



1709 Hermitage Boulevard, Suite 200 ▪ Tallahassee ▪ FL ▪ 32308
jnmcconnaughay@mcconnaughay.com ▪ T (850) 222-8121 ▪ F (850) 222-4359 ▪ www.mcconnaughay.com

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What's New In Our Industry Florida

Executive/Administrative

Proposed Rules Relating to Physicians Prescribing and Dispensing Medications

The Florida Division of Workers' Compensation issued Proposed Rules 69L-7.730 and 7.740, FAC in substance mandating that treating physicians have the authority to prescribe and dispense medication for injured workers subject to the Workers' Compensation Act. Unquestionably, a physician authorized by the employer/carrier can prescribe medication that is medically necessary for the treatment of the injured worker. The rule changes proposed by the Division, however, concern whether the employer/carrier can deny to the authorized doctor the right to dispense medication that is prescribed by the doctor.

Without going into a detailed discussion of the various legal arguments of the parties, it is the position of the Division that the choice of a "pharmacy" to dispense medication is that of the injured worker and if the injured worker chooses to obtain his medication from the doctor that prescribed it, the employer/carrier could not object to this decision. Since the doctor is legally allowed to dispense medication, this makes him/her a pharmacist and therefore if the injured worker chooses the doctor to dispense, this cannot be objected to by the employer/carrier. See Section 440.13(j), Florida Statutes. It was the position of the employer/carrier that the prescribing doctors are not "pharmacies" and the choice of the drug dispensing was dependent upon the authorization of the employer/carrier.

A hearing was held in regards to the proposed rule changes on February 23, 2023. Ralph Douglas with the McConnaughay firm represented the employer/carrier interests. Proposed Orders are due on March 13, 2023 following which the Order by the Administrative Law Judge will be entered.

Legislative

The Florida Legislature began its 2023 Session on March 7, 2023. According to the Legislative Calendar, the last day for filing proposed bills for consideration by this year's session was March 7, 2023.

The following bills have been filed with the Legislature and are directly or indirectly related to workers' compensation. If copies of the actual bills are required, please contact Jim McConnaughay at jnmcconnaughhay@mcconnaughhay.com.

House Bill 1509; Companion Bill Senate Bill 1550 – Prescriptions dispensed by prescribing Medical Providers. The intended substance of this bill appears to relate to the same subject being considered in the pending administrative litigation as summarized above concerning the propriety of efforts being made to label a drug dispensing physician as a “pharmacist” or “pharmacy” allowing for injured workers to choose, (no doubt marketed by others), where prescribed medication should be dispensed in accordance with Section 440.13(3)(j), Florida Statutes. In other words, the treating practitioner would be allowed to prescribe and then dispense the same medication as if the medical practitioner is deemed to be a pharmacy or pharmacist. The genesis of this issue began with an administrative decision in the case of *In the Matter of Todd Alea, MD, Case No. 122698-11-WC* adopted by the Department as a Final Order on August 31, 2012. The issues in the *Alea* case are exactly what is being litigated in the above summarized administrative rule challenge. The judge in *Alea* determined that just because a dispensing practitioner (physician) has a legal ability to dispense medication in limited circumstances, this does not make the dispensing practitioner a pharmacy or pharmacist. Section 465.0276(1)(a), F.S., distinguishes between a pharmacist and a dispensing practitioner mainly based on the fact that a pharmacist needs a license to dispense medication and a dispensing practitioner does not but only in very limited circumstances. The bill in this instance describes a “pharmacist” in an extremely broad manner, disregarding the need for professional standards required of a licensed pharmacist/pharmacy in the dispensing of medication by creating a third entity (“pharmacy benefit manager”) for the dispensing of medication (a pharmacy and a dispensing practitioner being the other two) thereby allowing an injured worker to choose the prescribing physician to dispense the exact same medication that he/she prescribed. Basically, the treating practitioner, if this bill is approved, becomes the prescriber and dispenser of medication, a built in conflict of interest. Regulatory oversight is provided for in the bill but according to **Senate Bill 1552**, such regulatory findings are confidential since information that can be obtained represents “trade secrets.” According to **Senate Bill 1552**, “the legislature finds that it is a public necessity to make such trade secret information contained in the records of pharmacy benefits manager confidential and exempt from public record requirements.” **See also SB 1638 and HB 203.**

