

Workers' Compensation Legislative & Regulatory Update

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*Volume 10, Issue 1
January 5, 2009*

An end of the year flurry of activity in the field of workers' compensation sets the stage for what appears to be another very active year legislatively and from a regulatory standpoint in Florida. Many of the initiatives for workers' compensation reform initially seen in 2008 will form the basis of continued activity for the next year. Initially reported in this first newsletter for 2009, further details will be provided as these matters progress to completion or further debate. Developing issues include: NCCI's estimate of unfunded liabilities as a result of the Florida Supreme Court case of Murray v. Mariner Health Inc. and ACE USA, No. SC07-244 ("Emma Murray"); the request for increases in premium rates as a result of the Emma Murray decision; development of the maximum compensation rate for injuries occurring after January 1, 2009; issuance of the annual report by the Division of Workers' Compensation and Division of Insurance Fraud on fraud within the workers' compensation system; notice of proposed rule development concerning changes to Rule 69L-24 "Workers' Compensation Insurers Standards and Practices".

Unfunded Liabilities as a Result of the Emma Murray Decision

As reported in last month's newsletter, the Florida Supreme Court in the Emma Murray decision recently determined that "reasonable attorney fees" for injured workers are not limited to a percentage of benefits recovered by the attorney on behalf of the worker. Rather, quantifying such fees could include consideration of other factors such as time expended by the attorney in the recoupment of benefits. Many have predicted that this decision will create substantial increases in litigation with corresponding cost increases to the system, contrary to the efforts made in 2003 by the legislature to reduce attorney involvement in the workers' compensation system. A special "law only filing" rate increase request was filed by NCCI based solely on this Supreme Court decision which will be discussed in the next section of this newsletter. This rate increase relates to prospective rates for new, renewal, and existing workers' compensation policies (prorated) ef-

fective March 1, 2009. In the minds of many, the real question relates to cost increases to the system (unfunded liabilities) that will result from this Supreme Court decision for dates of accident after October 1, 2003 (the effective date of the 2003 statutory amendments) and the effective date of the rate increase if any (March 1, 2009), a time period in which industry assumed the 2003 limitations on the attorney fees were in effect, but has now proved, as a result of the Supreme Court decision, to be in error. NCCI has now predicted these unfunded liabilities to be potentially up to \$400 million, losses that cannot be recouped by industry since rates are established only prospectively without remedy for unexpected retrospective losses. According to NCCI, "Each insurers unfunded liability will vary based on many factors including, but not limited to, the number and the type of open claims, average claim costs and claims handling practices. As a result, each insurer needs to analyze its own data and calculate its own estimate of its unfunded liability." The effect of such determination on future rates remains in question.

Rate Increase Request

As a result of the Emma Murray decision, NCCI made a “law only filing” requesting a rate increase based upon a determination that the Murray decision would create in excess of a 2% impact on existing workers’ compensation premium rates justifying such a filing (to be distinguished from an “experience filing” annually made in August of each year based upon the experience of the system for preceding years). This rate filing would affect premium charges by approximately 250 insurance companies doing business in the State of Florida. The overall rate request amounts to an 18.6% increase with an 8.9% increase (representing \$240,000,000 in increased premiums in the state) effective March 1, 2009 to the end of the year and the remainder of the increase request beginning January 1, 2010. NCCI believes that it will take two years for the full impact of the Emma Murray decision to be realized.

On December 16, 2008, a hearing was held before Insurance Commissioner Kevin McCarty concerning this rate increase. Since this was a “law only filing” as opposed to the annual experience filing, the proposed rate increase would apply to existing policies on a pro rata basis. A decision by the insurance commissioner has not yet been made. However, the focus of the hearing related to whether the rate decreases experienced by industry since the 2003 legislative changes were as a result of only the changes made to claimant’s attorney fees. The over 60% rate decrease experienced by industry since 2003 could be attributed to many reasons including improved claims closure rates, improved return to work procedures, declines in accident frequency, increased emphasis on compliance, redefinitions of permanent total disability, redefinitions for establishing

compensable accidents, increased emphasis on fraud detection, and changes in attorney fees payable to injured worker’s attorneys. The difficulty in determining whether there should be a rate increase based only on the Emma Murray decision is quantifying the impact of reducing attorney fees payable as a component of the experienced rate decreases since 2003. Surveys of insurance carriers indicated the substantial cost reductions realized were in significant part as a result of the changed provisions relating to how much attorney fees were paid to injured worker’s attorneys.

No decision has been made by the Insurance Commissioner but such is expected within the very near future if in fact a rate increase can be effective by March 1, 2009, allowing sufficient notice to Florida employers as required by Florida law. Copies of the slides and exhibits utilized by NCCI at the rate hearing can be obtained by e-mailing this newsletter.

Maximum Compensation Rate

In accordance with Section 440.12(2), Florida Statutes, the Division of Workers’ Compensation has determined that the maximum compensation rate for accidents on or after January 1, 2009 is \$765. This is an annual calculation made by the Division of Workers’ Compensation based the statewide average weekly wage paid by Florida employers as determined by the Agency for Workplace Innovation.

Fraud Report

As required by Florida Statutes, the Division of Workers’ Compensation and the Division of Insurance Fraud have issued its annual report on fraud within the Florida workers’ compensation sys-

tem. Access to the report can be made electronically by referring to <http://www.myfloridaCFO.com/wc/pdf/DIF-DWC-2009-Joint-Annual-Report.pdf>

Insurers’ Standards and Practices

The Division of Workers’ Compensation is proposing significant changes to Rule 69L-24 related to Insurers’ Standards and Practices for handling workers’ compensation claims. The primary purpose of the new rule change is to establish uniform guidelines for the Division to monitor and enforce the statutory obligations of the insurance industry (“regulated entity”) to ensure timely payment of workers’ compensation benefits to injured workers, timely payment of medical bills, and timely reporting to the Division of Workers’ Compensation as required by Florida law. New provisions are being proposed for penalties associated with non-compliance with these regulatory standards. Significant changes will be made in penalty assessment and processes for determining penalties due. A workshop for these proposed changes is currently scheduled for January 6, 2009. Any entity handling claims within the State of Florida should be a part of this rulemaking process. Significant new provisions are being proposed for maintaining and providing records of claims handling services with new patterns and practices provisions being considered. Performance standards are being created also. The rule changes will apply to actions taken by carriers, employers, servicing agents, third party administrators, self-insureds and generally any entity that is responsible for handling or adjusting claims in Florida. Contact this newsletter for a copy of the proposed rule changes.