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September 25, 2020

## What's New In Our Industry

### Florida

#### Workers' Compensation

##### I. Legislative

All seats of the Florida House and odd numbered seats of the Florida Senate are up for election on the November 3, 2020 election date. The Legislature will convene for an organizational session on Tuesday, November 17. Thereafter, committee meetings will be held prior to the formal beginning of the legislative session on March 2, 2021.

The Florida House and Senate leadership are looking at a response to the Covid-19 pandemic and the adverse economic consequences which is expected to create significant budget shortfalls for the state. At this time, it is not expected that a special session is planned with attention to this growing issue being expected during the regular session in 2021. The Restore Economic Strength through Employment and Tourism Task Force (Task Force) was formed to examine Covid-19 concerns for industry. It is anticipated that legislation will be prepared seeking to limit a cause of action for Covid-19 claims by requiring a heightened level of culpability to impose liabilities on the part of industry plus a shortened Statute of Limitations. It is unknown as to the effect, if any, for the payment of workers' compensation benefits. Some states have discussed and in fact passed legislation creating a presumption that Covid-19 claims are presumptively considered compensable under the Workers' Compensation Law.

##### A. PEO

Senator Jeff Brandes sent a letter to Senate President Bill Galvano requesting a study on the PEO industry by the Office of Program Policy and Analysis and Government Accountability (OPPAGA). President Galvano approved this request. Senator Brandes requested that the OPPAGA include in their study the following:

- Basic overview of what a PEO is and how it relates to insurance
- Overview of the Florida regulation of the PEO industry
- How other states regulate PEOs and how that differs from Florida's regulations

- Feasibility of an improved regulation by moving PEO regulation from the Department of Business and Professional Regulation to the Department of Financial Services

No doubt there is a concern that the last several bankruptcies in Florida related to insurance carriers that primarily insured PEOs. The question in the minds of many is whether this was as a result of PEOs or the insurance industry that insured PEOs.

## **B. General Legislation on Workers' Compensation**

Historically, the Legislature has agreed to consider systemic changes in the workers' compensation law only when employer premium costs go up, it being the belief (wrongly in our opinion) that the workers' compensation system is not "broken" and not in need of repair. NCCI has requested an overall 5.7% reduction of rates effective January 1, 2021 for new and renewal business (since the combined impact and direction of Covid-19 losses are unknown, NCCI did not make any adjustment in the filing on an overall or individual classification basis. The National Council on Compensation Insurance has created an actuarial review of how to quantify the value of Covid-19 cases). An average decrease of 7% overall rate reduction for the F-Classification Codes was also recommended. Based on this, there is a real question as to whether workers' compensation will be considered for systemic changes. The secondary market (JUA) is requesting a 5.5% increase in rates effective January 1, 2021 for new and renewal policies. (The cause of the request for increased premiums in the JUA is significantly the result of anticipated premium loss for the JUA which was projected to create overall premium amount of \$15 million, which is down from previous years.)

## **C. Specific Provisions in the Law Requiring Legislative Attention**

No specific legislative proposal to correct ongoing workers' compensation issues has been submitted although issues exist especially in regards to attorney fees and medical costs. Florida remains one of the highest cost states, if not the highest, in regards to hospital costs (inpatient and outpatient), while medical care providers' costs on an individual treatment basis remains one of the lowest in America. Past efforts by the Division of Workers' Compensation to update individual treatment costs have been unsuccessful because of the Legislature's failure to pass needed legislation to effectuate any changes. Continued abuses re-occur within the medical community as to prescribing and dispensing medication by the same treating doctors. (According to findings made by the Workers' Compensation Research Institute, costs in utilization of medical care increase when physicians are permitted to both prescribe and dispense medications. In addition, prescribing and dispensing medications by doctors oftentimes occurs prior to notice to the employer/carrier thereby removing or abrogating the employer/carrier's right to determine authorization, review medical necessity, determine causal relationship or other utilization issues of such medication prior to rendition of services); using "novel" billing practices including the unbundling of medical bills creating excess payments; allowing the medical community to qualify as a "pharmacy." (See Division of Workers' Compensation Bulletin DWC-01-2020 dated March 31, 2020. [DWC Bulletin](#). This position taken by the Division of Workers' Compensation is completely contrary to past administrative rulings by the Department. In Florida, the injured worker has the right to select his own pharmacy but the employer/carrier has a right to select the treating physician except in exceptional circumstances; the repackaging of medications (and in

the process re-adopting new National Drug Codes and increasing “average wholesale price” which medications are paid for by employer/carriers); paying for hospital bills utilizing criteria other than based on a per diem billings for reimbursement as provided for in the Workers’ Compensation Statute (utilizing stop loss provisions for large hospital bills currently followed by the Division); and the ongoing prescribing of opioids.

