

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 511 Workers' Compensation
SPONSOR(S): Health & Human Services Committee; Hudson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 668

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--------------------------------------|------------------|---------|--|
| 1) Insurance & Banking Subcommittee | 14 Y, 1 N | Reilly | Cooper |
| 2) Health & Human Services Committee | 16 Y, 1 N, As CS | Poche | Gormley |
| 3) Economic Affairs Committee | 15 Y, 2 N | Reilly | Tinker |

SUMMARY ANALYSIS

Florida's workers' compensation law, ch. 440, F.S., provides medically necessary treatment and care for injured employees, including medications. Reimbursement for prescription drugs (generally to dispensing physicians and pharmacies) is the average wholesale price (AWP) plus a \$4.18 dispensing fee, or at a contract rate, whichever is lower. AWP is not defined in the worker's compensation law and does not have a universally accepted definition.

Prescription drug repackaging companies are licensed by the Department of Business and Professional Regulation. Drug repackagers purchase pharmaceuticals in bulk from the manufacturer and relabel and repackage the drugs into individual prescription sizes. The repackaged drugs are then assigned a different AWP than the manufacturer's suggested AWP, which is often substantially higher than the manufacturer's AWP. As such, the cost for a prescription filled with repackaged drugs in the workers' compensation system is generally much higher than it would have been if the prescription had been filled with the same drug that had not been repackaged. The overwhelming majority of repackaged drugs in Florida's workers' compensation system are dispensed by physicians who are authorized to dispense drugs at their office.

It is estimated that higher reimbursements for repackaged or relabeled drugs add \$62 million annually to workers' compensation costs, and that providing the same reimbursement for the same prescription drug, regardless of whether the dispensed drug is repackaged, relabeled, or non-repackaged, will decrease system costs by 2.5%. The Division of Risk Management within the Department of Financial Services, which provides workers' compensation benefits for state employees, reports that repackaged or relabeled drugs add \$1.2 million to its annual costs. For 2012, overall workers' compensation premiums in Florida have increased by 8.9%, based on a rate filing that was approved by the Office of Insurance Regulation.

The bill provides the same rate of reimbursement for repackaged or relabeled drugs as for non-repackaged drugs. Specifically, reimbursement for repackaged or relabeled drugs is to be calculated by multiplying the number of units of the drug dispensed by the per-unit AWP set by the original manufacturer of the drug (which may not be the manufacturer of the repackaged or relabeled drug), plus a \$4.18 dispensing fee, unless the carrier has contracted for a lower amount. The bill expressly prohibits the price of repackaged or relabeled drugs from exceeding the amount that would otherwise be payable had the drug not been repackaged or relabeled. This reimbursement formula was included in HB 5603 (2010), which was vetoed by Governor Crist.

The bill prohibits an employer or a carrier from refusing to authorize a physician to treat an injured worker because the physician is a dispensing practitioner. The bill permits an authorized treating physician who is also a dispensing practitioner to dispense and fill prescriptions for medication in the workers' compensation system. The bill prohibits the department or an employer or carrier from selecting the pharmacy, pharmacist, or dispensing practitioner that an injured worker must use to obtain prescription medications. Lastly, the bill requires reimbursement to an out-of-network dispensing practitioner providing prescription medication to an injured worker to be paid according to the fee schedule amount.

The bill is effective July 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0511e.EAC

DATE: 2/24/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Workers' Compensation Benefits¹

Chapter 440, F.S., is Florida's workers' compensation law. For work-related injuries, workers' compensation provides:

- Medically necessary remedial treatment, care, and attendance, including medicines,² medical supplies, durable medical equipment, and prosthetics.³
- Compensation for disability when the injury causes an employee to miss more than 7 days of work.⁴

The Division of Workers' Compensation within the Department of Financial Services (DFS) provides regulatory oversight of Florida's workers' compensation system.

Reimbursement for Prescription Drugs in Workers' Compensation

Reimbursement to pharmacies and dispensing physicians for prescription drugs in workers' compensation is provided for in s. 440.13(12)(c), F.S. Under current law, prescription drugs are reimbursed at the average wholesale price (AWP) plus a \$4.18 dispensing fee, or at a contract rate, whichever is lower.^{5, 6} AWP is not defined in the workers' compensation statute (ch. 440, F.S.) and does not appear to have a universally accepted definition.^{7, 8}

¹ Whether an employer is required to have workers' compensation insurance depends upon the employer's industry (construction, non-construction, or agricultural) and the number of employees.

