irene Hansel, "who was intimately familiar with the care provided her mother." 437 S.E.2d 161 n. 2.2. Additionally, "National States failed to return at least fifteen telephone calls made by Irene Hansel." The opinion gives no indication why the calls were not returned. This neglect on National State's

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Continued from page 7

part could have resulted from any number of possible causes. Possible overwork by adjusters, who were too swamped to return calls, or a possible lack of internal telephone procedures to ensure the prompt return of telephone calls. However, most insurance companies have a firm policy of discussing claims only with the insured or the insured's guardian or attorney-in-fact.

C. Claim Review Procedures

Hansel illustrates the importance of the insurance company having a written claim review procedure. The National States' adjusters used no claims manual or guidelines to process claims, and National States had no claim review committee. 437 S.E.2d at 162 nn. 2.7 & 2.9. Moreover, "no personnel with medical training assisted the adjusters in reviewing medical records." *Id.* n 2.8.

There is no universal claim review procedure. Insurance companies have different claims procedures due to the varying types of claims they process. Since the claim review process is an important issue in bad faith litigation in South Carolina, both parties will be looking for analogous situations to bolster their arguments about the sufficiency of the insurance company's claim procedures.

The claim procedures under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, may be helpful. "ERISA requires benefit plans covered by the Act to provide internal dispute resolution procedures for participants whose claim for benefits have been denied. 29 U.S.C. § 1133. Employee benefit plans must provide adequate, written notice of the specific reason for such a denial and must afford participants a reasonable opportunity for a 'full and fair review' of the decision denying the claim." *Makar v. Health Care Corp.*, 872 F.2d 80, 83 (4th Cir. 1989).

One of the reasons Congress mandated these internal claim procedures was to "promote the consistent treatment of benefit claims." *Id.* Thus, under ERISA, the claimant must be given written notice of the specific reasons for denial of the claim and the benefit plan must contain some internal appeal process. In *Makar* after the claim's initial denial, the plan participant could appeal to a grievance committee and from there to a subcommittee of the plan's board of directors. No lawsuit could be filed until these internal procedures had been exhausted. *Hansel* strongly suggests that the insurance company should have some internal claim review procedure after the initial denial by the adjuster.

A standardized claim review process helps ensure that the claim is reviewed pursuant to objective criteria and is not subject to being denied at the whim of one adjuster. In *Crossley*, the denial of a claim pursuant to a standard written procedure was seen as evidence of good faith by the insurance company. In contrast, in *Hansel* no claims manual or guidelines were used. The mere use of standard written procedures does not automatically insulate the insurance company from bad faith liability, but such procedures can help explain why the claim was denied.

Many times, especially with complicated claims, there will be disagreement among the adjusters reviewing the claim. Such conflicting assessments of the claim might be viewed as evidence of bad faith.

In *Orangeburg Sausage Co. v. Cincinnati Ins.*, ____ S.C. ____, 450 S.E.2d 66, 73 (Ct. App. 1994), for example, the court noted as evidence of bad faith that one of the "adjusters determined that the loss was owed and increased the reserves...." A question arises as to how reasonable it will be to expect everyone in the claim review process will agree on how a claim should be handled. Moreover, should the statutory requirements for setting reserves be used as a badge of bad faith?

In the claim review process the insurance company must bring to bear on the claim those with expertise in the area. Mrs. Hansel's claim raised various medical issues, and the court found that the insurance company should have had someone with medical training, either inside or outside the company, review the type of treatment Mrs. Hansel had received, and to determine if the treatment was skilled or merely custodial care.

Of course, the opinions of the company's experts are subject to attack. For instance, in *Howard v. State Farm Mut. Auto. Ins. Co.*, ____ S.C. ____, 450 S.E.2d 582, 586 (1994), the Court noted the jury could question whether a lawyer's advice to the insurance company about proximate cause was reasonable.

