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June 1, 2020

What's New In Our Industry

Florida

Workers' Compensation

I. Executive/Administrative Activity

A. Proposed Rule Changes/Workshop Announcements

On May 21, 2020, the Florida Division of Workers' Compensation gave notice of the development of rulemaking to be held on July 22, 2020 at 9:30 a.m. at 1579 Summit Lake Drive, Room 155, Tallahassee, Florida 32317. The previously scheduled workshop set for Wednesday, May 27, 2020 was cancelled and will be held on July 22, 2020 at the time and place above noted. (See previous newsletter concerning the subjects of the cancelled workshop on May 27, 2020.) The July 22, 2020 workshop will consider changes to: Rule 69L-7.710 FAC(Definitions); 69L-720 FAC (Forms Incorporated by Reference for Medical Billings, Filings, and Reporting); 69L-730 FAC (Healthcare Provider Medical Billing and Reporting Responsibilities); and 69L-7.740 FAC (Insurers' Authorization and Medical Bill Review Responsibilities). The subject matter to be addressed in the July 22 workshop is "the Medical Reimbursement and Utilization Review Requirements." On May 21, 2020, the Division of Workers' Compensation also announced the cancellation of the scheduled workshop on June 10, 2020. This workshop was rescheduled for Wednesday, July 15, 2020 at 9:00 a.m. EST at the above stated location. The workshop concerns amendments to 69L-31, FAC (Utilization and Reimbursement Dispute Rules).

The Division is also reportedly engaged informally in preliminary rulemaking in regards to Chapter 69L-56, FAC, which are the rules relating to the technical obligations of carriers/TPAs to file data and reports under the EDI rules.

All of the proposed rule changes are extremely important to the employer/carrier community as partially outlined in previous newsletters. We strongly recommend your participation. We will keep you advised as to the substance of any proposed rules. There has been a fair amount of public comment in regards to all of the proposed rule changes as above summarized and we anticipate that there will also be administrative litigation brought by one or more of the vendors to the workers' compensation system designed to block any cost containment

reforms. It is important to point out that the regulatory staff and the Division of Workers' Compensation are receptive to public comment by industry on all matters relating to proposed rules. They are also responsive to public questions to matters not currently in litigation.

B. Results of 2020 Rule Making Workshops/Hearings Held.

On February 4, 2020, the Florida Division of Workers' Compensation held a Rulemaking Hearing in Tallahassee related to proposed changes in certain sections of Rule 69L-3, FAC (workers' compensation claims). The changes are considered technical changes to correlate more closely with existing policy as indicated below:

1. Rule 69L-3.003 Procedures for Filing Documents

Currently, the carrier, claim administrator (or any entity acting on their behalf) must obtain a temporary Division-assigned numerical identifier of the employee for use on all filings if the social security number of the injured employee is not known. The carrier must obtain this number by emailing a request to: DWCAssignedNumber@myfloridacfo.com. The newly proposed rule requires the carrier's claim administrator, "or any other entity acting on behalf of the insurer," to officially adopt the employee's social security number for on all filings by filing the Form DFS-F2-DWC-4 ("Notice of Action/Change form") listing the social security number within 90 days of obtaining the correct social security number.

The claims administrator must also notify the employer and employee by copy of the DWC-4 or an "explanatory letter" of its disclosure and use of the social security number. This change requiring notice and use of the social security number applies to all aspects of claim handling, bill review and electronic data reports and filings with the Division.

It is also noteworthy that the addition of language such as "or any entity acting on behalf of the insurer," serves notice to all carriers, servicing agents or "claim handling entities" that they will be deemed by the Division to be subject to regulatory penalties for all claim handling activities, regardless of who performs them.

2. Rule 69L-3.0035 Injured Worker Informational Brochure

This proposed revision provides minor grammatical changes to the existing rule, which requires the claim administrator to "mail" a copy of the Workers' Compensation "Employee Rights" or "Employee Facts" brochure to the injured employee within 3 business days of receipt of a Notice of Injury. The form, identified by DWC-60, or its Spanish counterpart, DWC-61, has also received technical revisions to include deletion of any reference to the "maximum temporary disability benefits of 104 weeks," as a result of the Westphal v. City of St. Petersburg, 194 So. 3d (Fla. 2016) decision of the Florida Supreme Court, rendered on June 6, 2016. In that decision, the Court determined that the 104 week limit on temporary disability, set forth in s.440.15, Fla. Stat. is unconstitutional, but that the prior statutory "cap" of 260 weeks of temporary disability remains constitutional. The "5 year cap" on temporary disability benefits is now in effect by Court decree.

