



STATE OF TENNESSEE
WORKERS' COMPENSATION ADVISORY COUNCIL



REPORT ON
ISSUE OF REPLACING EXISTING SYSTEM FOR ADJUDICATING
WORKERS' COMPENSATION CLAIMS WITH AN ADMINISTRATIVE
COMMISSION OR REVIEW BOARD



INTRODUCTION

Public Chapter 952, Section 30, codified as *TCA* §50-6-121(l), requires the Advisory Council to review the issue of replacing the existing court based system of adjudication with an administrative commission or board. The Advisory Council has reviewed information regarding commission or administrative systems for workers' compensation. This review revealed there is no uniform administrative system that has been adopted by a majority of the states. In fact, each state is unique in the manner by which the administrative board or commission handles workers' compensation.

CHARACTERISTICS OF ADMINISTRATIVE SYSTEMS

In general, most administrative systems include the following functions: claims processing; mediation and/or settlement of claims; adjudication of contested cases; appeals process for claims to Commissioners/Board; administration of claims; mediation/settlement of claims; legal staff and administrative law judges; self-insured employer programs; medical fee schedules; and special funds. It is the manner in which these functions are performed and by whom that make the systems unique to each state.

In an effort to supply the General Assembly information regarding these different structures, the following information concerning seven (7) states contiguous to Tennessee is included in the report for informational purposes. The information was obtained from the website for the Southern Association of Workers' Compensation Administrators [SAWCA] and is the result of a survey conducted by the Administration Committee in 2001.¹ As the survey is over three years old it is possible some of the information may be out of date. However, the general information regarding the type of administrative system and the claims procedures and appeals processes should be correct. It is known that the administrative agency in Kentucky has undergone some organizational changes recently; however, the changes were made by the executive branch in each state and are not related to the administrative systems created by the legislature.²

¹The information is available on the SAWCA website: www.sawca.org

²The states of Alabama and Tennessee have been omitted from this information as these two states have court-based systems of adjudicating workers' compensation claims. In addition, the contiguous state of Missouri is not included as it is not a member of SAWCA.

ARKANSAS

AUTHORITY

Statutory Basis: Created in 1938 pursuant to 26th Amendment to Arkansas Constitution. Laws regarding the Act (Arkansas Statute Ann. §§81-1301 *et seq.*) were passed in 1939. Laws codified effective 1-1-88 (Ark. Code Ann. §§11-9-101 *et seq.*).

Funding Basis: Monies come from carrier fees and premium taxes assessed against insurance companies and self-insurers. At the time of licensing, insurance companies pay a one-time fee of \$500; self-insurers pay a \$100 fee. Premium taxes are set yearly. The funds are invested by the Commission. Penalties are assessed for non-compliance with W.C. law.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: Administered by Arkansas Workers' Compensation Commission. The Commission employs approximately 150 people with a maximum authorized of 156 (thru July 1, 2001). There are 2 branch offices and central offices in Little Rock.

Operations; Qualifications; Selection Process; Salaries & Tenure: The Commission is composed of 3 members appointed by the Governor with approval by the Legislature. The chairman must be an attorney and have 5 years experience. The other 2 commissioners must have at least a 5-year affiliation in labor or management. Salaries are provided by law. Terms are for 6 years and are staggered. The FY 01 maximum salary of the chairman is \$94,298 and the FY 01 maximum salary of each commissioner is \$92,726. Chief of Administration is the Chief Executive Officer.

Hearings: Conducted by 13 administrative law judges throughout the state. Rule 20 sets forth the policy regarding reporting and transcription fees. Respondents may bear cost of the expense of taking and transcribing a hearing. The FY 01 maximum salary of each of the 13 administrative law judges is \$77,009.

Ombudsmen: The Ombudsmen Program in Arkansas is called the Legal Advisor Program. The Legal Advisor is a classified position with a starting salary of \$32,992 and a range, based on longevity, to \$64,777. The authority for the program is found in A.C.A. §§11-9-703. Their responsibilities include "providing the claimant with an opportunity to confer with a legal advisor on the staff of the Commission to be advised of his/her rights ... and to ensure that the rights are protected." The Legal Advisor has the authority to "approve compromise settlements entered into at or as a result of the preliminary conference, as well as joint petition settlements as provided under A.C.A. §§11-9-805."

PROCEDURES

Initiation of Claim by Employee: Notice must be given to the employer in writing on Commission approved form unless excused. A claim must be filed generally within 2 years from the date of disability or 1 year from the last benefit payment. Claims for occupational illness must be generally filed within 2 years of last exposure or one year from date of most recent benefit payment. A.C.A. §§11-9-702. An employer is not liable for the expenses of the employee until after proper notice of the injury.

Initiation of Claim by Employer: Compensation must commence or employer must notify Commission of controversion within 15 days of receipt of notice of injury.