## **II. Judiciary**

### **A. Case Law Update**

Referring to [Case Summary](#) is a summary of cases related to workers’ compensation issues that have been decided by the Florida First District Court of Appeals. Of note, the First District Court of Appeals has certified for review to the Supreme Court the case of [City of Bartow v. Flores](#), Case No. SC-20-1126. The certification relates to an issue deemed of “great public importance” and the processes to be followed by the employer/carrier in response to a one-time change in physician being made by the injured worker. Since the rulings by the Supreme Court in the cases of [Castellanos v. Next Door Company](#), 192 So. 3d 431 (Fla. 2016) and [Westphal v. City of St. Petersburg](#), 194 So. 3d 311 (Fla. 2016), numerous attempts have been made to seek review by the Supreme Court primarily related to constitutional attacks on particular provisions of the law. Jurisdiction has not been accepted by the Supreme Court and this is the first time since these earlier decisions that the First District Court of Appeals has certified to the Supreme Court a question to be considered. Initial jurisdictional briefs have been filed by the parties and it has yet to be determined as to whether the Supreme Court will accept jurisdiction. The court that decided the [Castellanos](#) and [Westphal](#) cases has changed so it is difficult to determine how this new court will rule on workers’ compensation issues.

### **B. Judicial Litigation Rate (Petitions for Benefits filed with the Office of Judges of Compensation Claims)**

New case filings for the two months of July and August were down 14% as compared to previous periods. However, new cases in the first nine full days of September, 2020 (738) for the same nine full days last year (612) shows a 21% increase. Petitions filed in the first nine full days of September, 2020 number 1,717 and for the same full days last year (1315) demonstrating a 30% increase. Whether these increases in litigation activities represent a permanent increase or rebound in judicial activity remains to be seen.

## **III. Executive/Administrative**

### **A. Covid-19 Reports of Claimed Accidents On-the-Job**

Not counting “medical only” cases, the Division has attempted to identify the number of Covid-19 cases based on the dates of accidents for the period January 1, 2020 to August 31, 2020 as compared to January 1, 2019 to August 31, 2019. (It should be noted, as did the Division, that the claims information as provided in its report was valued as of 9/1/20, and had not been fully matured. In determining the date of accident, there is no indication that the Division attempted to differentiate between the usual definition of the date of accident for “exposure cases” (last injurious

exposure) as compared to “occupational diseases” (date of disability). A review of the Division’s report can be made by referring to [DWC COVID-19 Report](#).

In reviewing the Division’s report, the number of Covid-19 claims (accidents) has increased dramatically. Also, the number of Covid-19 claims as compared to other types of injuries during this same time period is reported. Total benefits paid on all cases paid (open and closed, Covid and non-Covid) totaled over \$22 million, with most (\$16,984,000) being paid on Covid claims in mainly the payment range from \$0 to \$4,999. The number of reported Covid-19 injuries has trended upward. As expected, most payments have been made in Dade, Broward and Palm Beach Counties when compared to the number of Covid-19 cases on a county by county comparison. The number of Covid-19 cases claimed to have resulted from workplace exposures represent only a small percentage of the total Covid-19 cases reported. Most of the Covid-19 claims have come from “protected services” which includes first responders and health care providers which would be expected. Most Covid-19 reported workplace injuries are to females in the age range of 30-39 (which is the same age range for males). It should be noted that a total of 7,760 Covid-19 claims have been denied either partially or totally.

#### **B. Covid-19 Claims for Workers’ Compensation Benefits**

From an administrative standpoint, the Division of Workers’ Compensation has been busy trying to keep up with all that is happening in the “Covid-19 World.” As indicated in the previous emailed Newsletter, the Division has created a “Dashboard” attempting to follow the many adverse nuances that are oftentimes difficult to follow. If you would like to receive the latest report on the impact of the virus in Florida’s workers’ compensation system, identifying those types of cases for which workers’ compensation benefits are being claimed, and describing those workers most likely to file workers’ compensation claims, please refer to [DWC COVID-19 Report](#).

