Workers' Compensation Legislative & Regulatory Update

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Governor Jeb Bush has vetoed two items that would have had ramifications for the workers' comp system. Using his line-item veto authority, Bush eliminated from the state's budget a $7.5 million appropriation from the Workers' Compensation Trust Fund to the Florida Workers' Compensation Joint Underwriting Association. The money was earmarked to help pay FWCJUA's deficits and was tied to a plan that would have granted regulators more control over the association as a step toward qualifying it for federal tax-exempt status. Bush also vetoed a bill (HB 1361), which included a provision that would have allowed two or more non-profit organizations to organize a self-insurance fund for the purpose of purchasing workers' comp coverage. The bill also would have prevented any person or company from refusing to hire a contractor on the grounds that the contractor's workers' comp policy was issued by a non-rated self-insurance fund.

Bush did sign several bills that are largely technical in nature. One bill clarified that employers who knowingly violate a stop-work-order issued by the Division of Workers' Compensation would be subject to criminal charges of committing a third-degree felony. A social service bill (SB 394), amended Section 440.02 to delete a provision that provided for the expiration of an exemption from the workers' comp law for certain clients enrolled in the Medicaid program that are served by adult training services.

Of special note is a bill signed by Bush (CS/SB 428) that increased the state mileage reimbursement rate from 29 cents per mile to 44.5 cents. As part of the 1993 reforms, legislators deleted any mention of a reimbursement rate for medical mileage in workers' compensation cases. As a result, most insurers used the state reimbursement rate, which has been set at 29 cents per mile since fiscal year 1994-1995. Under the new law, the state mileage rate has been increased to 44.5 cents per mile. Just how that will affect the workers' comp system remains to be seen and it could become an object of litigation.

In regulatory news, the Division of Workers' Compensation has scheduled two rule hearings. The rules address two minor changes in the area of compliance. The medical services billing, filing, and reporting rule (69L-7.602) also took affect as of June 25. DWC officials also are working on changes to the various health care reimbursement manuals.

In legal news, the Florida Supreme Court ruled in the case of *Curtis Jones v. Martin Electronics, Inc.*, that a worker could pursue a civil case against an employer if they made no conscious effort to pursue workers' compensation benefits. In a unanimous opinion, the court ruled that just because an employer/carrier voluntarily paid workers' comp benefits or a claim was filed and adjudicated in the workers' compensation arena that does not relate to a compensability finding, a worker is not precluded from filing a civil claim if the workplace injury rises to the level that "the conduct of the employer is so egregious that it is tantamount to an intentional tort." The First District Court of Appeals in *Lundy and Williams v. Four Seasons Ocean Grand Palm Beach,* 31 FLW D1663, and *Wood v. Florida Rock Industries*, 31 FLW D463 (on rehearing), restricted claimant's attorney fees to the statutory fee schedule approved by the legislature as part of the 2003 reforms.

Legislative

Resolving the issues affecting the FWCJUA was the main workers' compensation legislative objective in the

2006 session. Despite the fact that the Senate Banking and Insurance Committee and the House Insurance Committee spent hours on the subject, the two chambers could not agree on a final bill. The initial debate focused on shaping a plan to solidify the association's financial condition. But in the end, the disagreement between the House and Senate came down to a public policy debate over the association's statutory organization. On the Senate side, legislators supported maintaining the status quo and preserving the FWCJUA's authority. The House, however, pushed for the FWCJUA to become more of a quasi-state agency following the model of the state's other residual markets. Unable to agree on a FWCJUA-specific bill, legislators in a conference committee made up of both Senate and House members, agreed to insert into a bill implementing the state's budget a series of reforms, which reflect the House's position. The reforms were tied to a $7.5 million fund in the state's budget, which the FWCJUA could tap into if needed to retire certain deficits.

