

Workers' Compensation Legislative & Regulatory Update

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The National Council on Compensation Insurance (NCCI) has submitted a rate filing to the Office of Insurance Regulation, which calls for a statewide overall average 7.2% rate decrease (effective January 1, 2006.) If approved as filed, the rate filing marks the third such decrease since the enactment of the 2003 reforms, representing a cumulative rate cut of 26.3%. Insurance Commissioner Kevin McCarty previously approved a 14% rate cut, which applied to all policies as of the reform's effective date of October 1, 2003. McCarty further ordered a statewide overall average 5.1% rate cut that applied to all new and renewal policies as of January 1, 2005. Regulators are expected to hold a public hearing on the filing next month with a final decision slated to be announced by November 1.

NCCI's rate filing comes as the Division of Workers' Compensation and the Agency for Health Care's Workers' Comp

Medical Unit are working on an inter-agency agreement that would transfer the agency's medical unit to the division. The move is designed to centralize the monitoring and regulation of the state's workers' comp health care services. DWC and AHCA officials are expected to finalize the agreement sometime early next month. The agency also has withdrawn a proposed rule that set out a new process for resolving disputes between carriers and health care professionals over reimbursement and utilization issues. Insurers had strongly objected to the rule on the basis that it was arbitrary in its application and exceeded the agency's statutory authority.

In other news, the legislative budget commission has signed-off on a \$1.22 million appropriation to help cover subplan D deficits in the Florida Workers' Compensation Joint Underwriting Association. The FWCJUA has now received \$7.9 million out of a \$15 million fund set aside by lawmakers to cover deficits. Regulators are warning that a statewide assessment on all policyhold-

ers may eventually be needed to retire the subplan's total deficit. The DWC Bureau of Compliance is also continuing work on three rules that implement provisions to the state's exemption laws.

Rate Filing

NCCI's rate filing provides the most comprehensive evidence yet on the impact of the 2003 reforms on costs. Based on insurers' 2003-2004 loss data, 15-months out of the 24-month period fall under the new law. NCCI officials, however, cautioned that not all the proposed decrease could be attributable to the reforms. The state is also benefiting from national changes in financial and loss trends such as a continuing reduction in claims' frequency. However, the state's accident-year combined ratio has dropped from 120% in 2000 to 106% in 2003. NCCI projected that the state's total written premium in 2004 will equal roughly \$3.3 billion.

The major calculation behind the rate filing is the change in insurers' experi-

ence, trend, and benefit changes. Based on a trend factor of a minus 0.1% for indemnity benefits and plus 1.5% for medical, the final loss experience number equals minus 5.8%. Unlike last year, NCCI is not requesting any factor for profit and contingency, which accounted for a plus 1.4% factor in the 2004 filing. A breakdown of the filing as is follows:

- Experience, trend, and benefit changes – minus 5.8%
- Loss adjustment expenses – minus 0.5%
- Production and general expenses – plus 0.4%
- Taxes and assessments – minus 1.4%
- Profit and contingencies – minus 0.5%

When approved by regulators, individual employers' rates will vary by class code. Additionally, employer's individual premiums will be calculated based on their experience modification factor and any discounts, deductibles, or credits. Under the law, employers can receive a 5 percent credit for implementing a drug-free workplace and/or 2 percent for having a safe workplace program.

Considering the five major industrial categories as filed, the statewide overall average decrease equals 7.2%. All five-industry groups are seeing an average rate cut, ranging from minus 11.1% in miscellaneous classes to minus 4% in manufacturing classes. Since the 2003 reforms, contracting classes have seen a

cumulative 26% reduction. Additionally, "F" classifications would see an overall average 3.8% rate decrease. The average decrease per industry group is as follows:

- Manufacturing classes – minus 4%
- Contracting classes – minus 4.8%
- Office and clerical classes —minus 8.1%
- Goods and services classes – minus 7.8%
- Miscellaneous classes – minus 11.1%

DWC and AHCA

DWC and AHCA officials are expected to finalize an interagency agreement whereby the agency's medical services unit would be housed in the division. Under a 1999 agreement, the medical services unit was initially transferred to AHCA; a move later codified by lawmakers. At the time of the transfer, the medical services unit consisted of 29 positions. Currently, the unit is staffed by 14 people including one supervisor, five registered nurse consultants, one registered nurse specialist, one medical/health care program analyst, and six supporting staff members. Under Section 440.13, Florida Statutes, the medical services unit oversees the certification of health care providers and expert medical advisors and maintains the certification databases of the providers that can be accessed by carriers and others.

