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What's New In Our Industry
Florida

An Up-to-Date Summary of what is happening in Florida related to workers' compensation in all branches of government.

I. Legislature

1. Calendar 2024 Regular Session

August 4, 2023	Deadline for filing claim bills (Senate Rule 8.81(2))
January 9, 2024	Regular Session convenes 12:00 noon, deadline for filing bills for introduction (Article 111, section 3(b), State Constitution) 12:00 noon, deadline for filing bills for introduction (Senate Rule 3.7(1)
February 24, 2024	Motion to reconsider made and considered the same day (Senate Rule 6.4(4)
February 27, 2024	50th day – last day for regularly scheduled committee meetings (Senate Rule 2.9(2))
March 8, 2024	60th day – last day of Regular Session (Article III, section 3(d), State Constitution)

2. Bills Filed to Date

a) HB 161, SB362(Companion Bills)
Payment of Health Care Providers and
Surgical Procedures Under Workers' Compensation

When a health care provider who gives a deposition is allowed to charge a witness fee, the amount charged by the witness may not exceed $300 per hour. This amount represents an increase in the current law that allows for a charge of $200 per hour. Medical care provided by a physician licensed under Chapter 458, Florida Statutes, and Chapter 595, Florida Statutes, shall be paid at the rate of 200% of the reimbursement allowed by Medicare, using appropriate codes and modifiers or the medical reimbursement level adopted by the three-member panel as of January 1, 2003, whichever is greater. (Current fee schedule is 110%.) Maximum reimbursement for surgical procedures shall be 200% of the reimbursement allowed by Medicare or the medical

reimbursement level adopted by the three-member panel as of January 1, 2003, whichever is greater. (Current fee schedule is 140%.) Identical bill filed in 2023 legislative session (SB 1344 and HB 1299.) NCCI priced this proposed multiplier scenario and estimated the percentage impact on medical costs of an increase of 7.3% totaling $286 million.

b. HB 637 Employee Selection of Physicians - Presumption of Compensability of Medical Conditions

A firefighter, law enforcement officer, correctional officer or correctional probation officer is entitled to select his own medical care provider if suffering from presumed compensable tuberculosis, heart disease, or hypertension resulting in total or partial disability or death. Prior to receiving treatment from this medical specialist, notice must be given of the claimant's selection of the medical specialist to the firefighters or officer's workers' compensation carrier, self-insured employer, or Third Party Administrator. The selected medical specialist would be reimbursed 200% of the Medicare rate. The selected "medical specialist" must be a physician licensed under Chapter 458 or Chapter 459 who has board certification in a medical specialty inclusive of care and treatment of tuberculosis, heart disease or hypertension.

II. Administrative (Executive Branch of Government)

1. Primary emphasis from an administrative standpoint on workers' compensation in the past year relates to the payment of medical for the treatment of injured workers.

    a. To understand the administrative activity concerning workers' compensation in Florida is to appreciate the legislative activity that occurred as a result of the 2023 Legislative Session and previous legislative and final administrative attention provided over several years. See past background information as contained in the House Summary Analysis of Committee Substitute/Committee Substitute/House Bill 487 passed by the Legislature on May 3, 2023 and thereafter approved by the Governor.

    b. Statutorily, the Division of Workers' Compensation (DWC) is responsible for ensuring that employers provide medically necessary attention to workers injured on-the-job. Insurers must reimburse health care providers based on statewide schedules of Maximum Reimbursement Allowances (MRAs) developed by the DWC or an agreed upon contract price. The DWC mediates and decides utilization reimbursement disputes concerning the payment of such medical. Annually, the three-member panel adopts schedules of maximum reimbursement allowances for physicians, hospital inpatient care, hospital outpatient care, ambulatory surgical centers, work hardening programs, and pain programs.

    c. For the past year, primary focus from an administrative standpoint has related to reimbursements for prescription bills focusing on cost reimbursements for medications that are prescribed and dispensed by the same medical provider and inpatient hospital costs.

2. Proposed Rules Relating to Medical Practitioners Prescribing and Dispensing Medication.

   a. On December 29, 2022, the Department of Financial Services, Division of Workers' Compensation (Division) published a Notice of Proposed Rule 69L-7.730 and 7.740, FAC, which requires the payment of medications prescribed and dispensed by an otherwise authorized doctor if the injured worker chooses to obtain prescribed medication that is dispensed by the prescribing doctor. Pursuant to Section 440.13(3)(j), F.S., the injured worker has free choice in the selection of his pharmacy. It was the interpretation of the Division that medical practitioners were "pharmacies" if those doctors and nurses are registered as dispensing practitioners.

