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What's next for workers' compensation attorney fees in Florida?

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During a six-week time span from the end of April to early June, the Florida Supreme Court issued two important rulings that could have a significant impact on the workers' compensation system in the state.

On April 28, 2016, the Florida Supreme Court ruled in the case of Castellanos vs. Next Door Company that state law limiting attorney's fees in workers' compensation insurance cases is a violation of due process rights under the Florida Constitution and the U.S. Constitution. The court found it prevents challenges to the "reasonableness" of attorney's fees awarded in workers' compensation cases.

The ruling stemmed from a case that started in 2009 when Marvin Castellanos was injured while working at the Next Door Company, a manufacturer of metal doors and door frames. A dispute about the injuries ultimately led to the case going before a judge of compensation claims (JCC), and resulted in Castellanos securing benefits with a value of $822.70. His attorney spent 107.2 hours on the case and was entitled, under the formula, to fees of $164.54—or $1.53 an hour.

On June 9, 2016, the Florida Supreme Court issued an opinion in Westphal and concluded that the maximum 104-week duration for temporary total disability (TTD) benefits does not provide a reasonable alternative to tort litigation.

In this case, Bradley Westphal, a firefighter who suffered severe injuries in the course of employment, was entitled to TTD for up to 104 weeks. When Westphal's entitlement to TTD benefit expired, he was still incapable of working. However, because he had not yet reached maximum medical improvement (MMI), it was uncertain whether he would be found totally disabled when MMI was reached in the future. As a result, he was denied permanent total disability benefits even though he remained totally disabled and incapable of obtaining employment, essentially falling into a "statutory gap."

A look back at the history of Florida workers' compensation is helpful in understanding the importance and impact of these rulings. Prior to 2003, workers' compensation coverage in Florida was one of the most expensive in the country. Between 1999 and 2003, rates had increased by over 20%, and carriers began leaving the state in record numbers. Amid concerns of availability and affordability of workers' compensation insurance, Florida Senate Bill 50A (SB 50A) was passed and became effective October 1, 2003. This reform brought about a number of changes to the Florida workers' compensation system, including limitations on attorney fees as follows:

- Use of a 20/15/10/5 attorney fee schedule. With this schedule, fees are limited to 20% of the first $5,000 of benefits secured, 15% of the next $5,000, 10% of the remaining amount of benefits secured, to be provided during the first 10 years after the claim is filed, and 5% of the benefits secured after 10 years.
- Alternative hourly fees are eliminated with one exception. A fee based on hours worked of up to $1,500 may be awarded per accident for medical-only petitions.
- Fees are based on benefits secured above the offer only if the carrier makes an offer that includes attorney fees, which are then "taxed" against the carrier.

Soon after the passage of SB 50A, Florida's Insurance Commissioner approved a 14% decrease in rates, effective October 1, 2003. Experience since then has revealed dramatic and steady decreases in the claim frequency rate as well as in the average costs of claims involving claimant attorney representation. Over the five-year period since the enactment of SB 50A, five rate decreases were approved in Florida. Their cumulative overall impact amounted to more than a 60% decrease following the legislation. Florida moved from having one of the highest workers' compensation rates to an estimated 10th-lowest in the country. The changes to claimant attorney compensation included in SB 50A have been credited with a material portion of this decrease.

In 2008, industry observers worried they were facing a setback in this trend when the Florida Supreme Court issued its opinion in Emma Murray vs. Mariner Health Inc. and ACE USA (Emma Murray). It concluded that the SB 50A language limiting claimant attorney fees was ambiguous and, as a result, it looked to sources outside Florida statute to interpret the meaning of "reasonable attorney's fee." The court held that a reasonable attorney's fee is determined based on the rules regulating the Florida Bar, which include hours worked. The court, therefore, effectively returned Florida to pre-SB 50A law on claimant attorney fees, namely hourly fees.

In response to the Emma Murray decision, the National Council on Compensation Insurance (NCCI) estimated that its full impact would be an increase to Florida workers' compensation system costs of 18.6% over two years. The NCCI proposed a first year increase of 8.9% effective April 1, 2009. The Florida Office of Insurance Regulation (OIR) approved an increase of 6.4%.