² Many workers' compensation insurers have implemented prescription drug programs (sometimes called "first fill" programs) designed to avoid out-of-pocket pharmacy expenses to injured employees for the initial prescription filled at the pharmacy as well as subsequent prescriptions. Under such a program, an injured employee may be given a form or card to show at a pharmacy to avoid out-of-pocket expense.

³ See s. 440.13(2) (a), F.S.

⁴ See s. 440.12(1), F.S.

⁵ Section 440.13(12)(c), F.S., states: "As to reimbursement for a prescription medication, the reimbursement amount for a prescription shall be the average wholesale price plus \$4.18 for the dispensing fee, except where the carrier has contracted for a lower amount. Fees for pharmaceuticals and pharmaceutical services shall be reimbursable at the applicable fee schedule amount. Where the employer or carrier has contracted for such services and the employee elects to obtain them through a provider not a party to the contract, the carrier shall reimburse at the schedule, negotiated, or contract price, whichever is lower. No such contract shall rely on a provider that is not reasonably accessible to the employee."

⁶ In response to inquiries received by the Florida Division of Workers' Compensation (the Division) as to whether employers/carriers may appropriately deny authorization or reimbursement for prescription medication that is dispensed by a physician instead of a pharmacist, the Florida Department of Financial Services issued Informational Bulletin DFS-02-2009 on August 12, 2009. The bulletin informs in part that the Division is unaware of any specific provisions of the workers' compensation law that address the issue presented. Available at: <http://www.myfloridacfo.com/wc/> (last accessed February 20, 2012).

⁷ See, for example, "Prescription Benchmarks for Florida, 2nd Edition," a 2011 study by the Workers' Compensation Research Institute (WCRI study) compared with "Impact of Physician-Dispensing of Repackaged Drugs on California Workers' Compensation, Employers Cost, and Workers' Access to Quality Care," a 2006 study conducted by Frank Neuhauser and colleagues for the California Commission on Health and Safety and Workers' Compensation (California study). The WCRI defines average wholesale price as: "Published by First DataBank and Medi-Span ®. The AWP operates as an available price index that represents the most common wholesaler price charged to customers. The AWP does not necessarily represent the actual sales price in any single transaction. The payors may negotiate for lower prices. In workers' compensation systems, however, the AWP is often used as a price benchmark for pharmacy reimbursements of prescription drugs." [Note: On September 28, 2011, First DataBank discontinued publication of the "Blue Book on Average Wholesale Price." See <http://www.firstdatabank.com/Support/drug-pricing-policy.aspx>.] The California study states that: "AWP is probably the most widely quoted pricing benchmark, but the least meaningful.... unlike what the name implies, the price has no relation to a wholesale price, average or otherwise. It is simply a price point established by the manufacturer, wholesaler, or repackager.... The AWP... is typically much higher than the actual amounts that are paid by pharmacies and other wholesale drug purchasers...." For details on the WCRI study, see <http://www.wcrinet.org/>. The California study is available at: <https://www.dir.ca.gov/chswc/medicalPage1.html> (last accessed February 20, 2012).

Physician Dispensing of Drugs

The authority for a physician to dispense medicinal drugs is found in s. 465.0276, F.S. To dispense medicinal drugs, a physician must register with the applicable professional licensing board and pay a fee of \$100.⁹ In addition, the physician must comply with all applicable statutes found in chapter 465, chapter 499, and chapter 893, all applicable rules, and federal laws regarding the dispensing of medicinal drugs.¹⁰ Lastly, a physician must provide the patient with a written prescription and advise him or her, orally or in writing, that there is an option to have the prescription filled at the doctor's office or at a pharmacy.¹¹ Physician dispensing is regulated by the relevant licensing boards with the Department of Health. Currently, there are 6,677 registered dispensing physicians in Florida.¹²

A physician may not dispense drugs listed in Schedule II and Schedule III, as provided in s. 893.03, F.S.¹³ However, the following physicians are exempted from the ban on dispensing:

- A physician who dispenses complimentary medications in the normal course of practice without payment or remuneration;
- A physician dispensing a controlled substance listed in Schedule II or Schedule III in connection with the performance of a surgical procedure, limited to a 14 day supply;
- A physician dispensing a controlled substance listed in Schedule II or Schedule III pursuant to an approved clinical trial;
- A physician dispensing methadone in a methadone clinic licensed under s.397.427, F.S.; and
- A physician dispensing a controlled substance listed in Schedule II or Schedule III in a hospice care facility licensed under part IV of ch. 400, F.S.

