

Workers' Compensation Legislative & Regulatory Update

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*Volume 10, Issue 4
March 5, 2009*

The 2009 Florida Legislature opened in Tallahassee on March 3, 2009. The deadline for filing bills to be considered at this year's session was at noon on the opening day. The last Legislative and Regulatory Update dated February 20, 2009 summarized some of the bills that were filed that have workers' compensation relevancy and application. The following is a summary of the remainder of the bills filed. By far, the greatest interest in legislative change relates to the issue of attorney fees payable to injured workers' attorneys and the cost impact on the system in attempting to cap fees. Other bills filed, however, warrant monitoring. As the bills filed are assigned to committees and considered for passage, updates will be provided.

Attorney Fees

House Bill 1489 sponsored by Representative Rivera and Senate Bill 2280 sponsored by Senator Gelber are probably the most substantive and comprehensive legislation dealing with specific issues under the workers' compensation law. (See additional summary of these bills under the next section of this newsletter.) In regards to attorney fees,

these bills take away the requirement that Judges of Compensation Claims (JCCs) approve attorney fees in the settlement of workers' compensation claims and allows for the attorney and the injured worker to agree, without limitation, on how much attorney fees should be paid in this settlement process. Liberalized standards for the determination of attorney fee entitlement payable by the employer/carrier are created. If the employer/carrier pays benefits to the injured employee within 30 days from the receipt of a Petition for Benefits, no attorney fees would be payable by the employer/carrier (fees could be payable by the injured worker in this instance). If benefits were paid after this 30 day period but within 90 days, an attorney fee of 25% of the value of the benefits secured would be payable by the employer/carrier. If benefits were paid after this 90 period or as ordered by a JCC, "reasonable" attorney fees would be payable. Reasonable attorney fees payable presumably would be as that term is defined in the recent Supreme Court case of Emma Murray v. Mariner Health and ACE USA (Emma Murray). Fees payable by the employer/carrier would have to be approved by the JCC. The injured worker and his or her attorney could enter into a separate agreement or contract for representation in regards to a workers' compensation claim.

This bill is unquestionably the claimant's bar's response to the Emma Murray case and is in stark contrast to House Bill 903 (referred to House Insurance, Business & Financial Affairs Policy Committee) and Senate Bill 2072. (Both bills were summarized in the Legislative and Regulatory Update dated February 20, 2009.) These bills are intended to restrict attorney fees that in all probability were increased by the Emma Murray case, i.e., these bills are intended to reverse the Emma Murray decision. NCCI has predicted that the Emma Murray case would increase overall costs in the workers' compensation system by 18.6% over a two-year period. If either House Bill 903 or Senate Bill 2072 passes, NCCI predicts, based on actuary studies, that: 1) the increase of 18.6% will not be fully realized and 2) NCCI will propose that the first rate increase installment of +6.4% approved by the Florida Office of Insurance Regulation effective 4/1/09 (see Legislative and Regulatory Update dated February 20, 2009) should be rolled back as of the effective date of the bill. NCCI stated that: "Once the 18.6% increase associated with the Emma Murray decision is fully realized, the enactment of a bill that reverses Emma Murray will reduce overall workers' compensation costs in Florida by 15.7% (\$428M), offsetting NCCI's estimate of the impact (+18.6%)." NCCI predicted that the

unfunded liabilities “during the window from 10/1/03 to the enactment date (of the bills)” would still exist.

Miscellaneous

House Bill 1191 sponsored by Representative Patterson and Senate Bill 2406 sponsored by Senator Oelrich relate to the presumption of compensability of workers’ compensation claims for firefighters, correctional officers, and law enforcement officials suffering from tuberculosis, heart disease, and hypertension. According to current law, if these employees suffer from the listed medical conditions and upon entrance to their employment a physical examination is performed that failed to reveal the existence of these conditions, there is a presumption that the conditions are job related. Under proposed amendments, the presumption of compensability would not apply if such an employee “departed in a material fashion from the prescribed course of treatment of his or her personal physician” which affected the condition. The presumption likewise would not apply if the conditions had been previously compensated for under the workers’ compensation statute and the employee departs, in a material fashion, from treatment recommended that aggravates the conditions. In order to be entitled to the presumption of compensability, a workers’ compensation claim for these conditions must be made by the employee prior to his leaving the employment of the employing agency. The bill also establishes procedures for independent medical examinations and second opinions if there is a dispute as to the appropriateness of medical care.

House Bill 1191 and Senate Bill 2406 (also summarize as above noted) includes provisions that: 1) alter the current system utilized concerning mediation of workers’ compensation issues; 2) allow for one continuance of final workers’ compensation hearings upon proper motion. JCC approval would be required for a subsequent continuance;

3) establish maximum time limitations for presenting evidence in expedited hearings; 4) delete current statutory requirements that provide for the referral to appropriate grievance committees for attorneys who file proceedings without reasonable grounds; and 5) rehabilitation temporary total benefits would be payable in excess of the 104 week maximum limitation of temporary benefits as provided in Section 440.15, Florida Statutes.

Senate Bill 2486 sponsored by Senator Wise extends the jurisdiction of the State Fire Marshal, in consultation with the Department of Education, to adopt safety rules and perform safety inspections of educational property in any county that does not employ or appoint a “certified fire safety inspector.” Safety inspections are also provided for charter schools not located on school board owned or leased property. Safety inspections are also provided for in regards to construction, renovation, and remodeling of educational facilities. This bill amends Section 633.025, Florida Statutes, concerning minimum fire safety standards for existing buildings and requires compliance with minimum fire safety code provisions by December 31, 2016. Buildings in existence on July 1, 2009 are exempt from certain fire safety code standards including designated provisions of the National Fire Protection Association Life Safety Code for certain structures. See also House Bill 1297 sponsored by Representative Schwartz concerning exemptions to the Life Safety Code.

Committee Assignments and Meeting Schedules

As the filed bills are assigned to committees and meetings of these committees are scheduled to discuss the bills, notice will be provided. Since the last

newsletter, House Bill 845 (Electric Cooperatives Self Insurance Fund) has been referred to the Insurance, Business and Financial Affairs Policy Committee; House Bill 923 (Hoisting Equipment Safety) has been referred to the Insurance, Business, & Financial Affairs and Military and Local Affairs Policy Committees. If copies of the filed bills are needed, please contact this newsletter.

Legislative Action

Although workers’ compensation issues are not of a high priority for legislative consideration this year in view of the other issues taking “center stage” primarily related to the economy, there still is a general feeling that changes are needed. In view of the sixty-plus percent rate decreases since the 2003 systemic changes in the law, workers’ compensation legislation does not appear to be of critical concern to the economy in Florida that requires immediate legislative attention. However, there is no question that potential actions taken this year can have a significant impact on future rate filings. Negative trending in workers’ compensation costs, especially medical; potential increased attorney involvement (plus unfunded liabilities as referenced above); adverse effects of the economy on investment income; and potential increases in the costs of large deductible policies and being able to self-insure (see Legislative and Regulatory Update dated February 20, 2009) suggest overall costs in obtaining appropriate workers’ compensation coverages will be increasing.