

## **A G E N D A**

### **SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

1333 Main Street, 5<sup>th</sup> Floor  
Columbia, South Carolina 29201

**May 29, 2012 – 10:30 a.m.**

Commission Hearing Room A

*This meeting agenda was posted prior to the meeting and proper advance notice was made to all concerned parties in compliance with requirements in the Freedom of Information Act.*

#### **PUBLIC HEARING**

1. CALL TO ORDER *CHAIRMAN BECK*
  
2. PROPOSED NEW MEDIATION REGULATION (R 4286) *CHAIRMAN BECK*
  
3. PUBLIC COMMENT PERIOD
  
4. ADJOURNMENT *CHAIRMAN BECK*

#### **SPECIAL BUSINESS MEETING**

1. CALL TO ORDER *CHAIRMAN BECK*
  
2. APPROVAL OF AGENDA *CHAIRMAN BECK*
  
3. PROPOSED NEW MEDIATION REGULATION (R 4286) *CHAIRMAN BECK*
  
4. ADJOURNMENT *CHAIRMAN BECK*

# *State of South Carolina*

1333 Main Street, 5<sup>th</sup> Floor  
P.O. Box 1715  
Columbia, S.C. 29202-1715



TEL: (803) 737-5700  
FAX: (803) 737-5764

## *Workers' Compensation Commission*

TO: Workers' Compensation Commissioners  
FROM: Gary M. Cannon  
DATE: May 25, 2012  
RE: Public Hearing – Proposed Mediation Regulation (R 4286)

Prior to the Special Business Meeting on May 29, 2012, a public hearing is scheduled to receive comment on the proposed new Mediation Regulation. The proposed regulation will add a new Article 18 for the purposes of establishing a defined mechanism to resolve disputes pursuant to Title 42 of the SC Code of Laws without the necessity of a hearing.

### **Background**

At the regular business meeting on January 17, 2012 the Commission received the recommendation from the Mediation Advisory Committee proposing a new regulation to give Commissioners authority to order mediations, create a list of cases for which mediation before any hearing would be beneficial to all parties and deal with procedural issues to include, but not be limited to, requesting mediations, selecting mediators, and costs. The Commission unanimously approved to proceed with publication of the Notice of Drafting of the proposed Mediation Regulation in the February 24, 2012 issue of the *State Register*. The deadline to receive comments was 5:00 p.m. on March 26, 2012. Comments were received from American Insurance Association and Samuels Law Firm.

The Commission approved the language of the proposed Mediation Regulation at a Special Business Meeting on April 9, 2012. The attached Proposed Mediation Regulations were published in the April 27, 2012 *State Register*. The deadline to receive written comments was 5:00 p.m. on Monday, May 28, 2012. As of this date, comments on the proposed regulations were submitted by the South Carolina Counties Workers Compensation Trust and the American Insurance Association.

Agency Name: Workers' Compensation Commission  
Statutory Authority: 42-3-30, 42-9-10 and 42-9-30(21)  
Document Number: 4286  
Proposed in State Register Volume and Issue: 36/4  
Status: Proposed  
Subject: Mediation

History: 4286

<u>By</u>	<u>Date</u>	<u>Action Description</u>	<u>Jt. Res. No.</u>	<u>Expiration Date</u>
-	04/27/2012	Proposed Reg Published in SR		

Document No. 4286  
**WORKERS' COMPENSATION COMMISSION**  
CHAPTER 67

Statutory Authority: 1976 Code Sections 42-3-30, 42-9-10 and 42-9-30(21)

- 67-1801. Mediation.
- 67-1802. Mediation Required with Certain Claims.
- 67-1803. Mediation Requested by Parties.
- 67-1804. Selection of Mediator and Required Schedule.
- 67-1805. Parties Represented.
- 67-1806. Mediation Communications Confidential.
- 67-1807. Expense of Mediation.
- 67-1808. Penalties.
- 67-1809. Forms Required Upon Completion.

**Preamble:**

The South Carolina Workers' Compensation Commission proposes to amend Chapter 67 of the Regulations of South Carolina Workers' Compensation Commission by adding Article 18 for the purposes of establishing a defined mechanism to resolve disputes pursuant to Title 42 of the SC Code of Laws without the necessity of a hearing. The Notice of Drafting regarding this regulation was published on February 24, 2012 in the *State Register*.