To be eligible for payment under the workers' compensation law, health care providers who treat injured employees, except for emergency treatment, must apply for and be certified by the DFS and receive authorization from the insurer before providing treatment.¹⁴ As of October 2011, there were 37,694 certified health care providers in the workers' compensation system.¹⁵ The number of certified workers' compensation health care providers who are also authorized to dispense drugs is unknown.

Relabeled or Repackaged Drugs

The term "repackage," used in the context of distributing drugs in Florida, means to repack or otherwise change the container, wrapping, or labeling to further the distribution of a drug, device, or cosmetic.¹⁶ A "repackager" means a person who repackages a drug, device, or cosmetic, but specifically excludes pharmacies operating in compliance with pharmacy practice standards set out in chapter 465, F.S., and under applicable rules.¹⁷ The term "repackaged" drugs refers to pharmaceuticals that have been

⁸ The Florida Division of Workers' Compensation informs that in the event of a reimbursement dispute it would rely on the "Drug Topics Red Book," published by Thomson Reuters (New York) to determine the average wholesale price. The "Red Book" is listed as a reference source in the "Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2008 Edition." The Reimbursement Manual is available at: <http://www.myfloridacfo.com/wc/> (last accessed February 20, 2012).

⁹ See s. 465.0276(2)(a), F.S.; Rule 64B8-3.006, F.A.C.; Registration is not required for dispensing complimentary medications in the normal course of practice without payment or remuneration.

¹⁰ See s. 465.0276(2)(b), F.S.; chapter 499, F.S., contains the Florida Drug and Cosmetic Act, administered by the DBPR; chapter 893, F.S., contains the Florida Comprehensive Drug Abuse Prevention and Control Act, which was significantly amended during the 2011 Regular Legislative session; see also chapter 2011-141, L.O.F.

¹¹ See s. 465.0276(2)(c), F.S.

¹² Email correspondence from the Florida Department of Health on file with staff of the Health and Human Services Committee, dated February 6, 2012.

¹³ See s. 465.0276(1)(b), F.S.; see also s. 15, chapter 2011-141, L.O.F.

¹⁴ Section 440.13(3)(a), F.S.; Rule 69L-29.002, F.A.C.

¹⁵ Correspondence from the Division of Workers' Compensation on file with staff of the Insurance & Banking Subcommittee.

¹⁶ Section 499.03(49), F.S.

¹⁷ Section 499.003(50), F.S.

purchased in bulk by a relabeler from a manufacturer, relabeled, and repackaged into individual prescription sizes that can be dispensed directly by physicians to patients.¹⁸

Repackagers assign an AWP for a repackaged drug that differs from the AWP suggested by the original manufacturer of the drug.¹⁹ Frequently, the AWP assigned by the drug repackager is significantly greater than the AWP suggested by the drug's manufacturer. Thus, the cost of the repackaged drug, in terms of reimbursement paid by an insurer, is often significantly greater than it would have been if the prescription had been filled with the identical non-repackaged drug.

The Florida Department of Business and Professional Regulation (DBPR), which regulates prescription drug repackagers, reports that there are 26 licensed prescription drug repackagers in the state.²⁰

The Cost of Repackaged or Relabeled Prescription Drugs to Florida's Workers' Compensation System

Findings of the National Council on Compensation Insurance

The National Council on Compensation Insurance (NCCI) is the designated licensed rating and statistical organization for workers' compensation in Florida. Among its responsibilities, NCCI collects data from workers' compensation insurers in Florida and makes rate filings on the insurers' behalf. The workers' compensation rate filing for 2012, which was approved after a public hearing and subsequent review by the Office of Insurance Regulation (OIR), provides for an overall increase in workers' compensation rates of 8.9%.²¹

Based on current pricing with 2009 data, the NCCI has estimated that reimbursements for repackaged or relabeled prescription drugs add \$62 million in annual costs to the workers' compensation system, and that elimination of the higher reimbursements available for these drugs, as compared to non-repackaged drugs, would decrease system costs by 2.5%.²²

Additional findings by the NCCI about Florida's workers' compensation system include the following:²³

- The 15 most frequently dispensed drugs are 45% to 679% more expensive when a repackaged drug (rather than the identical non-repackaged drug)²⁴ is dispensed.²⁵
- Physician-dispensed drugs account for 50% of all prescription drug dollars; the highest percentage of the 46 states studied by NCCI.

¹⁸California study, *supra* note 7, at 6.

