McCONNAUGHHAY · COONROD
POPE · WEAVER · STERN P.A.

Tallahassee ▪ Fort Lauderdale ▪ Gainesville ▪ Jacksonville ▪ Ocala ▪ Panama City ▪ Pensacola ▪ Sarasota
*Thomasville, GA ▪ *Savannah, GA * *Satellite Offices*

October 26, 2021

What's New In Our Industry

Florida

WORKERS' COMPENSATION

Legislative

Special Legislative Session

JOINT STATEMENT FROM FLORIDA HOUSE SPEAKER CHRIS SPROWLS AND SENATE PRESIDENT WILTON SIMPSON

TALLAHASSEE, Fla. *(Oct. 21, 2021)* – In response to today's morning press conference where Governor Ron DeSantis called for a special session to take a stand against the federal government's overreach, Florida House Speaker Chris Sprowls (R-Palm Harbor) and Senate President Wilton Simpson (R-Trilby) issued the following joint statement:

"Across the country, hard-working employees and business owners trying to make a living are being threatened by the Biden Administration's reckless one-size-fits-all approach to Covid-19 vaccine mandates. Meanwhile, the rights of parents are being trampled on. Florida will respond to this gross overreach by the federal government.

In the coming days, we will review the Govern's specific proposals as well as discuss our own ideas for legislative action, including whether now is the time for Florida to withdraw from the Occupational Safety and Health Administration and establish our own state program. We believe that by doing so, Florida will have the ability to alleviate onerous federal regulations placed on employers and employees.

We stand with the dedicated health care workers, law enforcement, first responders, military service members, and all workers across the country who never got a day off and couldn't work from home during the pandemic. Too many of our esteemed heroes are facing termination thanks to heavy handedness at all levels of government. During the upcoming special session, our goal is to make our laws even more clear that Florida stands as refuge for families and businesses who want to live in freedom."

As of the date of this statement, no date for the special session has been set. At one time, Florida did have a Safety Division but because of extraordinary costs, among other things, it was abolished. Depending on what is passed by the Legislature, there could be workers' compensation implications.

Regular Legislative Session
(January 11 – March 11, 2022)

The Legislature has also begun its activity in preparation for next year's regular session with the filing of bills in both the House and Senate. Those bills having workers' compensation implications are as follows:

House Bill 295 Workers' Compensation Coverage by Employer Leasing Companies –Contractual arrangements between PEOs and client companies engaged in the construction industry (contractors and subcontractors) must provide that all employees who are hired by contractors/subcontractors or a leasing company (leased or non-leased) are deemed employees of the leasing company for purposes of workers' compensation coverages. Requires at least a 10-day notice to the construction company client of cancellation of the contract allowing the client company to cure any contractual defaults or deficiencies within that time period frame. Precludes employee leasing companies from sponsoring a self insurance program for health benefits unless an admitted insurance carrier has issued a policy of insurance being primarily responsible for the obligations of the health plan. If the employee leasing company terminates its contractual agreement with a construction client company, it must send the Notice of Cancellation by first class mail to the client company at its last known address and to leased employees and non-leased employees, providing information as to the date of cancellation.

Client companies engaged in the construction industry must make available to the licensed employee leasing company records necessary to verify payroll and must allow leasing companies to make physical inspections of the client company's operation. If there is a failure to provide information and an audit cannot be completed, the client company shall pay a penalty not to exceed three (3) times the most recent estimated annual premium to the licensed employee leasing company. If a client company misrepresents payroll or employee duties, attorney fees and penalties are enforceable in the circuit court having jurisdiction over the licensed employee leasing company.

If an accident occurs on the job to an employee not reported to the leasing company, the client company shall indemnify the leasing company for all benefits paid to or on behalf of the injured employee plus attorney fees.

Senate Bill 200 - First Responder Definition Expanded - Expands the definition of "First Responders" for the determination of compensability of employment related accidents and injuries to include correctional officers as defined in s. 943.10(2), correctional probation officers as defined in s. 943.10(3) and 911 public safety telecommunicators as defined in s. 401.465(1). Includes volunteers in these professions. Requires at least one hour of continuing education annually which must include specific training on evidence-based coping strategies to mitigate traumatic stress in first responders as well as information on suicide prevention and other topics.

Senate Bill 468 – Audits Concerning Payments of Workers' Compensation Premiums - Provides for the adoption of rules related to audits of payroll and classifications to ensure that appropriate premiums are charged for workers' compensation coverage (construction and non-construction). Such rules must ensure that audits are performed by carriers and employers. Audits must be performed at least biennially. Employers paying premiums in the construction industry sufficient to be experience rated must be audited at least annually. For employers in the construction industry, the audit must be a physical on-site audit for new and renewal policies if the estimated annual premiums are $10,000 or more. Amends s. 440.381.

House Bill 17 - Telehealth Providers may not use telehealth to prescribe a controlled substances listed in Schedule II of s. 893.03, except for treatment of a psychiatric disorder, inpatient treatment at a licensed hospital, treatment of a patient receiving hospice services, or treatments of a resident in a nursing home facility.

