

State of South Carolina

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Workers' Compensation Commission

October 3, 2011

Catherine Templeton
Executive Director
South Carolina Department of Labor, License and Regulation
P.O. Box 11329
Columbia, SC 29211

Dear Ms. Templeton:

Enclosed is the report that the staff of the South Carolina Workers' Compensation Commission agreed to prepare after a meeting on July 20, 2011 at which time we discussed your interest in merging the SC Workers' Compensation Commission into the Department of Labor, License and Regulation.

The purpose of this report is to facilitate discussion of potential issues of merging the two agencies by providing information about the creation, organization and function of each agency and potential issues to consider. The information is presented in an objective and unbiased manner for purposes of discussion and we trust it is received in that spirit. We fully recognize our agency is statutorily created by the General Assembly and any changes to its form or structure rest entirely with the General Assembly. Should any statutory changes occur to our organizational or governing structure we remain committed to implementing the changes for the betterment of the citizens of South Carolina.

I look forward to discussing the contents of the report with you and Governor Haley.

Sincerely,

T. Scott Beck
Chairman

On July 20, 2011 T. Scott Beck, Chairman of SC Workers' Compensation Commission (COMMISSION), and Gary Cannon, Executive Director, met with Catherine Templeton, Director of Labor, License and Regulation (LLR), Barbara Derrick, Director of Administration at SC LLR, and Austin Smith, Special Counsel to the LLR Director at the COMMISSION offices. The meeting was held at the request of Director Templeton to discuss a proposal to merge the COMMISSION with LLR and to discuss improvements to the exchange of information between the two agencies pursuant to Section 42-3-195 of the SC Code of Laws. The purpose of the merger is to provide additional matching funds for the SC Occupational Safety and Health Act (OSHA) program. Director Templeton's merger proposal is based upon the premises that a majority of state workers' compensation programs operate under the auspices of their respective state's department of labor and a merger could happen by the SC General Assembly making a simple change to the language in the Section 42-3-10 of the SC Code of Laws. The meeting concluded with COMMISSION staff agreeing to research the proposal and prepare a report of its findings.

The purpose of this report is to facilitate discussion of potential issues of merging the COMMISSION into LLR by providing information about the creation, organization and function of the COMMISSION and LLR and potential issues to consider for the merger to proceed. The information is presented in an objective and unbiased manner for purposes of discussion. COMMISSION staff fully recognizes that the COMMISSION is statutorily created by the General Assembly and the final authority of making any statutory changes to the organizational structure of the COMMISSION rests entirely with the General Assembly. The COMMISSION is fully committed to implement statutory changes made by the General Assembly with regard to its form or function.

Occupational Safety and Health Administration

The Occupational Safety and Health Act (the Act) was enacted by Congress in 1970. In April 1971 the Occupational Safety and Health Administration (OSHA) was created. The Act authorizes OSHA to contract with states to operate the OSHA program and enforce the provisions of the Federal Act. South Carolina was the first state to operate the program and enforce the provisions of the Act within the state. The state program has operated within the SC Department of LLR since its inception. The program is funded by a state-federal match formula on a one to one ratio. The federal government has certain funding and operational requirements for the state to manage the program.

SC OSHA program funding match is approved by the General Assembly in the annual General Fund appropriations budget. The budget reductions imposed on all state agencies by the General Assembly for the past three fiscal years reduced the state matching funds for the SC OSHA program. According to Director Templeton, the reduction potentially has the State in jeopardy of losing its authority to operate the program.

Director Templeton began investigating ways to replace the loss of matching funds appropriated by the General Assembly. During the July 20 meeting, Director Templeton reported research by LLR staff discovered 25 other states workers' compensation programs are under the auspices of the agency responsible for labor and licensing and/or insurance functions. This

resulted in the concept of merging the COMMISSION within the LLR to use the General Funds budgeted for the COMMISSION as match for federal funds for the SC OSHA program. Director Templeton indicated the COMMISSION budget contained \$800,000 of administrative expenditures funded from the General Fund which could be used as matching funds for the OSHA program. Further, merger of COMMISSION into LLR may reduce overall expenditures by the elimination of salary and operating expenses for duplicative administrative functions (finance, human resources and procurement) and the expense of office space lease by relocating COMMISSION to state owned space. LLR is considering relocating from its leased space in Koger Office Center to the State Museum.