      Simultaneously, the Division published a Statement of Estimated Regulatory Costs (SERC) indicating that this would increase prescription costs by $42.8 million over 5 years or $8.6 million per year. These cost increases were for fully insured employers, and presumably did not include estimated costs for self-insured governmental entities, such as most state, county and municipal government and school district employers

      A report from the Workers' Compensation Research Institute dated June 2022 determined that 65% of pharmaceuticals in Florida were physician dispensed (highest in states reviewed).

   b. In the case of *Publix Super Markets, Inc. et al, v. Department of Financial Services, et al,* Case #23-00027, a group of carriers and self-insured employers challenged the mandatory authorization of dispensing practitioners in the proposed rules, with concerns over decreased patient safety and increased costs with physicians prescribing and dispensing. Organizations such as the Workers' Compensation Research Institute (WCRI) suggest through various data studies over the past decade that practitioner dispensing can be associated with changes in prescribing behavior, including use of different medications, more medications, and more expensive medications when practitioners prescribe and dispense. Anecdotal evidence from Florida carriers supports the notion that many practitioners dispense questionable topical medications, and often charge anywhere from hundreds up to $2,000 for cream and gels that are available either over the counter or at a pharmacy for a small fraction of the cost.

On March 27, 2023, a Final Order was entered by an Administrative Judge finding that the Division has rule-making authority to interpret the law to mean that injured workers have a free, full and absolute choice of wherever they wish to obtain their medication, including from an authorized treating physicians or practitioner registered to dispense medications in the office.. A timely appeal has been filed. All briefs submitted to Florida's First District Court of Appeals. The Court has scheduled Oral Argument for January 16, 2023.

3. Proposed Rules Related to Inpatient Hospital Costs

   a. Section 440.13(12), Florida Statutes, requires that the maximum reimbursement allowances (MRAs) for inpatient hospital care shall be based on a schedule of "per diem rates" to be approved by the three-member panel. The reimbursement schedule adopted by the three-member panel into the 2014 Hospital Reimbursement Manual

provided a certain amount per day for inpatient care, a "per-diem" MRA , but added a "stop loss" provision, which abandoned the per-diem MRA rate if the total hospital bill exceeds a certain amount. If the hospital billed more than this 'stop-loss threshold" the hospital would be reimbursed 75% of whatever the hospital chose to bill. An Order was entered by an Administrative Law Judge (ALJ) that the stop-loss methodology for reimbursing inpatient care was invalid, since it was not consistent with the statute that the bill must be based on a per diem amount. The ALJ concluded that the stop loss provision did not constitute a "per diem" billing rate and therefore, the stop loss provision was invalid. The ALJ's finding of fact, and conclusion of law were rejected by the Department, under the theory that the stop loss payment of 75% of total charges is 'based on' a per diem. Notwithstanding the administrative judge's opinion, the Division retained the per diem rate structure, which included the stop loss provision. The decision by the Division to retain the stop loss provision was appealed to the Florida First District Court of Appeals. *Zenith Insurance v. Department of Financial Services,* Case Number 1D2023-1346. Initial Briefs have been filed. Ralph Douglas with our Firm is handling this litigation.

b. Effective May 25, 2023, the department implemented a new Hospital Inpatient Fee Schedule which deletes the 'stop-loss methodology in favor of a system of exclusively Per Diem MRAs, set forth in the 2020 Hospital Reimbursement Manual. The Division approved the new 2020 Hospital Fee Schedule, utilizing per diem amounts in excess of those previously mandated. An appeal has been taken concerning the methodology utilized to establish the amount of the new per-diem rates. *Zenith Insurance v. Department of Financial Services,* Case Number 1D2023-1346. *Normandy Insurance Company, et al v. Department of Financial Services,* Case Number 1D23-0830. These new inpatient hospital rates apply to hospital inpatient care beginning on May 25, 2023. The First District Court of Appeals has yet to render an opinion in regards to the original per diem rate filings with the stop loss provisions and also the amounts of the new per diem rates and how they were established. Ralph Douglas in our firm is participating in this litigation.