The FWCJUA's statutory reform provisions were as follows:

- The FWCJUA must submit a request to the Internal Revenue Service no later than Jan. 1, 2007, seeking federal tax-exempt status.
- The Financial Service Commission is required to appoint a nine-member board of governors to oversee the association's operations. There is no criteria for who may serve on the board. Currently, the statute contains a formula that ensures the board will be representative of domestic and foreign carriers, agents, and other stakeholders.
- The FWCJUA's plan of operation will be subject to the approval of the Office of Insurance Regulation, which may reject parts or the entire plan whenever OIR deems it necessary.
- The FWCJUA's rates must be implemented on a "file and use" basis, whereby regulators must approve the rates before they can be implemented. Prior to the proposed law change, the FWCJUA implemented its rates on a "use and file" bases.
- Deficits in tier one and two and any previous subplan must first be funded using the surplus in subplan C. After the surplus from subplan C is exhausted, the FWCJUA may request monies from a contingency fund set up in the Workers' Compensation Administrative Trust Fund, which will cover the difference between the deficit and the necessary funding needed on a six-month basis.
- Once the subplan C and the contingency reserve monies are exhausted, the FWCJUA can request that regulators implement a below-the-line assessment on all workers' compensation policies. However, subplan C policyholders are exempt from said assessments, due to the fact they would not face a deficit except for the decision to use the subplan's surplus to fund other subplan losses.

When Bush vetoed the $7.5 million appropriation, the FWCJUA's legal counsel, with the input of legislative staffers, rendered an opinion that the reforms in the implementing bill were moot. As a result, lawmakers will likely have little choice but to readdress the issue next year.

On a positive note, the FWCJUA's financial position is improving. Recently, the association submitted a letter to the Office of Insurance Regulation spelling out its financial position. FWCJUA officials reported they had an $8 million surplus in 2005. Together subplans A, B, and C had an overall surplus of $30 million, which was largely due to subplan C. Subplan D had an $11.8 million deficit and tier one had a $1.4 million deficit. Likewise, tiers two and three had deficits of $4.8 million and $3.4 million, respectively. In the letter to OIR, the association stated that due to the subplan D contingency fund, there will not be a need for policyholder assessments between now and July 1, 2007, when the law states the funds will no longer be available. A positive development in loss experience is expected to eliminate the tier three deficit in this year, while the tier deficit is expected to be retired in 2030. FWCJUA officials also indicated they would eliminate a tier one deficit by raising rates sometime this year.

Bush also vetoed a bill (HB 1361), which included a provision that would have allowed two or more non-profit organizations to organize a self-insurance fund for the purpose of purchasing workers' comp coverage. The bill also would have prevented any person or company from ruling out hiring a contractor on the grounds the contractor's workers' comp policy was issued by a non-rated self-insurance fund. In a veto message to Secretary of State Sue Cobb, Bush stated there were inadequate safe guards to allow for the formation of the self-insurers fund. He also cited the example of the self-insurance industry, which once controlled a third of the workers' comp market before a change in market and regulatory conditions all but ended the industry. "Because of a lack of regulatory oversight, inadequate surplus and problematic insolvencies, these funds may become more harmful than helpful to the members of an organization," Bush wrote.

Bush did sign several bills into law. Legislators enacted a number of minor provisions including one addressing employers who violate a stop-work-order issued by the Division of Workers' Compensation. Currently there are two conflicting penalties under the law pertaining to employers who knowingly violate a stop-work-order. An administrative compliance penalty makes the violation

a first-degree misdemeanor under Section 440.107, Florida Statutes. However, the Division of Insurance Fraud section has the ability to charge the employer with a third-degree felony under Section 440.105. The DWC indicates that in cases where it finds an employer has violated the statute, it refers the case to the DIF within 24 hours. Based on the input of the two divisions, legislators in HB 561 passed a provision striking the reference to the misdemeanor charge. As a result, employers caught violating a stop-work-order would be subject to criminal charges of committing a third-degree felony.