History and overview of workers' compensation in South Carolina

Prior to the establishment of the Workers' Compensation Act, an injured employee had few options in pursuing compensation for his injuries. His only chance for recovering benefits from his employer was to sue the employer for a tort such as negligence. Under the common law of South Carolina, a master, or employer, was liable to their servant, or employee, for damages arising from the employer's negligence. This created a number of problems for both the employer and the employee. The employee had to overcome the burden of proving that the employer's negligence caused the injury. Further, if the employer could show that negligence of the injured employee or negligence of a fellow servant, or employee, contributed to the injury, the employer would be excused from liability. The employee would also be barred from recovery if his employer could show that the employee had assumed the risk of injury by agreeing to enter into the employment, knowing the unsafe conditions existed in his employment that created a risk of injury.

When the employee was successful in his claim against his employer, the employer risked not only liability for the lost wages and medical costs required by the employee, but he could also be held liable for intangible damages such as pain and suffering, emotional distress and loss of consortium. Furthermore, an employer could be assessed punitive damages and forced to pay the employee's attorney's fees. Without a limitation on damages, an employer risked bankruptcy from a single claim.

Any claims brought by an injured employee had to be brought in the Court of Common Pleas and were often tried before juries. This was a slow, costly, unpredictable and inefficient system. Following the industrial revolution the number of industrial accidents and the severity of injuries increased. West Publishing, *South Carolina Statutes and Regulations Relating to Workers' Compensation as Appearing in the Code of Laws of South Carolina* 2011, p. v. Around 1911, states began passing the first workers' compensation laws. *Id.* By 1930, South Carolina was one of only four states that did not have a workers' compensation act. On July 17, 1935, following pressure from the U.S. Secretary of Labor, Governor Olin D. Johnston signed the South Carolina Workers' Compensation Act into law.

Purpose of the Workers' Compensation Act

The Workers' Compensation Act was enacted to:

1. Provide sure, prompt and reasonable income and medical benefits to work-related accident victims, or income benefits to their dependents, regardless of fault;
2. Provide a single remedy and reduce court delays, costs, and judicial workloads arising out of personal injury litigation;
3. Relieve public and private charities of financial demands incident to uncompensated occupational accidents;
4. Minimize payment of fees to lawyers and witnesses as well as time-consuming trials and court appeals;
5. Encourage maximum employer interest in safety and rehabilitation through an appropriate experience rating mechanism; and
6. Promote frank study of the causes of accidents (rather than a concealment of fault) in an effort to reduce preventable accidents and human suffering. *Id.*

Benefits available under Workers' Compensation

In general, all employers are subject to the Workers' Compensation Act and all employees are entitled to benefits for injury or death arising out of and in the course of their employment. S.C. Code Ann. § 42-1-310 (1976). However, certain types of employment, such as agriculture, railroads and real estate sales are exempt from the Act, unless they elect to be covered. § 42-1-360. Federal employees are entitled to federal benefits and thus are exempt from the Act. *Id.* The Act also exempts small businesses that regularly employ less than four employees. *Id.*

The employer is required to provide coverage for all injuries, regardless of fault. In exchange, the injured employee is only entitled to payment for all causally related medical treatment, compensation for the loss of wages during the period of disability, and compensation for permanent disability or disfigurement. § 42-9-10; § 42-9-20; § 42-9-30; § 42-15-60. If the employee dies as a result of on the job injuries, the employees' dependents are entitled to compensation. § 42-9-290. An employee is also entitled to payment for causally related medical treatment, compensation for the loss of wages during the period of disability, and compensation for permanent disability or disfigurement if she contracts an occupational disease or suffers an ionizing radiation injury arising out of and in the course of her employment. § 42-11-10; § 42-13-10.

The amount of compensation an employee is based on the amount of wages earned in the employment at the time of the injury during the one-year period prior to the injury. § 42-1-40. The employee's Average Weekly Wage is calculated by taking the employee's total earnings during the four quarters preceding her injury and dividing that amount by the number of weeks the employee actually worked during that time period. *Id.* Multiplying the Average Weekly Wage by sixty-six and $\frac{2}{3}$ percent equals the employee's Compensation Rate. The Compensation Rate is equal to one "week" of benefits. For each week an employee is unable to work as a result of the injury, the employee is entitled to one payment of the Compensation Rate. § 42-9-10. In no case may an employee receive compensation in excess of 500 weeks of the Compensation Rate, unless the employee is determined to be permanently and totally disabled and a paraplegic, tetraplegic, or has suffered a traumatic brain injury. *Id.*

The amount an employer pays to a healthcare provider for services rendered to a workers' compensation patient must be approved by the COMMISSION. § 42-15-90. Rather than approve each individual medical bill, the COMMISSION promulgates policies and procedures regarding payment for medical services that are governed by regulation. § 42-3-185; *See also* 25A S.C. Code Ann. Regs. 67-1301 (1985) et. seq. The Regulations permit the COMMISSION to publish a Medical Services Provider Manual that establishes the maximum allowable payments to medical practitioners. R.67-1301 – R.67-1304. As long as payments accepted by healthcare providers for services rendered are equal to or less than the maximum allowable payment, the amount is deemed approved by the COMMISSION. The COMMISSION'S Insurance and Medical Services Division has the authority to hear and decide disputes between payers and providers. R.67-1305.

