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What's New In Our Industry

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Workers' Compensation

I. Legislative

The Florida Legislature adjourned in 2020 with only limited attention being given to workers' compensation issues. The only bill that passed related to salaries of Judges (JCCs) that adjudicate workers' compensation claims. Under new statutory guidelines, JCCs will be paid the same salary as county judges. See HB 1049. As of the date of this newsletter, the Governor has not signed this bill. Current JCC salaries are $124,564. If the Governor signs this bill, the new salary will be $151,822. A summary of all relevant bills that indirectly relate to workers' compensation and civil litigation issues that passed will be provided in our next report. Ordinarily, summaries would have been provided by now but because of COVID-19 issues, this has been delayed.

Substantive law changes in the Florida workers' compensation law (Chapter 440, Florida Statutes) did not pass and were not serious considered. This is because of the legislative perception that Florida's workers' compensation system is not experiencing any major problems deserving of legislative attention. NCCI filed for a reduction in workers' compensation premiums for 2020 which was approved in part by the insurance commissioner. Accordingly, the conclusion was that workers' compensation did not need any significant reform.

Tying the need for legislative attention to workers' compensation issues solely to premium rate charges for employers continued a historical tradition of ignoring further negative trending showing growing problems deferring only to premium costs payable by employers. Current developing problems include but are not limited to the fact that Florida's hospital costs for providing care to injured workers is the highest in the nation (inpatient and outpatient) and that the ratio of medical cost as compared to compensation paid (70% medical, 30% compensation) is one of the highest in the nation and certainly higher on a regional basis. In addition, no consideration was given to increased litigation expenses primarily in the form of increased attorney fees. It will be interesting to see what the rate filing by NCCI will be this year for 2021 rates when considering these growing problems along with trending of reduced payrolls caused by the pandemic, cost shifts to workers' compensation for medical and indemnity as a result of the current pandemic, the overall very high unemployment caused by the pandemic, and the expected reduced investment income. Hopefully, what seems like early warnings of impending very significant problems for the employer/carrier community will not be the case.

II. Executive/Administrative

A. Medical Bill Dispute Resolution Reform/Changes

One of the least understood processes for resolving disputes under the workers' compensation laws relates to controversies between the employer/carrier and medical providers (including pharmacies) concerning the appropriate payment of bills for the treatment of injured workers. The lack of knowledge among industry professionals about this bill dispute process may stem from the fact that The Administrative Procedure Act (Chapter 120, Florida Statutes) governs these disputes and not the workers' compensation resolution dispute law that is familiar with industry. Disputes are initially determined by the Division and resolved by an Administrative Law Judge (ALJ), as opposed to a Judge of Compensation Claims. That being said, the number one issue most often litigated in proceedings before JCCs relate to medical issue controversies and attorney fees (the two leading cost drivers in the workers' compensation system). Over 4 million medical bills are sent to the Division of Workers' Compensation and 4,000 to 5,000 disputes result. You can well understand the backlog that exists in the Division's adjudication process. As mentioned above, 70% of all benefits paid under the workers' compensation system relates to medical issues.

1. Current Resolution Procedures. In order to appreciate the need for change in administrative procedures in adjudicating medical bill disputes by the Division, it is important to understand the current procedures.

Upon receipt of a completed medical bill from a provider, the carrier or its designated servicing entity has 45 days to issue an Explanation of Bill Review (EOB or EOBR) along with a "minimum partial payment" if there is a dispute over some portion of the payment. The employer/carrier bill reviewer may extend the 45 day deadline by sending an appropriate request for more information.

Once the initial EOB is issued, the provider has 45 days in which to file a Petition for Reimbursement Dispute with the Division of Workers' Compensation. The provider must include documentation demonstrating that the disputed service or bill was for actually authorized treatment or that it was authorized by virtue of an "emergency." Alternatively, treatment may be "deemed authorized" if the carrier fails to timely respond to a request by the injured worker for a change in a medical care provider. Failure by the provider to provide documentation supporting the claim for the payment of the bills typically leads to the Division issuing a "Notice of Deficiency" which gives the provider a certain amount of time to provide the documentation or face dismissal of the petition.