D. Varying Reasons for Denial

In footnotes 2.5 and 2.6 the Court noted that National States gave two reasons for denying the claim. Varying reasons for the claim's denial can give the impression that the insurance company is fishing for reasons to deny the claim. This conflicts with the company's duty to put the interests of the insured above the company's interest. On the other hand, if the claim is subjected to multiple levels of review, as the *Hansel* opinion suggests it should, additional reasons for claim denial may be discovered in the claim review process. If these additional grounds are reasonable, should the insurance company be precluded from using them? Furthermore, should the insured receive a potential windfall because the additional grounds were not discovered sooner?

II. Claim Coverage

The remaining footnotes in *Hansel* relate to the substantial evidence that Mrs. Hansel's claim was covered by the policy. There was overwhelming evidence that Mrs. Hansel's care at Christopher East was skilled and intermediate and not custodial. In fact, footnote 2.16 indicates that "National States possessed no record from any doctor or nurse stating that Mrs. Hansel required only 'custodial care'." 437 S.E.2d at 162. Faced with such overwhelming evidence of coverage, the court held the claim should have been paid.

There is tension between claim handling and claim coverage in almost all bad faith actions. It is the tension between the contract claim and the tort claim for bad faith. It is interesting that in discussing why bad faith existed, half of the twenty footnotes in *Hansel* are related to coverage and not claim handling. The two appear inextricably linked.

For instance, in *Orangeburg Sausage Co.*, the lower court found that the insurance company "disregarded substantial evidence" that the loss was covered. Similarly, in *State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729, 732 (4th Cir. 1990), the court found that State Farm intentionally ignored clear evidence that the fire was set by vandals as maintained by the insured. More recently in *Cock-N-Bull Steak House v. Generali Ins.*, ____ S.C. ____, 466 S.E.2d 727 (1996), the insurance company ignored detailed language in the policy that covered the insured's claim. The South Carolina Supreme Court found that the insurance company's "short-hand" reading of the policy resulted in "a clear breach of the contract." 466 S.E.2d at 729. The court went on to note that the insurance company "did not present evidence as to why the claim was denied." *Id.* at 730. This suggests that the insurance company may have had the burden of coming forward with evidence justifying its denial of the claim. In short, a determination of bad faith usually involves poor handling of a claim that should clearly have been paid.

III. No Balance of Factors

Unfortunately, *Hansel* does not weigh the factors set forth in the twenty footnotes. Is a failure to return calls alone enough to constitute bad faith? Must the insurance company have a claim review committee? What is the interplay between the claim handling evidence and the claim coverage evidence? If none of the claim handling problems existed, would the bad faith verdict have been upheld with only the coverage factors at issue? Perhaps, the idea is that better claim handling would have led to the correct coverage decision.

Conclusion

South Carolina courts look to what procedure was used to review the claim and whether there was a diligent review of the claim by the insurance company. The claim must be promptly reviewed and the insurance company must communicate with the insured in a timely fashion and share relevant information with the insured. The company's financial incentive to deny claims must be placed second to the insured's right to have the claim thoroughly reviewed and paid if covered. The failure to pay a clearly covered claim can by itself constitute bad faith. Unfortunately, the line between clearly covered claims and those that are fairly debatable is not subject to easy demarcation.

"Is a failure to return calls alone enough to constitute bad faith?"

Workers' Compensation Report

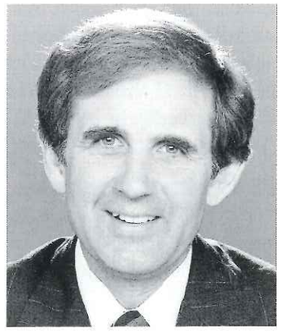
Honorable Thomas M. Marchant, III
Chairman, S.C. Workers' Compensation Commission

The South Carolina workers' compensation market has performed extremely well over the past several years. Rates have been on a downward trend, lowering the cost employers pay for workers' compensation insurance. More insurance carriers have entered the market and those insurance carriers already operating in our state have been actively pursuing more business. The market has become more profitable and more competitive.