Workers' Compensation Commission

The COMMISSION was created by an act of the General Assembly. 1936 S.C. Acts No. (39) 1231. This act was codified in its modern form as Title 42 of the South Carolina Code of Laws in 1976. *See* § 42-3-10. The seven Commissioners are appointed by the Governor with the advice and consent of the Senate for fixed terms of six years. § 42-3-20(A). The Governor may appoint a Chairman from among the Commissioners who serves for a term of two years. § 42-3-20(B). Commissioners may only be removed from office by the Governor prior to the expiration of their term for "malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity". § 1-3-240(C). In fulfilling their judicial role, the Commissioners have the authority to "hear and determine all contested cases. . . and handle such other matters as may come before the department for judicial disposition." § 42-3-20(C). The COMMISSION has exclusive authority to decide all questions arising under Title 42. § 42-3-180. The Commissioners are bound to perform their responsibilities in accordance with the Code of Judicial Conduct. § 42-3-250; Rule 501, SCACR, Code of Judicial Conduct.

Commissioners have the authority to hear and adjudicate all contested cases under the Workers' Compensation Act. § 42-3-20(C); § 42-3-180. Commissioners are subject to the Code of Judicial Conduct. § 42-3-250; Rule 501, S.C.A.C.R. At a Hearing, the Commissioner makes both findings of fact and rulings of law based on the evidence submitted into the record. § 42-17-40. The Decision and Order of the single Commissioner may be appealed by either party to the Full COMMISSION. § 42-17-50. The Full COMMISSION may make its own findings of fact and rulings of law after weighing the evidence presented at the initial Hearing. *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967). The award of the Full COMMISSION is conclusive and binding as to all questions of fact. § 42-17-60. Rulings of law made by the COMMISSION may be appealed to the Court of Appeals if the date of injury is on or after July 1, 2007. *Id.* For dates of injury on or before June 30, 2007, decisions may be appealed to the jurisdictional Court of Common Pleas. *See* Act No. 111, Pt. I § 30, eff July 1, 2007.

The COMMISSION serves both administrative and judicial functions. § 42-1-90. The Chairman is the Chief Executive Officer of the COMMISSION. § 42-3-25. The COMMISSION is the governing body of the judicial department and the administrative department. *Id.* The

COMMISSION appoints an Executive Director to serve at its pleasure. § 42-3-80. The Executive Director is the Chief Operating Officer and is responsible for directing the administrative department of the COMMISSION. *Id.* With the approval of the Chairman, the Executive Director is charged with the appointment and discharge of all personnel within the administrative department, excepting the division directors. *Id.* The administrative department is divided into three divisions, the Division of Coverage and Compliance, the Division of Claims and Statistics, and the Division of Medical Services. § 42-3-90. The judicial department is responsible for disposition of all contested cases presented to the COMMISSION for adjudication. § 42-3-80. The Judicial Division is managed by a director. All division directors are recommended by the Executive Director with the concurrence of the Chairman and are subject to the approval of the COMMISSION. § 42-3-90.

Labor Licensing and Regulation

The Department of LLR was created in 1994 by 1993 S.C. Acts No. 181. The Legislature created the Department of Labor, Licensing and Regulation by combining the Department of Labor, the State Fire Academy, the Office of the State Fire Marshal and 38 professional and occupational licensing boards into a single executive agency accountable to the Governor. 1993 S.C. Act No. 181, § 960, effective February 1, 1994. Statutory authority for the powers of the department are enumerated in S.C. Code Ann. § 41-3-10 (1976) et. seq. The Department of LLR is authorized to promulgate, administer and enforce rules and regulations necessary to carry out the provisions of Chapter 3 of Title 41. § 41-3-10. It may also direct all inspections and investigations pursuant to Chapter 3 of Title 41. *Id.* Labor, Licensing and Regulation has the power to enforce and prosecute its regulations. § 41-3-10. However, it lacks the power to adjudicate questions arising under its enabling statute. *See* § 41-3-120. The power to determine contested cases arising out of the laws the Department of LLR is charged with enforcing is exclusively reserved for the courts. *Id.*

Labor, Licensing and Regulation is a department created within the executive branch of South Carolina state government. *See* § 1-30-10(A)(11). LLR falls within the definition of an agency as it is authorized by law to promulgate regulations in order to accomplish the statutory duties of the department. *See* § 41-3-10; § 41-3-30. The Director of the Department of LLR is a member of the Governor's cabinet. § 30-4-65; § 40-1-40. The Director is appointed by the Governor with the advice and consent of the Senate and may be removed from office at the Governor's discretion. § 1-3-240(B).