Other: There are no other parties with standing before the Commission except if a dispute arises over a fee charged by a medical provider which is covered by Commission Rule 30 and the Medical Fee Schedule. In such cases, the provider can write the Commission for adjudication of the fee dispute, first administratively by the Administrator of the Medical Cost Containment Program, and then through the normal hearing process.

Prehearing Process: Commission Rule 15 provides for a pretrial conference before the Commission or administrative law judge. Mediation is available for injuries occurring on or after January 1, 1987.

Alternative Dispute Resolution: The alternative dispute resolution process in Arkansas is administered by the Legal Advisor Program. In the event a claim is controverted, a claimant has two options prior to requesting a hearing before an Administrative Law Judge: He/she may request a preliminary conference or mediation. These procedures are informal. The preliminary conference, by telephone conference call or in person, affords the parties the opportunity to confer with a Legal Advisor who can explain the law as well as the rights and responsibilities of the respective sides. A mediation enables the parties, with the help of the mediator who is an objective 3rd-party, to create an agreement satisfactory to both. The preliminary conferences are voluntary, as are mediations not mandated by AWCC Rule 26. The orders of the Legal Advisors are binding only if the parties agree and their agreement is reflected in the order.

Hearings: Discovery is in accordance with the Arkansas Rules of Civil Procedure. Continuances are discretionary with the administrative law judge or Full Commission.

Appeals: Awards or orders of administrative law judges may be appealed to the Full Commission within 30 days from receipt of the order. Commission Rules 17 and 18 cover oral argument and the format of briefs. An order or award of the Full Commission may be appealed to the Court of Appeals within 30 days of receipt of the order or award. On appeal, Full Commission conducts *de novo* review and may take additional testimony.

Representation by Counsel: Not required, fees approved by the Commission after

considering the length, complexity and nature of the services performed and benefits achieved for the claimant. Fees are determined by the following guidelines: Maximum of 30% of first \$1,000; 20% of \$1,001-\$3,000; 10% of sums over \$3,000. For prevailing on appeal, claimant's attorneys receive \$250 at the Full Commission level and \$500 at the Court of Appeals or Supreme Court level. In controverted cases, the employer pays one-half of the fee and the employee pays one-half out of compensation awarded.

GEORGIA

AUTHORITY

Statutory Basis: 1920 legislation created the Industrial Commission, abolished in 1937 and replaced with the State Board of Workers' Compensation. The Board is an independent state agency whose authority is found in Georgia Code Title 34, Chapter 9.

Funding Basis: Assessments against insurance companies and self-insurers paid into State Treasury; funding through state appropriation to agency.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: A quasi-judicial system with initial hearings conducted by administrative law judges of the trial division, with appeal to the three Board members (Appellate Division), further appeal to superior court, and then application for discretionary appeal to court of appeals and supreme court.

There are 10 branch offices located throughout the state and one main office with a total of 164 positions. The main office is located in Atlanta.

No./Commissioners; Qualifications; Selection Process; Salaries & Tenure: The chairman and two directors are appointed by the Governor for 4-year terms. Must be lawyers with at least seven years of practice experience. O.C.G.A §§34-9-42.

Salaries are as provided by law at 90% of salary of judges of court of appeals. O.C.G.A §§34-9-52.

Hearings: Presently, there are 24 administrative law judges who are attorneys with salaries depending on length of service and promotions. Beginning salary of \$70,000.

Hearing held in the county of injury or death or any contiguous county, or in any county within 50 miles of the county of injury or death, unless otherwise agreed by the parties and authorized by the Board. O.C.G.A. §§34-9-102(b).

A record of the case is made at the administrative law judge hearing by a court reporter. Transcript prepared after the hearing before the administrative law judge or, if directed by the administrative law judge not to be transcribed, then on appeal to the Appellate Division. O.C.G.A. §§34-9-102(g).

Cost of transcription is paid by the parties to the case. The Board pays only if no other party requests a copy. The court reporters are hired on a contract basis and compensated through sales of transcripts. O.C.G.A. §§34-9-102(g).

PROCEDURES

Initiation of Claim by Employee: Notice must be given immediately or as soon thereafter as practical, but within 30 days. O.C.G.A. §§34-9-80. Filing of a claim must be within one year after injury, except where payment of weekly benefits has been made or remedial treatment has been furnished, and then filing can occur within one year of the last treatment furnished or two years after the date of the last payment of weekly benefits. O.C.G.A. §§34-9-82.

Initiation of Claim by Employer: Benefits must be commenced 21 days after knowledge of injury or death or controverted within 21 days. O.G.C.A. §§34-9-221(b) & (d).

Other: N/A

Prehearing Process: Prior to hearing, some claims and issues may be disposed of by a judge by order on a motion filed by any party. O.C.G.A. §§34-9-102(c). Parties use motion forms approved by the Board and submit written evidence.