The carrier has 30 days from receipt of a Petition for Reimbursement Dispute in which to file a response. The carrier may provide additional information including a "continuation of response" along with additional documentation that it believes is relevant to resolution of the dispute. Failure by the carrier to file a response results in a waiver of any arguments the carrier would otherwise be entitled to raise.

The Division renders a "determination" based on the documentation submitted by both the provider and the employer/carrier, in compliance with the statute and its own rules. Either party can appeal the decision made by the Division by filing a Petition for Ruling with an Administrative Law Judge governed by Chapter 120, Florida Statutes (not by the filing of a Petition for Benefits with the Judge of Compensation Claims).

Unfortunately, as indicated below, some portions of the rules and use of "fee schedules" by the Division in rendering a reimbursement determination conflict with the stated legislative intent of the law that all payments ordered by the Department must be based on or limited by, the "Maximum Reimbursement Allowance" or an agreed upon price, and that all payments must be commercially reasonable. For example, the Division has decided that, where no maximum reimbursable allowance has been published in a reimbursement manual, the "fee schedule" results in a payment to a provider at either 60% of the bill charged or 75% of the bill charged (without reference to reasonableness) as the case may be. The Division is seeking to make systemic changes in their rules, recognizing that their interpretation of legal issues is subject to criticism as not being substantiated from a legal standpoint.

2. Notice of Public Hearing. The Florida Division of Workers' Compensation has scheduled a public hearing to occur on June 10, 2020 in a workshop format to address industry comments on proposed changes in the Workers' Compensation Medical Utilization and Reimbursement Dispute Rules found at 69L-31 Florida Administrative Code. These rule changes "address the broader agency policy as well as methodology for billing and payment of all medical and pharmaceutical services provided under the workers' compensation law." Another public hearing is scheduled for May 27, 2020 to review "the medical reimbursement and utilization review requirements."

By rule, the Division is seeking guidance in determining such things as jurisdiction to decide pricing issues for medical care, the meaning of "overutilization" and "authorization of medical care" and "medical necessity," pricing for hospitalization costs and many other instances potentially affecting ultimate liabilities for the employer/carrier community. The Division expressly put "an exclamation point" on the need for employer/carrier attention to participating in these rule changes by saying:

> **WE (Division of Workers' Compensation) recommend that carriers and employers monitor, understand, and submit public comment on these rules in an effort to reasonably pursue the Legislative Intent of the Law. We also respectfully request that the failure of employers and carriers to understand and appropriately engage with the rule-making process may lead to rule interpretations and policies with (sic) do not serve either their interests, or the overall legislative intent of the law.**

Nothing more can affect the ongoing increased financial liabilities of the employer/carrier community than not being a part of these rulemaking changes, delegating to special interests the right to play the primary role in deciding what should be paid for medical care. It can reasonably be expected that medical expenses will increase even more than the current exorbitant 70% of total costs paid under workers' compensation system as compared to compensation payable to the injured worker if no action is taken by Employer/Carriers in the promulgation of these rules.

B. Stop-Loss for Hospital Bills Ruled Invalid

This dispute arose after an injured employee presented to the hospital for an authorized, inpatient finger surgery. The hospital billed the carrier $163,697.30 for the surgery. The carrier adjusted the bill under its network contract and paid $31,844.70 because various data reviewed indicated this was a commercially reasonable and more than adequate for the services provided. The hospital petitioned the Division of Workers' Compensation to resolve the dispute, arguing that it was entitled to 75% of whatever it decided to bill, because the stop-loss set forth in the fee schedule. The Division issued a determination that the carrier should pay a total of $110,859.24 for the finger surgery. The carrier appealed this determination by filing a Petition for Administrative Hearing with the Division of Administrative Hearings (DOAH).

According to the fee schedule (Hospital Manual), the hospital would be paid a per diem rate for in-house hospitalization. If the hospital submits a bill higher than a "stop loss" amount, the per diem rate does not apply and the carrier must pay 75% of the billed amount. Section 440.12(12)(a), F.S., says that in-patient medical care is payable at the per diem rate without reference to a stop loss provision.