Section-by-Section Discussion

- 67-1801. Mediation. This regulation is added to establish the purpose and parameters for a Commissioner ordering mediation, selecting a mediator and retaining jurisdiction over the case.
- 67-1802. Mediation Required with Certain Claims. This regulation is added to set forth the types of claims required to be mediated prior to a hearing.
- 67-1803. Mediation Requested by Parties. This regulation is added to set forth the proper forms for requesting a mediation.
- 67-1804. Selection of Mediator and Required Schedule. This regulation is added to establish the use of a mediator by consent of the parties, qualifications of an individual to mediate a workers' compensation case, the schedule for selecting a mediator and completing the mediation. The Commissioner has the authority to appoint a mediator if the parties cannot agree.
- 67-1805. Parties Represented. This regulation is added to require the representatives of the parties to participate either in person or via telephone. Further it requires the representative to have the authority to enter into negotiations and be available during the mediation. Reasonable notice must be provided to the opposing party concerning attendance via telephone.
- 67-1806. Mediation Communications Confidential. This regulation is added to require all communications taking place within the context of the mediation shall be confidential and not subject to disclosure. Executed agreements resulting from the mediation are not subject to the confidentiality requirement. The mediator or any third party observer may be subpoenaed or required to testify concerning the mediation. The mediator's notes shall not be placed in the Commission's file or used as evidence in any proceeding.

67-1807. Expense of Mediation. This regulation is added to require the parties to share the cost of the mediation equally unless otherwise agreed by the parties or ordered by the Commission.

67-1808. Penalties. This regulation is added to impose penalties in the form of a fine not to exceed the actual cost of the mediation on a party who refuses or neglects to act in good faith during the mediation

67-1809. Forms Required Upon Completion. This regulation is added to require the proper forms to be completed and submitted to the Commission upon completion of the mediation.

**Notice of Public Hearing and Opportunity for Public Comment:**

Interested persons may submit written comments to the South Carolina Workers' Compensation Commission, attention Gary M. Cannon, Executive Director, Post Office Box 1715, Columbia, South Carolina 29202-1715. To be considered, comments must be received no later than 5:00 p.m. on Monday, May 28, 2012.

The South Carolina Workers' Compensation Commission has scheduled a public hearing for May 29, 2012 at 10:30 a.m. in Hearing Room A at the SC Workers' Compensation Commission, 1333 Main Street, Columbia, SC 29202.

**Preliminary Fiscal Impact Statement:**

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

**Statement of Need and Reasonableness:**

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

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

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

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

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

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

**DETERMINATION OF COSTS AND BENEFITS:**

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

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

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

None.

**Statement of Rationale:**

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

~~Indicates Matter Stricken~~  
Indicates New Matter

**Text:**

ARTICLE 18

MEDIATION

67-1801. Mediation.

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

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

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

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

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

67-1802. Mediation Required with Certain Claims.

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

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

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

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

#### 67-1803. Mediation Requested by Parties.

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

#### 67-1804. Selection of Mediator and Required Schedule.

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

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

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

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

#### 67-1805. Parties Represented.

In addition to their attorney being present, each party shall provide a representative, who shall attend the mediation in person or via telephone. The representative shall have authority to enter into negotiations, in good faith, to resolve the issues in dispute. If the representative attends via telephone, they shall be available by telephone for the duration of the mediation. Reasonable notice shall be provided to the opposing party concerning attendance via telephone, prior to the mediation.

#### 67-1806. Mediation Communications Confidential.

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

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

67-1807. Expense of Mediation.

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

67-1808. Penalties.

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

67-1809. Forms Required Upon Completion.

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

Comments  
Received



**RECEIVED**

MAY 24 2012

S. C. WORKERS COMP. COMM.  
EXECUTIVE DIRECTOR

May 24, 2012

Mr. Gary Cannon, Executive Director  
South Carolina Workers Compensation Commission  
1333 Main Street  
Columbia, SC 29201

Dear Mr. Cannon:

Please allow this letter to serve as the South Carolina Counties Workers Compensation Trust's written comments to the SC Workers Compensation Commission's proposed regulations establishing a defined mechanism to resolve workers' compensation disputes without a hearing. The SCCWC Trust is a self-insurance risk pool of 42 of the state's 46 counties. These comments are the result of discussions between the Trust staff, and outside lawyers retained to represent member county entities before the Commission.

