

# Workers' Compensation Legislative & Regulatory Update

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*Volume 10, Issue 7  
May 11, 2009*

The Florida Legislature has ended its regular session for 2009. Workers' Compensation attention was primarily directed toward responding to the Supreme Court decision in the case of Emma Murray v. Mariner Health, 994 So. 2d 1051 (Sup. Ct. 2008), (Emma Murray). Other issues were considered and ultimately a limited number of bills did pass. Meanwhile, the Division of Workers' Compensation continues its oversight of the Florida workers' compensation system by issuing its first research brief on some of the key provisions in Senate Bill 50A, the legislative package that resulted in the systemic changes in 2003.

## Attorney Fees

The 2003 changes in the Florida workers' compensation law limited claimants' attorneys' fees to a percentage of benefits accruing to the injured worker

as a result of his/her attorney's efforts (except in medical only cases). In summary, the Emma Murray opinion held that there was a conflict in the terms of Section 440.34, Florida Statutes, relating to the payment of attorney's fees and determined that such fees were not limited to a percentage of recovered benefits. Rather, the amount of the fee should be calculated on other considerations such as time expended by the attorney, the novelty of the issues involved in the litigation, the level of expertise in the field of workers' compensation that the attorney possessed and other factors as created by past Supreme Court decisions.

NCCI estimated that the cost to the workers' compensation industry as a result of this decision amounted to approximately 16% over a period of two years. As a result of these concerns over increased rates, House Bill 903 passed the House early in the session. This bill responded to the Emma Murray decision by reinstating the percentage of

benefits method of calculating fees rather than considering other criteria. This bill in effect overturned Emma Murray.

The Full Senate considered Senate Bill 2072 which would have been more in line with Emma Murray in fee calculations. NCCI determined that the Senate reaction was more costly than the Emma Murray decision.

At the end of the day, the Senate adopted the House version of the proposed law change. The House Bill has now been sent to the Governor for signature. The effective date of the bill is July 1, 2009. The rate increase previously approved by OIR effective April 1, 2009 will be discontinued as of July 1, 2009, the effective date of the bill. A filing to this effect will be made by NCCI.

The Emma Murray opinion did not decide the constitutionality of the different methodologies for calculating attorney's fees. This issue will most certainly be considered by the Supreme Court at some future date and it still

remains questionable as to how injured worker attorney's fees will be paid.

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## Miscellaneous Legislation – 2009 Legislature

House Bill 845 relates to self insured funds and requires applicants for workers' compensation coverage through these funds established pursuant to Chapter 626, Florida Statutes, to sign an application confirming the fact that such policies are assessable and if deficits result in sums sufficient to pay claims that each insured would be responsible for paying any unfilled obligations based on a pro-rata earned premium basis. Employers signing such applications would be deemed to have made an informed, knowing acceptance of this assessment liability. The bill also permits Electric Cooperatives to establish self insured funds for workers' compensation purposes.

Senate Bill 408 deletes the requirement that Initial Drug Tests performed in compliance with the Florida Drug-Free Workplace Program (Section 440.102, Florida Statutes) be conducted by a licensed or certified laboratory. Confirmation Tests continued to be required by such laboratories. The bill also allows for certain registered nurses certified in accordance with Section 464.012, Florida Statutes, to collect human specimens for testing.

House Bill 425 relates generally to the Department of Business and Professional Regulation. In regards to workers' compensation, Section 25 concerns owners of property doing construction on their own property in such situations. Under such a scenario, the owner-builder must provide direct on-site supervision of construction being performed and cannot hire an unlicensed person to act as contractor or to supervise persons working on the building under construction. It is the owner-builder's obligation to ensure that all required licenses have been obtained by such contractors. Any person working on the construction project that is not licensed is considered employed by the landowner. Accordingly, the landowner must provide workers' compensation for such employees. If an owner-builder building permit is obtained and a licensed contractor is utilized, the homeowner is responsible for verifying whether the contractor is properly licensed and has the appropriate workers' compensation coverage.

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## Division of Workers' Compensation (Division) Study

In January 2008, the Division first announced its research initiative to make an objective and analytical analysis of the merits of the 2003 legislative changes

that have in significant part led to an approximate 65% reduction in costs since initial enactment. The first study related to the changes in some of the compensability requirements, specifically those statutory changes related to injuries and illnesses qualifying as compensable and the standards for evidence supporting these conditions.

Based on data maintained by the Division, it was determined that: 1) the denial of such claims is more frequent in the post-reform period; 2) litigation over denied compensability has diminished in the post-reform period; and 3) in the post-reform period, fewer workers received benefits following a denial of compensability. The decline in the percentage of denied compensability cases receiving lost-time benefits could also be a part of the broader decline in litigation. A complete copy of this extensive report can be obtained at <http://www.myfloridacfo.com/wc/pdf/SB-50A-compensability.pdf>.