South Carolina has the third lowest workers' compensation insurance costs in the nation for the manufacturing industry according to Actuarial & Technical Solutions. Based on a study by the Oregon Department of Consumer & Business Services, South Carolina has the fifth lowest workers' compensation premium rates in the country. However, the market is not static, and we can expect to see further change.

The Commission has been working diligently to administer an effective and efficient system which delivers benefits to injured workers quickly and minimizes operating and overhead expenses for all parties. For example, in 1995 the Generally Assembly approved regulations proposed by the Commission which allow requests for hearings to be processed more quickly. Since 1990 the Commission has encouraged attorneys to serve a request for hearing directly on defendants. This option, which became mandatory on September 1, 1995, reduces by as much as 30 days, the time it takes to process a request for a hearing, which means a case can normally come to trial in 90 - 120 days after filing.

We continue to be a leader in workers' compensation in the development of electronic data interchange. In 1995 over a third of the First Reports of Injury filed with the Commission were transmitted in electronic format. The addition of Zurich, Cigna, Liberty Mutual, Crawford & Company and PHT Services brought the number of companies in EDI production to nine. Along with Aetna, Kemper, Frank Gates Service and Travelers, they have helped South Carolina remain a national leader in the implementation of electronic reporting. Ongoing development will add payment and detailed reporting capabilities giving the Commission more specific and timely information with which to assist all parties and eliminating the need for paper reports in many cases. When fully implemented, EDI will save states and their electronic data partners millions of dollars in operating and personnel expenses while providing more accurate and timely information.



The workers' compensation system was designed to provide prompt income and medical benefits to work-related accident victims while minimizing the cost of resolving contested issues. The Commission remains committed to implementing changes which will hance the system, improving both the claims administration process and how contested issues are resolved.

Open Conduct and Truthful Speech

Judge LOGAN E. BLECKLEY,
in Minor v. State. 56 Ga. 630.

Opinion: There was no error in calling the jury's attention to a possible guilty motive for the open dealing and truthful answer of the prisoner. Men hide under light as well as under darkness. Vice assumes the frank demeanor of virtue. To do right, or seem to do right, after doing wrong, is often the best means of shunning detection. Still, the natural and probable indications from open conduct and truthful speech are favorable to innocence; and do, in effect, the judge stated to the jury.

Recent Order of Interest

In The United States District Court For The District Of South Carolina, Charleston Division, Honorable Patrick Michael Duffy, United States District Judge

Editor's Note: By request, the names of parties in this case have been deleted.

ORDER

Introduction

This matter is before the court on motion of the Defendant, and the Plaintiff, for summary judgment. This is a defamation action based on medical analysis reports provided by the defendant to State Farm Insurance Company ("State Farm"). Based on the briefs submitted by the parties and oral arguments heard on May 6, 1996, this court finds that the alleged libel is constitutionally protected and also protected by absolute and qualified privilege and therefore, grants summary judgment in favor of the defendant.

I. Background

Both the Plaintiff, and the Defendant, are medical doctors who at various times serve as expert witnesses for personal injury claims. The Plaintiff is a member of the American Board of Forensic Examiners, which is a specialty involving the interrelationship between the legal and medical professions. The Defendant's sole employment is providing medical consultant reports.

In 1992 and 1993, the Plaintiff treated three persons involved in two separate car accidents; Christopher Ward, who was referred by attorney John Campbell, Romana Almazan and Arturo Delacruz, who were referred by the Law Firm of George Sink. Each of these individuals, through their attorneys, made claims against State Farm. State Farm sent the claimants' medical records to the Defendant for review and evaluation. The Defendant prepared two medical analysis reports ("Reports") which he forwarded to State Farm and no one else. In the Reports, he disagreed with the Plaintiff's treatment and questioned whether the injuries claimed were related to the accidents. As part of settlement negotiations, these Reports were evidently forwarded by State Farm to the claimants' attorneys. The Plaintiff has now filed this suit against the Defendant for libel based on the Reports.