4. Maximum Workers' Compensation Rate – Effective January 1, 2024

By Administrative Order entered by the Chief Financial Officer of Florida dated November 30, 2023, it has been ordered that the Maximum Medical Improvement rate for work-related injuries and illnesses occurring on or after January 1, 2024 shall be $1,260.

III. Judicial Branch

The following are summaries of cases decided by the First District Court of Appeals since May 2023 that relate to Workers' Compensation issues:

1. Friesen v. State of Florida Highway Patrol/Division of Risk Management
   48 FLW D1256
   2023-06-21

Claimant was a law enforcement officer seeking benefits under the "heart-lung" workers' compensation statute utilizing the presumption of compensability under Section 112.18, Florida

Statutes. The issue in this case was whether the claimant suffered a “disability,” a prerequisite for utilizing the presumption of compensability as indicated under Section 112.18, Florida Statutes. The claimant was entitled to the presumption of compensability since he was a designated law enforcement officer. In order to be entitled to the presumption of compensability, the claimant as a law enforcement officer must prove that he was disabled following the diagnosis of the medical condition that creates the presumption of compensability (in this case hypertension).

Following the diagnosis, the claimant's treating doctor did not take him out of work, assign work restrictions or refer the claimant to the hospital. The doctor only adjusted the claimant's medication, counseled him on obesity and lifestyle changes, and recommended a stress test. The claimant was also allowed to remain in the doctor's waiting room for 10 to 15 minutes for the medication as prescribed to take effect and lower his blood pressure.

JCC denied compensability of the claim filed by a law enforcement officer utilizing the presumption of compensability under Section 112.18, Florida Statutes, the “heart-lung” statute. JCC determined that the claimant failed to satisfy his "disability," a prerequisite for determining the compensability of an occupational disease utilizing the presumption of compensability under Section 440.151(1), Florida Statutes. On appeal, JCC's denial of benefits affirmed.

2. Dade County v. Guyton
   48 FLW 1500
   2023-08-02

This was a decision by the Third District Court of Appeals. Claimant suffered accident on the job and sought payment of workers' compensation benefits which were paid by the employer/carrier. Thereafter, the employer terminated the claimant's employment because of "long term absenteeism." Civil cause of action filed pursuant to Section 440.205, Florida Statutes, alleging that the claimant was terminated by reason of her valid claim for workers' compensation benefits following her on-the-job injury. Jury verdict returned in favor of claimant and this appeal was taken.

The basis of the appeal was that the court should have granted a Motion for Summary Judgment and Motion for Directed Verdict in favor of the employer prior to the case being referred to a jury for determination. Court determined that a directed verdict is proper only when the record conclusively shows an absence of facts or inferences from facts to support a jury verdict, reviewing the evidence in light most favorable to the non-moving party. The court determined that generally speaking, an employer does not announce or state in writing that it is discharging an employee because he or she has filed a workers' compensation claim. Accordingly, employee actions for a retaliatory discharge under Section 440.205, F.S., are often ill-suited for final disposition on a Motion for Summary Judgment. Court affirmed lower court's denial of Motion for Directed Verdict or Motion for Summary Judgment.

3. North Collier Fire Control and Rescue District v. Harlem
   48 FLW D1573
   2023-08-09

JCC entered order determining that the claimant's thoracic aortic aneurysm was compensable under the workers' compensation law based on the judge's conclusion that the

aneurysm constituted a "heart disease." This finding supported the application of the statutory presumption of compensability referenced for firefighters in Section 112.18, Florida Statutes. On appeal, court determined that a thoracic aortic aneurysm that resulted in the need for surgery was not deemed to be a "heart disease" as that term is used in Section 112.18, F.S. Relying on the presumption of compensability, no evidence was presented as to the relationship between the surgically repaired thoracic aortic aneurysm and the claimant's job. Accordingly, JCC's award of benefits reversed.

Relying on the case of *City of Venice v. Van Dyke*, 46 So. 3d 115(Fla. 1st DCA 2010), the JCC had determined that the ascending aorta was one of the structures of the heart and therefore the presumption applied. On appeal, the court determined that the decision in *Van Dyke* did not apply and any reference to the compensability of whether the aorta is a part of the heart and constitutes heart disease was purely dictum and without force as a precedent. The opinion also noted that the use of a dictionary definition to define a statutory term is not an effective interpretation approach for appellate purposes. Following several reviews of medical treatises, the court determined that the mention of "heart disease" almost universally referred to a medical finding that causes a weakening of the heart muscle itself and treatment that was to relieve the increased stress from some activity that could lead to a heart attack.