¹⁹ United States Government Accountability Office, "Brand-Name Prescription Drug Pricing: Lack of Therapeutically Equivalent Drugs and Limited Competition May Contribute to Extraordinary Price Increases" (GAO-10-201, December 2009). Available at: <http://www.gao.gov/products/GAO-10-201> (last accessed February 20, 2012).

²⁰ Correspondence from the Department of Business and Professional Regulation (DBPR) on file with staff of the Health and Human Service Committee. The DBPR also reports that as of January 2012, there were 257 "out-of-state prescription wholesaler distributor" permits issued. Such distributors are able to repackage drugs. However, the DBPR does not collect information as to whether applicants for such permits repackage drugs, as it does not have legal authority to regulate repackaging outside of the state of Florida.

²¹ See the Office of Insurance Regulation's website at <http://www.floir.com/PressReleases/index.aspx> (last accessed February 20, 2012).

²² Testimony by NCCI at the 2012 workers' compensation rate hearing, held October 11, 2011. A videotape of the meeting is available at www.floir.com/sections/pandc/productreview/ratehearingvideo.aspx (last accessed February 20, 2012); *see* Letter from Commissioner Kevin M. McCarty, Office of Insurance Regulation, to The Honorable Rene Garcia, Chair, Senate Health Regulation Committee, dated January 25, 2012 (on file with the Health and Human Services Committee)(commitment by Commissioner of OIR to seek 2.5% premium rate decrease upon passage of reforms in HB 511).

²³ Correspondence from NCCI on file with staff of the Insurance & Banking Subcommittee.

²⁴ NCCI's cost analysis compared brand name drugs to brand name drugs and generic drugs to generic drugs. Accordingly, the calculations did not involve a comparison of brand name drugs with generic drugs, which would have inflated the price increases that were reported for repackaged drugs.

²⁵ The 15 drugs are Carisoprodol, Meloxicam, Ranitidine HCL, Tramadol HCL, Lidoderm®, Naproxen, Omeprazole, Hydrocodone-Acetaminophen, Etodolac, Skelaxin®, Oxycodone-Acetaminophen, Cyclobenzaprine HCL, Cephalexin, Zolpidem Tartrate, and Ibuprofen.

- Physician-dispensed repackaged drugs account for 36% of overall prescription drug costs (by comparison, repackaged drugs dispensed by pharmacies account for approximately 4% of overall drug costs).

When California enacted a reform to eliminate higher reimbursements for repackaged or relabeled drugs and provide for the same rate of reimbursement as for non-repackaged drugs, physician dispensing remained fairly stable. Pre-reform (2003-2006), physician dispensing in California ranged from 38% to 53%; after the 2007 reform, physician dispensing has ranged from 47% to 50%. While prescription dispensing of repackaged drugs by California physicians has decreased since the reform (from over 49% of overall prescription dollars in 2006 to less than 5% of prescription drug dollars in 2009), physician dispensing of non-repackaged drugs increased (from less than 5% in 2006 to approximately 43% in 2009).²⁶

Findings of the Workers' Compensation Research Institute (WCRI)²⁷

In July 2011, the Workers' Compensation Research Institute (WCRI) published "Prescription Benchmarks for Florida, 2nd Edition,"²⁸ a study that compares the cost, price, and use of pharmaceuticals in workers' compensation in Florida with 16 other states.²⁹ Among the study's findings on Florida:

- For 2007/2008, the average payment per workers' compensation claim for prescription drugs was \$536, the second highest cost of the 17 states studied, and 45% higher than the median³⁰ of the states studied.³¹
- Between 2005/2006 and 2007/2008, the average cost per claim for prescription drugs in Florida increased by 14%, but remained relatively stable in the other study states.
- Higher and growing costs of prescription drugs in Florida were largely due to more frequent and higher-priced physician dispensing.
- Over a four-year period (from 2004/2005 and 2007/2008), the percentage of payments for physician-dispensed prescriptions increased from 17% to 46% of all prescription payments.
- In 2007/2008, for many common drugs, physicians were paid 40% to 80% more than pharmacies for the same prescription.
- 65% of physician-dispensed prescriptions were for pain medications.

Further, the WCRI study identifies and addresses two concerns that have been raised in response to proposals to eliminate higher reimbursements for repackaged drugs, and to provide the same rate of reimbursement for the same drug, whether it is repackaged or non-repackaged. The first concern is that prescription costs would increase as a result of such a change. This position is based on the following assumptions: that physician dispensing would decrease and that physicians dispense generic drugs more frequently than pharmacies. For the most commonly dispensed drugs, the WCRI found that physicians and pharmacies almost always dispense generic drugs, and that physicians are paid much higher prices per pill than pharmacies for the same prescription.

