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June 14, 2021

What's New In Our Industry

Florida

WORKERS' COMPENSATION

I. LEGISLATIVE ACTIONS

BILLS CONSIDERED BY THE FLORIDA LEGISLATURE AFFECTING WORKERS' COMPENSATION

For the past several months, we have been monitoring legislative actions in the 2021 session (and special session which had no relevance to workers' compensation issues) to determine what effect, if any, actions taken would affect workers' compensation (either directly or indirectly). As it turned out, very few bills affecting workers' compensation directly passed. Some that passed have indirect implications. Those bills that did not pass may be an omen of expected bills to be considered in the future. The following are summaries of the bills that passed and those that did not pass.

A. Bills That Passed

1. **CS for CS SB 366**. - This bill relates to "work based learning" (WBL) which applies to learning opportunities for students involved in such programs as internships, job shadowing, service learning, and pre-apprenticeships as sponsored by school districts and others. This education involves the student that actually goes to a workplace or works with an employer doing meaningful jobs that develop the student's skills, knowledge and readiness for work. Knowledge and skills are taught exclusively on-site with a business or industry partner instead of in a traditional classroom setting. The bill creates a provision in the law that encourages school districts to place students in paid work experiences for purposes of educational training in WBL. The program is known as a Work Credential Program designed to help or enhance the employability skills of Floridians and better prepare them for successful employment. A student 18 years of age or younger who is in a paid WBL position would be paid workers' compensation benefits, if due, from the employer where the accident occurred. For instances where the student is not being paid

who is under the age of 18, workers' compensation benefits would be paid by the sponsoring school district or Florida college system institution. Prior law stated that the State of Florida would be considered the employer. The Department of Education (DOE) subject to appropriations can reimburse employers, including school districts and state colleges, for the proportionate cost of workers' compensation insurance premiums for students in work-based learning opportunities in accordance with DOE rules. (Note that premiums for coverage can be reimbursed, not the actual workers' compensation benefits being paid out.)

2. **CS for CS HB 431 -** Relates to physician assistants practicing under the supervision of a licensed physician. The bill increases the number of physician assistants that can be supervised by a physician to 10. Previously only 4 could be supervised. Physician assistants may procure medical devices and drugs unless the medication is listed in a formulary created by Section 458.347(4)(f), F.S. The physician assistant's name, address, and telephone number and the name of each of his or her supervising physician must be on the prescribed medication. Except for a physician certified under Section 381.986, Florida Statutes, a physician assistant may authenticate any document with his or her signature or other endorsement if otherwise allowed by law which includes medical examinations required for the evaluation and assignment of the claimant's date of maximum medical improvement as defined by Section 440.02, F.S., and for an impairment rating, if any, under Section 440.15, F.S. A physician assistant may supervise a medical assistant. Third party payors can reimburse employers of physician assistants for services performed if the same service would have been covered if ordered or performed by the supervising physician. Physician assistants are authorized to bill for and receive direct payments for services performed. The bill removes the prohibition of physician assistants prescribing psychiatric medications for those under 18 years of age and removes the requirement that a physician assistant notify a patient that he or she has the right to see a physician prior to the physician assistant prescribing or dispensing a prescription. This new bill adopted by the Legislature might give the reader some idea as to the direction the physician community is going in regards to future billings under the workers' compensation system.

3. **SB 0308** - Amends Section 625.091, F.S., relating to losses and loss adjustment expense reserves for workers' compensation insurers annual statement and financial statement for unpaid losses and loss adjustment expenses. Requires such information (reserves) to be included in these statements with tabular reserves being reduced by a 4% discount factor for certain types of injuries.

4. **CS for SB 72** - The Legislature (as approved by the Governor) determined that for certain business entities, the public interest as a whole is best served by providing relief to businesses, entities, and institutions against being sued for Covid exposure claims/damages (civil liability). Before being able to file a valid civil cause of action against these individuals/companies for Covid related conditions, the complaint must allege with particularity the basis of such a claim and must attach an affidavit signed by a physician which attests to the physician's belief that the plaintiff's Covid-19 related damages resulted from the defendant's acts or omissions. If these two conditions are not complied with, the claim would be dismissed without prejudice. However, if these two requirements had been met, the court must make a determination as to whether the employer made a "good faith"

effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued. If the court determines that the defendant employer made such a good faith effort at compliance, the defendant is immune from civil liability. If the court determines there was no good faith effort at compliance with recognized standards, the plaintiff may proceed with a filed cause of action. However, it must be proved by the plaintiff that based on clear and convincing evidence that the defendant is guilty of at least gross negligence. The cause of action of a Covid-19 related condition must be submitted within one (1) year after the cause of action accrues or within one year after the effective date of the bill if the cause of action occurred before the effective date of the bill.