### **Introduction**

The workers' compensation system was designed for the Commission to facilitate resolution of disputes between employees and employers concerning workplace injuries in a timely, efficient, predictable and equitable manner. Due to the practical realities inherent in any adversarial system, voluntary mediation of workers compensation cases is increasingly becoming the norm. The SCCWC Trust believes that the voluntary mediation of disputes has been a net benefit for parties seeking to resolve disputes on reasonable terms, and with some degree of predictability. It must be recognized however, that there are certain factors that must exist for mediation to be successful. First, all parties must support the mediation and participate in good faith. Second, it is critical that adequate time for preparation be given all parties before a mediated conference is held. Finally, mediation must provide all parties the benefit of reduced costs, time spent and better predictability. Mediation mandated by the Commission will not benefit employers, injured employees or the Commission if any of these factors are ignored.

### **Parties and Good Faith Participation in Mediation**

The SCCWC Trust is concerned that the proposed regulations do not adequately address the individual issues that determine good faith participation by the parties in mediation. Proposed regulation 67-1802 set forth broad classes of claims subject to mandatory mediation. Additionally,

regulation 67-1801(B) confers upon a Commissioner the absolute discretion to order mediation in any pending claim not subject to mandatory mediation. Taken together, these two sections will subject a vast number of claims to mediation. The Trust is particularly concerned about disputes where one party requests mediation; the other party has objected; but the Commissioner nonetheless orders the parties to mediate. In those cases mediation is likely to be an expensive waste of time, and potentially could lead to a greater level of animosity at a later hearing. Additionally, there is concern that inherent in Regulation 67-1801(B) authority is the potential to order mediation of complex or problematic cases in order to defer the responsibility of rendering a decision. Finally, the proposed regulations fail to consider those cases where a plaintiff employee is not represented by third-party legal counsel. An injured plaintiff has the right to represent himself/herself at a workers compensation hearing. At such a hearing the appointed Commissioner while not providing the pro se plaintiff legal advice must protect the plaintiff's legal rights at the hearing. During mediation however, the mediator will not have either the duty, or the ability to offer such assistance. Unless such plaintiffs are sophisticated enough to understand the legal issues involved, and the underlying issues are not complex then there is the real potential for plaintiff to be disadvantaged by the mediation process. This would result in unnecessary appellate challenges to the mediation, thus unreasonably delaying cases and greatly increasing costs to all parties.

The SCCWC Trust would suggest amending Section 67-1805 with language similar to the North Carolina Industrial Commission's Rule 1(j) which states: Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation.

### **Costs Associated with Mandatory Mediation**

The SCCWC Trust is concerned that the Regulations fail to provide any mechanism to contain the actual costs associated with mediation, including the regulation of fees and expenses. It is reasonable to conclude that the expected increase in demand for mediation due to these Regulations will result in an increase in demand for mediation services with no Commission oversight. The SCCWT Trust would suggest a reasonable fee structure be adopted to address fees and expenses of mediators. The North Carolina Industrial Commission's mediation rules provide guidance. Rule 7 provides the following:

Rule 7. Compensation of the Mediator.

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Commission Order. When the mediator is appointed by the Commission, the mediator's compensation shall be as follows:

1. Conference Fees. The mediator shall be paid by the parties at a rate of \$150.00 per hour for mediation services at the conference.

North Carolina's Rule 7(b) additionally provides for administrative fees and fees for postponing a scheduled mediation conference without cause. Any Regulation requiring the parties to mediate a

dispute should also regulate the expenses charged by mediators, agreed to by the parties, and those appointed by the Commission.

The SCCWC Trust is also concerned about Regulation 67-1807. Regulation 67-1807 provides for the parties to share the costs of mediation equally. However, the Regulation also gives the Commission the authority to order an alternative payment arrangement. The Trust, as an insurer is concerned that this alternative payment arrangement is often in the form of the insurer paying the full mediator's fees and expenses. Regulation 67-1807 should set forth a written standard the Commission will use to determine what circumstances would justify the Commission to order an alternative payment arrangement.

