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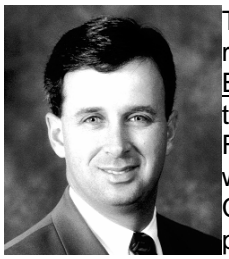
Workers' Compensation

The 2008 Revision to F.S. 440.34 and the Implications *by David S. Gold, WC Managing Partner.*



David Gold, Partner

The Florida Supreme Court recently resolved a long simmering issue regarding Carrier paid attorney's fees with the release of its opinion in Emma Murray v. Mariner Health and ACE USA. This opinion is likely to have a profound and immediate effect on Employer/Carriers in Florida as the Court has effectively eliminated the statutory fee that was linked directly to the value of the benefits obtained. Instead, a Claimant's attorney that successfully obtains a benefit can once again petition the Judge of Compensation Claims for the payment of a fee based on the attorney's hours. The near universal opinion regarding the effect of this case is that the litigation of claims will greatly increase as there is now an incentive for Claimants' attorneys to file and litigate even the smallest of claims.

The roots of this case go back to a 2005 Merit Order issued by Judge Turnbull wherein a denied claim was found compensable and the Employer/Carrier was ordered to pay $3,244.21 in past due benefits. At a fee hearing, the JCC ruled that the provisions of 440.34(1) as amended in 2003 mandated an award of $648.85 in fees as "reasonable". However, the JCC noted that such an award was really "unreasonable" given that the case was complex, had required extraordinary skill, and that the attorney had expended 80 hours in securing the benefits. The JCC went on to put in the Order that while he had no choice but to award a $648.85 fee, that a reasonable fee in the case should have been $16,000. On appeal the First DCA upheld the award of $648.85 based on their prior rulings in both Lundy v. Four Seasons and Wood v. Florida Rock Industries. However, as in both of the earlier opinions, the DCA certified a question to the Supreme Court with regards to the interpretation of the statute.

In their analysis, the Supreme Court noted that the Legislature only defined the term "reasonable fee" as being limited to the 20/15/10 statutory fee in 440.34(1) and did not make any effort to define the same term in the remaining three sections. The Court observed that the failure to define "reasonable fee" in the other three sections creates a conflict between the sections as they are supposed to all be read together. The rules of statutory construction require that when there is such a conflict, a specific section such as 440.34(2)(3)&(4) will control over a general provision such as 440.34(1). As such, the Court held that in order to resolve this conflict the long standing definition of "reasonable fee" previously adopted in Lee Engineering and allowing for the payment of hourly fees would apply to any case where fees are payable under 440.34(2)(3)&(4). Specifically left unanswered by the Court is the application of the $1,500 cap on fees in a medical only claim as the Court stated that this was not properly before the Court as this was not a basis for fees in the original fee award.

So what does it all mean? The short answer is that the system is now going back to the way it was before the 2003 revisions and the Employer/Carrier will have to pay the Claimant's attorney an hourly fee in many of the cases in which the Claimant prevails.

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Workers' Compensation continued

The 2008 Revision to F.S. 440.34 and the Implications.

However, numerous other revisions made to Chapter 440 in 2003 will limit somewhat the effect of this change. For example, Carriers are no longer required to pay for the Claimant's IME and so there cannot be a fee awarded for securing these benefits. The Claimant can only get one change of physician and so this will also limit fees for securing multiple new physicians. Left unresolved by this opinion however are the following serious questions:

- Does the one time $1,500 fee for a medical only claim still stand?
- What effect, if any, does this case have on previously settled claims?
- What effect does it have on prior fees that have already been adjudicated?
- What about cases that have been settled, but not yet approved by the JCC?

I expect that in the short term we are going to see some mediations get canceled as the Claimant's attorneys will want to file new claims in an effort to increase their fees and the overall settlement value. I expect that this will only last a month or so and then we are going to get hit with a lot of requests for mediations as the Claimant attorneys try to cash in. We are obviously facing a steep learning curve, at least in the short term. Since the current system has been in effect since 2003, there are lots of attorneys on both sides that have never litigated a fee issue based on Lee Engineering and its requirements. It is going to be a time where the old hands, those Adjusters and Defense attorneys who have been doing this for a long time, are going to be able to use our knowledge and experience to resolve these cases.

This new case is going to create some difficulties for Employer/Carriers as they readjust back to what once was. Cases are going to be re-evaluated as financial considerations will once again be a factor in deciding which cases to fight and which not too. As before, the system will eventually level out but it may take a year or more. Also unknown is what the Legislature will do, if anything, when they return to session in March 2009. 2009 is undoubtedly going to be an interesting year in the Workers' Compensation community.

Liability

The Upside of Fully Investigating Questionable Claims – Dismissal for Fraud Upon the Court or Better Odds at Trial *by James P. Waczewski, Tallahassee Managing Attorney.*

Many personal injury cases are settled pre-suit. These cases usually involve clear liability and a credible presentation by plaintiffs' counsels regarding the damages caused by the accident at issue. Although insurers are operating with limited information when deciding to settle a case pre-suit, insurers generally can tell when a case should be settled at this early stage. On the other hand, there are times when questions arise early on about the credibility of the plaintiff. A claim search may reveal a prior claim by the same plaintiff, the circumstances of the accident may suggest that the injuries claimed appear to be exaggerated, the plaintiffs' demand may be inconsistent with the medical evidence, or the medical evidence elicited in pre-suit may raise the insurer's suspicion about whether the alleged injuries pre-dated the accident. Those cases usually end up in Court.

When insurers assign us cases to represent their insureds, we take the investigative part of its defense obligations seriously. Learning the full medical history of a plaintiff can help develop significant defenses to personal injury actions, bringing into question the plaintiff's causation theory, or even revealing an effort by the plaintiff to defraud the court. The initial source of information about the plaintiff's medical history is the plaintiff. He or she will promptly be issued interrogatories to answer questions about prior health issues, including health issues similar to those the plaintiff argues were caused by the accident. After subpoenas are issued to disclosed medical providers, and the firm receives those records, the plaintiff is also deposed, and asked specific questions about his or her medical history.

Most often, plaintiffs answer interrogatories and deposition questions truthfully, and, if pre-existing causes for the injuries claimed are found, the defendant is in a good position to challenge the plaintiff's causation theories. Sometimes, however, plaintiffs are less forthcoming. For this reason, it is common practice in our firm to fully evaluate and summarize all medical records provided, paying particular attention to references to doctors who may not have been disclosed and to pre-accident complaints about similar injuries. Depending on the circumstances of each case, we may investigate public records and court files, or subpoena records from major hospitals, in locations where the plaintiff lived. We may interview former spouses, review records of prior employers, and we may otherwise find it in the best interest of the insured to conduct a more thorough investigation of the plaintiff's history.

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