In the case of *Zenith Insurance Company v. Department of Financial Services, Division of Workers' Compensation*, DOAH Case No. 18-3844, the ALJ compared the statutory language in Section 440.12(12)(a, F.S., with the Hospital Manual and concluded that the Stop Loss rule violated the statute and therefore was invalid. The hospital was not entitled to the payment of the billed $163,697.30, not to the amount paid by the carrier of $31,844.70, and not the amount originally deemed payable by the Division of $110,859.24. Rather the correct amount payable was $10,973.44.

The ALJ's recommended order now rests with the Department of Financial Services. We feel that the ALJ was correct in her recommended determinations. We encourage all parties in the workers' compensation system to audit unreasonable bills by using their access to data. All parties in the system should pursue the statutory mandate that medical payments must be commercially reasonable.

C. Division Determines that Physicians Dispensing Medications are Pharmacists Allowing Free Choice by Injured Workers

The Division of Workers' Compensation recently issued informational bulletin DWC-01-2020 related to the prescribing and dispensing of medications by authorized doctors. This new procedure is a change predicted to increase instances in which the authorized doctor prescribes and dispenses medication, ultimately increasing overall costs in the workers' compensation system. Specifically, the Division determined:

> Prescriptions for compensable medication, written and dispensed by the carrier's authorized treating physician, shall be reimbursed, if the authorized treating physician is a practitioner registered to dispense under §465.0276, Florida Statutes, and if the injured worker chooses to have its prescription dispensed and filled by the authorized treating physician . . . . Thus, failure to authorize and/or reimburse for prescription medication solely because the medication is or will be

> dispensed by a licensed Florida dispensing practitioner instead of a pharmacist, interferes with the full, free and absolute choice of the sick or injured employee and, therefore, is contrary to law.

It should be noted that §440.13(3)(j), Florida Statutes, only makes reference to the injured employee's right to select a pharmacist of his own choice and makes no reference to a "licensed dispensing practitioner." This information bulletin by the Division is completely contrary to a previous ruling that was adopted by the Division in the case of In the matter of Todd Alea, M.D., Case No.: 122698-11-WC adopted by the Division on August 31, 2012. The decision was made on July 17, 2012. According to that opinion, §440.13(3)(j), Florida Statutes, allowing for injured workers to select their own pharmacy does not include a choice of a "licensed dispensing practitioner." Basically, the court ruled that although some physicians may be allowed to dispense medications, this does not make them a "pharmacy." Accordingly, free choice of pharmacies does not include "licensed dispensing practitioners."

The basis upon which the Division issued its "informational bulletin" is unknown, including who made a request for making such a decision. Pursuant to Chapter 119, Florida Statutes, our firm has requested from the Division the basis upon which this ruling was made and who requested this opinion. If this ruling is followed, we feel that unnecessary costs will be incurred, further exacerbating the negative financial trending on the Florida's workers' compensation system. Physician prescribing and dispensing medication seemed to be moderating and becoming less of an issue or unnecessary expense. However, this ruling will surely have the effect of increasing incidences of physicians that both prescribe and dispense medication.

D. Administrative Actions Taken in Response to COVID-19 Pandemic

On March 9, 2020, the Governor issued Executive Order 20-52 that declared a State of Emergency for the state of Florida. Executive Order 20-52 authorized each state agency to suspend the provisions of any regulatory statute of that agency if strict compliance with that statute would in any way prevent, hinder or delay necessary action in coping with this emergency.

On March 24, 2020, the Governor issued Executive Order Number 20-83 directing the Surgeon General to issue a public health advisory urging persons over the age of 65 and persons with serious underlying medical conditions that place them at a high risk of severe illness from COVID-19 to stay home and take other measures as necessary to limit their risk of exposure to COVID-19. Executive Order 20-83 directed the state surgeon general and state health officer to issue a public health advisory urging those who can work to work remotely.

