

Workers' Compensation Legislative & Regulatory Update

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The Impact of Murray v. Mariner Health, Inc. and ACE USA: Industry's Response

As was summarized in the last newsletter, the Florida Supreme Court entered an opinion which promises to have a major impact on Florida workers' compensation. The impact of the Court's decision will be debated by many interest groups and the equities of the decision are the subject of ongoing discussions. Industry's response is best reflected in the supplemental rate filing made by the National Council on Compensation Insurance (NCCI) on November 14, 2008. NCCI determined that this court opinion will have a significant impact on overall costs, warranting rate increases not experienced in Florida for over five years.

Background

Based upon increased costs associated with the Florida workers' compensation system, the 2003 Legislature completely overhauled the workers' compensation statute to a degree never before experienced since the Florida workers' compensation statute was initially implemented in 1935. Almost every phase of the statute was reviewed and systemic changes were made. One such provision that was closely reviewed related to the payment of attorney fees for injured workers. At the time of the legislative review, it was estimated that attorney involvement in workers' compensation matters created excess litigation resulting in significant overall costs. If this component of the statute could be "corrected," it was argued that significant savings could be realized.

Effective October 1, 2003, the attorney fee statutory provisions were amended to quantify attorney fees based upon a percentage of benefits recovered on behalf of the injured worker by his or her attorney, except in medical only cases which allowed for a maximum cap on attorney fees payable. Under this scheme, regardless of the time expended by the attorney in the obtaining of benefits on behalf of the injured worker, the attorney was paid a percentage of those benefits. The overall effect of this

legislative change was to reduce attorney fees especially when the controverted benefits were minimal. The practical effect of the statutory change was to reduce litigation especially when overall benefits possibly due an injured worker were not significant. In addition early settlement without the necessity of claimants' attorneys expending extraordinary time to recover benefits was encouraged.

As a result of the statutory amendments, petitions for benefits were significantly reduced; there was anecdotal evidence that injured workers returned to work quicker; and overall costs were reduced. This change in the law as well as the other changes made in 2003 resulted in an over 60% rate reduction in charges paid by employers for workers' compensation coverage and transposed the state of Florida from the first or second most costly workers' compensation in America to the tenth lowest workers' compensation rate system in the country.

After several lower court decisions affirming attorneys' fees being based upon a percentage of recovery of benefits payable to the injured worker, the Florida Supreme Court entered its opinion in the case of Emma Murray v. Mariner Health, Inc. and ACE USA Number SC07-244 (Emma Murray). Basically, the court found that the 2003

amendments relating to attorneys' fees were conflicting and it was the determination that the claimant attorneys' fees would be payable as the law existed prior to the 2003 changes in the law. Under the prior system, regardless of the amounts of benefits accruing to the injured worker as a result of the attorney's actions, attorneys' fees would be based upon several factors including time expended in the prosecution of a claim. As a result of the court's determination, many have felt that litigation would be encouraged since claims would be filed regardless of benefits payable because attorneys could be paid on time expended in the prosecution of claims. The expectation of increased litigation is the opinion of everyone in the workers' compensation system, regardless of the various opinions of the interest groups involved in the system. The question is attempting to quantify the increased costs and debating the equities of such a process.

Industry's Response

Industry has estimated that costs to the overall system resulting from Emma Murray are significant. On November 14, 2008, NCCI made a supplemental rate filing with the Office of Insurance Regulation (OIR) requesting an 18.6% rate increase as a result of Emma Murray, to be effectuated over a two-year period. The first year rate level increase would be 8.9% for policies effective March 1, 2009. Pro rata increases for policies issued January 1, 2009 to March 1, 2009 is being requested.

This requested NCCI rate increase is based upon the expected increased frequency of lost time claims, the expected increase in the average cost per claim, and the increase in attorney fees payable. Not included in this rate filing was the expected increase in costs to existing claims resulting from accidents from October 1, 2003 (the effective date of the 2003 changes in the law) to March

1, 2009, the date of the requested rate increase.

Unfunded Liabilities

The rate increase would apply to accidents only after March 1, 2009. Of primary significance in estimating the cost increases caused by Emma Murray relates to those cases with dates of accident between October 1, 2003 and March 1, 2009 that have not been settled. The sixty-plus percent rate reductions since October 1, 2003 have been justified based in significant part on the changes that were made in the attorney fee statutory provisions above referenced and the calculated effect of these changes on costs. Now that the changes in the law have proved to be invalid and the basis of the rate reductions having been removed in retrospect, it is argued that the rate reductions prior to March 1, 2003 are not justified.

If indeed NCCI's prediction that reduced attorney involvement to a significant degree justified the approximate 60% pre-March 1, 2009 rate reduction is valid, the most significant part of the Emma Murray case could well relate to the adequacy of rates from 2003 to 2009. Following this argument to its logical conclusion, profits realized by industry assuming reduced attorney involvement could be without reasonable substance since attorneys were still a major player in effecting costs. Whether this decision will have an overall impact of reduced profits or at worse insolvencies or potentially reduced availability of coverages for Florida employers by the insurance industry remains to be seen. Certainly, the profitability of the insurance industry for years prior to March 1, 2009 will be impacted. NCCI will be evaluating the "magnitude of the unfunded liability." Ratemaking in Florida is prospective only and accordingly, insurers cannot recoup underpaid premiums.

Response of the Office of Insurance Regulation

Based on legal protocol, the Office of Insurance Regulation (OIR) is expected to schedule a public hearing on the rate increases requested by NCCI. That hearing is expected to be some time in December, 2008. Unquestionably, there will be a high level of interest by all interest groups in this hearing. The date of the hearing will be provided by this newsletter once announced by OIR. Perhaps of even more significance is the insurance industry's individual determinations of unfunded liabilities which will not be considered at the OIR hearing. A major consideration in the 2003 changes in the law related to ensuring the availability of workers' compensation coverages to Florida employers. The effect of Emma Murray on the availability of insurance coverages in Florida for the employer community will certainly be debated on an ongoing basis. If in fact NCCI is correct in its estimations of costs to the system caused by Emma Murray, the more significant debate may be the amounts of unfunded liabilities, the availability of workers' compensation coverages for Florida employers, and the financial impact on the insurance industry for the past over five years when profitability was in significant part gauged on reduced attorney involvement which has now been effected by the Emma Murray case. On the other hand, a welcomed increase in rates as a result in the new NCCI filing may encourage the insurance industry to continue being a part of the Florida workers' compensation system. Only time will tell.