Role of Administrative Agencies Under a System of Checks and Balances

One of the hallmarks of American government is the concept of the separation of powers. South Carolina constitutionally adopted the separation of powers as follows:

In the government of this state, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other. S.C. Constitution Art. I, § 8.

Legislative power rests with the General Assembly. *Calhoun Life Ins. Co. v. Gambrell* 245 S.C. 406, 140 S.E.2d 744 (1965). “While the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board to fill up the details by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.” *State v. Watkins* 259 SC 185, 191 S.E.2d 135 (1972). The General Assembly delegated the power to proscribe rules and regulations to both the Workers’ Compensation COMMISSION and the Department of Labor, Licensing and Regulation in order to accomplish the statutory duties of each agency. See S.C. Code Ann. § 41-3-10 (1976); § 41-3-30; § 42-3-30. Both agencies may only serve in their legislative capacity when promulgating regulations pursuant to the Administrative Procedures Act. § 1-23-10 et. seq. The extent of their regulatory power is limited to what has been authorized by the General Assembly.

The executive authority is vested in the Governor. S.C. Constitution Art. IV, § 2. The Department of LLR is an executive agency under control of the Governor, designed to assist her in her executive functions. § 1-30-10. The Director of the Department of Labor, Licensing and Regulation serves as a member of the Governor’s Cabinet. § 30-4-65; § 40-1-40.

The judicial power is vested in the courts. See *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910). The General Assembly granted the COMMISSION the power to hear and decide all cases arising under Title 42. § 42-3-180. The COMMISSION may award benefits, make findings of fact and rulings of law. § 42-17-40. “In a work[ers’] compensation case the [Workers’ Compensation] COMMISSION is the fact-finding body. *Walker v. City of Columbia* 247 S.C. 241, 146 S.E.2d 856 (1966). However, ultimate authority for deciding the law on appeal rests with the courts. See § 42-17-60. The Administrative Procedures Act (“APA”) provides the standard for judicial review of workers’ compensation decisions. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, th[e] Court can reverse or modify the decision of the Workers’ Compensation COMMISSION if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Transp. Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010) (citing S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2009)). The General Assembly granted the Department of LLR the authority to enforce and prosecute, but did not grant it the power to hear and decide contested cases for claims arising under Chapters 1-24 of Title 41. See § 41-3-120.

Workers’ Compensation Commissioners are vested with both the quasi-judicial power to hear and decide contested cases based on the facts of an individual case, and the quasi-legislative power to make regulations that govern all potential parties equally. See § 42-1-90; § 42-3-30; § 42-3-180. However, in order to avoid violating Article I § 8 of the South Carolina Constitution, Commissioners cannot engage in both functions at the same time. When sitting as a hearing officer or member of an appellate panel in a contested case, the Commissioners are serving in their judicial function. In this capacity, they may only make findings of fact and rulings of law on the particular case under review, and their decision must be based solely on the evidence submitted into the record. See South Carolina Administrative Procedures Act § 1-23-310, et. seq.

When the seven Commissioners are sitting as a collegial body, such as during their monthly Business Meetings, the Commissioners are serving in their administrative function. The COMMISSION may only promulgate rules and regulations as an agency while sitting in their administrative capacity and must have an affirmative vote of a majority of the Commissioners. Commissioners in their individual capacity do not possess the power to make rules or regulations. It is only by voting as a body, following a public hearing, and other procedures required by the APA, that the COMMISSION may engage in its rulemaking function. *See* § 1-23-110.

Commissioners - Canons of Judicial Conduct

The General Assembly subjected the Commissioners to the Code of Judicial Conduct. § 42-3-250. The Canons require that the Commissioners must be independent of any undue influence when serving in their judicial function. Rule 501, S.C.A.C.R., S.C. Code of Judicial Conduct, Canon 1. Furthermore, the Commissioners must avoid even the appearance of impropriety and must conduct their judicial functions with complete impartiality. *See* Rule 501, S.C.A.C.R., S.C. Code of Judicial Conduct, Canons 2-3. Unlike judges, Commissioners are appointed by the Governor. § 42-3-20. However, once the Commissioners are appointed, they serve fixed terms that do not coincide with the gubernatorial election cycle. The Governor may not remove a Commissioner from office without cause, and may only remove a Commissioner with cause for specific reasons set out by statute. *See* § 1-3-240(C). This serves to protect the Commissioners from turnover in the Office of the Governor.