On April 1, 2020, the Governor issued Executive Order 20-91 directing all persons in Florida to limit their movements and personal interactions outside of their own home to only those necessary to obtain or provide essential services or activities.

Based on the various orders of the Governor pursuant to his powers under Chapter 252, F.S., the Chief Financial Officer of Florida entered a Chief Financial Officer Directive 2020-06 which suspended (deferred) the payments of penalties that employers were responsible for paying. Stop Work Orders were suspended effective March 16, 2020. §440.107(7), F.S. The

requirement that informational brochures be mailed to injured workers by employers/carriers were suspended (§440.185(3), F.S.). In lieu of mailing, employers/carriers may comply with the brochure delivery by alternative delivery methods in order to meet the 3-day notification requirement under §440.185(3), Florida Statutes.

III. Judicial

A. Litigation Rates

1. Post-COVID-19 Pandemic Litigation Compared to Previous Years.

Many have inquired as to the effects of the pandemic on the litigation rates before JCCs. Accordingly, we reached out to the Chief Judge's office to get their "first hand" knowledge of what actually is occurring "in the trenches." This may give you some idea as to whether your experience is consistent with what is occurring statewide. Particular emphasis on whether changes are needed in handling cases, potential future expectations, and an affirmation of what you are doing being consistent with the statewide experiences is the purpose of trying to get this information for you.

Comparing the first three months of 2020 to the same three months in 2019, 19,242 new petitions were filed in 2020 as compared to 18,823 for the same three months in 2019. This increase in 2020 is consistent with what was expected. However, if you just compare March of 2020 (the beginning of the virus in earnest) to March of 2019, 6,288 petitions were filed in March 2020 as compared to 6,430 in March 2019, a significant decrease not otherwise expected by many. Even more dramatic is comparing April petitions (1-15 days). In 2020, 2,559 petitions were filed during this period compared to 3,267 in 2019, a very significant decrease. In addition, net filings (motions, notices, etc. and petitions) have significantly decreased.

B. Litigation Processes

1. Hearings

Hearings are still being held if possible using the state webcam. Requests for continuances of scheduled hearings are being liberally granted by judges primarily because of needed depositions of doctors not being allowed by the doctors themselves. The doctors' offices are closing and/or not allowing for outside persons to come to their offices for a deposition. Note that in 2019, House Bill 409 created the "Electronic Legal Documents Law, Chapter 2019-71, Laws of Florida; IN-7001, Florida Administrative Code. This law authorizes Florida notaries to perform online remote notarizations allowing for depositions telephonically. This law also authorizes Florida notaries to perform online notarizations allowing for the swearing-in of witnesses.

2. Other Proceedings

The Office of the Judge of Compensation Claims (OJCC) has mandated that all mediations be held by telephone through April 30, 2020. JCC's have been directed to use

discretion in the management of their dockets and to use the "greatest deference possible" to parties requiring individual accommodations. Additionally, all OJCC offices, except the Miami and Fort Pierce office, remain open. To facilitate approval of settlements, Florida Administrative Code Rule 60Q-6.123, requiring sworn statements regarding the disclosure of child support obligations has been suspended. These orders have been extended until April 30, 2020, unless a different date is provided by a subsequent order. For more information on the OJCC's response to COVID-19, please visit https://jcc.state.fl.us/jcc/ and scroll down to "Announcements."

C. Compensability of COVID-19 Claims

The Division of Workers' Compensation is preparing a "Dashboard" for their website which will provide details as to the number of COVID-19 claims reported to include breakdowns by industry, claimant age, and percentage of claims denied. As this data is made public, this will be summarized for you.

On April 6, 2020, the Florida Office of Insurance Regulation issued Informational Memorandum OIR-2—05 which stated:

> All Regulated Entities are reminded that section 440.09, Florida Statutes, requires an employer to provide workers' compensation coverage if the employee suffers a compensable injury arising out of work performed in the course and scope of employment. First responders, health care workers, and others that contract COVID-19 due to work-related exposure would be eligible for workers' compensation benefits under Florida law. See §440.151, Fla. Stat.
>
> Insurers licensed to provide workers' compensation coverage in Florida are reminded of this statutory requirement, which must be applied on a non-discriminatory basis. The OIR expects workers' compensation insurers to comply with all of the provisions of Florida's Workers' Compensation Law and will take appropriate action in the event of non-compliance.
>
> If you have questions regarding this memorandum, please email COVID-19_Orders@floir.com and include "Informational Memorandum OIR-20-05M" in the subject line.