The Alternative Dispute Resolution Division was created to handle disputes through the mediation process. O.C.G.A. §§34-9-100. All hearing requests and motions are screened and certain types of disputes are automatically referred to mediation. All motion forms and hearing request forms have a space for a party to request and attempt to resolve the issue through mediation. The mediation conference is generally scheduled 30-45 days after first filing which signals a dispute. There is no rule on discovery for mediation, but the policy is that formal discovery is not necessary prior to a mediation conference.

Mediators are staff attorneys who have also been certified as mediators through training and accepted by the Georgia Office of Dispute Resolution, which qualifies neutrals who serve in mediation programs approved by the Supreme Court of Georgia. The beginning salary for a mediator is \$40,000, but can vary depending on experience. Currently the Board has 6 full-time mediators and all administrative law judges and other staff attorneys are certified mediators. The authority of mediators is governed by ethical standards of neutrals.

If a claim is assigned to mediation, attendance is mandatory. Board Rule 100. If an agreement is reached at mediation, it is reduced to writing and signed by the parties and may be enforced as an order. If an agreement is not reached, the case proceeds to trial or ruling, and the content of any communications during mediation remains confidential and inadmissible in court. Board Rule 100.

Hearings: Workers' compensation laws and discovery proceedings are governed by the Civil Practice Act and the Georgia Rules of Evidence. O.C.G.A. §§34-9-102(d).

Continuances are granted once by agreement of all parties and subsequently only on strict legal grounds. Board Rule 102(c). Hearings are scheduled within 90 days of request. O.C.G.A. §§34-9-102(a). The administrative law judge must render an award within 60 days after completion of the evidence. O.C.G.A. §§34-9-102(f). The judges may issue interlocutory orders pending trial determination. O.C.G.A. §§34-9-102(c).

Appeals: Appeals from the Trial Division of the Board to the Appellate Division must be filed within 20 days of notice of the award. O.C.G.A. §§34-9-103(a). Any appealing party must enumerate errors. Board Rule 103(b). The Appellate Division does not receive evidence and reviews errors of law and also determines if the findings of fact are supported by a preponderance of competent evidence. O.C.G.A. §§34-9-103(a). No longer have de novo review and remand is only upon strictly legal grounds.

Appeals to the superior court are limited to errors of law, fraud, or review of facts under any evidence rule. O.C.G.A. §§34-9-105. Further discretionary appeal may be made by application to Georgia Court of Appeals or Georgia Supreme Court for same reasons. O.C.G.A. §§34-9-105.

Representation by Counsel: When a hearing is held to resolve a dispute, most parties are represented by counsel, although some appear pro se. Board approval is required for all attorney fees over \$100. O.C.G.A. §§34-9-108(a). An attorney fee contract is required to be filed with the Board after retention. Fees are limited to 400 weeks and up to 25% of indemnity benefits by statute, which are paid from claimant's income benefits. O.C.G.A. §§34-9-108(a). Attorney fees may also be assessed by the Board on a quantum meruit basis, if the administrative law judge finds that the claim has been prosecuted or defended, in whole or in part, without reasonable grounds or the Appellate Division finds that an appeal has been brought without reasonable grounds. O.C.G.A. §§34-9-108(b).

KENTUCKY

AUTHORITY

Statutory Basis: The Department of Workers' Claims is governed by KRS. Chapter 342.³

Funding Basis: Assessments against insurance carriers and self-insurers are collected, invested and managed by the Kentucky Workers' Compensation Funding Commission.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: The Commissioner exercises complete authority over administration of Department of Workers' Claims. The Workers' Compensation Board rules on appeals of decisions rendered by administrative law judges under the Workers' Compensation Act.

The Department of Workers' Claims has 212 employees. There are 10 administrative law judge offices and 5 specialist/ombudsmen offices located throughout the state. Main office is in Frankfort.

Chief of Operations; Qualifications; Selection Process; Salaries & Tenure: The Commissioner is appointed by the Governor. The 3 Board members are appointed by the Governor to staggered 4-year terms. They are required to have the qualifications of state appellate court judges. The position is full-time at a salary of \$109,704. Board members may not continue the private practice of law.

Hearings: KRS 342.230 establishes 19 administrative law judge (ALJ) positions who will handle claims filed. Each administrative law judge must be an attorney and have 5 years of experience in the practice of workers' compensation law. The position is full-time at a salary of \$105,036.

Hearings are held at 13 sites throughout the state. All formal evidentiary hearings before the ALJs are transcribed. No transcript is made of benefit review or pre-hearing conferences. The transcript of hearing is prepared at the conclusion of the formal evidentiary hearing. Department of Workers' Claims bears the cost of initial transcription of evidentiary hearing. Parties pay costs for obtaining a copy.

Court reporters who transcribe formal hearings are retained by the Department of Workers'

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The Advisory Council believes the agency is now known as the Kentucky Office of Workers' Claims, under the Labor Cabinet.

