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What's New In Our Industry

Florida

WORKERS' COMPENSATION

Administrative

On April 27, 2022 the Division of Workers' Compensation and the Three-Member Panel held a Three-Member Panel Rule Hearing for the specific purpose of approving the new Maximum Reimbursement Allowances (MRAs) for incorporation into a new Provider Reimbursement Manual, a new Hospital Reimbursement Manual, and a new Ambulatory Surgery Center (ASC) Reimbursement Manual.

Provider Manual

The Division presented the proposed increase in physician and practitioner MRAs without comment. Virtually all parties in the workers' compensation system recognize that the office-based MRAs have been historically low and need to be increased. However, because they have not been increased since 2014, this will lead to a large increase in cost, and must therefore be approved by the Florida Legislature. Not coincidentally, the Division proposed an increase last year, which went to the Legislature for ratification. Oddly enough, rumor has it that certain provider groups killed the proposed legislation, possibly for strategic business reasons. It remains to be seen whether the new physician and practitioner MRA increases will be ratified by the Legislature next year.

Ambulatory Surgery Center MRAs

After much negotiation between certain carrier groups and the Florida Society for Ambulatory Surgery Centers, the Division and parties in the system reached an agreement on a massive number of new MRAs, covering 99% of all surgical and procedure codes by ASCs. This also included the methodology for payment where there is no MRA for a billed CPT code. This was incidentally worked into the new manuals, requiring payment based on a "clinically similar" procedure code with an MRA.

We anticipate the MRAs will represent a cost savings and will go into effect once the new manual and attendant rules are promulgated by the Division. The Division will have to submit the final manual to rulemaking for adoption. We also anticipate this will reduce litigation and reimbursement disputes and the attendant litigation costs. Overall, it is a very good thing for the

system. Basically this new procedure states that when there is no established MRA, carriers should either pay based on an agreement with the provider, or on an established MRA for a "clinically similar" procedure.

Hospital Inpatient MRAs

Similar to the ASCs, the Division proposed a large number of new MRAs for hospital outpatient reimbursement. This will similarly reduce reimbursement disputes and will represent savings to the system both in terms of litigation and administrative costs, as well as in terms of total dollars paid for medical treatment. The new MRAs for outpatient will have to be incorporated into a new hospital reimbursement manual.

Hospital Inpatient Per Diem MRAs

Those monitoring the inpatient hospital reimbursement disputes recall that, in 2019, an Administrative Law Judge found the "stop loss" payment system to be in conflict with the workers' compensation statutory law. The Division of Workers' Compensation has since initiated rulemaking to adopt straight per diem reimbursements. The new model for inpatient per diem reimbursement has been vigorously debated between the parties, and the Division recommended a new three-tiered reimbursement model based on the level of care.

The three tiers, from highest to lowest are: Tier 3 - Intensive Care Unit (ICU)/Critical Care Unit (CCU) as the highest reimbursement tier, Tier 2 - a surgical stay as the next highest tier, and then Tier 1 -- a base bed for a non-surgical, non-ICU stay as the lowest, or "tier one" payment. This model was supported by industry with some reservations. The purist per diem reimbursement would pay an ICU day at the ICU rate for each date in the ICU. Similarly, the purist "per day" reimbursement model would reimburse the surgical per diem payment for each trip to the operating room as a surgery day. Each of the remaining days would then be reimbursed at the base rate.

The current model recommended by the Division and approved by the Three-Member Panel is a "hybrid" model, in that is reimburses the ICU/CCU days on a per day basis, but then applies the surgical per diem payment for the balance of any inpatient days, regardless of how many surgeries or how many days the patient is in a base bed.

The Three Member Panel also approved specific per diem amounts for each tier as follows:
Tier 1 – Base Bed -- $7,000.00 per day
Tier 2 – Surgical Bed -- $11,000.00 per day
Tier 3 – ICU/CCU Bed -- $13,000.00 per day

It is noteworthy that, under the newly approved model, the per diem amounts start at $7,000.00. In the "old system" they started at around $2,300.00. If not otherwise negotiated for a separate per diem payment between carriers and inpatient rehabilitation hospitals, rehab hospitals may demand a $7,000.00 per day payment, whereas they were previously willingly accepting per diem payment below the prior base per diem amount of $2,300.00 per day. This discrepancy may result in unanticipated cost increases to the system not foreseen by the Panel or the DWC.

