

Workers' Compensation Legislative & Regulatory Update

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Volume 9, Issue 5
July 9, 2008

The workers' compensation system is awaiting a Florida Supreme Court ruling in the case of *Emma Murray v. Mariner Health/ACE USA (SC07-244)*, which could find part or all of the 2003 legislative changes to the claimant attorney fees statute unconstitutional. The Supreme Court heard oral arguments on the case in May and is expected to issue a ruling sometime in the near future. Depending on the court's action, it could impact rates and could possibly trigger a legislative effort to revise the law. The Three-Member Panel on Workers' Compensation has put off for now a decision on approving a reimbursement methodology to cover the costs of outpatient hospital services. While some outpatient services are covered under other health care reimbursement manuals, hospitals still receive a percent of usual and customary charges for outpatient surgeries. Pending before the panel is a recommendation to base usual and customary charges in part on Medicare's Outpatient Prospective Payment System. The Division of Workers' Compensation has announced it is holding a two-day training class on the use of the EDI Release 3 and EDI Rule (69L-56FAC) on August 14 and 15th.

Murray v. Mariner Health/ ACE USA

In the 2003 reforms, lawmakers eliminated all claimant attorney hourly fees with one exception, that being a \$150 hourly fee up to a maximum of \$1,500 for one medical claim per accident. It was the legislative intent as confirmed by subsequent case law to base such fees on a statutory fee schedule based on benefits paid to injured workers, which calls for claimant attorneys to receive 20 percent of the first \$5,000 in benefits, 15 percent of the following \$5,000, and 10 percent of the remaining benefits awarded in the 10-year period following the date of accident. As a means to further bolster that the fee provisions were followed, lawmakers specifically stated that judges of compensation claims couldn't approve fees higher than what was spelled out in the law.

In *Emma Murray v. Mariner Health/ACE USA (SC07-244)* a Judge of Compensation Claims found that an on-the-job accident resulted in Murray needing surgery and that she also qualified for wage loss benefits. Those medical and indemnity benefits were determined to

be in the amount of \$3,224.21. Murray's lawyer spent 84.4 hours on the case, which under the current contingency fee schedule equaled a total fee of \$648.84 or \$8.11 per hour. By comparison, the employer/carrier's attorney spent 135 hours on the case and was paid \$16,050, which equaled \$125 per hour.

Based on this factual scenario, claimant attorneys put forward a number of constitutional objections including that the legislature interfered with the rights of injured workers to due process in the legal system. They also maintained that the statute as written doesn't stop JCCs from approving higher fees.

If the Supreme Court rules in favor of the claimant attorneys, the decision has several important ramifications. It would not affect cases with dates of accident post Oct. 1, 2003, if the case was settled including all applicable attorney fees. However, it would affect all post Oct. 1 cases that are still open. There is anecdotal evidence to suggest that claimant attorneys have held back claims for attorney fees in hopes of a favorable ruling. The court's ruling is expected to lead to a flurry of legal activity.

A favorable claimant attorney fee ruling creates a problematic issue of how

to calculate rates going forward, assuming that both attorney fees and overall awards increase. When the legislature enacted the 2003 reforms, the estimated first year savings of the law changes was a minus 14 percent, of which only two percent was attributed to the changes in the attorney fees statute. In subsequent years, however, it is statistically difficult to say how the changes in attorneys fees have quantifiably affected costs by changing the business practices of attorneys, carriers, and third-party administrators. For example, over the last three years, claims' frequency in Florida has dropped between eight percent and 12.6 percent. While that is in keeping with national trends, some portion of those trends is attributable to the limits on attorneys fees.

The National Council on Compensation is likely to make a supplemental rate filing immediately following the court's decision that would solely focus on the impact of the ruling on the system. There is some suggestion that the filing would be separate from the annual rate filing that is made in late August. NCCI will not price the effects of this case on workers' compensation costs until the court rules. The court's ruling and the additional cost it could add to the system could also translate into a legislative battle next year to rewrite the attorneys fee statutory provisions.

Outpatient Hospital Costs

The Three-Member Panel on Workers' Compensation has postponed any action on an outpatient hospital reimbursement manual while negotiations between the DWC and the industry continue. Restructuring healthcare provider reimbursements has been an ongoing

task since the 2003 reforms. As part of the statutory changes, lawmakers specified that all outpatient physical, occupational, and speech therapy must be reimbursed per the physician fee schedule, along with any radiological and clinical laboratory service not related to a surgical procedure. The outpatient surgeries are reimbursed at a percent of usual and customary charges.

At issue before the three-member panel is how to define "usual and customary" and create a valid methodology that would lead to a fee schedule that would be applied to all outpatient surgeries. Usual and customary charges are traditionally defined as the billed charges per the individual hospital's charge master. Critics point out that the payment scheme allows hospitals to determine their reimbursements unilaterally since they control their charges, which, in theory, can be changed on a daily basis. The First District Court of Appeal recent ruled in *One Beacon v. AHCA* (32 FLW D1578), that a legislative change in 1994 prohibited the calculation of a usual and customary charge on a per hospital basis in favor of the average fees of all hospitals in a given area. The ruling, however, leaves open the question of how to define or determine the fees and geographic zones.

At a recent panel meeting, the Research & Planning Consultants, —which was retained by the division— issued its report examining the current methodology used to pay hospitals and several scenarios to calculate an industry-wide payment method. RPC recommended that Florida follow the example of six other states and tie outpatient hospital rates to the Medicare system. Specifically, the fees would first come from the Medicare Outpatient Prospective Payment System, which establishes payment rates for most all outpatient services. In addition to the OPPTS method, Medicare has four other fee schedules

including one to cover physical, occupational, and other outpatient rehabilitation services. Then there is a clinical lab fee schedule, a prosthetics and orthotics and supplies fee schedule, and an ambulance fee schedule.

As for *Beacon v. AHCA*, the consultant recommended that rather than trying to match up the charges of hospitals and determine geographic areas, the state implement a Medicare-based system. Like the current state provider fee schedule, the hospital fees would be calculated using Medicare's schedule with a payment adjustment factor. For example, Tennessee sets outpatient fees at 150 percent of Medicare. Medicare already divides Florida into geographic zones, which would resolve the questions raised in *Beacon*. For now, however, the DWC and the industry are continuing to negotiate.

EDI Training Class

The DWC is holding a two-day EDI Release 3 and EDI Rule (69L-56 F.A.C.) workshop/meeting on Thursday and Friday, August 14 and 15th. The training will focus on EDI terminology, required codes, scenarios, and the timelines for submitting the data. The training, however, will not cover the technical training information on the DWC's website. The meetings will be held at the University of South Florida and while the program is free, seating is limited. To be included in the program fax a training request form to (850) 488-3453. The forms are available at http://www.myfloridacfo.com/wc/edi_clms.html.