House Bill 41 – Litigation Financing Consumer Protection Act. Litigation financing is described as being a litigation financier providing funds to a consumer in exchange for an assignment of the consumer's contingent right to receive an amount of the potential proceeds of a consumer's civil action or claim. Workers' compensation claims are specifically excluded from the definition of litigation financing.

House Bill 117 – Covid-19 or Infectious Diseases Where the Disease Has Been Declared a Public Health Emergency are treated the same way as hepatitis, Meningococcal Meningitis and tuberculosis in regards to emergency rescue and public safety workers (firefighter, paramedic, emergency medical technician, law enforcement officer, or correctional officer) employed full-time by the state or any political subdivision. Such conditions are presumed to be suffered in the line of duty, unless the contrary is shown by competent evidence. The employee must verify by written declaration that to the best of his or her knowledge and belief that he or she had not been exposed, outside the scope of his or her employment, to any person known to have Covid-19 or the infectious disease. In the case of an infectious disease, such employee must have contracted the infectious disease during a public health emergency declared in accordance with s. 381.0031. A similar bill (HB 53) was filed but withdrawn.

Senate Bill 432; See also HB 391 – Judicial Assistants. Amends s. 110.071 - Related to Judicial Assistants making personal information related to these individuals and their families exempt from public records disclosure requests.

Senate Bill 540 – Prescriptions by Psychologists – Provides for the Board of Psychology to certify psychologists to prescribe medications including controlled substances in the treatment of patients. A method of certification and renewal is provided for.

Senate Bill 594 – Covid-19 – A governmental entity may not require persons to provide any documentation certifying Covid-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the governmental entities operations in this state or as a condition of licensure or certification in this state. A person aggrieved by a violation of this law has a right of action in circuit court for injunctive or other equitable relief and is entitled to recover damages and reasonable attorney fees for each violation. Establishes criteria to determine the efficacy of using Covid-19 vaccine. (See subject of Special Legislative Session.)

Judicial

Jones v. State of Florida Department of Corrections – Columbia Correctional Institution/State of Florida
46 FLW D1720
7/29/21
The limitation of entitlement to indemnity benefits six months following the date of Maximum Medical Improvement for physical injuries in regards to claims based on mental injuries is dependent upon whether the claimant reaches physical MMI and has a permanent impairment rating from the physical injury. If there is no permanent physical impairment rating, there is no limitation of six months for temporary benefits related to mental injuries.

Estate of Ronald McKenzie through the Personal Representative Terry McIntosch v. Hi Rise Crane, Inc.
46 FLW D1890
8/19/21
Petition for Death Benefits filed by personal representative of deceased at a time prior to the appointment of the personal representative. Petition did not include the Certificate of Good Faith and Fraud Statement that, by statute, is required to be filed with the petition. JCC dismissed petition and appeal taken. Appellate court reversed. Failure to provide a Certificate of Good Faith and Fraud Statement is no basis upon which a Petition for Benefits should be dismissed. Section 440.105(7) does not provide for the dismissal of a claim for failure to provide the statements with the petition. In this case, the personal representative filing the petition was appointed personal representative after the filing of the petition. Court determined that such appointment related back to the date of the filing of the petition. Accordingly, court determined that JCC's dismissal of petition was in error.

Harman v. Merchant Transport, CCMSI
46 FLW D2055
9/15/21
Claimant requested one-time change of physician. JCC entered an order finding that the offer of the one-time change selected by the employer/carrier was unreasonable because of the time/distance between the doctor's office and the claimant's home. According to the judge's order, however, the one-time change doctor was to be selected by the employer/carrier, not the claimant. Claimant appealed asserting that because the offer of an alternate doctor was deemed not reasonable, the claimant should be given the right to choose the alternate doctor. Court determined that the choice of alternate doctors was that of the employer/carrier even in situations where the offered doctor was deemed unreasonable because of the time/distance from the claimant's home to the doctor's office. Statutorily, there are only two requirements regarding the alternate physician: timely authorization and practice within the same medical specialty. The statute imposes no criteria regarding distance of travel as a criterion for the employer/carrier's retaining its right of selection. Compare *City of Bartow v. Flores*, 301 So. 3d, 1094 (Fla. 1st DCA 2020). By statute, Section 440.13(2)(f), F.S., selection by the injured worker for the alternate care provider remained vested in the employer/carrier.

Holcombe v. City of Naples/Johns Eastern Company
46 FLW D2057
9/15/21
Claimant was a law enforcement officer for the employer and was seeking workers' compensation benefits based on the presumption of occupational causation as provided for in Section 112.18, F.S. The JCC denied claimant's use of the presumption since upon entering the employment with the employer, the pre-employment physical examination indicated that the claimant had hypertension precluding the use of the presumption. As a teenager, the claimant had undergone a liver transplant and a side effect of this surgery was the development of hypertension. Anti-rejection medications were prescribed for 15 years and after this time period ended, the claimant's hypertension had returned to normal upon cessation of the medications. At the time that the claimant went to work for the employer, the hypertension was confirmed to be normal. Thereafter, hypertension was deemed to be normal and several years after being employed by the employer, he was again diagnosed with hypertension. The claimant's preexisting hypertension was deemed to be "secondary hypertension" whereas workers' compensation benefits claimed were based on a finding of "essential hypertension." These were two different types of hypertension but it was agreed that both conditions would be described as a form of hypertension.