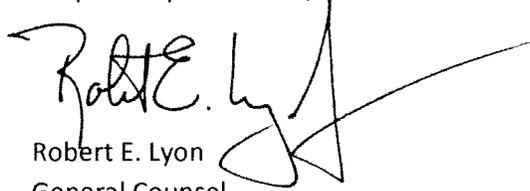
### **Miscellaneous Comments**

Proposed Regulation 67-1808 should set forth a reasonable standard for considering what constitutes a refusal or neglect to act in good faith during mediation. The SCCWC Trust is concerned that the lack of a reasonable standard in proposed Regulation 67-1808 will open the door to a party filing, or threatening to file, a Motion for a Rule to Show Cause for purposes of assessing fines and penalties for a perceived refusal or neglect to act in good faith during mediation. There is real potential for abuse of such motions and the increased costs to respond to such motions are obvious. Defense of such motions will be difficult to support. Proposed Regulation 67-1806(B) provides that neither mediators nor other third-party observers may be subpoenaed or testify regarding the negotiations. This conflict sets up a he-said she-said situation to resolve the matter. Moreover, proposed Regulation 67-1808 specifically provides for the right of review and appeal of such motions from a decision of the Single Commissioner, thus creating an additional layer of potential and expensive appellate litigation.

### **Conclusions**

The Proposed Regulations attempt to more efficiently dispose of the overwhelming case load now handled by the Commission. In many ways mediation can facilitate resolution of many of the routine cases filed each year in a timely, predictable, and equitable manner. However, in order to function efficiently and fairly to all parties mediation will only be effective if there is good faith on all sides, adequate time to prepare the case, and a mediation procedure that provides all sides with the benefits of cost reduction.

Respectfully submitted,



Robert E. Lyon  
General Counsel

**Ballentine, Kim**

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**From:** Stoller, Ken <KStoller@aiadc.org>  
**Sent:** Friday, May 25, 2012 11:59 AM  
**To:** Cannon, Gary  
**Cc:** Ballentine, Kim  
**Subject:** AIA Comments on Proposed Mediation Rule  
**Attachments:** AIA Comments - Proposed Mediation Rule - May 2012.docx

Dear Mr. Cannon:

Attached you will find the comments of the American Insurance Association (AIA) on Regulation 67-1801, Mediation.

Please note that we have added a new argument against the requirement that each party have their attorney present at mediation. I spoke with Commissioner Williams earlier in the week, and he indicated that the requirement may be necessitated by South Carolina's prohibition on the practice of law by corporations. Our comments express the view that mediations are inherently non-adjudicatory proceedings, and that there is nothing in the proposed regulation that would require any party, corporate or otherwise, to engage in the practice of law in order to participate in a mediation.

Please let me know if you have any questions about these comments.

Regards,

Ken Stoller  
AIA Law Department  
(202) 828-7167

**RECEIVED**  
MAY 25 2012  
S. C. WORKERS' COMP. COMM.  
EXECUTIVE DIRECTOR



American Insurance Association

MAY 25 2012  
S. C. WORKERS' COMP. COMM.  
EXECUTIVE DIRECTOR

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**VIA ELECTRONIC MAIL**

May 25, 2012

Gary M. Cannon  
Executive Director  
South Carolina Workers' Compensation Commission  
1333 Main Street  
Post Office Box 1715  
Columbia, SC 29202-1715

Re: Proposed Regulation 67-1801, Mediation

Dear Mr. Cannon:

The American Insurance Association (AIA) appreciates the opportunity to provide comments on proposed Regulation 67-1801, Mediation. AIA represents approximately 300 major property and casualty insurers that write nearly \$100 billion in premiums each year, including more than \$1 billion in South Carolina. AIA's member companies write nearly \$194 million in workers' compensation insurance in South Carolina, representing 33% of the market.

Overall, we support the proposed regulation, since the mediation option will provide an opportunity to settle certain claims before engaging in costly and protracted litigation, which in some cases can be detrimental to both the injured worker and the employer.