The effects of allowing for physicians to prescribe and dispense medications can best be determined by a review of recent studies made by the Workers' Compensation Research Institute in its June 2022 report “Interstate Variation and Trends in Workers' Compensation Drug Payments: 2018Q1 to 2021Q1.” This report examined state trends in the payment for prescription drugs for the time periods referenced, excluding Covid claims. For Florida, it was determined that prescription payments per medical claim increased by 17%. For a majority of the states studied, prescription costs decreased by 15% or more. The increases in Florida “were largely due to an increase in physician dispensing of higher priced dermatological products.” Of the 28 states studied, Florida had the highest percentage of drugs prescribed and dispensed by doctors which unquestionably resulted in the increase in drug costs in Florida. In 5 states studied, physician dispensing is not allowed and only minimal increases in prescription costs was observed (0-2%). By allowing for even more physician prescribing and dispensing of medication as would be permitted if this bill is passed, it is reasonable to assume that even more increased prescription costs will result.

House Bill 337 - Post-Traumatic Stress Disorder (PTSD) 911 Public Safety Telecommunicators and Crime Scene Investigators - PTSD is compensable under the Workers' Compensation Law as an occupational disease if such condition results from described traumatic events experienced by 911 public safety telecommunicators or crime scene investigators. The diagnosis of PTSD must be demonstrated by clear and convincing medical evidence. No physical injury is needed to make this condition compensable and there are no limitations of benefits payable. Notice of Injury by the injured worker is measured from the date of the traumatic event that caused the PTSD or the date the diagnosis of PTSD is made, whichever is later. A claim must be filed within 52 weeks after the qualifying event. The employing agency must provide educational training related to these qualifying employees which must contain mental health awareness, prevention, mitigation, and treatment.

Senate Bill 436 - 911 Public Certified Safety Telecommunicators and Public Safety Telecommunicators - Adds 911 public safety communicators to the list of firefighters, paramedics, emergency medical technicians and defines when they are considered on the job as provided for in Section 112.1815, Florida Statutes. In the situation of PTSD, provides that PTSD is deemed to be an occupational disease if caused by certain traumatic events resulting in such diagnosis. Amends Public Safety Telecommunicator Certification requiring at least 6 hours of telecommunicator cardiopulmonary resuscitation training; provides that a 911 public safety communicator is considered on the job when performing dispatch functions for an emergency medical condition or performing telecommunicator cardiopulmonary resuscitation in an emergency situation in this state even though such care is provided outside of the employer's jurisdiction or area of responsibility. This section does not apply if the 911 public safety communicator is performing activities for which he or she is paid by another employer or contractor.

House Bill 1299 - Health Care Provider Witness Fee; Maximum Fee Schedule - The amount charged by a health care provider who gives a deposition shall be allowed to charge an expert witness fee is increased to \$300 per hour. An expert witness who has never provided direct professional services to a party but merely reviewed medical records and provided an expert opinion may not be allowed a witness fee in excess of \$300 per day. This bill amends the maximum reimbursement amount for all physicians to be increased to 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. (Includes providers that perform surgery.) See also **SB 1344**. Note: Pursuant to Section 120.541(3), F.S., an agency rule must be ratified by the Legislature before it becomes effective if the rule increases regulatory costs in excess of \$1 million over a five-year period.

Senate Bill 240 - Work Based Learning Programs (Florida Ready to Work Credential Program) (WBL) - For injuries associated with students involved in WBL programs, reimbursement for workers' compensation insurance premiums in those situations where a school district or Florida College system is considered the employer of such students, provides for the submission of an appropriation to the Department of Financial Services for reimbursement of workers' compensation premiums paid to cover those employers. Such application for reimbursement of workers' compensation premiums paid would apply to the actual employer where the injured worker was injured or the sponsoring school district or Florida college system institution that is considered the employer.

House Bill 481 – Physician Assistants Prescriptive Authority - Amends various statutory provisions by removing restrictions on physician assistants and others to prescribe and dispense medications.