On May 1, 2009, the Florida Legislature passed House Bill 903 (HB 903) to address the Emma Murray decision. The word "reasonable" was removed from the statute, and wording that limits the attorney's fee to the statutory schedule was inserted. The NCCI estimated that HB 903 would have the effect of reversing the Emma Murray decision, essentially reinstating the SB 50A statutory cap on claimant attorney fees and eliminating hourly fees, except in medical-only cases, for dates of accident on or after July 1, 2009. As such, the NCCI proposed that the first rate increase installment of 6.4% approved by the Florida OIR be rolled back as of July 1, 2009. Since then, Florida workers' compensation costs have remained flat.

Now the Castellanos decision appears to open a new chapter for Florida workers' compensation attorney fees. The majority opinion notes that the right to obtain a reasonable attorney's fee when successful "has been considered a critical feature of the workers' compensation law since 1941." Florida Statutes Section 440.34, however, "does not allow for any consideration of whether the fee is reasonable or any way for the JCC or the judiciary on review to alter the fee." Rather, it creates "a conclusive irrebuttable presumption that the formula [in Section 440.34] will produce an adequate fee in every case."

To assess the constitutionality of such conclusive statutory presumptions, Florida courts undertook a three-part analysis: "(1) whether the concern of the Legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption."

As to (1), the court held that while the fee schedule does standardize fees (a purpose behind Section 440.34), it does so in a manner that disregards the time and effort actually expended by an attorney. Further, any worry the Florida Legislature had regarding excessive fee awards is mitigated because there are other provisions that preclude excessive awards. For example, time and labor required, the complexity of the case, and the skills required to competently render legal service are all considered when deciding whether a fee award is reasonable.

As to (2), the court held that there is no reasonable basis to assume that the conclusive fee schedule actually serves the function of avoiding excessive fees. After all, the fee schedule does not adjust fees downward where the recovery is high.

As to (3), the court held that individual determinations can be made, but, in fact, the imprecision of the fee schedule in Section 440.34 prevented the lower courts from doing anything about the unreasonableness of the resulting fee.

The court thus found the "irrebuttable presumption," or inability of any claimant to challenge the fee, to be unconstitutional. In striking down the fee law, the court directed the state to return to previous law "until the Legislature acts to cure the constitutional infirmity," essentially returning Florida's workers' compensation attorney fees structure to the pre-SB 50A system based on hourly fees. The decision emphasizes that "the fee schedule remains the starting point, and that the revival of the predecessor statute does not mean that claimants' attorneys will receive a windfall. Only where the claimant can demonstrate … that the fee schedule results in an unreasonable fee—such as in a case like this—will the claimant's attorney be entitled to a fee that deviates from the fee schedule."

The concern is that this also means a return to the high pre-SB 50A levels of attorney-represented claim costs. In response to the Castellanos decision, the NCCI initially proposed a rate increase of 17.1% to new, renewal, and all in-force policies effective on or after August 1, 2016.[1] Subsequently, the NCCI proposed amending the filing to include the impact of the Westphal decision as well, and proposed a rate increase of 19.6% effective October 1, 2016.[2] It should also be noted that the Castellanos and Westphal decisions have a retroactive impact on all claims that remain open or are reopened on or after July 1, 2009, and January 1, 1994, respectively. Because workers' compensation rate-making is prospective only, insurers are not able to recoup premium to cover such unforeseen retroactive system costs.

1 The proposed 17.1% increase also reflects the impact on system costs due to the enactment of SB1420, which ratified changes to the Florida Workers' Compensation Health Care Provider Reimbursement Manual.

2 In the September 27, 2016, order, the Florida OIR gave contingent approval to an overall combined average statewide rate increase of 14.5% (versus the requested 19.6%) to take effect December 1, 2016.

For now, carriers and self-insured employers can look for increasingly more expensive workers' compensation claims in Florida. Unless a legislative solution of some kind emerges, they should start preparing for higher attorney's fees. More changes from the courts and the legislature are almost certain and should be monitored closely.

In short, it remains to be seen how the new framework will operate on the ground, but changes are already in the works.

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