3. 69L-3.0195 Temporary Partial Disability Benefits

The existing rule requires the claims administrator to mail an informational letter to the injured employee within 5 business days of receipt of knowledge that the employee has been released to work. This letter must explain the employee's eligibility for temporary partial disability benefits, as well as the employee's obligation to report to the claims administrator any earnings received by the employee during this period of eligibility. (Typically, the claims handling entity also mails the DWC-19 Employee Earnings Reports to the employee with this letter.)

While retaining language relating to the "maximum number of weeks of Temporary Partial Disability benefits," the rule and proposed language for the employee letter deletes reference to the maximum benefits of 104 weeks, which was repealed by the decision of the Florida Supreme Court in Westphal v. City of St. Petersburg. (See above.)

4. 69L-3.025 (Official Forms)

The former "DWC-1) or First Report of Injury, has been replaced by the newer form designated DFS-F2-DWC-1. The first page of the form remains substantively the same. The second page has been reformatted. A new line has been added to require the Social Security or FEIN on page 2, just before an entirely new paragraph entitled: "Privacy Statement"

The new Privacy Statement outlines the mandatory reporting of the social security number to the Division of Workers' Compensation for internal use, and the specific statutory exemption of this disclosure from HIPAA Privacy protections under 42 USC ss. 402 and 423, as well as s.440.185(2), Fla. Stat. Nonetheless, the privacy statement acknowledges that the social security number remains exempt from all public records disclosure under s.119.07, Fla. Stat. (You can expect that the social security numbers will be, and should be, redacted from public view on all Petitions for Benefits uploaded to the OJCC docket.

If you would like copies of these proposed amendments, please let us know.

II. Judicial Activity

A. Effect of Covid-19 on WC Litigation

The Florida Deputy Chief Judge for the Office of Judges of Compensation Claims continues to monitor data showing the effect of the Covid-19 virus on workers' compensation claims filed and other litigation issues.. Comparisons are being made using data from the first quarter of calendar year 2020 to the same time periods in 2019. Comparisons are also being made between April, 2020 (the month in which the virus became so prominent in Florida) and April, 2019. The following is a summary of the judge's findings:

1. Evidentiary hearings decreased in April likely due to Covid-19.

2. The trial continuance volume in April is also likely related to Covid-19. In April, 2020 alone, there was a decrease of 52% in hearings due to continuances as compared

to the previous year's April continuances.

3. There has been a significant decrease in mediation continuances (minus 35%) which is likely related to relaxation of other time demands such as trials and depositions. (Some suppose that the convenience of telephonic appearances influence the 35% reduction in mediations.)

4. Settlement order volumes appear not to have been affected by Covid-19.

5. Mediations ending in an impasse have demonstrated increases overall. The increase in impasses for April, 2020 is notably less than the increase in the first quarter of 2020.

Should a copy of these findings be needed, please let us know. It should be noted that the data comparisons made by the Office of the Judge of Compensation Claims compares data for "fiscal year" comparison which is the first calendar year quarter.

B. <u>Effect of Covid-19 on New Petitions Filed</u>

Prior to January, February and March of 2020, there had been an increase in the number of petitions being filed for benefits, consistent with prior periods. Beginning in March and April, 2020, however, there was a showing of a pronounced decrease in filed petitions, strongly suggesting that the Covid-19 pandemic caused these decreases. Overall document filings for March and April, 2020 were markedly lower than expected as compared to previous months. Again, it is expected that these decreases were in significant part caused by the Covid-19 virus.

If additional information is needed or if the actual data is needed, please advise.

C. <u>Covid-19 Cases Affecting Judicial Findings</u>

The first litigation concerning the Covid-19 disease's effect on judicial findings was the case of *Gamero-Hernandez v. Bealls* decided by Judge Arthur in Lakeland. In that case, the claimant had suffered a compensable accident. Maximum medical improvement had not been reached, and the claimant had been placed on light duty employment by the authorized doctor. A claim for temporary partial benefits was filed. The employer/carrier defended the claim asserting that because of the Covid-19 virus, the employer's business had been closed and there was no job that could be offered to the claimant. Temporary partial benefits were ordered notwithstanding the fact that the employer's business was closed for reasons unrelated to the claimant's accident on-the-job. The judge concluded that once a claimant presents a prima facie entitlement to temporary partial benefits, the burden of proof shifts to the employer/carrier to show that the claimant unjustifiably refused gainful employment or was terminated for misconduct. Neither of these two defenses were pled or proved and accordingly, temporary partial benefits were deemed to be payable. The claimant had proved a prima facie entitlement to temporary partial benefits.

