

Workers' Compensation Legislative & Regulatory Update

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Special Legislative End of Session Wrap-Up

The Florida Legislature concluded its regular session by passing a number of workers' compensation bills that will be submitted to Gov. Charlie Crist for his approval. The bills primarily address insurance issues such as granting the state more control over the Florida Worker' Compensation Joint Underwriting Association with the aim of qualifying the residual market for federal tax-exempt status. Another bill prohibits general contractors from rejecting a subcontractor's proof of coverage if the coverage was secured from a non-rated self-insurance fund. Additionally, lawmakers finally agreed on a version of a bill that would expand first responders' rights under the law. After initially fighting the bill for the last several years, the industry finally gave its okay to the bill

after the bill's supporters agreed to remove a provision that would have allowed attorneys higher than statutory fees in certain cases. The bill was passed despite the objection of the Florida League of Cities and Florida Association of Counties, which maintained it would increase their overall workers' compensation costs.

FWCJUA

Of all the workers' comp bills considered by the Legislature, the ones that commanded lawmakers' most attention were two bills (SB 1894 and HB 1429) addressing the FWCJUA and its operations. The FWCJUA has been a subject of lawmakers' attention since the enactment of the 2003 reforms, when lawmakers decided to introduce new subplans to ensure there was available and affordable coverage. In the 2003, the legislature created subplans A, B, C, and D, without firmly comprehending that the caps on rates were set lower than actuarial reasonable estimates. This was especially true given the cap on

rates in subplan D, which were structured to provide small and new employers access to coverage. Due to those low rates, subplan D had a \$9.9 million deficit by Jan 1, 2004. Technically, subplan D deficits were supposed to be paid off by subplan D policyholders. However, due to the fact that most of the subplan D policyholders were small employers, it seemed improbable that they could sustain any necessary assessment.

In 1994, lawmakers once again turned their attention to the FWCJUA by replacing the four subplans with a three-tiered coverage scheme where premiums would more adequately reflect needed sums. As for the subplan D deficit, lawmakers created two methods to fund the deficits. One method allowed the FWCJUA to access monies from a \$15 million contingency fund set up as part of the Workers' Compensation Administrative Trust Fund. The financial request had to be cleared by the Legislative Budget Counsel, which could only provide three-months of financing at a time. To date,

the association has requested \$7.9 million from the fund and projects that in all probability, the FWCJUA will no longer need to access the fund. The 1994 law changes granted the association the authority to levy a “below the line” assessment against all workers’ comp policyholders to fund any deficits in tier one, tier two, or any funding needs in subplan A, B, C or D. The FWCJUA’s authority to levy the assessment would have expired on July 1, 2007, but under the bill approved by the legislature, the association’s authority to levy assessments has been extended until July 1, 2012.

To resolve the FWCJUA’s funding problems, lawmakers decided that the association could use the surplus in subplan C to pay deficits in other subplans and tiers one and two. As a result, the subplan’s deficit could easily payoff surplus D’s estimated \$2.4 million deficit, which FWCJUA’s officials stated would more than likely be covered through investment dollars. Under the proposal, the association’s overall surplus will still equal \$8.4 million after the deficits are paid off. The second funding options include allowing the FWCJUA to request monies from the trust over a six-month period as opposed to the three-month period under current law. It also would extend the association’s ability to levy assessments.

The main proposal that moved the bills through the process this year were a series of provisions aimed at making the residual market eligible for federal

tax-exempt status. Since 1994, the association has paid over \$33 million in federal income tax including \$16 million in 2006. To position the FWCJUA’s ability to apply for tax-exempt status, lawmakers transformed the association into a quasi-governmental agency. To do so, regulators now have the power to name all board members, require the residual market to gain prior approval before implementing rate changes, and approve the association’s plan of operation. Currently, the FWCJUA has 3,000 policies in force. The second bill shields public access to certain information including underwriting files, claims files until the termination of claims, and records obtained by internal auditors until the audit is complete. Other information kept in confidence would be medical records and the work product of attorneys retained by the FWCJUA to protect or represent the association.