Additionally, in the same bill, legislators clarified that it is unlawful for employers to not secure workers' compensation coverage. Currently, Section 440.105(4)(a), Florida Statutes, states that it is unlawful for an employer to knowingly "fail to secure payment of workers' compensation if required to do so by this chapter." The bill strikes the word "payment of compensation" to "workers compensation coverage," which clarifies the employer must have workers' comp coverage if so required by law. Section 627.433 was also amended to read: "Any retroactive assumption of coverage and liabilities under a policy providing workers' compensation and employer's liability insurance may not exceed 21 days." Legislators also amended Section 440.02 to delete a provision that provided for the expiration of an exemption from the workers' comp law for certain clients enrolled in the Medicaid program that are served by adult training services.

Regulatory News

The DWC has scheduled two workshops concerning rules addressing compliance issues. Rule 69L-6.017 deletes several provisions of an existing rule, which are no longer applicable to the workers' compensation exemption process. The rule broadly sets out the conditions under which a contractor/officer of a dissolved or inactive company and limited liability company may qualify for an exemption. Rule 69L-6.009 updates form DWC-250 to expand the ability of contractors to communicate with the division by using email and other electronic means. The rule includes the addresses of all 12 division field offices. Both rules will be the subject of a rule hearing on July 20, in room 104J Hartman Building, 2012 Capital Circle NE, Tallahassee, Florida.

The DWC's Florida Workers' Compensation Medical Services Bill Filing, and Reporting Rule (69L-7.602) was effective as of June 25. This comprehensive rule is a key piece of the division's Electronic Date Interchange (EDI) system. Specifically, the rule is designed to facilitate the timely reporting of medical bills to the division, which will be used to make sure insurers and other medical providers are complying with the applicable statues for providing medical treatment. Additionally, division officials say the information will create a database that will provide up-to-date information that will help lawmakers and regulators evaluate the effectiveness of the medical benefit delivery system

Under the rule, the division developed a number of forms to standardize the information sent by medical providers. Among the forms is the DWC– 9 form, which sets out the guidelines for bills submitted by health care providers, ambulatory surgical centers, and pain management and work hardening programs. The DWC–10 form sets out a statement of charges for drug and medical supplies and the DWC–11 form applies to dental charges. The division also created a uniform medical treatment form (DWC–25), which physicians are required to use to inform insurers and employers of an injured worker's condition. Among other things, providers use the treatment form to communicate to insurers and employers the date of a worker's maximum medical improvement and assignment of a permanent impairment rating.

Another major rule provision calls for insurers and other health care vendors to electronically submit the forms to the division. Initially, the reporting requirement was slated to take effect on April 1. However, the division delayed the implementation date to allow more time for insurers and other vendors to develop the technical capability to comply with the regulation. The rule does include some penalties for poor performance. Under the rules, insurers are expected to report all medical bills 95 percent of the time or face penalties.

For bills that fall outside of the 95 percent reporting standard, the per bill fines are as follows:

- One to 30 calendar days late: $5
- 31 to 60 calendar days late: $10
- 61 to 90 calendar days late: $25
- 91 days or more: $100

Legal Decisions

The Florida Supreme Court and the First District Court of Appeals have handed down two rulings that will have an important impact on the workers' compensation system. The ruling that will have the most sweeping significance is a DCA opinion on the legislative changes to the claimant attorneys' statutory fees schedule. The statute eliminated all hourly fees except for one medical claim per date of accident where they attorney could recover $150 per hour up to a cap of $1,500. Otherwise, claimant attorneys could collect a contingency fee of 20 percent of the first $5,000 in benefits, 15 percent of the next $5,000, and 10 percent of any remaining benefits.