However, AIA objects to the requirement in Section 67-1805 that each party have their attorney present at mediation. Some insurers would like to reserve the right to decide whether this is necessary, especially since this section already requires parties to have a representative with negotiation authority attend the mediation. Requiring attorney involvement in every mediation runs contrary to the notion that mediation should be viewed as an alternative to litigation. Furthermore, there is no evidence that mandating attorney involvement at this pre-litigation stage would enhance the possibility of resolving claims. Insurance company adjusters already work directly with claimant attorneys as a matter of course to settle the vast majority of claims before Commission

involvement even becomes necessary, and the decision of whether and when to assign an attorney to a particular claim should be left to the discretion of each company.

In addition, we respectfully disagree with the notion that each party must be required to have their attorney present at mediation because of South Carolina's prohibition on the practice of law by corporations. Mediations are inherently non-adjudicatory proceedings, and there is nothing in the proposed regulation that would require any party, corporate or otherwise, to engage in the practice of law in order to participate in a mediation. Indeed, Section 67-1801(A), the regulation's statement of intent, provides as follows:

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

Accordingly, there does not appear to be a sound legal justification for requiring insurers to have an attorney present at an alternative dispute resolution process whose stated purpose is to dispense with hearings and resolve disputes in the manner cited above.

We appreciate your consideration of these comments. Please call me at (202) 828-7167 if you have any questions.

Respectfully submitted,



Kenneth A. Stoller  
Senior Counsel

**RECEIVED**  
MAY 25 2012  
S.C. WORKERS COMP. COMM.  
EXECUTIVE DIRECTOR

State of South Carolina

1333 Main Street  
P.O. Box 1715  
Columbia, S.C. 29202-1715



TEL: (803) 737-5700  
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## Workers' Compensation Commission

May 25, 2012

The Honorable Larry A. Martin  
Chairman, Senate Judiciary Committee  
101 Gressette Building  
Columbia, SC 29201

RE: Regulation R 4286 – Mediation

Dear Senator Martin:

In 2009 the SC Workers' Compensation Commission initiated an effort to review all its business processes and operations to seek ways to improve its efficiency and effectiveness to better serve the citizens of South Carolina. As a result, many changes have been implemented after receiving input from stakeholders in the workers' compensation system. The stakeholders included employers, claimants, insurance carriers, medical service providers, and attorneys.

One such committee, the Mediation Advisory Committee, was created to afford a meaningful opportunity to the parties to achieve an efficient and just resolution of their disputes in a timely and a cost-effective manner. The committee was composed of representatives from business, defense attorneys, claimant attorneys, insurance industry, state agencies and mediators.

On January 17, 2012 the Mediation Advisory Committee recommended to the Commission language for a new regulation for mediation. The new regulation authorizes Commissioners to order mediations, and create a list of cases for which mediation would be beneficial to all parties. The regulation includes procedures for requesting mediations, selecting mediators and allocating costs.

The proposed regulation reduces the cost to the overall system by reducing litigation costs such as discovery, depositions, IMEs, FCEs, etc., by allowing the parties to resolve the cases earlier in the process. The committee found mediation of cases does not slow the system down, as those cases return to the normal docket almost immediately if the mediation fails. Mediation has

The Honorable Larry A. Martin  
Chairman, Senate Judiciary Committee  
May 25, 2012  
Page Two

already proven successful in "mass-claim" cases filed in the past several years in the workers' compensation system. These cases typically arise when businesses close, and literally hundreds of workers' compensation claims are filed seeking benefits for former employees.

Unlike the civil court system, the workers' compensation system does not have a "class action" mechanism for filing such a large number of claims simultaneously. Our Circuit Courts and Court of Appeals have some form of mediation in place. Adding this regulation to the workers' compensation system dovetails a similar process in the higher courts. Stakeholders throughout the system have continuously asked in the past 2-3 years for mediation of their cases. This ensures the parties have more control over their settlements and how the settlements are structured.

The Commission unanimously approved to proceed with publication of the Notice of Drafting of the proposed Mediation Regulation. The Commission approved the language of the proposed Mediation Regulation at a Special Business Meeting on April 9, 2012. The Proposed Mediation Regulations were published in the April 27, 2012 *State Register*. The deadline to receive written comments was 5:00 p.m. on Monday, May 28, 2012. To date we have received written comments from three parties.

