

Workers' Compensation Legislative & Regulatory Update

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The biggest news in the workers' compensation community this year, until recently, was the 2009 rate filings by the National Council on Compensation Insurance (NCCI) and its subsequent consideration by the Office of Insurance Regulation (OIR). That news has now been "trumped" by the Florida Supreme Court in its recent decision in the case of Murray v. Mariners Health decided on October 23, 2008. This decision is not yet final until the time for possible Motions for Rehearing has run (15 days) and/or any Motions for Rehearing have been disposed of. We have delayed in reporting on the rate filing until the Supreme Court ruled in this case for fear that this court decision might result in modifying the effect or erasing the effect of this most recent rate filing and the unprecedented multi-year rate reductions since the 2003 systemic changes in the workers' compensation law. The Supreme Court has now ruled in this case. No decision has been made by NCCI on the effect of the Murray decision on the workers' compensation market but popular opinion would suggest that there is going to be some impact on overall costs.

BACKGROUND

On August 27, 2008, the OIR received from NCCI its annual rate filing requesting a 14.1% overall average decrease in rate levels for workers' compensation coverages in the voluntary market. This rate decrease would apply to all new and renewal workers' compensation insurance policies written in the state of Florida effective January 1, 2009. The rate filing would have created a cumulative rate decrease of 58.3% since October, 2003 when the new law became effective. The importance of the Murray decision can best be determined by examining the basis for these cumulative rate decreases since 2003 and the 2009 rate filing.

Comparing today's workers' compensation market in Florida to that which existed for accident years prior to the 2003 changes, Florida has experienced a 37.2% decrease in claim frequency and an 11.6% reduction in claim severity. Countrywide, claim frequency showed a reduction of 27.2% and an actual increase in the severity of claims of 19.9%. In significant part, these favorable Florida statistics justifying rate decreases were as a result of claimants' attorneys' behavioral changes post-2003 statutory reform in filing claims prima-

rily because of attorney fee caps based on statutory percentages of payment depending on benefits payable to the injured worker, i.e., attorneys would be paid based on a percentage of benefits paid to the injured worker regardless of the time expended by the attorney in getting the benefits paid. The number of petitions filed for workers' compensation benefits fell from 127,826 in FY 2004 to 72,698 in FY 2008. During the 2003 legislative deliberations that resulted in the statutory changes that year, it was estimated by NCCI that claims severity of injured workers with attorney representation increased by approximately 40% when compared to those cases of injured workers who were not represented by attorneys. In short, capping attorney fees and reducing the litigation associated with workplace injuries played a role in the overall rate reductions.

Initial judicial decisions interpreting the amended statutory provisions relating to attorneys fees were favorable to industry, with several cases determining that the changes made in 2003 were constitutional. The Florida Supreme Court refused to take jurisdiction in determining the constitutionality of the attorney fee amendments. Frequency and severity of claims contin-

ued to show a downward trending. Indeed, the single most important factor in the 2009 rate reduction filing was as a result of experience changes (i.e., a negative 16%).

Ultimately, the OIR approved an 18.6% overall rate decrease based on this and other favorable data creating approximately a 60% cumulative rate decrease in workers' compensation rates for Florida employers since 2003. NCCI subsequently amended its rate filing to reflect this negative 18.6% number and it is expected that the insurance commissioner will enter a final order to this effect this week.

In the meantime, the case of Emma Murray v. Mariners Health was making its way through the judicial system. Unexpected to many, the Florida Supreme Court in October, 2007 decided to accept jurisdiction on the question of whether the statutory cap or formula for determining attorney's fees was legally permitted, in effect determining the appropriateness of the trends that had played a role in the historic rate decreases that had been witnessed in Florida since October, 2003. Oral Argument in the case took place in April, 2008 and on October 23, 2008, the Supreme Court rendered its opinion.

EMMA MURRAY V. MARINERS HEALTH AND ACE USA (SCO 07-244)

While the ultimate effects of this decision are yet unknown, in summary the court concluded that the statu-

tory cap or formula for determining attorney's fee would not be controlling in determining the final amounts payable for claimant attorney fees. By implication, there will be a dramatic increase in litigation and attorney involvement in the workers' compensation system since any limitation of fees discouraging such litigation was removed from the law. Claimants' attorney fees will now be determined based on criteria as established in the 1968 Supreme Court opinion of Lee Engineering and Construction Company v. Fel-lows, 209 So. 2d 454 (Fla. 1968) and will include considerations of the time and labor necessary to represent the injured worker, the likelihood of such representation precluding other employment, fees customarily charged in such representation, the nature and length of the professional representation between the attorney and the injured worker, the experience, reputation and ability of the attorney, and the contingency of certainty of a fee. Criteria for the determination of attorney's fees in and of themselves invite litigation, contrary to the resolution of fees based on a strict statutory percentage formula considering benefits payable to the injured worker based on the attorney's efforts.

INDUSTRY RESPONSE

Within hours of the release of the Supreme Court opinion, NCCI issued a statement indicating that there was no information available at the time as to whether the decision impacts the resolution of the 1/1/09 rate filing. Thereafter, NCCI determined that the Murray case will not impact the rate filing. However, NCCI announced that it intended to make a separate "law only filing" concerning the impact of the Murray decision in mid-November with a proposed effective date of 3/1/09 which

would apply to new, renewal, and outstanding policies as of that date. No doubt, the insurance commissioner will hold a hearing on this new filing in December or January and probably, the earliest time that there would be a ruling by the Commissioner is sometime in January, with 3/1/09 being an aggressive date for making the new rates effective. (Carriers must give 45 days notice to Florida insureds for changes in workers' compensation rates.)

Unquestionably, many questions remain as to the effect of this decision. Does it have retroactive application? Does it affect cases that have been settled since October, 2003 utilizing the presumed law that was in existence at the time which has now been overturned by the Supreme Court? Is there a need to readjust reserves on existing cases? How will this ruling affect workers' compensation rates when considering frequency and severity of claims? It is interesting to note that when the 2003 amendments in the law were originally priced by NCCI, the savings to the system because of the attorney fee changes was estimated to be 1%. Will this be the ultimate rate change that is filed for by NCCI? Will there be legislative action taken to address these attorney fee issues?

All of these questions and many more will be answered as time passes and we will keep you advised as to further developments.