Lundy and Williams v. Four Seasons Ocean Grand Palm Beach, 31 FLW D1663, and *Wood v. Florida Rock Industries*, 31 FLW D463, are the first cases to consider whether the 2003 changes represent an adequate fee. In the case, the claimant attorneys set out three basic arguments against the statutory fee schedule. First, the attorneys contended Section 440.34(1), Florida Statutes, should be read to allow for a payment of reasonable fees that exceed the statutory schedule. Secondly, that the Judge of Compensation Claims should approve fees in excess of the statutory schedule in a joint stipulation. Among other things, the attorneys argued that Section 440.34(1), Florida Statutes, violated a number of constitutional provisions and infringed on the ability of claimants to find adequate representation. On each issue, the court ruled against the claimant. In part the court's ruling in the Lundy case is as follows:

- The Judge of Compensation Claims was correct in limiting claimant fees to the schedule in Section 440.34, Florida Statutes. The court found that the statute begins by generally providing that no fee may be paid under Chapter 440 unless as reasonable, and then specifically addresses the approval of fees "for benefits secured" by setting forth the formula for determining the amount of fees paid.
- Since workers' compensation is created by statute, "The legislature may limit the amount of fees that a claimant's attorney may charge because the state has a legitimate interest in regulating attorneys' fees in workers' comp cases."
- Section 440.34(1), Florida Statutes, "is not discriminatory, arbitrary, or oppressive because it applies to all claimants in a workers' comp proceeding."
- "In the initial brief, the claimant contended that the statute denies access to courts because it impairs a claimant's ability to retain counsel. The claimant's argument is unpersuasive because it lacks evidentiary support."

The First DCA did certify the Lundy and Wood cases to the Supreme Court the question: "Do the amended provisions of Section 440.34(1). Florida Statutes, clearly and ambiguously establish the percentage fee formula provided therein as the sole standard for determining the reasonableness of an attorneys fee to be awarded a claimant."

The Florida Supreme Court in the case of *Jones v. Martin Electronics,* 31 FLW S380, found that a worker in certain circumstances could sue an employer in civil court even though the employer was paying the employer workers' compensation benefits. The claimant in the case suffered third-degree burns over three-fifths of his body due to an explosion on his employer's premises. Martin Electronics voluntarily paid Jones workers' comp benefits, even though Jones never filed a petition requesting the benefits. Subsequently, Jones filed a petition over the payment of hourly fees for the claimant's attendant care which was adjudicated in the workers' compensation court and on appeal. At a hearing, Jones checked "yes" on a standard form in respect to a question whether his injury was accepted as compensable. Subsequently, filed a civil lawsuit against Martin Electronics. In the civil suit, Jones took the position that Martin's conduct was "substantially certain to result in injury or death."

At the circuit court level, Martin Electronics moved for a summary judgment to dismiss Jones' claim, arguing that Jones had sought workers' comp benefits thereby electing his remedy for his injuries under the worker' compensation system and therefore was precluded from pursuing a civil cause of action. The circuit court, however, ruled against Martin Electronics and ruled that Jones could pursue a tort action against Martin if the facts alleged were established. On appeal to the First District Court of Appeals, however, the court overturned the lower court's decision and ruled that Jones could not pursue a tort claim since he had elected his remedy by litigating his claim for workers' compensation benefits.

The DCA ruled that filing a petition for additional attendant care benefits, litigating before a judge of compensation claims on the theory that a covered industrial accident occurred, and obtaining an order predicated on the finding that Mr. Jones sustained an injury by accident, 'implied a conscious intent… to choose compensation benefits over a tort action.' The DCA did certify that issue to the Supreme Court.

The Supreme Court overturned the DCA's ruling based on two points:

- "We hold that the petition for an adjustment in attendant care benefit rates under these circumstances did not amount to pursuit to a conclusion on the merits of a workers' compensate claim, and, therefore, did not constitute an inconsistent election of remedies."
- "The answer to a standard yes/no question on a form prehearing questionnaire, which was designed only to outline the disputed issues, was not enough to constitute a knowing waiver of any common law rights against Martin Electronics for the intentional injuries as alleged here."