Regulators say the rationale for moving the medical services unit back to the

division is to improve communication and efficiently monitor and enforce the law. For example, regulators point to the auditing process. Under Section 440.13(a) and Section 440.13(b), Florida Statutes, AHCA is responsible for auditing health care providers to determine whether they are overutilizing services or improperly billing for services. AHCA also has the statutory authority to set out fines in cases where providers are engaged in improper business practices. The division, however, is required by law to audit insurers to see that they are properly paying medical bills.

A major issue in the interagency agreement is the oversight of rules. The law specifically states AHCA has the statutory authority to promulgate any rules necessary to implement the requirements of Section 440.13, Florida Statutes. Even if the medical services unit were moved to the DWC it would not transfer AHCA's rulemaking authority to the division. AHCA would still be the state agency of record for any rule challenges to rules promulgated under Section 440.13.

AHCA Rule Reversal

Under pressure from insurers, AHCA has withdrawn a rule (59A-31) that set out the requirements for health care providers to petition the agency to resolve reimbursement and utilization disputes between providers and insurers. The statutory authority of the rule is

contained in Section 440.13(7), Florida Statutes, which grants health care providers 30 days to petition the agency upon receiving a notice from an insurer that a reimbursement request had been disallowed or reduced. The statute grants the agency the authority to issue a rule and sets out fines in cases where an insurer “engages in a pattern or practice of arbitrarily or unreasonably disallowing or reducing payments to health care providers.”

Insurers strongly objected to the proposed rule. For example, one rule provision stated that the practice of arbitrarily or unreasonably turning down reimbursement requests hinges on whether there is a “repetition of improperly or disallowed reimbursements.” Insurers stated the provision was too arbitrary since the term “repetition” could range from a few improperly paid bills to thousands. Additionally, the insurers stated the definition could lead to fines that exceed the legislative intent of the law.

DWC Drafts Additional Compliance Rules

The DWC Bureau of Compliance is continuing to promulgate rules that implement the compliance provisions enacted by lawmakers in the 2003 reforms. Among other things, the rules set out the conditions under which a member of a non-construction limited liability company can be elected to be con-

sidered a employee under Section 440.02(15) (c), Florida Statutes.

Two other rules address the extent to which a stop-work-order applies to multiple job sites and sets out penalties for employers who secure coverage while under investigation for non-compliance by the division. An overview of the rules is as follows:

- Rule 69L-6.030 addresses situations where a compliance officer finds that an employer had been in noncompliance with the law, but had met the compliance requirements prior to receiving a stop-work-order. The rule clarifies that in such cases employers are still liable for penalties authorized in Section 440.107(7)(d)1, Florida Statutes. The statute allows regulators to fine employers who fail to secure proper coverage an amount equal to 1.5 times the amount the employer would have paid in premium when applying approved manual rates for designated periods of time.
- Rule 69L-6.023 addresses officers of a limited liability company that are not engaged in the construction industry. The rule specifically states: “A member of a limited liability company created and approved under Chapter 608, Florida Statutes, that is not engaged in the construction industry is not an “employee” of the limited liability company, for purposes of Chapter 440, Florida Statutes.”

Insurers are objecting to the rule on the basis it that it does not treat non-

construction members of a limited liability company the same as non-construction corporate officers. Under Section 440.150(b), Florida Statutes, non-construction members of a corporation are considered an employee under the workers’ comp act. Under the rule, non-construction limited liability company officers would not be considered employees unless they elected to be considered as employees.

- Rule 69L-6.029 is a major rule that codifies Section 440.107(7)(a), Florida Statutes. Specifically, the rule states that in cases where a compliance officer issues a stop-work-order to an employer at one worksite, the employer must cease operations at all other worksites. For purposes of the rule, “worksite” is defined as any location in Florida where the employer is engaged in business activity. Out-of-state employers that are required by Rule 69-6.019 to maintain a Florida policy or endorsement are subject to the same stop-work-order provisions as instate employers. The rule also states that a penalty assessed against the employer shall be based on an employer’s payroll at all worksites where the employer is not in compliance.