III. Legislative Activity

Legislative attention to workers' compensation issues to a large extent has not yet been the center of discussion in 2020. If the data produced by NCCI on the state of the industry for ratemaking purposes continues to be the basis of legislative reform (see below), one would expect another premium rate reduction for 2021 and a corresponding reaction by legislative leaders that no reform is needed. However, we are of the opinion that judgment for the need for change should be based on all factors suggesting the need for legislative attention including the effects of the Covid-19 virus on the payment of unexpected claims, the need for close attention to the spiraling medical costs, investment income for the employer/carrier industry is reduced as a result of economic downturn including reduced premium volume nationwide caused by Covid-19, and the seeming never-ending increases in litigation expenses. As the legislative session approaches in 2021, there will be a closer review of all needed changes.

IV. Miscellaneous Activity

A. NCCI Prices Covid-19 Claims

In April, 2020, NCCI presented a "white paper" on the effect that the Covid-19 virus has had on workers' compensation. According to this report, NCCI stated that "this document (white paper) is being provided as a tool which may be used to gain insight into potential implications of the state exacting legislation related to the compensability of Covid-19 related claims in certain occupations." Estimates of costs were considered for first responders, healthcare workers, and all workers . . . . NCCI believes "this (report) is a valuable analytical tool that will assist in understanding the potential Covid-19 impact as individual state proposals continue to emerge related to workers' compensation coverage." If you would like a copy of this white paper report, please let us know. This white paper report may be of some assistance in establishing reserving for individual Covid-19 cases, making decisions on determining if such cases should be accepted as compensable, and possibly for underwriting purposes.

B. NCCI's "State of the Line Report"

At the annual NCCI Conference (AIS Virtual) on May 12, 2020, a report was made as to the state of the workers' compensation industry in 2019 as compared to previous years (data relates to NCCI states). According to the Chief Actuary for NCCI, the workers' compensation industry had another good year in 2019. For the calendar year 2019, the combined ratio was 85% nationally for private carriers. On an accident year basis, the combined ratio was 99%. This was the 6th straight year that the workers' compensation line of business posted an underwriting gain. Other findings of relevance were:

- Total written premium volume for the workers' compensation line declined between 2018 and 2019 to $27 billion.
- During 2019, on a preliminary basis, lost time claims frequency across NCCI jurisdictions declined on an average of 4% from the prior year.
- During 2019, on a preliminary basis across NCCI jurisdictions, the average accident year

indemnity claim severity increased by 4% as related to the prior year. Medical lost time claims severity increased by 3% on average.

In regards to the Covid-19 Pandemic and resulting economic fallout on the workers' compensation industry, the Chief NCCI Actuary stated that the "workers' compensation system faces a significant uncertainty because of the Covid-19 Pandemic and resulting economic fallout. Covid-19 is a shock to the industry, impacting almost every aspect of workers' compensation." The actuary did conclude, however, that she was confident the system will respond effectively.

C. Carrier Conduct During Covid-19 Crisis

The Office of Insurance Regulation issued Informational Memorandum OIR-20-04M on March 25, 2020 which in part concerns the workers' compensation industry. The memorandum encouraged carriers, when prudently possible, to be flexible with premium payments in order to avoid a lapse in coverage. Carriers were encouraged to only consider cancellation of a policy if all possible efforts were made to work with consumers to continue coverage had been exhausted. Carriers were also strongly encouraged to explore virtual options for underwriting and adjusting claims in lieu of in-person premium audits or employers' records. The Office of Insurance granted a 30-day extension for the filing of annual statements due to be filed with OIR.

D. Workers' Compensation Conferences Postponed

Both the Florida and Georgia Workers' Compensation Conferences have been postponed until 2021 as a result of the Covid-19 Pandemic. The only exception to this relates to the series of planned Cybersecurity breakout sessions that had been planned as a part of the Florida conference. These sessions will continue live at the Marriott World Center in Orlando, August 19 and 20, 2020. Because of the urgency for industry to understand new cybersecurity standards effective 2020 and the frequency of cybersecurity breaches occurring (regardless of industry), the Workers' Compensation Institute felt that under the current situation, it was essential to get this new information publicized as quickly as possible. For additional information about these seminar offerings, please refer to www.wci360.com.

Georgia

Workers' Compensation

I. Executive/Administrative

How to Progress Cases Despite COVID-19 Roadblocks
By: Caitlin Beyl and Hanna Williams

While COVID-19 has brought many challenges, it is important that we do not let medical progress to injured workers stall for an extended period of time. This is a great time to take advantage of the recent expansion of the WC-PMT.