First Responders

After four years on lawmakers’ agenda, the House and Senate finally agreed on a bill (HB 746) that would grant first responders certain rights under the 2003 amendments to the law. The bill basically addresses occupational disease claims and other medical treatments. The National Council on Workers’ Compensation Insurance estimated increased costs for first responders’ classes of 5.4 percent or \$11 million. The state’s Division of Risk Management estimated it would cost \$210,000 due to injuries involving state law enforcement agen-

cies. The Florida Association of Counties and Florida League of Cities protested—which are self-insured and not included in NCCI’s data—and lobbied hard against the bill, which they said would significantly increase their workers’ compensation costs. Since each county and city is a separate entity, there is no collection of data to estimate the true impact of the changes on individual municipalities’ workers’ comp costs.

The bill makes several changes starting with the definition of “first responders” as firefighters, emergency medical technicians, law enforcement officers, or medical and paramedic personnel. Secondly, the bill addresses any problems a first responder may have due to a small pox vaccination. The federal government has set up a fund to compensate first responders and their families if they have an adverse reaction to the vaccination. However, the program is secondary to any workers’ comp benefits paid. The bill clarifies that an adverse reaction to a small pox vaccination would automatically be deemed a compensable injury. Approximately 4,000 individuals in the state have been inoculated with 14 individuals suffering a negative reaction. Another area addressed allows first responders to receive permanent and total disability supplemental benefits for life if their employer doesn’t participate in the federal social security system.

One of the major points of the bill is a provision revising the standard of proof a first responder must meet in

order to collect benefits for toxic exposure claims. In 2003, the legislature changed the statutory proof stemming from exposures to toxic substances, occupational diseases, and repetitive exposures from a clear and convincing standard to a preponderance of the evidence. The lawmakers reverted back to the pre-2003 law when considering these types of injuries.

Lastly, the bill makes several changes in the area of psychiatric injuries. In the pre-2003 law, for a mental or nervous injury to be compensable it must be the direct result of a physical injury. Case law from that period also established that for a finding of compensability, there must be clear and convincing evidence that the psychiatric injury was directly linked to the initial injury suffered by the claimant. The pre-2003 law also placed no limits on the permanent impairment rates for a mental or nervous injury.

Statutory changes continued the legal precedent codifying case law that a mental or nervous injury must be shown by clear and convincing evidence and that it was directly caused by a physical injury. The law, however, did include a provision that if the psychological injury was not the result of a physical injury, the claimant could still receive medical benefits. The 2003 changes in the law placed a six-month cap on the payment of temporary benefits starting when the claimant reaches physical maximum medical improvement. Additionally, the 2003 law placed a one-

percent limit on permanent impairment benefits for mental or nervous injuries. Under the bill just passed by the legislature, compensation for a mental and nervous injury is still linked to a physical injury. However, lawmakers agreed to remove the limit on temporary benefits and lifted the one-percent cap on permanent impairment benefits.

Insurance Contracts

Lawmakers addressed one issue dealing with the business practices of general contractors hiring subcontractors. The issue hinged on whether general contractors can reject subcontractors who have insurance through non-rated self-insurance funds. The bill creates Chapter 627.442, Florida Statutes, and reads as follows: "A person who requires a workers' compensation policy pursuant to a construction contract may not reject a workers' compensation insurance policy issued by a self-insurance fund that is subject to Part V. of chapter 631 based upon the self-insurance fund not being rated by a nationally recognized insurance rating service." There are currently four self-insurance funds in the state. They are the following: Florida Citrus, Business, and Industry Fund, the Florida Retail Federation Self Insurers Fund, the Florida Rural Electric Self Insurers Fund, and the FRSA Self Insurers Fund. None of these funds are rated by a national rating organization.

Owner-Controlled Insurance Programs

Another insurance bill clarified how workers' compensation coverage could be handled on "owner-controlled" insurance programs formed specifically to construct public projects such as highways. Under current law, the program may secure various insurance policies for multiple employers needing coverage such as general liability and workers' compensation. The public works project is required to have a deductible or self-insurance retention of \$1 million. The bill states that general contractors and subcontractors working on the job are not required to individually satisfy the eligibility required to secure a large deductible policy. General contractors and subcontractors can combine their payrolls under the owner-controlled project as long as the minimum deductible for the project is more than \$100,000 or when the standard premium under the construction project is \$500,000 or more.