

FLORIDA SUPREME COURT DECISIONS RAISE QUESTIONS FOR EMPLOYERS



Two recent decisions by the Florida Supreme Court could have significant cost implications for the Florida workers' compensation system and employers operating in the state:

- On April 28, in *Marvin Castellanos v. Next Door Company*, the court found that the mandatory fee schedule in section 440.34 of the Florida workers' compensation statute is "unconstitutional as a violation of due process under both the Florida and United States Constitutions." The expected impact of this ruling is the elimination of statutory caps on attorney fees and a return to hourly rates.
- On June 9, in *Bradley Westphal v. City of St. Petersburg*, the court declared the state's 104-week duration cap on temporary total disability benefits to be unconstitutional. The decision reinstates the 260-week duration cap that was in effect prior to legislative reforms introduced in 1994.

The following is a snapshot of the current state of workers' compensation in Florida and implications of the recent court ruling for employers.

WHAT EFFECT WILL THESE RULINGS HAVE ON WORKERS' COMPENSATION RATES?

Effective December 1, 2016, rates for new and renewing workers' compensation policies will increase 14.5%. Rates will not change for existing workers' compensation policies.

The rate increase, which was agreed to by the National Council on Compensation Insurance (NCCI) and the Florida Office of Insurance Regulation, is attributed to several factors:

- A 10.1% increase as a result of the *Castellanos* decision.
- A 2.2% increase as a result of the *Westphal* decision.
- A 1.8% increase as a result of SB 1402, which updated the state's Workers' Compensation Health Care Provider Reimbursement Manual.

WHAT IS THE LONG-TERM IMPACT OF CASTELLANOS?

The rate increase is the estimated *first-year* impact of the *Castellanos* ruling on new claims. NCCI estimates that the ruling could ultimately increase Florida workers' compensation costs as much as 38%.

It will take time for attorney activity to increase; claimant behavior will first need to adjust to the ruling and claimant attorneys will need to re-enter the workers' compensation market in Florida. Our expectation is that it will take two to four years for the long-term cost impact of *Castellanos* to emerge.

HOW WILL CASTELLANOS AND WESTPHAL AFFECT NEW AND OLD CLAIMS?

For new claims, NCCI's estimates suggest that loss picks for Florida workers' compensation costs should increase in the next year. NCCI estimates that loss picks for new claims several years from now could potentially be 38% higher than current values.

For both open and closed claims with dates of loss prior to April 28 and subsequent to July 2009, attorneys are no longer bound



by the fee restrictions found to be unconstitutional and may be engaged to secure additional benefits. Accruals for the unpaid cost of Florida workers' compensation claims should be increased to reflect the impact of *Castellanos*. NCCI has not yet estimated the retrospective impact of the *Castellanos* decision.

WHAT OTHER MATERIAL RISKS CURRENTLY EXIST IN THE FLORIDA WORKERS' COMPENSATION SYSTEM?

On April 20, in *Martha Miles v. City of Edgewater Police Department et al.*, Florida's 1st District Court of Appeals removed certain restrictions on attorney fees paid by claimants. The impact of the *Miles* decision has not been quantified and was not included in NCCI's proposed rate increase for Florida. But NCCI and others have expressed concern that this ruling and *Castellanos* mean that claimant attorneys now have the potential to earn greater compensation. The combined impact of *Castellanos*, *Westphal*, and *Miles* will likely result in unanticipated changes in claimant behaviors that could lead to additional cost increases not contemplated in NCCI's proposed rate increase. This emphasizes the importance of effective claim management by employers.

WHAT WILL BE THE SYSTEM-WIDE IMPACT ON WORKERS' COMPENSATION CLAIMS IN FLORIDA?

Marsh expects these rulings to increase:

- The frequency of attorney-represented claims.
- Indemnity and medical benefits on attorney-represented claims.
- Defense attorney expenses.
- The duration of temporary disability claims (partial or total).
- The duration of total disability on permanent partial disability claims.

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WHAT STEPS SHOULD EMPLOYERS WITH FLORIDA WORKERS' COMPENSATION EXPOSURES CONSIDER TAKING?

Florida employers should:

- Identify open cases with attorney representation or the potential for attorney representation.
- Identify closed claims with dates of loss subsequent to July 2009 — the effective date of the attorney fee limitations found unconstitutional by *Castellanos* — that have the potential to reopen.
- Establish protocols to minimize the likelihood of attorney involvement and litigation.
- Ensure that claims staff is thoroughly trained in defining and negotiating "reasonable" attorney fees.
- Monitor claims closely for maximum medical improvement.
- Make effective use of return-to-work programs.



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