The Chief Financial Officer had previously issued Directive 2020—5 providing workers' compensation for public servants on the front line of COVID-19.

All of the directives being made by the executive branch concerning the effect of the COVID-19 crisis on the payment of workers' compensation benefits are being made following the Governor's declaration of a State of Emergency (Executive Order 20-52 dated March 9, 2020 and Article IV, Section 1(a) of the Florida Constitution, and the State of Emergency Management Act §252.31, Florida Statutes, et al, as amended and all other applicable laws. The meanings, interpretations, and legality of Declarations, Executive Orders and Informational Memoranda are subject to review by the judicial branch of government. See other directives made as above referenced.

D. Caselaw Update

The following cases were decided by the Florida First District Court of Appeal relating to workers' compensation issues from March 1, 2020 to April 23, 2020.

Dominguez v. South East Personnel Leasing, Inc./Packard Claims Administration & Centerline Directional Drilling Service, Inc./Lion Insurance
45 Fla. L. Weekly D569d
3/12/20
In a claim where the E/C voluntarily accepted the Claimant PTD, following the filing of the Petition for Benefits, the JCC still had jurisdiction over the costs pled in the Petition. Additionally, no evidence was presented to clearly show PTD benefits were paid for periods of time prior to the PTD acceptance, but also covered in the Petition. The JCC erred in dismissing the claims in the Petition for lack of jurisdiction.

Morgan v. American Airlines/Sedgwick CMS
45 Fla. L. Weekly D685a
3/24/20
The DCA affirmed the JCC's denial of fee entitlement, as the Claimant failed to demonstrate successful prosecution of her claims, pursuant to 440.34(3)(b). Specifically, the Claimant did not prove her attorney obtained acceptance and payment of the claims, on the Claimant's behalf. Since her attorney's efforts did not lead to the provision of benefits, the Claimant was not entitled to fees or costs.

Pannell v. Escambia School District/Risk Management Services, Inc.
45 Fla. L. WeeklyD886a
4/15/20
The DCA reversed the JCC's denial of PTD benefits in this claim involving a 1999 date of accident. The JCC found that when the Claimant retired from her job in 2003, at age 49, for reasons unrelated to the work accident, she was not PTD under the statute, and did not show a deterioration in her condition that would result in PTD entitlement. The DCA found the JCC's focus on the Claimant's retirement date and disability at that time was misplaced, as the important dates were the date of overall MMI and/or expiration of entitlement to temporary indemnity benefits. The Claimant reached statutory MMI on 12/30/04, and overall MMI in 2011. The evidence presented indicated the Claimant was disabled, and would qualify for PTD under the statute, as of the statutory MMI date. Therefore, the Claimant is entitled to PTD benefits.

City of Jacksonville v. O'Neal
45 Fla. L. Weekly _____
4/23/20
On appeal for the second time, the DCA again reversed and remanded for further consideration of the evidence. The Claimant suffered from congenital atrial tachycardia resulting in atrial fibrillation. On initial review by the JCC, the claim was deemed compensable, as the trigger of the condition was found to be work-related. On first appeal, the DCA remanded for findings regarding the underlying triggering condition and diagnosis, to make further findings. On remand, the JCC again granted compensability of the Claimant's congenital atrial tachycardia.

The DCA, in the current case, reversed and remanded, finding that under the trigger theory, it was unclear as to whether the trigger was due to a work-related or non-work-related cause. The evidence showed that the Claimant's initial episode of atrial fibrillation was from a non-occupational cause, as it was medically induced during a cardiac procedure. Further, the evidence revealed other episodes of atrial fibrillation may have been caused from exercise that was unrelated to work. The DCA remanded for the JCC to further consider the trigger theory, in view of the "exercise-related" medical evidence.