CS for Senate Bill 314 – Mental Health Counseling for First Responders, Correctional Officers and Correctional Probation Officers - An employing agency for a first responder (law enforcement officer, firefighter, emergency medical technician, paramedic, and volunteer first responder) correctional officers and correctional probation officers must pay for up to 12 hours and if needed an additional 24 hours (maximum cost of \$500 per hour) of mental health counseling by a licensed mental health professional in person or through telehealth. These counseling requirements are for such individuals that have experienced a listed event that could be the basis for an award of workers' compensation benefits based on a diagnosis of PTSD. The provision of such counseling does not create a presumption that the employee suffered a compensable occupational disease as provided for under the Workers' Compensation Act. The employee selects the licensed mental health professional from a list of qualified professionals provided by the employing agency. This counseling is in addition to and separate from any benefits already being provided by an employer-sponsored health plan or group health insurance trust-fund. The employing agency may not require affected employees to use his or her accrued annual or vacation leave, personal leave or sick leave if the first responder's licensed counseling is scheduled during his or her established work hours. Beginning on March 1, 2024 and annually thereafter, the employing agency for affected employees shall submit a report to the Chief Financial Officer providing certain information including the total number of employees who participated in the program and who subsequently filed a workers' compensation claim. **See HB 291.**

House Bill 837 – Attorney/Client Privileged Communications; referral by attorney to doctors Amends Section 90.502(4), Florida Statutes, providing that there is no lawyer-client privilege concerning a communication between a lawyer's act of referring a client for treatment by a health care provider. Part of Civil Justice Reform Act, the majority of which has no application to workers' compensation.

House Bill 203 – Clinician Administered Drugs - Defines a "pharmacy" as a pharmacy licensed under Chapter 465 to dispense drugs to patients located in the state of Florida. Section 465.0276(2), Florida Statutes, provides for the dispensing of medication by medical practitioners through registering their status as a dispensing practitioner. Pursuant to Section 440.13(3)(j), F.S., the injured worker is entitled at all times to free, full and absolute choice in the selection of the pharmacy or pharmacist dispensing or filling prescriptions for medicines required under this chapter. By the adoption of this bill, an argument could be made that a dispensing practitioner is indeed a pharmacist to be chosen by the injured worker in the dispensing of medication. The bill relates only to "clinician administered" drugs and specifically states that an insurer may not limit the patient's rights to obtain the drugs from a participating provider. The bill could be amended to include all drugs; accordingly close attention should be given to its status. **Companion Bill SB 1638.**

House Bill 1447 – Funding Litigation through Assignment of Benefits - Non-Applicability to Workers' Compensation - Defines "litigation" financier as a situation where a litigation financier provides funds to a consumer in exchange for an assignment of the consumer's contingent right to

receive an amount of the potential net proceeds of the consumer's civil action or claim. Such an assignment of a contingent claim does not apply to workers' compensation matters.

House Bill 487 - Department of Financial Services-Multiple changes - (The following changes directly relate to and concern Workers' Compensation issues.)

The substance of the bill extends the authority of the Division of Investigative and Forensic Services to conduct criminal investigations into any matter under the jurisdiction of the Chief Financial Officer. The Bureau of Workers' Compensation Fraud within the Division is responsible for investigating workers' compensation fraud cases. This extension of jurisdiction includes any board or commission which the Department or Chief Financial Officer has appointment authority. This bill amends Section 440.13, Florida Statutes, deleting the responsibility of the three-member panel and Department to set maximum reimbursement allowances under the Workers' Compensation Act for physicians, work hardening programs, pain programs, and durable medical equipment. The three-member panel would only be responsible for setting the maximum fee schedules for inpatient and outpatient hospital costs (hospitals) and ambulatory surgical centers (ASC). In addition, the reimbursement would be based on the agreed upon contract price or if there is no such contract, the maximum fee amount or the amount billed by the provider, whichever is less. Current law does not include the "whichever is less" language. Maximum reimbursements for physicians remain 110% of the reimbursement allowed by Medicare, using appropriate codes and modifiers, and for surgical procedures, 140% of the reimbursement allowed by Medicare is payable. Fee schedules for pharmaceutical drugs are not a part of maximum fee amount. (Maximum costs for prescriptions would be provided for under the current law.) In determining the maximum amount chargeable by hospitals and ASCs, the three-member panel considers various criteria including the maximum allowable rates of increases for hospitals determined by the Health Care Board under Chapter 408, Florida Statutes. This requirement has been deleted by this amendment, as this board is obsolete. Any reference to the need for medical providers to follow the practice parameters and protocols adopted by the United States Agency for Healthcare Research and Quality in effect on January 1, 2003, is deleted from the statute, as these practice parameters and protocols are no longer in existence.. Chapter 440.385, Florida Statutes, related to the Florida Self- Insurers Guaranty Association is amended to reflect organizational changes within the Guaranty Association primarily including those related to the board of directors. Numerous changes remain in this bill to other lines of insurance not applicable to workers' compensation. Those changes have not been summarized. THIS PROPOSED BILL BASICALLY TAKES THE THREE MEMBER PANEL AND THE DEPARTMENT OUT OF THE PROCESS FOR DECIDING PHYSICIAN REIMBURSEMENTS. STATUTORILY, THE MEDICARE STANDARDS ARE USED FOR SUCH DETERMINATIONS. DOES THIS INCLUDE THE MEDICARE AND DEPARTMENT INSTRUCTIONS FOR INTERPRETING THE CODES AS WELL AS THE CODE REIMBURSEMENTS/AMOUNTS? CAN MEDICAL PROVIDERS BE DEFINED IN SUCH INSTRUCTIONS AS PHARMACISTS? CAN THERE IN ANY WAY BE DEVIATIONS FROM THE MEDICARE PRICING STANDARDS IF THE PROVIDERS AND/OR EMPLOYER/CARRIERS REQUEST A CHANGE IN RATE STRUCTURES?