Claims. The party taking a pre-hearing deposition employs a court reporter to transcribe it. Other parties wishing to purchase the copies of the deposition transcript must make arrangements with the court reporter.

Ombudsmen and Workers Compensation Specialists--Qualifications, number, responsibilities, authority: Regional offices staffed with Ombudsman personnel are located in Paducah and Frankfort. There are 8 ombudsman positions. Bachelor's degree plus two years of work experience as an Ombudsman for either the public sector or private industry.

Regional offices staffed with Workers' Compensation Specialists are located throughout the state in Frankfort, Madisonville, Paducah, Pikeville, and Louisville. Bachelor's degree plus 4 years' workers' compensation experience required. The Specialist staff is supervised by an attorney manager, operating under the title of Chief Workers' Compensation Specialist. There are 11 specialists and 2 attorneys on the specialist staff in addition to the Chief Specialist. The Specialist and Ombudsman staff assist citizens in workers compensation matters by answering questions and attempting to resolve conflicts.

Initiation of Claim by Employee: Employee is required to give notice to his employer as soon as practicable. If the employer contests the claim, the employee files a formal application for adjustment of claim, to be decided by an administrative law judge. The employer shall file a notice of claim denial or acceptance (Form 111) within 45 days after the date of issuance of notice that an application has been filed. If none is filed, all allegations of the application shall be deemed admitted. This requirement of filing a notice of admission or denial is in addition to the requirement to file a special answer asserting special defenses. There is a two-year statute of limitations on filing.

Initiation of Claim by Employer: Employer required to file a First Report of Injury (Form IA-1) within seven days after an employee gives notice of an injury which results in at least one loss day from work. Termination of payment of voluntary benefits by employer must be reported to Department of Workers' Claims.

Employer must also report an election not to pay.

Other: Any party to the claim, including a physician or medical payment obligor insurance carrier or self-insured employer, may file a request to resolve a medical fee dispute with the Department of Workers' Claims for resolution by an Administrative Law Judge.

Pre-Hearing/Hearing Process: All applications for adjustment of claim are referred to an administrative law judge (ALJ) for resolution. The parties have ninety (90) days after a claim is assigned to an ALJ to file medical reports and depositions in support of their positions. All parties can submit proof during the first 45 days, followed by 30 for the defendant and 15 for the rebuttal. Cross-examination of witnesses is at the expense of the party seeking the cross-examination. The administrative law judge to whom the claim is

assigned will conduct a benefit review conference at the conclusion of proof. The benefit review conference shall be an informal proceeding and no transcript or recording of the conference shall be made. Parties shall discuss settlement and define the issues involved. If the matter is not resolved at the benefit review conference, then a hearing will be held. Then, if the claim is not voluntarily resolved, the ALJ shall render a decision within sixty (60) days of the hearing.

University of Kentucky and University of Louisville Evaluations: The Commissioner shall contract with the University of Kentucky and the University of Louisville Medical Schools to evaluate workers who have had injuries, hearing loss or become affected by occupational diseases covered by Chapter 342. Referral for evaluation may be made to one (1) of the medical schools whenever a medical question is at issue. All applications for adjustment of a claim for an occupational disease or hearing loss will automatically be referred to one (1) of the medical schools. An administrative law judge will have discretion as to whether or not to refer an employee for an evaluation who has filed an application for adjustment of claim for an injury.

Medical Fee Dispute: If any medical expenses are in dispute, a simplified procedure call a Request to Resolve Medical Fee Dispute (Form 112) may be used. If an expedited determination is necessary concerning proposed medical care, Form 120EX may be filed, supported by affidavits of the employee and employee's physician.

Appeals: Within thirty (30) days after the date of the filing of a final ALJ decision, any party aggrieved by the determination may appeal to the Workers Compensation Board. The Board's decision may be appealed pursuant to statute and Kentucky Civil Rules to the Court of Appeals and Kentucky Supreme Court. The Workers' Compensation Board may not receive any new or additional evidence unless fraud or misconduct affecting the ruling is alleged. The Board may not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact.

Parties have thirty (30) days from the date upon which the Board enters its final decision in which to appeal to the Court of Appeals. Further review may be obtained in a similar manner from the Kentucky Supreme Court. The scope of review by the state appellate courts includes all matters subject to review by the Board and also errors of law arising before the Board and made reviewable by Rules of the Kentucky Supreme Court for review of decisions of an administrative agency.

Attorney Fees: Attorney fees, both defense and plaintiff, must be approved by an administrative law judge. Attorney fees are subject to certain percentage limitations, maximums, as well as review of reasonableness in light of quality and difficulty of services rendered. Attorney fees for plaintiff counsel cannot exceed 20% of the first \$25,000 of an award, 15% of next \$10,000, and 5% of remainder of the award, but in no event to exceed \$12,000. Fees for representing employers shall not be dependent upon the result achieved.