The Commission is scheduled to conduct a Public Hearing on May 29, 2012 to receive comment on the proposed new Mediation Regulation. Subject to the comments received at the Public Hearing, the Commission will conduct a Special Business Meeting the same day to approve the final language of the proposed regulations for submission to the General Assembly. The Commission is expediting the process in order to implement these cost saving measures sooner rather than later.

We anticipate the General Assembly will not be able to consider regulation Document No. 4286 before the Session adjourns on June 7, therefore we respectfully request the Senate include the consideration of the Mediation Regulations Document No. 4286 in the Sine Die Resolution.

Thank you for your consideration in this matter. I will be happy to provide you with additional information to support the request if necessary.

Sincerely,



T. Scott Beck  
Chairman

Comments  
Received  
During Notice  
of Drafting



American Insurance Association

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**VIA ELECTRONIC MAIL**

March 26, 2012

Gary M. Cannon  
Executive Director  
South Carolina Workers' Compensation Commission  
1333 Main Street  
Post Office Box 1715  
Columbia, SC 29202-1715

**RECEIVED**  
MAR 26 2012  
S. C. WORKERS' COMP. COMM.  
EXECUTIVE DIRECTOR

Re: Proposed Regulation 67-1801, Mediation

Dear Mr. Cannon:

The American Insurance Association (AIA) appreciates the opportunity to provide comments on Regulation 67-1801, Mediation. AIA represents approximately 300 major property and casualty insurers that write nearly \$100 billion in premiums each year, including more than \$1 billion in South Carolina. AIA's member companies write nearly \$194 million in workers' compensation insurance in South Carolina, representing 33% of the market.

Overall, we support the proposed regulation, since the mediation option will provide an opportunity to settle certain claims before engaging in costly and protracted litigation, which in some cases can be detrimental to both the injured worker and the employer.

However, AIA objects to the requirement in Section I that each party have their attorney present at mediation. Some insurers would like to reserve the right to decide whether this is necessary, especially since Section I already requires parties to have a representative with negotiation authority attend the mediation. Requiring attorney involvement in every mediation runs contrary to the notion that mediation should be viewed as an alternative to litigation. Furthermore, there is no evidence that mandating attorney involvement at this pre-litigation stage would enhance the possibility of resolving claims. Insurance company adjusters already work directly with claimant attorneys as a matter of course to settle the vast majority of claims before Commission

involvement even becomes necessary, and the decision of whether and when to assign an attorney to a particular claim should be left to the discretion of each company.

We appreciate your consideration of these comments. Please call me at (202) 828-7167 if you have any questions.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kenneth A. Stoller". The signature is written in black ink and is positioned above the printed name and title.

Kenneth A. Stoller  
Senior Counsel



Stephen B. Samuels, Attorney at Law

P.O. Box 50349 • Columbia SC 29250-0349  
1527 Blanding Street • Columbia SC, 29201  
803-779-4000 office, 803-779-4004 facsimile  
www.SamuelsLawFirm.net

March 23, 2012

The Honorable Gary Cannon, Executive Director  
SC Workers' Compensation Commission  
1333 Main Street  
Post Office Box 1715  
Columbia, SC 29202-1715

**RECEIVED**

MAR 26 2012

S. C. WORKERS' COMP. COMM.  
EXECUTIVE DIRECTOR

**RE: New Regulation, R 67-1801 Mediation**

Dear Mr. Cannon:

I am writing to offer public comment to the Commission's proposed Regulation on mediation. By way of background, I have been a practicing attorney for almost fifteen years. A majority of my practice involves representing injured workers before the Commission. I also represent plaintiffs in personal injury, employment and insurance disputes. As such, I am very familiar with the mediation process both in workers' compensation and in civil cases. Please note that while I am a member of IWA and SCWCEA, my comments are being offered solely as an individual and not on behalf of either organization.

I endorse the Commission's efforts towards increased mediation of complex workers' compensation cases. I would oppose mandatory mediation of every case as unduly expensive and burdensome.

I do have specific suggestions to make the process more effective which I would request the Commission consider.