It is also noteworthy that, according to NCCI medical cost data reporting, the nationwide average per diem payments in the workers' compensation system tended to range between $4,000.00 and $7,000.00, with the most recent national annual average hovering below $6,000.00. With the new

per diem payment starting at $7,000.000, and going up from there, we anticipate that there will be some additional unexpected cost increases not fully factored into the NCCI pricing analysis. We also anticipate that this change may not affect all carriers and providers in the same manner.

The Division of Workers' Compensation will still have to incorporate definitions for the new three-tiered inpatient per diem reimbursement model into the Hospital Manual. Stay tuned for rulemaking in that regard. Additionally, stay tuned for further public comment.

It behooves all responsible carriers to develop a plan for dealing with inpatient rehabilitation bills, if they do not already have one. If they do not, they may pay a 350% increase in their rehabilitation payments, other things being equal.

We recommend that all carriers become familiar with the new payment methodologies and MRAs. We also recommend that carriers monitor new and ongoing rulemaking initiatives by the DWC. The DWC will be "stepping up" their carrier compliance audits and initiatives. If you have any questions, please call one of our McConnaughhay attorneys.

Judicial

Noa v. City of Aventura/Florida League of Cities
47 FLW D297c
1/26/22

The Claimant sought an adjustment to her average weekly wage (AWW) to include a pro rata share of her annual merit bonus. The bonus was paid in July 2020, *after* the accident in February 2020, but was for the period of July 2019 through July 2020. The JCC denied the adjustment, and the DCA reversed, finding that pursuant to 440.14(1)(a), the AWW includes "wages earned" during the 13 weeks before the accident. In some instances, this will include income paid/received after the date of accident, but earned in the 13 weeks prior to the accident. The DCA likened the situation to receipt of profits or commissions, which are usually paid well after they are earned.

Palm Beach County School District/Sedgwick CMS v. Smith
47 FLW D382a
2/9/22

The Claimant sought a one-time change in physician, which was timely granted by the E/C. Upon learning of the contractual fee agreement reached between the new physician and the E/C, the Claimant objected to the provider, and requested a new physician. The JCC agreed with the Claimant, and ordered another physician be provided. The E/C appealed, and the DCA reversed the decision of the JCC stating that the statute does not allow a JCC to disqualify physicians based on a claimant's complaint about the fee reimbursement arrangement between the physician and the E/C. The JCC was outside the scope of her jurisdiction, as it is well established that fee reimbursement disputes fall under the jurisdiction of the Department of Financial Services (DFS). Further, the statue allows for physicians to require higher than fee scheduled arrangements. So long as the E/C agrees with the physician on the amount or the fee payable, the Claimant has no recourse.

In passing, the DCA addressed the *City of Riviera Beach v. Napier* case, where they recognized a JCC could lawfully discount the testimony of an IME physician who charged more than the law allowed, but this only goes to admissibility and credibility of evidence.

Silberberg v. Palm Beach County School Board/York Risk Services Group
47 FLW D461a
2/16/22

It was undisputed that the Claimant was injured during the course and scope of his employment, when he unexpectedly fell after going from sitting at his desk to standing. The JCC found the Claimant's fall did not arise from his employment, and denied compensability. In a lengthy opinion, the DCA affirmed the denial, and reviewed the case law surrounding the issue of causation. The DCA walked through the analysis of compensability, looking first to whether the injury arises out of the work performed in the course and scope of employment. Next, causation must be addressed, including an analysis of potential increased hazard of the work place, when a pre-existing or idiopathic condition is present. Finally, the work performed must be the major contributing cause of the injury. Using this analysis, the DCA found the Claimant's idiopathic fall did not arise from his employment, and the Claimant's employment was not the cause of the fall.

Soya v. Health First, Inc./CCMSI
47 FLW D489a
2/21/22

While walking in her place of employment, the Claimant fell. There was no evidence of any cause of the fall. The JCC denied compensability based on *Valcourt-Williams*, applying the increased hazard of employment analysis. The DCA reversed the JCC, stating that the increased hazard analysis applies only where there is a contributing cause to the accident outside of the claimant's employment. The DCA looked to the line of cases including *Caputo* and *Walker*, noting that in those cases where there is no other basis for the fall, the accident is compensable. As the Claimant is actively engaged in work activities, the causal relationship between employment and the accident is met. Concurring opinion.