Administrators of the Department of LLR have no such protection. The Director is answerable directly to the Governor and may be removed at any time by her with or without cause. § 1-3-240 (B).

Workers' Compensation Systems by State

The oversight of the workers' compensation system varies from state to state, including the District of Columbia. The following is a summary of the of the oversight responsibility of workers' compensation by agency category.

<u>Oversight responsibility</u>	<u>States</u>	<u>(Southeast)</u>
Independent board, agency, or commission	19	6
Labor	17	1
Workforce or industrial development	6	6
Courts	3	0
Insurance	3	0
Human resources (employment)	1	0
Financial services	1	1
Licensing & regulatory affairs	1	0

Finance/Budget

The COMMISSION receives its funds from two sources, the State General Fund appropriations and Other Funds (Earmarked Funds). The Earmarked Funds are received as filing

fees, fine and assessments and other miscellaneous revenues. The annual operating budget for the COMMISSION for FY 2011-12 is \$4.8 million. The COMMISSION receives \$1.7 million from General Fund appropriations and \$3.1 million from other appropriated funds (Earmarked Funds). Expenses in the General Fund are solely for salary and benefits. Expenses in the Earmarked Funds include salary and benefits and all other operating expenses. Table 1 reflects the details of the budget.

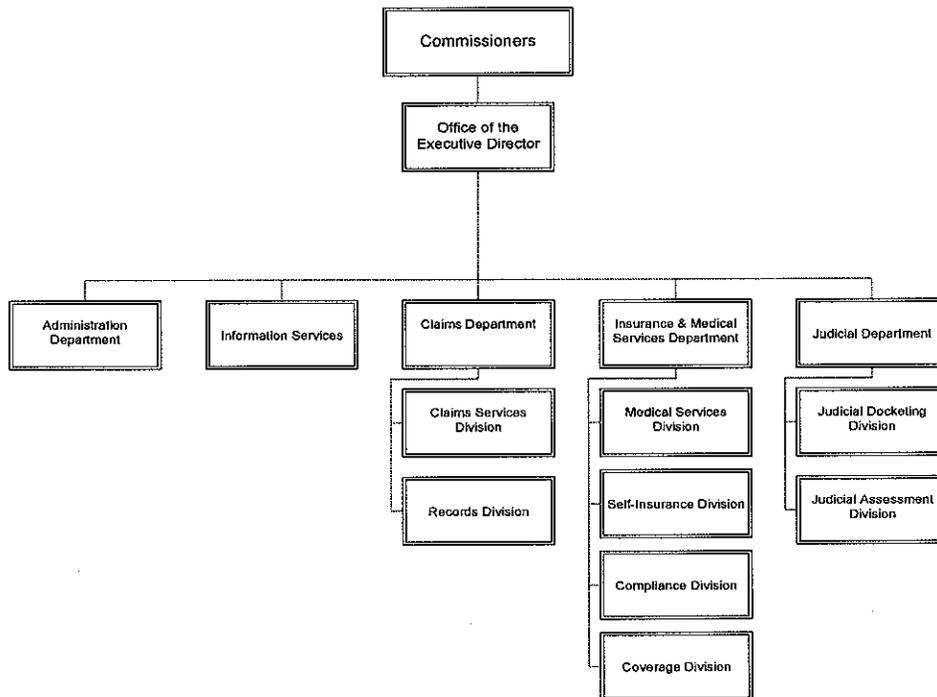
Table 1
South Carolina Workers' Compensation Commission
FY 2011-12 Budget

	Budget
STATE APPROPRIATIONS	
General Appropriation	<u>\$ 1,743,070</u>
Account Description	Expenditure
Personal Services	\$ 1,329,429
Other Operating Expenses	-
Employer Contribution	413,641
Total	<u><u>\$ 1,743,070</u></u>
OTHER APPROPRIATIONS EARMARKED	Revenues
Training Conference Registration Fee	\$ 1,000
Sale of Publication and Brochures	8,000
Workers' Comp Award Review Fee	75,000
Sale of Photocopies	95,000
Workers' Compensation Filing Violation Fee	1,891,000
Sale of Listings and Labels	30,000
Workers' Comp Hearing Fee	600,000
Earmarked Funds - Original Authorization	<u>\$ 2,700,000</u>
Increase Authorization	418,815
Total Earmarked Revenues + Fund Balance	<u><u>\$ 3,118,815</u></u>
Account Description	Expenditure
Personal Services	\$ 1,378,265
Taxable Subsistence	72,350
Other Operating Expenses	1,220,016
Employer Contribution	448,184
Total Earmarked	<u><u>\$ 3,118,815</u></u>
TOTAL OPERATIONS	<u><u>\$ 4,861,885</u></u>

