

Workers' Compensation Legislative & Regulatory Update

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With just two weeks before the Florida legislature adjourns for the year, legislators are largely avoiding workers' compensation issues based on the success of the 2003 reforms and the corresponding decreases in rates. However, there are several workers' comp bills making their way through the legislative process that appear to have a good chance of passing. The top workers' comp priority is resolving the funding issues of the Florida Workers' Compensation Joint Underwriting Association. The FWCJUA has been operating a deficit in some subplans since legislators modified the association's coverage structure in 2003 and 2004. The Senate version of the bill (SB 2118) is currently awaiting a full vote while a similar House bill (HB 1267) has yet to be placed on the House's agenda. The Senate has also drafted a bill that would exempt some FWCJUA records from the state's sunshine law. The language is contained in the House's version of the bill.

By a unanimous vote the Senate has approved a bill (SB 346) that would grant first responders certain rights under the workers' compensation law,

which would not be available to other workers. Among other things, the first responders are seeking benefits for adverse reactions due to small pox vaccinations, the ability to collect additional permanent total benefits in certain circumstances, and meet a lower standard of proof in cases involving toxic exposures. House Insurance Chair Dennis Ross (R-Lakeland) agreed to support the House's version of the bill (HB 141) when the bill's sponsor agreed to remove two provisions including one that would grant additional attorneys fees in cases involving toxic exposure. Technically, the bill opens the door to amending all of Chapter 440, but Ross vowed the bill would not pass unless it remains in its current form. Last year, Ross single handedly killed the bill by not placing it on the committee's agenda.

Legislators have also included a minor change in the law concerning employers who violate a stop-work-order issued by the Division of Workers' Compensation. Currently, there are two conflicting criminal penalties under the law pertaining to employers who knowingly violate a stop-work-order. One penalty makes the violation a first-degree misdemeanor under Section 440.105(2), Florida Statutes. Another

penalty makes the violation a third-degree felony under Section 440.105, Florida Statutes. Under SB 1596 and HB 561, the reference to the misdemeanor charge would be stricken from the statute, making the violation a third-degree felony.

FWCJUA

In 2003, legislators revamped the FWCJUA's coverage options to make it more feasible for small and new employers to purchase coverage. Four coverage subplans were created including subplan D, which was available to small employers and non-profit organizations. To make the subplan affordable, lawmakers set rates at 125 percent above manual rates for small employers and 110 percent for non-profits. As a result of the artificially low rates, the subplan quickly amassed a deficit of \$9.9 million as of December 2003. Under the law, only subplan D policyholders could be assessed to pay off the deficit, a provision deemed prohibitive since the subplan only had 2,500 policyholders.

In 2004, lawmakers sought to tackle subplan D's deficit and establish a new FWCJUA coverage scheme. The subplans were replaced by a three-tier plan that is

designed to be more in line with an individual employer's loss ratio. Given that subplan D had a substantial deficit and that tiers one and two rates were not scheduled to be adequate until 2007, the legislature created several methods to finance the deficits. Per subplan D, lawmakers approved a \$15 million contingency fund in the Workers' Compensation Administrative Trust Fund. The FWCJUA could request money from the fund to cover any projected deficits on a three-month basis.

As for tiers one and two, the FWCJUA could request that regulators levy a below-the-line assessment on all policyholders in the voluntary market to fund any deficits. At issue, however, is that the FWCJUA's ability to access monies from the reserve fund ends on January 1, 2007 and its ability to levy assessments expires on July 1, 2007. The law prohibited the use of any surplus in a subplan or tier to help retire the deficit in another subplan or tier. Experts calculated that due to the FWCJUA's financial status, the association will need the ability to raise funds past the 2007 dates.

Both bills contain the following provisions:

- Require the use of the \$30 million projected surplus in subplan C to retire the deficits in subplan D and tiers one or two. The \$30 million surplus is to be used before accessing any money from the contingency fund or levying an assessment. The \$30 million deficit is projected to cover the currently projected \$22 million deficit in all of the other coverage categories.
- The deadline for accessing the contingency reserve fund is extended from January 1, 2007 to January 1, 2011. The FWCJUA's assessment au-

thority is extended from July 1, 2007 to July 1, 2011.

- Require the FWCJUA to obtain prior approval of rates (file and use) before they may be implemented as of January 1, 2007. The rate setting change brings the FWCJUA inline with the voluntary market.
- Require the FWCJUA to seek a ruling from the IRS in an effort to be declared a federal tax-exempt entity. In order to qualify for the tax-exempt status, the Department of Financial Services would appoint the association's nine board members.
- The bill grants the Office of Insurance Regulation greater control over the FWCJUA's plan of operation. The bill also spells out a code of ethics for FWCJUA officers, employees, and board members. The bill also states the procedures for bidding for contracts.

First Responders

After the 2003 reforms, a House task force identified a number of concerns relating to first responders under the new law. Among other things, the first responders are seeking benefits for adverse reactions due to small pox vaccinations, the ability to collect additional permanent total benefits in certain circumstances, and meet a lower standard of proof in cases involving toxic exposures. The bill has a broad base of support, especially in the House where over 50 lawmakers have signed on as co-sponsors of the bill (CS/HB 141). Despite that support, however, up until this year the bill has had little chance of passing. Opponents of the legislation have until now successfully argued it would carve out a special class of workers and re-open for amendment Chapter 440, Florida Statutes.

Last year, Ross single-handedly killed the bill by refusing to place it on the committee's agenda for a vote. After lengthy negotiations with the bill's prime sponsor, Rep. Sandy Adams (R-Oviedo), Ross now says the bill is now in a form that is acceptable under the workers' comp law.

The compromise between Ross and Adams centered on two provisions addressing benefits for psychiatric injuries and more importantly attorneys' fees. As initially drafted in the bill, first responders would qualify for medical benefits due to a mental or nervous injury even if the injury is not due to a physical accident. However, the employee would not collect indemnity benefits unless the mental condition is the result of a physical injury. The latest version of the bill strikes all mention of psychiatric benefit changes, thus retaining current law.

The second major change in the bill deletes all references to a change in attorneys' fees. Under the 2003 reforms, lawmakers significantly reduced claimant attorneys' fees by striking any reference to hourly fees while retaining a contingency fee schedule based on a percentage of benefits awarded to the worker. The one exception related to one medical-only claim per accident. In those cases, claimant attorneys could earn \$150 per hour up to a maximum \$1,500, while retaining the current statutory fee schedule. The original version of the bill allowed judges of compensation claims to ignore the attorneys' fees' schedule and award additional fees in cases involving toxic substance and occupational diseases. However, as mentioned above, any reference to attorney fees was deleted from the bill.