II. Summary Judgment Standard

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine is there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. Finally, the "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F. 3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990).

III. Analysis

This court finds that the alleged libel is constitutionally protected opinion and is also protected by an absolute and a qualified privilege.

A. First Amendment Protection

This court finds that the alleged libel is constitutionally protected opinion.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact.

"In 1992 and 1993, the Plaintiff treated three persons involved in two separate car accidents"

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Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

The United States Supreme Court recognized that opinion statements, as opposed to verifiable factual statements, are granted constitutional protection. *See Gertz*, 418 U.S. at 340; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). The determination of what is constitutionally protected opinion and what is unprotected fact is an issue for the court. *Potomac Valve and Fitting, Inc. v. Crawford Fitting*, 829 F.2d 1280, 1285 n. 12 (1987). Between the *Gertz* decision in 1974 and *Milkovich* in 1990, several circuits, including the Fourth Circuit, developed tests for determining if an alleged defamatory statement was constitutionally protected opinion or unprotected fact.[1] The United States Supreme Court in *Milkovich* appeared to discount such tests stating "existing constitutional doctrine" was adequate to protect opinions; however, the Court continued to use the same or similar factors.

First, the Court, citing *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986), stated an alleged defamatory statement "must be provable as false before there can be liability under state defamation law." *Milkovich*, 497 U.S. at 18. "[O]pinion statements, defamatory or otherwise, are not actionable unless they contain provably true or false factual connotations." *Chapin v. Greve*, 787 F.Supp. 557, 563 (E.D. Va. 1992) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 1990)). Clearly, if the statement was not capable of being verified as false, there could be no liability for defamation.

In this case, the Reports of the Defendant are not capable of being verified as false, and therefore, are not actionable. Plaintiffs allege the following two statements, contained in the Reports, are libelous.

> They have both received excessive and not recommended treatment and x-rays. If the Plaintiff had instructed the patients in a good home exercise program, as the medical literature strongly suggests, then the patients most likely would have returned to normal sooner and without complaints. His opinion that these patients were entitled to 5% and 6% permanent disability, respectively, is not supported by the records...
>
> The treatment rendered is far in excess of any possible injury from this accident...There is no relationship to a TMJ disease from an injury from this accident.... However, the treatment rendered is considered okay, although it was given excessively.

"The obvious purpose in sending the medical records to the Defendant for review was to obtain a second opinion as to the propriety of the treatment."

This court finds that none of these alleged libelous statements are verifiable facts. Whether treatments and x-rays are recommended or excessive; whether the patients would have most likely returned to normal sooner with the use of a home exercise program; whether the patients were entitled to 5% and 6% permanent disability ratings; and whether there is a relationship between TMJ and the claimed injury, are all opinions, not verifiable facts. There is no standard which could be used to render an objective, verifiable, factual answer to these questions. Medicine, with all its great accomplishments, remains an inexact science. Doctors frequently refer to "medical science" but other disciplines have always referred to the practice of medicine as the healing art. Treatment considered appropriate by one doctor may be considered excessive by another doctor. The Plaintiff, himself, testified in his deposition, "there are always differences of opinions between doctors." The Defendant in his Reports disagreed with the opinion of the Plaintiff. The Plaintiff may freely disagree with the Defendant's opinion or even find the Defendant's opinions pernicious, However, the Reports remain the Defendant's opinions and are constitutionally protected.