Similar grants of immunity are given to medical care providers unless the health care provider is grossly negligent or engaged in intentional misconduct. Affirmative defenses to such claims include: 1) substantial compliance with government based health standards or other standards; 2) substantial compliance with government-issued health standards specific to the infection disease in the absence of standards specifically applicable to Covid-19; 3) substantial compliance with government-issued health standards related to Covid-19 or other relevant standards was not possible due to widespread shortages of necessary supplies, materials, equipment, or personnel; 4) substantial compliance with any applicable government health standard related to Covid-19 or other relevant standards if the applicable standards were in conflict; 5) substantial compliance with government-issued health standards was not possible because there was insufficient time to implement the standards. A one-year statute of limitations is provided for in accordance with specifically defined dates. The terms of the provisions in the bill do not apply to claims governed by Chapter 440, F.S., the Workers' Compensation Act. The act applies retroactively and prospectively. However, it does not apply to a civil cause of action against a particular named defendant which commenced before the effective date of the act. (Approved by the Governor 3/29/21 – Chapter No. 2021-001.)

5. **HB 245** - Relates to massage therapy practices. The bill expands the scope of practice for massage therapy by authorizing a massage therapist to perform a massage therapy assessments to determine the course of massage therapy treatment. The bill authorizes a massage therapist to use his or her knee during the course of massage therapy treatment. Current law authorized a massage therapist to use his or her hand, foot or elbow during the course of massage therapy treatment. The bill also changes the term "massage" to "massage therapy" throughout the statute in order to standardize terminology.

6. **HB 1209** – Amends §284.31, F.S., to require the Insurance Risk Management Trust Fund covering all departments of the State of Florida to fund in a separate account firefighter cancer benefits payable under § 112.1816(2), F.S. Benefits payable under §112.1816(2), F.S., may not be paid from the fund until request for any out-of-pocket deductible, co-payment or co-insurance costs and one-time cash out has been validated and approved by the Department of Management Services.

7. **CS for SB 1080** - §569.11, F.S., which makes it unlawful for any person under the age of 21 years to knowingly possess any tobacco product, misrepresent his/her age for the

purpose of purchasing tobacco products, or misrepresenting military service to purchase tobacco products. The bill provides different punishments for different types of violations of this act. If a punishment includes community service and an accident occurs while performing such community service, the injured individual is considered an employee of the state for the purpose of Chapter 440, F.S.

B. Bills That Did Not Pass That Have Relevancy To Workers' Compensation (to Possibly be Considered in Future Sessions of the Legislature)

1. **CS SB 1390** – Relates to Corporate Investment Tax credit for intellectual property investments. Workers' compensation premiums could be considered a cost/deduction in the development of intellectual property constituting a tax credit.

2. **SB 1596, HB 1245, 1247** - Created a Florida Family and Medical Leave Act (FMLA). Benefits payable would run concurrently with the federal FMLA.

3. **SB 1724** - Technical changes to the Workers' Compensation Act in response to existing case law and related to: specificity of Petitions for Benefits; deletion of co-employee civil immunity based on exclusive remedy of the Workers' Compensation Act when employee and co-employee are engaged in "unrelated works"; when filing a claim for workers' compensation benefits, the injured worker must sign a statement that he/she is responsible for paying his/her attorney fees except in certain situations. Even if the employer/carrier pays for fees the claimant could still be responsible for paying additional fees; Maximum Medical Improvement (MMI) must be specifically stated in the petition if permanent benefits are claimed; there is a rebuttable presumption that the average weekly wage (AWW) chosen by the employer/carrier is correct; prior to filing a claim, the claimant must certify that a good faith effort was made to settle issues that are the subject of the claim and the JCC had jurisdiction to determine if such is the case; when multiple claims for benefits are made, 15 days prior to hearing, claimant's attorney must certify hours expended for each claim; attorney fees are not payable if benefits claimed are paid by the employer/carrier within 45 days after the petition is filed rather than 30 days which is the existing law.