Personnel

The COMMISSION has 54 budgeted positions, 19 are funded by the State General Fund Appropriations and 35 are funded by the Commission's Earmarked Funds. Total salary and benefits for the 54 positions is \$3,606,722. The total for the General Fund is \$1,754,097 and the total for the Earmarked Fund is \$1,852,625. Of the 19 positions in the General Fund, salary and benefits for only 4 positions (\$230,832) may be used as matching funds for the OSHA program. The positions are Program Manager II, two Administrative Assistants and the Senior Applications Manager. The salary and benefits (\$1,523,265) for the remaining positions; 7 Commissioners, 7 Administrative Assistants and the Executive Director, could not be used as matching funds without statutory changes. Positions allocated to the Earmarked Funds include 11 Insurance Claims Examiners II, 3 Administrative Assistants, 3 Administrative Specialist II, 3 Program Coordinator I, 4 Program Coordinator II, 1 Program Manager I, 2 Program Manager II, 2 Administrative Coordinator II, 1 Claims Analyst I, 1 Records Analyst II, 1 Accounting/Fiscal Manager I, 1 Postal Center Director I, 1 Postal Specialist, 1 Physician (Part-time), and 1 Human Resource Manager. An organization chart of the COMMISSION is shown in Exhibit 2. An organization chart of the COMMISSION is shown in Exhibit 2.

EXHIBIT 2 South Carolina Workers' Compensation Commission



Information Technology

Recently, the COMMISSION implemented business processes less reliant on paper documents and more reliant on electronic imaging for the filing, storage and retrieval of documents. The processes now include real time access to claims status, electronic filing of pleadings and orders by attorneys and processing of Orders by the Commissioners. Future goals include implementation of a system to allow electronic filing of periodic reports by insurance carriers. The accomplishment of the past and future goals rely heavily on the IT staff's unique expertise and knowledge of the COMMISSION's business processes and systems and information technology necessary to keep the business processes operating at maximum efficiency and effectiveness.

The COMMISSION has two full time employees (FTE) in the Information Technology Department. One FTE is responsible for the coding and system maintenance and one FTE is responsible for the business analysis, processes, design, testing and implementation. The COMMISSION contracts with the SC Division of Information Services and Technology (DSIT) infrastructure management and support and for a ½ FTE Chief Information Officer (CIO). The IT infrastructure contract involves managed hosting of 2 servers, production and development for the Progress SQL database, San Fiber Channel, Firewall, 10 MB internet, router maintenance, business document (non-SCEIS) imaging and processing through Hyland OnBase, standard desktop support, software assurance, VPN clients and disaster recovery. The CIO is responsible for interface with DSIT, oversight of the infrastructure management and support, including but not limited to, SQL servers, PC's, software, vendor contracts, telephones, wireless devices, and air cards. The CIO also provides business processes analysis as needed.

Total annual operating expenses for the IT Department for FY2011 was \$364,498. This includes personnel, DSIT contracts, supplies, communications and allocated indirect cost.

Considerations

Exchange of Information – COMMISSION & SC OSHA

In 1993 the General Assembly enacted Act No. 121. The Act contained language for the Workers' Compensation COMMISSION to cooperate and provide information and statistics to the SC Commissioner of Labor solely for scheduling inspections for compliance with occupational safety and health rules and regulations and statistical evaluation of hazards. Further, the Act provided, with limited exceptions, the information and statistics were confidential and exempt from any disclosure pursuant to the Freedom of Information Act. § 42-3-195

LLR OSHA staff determined the information identified in § 42-3-195 had not been requested by LLR nor provided by the COMMISSION in recent years. Under the leadership of Director Templeton, OSHA has made efforts to improve technical assistance to businesses in the State. During the July 20 meeting Director Templeton expressed a desire to re-establish lines of communication between COMMISSION and the LLR OSHA program for the exchange of information between the two agencies pursuant to § 42-3-195.

