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What's New In Our Industry Florida

Administrative Physicians Prescribing and Dispensing Drugs

Background

On December 29, 2022, the Department of Financial Services/Division of Workers' Compensation published in the Florida Administrative Register a Notice of Proposed Rule Changes. In addition, a Statement of Estimated Regulatory Costs (SERC) of the administrative changes was filed. A hearing was scheduled and subsequently held on January 13, 2023. The proposed rule changes related to Rules 69L-7.730(2)(b), Florida Statutes, and 69L-7.740(2)(c), FAC. Attorney Ralph Douglas of the McConnaughay law firm represented the interests of employer/carriers by presenting oral and written public comments, providing a lower cost regulatory alternative to the proposed rules, and questioning several of the assumptions contained in the SERC submitted by the Division. In addition, a formal Petition was filed with the Department of Administrative Hearings (DOAH) objecting to the legality of the changes being proposed by the Division. The Division had previously written an Advisory memorandum stating that the employer/carrier could not deny authorization of a doctor to dispense medication, effectively determining that a dispensing physician was a pharmacist and if the injured worker chose the physician to dispense medication, the employer/carrier could not deny that choice. Based on the advocacy of Mr. Douglas, that Advisory memorandum was withdrawn.

Issues Summary

In accordance with Section 465.0276, Florida Statutes, physicians can be certified to dispense medication if specifically registered to do so. Pursuant to Section 440.13(3)(j), Florida Statutes, the injured worker is "entitled, at all times, to free full and absolute choice in the selection of the pharmacy or pharmacist dispensing . . . prescriptions for medicines required . . . It is expressly forbidden for the . . . employer . . . or carrier to select the pharmacy or pharmacists . . . which the injured worker must see . . . or to otherwise interfere in the selection . . . by . . . the injured worker of a pharmacy or pharmacist" The practical effect of the proposed rule treats a certified physician who dispenses medication as a pharmacy or pharmacist and as such, it is the injured employee's choice to select the treating physician to dispense medications. A prior administrative Final Order entered and approved by the Department in the case of *In the Matter of Todd Alea, MD*, DFS, Case No. 121698-11 dated August 31, 2012, previously determined that a dispensing physician is not a pharmacy or pharmacist as a matter

of law. See also *Philip Bonanno v. Diocese of Venice Epiphany Cathedral Catholic Church v. OJCC*, Case No. 03-042789DBB, dated June 16, 2009.

Practical Effect of Litigation/Rulemaking on Industry

The insurance carrier (including self-insureds hereafter referred to as carrier), typically enters into a contract with a pharmacy benefit management company (PBM) to among other things agree to make payments to pharmacies on behalf of carriers. The PBM contracts with drug manufacturers for the purchase of medications at reduced costs. This arrangement is of no consequence to the injured worker since the only thing that he or she wants is the medication that is being prescribed. The proposed rule changes augment the current business model where third party entities (not PBMs) are separately entering into contracts with drug manufacturers, with little incentive in controlling pharmaceutical costs. This arrangement benefits the manufacturer of the drugs and the third party entities, since such an arrangement would never be of a type that a carrier would agree to since the costs would be in excess of what could be provided through a PBM arrangement. These third party entities contract with physicians allowing them to profit from dispensing medications with a guarantee that the physicians are paid a fee by third parties. In addition, the physician may be encouraged to prescribe medication because of the previous unfounded revenue source. Under this business model, the injured worker is not concerned with the cost of the medication since it is paid in full by the carrier.

Allowing doctors to both prescribe and dispense medications presents a conflict of interest in the minds of some. This third party business model has unnecessarily driven up pharmaceutical costs in Florida to one of the most costly systems in the U.S. according to evidence based national studies. To control these costs and help minimize harmful drug interactions is to ensure the carrier has the choice whether to allow a physician to dispense medication. The injured worker as a matter of law can select the pharmacy of his or her choice to dispense medication. However, this statutory mandate does not include a dispensing physician designated as a pharmacy or pharmacist. The proposed rule changes permit the injured worker to select a dispensing physician in the same manner as he or she selects a pharmacy or pharmacist. The practical effect of allowing such a system is to create an unwarranted stream of revenue to the provider community and to third party non-PBMs. The losers in such a scheme are the carriers who are trying provide cost effective and appropriate medical care to injured workers and employers who pay increased premiums these excess costs.

Conclusion

No final determination has been made by the Division in regards to approving the proposed rule. There remains the question of whether the proposed rules are legally permissible to be decided by an Administrative Law Judge. There also remains the question as to what the predicted costs to the workers' compensation system will be if the rule changes are made.

Legislative

The following bills have been filed with the Legislature and are directly or indirectly related to workers' compensation. As further bills are filed, summaries will be provided. If copies of the actual bills are required, please contact Jim McConnaughay at jnmconnaughay@mcconnaughay.com.

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 e 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 be 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.

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.

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.

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.

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.