4. **SB 820, HB 1183** - Related to the PEO industry and when leased employees are considered statutory employees of PEO.

5. **SB 846, HB 561** - Establishes the value of medical claims in third party claims filed by the claimant. Quantifies the value of such paid medical benefits when medicals have been paid or not paid by workers' compensation among.

6. **CS SB742, CS HB 815** - Establishes basis upon which workers' compensation rates are established to include employer experience within and without Florida.

7. **SB 1224, HB 1171** - Adds to the definition of "first responders" (creating increased benefits) 911 public safety telecommunicators and volunteers to such positions.

8. **HB 949, SB 1422, SB1314** - Amends §112.81, F.S., to add an "infectious disease" (Covid) to the list of medical conditions that are presumptively related to an individual's employment. (To be considered in the future??? It should be noted that on the federal level, HR 3114 is currently being considered which would provide a presumption of workers' compensation coverage and compensability for Covid-19 infection under the U.S. Longshore and Harbor Workers Compensation Act. The House of Representatives in Washington passed a provision in the American Rescue Plan Act of 2021 which created the presumption of compensability. However, the U.S. Senate did not approve such a provision.)

9. **SB 1458, HB 1305** – Establishes employer/employee relationships in certain situations where subcontractors are covered for workers' compensation purposes by a PEO. Creates dates when such individuals are considered employees of PEO.

10. **HB 1293, SB 1750** – Specifically excludes workers' compensation from definition of "litigation financing" as related to the Litigation Financing Consumer Protection Act.

11. **HB 1617** – Covid claims are presumptively related to an employee's employment. (See #8 above.)

12. **SB 660, CS HB 247** – Telehealth providers are permitted to prescribe controlled substances. Deletes prohibition on prescribing controlled substances.

13. **HB 1299** – Allows physician assistants to test for drugs in the workplace.

14. **CS SB 390** – Allows for market conduct examinations of pharmacy benefit managers by carriers. The examination is for the purpose of determining compliance with the provisions of the Workers' Compensation Act.

15. **HB 687, SB 160** – Allows for a "prescribing psychologist" to prescribe drugs used to diagnose and treat psychiatric disorders.

16. **SB 1460, HB 1489, SB 1676** – With additional training, chiropractor may prescribe medical oxygen and "articles of natural origin" and "legend drugs." Pharmacists can dispense articles of natural origin pursuant to an order from a chiropractic physician.

II. ADMINISTRATIVE ACTIONS-DISPUTE RESOLUTIONS

Dispute resolution in regards to Florida's out of control medical costs has taken "center stage" in the administration of the workers' compensation system by the Division of Workers' Compensation. Florida is unique in its handling of various disputes within its workers' compensation system. The failure to understand the "rules of engagement" when considering these different dispute processes have created devastating results for the unsuspecting claims handler/medical bill reviewer- a "misstep" creating significant losses and payment for services that go well beyond what reasonably should be paid. In recent years, knowledge of the different issue resolution procedures have been the focus of significant attention by the Division of Workers'

Compensation in an administrative setting, areas of attention oftentimes not being closely followed by industry. This newsletter will begin the process of updating you on agency actions being taken to respond to this growing problem.

Introduction

Florida's multiple dispute resolution processes depend on who the dispute is between in regards to workers' compensation issues. Until recently, the most regulated by statute or rules/ understood/misunderstood/subject to judicial interpretation is the system that relates to conflicts between injured workers and employer/carriers as to benefits payable to the injured worker, if any. Emphasis on these types of disputes has always been on early resolution between the parties beginning with a "good faith" effort to resolve the issues as quickly as possible. Final resolution oftentimes is by a Judge of Compensation Claims with possible appellate review. (Other procedures are available such as grievance procedures in a managed care arrangement or arbitration when legally allowed.)

Additional processes are provided when the dispute is between other players in the workers' compensation system. If the dispute is between the employer and carrier as to premium calculations, disputes are resolved through the Florida Workers' Compensation Appeals Board pursuant to rules established and approved by the Department of Financial Services with appellate rights and possibly the right to litigate in circuit (civil) court. If the dispute is between multiple carriers to determine which is responsible for the payment of benefits to an injured worker, there is a separate statutory procedure to resolve that dispute. Issues between employer/carrier and negligent third party tortfeasors are governed by still other statutory rules.