MISSISSIPPI

AUTHORITY

Statutory Basis: The Commission was created by act of the Mississippi Legislature in 1948. The authorizing statutes are MCA Section 71-3-1, *et seq.*

Funding Basis: The Commission is funded by assessments on insurance carriers and self-insurers. The assessments are based on a prorated dollar amount of medical and indemnity claims paid by each in the previous year.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: Commission. There are 75 employees. Main Office is in Jackson; there are no field offices.

No./Commissioners; Qualifications; Selection Process; Salaries & Tenure: There are three Commissioners, each appointed by the governor (for 6-year terms) with the consent of the Mississippi Senate. One commissioner represents employers, one represents employees, and one is neutral. One of the commissioners is required to be an attorney with five years' experience in workers' compensation law. The governor designates one commissioner as chairman. Legislatively set salary is currently, Chairman, \$80,000; other two Commissioner, \$78,000 per annum.

Hearings: Hearings are conducted by one of eight administrative judges.

1. Judge must be a lawyer with at least three years' experience. They are appointed by the Commission with consent of the governor for indefinite terms. Current annual salary is \$75,000.
2. Hearings held throughout the state in the county where injury occurred.
3. All dispositive hearings are recorded by official court reporters.
4. The transcript is normally prepared upon notice that the decision of the administrative judge has been appealed to the full Commission.
5. The Commission currently bears the cost of transcription.
6. Eight court reporters are employed by the Commission and are paid an annual salary of \$38,000.

PROCEDURES

Initiation of Claim by Employee: Claims can be initiated by employees filing a "Petition to Controvert" (MWCC B-5, 11).

Initiation of Claim by Employer: Claims are reported by filing a "First Report of Injury" (MWCC form B-3) by the employer. Employer or its carrier required to report the injury or death within 10 days thereof.

Prehearing Process—Expediting of partial or complete resolution of controversies

1. Method of prehearing process: Once the B-5, 11 Form is filed the claim is then controverted, and it is routed to the prehearing supervisor for assignment to an administrative judge and for notification to the employer and carrier. Administrative judges manage pre-hearing discovery and motion practice. Motion days are reserved for the speedy resolution of non-dispositive matters such as discovery disputes.

2. Mediation, Arbitration or Alternate Dispute Resolution:

a. Procedure—The Commission has no formal ADR procedures at present.

b. Informal mediation is performed by three commission employees with workers' compensation work experience.

Hearing

1. Discovery is permitted. The Commission has adopted the Mississippi Rules of Civil Procedures as they pertain to discovery. All discovery should be completed within 120 days of the filing of the Petition to Controvert. Notice of medical depositions must be at least filed with a request to set a hearing on the merits. The hearing on the merits is set after the date of the last deposition notice. Cost, except for limited reimbursement for taking depositions on behalf of the claimant, are borne by each party.

2. Continuance are discourage, but may be granted if need is demonstrated.

3. Time limits on decisions. There are not statutory time limits on decisions. Records may be held open following a hearing for a limited time at the discretion of the administrative judge for the submission of medical and other documentary evidence. This procedure is discouraged.

Appellate Procedure

1. Appeals must be filed with the Commission within twenty (20) days of the date of the administrative judge's order. Appeals may be on the record, or the parties may request that the matter be set for oral argument before the Commission.

2. The Commission is the finder of facts. Additional evidence may, in the Commission's discretion, be introduced at the review hearing.

3. Appeals from a commission order to Circuit Court must be perfected within thirty (30) days of the date of the Commission order. Appeals to the Circuit Court are solely on the

record and not de novo.

4. No evidence other than that in the record before the Commission is allowed on appeal. Appeal from the Circuit Court to the Supreme Court is allowed on errors of law or fact.

Representation by Counsel

1. Employees are only represented in a small percentage of non-controverted cases. In controverted cases, attorney representation of employees approaches one hundred percent.

2. Employer and carrier representation in non-controverted cases is not tracked. In controverted cases, attorney representation of the employer and carrier approaches one hundred percent.

3. Fees may be paid by the employee to an attorney upon approval of the Commission. Fees may not exceed 25% of the total award of compensation for representation before the Commission. Attorney fees are usually calculated upon lump-sum settlement payment or permanent disability payments only. Commission approval is not required for a "consultation fee" of \$200 or less. If representation continues by way of appeal to Circuit Court and/or Supreme Court, attorney fee may be increased to 33 1/3% of total compensation.

NORTH CAROLINA

AUTHORITY

Statutory Basis: Created by legislature in 1929 as the Industrial Commission, Chapter 97, N.C. General Statutes.

Funding Basis: Appropriation by the legislature.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: Administered by the North Carolina Industrial Commission. The main office is in Raleigh; there are no satellite offices. There are 136 employees.

Chief of Operations; Qualifications; Selection Process; Salary: Seven Commissioners, one of whom is designated as Chairman, are appointed by the Governor to serve staggered six-year terms. The Chairman is the chief judicial officer and chief executive officer. No more than three Commissioners may be classified representatives of employers and no more than three, that of employees. The salary of a Commissioner is \$92,931 and that of the Chairman is \$94,431.