• 67-801 C:

The specific enumeration of certain classes of cases as in 67-801(c) is a good solution provided there is an opt out provision. For example, there are cases where the employee is claiming permanent and total disability, but the defendants strongly disagree. These cases may involve low impairment ratings but high restrictions; disputed body parts or medical conditions; denied liability,; or extensive future medical treatment. While at first blush one might think these are the perfect cases to mediate, that can only happen if the parties come to the table with the ability to compromise. In some cases, the employer/carrier simply has no intention of making a settlement offer that would resolve the case within the claimant's demand. Or the employer/carrier will only settle on a clincher where the claimant needs medical treatment to remain open.

Rather than require the parties to appear for a pointless five-minute mediation (as sometimes happens in circuit court), the parties should be allowed to either opt out of mediation by joint written agreement or file a motion to defer or exempt a case from mediation for case specific reasons. I would propose a separate form be created to simplify the opt out process.

- 67-801 I.

The proposed regulation reads:

In addition to their attorney being present, each party shall provide a representative, who shall attend the mediation in person or via telephone. The representative shall have authority to enter into negotiations, in good faith, to resolve the issues in dispute. If the representative attends via telephone, they shall be available by telephone for the duration of the mediation. Reasonable notice shall be provided to the opposing party concerning attendance via telephone, prior to the mediation.

In my experience, when an adjuster attends a mediation by telephone, the chances of settlement drop exponentially. I have been burned several times by this and will no longer mediate without a live representative from the carrier. In practice, the adjuster sits at her desk attending to her normal activities. Periodically she takes phone calls from the defense attorney who relays updates to her. The adjuster never meets the claimant; never sees the opening presentation; and rarely engages with the mediator.

I recognize requiring physical attendance creates a cost to the carrier. However, the cases in which mediation will be required all have exposure in the \$100,000+ range, if not substantially more. A plane ticket and hotel room can easily be managed for under \$1,000.00 – an amount far less than the mediator's fee, a doctor's deposition, an IME, or video surveillance by a private investigator.

The Judicial Department's ADR rules specifically address this issue by requiring all parties to physically attend the mediation (unless otherwise agreed by the parties). I would request the Commission adopt the same rule. It states:

(b) Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:

- (1) The mediator;
- (2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the

agency and recommend a settlement to the appropriate decision-making body of the agency;

- (3) The party's counsel of record, if any; and
- (4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

#### Rule 6, SCADR

An additional problem arises when the adjuster does not come to mediation with settlement authority to meet the claimant's demand or the potential exposure in the case. Sometimes adjusters have no authority to leave the medical treatment open; other times they only have authority up to "their evaluation." Sometimes a case cannot settle because the reserves have been set too low.

The South Carolina Supreme Court recently defined "full authority" in the above rule as "an individual who is empowered with the decision to offer a settlement sum up to the existing demand of the Plaintiff or the policy limits of coverage, whichever is less." Full settlement authority for any party "means the party individually or a representative who has binding authority to make a decision for that party." See Order of the South Carolina Supreme Court, 2008-7-23-01. The Commission should adopt a similar definition.

I would emphasize that coming to a mediation with full authority does not bind a party to offer that amount. It simply means that the mediation can go forward without an arbitrary take it or leave it stopping point set by a carrier beforehand. Most cases resolve outside the settlement range of both parties – it is the mediation process that forces people outside of their comfort zones and makes them rethink their positions. Allowing a party to put a preset limit on settlement eviscerates the very process which makes mediation effective.

#### ● 67-801 M.

The proposed regulation states: "Any party who refuses or neglects to act in good faith during the mediation may be subject to a fine not to exceed the actual cost of the mediation."

I would suggest this language is unclear. Is the fine payable to the aggrieved party or to the Commission? Does "actual cost of the mediation" refer only to the mediator's fee – or does it include the expenses incurred by the party including attorney's fees, travel, and so forth?

The Judicial Department's ADR rules are much more specific. I would suggest the Commission adopt similar language with reference to § 42-3-150 in place of Rule 37.

If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions,

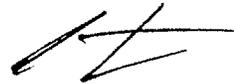
including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

Rule 6, SCADR

Thank you for considering my comments. I do feel this is a positive step for the Commission and applaud Commissioner Williams and other individuals who have spearheaded this effort. I hope you find my comments helpful.

With kindest regards, I am

Yours very truly,

A handwritten signature in black ink, appearing to read "Stephen B. Samuels". The signature is stylized with a long horizontal stroke and a diagonal stroke crossing it.

Stephen B. Samuels

SBS/aro