Resolution of Medical Bill Disputes Between The Payor (Employer/Carrier) and Medical Providers

The number-one issue of late requiring extraordinary administrative attention by the Division of Workers' Compensation relates to disputes between employer/carrier and medical providers (including pharmaceutical bills, hospitals, physicians, physician assistants, ambulatory surgery centers and others) over the payment of medical bills. Currently, there are many procedural "traps" requiring industry to pay excess costs in disputes between employer/carrier and medical care providers. It is absolutely incumbent upon industry to be an active player in the development of the rules for litigating payment for medical care, and to appreciate the fact that there are processes to be followed and substantive rules to apply in determining if bills should be paid in whole or in part.

Examples of Conflicts Between Payors and Service Providers

Under Section 440.13, F.S., the Division of Workers' Compensation has exclusive responsibility for determining the payment of medical bills when there is a dispute between the employer/carrier and the medical care provider as to reimbursement. The following representative examples are the types of cases that are being litigated administratively by the Division of Workers' Compensation utilizing current administrative procedures and those that are in the process of development.

1. The right of authorized doctors prescribing and dispensing drugs at dramatically increased costs regardless of previous instructions by the employer/carrier that the doctor could not dispense such drugs. An ALJ ruling, pursuant to Chapter 120, F.S., as adopted by the Division, has determined that physicians are not pharmacists which would otherwise allow the injured worker to choose the pharmacist. The Division seems to be taking a different position.

2. Excess billing for medication when compared to the costs of medication pricing through a PBM, non-practitioner dispensing, or if a generic over the counter equivalent or "near equivalent" is also available. Abusive billing when it appears that dispensing providers are changing their prescription habits to take advantage of more expensive drugs such as with proton pump inhibitors or anti-nausea medication or low-dose high pill count prescriptions of medication.

3. Physicians treating soft tissue injuries with drugs costing upwards of $5,000 per month when therapeutic equivalent drugs costing substantially less are available. For example, a recent billing from a medical care provider for standard Lidocaine 5% ointment was billed at $720.48. This was denied per peer review. You can now buy 5% Lidocaine OTC for about $15 to $20, a little more for a larger tube. Another example is the dispensing of Diclofenac Sol billed at $1,650.78. The bill was denied per peer review. $14 for the same size tube OTC with slightly lower strength could be obtained.

4. Prescribing medications that therapeutically are questionable and at the same time the efficacy of prescribing such treatment is questionable at best. For example, pain management doctors are beginning to prescribe Ketamine infusions for CRPS(RSD). Peer review determined this is very questionable in providing therapeutically appropriate medication and is very expensive.

5. Bill review for inpatient hospital stays utilizing the stop loss provisions of the reimbursement rules of approximately $59,000 and paying 100% of sums billed in excess of the stop loss amounts. An ALJ administrative ruling has determined that such stop loss provisions are not consistent with the law (i.e., even though the stop loss provisions are a part of the reimbursement schedule, such schedules are not consistent with the law).

6. Pharmacy and physician repackaged medications with the adoption of questionable re-pricing of medication methodologies.

7. Claim for reimbursement of medical bills when the employer/carrier failed to strictly follow the adopted rules of procedure, such failure precluding rights to contest payment of medical bills, in whole or in part. Similarly, failure to follow procedures by providers precludes payment of bills.

8. Overutilization of medical care (including frequency or duration of services) in accordance with Chapter 440, F.S., especially where no plan is in place related to standards of care and reporting such claims of overutilization to the Division.

9. Interpretations of Fee Schedules.

10. Pharmacy and physician repackaged drugs utilizing repricing methodology which results in excess costs.

Discussion of Administrative Actions Being Taken By the Division of Workers' Compensation

The above examples of pending Petitions for Resolutions are just a few of instances where the Division of Workers' Compensation is being called upon to adjudicate various conflicts that exist between employer/carriers and medical providers. According to the "2020 Results and Accomplishments Report" completed by the Division of Workers' Compensation, $1,703,006,383 was paid alone in 2019 in medical care payments in just 9 categories of medical treatments. Over 4,000 petitions to resolve conflicts between payors and providers are filed each year; so the chances of being involved in such litigation is high for the employer/carrier community. Accordingly, close attention should be given to compliance with current rules. It is likewise important to be an active "player" in overseeing new rules that are being developed as indicated below.