The Georgia State Board of Workers' Compensation has expanded the use of the Petition for Medical Treatment ("WC-PMT") for the failure of a claimant to attend a medical appointment. Pursuant to Rule 205(c), employers and insurers can now file a WC-PMT(b) to petition the Board for a telephone conference with an administrative law judge ("ALJ") during which the claimant must "show cause" why an order should not be issued directing the claimant to attend an appointment with an authorized treating physician.

An Employer/Insurer must be able to show that the claimant was provided with at least five days' advance notice of the appointment.

In lieu of participating in the telephone conference, the claimant can file a response agreeing to attend the at-issue appointment. This is a "win" for both sides.

If the injured worker fails to attend the next scheduled appointment after agreeing to attend or being ordered to attend, employers and insurers can file an additional WC-PMT(b) requesting a suspension of benefits. Upon filing this WC-PMT(b), a conference call with an ALJ will be scheduled and the injured worker must show cause why an order should not be issued suspending income benefits.

Prior to this rule change, employers and insurers were required to file a motion or a hearing request seeking a claimant to comply with medical treatment. This new WC-PMT(b) rule streamlines and shortens this process.

While the ALJs are sensitive to injured workers' concerns over attending live appointments, this is a great tool to use when an injured worker refuses to attend an appointment via telemedicine. It has been our team's strategy to encourage continued claim progress despite the difficult climate. We regularly conference with our authorized treating physicians and monitor medical progression.

Florida

Civil

Expert Medical Testimony and the Daubert Standard
By: Hayley Fulmer

The Florida Rules of Civil Procedure defines an "expert witness" as a person regularly engaged in a profession's practice who holds a professional degree from a university or college and has had special training and experience, or someone possessed of special training about a given subject. Medical experts must be qualified to express their opinion. Although doctors cannot give expert opinions in all fields of medicine, doctors may provide expert testimony if he or she possesses sufficient training, experience, or knowledge.

For instance, Florida courts have held that an orthopedist was qualified to provide an expert opinion on chiropractic care, that a forensic pathologist could render expert testimony about forensic odontology, and that a pediatrician could opine about a neurosurgeon's standard of care.

Spears v. Gates Energy Products, 621 So. 2d 1386 (Fla. 1st DCA 1993); Alston v. State, 723 So. 2d 148 (Fla. 1998); Myron v. South Broward Hosp. Dist., 703 So. 2d 527 (Fla. 4th DCA 1997). However, courts have also found that a mental health expert was not qualified to testify about a gun's location and that physicians lacking emergency room experience could not testify about an emergency room physician's standard of care. Holland v. State, 773 So. 2d 1065 (Fla. 2000); Franklin v. Public Health Trust of Dade County, 759 So. 2d 703 (Fla. 3d DCA 2000).

In addition to being qualified to provide an expert medical opinion, medical experts must serve the court in determining a relevant fact or issue. Expert medical testimony is designed to assist the court in understanding evidence in areas that are not of common knowledge. In essence, the trial court serves as a gatekeeper in ensuring the reliability and relevance of expert testimony. In the last decade, the Florida Legislature and Florida Supreme Court have been engaged in a debate on how trial courts act as gatekeepers. In 2013, the Florida Legislature adopted the Daubert standard but the Florida Supreme Court later rejected the standard in 2017 and held Frye was the standard for the admissibility of expert testimony. However, in a reversal, the Court adopted the Daubert standard as a procedural rule in 2019.

The Frye standard evaluates whether an expert opinion has "gained general acceptance in the particular field" to which the expert is testifying. In effect, a trial judge when reviewing a medical expert's testimony would assess whether their testimony is aligned with "general acceptance" in their medical field. However, the Daubert standard does not solely rely on "the general acceptance in the medical field" standard. Instead, under the Daubert considerations, multiple factors are considered. These factors include if: (1) the expert has specialized knowledge that will help a trial court understand the evidence or determine a fact in issue; (2) the testimony is based on sufficient facts or dates; (3) the testimony is the result of reliable principles and methods; and (4) the expert reliably applied the principles and methods to the facts of the case.

The Florida Supreme Court noted that its adoption of the Daubert standard created consistency between the state and federal courts, promotes predictability in the legal system, and helps lessen forum shopping. However, opponents note that Daubert's implementation imposes unnecessary burdens on judges and lawyers and increases expenses and delays in the judicial system. The last decade has seen many exchanges between the Frye and Daubert standards but the debate seems to have settled for now. We will continue to closely monitor the various rulings by the courts.

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