

Insurance & Banking Subcommittee

Contents of Draft Proposed Committee Bills on Workers' Compensation 2016–17

REVISE THE WORKERS' COMPENSATION LAW IN RESPONSE TO RECENT CASE LAW

Miles – Payment of Attorney by or on Behalf of the Injured Worker

Goal: Conform statute to the holding of the *Miles* case so that an attorney may be paid by or on behalf of an injured worker. Each party will be responsible for their own attorney's fees, except when a Judge of Compensation Claims (JCC) awards the injured worker an amount for their attorney's fees pursuant to statute (see *Castellanos* provisions, below, for revisions to the award of fees).

Measures:

- Repeal provisions that prohibit attorneys from accepting and the JCC from approving attorney's fees paid directly by or on behalf of the injured worker outside of an award against the employer/carrier.
- Provide express authority for attorneys to accept fees paid directly by or on behalf of the injured worker outside of an award against the employer/carrier.
- Require the filing of retainer agreements with the JCC. Retainers are not subject to JCC approval.

Castellanos – Hourly Fee Based Departure from the Statutory Attorney Fee Schedule

Goal: Provide criteria for the award of a fee that departs from the fee schedule while controlling cost and taking the holding in the *Miles* case into account.

Measures:

- Keep the current statutory attorney fee schedule (i.e., percentage fee) as the primary attorney fees provision.
- Amend the statute to provide express authority to the JCC to approve an attorney fee that departs from the statutory attorney fee schedule.
- Permit a departure fee only when the JCC finds that the statutory attorney fee schedule produces an equivalent hourly rate that is less than 50 percent or more than 125 percent of the fee customarily charged in the locality for similar legal services.
- Incorporate factors using the ones that were removed from this statute in 2003 to guide the JCC when awarding a departure fee.
- Provide discretion to JCC to determine the precise hourly amount of the departure fee that is awarded (i.e., eliminate the current judicial restriction to select only from the amounts plead by a party).
- Cap the amount the carrier must pay under a departure fee at \$250 per hour. This limits how much would be due from the carrier.
- Create a statutory mechanism to annually adjust the \$250 per hour, cap. It will adjust each year by the same percentage as that year's change in the statewide average weekly wage (SAWW). SAWW is currently used to the limit the maximum amount of indemnity benefits the injured worker can receive and is determined annually under the workers' compensation law.
- Pursuant to a retainer agreement, the injured worker may be responsible for any attorney fees due after award of the statutory fee schedule amount or the departure fee, as applicable (see *Miles* provisions, above).

Westphal and *Jones* – Duration of Temporary Disability Benefits

Goal: Address the gap in wage replacement benefits cited in the *Westphal* and *Jones* cases while also incorporating the outcome of those cases into the statute.

Measures:

- Consistent with holdings, remove the 104 week limitation and allow a combined total of 260 weeks of temporary total disability (TTD) and temporary partial disability (TPD).

- Provide a limited extension of TTD benefits for up to 26 additional weeks when the injured worker reaches the maximum number of weeks but permanent benefits cannot begin because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
 - If the injured worker is not at overall maximum medical improvement after the extended TTD benefit is exhausted, the JCC is required, upon motion, to determine the injured workers' eligibility for permanent total disability benefits. Note: this occurs, if needed, more than five and one half years into the claim and is expected to be a rare occurrence.
- Require the provisional payment of Impairment Benefits (IBs) if the injured worker reaches the maximum number of weeks of temporary benefits (i.e., 260 weeks) but permanent benefits cannot begin because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
 - Pay provisional IBs consistent with the single highest permanent impairment rating and credit this amount to the carrier when they pay the final IBs upon overall maximum medical improvement and receipt of the overall permanent impairment rating. If necessary, the injured worker or carrier can seek the final impairment rating. Note: this occurs, if needed, more than five years into the claim and is expected to be a rare occurrence.

RATEMAKING REFORM

Goal: Increase insurer competition.

Measures:

- Permit insurer discretion to depart from required premiums in a uniform way by no more than five percent. This allows them to adjust prices to reflect efficiency in operations or other competitive factors.
- Require them to notify the Office of Insurance Regulation (OIR) of such a departure within 30 days of implementation. No review or approval is required by OIR; however, OIR may disallow the lower rate if it violates the ratemaking standards, imperils the financial condition of the insurer, or results in predatory pricing.