Dissenting opinion in significant part dealt with the necessity for an en banc ruling when panels of the court differ in the decision of identical issues. According to the dissent, "a three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an identical point of the law." Reference to the case of *Normandy Insurance Company v. Bouayad and Value Car Rental LLC* concerning en banc decisions.

4. Normandy Insurance Company v. Bouayad and Value Car Rental LLC
   48 FLW D1637
   2023-08-16

Claimant while on the job was shot 7 times at close range by an unidentified shooter. The parties stipulated that the shooting occurred in the course and scope of the claimant's employment with the employer (Value), the only issue in dispute was whether the injuries the claimant sustained from the shooting arose out of the work performed for Value. The JCC awarded benefits. Benefits were awarded notwithstanding the fact that there was no evidence as to why the claimant was attacked. On appeal, JCC's decision reversed.

To be compensable under the Workers' Compensation Act, an employee must suffer an accidental compensable injury arising out of work performed in the course and scope of employment. The "arising out of" element of proof refers to the origin or the cause of the accident and "in the course and scope of employment" refers to the time, place and circumstances under which the accident occurs. For an injury to arise out of and in the course of employment, there must be some causal connection between the injury and the employment or it must have had its origin in some risk incident to or connected with the employment or that it flowed from a natural consequence of the employment. It is the claimant's burden of proof to prove the requirements for a compensable accident being satisfied. In this case, the employer/carrier conceded that the claimant's injuries occurred in the course and scope of employment. There was no proof, however, as to why the shooting occurred satisfying the "arising out of" element of proof.

Once the injury/accident is deemed to have arisen out of employment and was caused by activity in the course and scope of employment, the burden shifts to the employer to prove that the major contributing cause of the injuries sustained was the accident. In this case, the accident was deemed to be non-compensable and accordingly, did not trigger the major contributing cause analysis.

In this case, the court determined that the shooting did not present evidence as to occupational causation for his injury and therefore benefits were denied. Chapter 440 does not cover workplace injuries; it covers work caused injuries. Mere presence at the workplace when an accident occurs is never enough, standing alone, to meet the "arising out of" prong in determining compensable claims. The facts establish only that the claimant was in the course and scope of employment when he was shot. The claimant, however, had to show that he was shot as a direct result of his working when the incident occurred (arising out of).

Case certified to Supreme Court to determine compensability when an act of a third party tortfeasor is the sole cause of an injury to an employee who is in the course and scope of employment. Motion for Rehearing en banc denied. See separate summary of opinion at 48 FLW D2045.

5. East Coast Waffles, Inc. d/b/a Waffle House v. Haselden
   48 FLW D1954
   2023-10-04

Claimant testified that he was having back complaints having worked an 18 hour shift for his employer. In response to these complaints, the employer's manager thought that manipulating ("popping") the claimant's back might relieve some of his pain. The claimant testified that he believed that his manager's manipulating or popping his back created the need for surgery following a diagnosed L4-5 disc herniation.

Court determined that manipulating the claimant's back by the supervisor did not constitute an injury that arose out of the claimant's employment. The claimant must prove that his injury was the result of an accident happening not only in the course of his employment but also arising out of that employment. There was no proof that working an 8 hour work shift was the cause of his back complaints. The claimant in fact had not pled this as the basis for his claim for benefits. Had he done so, the claimant would have needed to plead and offer proof that the injury was caused by repetitive trauma - a claim with a much higher burden of proof. To prove a repetitive trauma injury, the claimant had to show by clear and convincing evidence: 1) prolonged exposure, 2) the cumulative effect of which is injury or aggravation of a preexisting condition, and 3) that he had been subjected to a hazard greater than that to which the general public was exposed.

In regards to the claimant's supervisor manipulating his back causing injury, the court pointed out that Chapter 440 does not cover all workplace injuries but rather only covers work caused injuries. Occupational causation cannot be established based solely on a showing that but for the employee being at work, he would not have been injured in the manner and at the particular time that he was hurt. Meer presence at the workplace is never enough standing alone to meet the arising out of prong of the coverage formula, i.e., the back manipulation was not performed to support the claimant's duties for the employer.