Planned Agency Action

Attached (Click Here) are recent notices of upcoming workshops that have been scheduled concerning medical bill payment procedures and reforms concerning procedures for resolving disputes concerning employer/carriers and medical care providers. If additional information is needed about current rules for adjudicating claims for reimbursement or particular rules for determining how much should be paid concerning specific claims for reimbursement, please contact our firm.

III. JUDICIAL

Attached (Click Here) is a summary of the cases that have been decided by the Florida District Court of Appeals since our last update.

Two cases are of some concern that deserve special attention.

Guifarro v. Valdez Group Corp., Civil case cause of action filed in the 11th Judicial Circuit in and for Miami-Dade County. Declaratory Judgment claim filed by attorney Richard Sicking of Coral Gables, Florida seeking to declare unconstitutional §440.13(3)(k), Florida Statutes, which precludes the payment of benefits under the Workers' Compensation Act for reimbursement of oral vitamins, nutrient preparations or dietary supplements. It is asserted that such limitations of benefits under the Florida Workers' Compensation Act are unconstitutional based upon the "Supremacy Clause" of the U.S. Constitution, Article VI, Clause 2; access to courts in violation of the Florida Constitution, Article I, Section 21; and the "Single Subject Matter" clause as referenced in the Florida Constitution, Article III, Section 6. This action to declare parts of the Workers' Compensation Statute to be unconstitutional is being filed in a circuit court proceeding as opposed to seeking relief through customary workers' compensation channels.

City of Bartow v. Flores, 301 So. 3d 1091 (Fla. 1st DCA 2020). Upon a written request to the employer/carrier, Section 440.13(2)(f), F.S., entitles an injured worker to a one-time change in physicians. The employer/carrier controls selection if the alternate physician is authorized within 5 days of the receipt of the request. However, the employer/carrier forfeits the right of selection if it subsequently fails to provide the alternate physician because of an unreasonable delay in acquiring an appointment date. Case certified to Florida Supreme Court as a Question of Great Public Importance. The Florida Supreme Court accepted jurisdiction. This is the first case that the "new" Florida Supreme Court has considered issues relating to the workers' compensation statute. The expected opinion by the Supreme Court will give some indication as to how the new Supreme Court is looking at workers' compensation issues.

Florida

I. CIVIL

Auto Claims - Court Ruling Limits Attorney Fees

South Florida Pan and Rehabilitation of West Dade v. Infinity Auto Insurance Company, 46 FLW D915 (Fla. 4th DCA 2021). The 4th Circuit of Florida has affirmed a county court decision: Auto insurers who have delayed payment of penalties owed (or postage costs) will not owe attorney fees on the delayed payment. Where the PIP statute allows for recovery of reasonable attorney fees expended in prosecuting a PIP lawsuit, the Court has limited those fees to attach only onto actual PIP benefits, not the penalties or litigation costs associated with the litigation.

In a prior Final Order, a county court denied a medical provider's request for attorney's fees in a personal injury protection ("PIP") action. In this action, the insurer timely rendered payment of benefits but denied payment of the penalty and postage pursuant to section 627.736(10)(d), Florida Statutes (2018), on the grounds that the insured's PIP benefits had been exhausted. The provider proceeded to file a demand letter requesting payment of the outstanding benefits payable including attorney fees. The insurer then filed a confession of judgment and paid the total amount owed in penalties and postage but not the provider's attorney's fees.

The provider moved to recover its attorney's fees pursuant to sections 627.736(8) and 627.428(1), Florida Statutes (2018). Section 627.428(1) provides that "[u]pon rendition of a judgment or decree by any of the courts . . . against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy" the insured is entitled to the recovery of reasonable attorney's fees expended in prosecuting the suit. Further, section 627.736(10)(d) provides that where an insurer renders payment of PIP benefits in a timely fashion it should not be liable for attorney's fees.

The county court denied the action to recover attorney's fees and the Fourth District Court of Appeal affirmed. The appellate court found that the provider's suit to recover penalties and postage did not entitle the provider to attorney's fees despite the insurer's confession of judgment. Payment of attorney's fees is triggered by the insurer's failure to timely pay PIP benefits and absent a policy provision stating otherwise, payment of penalties and postage do not constitute a PIP benefit. Here

the insurer timely paid the maximum amount of PIP benefits; therefore, sections 627.736(8) and 627.428(1) were not triggered.