Court determined that a preexisting secondary hypertension on a pre-employment physical may preclude a claimant's use of the presumption of Section 112.18, F.S., when the claim was for essential hypertension. By the interpretation of Section 112.18, F.S., court found that evidence of secondary hypertension on a claimant's pre-employment physical precludes his use of the presumption of Section 112.18, F.S. for essential hypertension.

ABM Industries, Inc. v. Valencia
46 FLW D2159
9/29/2021
Court determined that the employer/carrier had failed to timely respond to a request by the claimant for a one-time change in physicians. Injured worker followed the "self-help" provision of the Workers' Compensation Act and obtained his own doctor who recommended surgery. The employer/carrier had authorized a doctor to treat the claimant who determined that surgery was not needed. With these two opinions, the question was whether the JCC erred in not appointing an EMA pursuant to a motion filed by the employer/carrier. Court determined that the JCC did err in not appointing an EMA. The selected doctor by the employer/carrier conflicted with the opinions of the claimant's self-help chosen physician and court determined that the JCC erred in not appointing an EMA.

Cabrera v. Kablelink Communications LLC
46 FLW D2204
10/6/21
The definition of an "employee" includes an independent contractor working or performing services in the construction industry. However, an employee in a non-construction job working as an independent contractor is not entitled to benefits. See Section 440.02(15)(c)3,(d)1. The question in this case was whether the claimant was engaged in the construction industry at the time of his accident. In order for a job to be considered in the construction industry, a definition of "construction" must involve activities that create a substantial improvement in the use of any

structure. In this case, there was no evidence that at the time of the accident, the claimant was making a substantial improvement in the use of any structure and accordingly, he was not deemed to be working in the construction industry. As such, he did not qualify as working in the construction industry and therefore would not be entitled to benefits as an employee.

Shelton v. Pasco County Board of County Commissioners
46 FLW D2207
10/6/21
Expert Medical Advisor's opinion was struck based on the claimant's *Daubert* objection (*Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993) (codified at Section 90.702, F.S.), court determined that upon striking the EMA's opinions, the JCC should have appointed a successor EMA. The parties stipulated that a condition of the injured worker was related to the compensable accident. Court determined that JCC's failure to accept the stipulation between the parties was error. Court held that a joint stipulation of the parties is binding on the JCC.

Executive/Administrative

Much of the Administrative/Executive activity related to workers' compensation concerns the payment of medical bills which include pharmaceutical costs, hospital cost schedules, provider fee schedules, physician's prescribing and dispensing medications and the development and interpretation of procedures to adjudicate controversies for the thousands of pending claims that involve controversies between providers and employer/carriers. As these procedures develop, cases are decided by Administrative Judges, or how the Division of Workers' Compensation is deciding reimbursement requests based on non-rule procedures, summaries of these actions will be provided.

Procedures for Adjudicating Conflicts Concerning Medical Bills

ADCO Billing Solutions, LP Petitioner v. Department of Financial Services, Division of Workers' Compensation, Respondent

On September 21, 2021, the Department of Financial Services issued a Final Order holding that, in a Workers' Compensation Reimbursement Dispute under s.440.13(7), Fla. Stat., a second EOBR by the carrier, issued in response to a second or duplicate bill by a provider, does not toll the time for the provider to file a Reimbursement Dispute Petition. While the ALJ had found in the underlying Recommended Order that the second bill was somehow 'different' because the Carrier's EOBR necessarily used a different code to describe the second bill as a duplicate bill, the ALJ's finding was legally incorrect. The second bill was a duplicate bill as the first. The use of the "code 60" by the carrier, which identifies the second bill as a duplicate bill, does not restart the clock for the provider to file a Reimbursement Dispute Petition if it disagrees with the payment adjustment in the first EOBR.

When there was no material difference between an original bill and a second bill or "Request for Reconsideration" as it is often called, the deadline for filing a Provider

Reimbursement Dispute Petition with the Division of Workers' Compensation begins to run from the Provider's receipt of the first EOBR. That deadline expires 45 days from the Provider receipt of that first EOBR. To hold otherwise eviscerates the entire notion of a statutory deadline. Otherwise, the deadline could be eliminated or restarted every time the provider resubmitted the bill, up to an infinite number of times. This result would be legally and practically absurd, in light of the statutory deadline in s.440.13(7), F.S.

While ADCO did not address this situation, one would also assume that if the Provider submitted some, materially new and relevant information on the second bill, such as relevant documentation requested in the carrier's First EOBR, this would restart the clock for a Provider Petition, but only in reference to any line items addressed by the relevant and new information. This is consistent with both the letter and the spirit of the law, which encourages cost-effective and efficient resolution of disputes, while affording due process and resolution of disputes on their merits, within a fixed and reasonable period of time under the Law.