Hearings: The trials are conducted by one of 20 trial judges. All are required to be licensed North Carolina attorneys. The salary ranges are from \$55,867 to \$89,675.

Trials are held throughout the State. Trials are electronically recorded at the initial stage.

Transcripts are prepared only when a case is appealed to the Full Commission.

The Commission bears the costs of the original transcript copy for the Commission and for the employee, regardless of the outcome on appeal. The employer/carrier always bears the costs of its copy.

The Commission has contracted with court reporting services to record trials and transcribe appealed cases.

Ombudsmen—Qualifications, salary, number, responsibilities, authority, limitations: Currently, four ombudsmen, whose salaries begin at \$31,248, are responsible for providing information to any party requesting assistance concerning the rights and remedies existing under the Workers' Compensation Act and are required to maintain neutrality. Ombudsmen also explain the need for the services of a lawyer and assist in the resolution of misunderstandings between claimants and payers. Ombudsmen are not allowed to practice law, give legal advice, or evaluate claims of settlement.

PROCEDURES

Initiation of Claim by Employee: Employee must report injury in writing to employer within 30 days.

Initiation of Claim by Employer: Must report injury to the Commission within five days of knowledge.

Other: According to case law, medical providers have standing to request a trial on payment of their bills.

Hearings: Interrogatories may be filed without approval of the Commission; however, Commission approval is required for other methods of discovery, all of which should be completed before the trial. Either party must provide opposing party upon request copies of all medical reports.

Continuances are granted upon showing of good cause.

A proposed decision from the prevailing party may be requested.

Statute requires decision within 180 days after record closed.

Case management ability, legal knowledge and appropriate application, special project contributions, and attitudes.

Mediation, Arbitration or Alternate Dispute Resolution: As of October 1996, all cases with requests for hearing are ordered into non-binding mediation. Cases with requests filed previously may also be ordered into mediation or the parties may voluntarily agree. Mediation is performed by attorneys qualifying as mediators through the administrative office of the courts or by a non-attorney by agreement of the parties. A certified mediator is paid \$100 for preparation time, then \$100 per hour for conducting mediation. A non-certified mediator is not subject to these amounts. Currently, approximately 92% of the claims brought annually under the Act are settled during mediation or after mediation but prior to hearing.

Appeals: Appeals from the trial judge must be taken within 15 days of receipt of the decision and are made to the Full Commission consisting of a panel of three Commissioners.

The Full Commission may make findings of fact and conclusions of law but usually does not hear additional testimony.

In order to appeal from the Full Commission, the record must be filed with the Court of Appeals within 150 days of entry of notice of appeal which must be filed within 30 days of the Full Commission's decision.

The appellate courts are limited to reviewing errors of law.

Representation by Counsel: Commission approval required for plaintiff's attorney fee only. Usually charges range from 20% to 25%.

Plaintiff's attorney's fees are paid from the plaintiff's recovery while defendant's attorney's fees are paid by the carrier or employer.

SOUTH CAROLINA

AUTHORITY

Statutory Basis: Created by legislature as the South Carolina Industrial Commission in 1935, the agency's name was changed to the South Carolina Workers' Compensation Commission in 1986. The Commission is an independent state agency authorized by Title 42, Chapter 3.

Funding Basis: The Commission is funded through annual appropriations from the state's General Fund. 2½% of premiums and of cost of self-insurance is paid by carriers and self-insurers to the General Fund.

ORGANIZATION MAKE-UP

Type Administration; Location/Main Office; No. of Employees: The South Carolina Workers' Compensation Commission is a quasi-judicial state agency that has regulatory, administrative, and judicial responsibilities in the area of workers' compensation. There are 80 employees.

The Commission has one office in Columbia. There are no regional offices.

Chief of Operations; Qualifications; Selection Process; Salaries and Tenure: There are no stated qualifications for workers' compensation commissioners. Commissioners are not required to be attorneys.

Seven commissioners are appointed for six-year terms by the Governor with Senate approval. One commissioner is appointed chairman for a two-year term.

The Commission's executive director is the chief operations officer. The executive director is hired by the commissioners and serves at their pleasure. There are no legal qualifications for the position of executive director. By statute, commissioners and the executive director receives a salary which is 85% of the salary of a circuit court judge. For Fiscal Year 2001, the annual salary is \$94,613.

Ombudsmen—Qualifications, salary, number, responsibilities, authority, limitations: Ombudsmen provide general and specific information about the workers' compensation system to the general public; research and respond to inquiries on claims; provide quality control assessment reports to the Executive Director, detailing any systematic problems or deficiencies as evidenced by the commonality of complaints; research and prepare draft responses for claim inquiries from state and federal legislators; and monitor the number, nature, and geographic location of all inquiries. Two positions were available, but have been eliminated over the years due to budget constraints.