On July 25 the COMMISSION Executive Director emailed a report summarizing the claims by nature of injury for FY 2010-11 to Dorothy Ison, Administrator of Office of Occupational Safety and Health. On August 10 Mr. Cannon met with Ms. Ison, Harvey Jessup, Program Manager, Office of OSHA Voluntary Programs, and Anthony Wilks, Compliance Manager, Office of Occupational Safety and Health Director of the OSHA program at the LLR offices to discuss the report and additional information needed from COMMISSION. Mr. Cannon agreed to have the COMMISSION Information Technology staff determine if the information needed by LLR was available in COMMISSION's data base. On September 7 Mr. Cannon emailed a supplemental report containing additional information on claims filed for FY 2010-11. The COMMISSION will continue to cooperate with LLR and provide any information available in COMMISSION's data base to comply with the provisions of § 42-3-195.

Cabinet vs. non-cabinet agency

While the COMMISSION and the LLR were created by the General Assembly, they are different creatures under South Carolina law. LLR is an executive department directly under control of the Governor. § 1-30-10. Its Director serves at the Governor's pleasure. § 1-3-240(B). The Governor has broad statutory powers to reorganize executive departments. *See* § 1-30-10(C).

The COMMISSION is an independent agency as defined by the Administrative Procedures Act, due to its authority to make rules and decide contested cases. *Lark v. Bilo* 276 S.C. 130, 276 S.E.2d 304 (1981). The APA defines this type of independent agency as "each state board, COMMISSION, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases" § 1-23-310(2). Unlike LLR, the COMMISSION is not an executive department. *See* § 1-30-10. The Legislature did not extend the governing authority of the COMMISSION the broad power to reorganize the agency that was granted to LLR in § 1-30-10(C). The structure of the COMMISSION is rigidly set by Chapter 3 of Title 42. *See* § 42-3-10, et. seq. Any changes to the structure of the COMMISSION and its internal departments can only be made by the General Assembly.

Promulgation of Regulations

When the COMMISSION establishes a Regulation pursuant to the Administrative Procedures Act, approval of any changes must be made by a majority vote of the COMMISSION with ultimate approval by the General Assembly. § 42-3-30. The Department of LLR possesses the power to promulgate Regulations, under the administration of its Director. § 41-3-10. Under a combined agency, a conflict may exist regarding who has final say over the promulgation of Regulations relating to the administration of workers' compensation laws.

The COMMISSION and LLR are subject to the provisions of the Administrative Procedures Act. *See* § 1-23-10 et. seq. However, the General Assembly entrusted to the COMMISSION the additional power of adjudicating contested cases that had previously been reserved for the courts. Under the current law, LLR lacks the power to hear and decide contested cases arising under Title 41. In order for the Department of LLR to have the power to hear and decide contested cases, it would have to be expressly granted by the General Assembly. Any

effort to combine these agencies would have to be accomplished by a legislative act of the General Assembly.

Code of Conduct Judicial Canons

If the COMMISSION is merged with Department of Labor, Licensing and Regulation, the clear line of impartiality, provided by the Canons of Judicial Conduct may be blurred because of the COMMISSION being housed within a Cabinet agency of the Governor. A potential concern would be to whom are the Commissioners ultimately answerable? Under the current laws, the seven Commissioners sitting together as a body are the ultimate governing authority within the agency. The conduct of the Commissioners is regulated by the General Assembly, through statutes pertaining to workers' compensation, and by the Courts, through the Canons of Judicial Conduct, and judicial review of the Decisions and Orders of the Commission. The governing authority for the Department of LLR is its Director. § 41-3-10. All personnel of the Department of Labor, Licensing and Regulation are under the control of the Director. § 41-3-30. If the Commission were combined into an executive agency with LLR, this would create a significant problem regarding what to do with the Commissioners. If the Commissioners become employees of the Department, pursuant to § 41-3-30, they would be under the control of the Director of LLR. This would create a conflict with Chapter 3 of Title 42, which outlines the powers and duties of the Commissioners. This would also create an ethical dilemma under Canons 2 and 3 of the South Carolina Code of Judicial Conduct. Making the Commissioners employees of the LLR Director could present an appearance of an influential relationship prohibited by Canon 2(B), or the appearance of a bias prohibited by Canon 3(B)(5). Rule 501 S.C.A.C.R., S.C. Code of Judicial Conduct. In order to violate the Canons, it is not necessary that the Commissioners *actually* be influenced or biased by their employment relationship with the Director; the existence of a relationship where it merely *appears* that the Commissioner's impartiality might reasonably be questioned is sufficient for a violation. *See Id.*

Duplication of Positions

A merger of the agencies may result in the duplication of similar administration positions in the respective agencies. For example both agencies currently have responsibilities in the financial/accounting, human resources, procurement, information technology, postal services. A cost savings may result by the elimination of positions performing the same functions. However, consideration must be given to the specialization required for each position as it relates to their respective agency, particularly in the areas of information technology, financial/ accounting and human resources. The COMMISSION's information technology system is highly specialized in electronic document imaging and management, the billing and accounting of fines and fees. For example the COMMISSION's human resources staff performs additional duties and responsibilities in the ombudsman/constituent services area, which requires specific knowledge of the COMMISSION statutes, regulations, policies and procedures. Due to the complex, multi-functional and specialized duties and responsibilities provided by each agency's administrative positions in conjunction with the agency's mission, the specialization required for the position may not allow an elimination of position.