ELIMINATE NEGATIVE COST DRIVERS

Attorney Involvement

Goal: Control incentives for attorney involvement.

Measures:

- Prohibit the award of carrier paid attorney fees for services provided prior to the filing of a petition for benefits (injured workers would be responsible for these costs; see *Miles* provisions, above).
- Extend the attachment of attorney fees following the filing of a petition for benefits from 30 days to 60 days.
- Require greater specificity when reporting defense attorney fees as required by statute.
 - For litigated claims, the total amount of attorney fees and the total number of attorney hours will be filed with the Office of the Judges of Compensation Claims, in the aggregate.
 - For attorney fees unrelated to litigation, only the total amount of attorney fees will be filed.

Outpatient Facility Costs

Goal: Control growth in facility related reimbursements.

Measures:

- Change the reimbursement methodology for outpatient services provided by hospitals and ambulatory surgical centers from a charge based reimbursement to a percentage of the amount allowed under the Medicare Outpatient Prospective Payment System (OPPS). Currently, hospital outpatient care, except for scheduled outpatient surgery, is reimbursed at 75 percent of the usual and customary (U&C). Scheduled hospital outpatient surgery and ambulatory surgical center care are reimbursed at 60 percent of U&C. Note: the resulting scheduled surgery reimbursement rate is 80 percent of the rate for all other hospital outpatient care (i.e., 60% of U&C / 75% of U&C = 80%).
 - The applicable reimbursement is:
 - For hospital outpatient services, 140 percent of OPPS, except scheduled surgery is reimbursed 112 percent of OPPS (i.e., 140% x 80% = 112%).

- For ambulatory surgical center care, 112 percent of OPPS, i.e., the same level as scheduled hospital outpatient surgery.
- For outpatient services that are not reimbursable under OPPS, incorporate into statute the current reimbursement methodology adopted by the Three-Member Panel. This is either 75 percent (hospitals generally) or 60 percent (hospital scheduled surgery or ambulatory surgical center care) of the statewide average charge for the applicable procedure, as contained in the Division of Workers' Compensation database of billed charges at a stated frequency. And, for those procedures that lack an allowed amount under this procedure, then the applicable percent of the facility's actual billed charge.
- For care that does not fall under a statutory reimbursement method, give specific authority to the Three-Member Panel to adopt a reimbursement methodology. This will allow the Three-Member Panel to maintain or revise current reimbursement on other items or care, such as surgical implants, that otherwise lack a statutory reimbursement.

Authorization Requirements

Goal: Facilitate timely and efficient authorization of medical care.

Measures:

- Provide that carriers must respond to medical authorization requests in a material way by creating a definition of the term "respond." Currently, carriers are required to respond to an authorization request within 3 business days, or 10 business days in certain circumstances, but the nature of the required response is not defined.

Miscellaneous

Measures:

- Create a requirement that the Governor fill a vacancy on the Three-Member Panel within 45 days.
- Require the Chief Financial Officer (CFO) to fill the vacancy if the Governor does not make an appointment. The CFO's appointment period will also be 45 days, subject to Senate ratification.

PUBLIC RECORDS EXEMPTION – PERSONALLY IDENTIFYING INFORMATION OF INJURED WORKERS

Goal: Protect sensitive personal information of injured workers.

Measures:

- This measure requires a separate bill.
- Enact a public records exemption to protect personal identifying information of an injured or deceased worker. A similar provision was law from 1998 to 2003 and automatically sunset during the workers' compensation reforms of 2003.
 - Make such information held by the Department of Financial Services, Agency for Healthcare Administration, and Division of Administrative Hearings (i.e., the JCCs) confidential and exempt from disclosure.
 - Allow disclosure of personal identifying information of an injured or deceased worker, under the following circumstances:
 - To the injured worker or the dependents of a deceased worker,
 - In an aggregate report, without disclosing the personal identifying information, if the report contains the records of at least 10 workers and those records were filed more than 90 days prior to the records request,
 - To a party litigant, or their representative, in matters pending before a JCC,
 - Under a court order, or
 - To a state agency or law enforcement (which also must protect the information), when they are acting in their official duties.
- By law, this measure would include a sunset provision requiring repeal or reenactment after 5 years.