THE STATUTORY PROPOSALS TAKING THE THREE MEMBER PANEL AND THE DEPARTMENT OUT OF ESTABLISHING PROVIDER REIMBURSEMENTS EXCEPT FOR REPORTING MEDICARE REIMBURSEMENT AMOUNTS MAY CREATE UNINTENDED RESULTS. WOULD THIS INCLUDE CHANGES/ADDITIONS THAT ARE CURRENTLY BEING MADE BY THE DEPARTMENT INTERPRETING THE MEDICARE

REIMBURSEMENT AMOUNTS AS RELATED TO THE FLORIDA WORKERS' COMPENSATION REIMBURSEMENTS? DOES TRANSFERRING MAXIMUM REIMBURSEMENT AMOUNTS PAYABLE TO PROVIDERS IN THE WORKERS' COMPENSATION SYSTEM WITHOUT INPUT FROM THE LEGISLATURE OR THE DEPARTMENT CONSTITUTE AN UNCONSTITUTIONAL TRANSFER OF POWER? FURTHER INQUIRY IS NEEDED TO DETERMINE THE EXACT REASONS FOR THE REQUESTED LEGISLATIVE LANGUAGE. See **SB 1158**.

Senate Bill 364 - Law Enforcement "Respecting the Sacrifice of Law Enforcement Officers Act"
This bill allows for the head of a law enforcement agency to grant administrative leave not to exceed 8 hours for law enforcement officers to attend the funeral services of a law enforcement officer who was killed in the line of duty. The head of a law enforcement agency may designate as official state business the travel of a law enforcement officer for the agency to attend the funeral services. The law enforcement officer must be reimbursed for traveling expenses to attend the funeral. See HB 535.

House Bill 401 – Sovereign Immunity bill eliminates maximum cumulative amounts payable (\$200,000) in claims against the state or its agencies or claims for punitive damages or claims for interest prior to judgment. It should be noted that there are no limitations on insurance policies for workers' compensation benefits payable under Chapter 440, Florida Statutes. The employer/carrier's liability for paying benefits to injured workers is based only on the cost of any benefit that is payable under the law regardless of the monetary sums. See SB 604.

Senate Bill 352 – Post-Traumatic Stress Disorders - 911 Public safety telecommunicators and crime scene investigators. A diagnosis of PTSD for 911 public safety telecommunicators and crime scene investigators is deemed to be a compensable occupational disease under the terms of the Florida Workers' Compensation Act. The Bill establishes events that cause this diagnosis to be compensable. The Bill establishes traumatic events witnessed by public sector telecommunicators and crime scene investigation resulting in a diagnosed PTSD to be compensable. Eliminates any reductions in benefits caused by apportionment, permanent psychiatric impairment benefits, or limitations of temporary compensation benefits. Educational training required by employing agency of safety telecommunicators and crime scene investigators. Compare to **HB 337** and **SB 436**. See **HB 291** below.

Senate Bill 420 – Pharmacy Benefit Manager (PBM) requires the Office of Insurance Regulation to conduct market conduct examinations on PBMs. Authorizes the Office to take certain disciplinary actions against PBM Managers for specified acts. Provides for the registration of Pharmacy Benefit Manager that directly or indirectly have an investment/financial/ownership interest in a PBM. See above summary of **HB 203**.

House Bill 7011 – Revisers bill – Effects Workers' Compensation Statute Sections: 440.02, 440.14, 440.151, 440.385, 440.525.