Second, the United States Supreme Court has held that statements which can not be reasonably interpreted as stating actual facts about an individual should be given constitutional protection.[2] *See Milkovich*, 497 U.S. at 17 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). Read in their entirety, the Reports are clearly the opinions of the Defendant. Without any additional information, it is obvious from the Reports that the Defendant was asked to review the listed medical records. The obvious purpose in sending the medical records to the Defendant for review was to obtain a second opinion as to the propriety of the treatment. It is equally obvious that since the Defendant did not actually treat the patients, anyone reading the Reports would be fully aware that the Defendant was not stating facts of which he had personal knowledge, but was opining based on records which were sent to him. In addition, the Reports state that they are opinion.[3] Therefore, the alleged libelous statements, when read together with the complete Reports, are clearly the embodiment of the Defendant's medical opinion.

B. Absolute Privilege

This court also finds that the Reports were rendered as a preliminary step to a judicial proceeding which bore a reasonable relation to litigation, and they are therefore absolutely privileged.

> [An] absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it.

Crowell v. Herring, 392 S.E.2d 464 (S.C. Ct. App. 1990)(citing Restatement (Second) of Torts § 587 comment (e) (1977)).

Restatement (Second) of Torts § 588 (1977), which *Crowell* recognized, states:

> A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding..., if it has some relation to the proceeding.

Comment (b) to § 588 states:

> The privilege also protects [the witness] while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal.

In *Crowell*, a Veterans of Foreign Wars ("VFW") member was acquitted in a VFW court martial hearing of charges alleging improper receipt of money from a company which maintained video machines at the VFW. After his acquittal, the member brought an action for slander, libel and malicious prosecution against two officials of his VFW post. Part of the alleged defamation was made by these two officials during their respective depositions and during the court martial proceeding. The court held these statements were absolutely privileged. However, part of the alleged defamation was the statements made by these officials during the investigation which led to the court martial proceedings. The court held that these statements were also absolutely privileged because they were preliminary steps to the court martial proceeding and they bore a relation to the contemplated court martial proceeding.

Likewise, the Defendant was asked to review and investigate treatment rendered to persons making claims against State Farm's insureds. His understanding was that his Reports could be used as an exhibit in a future trial proceeding and that he could be called upon to be a witness in a proceeding such as a deposition or trial.[4] Clearly, if the Defendant's Report was part of an actual trial or deposition, his statements would be absolutely privileged. In this case, the Reports were preliminary steps leading to a trial and bore a reasonable relation to the upcoming litigation.

The New Jersey Supreme Court found a sound policy reason behind allowing absolute privilege to alleged defamation prior to the institution of a formal proceeding in *Rainier's Dairies v. Raritan Valley Farms*, 117 A.2d 889 (N.J. 1955). In that case, petitioners asked the Director of the Office of Milk Industry to investigate a possible price fixing scheme. The petitions were unsolicited and were given prior to the institution of a formal investigation or proceeding. The court held that the petitions to investigate were absolutely privileged. *See Rainier's*, 117 A.2d 889. The South Carolina Court of Appeals in *Crowell* held, "[t]he reasoning behind the decision in *Rainier's* is sound and applicable to the case at bar. The threat of a civil action and slander or libel would undoubtedly have a chilling effect on those tempted to initiate legitimate investigations or inquiries into other supposed wrongdoing." *Crowell*, 392 S.E.2d at 468.

Likewise, an insurance company or anyone facing a claim involving personal injury, should have the right to initiate legitimate investigations and inquiries into those alleged personal injuries prior to the commencement of a lawsuit. If a difference of opinion is going to bring about a defamation cause of action, there will be a chilling effect upon a party's ability to initiate legitimate inquiries and also upon a medical provider's ability to render contradictory, but needed, second opinions.

This case is similar to *Kahn v. Burman*, 673 F.Supp. 210 (E.D. Mich. 1987). In that case, a defendant/physician in a medical malpractice case sued the plaintiff's expert witness, also a physician, alleging, among other things, defamation. The court granted the plaintiff's expert witness absolute immunity. The court stated:

> Although Dr. Burman's reports are not statements that were made under oath in the course of litigation, they may well satisfy the witness immunity prerequisite of 'relevancy' to the judicial proceedings.... To hold otherwise would defeat the purpose of witness immunity, which is to ensure the judicial process functions unimpeded by fear on the part of its participants that they will be sued for damages for their part in the proceedings.