#### **C. Dispute Resolution Rule Amendments**

Dispute Resolutions under the Florida Workers’ Compensation Law have different “paths” depending upon the issues and parties involved. The following is a general summary of the Workers’ Compensation Dispute Resolution Processes.

If the dispute is between the injured worker and the employer/carrier as to benefits payable to the injured employee or whether a compensable accident has occurred for which benefits are payable, disputed issues are resolved by a Judge of Compensation Claims (JCC) if the parties cannot amicably resolve their differences. The JCC would also have jurisdiction to decide disputes between multiple carriers as to which entity would be responsible for paying benefits. Orders entered by the JCC are enforced by the filing of a lawsuit in the civil courts of Florida (Article V of the Florida Constitution). The JCC does not have jurisdiction to enforce his/her orders. Appeals are taken from JCC orders to the First District Court of Appeals.

If the dispute is between the insurance carrier and the employer concerning the amount of premiums that are payable for workers’ compensation coverage including payments due under a retrospectively rated plan, the dispute is resolved by the NCCI Appeals Board and rules developed by this board.

Finally, if the dispute is between the employer/carrier and a medical care provider as to whether medical bills, including prescription costs, are payable and if so the reimbursable amount, the dispute is resolved by the Division of Workers' Compensation with "appellate rights" for a full administrative hearing before an Administrative Law Judge in accordance with Chapter 120, Florida Statutes. The Division of Workers' Compensation also holds regulatory authority to audit Carriers, Servicing Agents and Medical Providers and sanction those parties for non-compliance with statutory reporting, billing, and medical utilization requirements.

Historically, most attention to reform of dispute resolution processes is given to the procedures and rules that are to be followed in proceedings before JCCs. With the filing of literally thousands of administrative petitions requesting adjudication of medical bill disputes, emphasis is now on procedural reforms in situations where the Division of Workers' Compensation is adjudicating disputes over medical bills. Notwithstanding the fact that in Florida, approximately 70% of the total workers' compensation payments made are related to medical costs, unfortunately industry has not been that attentive or interested in procedural changes made or proposals for change concerning the payment of medical bills.

The Division of Workers' Compensation has held several public hearings on developing comprehensive rules concerning the adjudication of disputes over the payment of medical bills. The Notice of Public Hearings have been forwarded to everyone receiving this newsletter. The next public hearing is scheduled for October 7, 2020 at 9:30 a.m. via webinar. If you would like to review the changes in the rules as of the last public hearing, please refer to [Proposed Rules](#). Unquestionably, your involvement in this process is extremely important. Trying to control workers' compensation medical costs is extremely important and that effort begins with establishing the "ground rules" for these determinations. We cannot overemphasize the importance of getting involved in this process.

#### **D. Telemedicine**

In the previous newsletters and following the passage of significant legislation in regards to telemedicine, it was predicted that the use of telemedicine would play an important new process for providing new treatment methods for injured workers. In fact, this is exactly what happened (See pages 18-19 of [DWC COVID-19 Report](#).) Dramatic increases have occurred considering just the first 8 months of 2020. Most of the telemedicine billing is from medical doctors but other specialists are participating. Specific billing codes for telemedicine activity have been created by the Division. Judging from past fraudulent billing processes and services provided, there is an expectation for fraudulent activities occurring which needs to be closely monitored.

## **IV. Miscellaneous**

**A. Electronic Service for Employers**

The Florida Offices of the Judges of Compensation Claims is accepting registrations for employer e-service. Any employer may register to automatically receive electronic service regarding filings in its cases. The filing party will be responsible to assure that a "Registered Employer" has been selected upon the initial filing in any case. This option will obviate the need for certified mail service on that initial filing. A party may elect not to select a "Registered Employer," and instead to insert an employer manually. Selecting this option will leave the filer responsible for the manual U.S. mail service and certified mail where applicable. Any Registered Employer may request its status in any case to be altered thereafter to the Registered designation.

**B. Telephonic Mediation Extended**

The Florida OJCC will extend the mandatory telephonic mediation through October 30, 2020. That this is not universally preferred is acknowledged. However, COVID-19 remains a risk. This mandate diminishes the party's burden of requesting telephonic appearance, and the mediator's burden of considering those requests.