PROCEDURES

Initiation of Claim by Employee: Employee must give immediate notice of the accident to the employer or give notice as soon after the accident as practicable. No compensation shall be payable unless notice is given within 90 days.

Initiation of Claim by Employer: Within 10 days of knowledge of the accident, the employer must file a First Report of Injury with the carrier or, in cases of self-insurers, with the Commission. Compensation is payable on the 14th day of disability.

Prehearing Process: When only the disability rating is at issue, an informal conference is held and the deputy commissioner recommends an award; the parties may then agree to settle or have the matter heard as a contested case. A commissioner has the discretion to hold prehearing conferences.

There is no formal procedure or requirement for Alternative Dispute Resolution, other than the informal conference procedure.

Hearings: A written expert's report to be admitted as evidence at the hearing must be provided to the opposing party at least 10 days before the scheduled hearing. The report shall be filed with the commissioner at the scheduled hearing. Failure to provide the opposing party at least 10 days notice of the report may result in the report being ruled inadmissible. All available evidence and testimony shall be presented at the scheduled hearing or a party must move for adjournment. The commissioner may adjourn the hearing, and testimony of a necessary witness unable to appear at the scheduled hearing may be presented by deposition or at a hearing reconvened at a later date. The commissioner may order the party moving for adjournment to take the *de bene esse* deposition of the expert. The commissioner may order the party moving for adjournment to pay to the Commission hearing costs of \$250 if it is necessary to reconvene. Postponement of a scheduled hearing may be granted only for good and sufficient cause established by the moving party and allowed by the commissioner before or at the time of the scheduled hearing. A hearing will be postponed only until the following month. If the commissioner cannot hear the case the following month, the hearing will not be reset until requested by either party. The commissioner identified on the hearing notice may adjourn a scheduled hearing to allow a party to produce additional evidence when the evidence is in existence, identified, and necessary for the decision but unavailable at the hearing.

*To be admitted as evidence at a hearing, a written expert's report must be provided to the opposing party at least 15 days before the scheduled hearing. The actual report shall be filed with the commissioner at the scheduled hearing. Failure to provide the opposing party notice as required may result in the report being ruled inadmissible. All available evidence and testimony shall be presented at the scheduled hearing or a party must move for adjournment. The commissioner may adjourn the hearing, and the testimony of a necessary witness unable to appear at the scheduled hearing may be presented by deposition or at a

hearing reconvened at a later date. The commissioner may order the party moving for adjournment to take the *de bene esse* deposition of the expert. The commissioner may order the party moving for adjournment to pay hearing costs if it is necessary to reconvene. Each set of APA submissions shall have an index sheet listing its number, name of the provider, dates of service, and number of pages, with the records from each medical provider identified in groups. The report shall be in either chronological or reverse chronological order and be in consecutive order beginning with the first page of APA #1 and continuing through the final page of the last APA submitted. By complying with this regulation, the parties do not waive any evidentiary objections to the introduction of a particular exhibit. Objections include relevancy, materiality, qualification of the expert, timeliness, privilege, hearsay, or authenticity.

*This information, as printed here, is now before the General Assembly for approval. The regulation being revised is 67-612.

There are no particular procedures utilized to expedite decisions in contested hearings. There is no time limit within which decisions must be filed. Because of the large volume of hearings, commissioners often request a draft order from the prevailing party. During Fiscal Year 1997, the Commission began to capture data to measure the timeliness of the hearing process.

Appeals: The South Carolina Workers' Compensation Commission commissioners also sit on appellate panels. A panel may consist of either six or three commissioners, absent the original hearing commissioner. Currently, two three-member panels are hearing appeals. The appellate body may review both the finding of facts and the rulings of law. Oral arguments are permitted, but additional testimony is not taken. Appeals to the Commission's appellate panel must be submitted within 14 days after the single commissioner's order is filed, and appeals from the Commission's appellate panel must be filed with the Court of Common Pleas in the county in which the accident occurred within 30 days of the Commission's decision. The circuit court is limited to viewing the record for errors of law.

Representation by Counsel: The agency does not have any figures on the percentage of cases at each level in which either the employee or the employer/carrier is represented by counsel. By law, however, the employer/carrier must be represented by legal counsel at either a formal hearing or an appellate review. Neither the employee nor the employer/carrier is usually represented at informal conferences. Probably, about sixty percent of the employees are represented at the single commissioner hearing level. About the same number of employees are also represented at the appellate level.

