

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1007 Workers' Compensation
SPONSOR(S): Hood, Jr.
TIED BILLS: **IDEN./SIM. BILLS:** SB 1214

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee		Reilly	Cooper
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The bill makes various changes to Florida's workers' compensation law, including the following:

- Clarifies that all pre-existing conditions, both work-related and non-work-related, are to be considered in determining whether the workplace injury is the "major contributing cause" (more than 50 percent responsible) for the treatment or benefits being sought. Similarly, as employers or insurers are responsible only for medical treatment associated with a workplace injury, all pre-existing conditions are to be considered and the percentage of medical care attributable to those conditions apportioned out from the liability of the employer or insurer.
- Requires insurers to respond to an employee's written request to change to a new physician within 5 *business* days. At present, insurers are required to respond within 5 days.
- Authorizes permanent total disability (PTD) benefits to be paid at either 66 2/3 or 66.67 percent of the employee's average weekly week. Currently, PTD benefits are payable at 66 2/3 percent. The amendment addresses a court decision regarding the calculation of PTD benefits.
- Specifies that PTD benefits cannot be awarded if the authorized physician believes the employee can perform light-duty work.
- Limits circumstances under which the advance payment of compensation may be ordered or approved by a Judge of Compensation Claims to cases in which the injury is compensable (covered by workers' compensation). Prohibits an advance when the employer or insurer denies compensability. Provides a repayment formula when advance payments are made by self-insured employers.
- Authorizes the employer or insurer, when certain controlled substances are prescribed, to require the prescribing physician to meet with and evaluate the injured employee at medically reasonable intervals to determine levels of each controlled substance in the employee's system.
- Requires employers with a drug-free workplace program to conduct post-accident drug testing, which employees must submit to immediately after receiving initial treatment for their injury. Creates rebuttable presumption that the injury was primarily occasioned by drug use if the employee refuses to submit to testing.
- Provides that employers who are in compliance with material provisions of drug-free workplace program requirements, but are not in compliance with every non-material provision, cannot be precluded from using positive test results to deny benefits, unless the non-compliance affects the validity of the test results.
- Requires health care providers and medical entities, at the request of an employer who does not have a drug-free workplace program or its insurer, to collect bodily samples for drug or alcohol testing. Requires the employer or insurer to pay all associated costs, regardless of the test results.

The bill has no fiscal impact on state or local government. The National Council on Compensation Insurance (NCCI) has indicated that the bill will likely result in some cost savings, partially offset by increased frictional costs. However, NCCI is unable to explicitly quantify the impact on overall workers' compensation costs that may result from the bill.

The bill is effective July 1, 2014.

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

STORAGE NAME: h1007.IBS

DATE: 3/9/2014

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 440, F.S., is Florida's workers' compensation law. 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. Construction industry employers with 1 or more employees are required to have workers' compensation insurance.¹ Non-construction industry employers with 4 or more employees are required to have workers' compensation insurance. Agricultural employers with more than 5 regular employees and 12 or more employees at one time for seasonal agricultural labor who work more than 30 days are required to have workers' compensation insurance.²

Workers' Compensation Rates and Statistical Information

The National Council on Compensation Insurance (NCCI) is the designated statistical agent and rating organization for workers' compensation insurance in Florida. NCCI's responsibilities include collecting and analyzing data from workers' compensation insurers conducting business in Florida and submitting rate filings to the Office of Insurance Regulation. NCCI is often asked by the Florida Legislature to provide cost impacts of pending legislation to the Florida's workers' compensation system.

Workers' Compensation Benefits

For work-related injuries sustained by employees, workers' compensation provides:

- Medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment and prosthetics.³
- Compensation (indemnity benefits) for disability when the injury causes the employee to miss more than 7 days of work.⁴ Indemnity benefits are discussed in more detail below.

To be eligible for workers' compensation benefits, the workplace injury must arise out of the course and scope of employment and be, and remain, the "major contributing cause" of any resulting injuries for which treatment or benefits are sought. Major contributing cause is defined as the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought.⁵ The bill clarifies that all pre-existing diseases or conditions, both work-related and non-work-related, are to be considered in determining major contributing cause. NCCI is unable to quantify the savings associated with this provision.⁶

When an employee with a preexisting condition or disease suffers a compensable injury, the employer or insurer is responsible only for medical treatment associated with the compensable injury, excluding any preexisting conditions. In other words, the need for any medical care attributable to pre-existing conditions is "apportioned" out from that attributable to the workplace injury. The bill clarifies that all pre-existing diseases or conditions, both work-related and non-work-related, are to be considered in determining the percentage of medical treatment attributable to the compensable injury, and for which the employer or insurer is responsible. NCCI is unable to quantify the savings associated with this provision.⁷

Under the workers' compensation law, health care providers must be authorized by the insurer before providing treatment, except for emergency services. However, injured employees are entitled to one

¹ Section 440.02(17)(b)2, F.S.