Civil

I. Judicial Responses to COVID-19

The federal government and communities across the country have implemented social distancing directives to help contain COVID-19. Federal social distancing guidelines remain in place until April 30th, with the possibility of extensions. The pandemic has changed many aspects of life, including the way judicial proceedings are done.

A. Florida Supreme Court response to COVID-19 (not applicable to workers' compensation proceedings)

The Florida Supreme Court issued an Administrative Order, AOSC20-2, in effect until May 29, 2020, unless a different date is provided by a subsequent order. All civil jury trials in Florida will remain suspended; however, other court proceedings may be conducted remotely through telephonic or other electronic means. Moreover, to make remote work effective, AOSC20-2 suspends all rules of procedure, court orders, and opinions that previously restricted the use of communication equipment for remote court proceedings. For instance, judges have discretion to ensure cases continue as scheduled by allowing attorneys to appear at hearings electronically. To read AOSC20-2, visit https://www.floridasupremecourt.org and scroll down to "News and Updates." See previous discussion on Florida's Electronic Legal Documents Law.

Because of this order, depositions and hearings will be able to continue remotely. AOSC20-2 allows for notarization and the administration of oaths via remote technology. For instance, witnesses, parties, and experts may be sworn in for depositions using remote means. However, out-of-state witnesses must consent to being put under oath via remote technology. Moreover, court reporter must both see and hear the witnesses to administer the oath for a deposition. Telephonic depositions may be allowed if each attorney consents to have the witness make a declaration on the record in lieu of administering an oath. McConnaughhay Coonrod partners with many court reporting agencies that are set up to handle this type of deposition successfully.

B. Georgia Supreme Court response to COVID-19 (Adopted for Georgia Workers' Compensation except as noted below)

The Georgia Supreme Court has declared a statewide judicial emergency until May 13, 2020. The order instructs, when feasible, court proceedings should be done in a manner to limit the risk of exposure, such as videoconferencing or telephonic appearances. The order also

suspends, tolls, and extends any deadlines or other time schedules or filing requirements imposed by statutes, rules, regulations, or court orders.

Moreover, depositions of witnesses, parties, and experts are allowed to be taken telephonically or by other remote means to practice social distancing. Court reporters may administer oaths remotely so long as the parties stipulate in writing. However, unlike Florida, the Georgia Administrative Office of the Courts advises that depositions be administered by video-conference only, and not by telephone.

In light of the Georgia Supreme Court order, the Georgia State Board of Workers' Compensation has postponed all hearings scheduled for the period of March 16 to May 13, 2020. However, the Board will continue to handle settlements, Petitions for Medical Treatment, motions, conference calls, and any emergency situation. Additionally, the Board is allowing mediations to be conducted telephonically. Of note, the Board of Workers' Compensation ordered that the statutory requirements and Board rules relating to payment of benefits or provision of authorized medical treatment are **not** affected by this order and, as such, should continue to be timely provided. Appellate proceedings continue but on a reduced basis.

Up-to-date information regarding the Georgia Supreme Court's response to COVID-19 can be found at https://www.gasupreme.us by scrolling down to "COVID-19 Information". Moreover, further updates regarding the State Board of Workers' Compensation can be found at https://sbwc.georgia.gov/ by scrolling to "COVID-19 Notices."

CONCLUSION

We regret that we have been unable to personally meet with you about the "happenings" occurring in the workers' compensation industry. Regardless of the interruptions in all of our daily lives, you can be assured that changes in the workers' compensation system continue. As quickly as they happen, we will report them to you just like we did when we presented at our statewide seminars. If there are areas of our industry that you feel further explanation is needed, we will be glad to create a webinar for you on these issues.

Thanks for everyone's continued cooperation in our provision of information to you in these difficult times. Hopefully this crisis that we are all a part of will soon pass and we can get back to some level of normalcy. Stay healthy. This hopefully will soon end shortly with everyone's cooperation and willingness to work with each other for everyone's best interest. If you have any questions, please do not hesitate to contact us.