Kahn, 673 F.Supp. at 212.

Likewise, the Defendant's Reports were prepared with his understanding that he could be called as a witness in this case. Absolute immunity for defendant's expert witness

"In that case, a defendant/physician in a medical malpractice case sued the plaintiff's expert witness, also a physician, alleging, among other things, defamation."

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cannot be limited by plaintiff's decision to actually file suit. Accordingly, this court finds that the Reports are protected by absolute privilege.

C. Qualified Privilege

Further, the Reports were also protected by a qualified privilege.

> The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Manley v. Manley, 353 S.E.2d 312, 315 (S.C. Ct. App. 1987) (quoting *Conwell v. Spur Oil of Western South Carolina,* 125 S.E.2d 270, 274-75 (S.C. 1962).

In this case, the Defendant was asked to review medical records and give an opinion to determine if the claimant's treatment was appropriate. After analyzing those records, he wrote a medical report and gave it to the insurance company making the request, State Farm. State Farm has an interest in insuring that it does not pay a fraudulent or overpriced claim. The Defendant agreed to use his medical expertise to assist in that effort. He gave opinions to the questions asked and communicated with State Farm and with no one else. Therefore, the Reports are protected by qualified privilege.

IV. Conclusion

It is therefore,

ORDERED, for the reasons stated above, that Defendants' Motion for Summary Judgment be granted.

And it is so ordered.

Patrick Michael Duffy
United States District Judge
Charleston, South Carolina.

Footnotes

[1]The Fourth Circuit in *Potomac* required a two part test. First, a court should determine whether the alleged libel can be objectively verified as true or false. If the statement cannot be objectively verified, then it is not actionable as defamation. Second, even if the statement can be verified, a court must consider three other factors: (1) the author's or speaker's choice of words, (2) the context of the challenged statement within the writing or speech on the whole, and (3) the broader social context into which the statement fits. If after considering these factors, either individually or in conjunction, the reader would recognize the statement as an opinion, it is constitutionally protected. *Potomac,* 829 F.2d at 1285-89.

[2]This standard is similar to the second prong of the *Potomac* test which stated even if the court finds the statements can be verified as true or false, they nevertheless are protected. "We hold that a verifiable statement, a statement that [can be objectively characterized as true or false], nevertheless qualifies as an 'opinion' if it is clear from *any* of the three remaining factors *individually or in conjunction* that a reasonable reader or listener would recognize its...subjective character...." (emphasis added). *Potomac*, 829 F.2d at 1288 (The Fourth Circuit in determining these factors borrowed from and modified *Olman v. Evans*, 750 F.2d. 970 (D.C. Cir. 1984)). *Potomac* requires a court to examine the context of the challenged statement. The court noted that "the word 'blackmail'" taken out of context might easily appear to refer to a specific criminal activity. Read as a whole, however, the article at issue [may provide] the reader enough background information to realize that the term blackmail has only been used to criticize the Plaintiff's bargaining position." *Potomac*, 829 F.2d at 1287-88 n. 23.

[3]Even though a characterization of a statement as an opinion does not necessarily make it constitutionally protected, the characterization should be considered in determining whether a statement should be reasonably interpreted as stating actual facts. *See Milkovich*, 497 U.S. at 18.

[4]This finding was evidenced by an Affidavit of the Defendant. The Plaintiff submitted no affidavits or sworn testimony to the contrary.

Legislative Report

Introduction

1. **Judicial Merit Selection.** Both the House and Senate adopted the free conference reports of H.3961 and H.3962 on May 30, 1996. These bills create the Judicial Merit Selection Commission and restructure the manner in which judges are nominated, qualified, and elected by the General Assembly.