6. Normandy Insurance Company v. Bouayad and Value Car Rental LLC
   48 FLW D2045
   2023-10-20

Order on Motion for Rehearing en banc. See summary of case in regards to decision of compensability of case. Motion denied with opinion summarized below. This summary also references the opinion by concurring judge denying motion for en banc review pursuant to the Florida Rules of Appellate Procedure 9.331(d). The case in chief had been certified to the Florida Supreme Court for review and that certification Request for Hearing had not been ruled upon by the Florida Supreme Court as of this summary. This opinion is in response to a review of the First District Court of Appeal en banc concerning the motion (i.e., review by the full District Court of Appeals as opposed to review by a three-judge panel of the court). The basis of the denial of the en banc review was that the case in chief did not depart from the plain language of the applicable statute or that the opinion of one three-member panel disagreeing with the opinions of another three-member panel.

The court ruled that a rehearing en banc is not mandatory and is a matter left to the discretion of the district Court. En banc rehearing may be authorized solely on the grounds that the case or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the courts' decisions. En banc rehearing denied in this matter.

What was troublesome in this court decision was the opinion of a concurring judge that determined that there is no legal basis upon which one panel of the First District Court of Appeals is required to accept a decision by another panel of the First District Court of Appeals. The concurring opinion in part stated:

> To be sure, a district court panel should respect the work of a prior panel of the court's constitutional judges - constitutional officers of equal judiciary dignity faithfully applying the law as they see it. Respect, though, is one thing; duty is another. Judges on the subsequent panel have the same duty to be faithful to the text of law (i.e., the constitution and statutes). If the subsequent panel, in its collective judgment, determines that there is a clear bonafide conflict between the prior panel's decision and the legal text, the panel has both the authority and the duty to choose the law over the prior panel's decision.

7. Siena v. Orange County Fire Rescue
   48 FLW D2075
   2023-10-25

Claimant, a firefighter, died of brain cancer and as such was entitled to receive benefits under Section 112.1816(2), Florida Statutes (medical care and a $25,000 payment). Upon his diagnosis of the cancer condition, he filed for benefits under Section 112.1816(2), Florida Statutes. When he died, a claim was filed for death benefits under the workers' compensation law and those benefits otherwise payable under Section 112.191(2)(a), Florida Statutes. The question in this case was whether the filing for benefits payable prior to the claimant's death precluded filing for death benefits under the Florida Workers' Compensation Act. Specifically, the question was whether the election of benefits under Section 112.1816(2), Florida Statutes, precluded the receipt of benefits under the Workers' Compensation Act.

Court determined that the receipt of benefits under Section 112.1816(2), Florida Statutes, upon the diagnosis of the cancer (medical care and $25,000 payment) would only disqualify the payment of workers' compensation benefits, if any, until the employee's death. Benefits payable under Chapter 112 only relates to firefighters' ability to obtain benefits, not their dependents or beneficiaries including the one-time cash payout (to the firefighter) upon diagnosis of his condition. Benefits payable under Section 112.1816(2) no longer apply once the firefighter dies from the cancer condition covered.

8. Gulf Management, Inc. v. Wall
   48 FLW D2253
   2023-11-29

JCC awarded claimant permanent total disability benefits pursuant to Section 440.15(1), Florida Statutes. On appeal, decision affirmed. Court determined that where a JCC has made "administrative findings" based at least in part on live testimony, the appellate court does not consider the evidence anew. Instead, the appellate assessment is whether someone reasonably could reach the conclusion the JCC did about certain facts when based on the evidence submitted. In other words, the appellate court does not re-weigh the evidence; that is a more subjective task reserved entirely to the fact finder. On appellate review, the court does not reconsider whether the record contains evidence which could be interpreted to support the arguments rejected by the JCC.

There are three ways in which entitlement to permanent total disability benefits according to the law in place prior to January 1, 1994. The three methods are: 1) evidence of permanent medical incapacity to perform even light work uninterrupted; 2) evidence of permanent work related physical restrictions coupled with an exhaustive but unsuccessful job search; or 3) evidence of permanent work related physical restrictions that while not alone totally disabling, do preclude performing light work uninterruptedly, when combined with other vocational factors. PTD could be proven by medical evidence that a claimant is unable to do light work uninterruptedly. The claimant could prove entitlement to PTD compensation through a combination of medical proof of a substantial permanent impairment and vocational evidence that the claimant is unemployable. The requirements for proof of permanent total disability as above noted are flexible, which are also a "holistic approach" to the evidence in assessing the sufficiency of proof in support of PTD. The categories of proof above referenced should not be read as being restrictive and do not operate as separate theories of "recovery."