Statutory Positions

The Executive Director and the Commissioner's Administrative Assistants' positions are created by statute. § 42-3-60: § 42-3-80. In the event of a merger it will be necessary for the General Assembly to address these statutory provisions. The seven Administrative Assistants to

the Commissioners are at will employees and serve at the pleasure of their respective Commissioner. Because the General Assembly provided by statute the annual salaries of the Commissioners, the Workers' Compensation does not have the authority to adjust their compensation. § 42-3-40. The same would be true if the Commissioners became part of LLR; only the General Assembly can affect the salaries of the Commissioners. Furthermore, the General Assembly provided that "[e]ach Commissioner shall be authorized to employ an administrative assistant to serve at the Commissioner's pleasure." § 42-3-60. Only the General Assembly can eliminate the positions of the seven Administrative Assistants, however, the positions could be reclassified to fit within LLR's staffing patterns.

The Director of LLR has authority over all employees of the department and may "... prescribe their duties, powers, and functions as [s]he considers necessary and as may be authorized by the statute. . .". § 41-3-30. This presents a conflict with the powers of the COMMISSION's Executive Director, which are set out by statute. *See* § 42-3-80. The question arises as to how the Executive Director would fit into the structure of LLR. Under the current statute, the administrative department of the Commission "... shall be under the direction of the executive director. The director must be appointed by the commission, [and] shall serve at its pleasure. . .". § 42-3-80. Specific duties and responsibilities of the Executive Director and the administrative department are enumerated by this statute. *Id.* In a combined executive agency, this would conflict with § 41-3-10 and § 41-3-30, which hold that the Director of LLR is the chief administrative officer and may regulate the employees of the department. § 41-3-30. In a combined agency, the Executive Director would essentially be serving two masters, as § 42-3-25 holds that the Executive Director is subject to the control of the Chairman and the COMMISSION, but § 41-3-30 indicates that all personnel of the department are answerable to the Director of LLR. *See* § 41-3-30; § 42-3-25; § 42-3-80. Furthermore, this raises the question as to who would have control of the employees of the COMMISSION's administrative department. § 42-3-80 gives the Executive Director control over personnel of the administrative department, but § 41-3-30 gives the Director of LLR control over the personnel of LLR.

Workers' compensation claims by the COMMISSION and LLR Employees

The General Assembly requires that, if any Commissioner or a member of his or her household, or an employee of the COMMISSION, suffers an on-the-job injury that should be handled pursuant to the Workers' Compensation Act, the claim cannot be heard by the COMMISSION and must be heard by the Court of Common Pleas in the county where the accident occurred. § 42-17-40. If the COMMISSION is integrated into LLR, this statute may be read to require all on-the-job injuries sustained by employees of LLR to be filed with the Circuit Court, rather than the COMMISSION. Furthermore, it is likely that all seven Commissioners would have to recuse themselves from presiding over claims filed by their co-workers within the Department, in order to avoid the appearance of impropriety pursuant to Rule 501, S.C.A.C.R., the Canons of Judicial Conduct, Canon 3.

Conclusion

The COMMISSION recognizes LLR's budgetary situation and subsequent interest in various options to obtain a sustainable funding source for the OSHA program including. The

COMMISSION's budget situation is similar to LLR's and other state agencies that have experienced decreasing financial resources without the corresponding decrease in the demand for services. The COMMISSION found it necessary to "think outside the box" to find ways to provide services in a more efficient and effective manner.

COMMISSION and LLR were created under state law for specific purposes providing services to the citizens of South Carolina. These specific independent purposes of each agency should be kept in mind during any consideration to merge the two agencies in order to prevent unintended consequences which may cause harm to the effectiveness and statutory purpose of each agency. As already exhibited the COMMISSION has initiated communication and provided information and statistical data to LLR OSHA.

The COMMISSION wants to reiterate the intent of this report is to identify the potential considerations. It is not for the purpose of expressing opposition to, or an acceptance of, a merger. The COMMISSION is fully aware of the statutory authority of the General Assembly with regard to the COMMISSION's organizational structure, authority, scope and purpose. The COMMISSION stands ready and is fully committed to implement any changes made by the General Assembly with regard to statutory provisions for workers' compensation.