A second concern with providing the same reimbursement for repackaged and non-repackaged drugs is that physicians would stop dispensing drugs, and patients who do not have prescriptions filled by their doctor are less likely to take their medicine as prescribed, which would be detrimental to the

²⁶ Correspondence from NCCI on file with the Insurance & Banking Subcommittee.

²⁷ WCRI is an independent research organization that analyzes workers' compensation systems for states with which it contracts. WCRI provides information through studies and data collection efforts, and does not take positions on the issues it researches.

²⁸ WCRI study, *supra* note 7.

²⁹ The 17 states in the WCRI study are California, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Wisconsin.

³⁰ The Merriam-Webster Dictionary online defines median as "a value in an ordered set of values below and above which there is an equal number of values or which is the arithmetic mean of the two middle values if there is no one middle number...." See <http://www.merriam-webster.com/dictionary.htm>.

³¹ WCRI study, *supra* note 7, informs that physician dispensing is not generally allowed in three of the states in its study - Massachusetts, New York, and Texas.

patient. For California, the WCRI reports that physician dispensing decreased from 50% to 25% of all prescriptions immediately following enactment of a reform to provide the same reimbursement for repackaged and non-repackaged drugs.³²

Effect of Bill

The bill provides the same rate of reimbursement for repackaged or relabeled drugs as for non-repackaged drugs. Specifically, reimbursement for repackaged or relabeled drugs is to be calculated by multiplying the number of units of the drug dispensed by the per-unit AWP set by the original manufacturer of the drug (which may not be the manufacturer of the repackaged or relabeled drug), plus a \$4.18 dispensing fee, unless the carrier has contracted for a lower amount. The bill expressly prohibits the price of repackaged or relabeled drugs from exceeding the amount that would otherwise be payable had the drug not been repackaged or relabeled.

The bill prevents an employer or carrier from refusing to authorize a physician, who is also a dispensing practitioner pursuant to s. 465.0276, F.S., from treating an injured worker solely because the physician is a dispensing practitioner. If a physician is a dispensing practitioner and is authorized to treat an injured worker, the physician can dispense and fill prescriptions for medicines under chapter 440.

The bill prohibits the department or an employer or carrier from choosing the pharmacy, pharmacist, or dispensing practitioner that an injured worker must use in order to obtain prescription medication. Lastly, the bill requires an out-of-network dispensing practitioner, who is not a party to a contract setting out the price of filling and dispensing prescription medication, to be reimbursed pursuant to the fee schedule.

B. SECTION DIRECTORY:

Section 1: Amends s. 440.13, F.S., relating to medical services and supplies; penalty for violations; limitations.

Section 2: Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

According to the DFS, providing the same rate of reimbursement for repackaged, relabeled, and non-repackaged drugs dispensed to injured state employees will reduce costs incurred by the Division of Risk Management by \$1.2 million annually.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

To the extent that repackaged drugs are dispensed by physicians to local government employees who suffer a workplace injury, the bill will lower the costs that local governments pay for prescription drugs.

³² Data from the first quarter of 2008. Subsequent dispensing patterns are not addressed in this study.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Providing the same rate of reimbursement for repackaged or relabeled drugs as for non-repackaged drugs will save Florida employers \$62 million annually in workers' compensation costs, a 2.5% system savings.³³

Physicians that dispense prescription drugs under the workers' compensation system will continue to receive a \$4.18 dispensing fee for each prescription they fill, but will no longer derive additional income from current higher reimbursements.

D. FISCAL COMMENTS:

The bill will result in significant savings to state and local governments and lower workers' compensation costs for Florida employers.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 9, 2012, the Health and Human Services Committee adopted a strike-all amendment to House Bill 511. The strike-all amendment made the following changes to the bill:

- Prevented an employer or carrier from refusing to authorize a physician to treat an injured worker because the physician is a dispensing practitioner under s. 465.0276, F.S.;
- Permitted a physician who is a dispensing practitioner and is authorized to treat an injured worker to dispense and fill medications;
- Prohibited the department, employer or carrier from selecting the pharmacy, pharmacist, or dispensing practitioner the injured worker must use to obtain prescription medications; and
- Required reimbursement to an out-of-network dispensing practitioner to be at the fee schedule amount.

The bill was reported favorably as a committee substitute. The analysis reflects the committee substitute.

³³ See *supra* at note 22.