Ratified Version– H.3961

H.3961 is a bill providing the statutory mechanism for the Judicial Merit Selection Commission. The Conference Committee Report of May 29, 1996 proposes to create a Judicial Merit Selection Commission consisting of:

–ten members, five selected by Speaker of the House of Representatives, three by the Chairman of the Senate Judiciary Committee, and two by President Pro Tempore of the Senate. The five selected by each body must consist of three legislators and two non-legislators.

Other significant features of the H.3961 include:

–authorizing the Commission to obtain information on candidates from organizations such as the South Carolina Bar and law enforcement agencies.

–authorizing the Commission to hold public hearings.

–requiring the Commission to nominate the three candidates whom it considers best qualified. Fewer than three names may be submitted if less than three apply for the position or the Commission concludes there are fewer than three qualified candidates.

–binding nominations on the General Assembly and no person may be elected who is not found qualified by the Commission.

–if an incumbent is not found qualified his name will not be submitted for consideration by the General Assembly.

–at least three weeks must elapse between the date of the Commission's nominations and the date of the election of the judicial officers.

–no member of the General Assembly may be elected to a judicial office while he is a sitting member, or for a period of one year after he: (1) ceases to be a member; or (2) fails to file for re-election.

–prohibiting the trade of anything of value including pledges to vote for legislation or for other candidates in exchange for another member's pledge to vote for a candidate for judicial office.

–election of judicial officers by a majority of the General Assembly in joint session.

–changing the requirements for Family Court Judge so as to require the applicant to have reached the age of thirty-two, and been a licensed attorney of not less than eight years.

–master-in-equity must be found qualified by the Commission before the General Assembly can consent to their appointment.

Ratified Version– H.3962

H.3962 is a joint resolution proposing an amendment to Section 15, Article V, of the South Carolina Constitution, relating to the qualifications of the Supreme Court, Judges of the Court of Appeals, and the Circuit Court.

–changing the minimum age for a judge from twenty-six years to thirty-two years and increases the number of years the person must have been a licensed attorney from five to eight years.

–requiring any person elected to a judicial office must first be found qualified by the Judicial Selection Commission.

2. **Venue.** S.503, sponsored by Senator Sam Stilwell, passed the Senate during the 1995 session and was referred to the House Judiciary Committee where it was placed in the Constitutional Laws Subcommittee. The bill allows tort actions against a defendant to be tried in the county where the cause arose. S.503 remained in the House Judiciary Committee through the end of the session, and no further action was taken.
3. **Noneconomic Damages.** Representative Herb Kirsh introduced H.4466 in January 1996. The bill limits the award for noneconomic damages in a personal injury action to the greater of either $250,000 or the amount awarded as economic damages. The bill includes definitions for economic and noneconomic damages and requires the trier of fact to make separate findings on components of the damage award. H.4466 was referred to the House Judiciary Committee on January 18, 1996. Senator Greg Gregory introduced S.1046, which is the Senate version of H.4466. S.1046 was referred to the Senate Judiciary Committee where it was carried over by a subcommittee on April 30, 1996. No further action was taken on either piece of legislation.
4. **Double Recoveries.** H.4468, introduced by Representative Herb Kirsh, allows the admission into evidence of proof of collateral source payments to a person as compensation for the same damages sought in the suit. In addition, the bill requires the trier of fact to be informed of the

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Editor's Note:

The South Carolina General Assembly's regular session ended on June 6. The House and Senate, however, reconveined on June 12 and 13 for two days to address selected legislation. The following summary provides information regarding legislation of interest to the Association. For more information, please feel free to contact the SCDTAA legislative committee.

tax implications of all damage awards. H.4468 was introduced in January 1996 and referred to the House Judiciary Committee on January 18, 1996. Senator Greg Gregory introduced S.1048 which is the Senate version of H.4468. S.1048 was referred to the Senate Judiciary Committee where it was carried over by a subcommittee on April 30, 1996. No further action was taken on either of the bills.