According to statutory law and Commission Regulation, an attorney shall report and obtain approval of any fee for services rendered in a workers' compensation claim. The parties may agree to a fee based on an hourly rate and/or a retainer, or parties agree to a contingent fee contract. If the parties fix the fee by contract and base the fee on an hourly rate and/ or

a retainer fee, the fee is deemed reasonable unless it conflicts with the South Carolina Supreme Court Disciplinary Rule on determining reasonable fees. If the parties agree to a contingent fee contract, an attorney may charge up to thirty-three and one-third percent of the total amount of compensation. There are certain circumstances specified in the law which limit the amount of legal compensation. For example, if the claim involves a fatality and the employer's representative does not contest liability, compensability, or beneficiaries, the attorney may charge a fee up to \$2,500. Attorney fees are paid by the person or company that incurs them.

VIRGINIA

AUTHORITY

Statutory Basis: The Virginia Workers' Compensation Commission established in the Workers' Compensation Act in 1919.

Funding Basis: Funding is derived from a tax assessed against the carriers and self-insurers.

ORGANIZATIONAL MAKE-UP

Type Administration; Location/Main Office; No. of Employees: Commission. There are 180 employees and six regional offices including the Criminal Injuries Compensation Fund. Main Office in Richmond.

No./Commissioners; Qualifications; Selection Process; Salaries & Tenure: The Virginia Workers' Compensation Commission consists of three members elected by both houses of the General Assembly for staggered 6-year terms. One Commissioner is elected every two years. The Commission appoints hearing officers, called Deputy Commissioners, who are required to have five years' experience in the active practice of law and be a member of the state bar in good standing. Salaries range from \$68,500 to \$101,691. Commissioners' salaries are set by the General Assembly.

Hearings. Deputy Commissioners conduct hearings throughout the state. Trial hearings are recorded and a transcription is made only for review. The parties bear the cost of transcription, which is \$.50 per page.

Ombudsmen—Qualifications, salary, number, responsibilities, authority, limitations: The Commission employs two ombudsmen for the Commission and one ombudsman for the Criminal Injuries Compensation Fund.

Fraud and Other Substantive Rights Violations: The agency has no investigatory or enforcement authority. The Virginia State Police investigate claims of insurance fraud.

PROCEDURES

Initiation of Claim by Employee: Written notice is required within 30 days, unless the employer had knowledge. Failure to provide notice may bar compensation. Employee must file written claim within two years with Commission, even if employer has accepted claim

and made payments. Otherwise claim is time-barred unless employer voluntarily filed agreement forms.

Initiation of Claim by Employer: An Employer's Accident Report is required within 10 days of the occurrence. The Commission then sends instructions to the claimant. Guidelines, are contained in a pamphlet mailed to all who report injury.

Other: Dispute Resolution—Commission has a dispute resolution department consisting of one Deputy Commissioner and four support staff. Department renders decisions in cases determined appropriate for on-the-record hearings. Limited discovery. Procedures are mandatory and decisions are binding, with right of appeal to Full Commission.

Prehearing Process: Nine claims examiners attempt to resolve all claims.

Hearings: Discovery, to include depositions, is permitted before the hearing. Continuances are granted only when necessary to prevent material and irreparable harm. A written opinion by the Deputy Commissioner who heard the case is expected within three weeks following the hearing. Supervised closely by Chief Deputy Commissioner.

Appeals: Application for Review must be received by the Virginia Workers' Compensation Commission within 20 days of party's receipt of hearing opinion. The Virginia Workers' Compensation Commission's final order may be appealed within 30 days to the Virginia Court of Appeals.

Representation by Counsel: In excess of 75% of employees are represented by counsel during judicial proceedings, and 100% of employers and/or carriers are represented by counsel. Attorneys' fees are subject to Commission approval, generally from 10% to 20% depending on amount of work involved and complexity of the case, and are paid by the parties.

CONCLUSION

The Advisory Council has concluded that if the General Assembly decides to enact an administrative system for workers' compensation to replace the present court-based system of adjudication, many questions and issues will have to be addressed. The Advisory Council respectfully submits the following list includes some of those issues:

- Will the administrative system function as an independent agency or be attached to the current department?
- How will the commission/board be funded? Will the money come directly to the Commission from specific assessments against insurance companies and self-insurers or will the funding be from the General Fund?.
- How will the commissioners/board members be selected and how many will be required? Who will appoint the members and for what terms? What will be the function of the commissioners/board members - will they be responsible for the administration of the Commission and/or serve only as an appellate level of hearing officers?
- Will the Commission have regulatory authority over workers' compensation insurers and self-insurers?
- What will be the appellate process within the administrative agency and how will appeals be handled after hearing by the full Commission - appeal directly to the Supreme Court or to the circuit/chancery courts? Will the appeal to the Supreme Court be a direct appeal or

discretionary?

- Will the attorneys who are administrative hearing officers or administrative law judges be under the sole control of the Commission without involvement of the Secretary of State or the Attorney General?
- Will the Commission handle the entire claims process?
- Will the Tennessee Rules of Evidence apply in hearings before the Administrative Law Judges or Hearing Officers?

Respectfully submitted on behalf of the
Workers' Compensation Advisory Council,

Dale Sims, State Treasurer
Chair