Arrez Brothers Carpentry, LLC/Norguard Ins. Co. v. Alvarado Ortiz
47 FLW D511a
2/23/22

The E/C appealed an order of the JCC granting many requested benefits. The DCA reversed the award of treatment provided by a hospital and an accompanying radiology bill from the hospital billing service. The DCA found that nothing in the record supported a finding that the hospital and radiology services were a result of an emergency condition, as outlined in *Cespedes v. Yellow Transp., Inc./Gallagher Bassett*. Given the lack of evidence to support an emergency for unauthorized medical care, the award of this medical care was reversed.

Aquino v. American Airlines/Sedgwick CMS
47 FLW D617c
3/9/22

The Claimant worked as a baggage handler for the Employer. After clocking out for the day and leaving the airport terminal, the Claimant was walking towards the parking-lot-shuttle bus stop, when he injured his calf muscle stepping off a curb. The Claimant reported the accident the following day, and presented to the on-site clinic for treatment where care was provided. Within 14 days, the E/C denied his claim in its entirety. Litigation ensued, and the JCC ruled in favor of the E/C. The Claimant appealed the JCC's decision, and argued that his claim should be allowed under 1) the going and coming statute, 2) premises rule, and/or 3) waiver. The DCA addressed each of these arguments.

With regard to the going and coming statute, the DCA found that the Claimant did not meet any of the exceptions to this rule, as it was clear he was not engaged in a special errand or mission for the Employer. Tying in the premises rule, the DCA found that the Claimant had left his workplace, and was making his way towards his vehicle in the employee parking lot. The area between the airport and the parking lot is public area, not owned or controlled by the Employer. As such, an argument that he was on the Employer's premises fails. Lastly, the E/C did not waive its right to deny compensability in allowing the Claimant to treat in the clinic, and then deny the claim. The claim was denied within 14 days of being reported and investigated.

Kelly Air Systems, LLC/AmTrust North America of Florida & Technology Ins. Co. v. Kohlun
47 FLW D668d
3/16/22

The Claimant was injured while driving his employer-provided vehicle, but after he had verbally clocked out from work with his supervisor. The JCC found the Claimant was a traveling employee under 440.092(4) and accordingly, the accident was deemed to be compensable. The DCA looked to whether the vehicle was for the Claimant's personal use, and it was found the Claimant did have personal use, as he could use the vehicle to travel to and from work, and perform some personal tasks, if needed. The DCA then looked to whether the going and coming rule applies, and it was determined that the Claimant was not in a "travel status" at the time of the accident. He likewise was not a traveling employee, because he would not qualify for the travel status because he was not being paid or compensated, nor was he performing work or services of employment while traveling home. The DCA reversed the finding of compensability.

Lakin v. Hernando County Sheriff's Office/Florida Sheriffs Risk Mgmt Fund
47 FLW D662f
3/16/22

The E/C denied the Claimant's claim for compensability of his hypertension, under Section 112.18. The E/C argued that there was evidence of hypertension on the Claimant's pre-employment physical (PEP); as such, he did not meet the requirements of the presumption of compensability under 112.18(1)(a). The Claimant argued that while his blood pressure was elevated on the pre-employment physical, the Claimant was never diagnosed with hypertension. An EMA was appointed, and testified the PEP did reveal evidence of hypertension. The JCC ruled in favor of the E/C, and the DCA affirmed the decision. The DCA pointed out that Section 112.18 indicates that only evidence of hypertension is needed on the pre-employment physical to negate the statutory presumption of compensability. A diagnosis is not required.

DSK Group, Inc./Zurich American Ins. Co. v. Hernandez
1D19-2632
4/27/22

The Claimant was involved in a motor vehicle accident while in route from his home to a work site. He was in his personal vehicle, and he had not clocked in for work via an application on his mobile phone. The JCC determined the Claimant was a field employee, who commuted to and from his home to a job "in the field," and he was within the course and scope of his employment once he started his vehicle to proceed to the work site. The JCC determined that the "going and coming" rule did not apply in this case because of the nature of the Claimant's daily travels because he commuted from work site to work site each day, rarely going to the employer's place of business.