5. **Punitive Damages.** This bill, H.4320, caps punitive damages at the greater of either $250,000 or three times the amount of compensatory damages. The bill provides that punitive damages may be awarded only if the defendant is liable for compensatory damages and an aggravating circumstance, such as fraud, malice, or wilful, wanton, or reckless conduct, is found. H.4320 was introduced by Representative Herb Kirsh and the bill was referred to the House Judiciary Committee. No further action was taken on the bill.
6. **Non-unanimous Juries.** Representative J.L. Cromer introduced H.3267 during the 1995 session. This joint resolution proposes an amendment to the constitution and, if approved, allows only ten or more members of the petit jury of the Circuit Court to agree to a verdict. H.3267 was referred to the House Judiciary Committee on January 17, 1996 and no further action was taken on the bill.
7. **Workers' Compensation.** During the 1995 session, the House of Representatives passed four bills, sponsored by the House Labor, Commerce and Industry Committee, relating to Workers' Compensation which were subsequently referred in the Senate to the Senate Judiciary Committee:

   H.3835 – "Administrative Package". This legislation, among other things, redefines "average weekly wage"; prohibits health care providers from pursuing collection against a workers' compensation claimant prior to the final adjudication of the claimant's claim; requires timely payment to health care providers; and revises the recording and reporting requirements for employers.

   H.3836 – Mental Illness-Stress. This legislation codifies the definition of "stress" and provides the conditions under which stress is compensable under the Workers' Compensation Law. Stress would be compensable if it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment.

   H.3837 – Start-Stop Pay. This bill, among other things, allows an employer to stop temporary disability payments without a Workers' Compensation Commission hearing within 120 days of the date that payments are commenced if a good faith investigation reveals grounds for denial of the claim. In addition the legislation allows an employee to attempt a trial return to work for a period not to exceed three months.

   H.3838 – Back Injuries. H.3838 provides that a fifty percent or more loss of use of the back creates a presumption of total and permanent disability which may be rebutted by a preponderance of the evidence.

   On April 24, 1996, the Senate Judiciary Committee reported H.3838 to the Senate with a compromise amendment which: (1) eliminates the opt-out provisions of the Workers' Compensation Law; (2) provides that the employer does not waive grounds for good faith denial of a claim for up to 150 days from the date the injury or disease is reported and allows the employer to terminate or suspend payments during the 150 day period without a hearing if, among other reasons, a good faith investigation reveals grounds for denial of the claim; (3) contains the "administrative package"; (4) codifies the definition of "stress"; and (5) allows insurers to provide policies with deductible options.

   H.3838 was passed by the General Assembly on May 30, 1996 and was enrolled for ratification. Ratification of this legislation is expected on June 12 or 13, when the General Assembly reconvenes to address several other important issues.
8. **State Grand Jury.** As pre-filed on October 17, 1994, S.163 expanded the jurisdiction of the State Grand Jury to include environmental crimes. The bill was not considered until April 9, 1996, at which time it was referred to a subcommittee of the Senate Judiciary Committee. On April 18, 1996, the subcommittee gave the bill a favorable report and the Senate Judiciary Committee reported the bill favorably on April 23, 1996. By April 30, the Senate had amended the bill to include insurance fraud and had given the bill a third reading. The House of Representatives referred the legislation to the Judiciary Committee on May 1, 1996. No further action was taken on this legislation.
9. **Environmental Audit.** H.3624, the "South Carolina Environmental Audit and Disclosure Immunity Act of 1996," establishes a statutory privilege for information obtained in environmental audits and this information is immune from discovery and admission as evidence in civil, criminal, and administrative proceedings. In addition, persons who voluntarily disclose environmental violations would not be subject to fines or penalties in civil and administrative proceedings. This legislation was passed by both Houses on May 23, 1996 and ratified on May 30, 1996. The bill awaits the Governor's signature.

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