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Objects in Mirror are Smaller Than They Appear: The Shrinking Discount for Lump Sum Payments

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On June 27, 2014, the South Carolina Workers' Compensation Commission announced a change to the regulation governing the discount provided employers and carrier for lump sum payment of an award. Prior to the change, all awards of less than 100 weeks were discounted at a 2% rate and all awards of 100 weeks or more were discounted at a 5% rate. The changes to the regulation tie the discount rate on award of 100 weeks or more to the interest rate on the Five Year U.S. Treasury Note as reported by the Federal Reserve on the first business day of each year. The regulation prevents the discount from being any less than 2% or any more than 6%.

Based on historical trends, the practical effect of the new regulation is to decrease the discount provided for lump sum payments, thereby increasing the cost of those payments. For illustration, the yield on a five-year note as of January 2, 2014, was 1.72%, meaning the regulation resulted in a discount rate of 2%, as opposed to the 5% that was already in effect. This result could be long-standing, as not since July 9, 2007, has the yield rate on the five-year note been sufficient to trigger the discount in effect at the time the new regulation was implemented.

Although nobody questions the Commission's authority to create regulations governing payment of awards in lump sum, the Commission's implementation of the regulation has caused debate in the legal community. Rather than make the regulation prospective, the Commission announced the new regulation would take effect immediately and would apply to all lump sum awards of the Commission granted after June 27, 2014. The implementation of the award raised questions as to whether the new regulation should impact all claims currently pending before the Commission, rather than just those with a date of loss after the effective date of the regulation.

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One line of thought is that the regulation is substantive in nature, so that application of the regulation should be limited only to awards where the date of accident is later than the effective date of the regulation. There is legal support for this argument in the case of *Bartley v. Bartley Logging*, 359 S.E.2d 55 (S.C. 1987). In *Bartley*, the claimant was rendered a paraplegic due to an accident in June 1983. At the time of the injury the South Carolina Workers' Compensation Act (Act) limited all indemnity awards to 500 weeks. In May 1984, South Carolina amended the Act to remove the 500 week limitation on benefits in claims involving paraplegia. After noting the general rule that statutes are to be construed prospectively, the Court determined the amendment did not apply to the claimant's award. The Court reasoned the Act is concerned with contractual rights and liabilities of the employee and employer and that, to be retroactive to the date of accident, the amendment required either a clear legislative intent that it be applied retroactively or that it be remedial or procedural in nature. After determining no such legislative intent existed, the Court also determined that the right to compensation is a not a procedural right. Rather, it is a substantive right that accrues on the date of accident. As a result, the Court ruled the amendment could only be applied to dates of accident accruing after the date of the amendment.

Using a similar line of reasoning, one criticism of the Commission implementation of the regulation is that it impacts the employer's liability to pay a particular sum of money to a claimant and, as such, is a substantive change to the Act. As a substantive change to the Act, the regulation impacting the discount provided for lump sum payments should only be applied to dates of accident after the date of the regulation.

Another line of thought looks to the wording of the regulation itself, which authorizes the Commission to publish the commuted value table on the first business day following January 1 of each year. Further, the regulation states the commuted value table "published on the first business day following January 1 shall apply to all awards made during the year and until a new present value table is published the following year." Since the Commission did not publish a new commuted value table on the first business day of 2014, and since the regulation does not explicitly provide the Commission authority to publish a new table until the first business day following January 1, 2015, the published commuted value table in effect at the beginning of 2014 should remain in effect for the duration of the year.

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At present, the Commission continues to apply the new regulation to all awards issued after June 27, 2014. In cases involving awards of less than 100 weeks, the new regulation does nothing to change the calculation of lump sum awards. Further, looking only on a case-by-case basis, application of the new regulation on the number of cases where the value of remaining benefits is substantially less than 500 weeks will have an impact primarily on the aggregate of these awards, rather than on each award individually. The increase in benefits paid on a lump sum payment of 500 weeks at the maximum compensation rate is $43,603.77 however, meaning there is considerable impetus for pursuing appeal of the implementation of the new regulation on, for example, a denied death claim where the claimant is entitled to the maximum compensation rate.

While understanding how the Commission is applying the new regulation, carriers should also be aware of the unsettled nature of the regulation's implementation. Legal challenge to the implementation is expected, and could create substantial discord in the event it is overturned. A successful legal challenge to the implementation of the regulation could result in numerous instances where claimants are obligated to refund benefits paid by a carrier, and carriers are likely to face significant collectability issues should this scenario come to pass. As a result when estimating potential exposures to indemnity benefits in cases where the anticipated award is greater than 100 weeks, a carrier should consider its exposures using both the 2% and 5% discount rate and seek compromise to mitigate against this possibility. That being said, expect the Commission to continue using the lower discount rate on all awards after June 27, 2014.

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