The DCA reversed the finding of the JCC, and deemed the accident was not compensable. The key issue was whether the "going and coming" rule prevented this accident from being compensable. The DCA noted the claimant was an hourly employee, who traveled from work site to work site throughout his day with supplies, in his personal vehicle, and was not reimbursed for his gas, but given a gas card with a monthly cap. He clocked in once at the job site, would clock in and out for breaks, and clocked out at the end of the day before driving home. The DCA found the going and coming exception did not apply because the Claimant's work did not start until he arrived at the job site. The Claimant argued that the JCC was correct in finding a compensable accident, but the traveling employee analysis should have been used to support compensability. The DCA addressed this exception, stating it does not apply while in route to a job site, unless the claimant is in a "compensation status" at the time of the accident. The DCA looked to three cases discussing same, including one involving a salaried lawyer who began work at his home in the morning, then drove from his home to a deposition location. He was in a compensation status.

The DCA concluded the Claimant in this claim was a typical community employee, or an "ordinary workman going to work." As a result, the claim was not compensable.

Guerrera v. Becton Dickinson & Co./Sedgwick CMS
1D21-1788
5/4/22

The JCC denied the Claimant's Verified Petition for attorney's fees related to securing an increase in the Claimant's average weekly wage (AWW). The DCA reversed the JCC's denial of an Employer/Carrier paid attorney fee, finding that even though no additional benefits were owed to the Claimant as a result of the AWW increase, the adjustment did increase the 80% threshold for TPD benefit entitlement, and could impact potential future offsets of federal disability benefits. Given the potential for future indemnity benefits based on the increase in the AWW, there was attorney fee entitlement payable by the Employer/Carrier.

LFI Ft. Pierce/ESIS WC Claims v. Holmes, Blue Goose Growers, LLC/FFVA Mutual Ins. Co.
1D18-5243
5/6/22

Claimant employed by employee leasing company (LFI) as defined by §440.11(2), Florida Statutes (General Employer), and worked for special employer, Blue Goose (Special Employer). On the way home from his employment for Special Employer Blue Goose, while a passenger in a car operated by another employee of the Special Employer Blue Goose, he was injured in an automobile accident approximately 45 minutes away from the job site. The accident was caused when the driver of the vehicle fainted allegedly because of dehydration caused by the driver's job. The claimant filed a civil cause of action against General Employer LFI and Special Employer Blue Goose. LFI did not appear in civil case. Blue Goose asserted the workers' compensation exclusive remedy defense. Summary Judgment entered in favor of Blue Goose and claimant voluntarily dismissed the civil action against the General Employer LFI. A workers' compensation claim was then filed against both LFI (General Employer) and Blue Goose (Special Employer). Workers' compensation benefits were awarded by the JCC. JCC determined that LFI was estopped in denying that workers' compensation benefits were payable because of the position taken by Blue Goose (Special Employer) in civil cause of action; that workers' compensation was the exclusive remedy. In addition, LFI argued that the "Going and Coming Rule" precluded workers' compensation liability for the accident. The JCC also determined, alternatively, that the Going and Coming Rule did not apply because of the "Special Hazard Rule," i.e., the driver's dehydration was a "special hazard." Finally, the JCC ruled that the accident arose directly from the employment of the claimant and the driver of the vehicle, i.e., the dehydration.

Court reversed the JCC's opinion in regards to the estopped finding since there was no mutuality of parties, a necessary element of judicial estoppel. In addition, the position taken by Blue Goose of workers' compensation immunity in the civil cause of action could not be imputed to LFI since the two employers had adverse interests. The special hazard exception to the Going and Coming Rule was rejected by the court since this exception only applies to a hazard at an off-premises location in close association with an access route with the work premises. Finally, the court determined that the accident was not compensable in response to the JCC's findings that the accident was caused by work factors resulting from the dehydration suffered from work related conditions which caused the driver to faint and accordingly, workers' compensation benefits were payable. Court determined that this theory of compensability would apply only to injuries sustained by the driver. Concurring Opinion.

Hardin v. Heyl Truck Lines, Inc./CBCS/Travelers/Christiansen
1D22-700
5/11/22

The Claimant filed a petition for writ of prohibition related to an order on Claimant's Motion for Determination of Material Breach of Contract. The DCA dismissed the writ of prohibition finding that there was no facial basis for relief sought, and stating that prohibition is a preventative remedy, not corrective, i.e., re-write is only utilized to prevent the commission of an act, not to revoke an order already issued.