² Section 440.02(17)(c)2, F.S.

³ Section 440.13(2)(a), F.S.

⁴ Section 440.12(1), F.S.

⁵ Section 440.09(1), F.S.

⁶ Correspondence from NCCI dated March 4, 2014, on file with the Insurance and Banking Subcommittee.

⁷ *Id.*

change of physician. If the insurer does not authorize a new physician within 5 days after receiving the employee's written request, the employee is authorized to select the treating physician. The bill amends current law by providing that insurers have 5 *business* days to respond to an employee's written request to change physicians. NCCI estimates that this change would have a negligible impact on overall workers' compensation system costs.⁸

Workers' compensation indemnity benefits are payable to employees who miss at least 8 days of work due to a covered (compensable) injury. However, the benefits are payable retroactively from the first day of disability (to include compensation for the first 7 days missed) to employees who miss more than 21 days of work due to a compensable injury.⁹ In most cases, indemnity benefits are payable at 66 2/3 percent of the employee's average weekly wage (AWW) up to the maximum weekly benefit for the year of injury. For example, s. 440.15(1)(a), F.S., provides for permanent total disability benefits to be paid at 66 2/3 percent of the employee's AWW up to the maximum weekly benefit established by the workers' compensation law.¹⁰

In *Escambia County School District v. Vickery-Orso*,¹¹ the employer calculated the compensation rate for an employee with a permanent total disability by multiplying the AWW by .66667. This resulted in the employer paying more than 66 2/3 percent of the AWW (a weekly benefit of \$529.48 rather than \$529.47, when rounded to cents). The Judge of Compensation Claims (JCC), however, determined that the appropriate multiplier was .6667 (AWW x .6667), which resulted in a weekly benefit of \$529.50. The JCC ordered the employer to pay this benefit amount and awarded associated penalties, interest, costs, and fees to the employee. On appeal, the First District Court of Appeal held that the JCC erred in requiring the employer to pay a greater benefit because the employer had not paid less than the compensation rate (66 2/3 percent of the AWW) required by statute.

With respect to permanent total disability benefits, the bill addresses the *Escambia* decision by authorizing employers to pay compensation at either 66 2/3 percent or 66.67 percent of the AWW. The latter calculation produces a slightly higher compensation rate for injured employees and removes the need for employers/carriers that have been paying permanent total disability benefits at 66.67 percent to incur reprogramming costs.

Permanent Total Disability

As noted earlier, medically necessary treatment, care, and attendance is provided under the workers' compensation law for such period as the nature of the injury or the process of recovery may require. In cases in which the workplace injury results in permanent total disability (PTD),¹² monetary benefits are payable during the continuance of the total disability.¹³ Section 440.15(1)(a), F.S., bars the payment of PTD benefits to employees engaged in, or physically capable of engaging in, at least sedentary employment.

The bill clarifies eligibility for PTD benefits by specifying that such benefits cannot be awarded if, in the opinion of the authorized physician, the employee is able to perform light-duty work. Employees, however, may contest their release to light-duty work. NCCI is unable to quantify the potential savings that might result from this change.¹⁴

⁸ *Id.*

⁹ Section 440.12(1), F.S.

¹⁰ The maximum weekly compensation rate for work-related injuries and illnesses occurring on or after January 1, 2014 is \$827.00. See Informational Bulletin DFS-03-2013 (December 19, 2013). Available at: <http://www.myfloridacfo.com/division/wc/pdf/DFS-03-2013.pdf> (Last accessed: March 7, 2014).

¹¹ 109 So.3d 1242 (2013).

¹² The employee can be adjudged to be permanently and totally disabled or presumed to be permanently and totally disabled. Section 440.15(1)(b), F.S., lists injuries that are presumed to result in PTD. The list includes a spinal cord injury involving severe paralysis of an arm, leg, or the trunk; amputation of an arm, hand, foot, or leg involving the effective loss of use of that appendage; and severe brain or closed-head injury under certain conditions. In all other cases, to obtain PTD benefits, the employee must establish that she/he is not able to engage in sedentary employment, within 50 miles of the employee's residence, due to her/his physical limitation.

¹³ Entitlement to PTD benefits cease when an employee reaches age 75, unless the compensable injury has prevented the employee from working sufficient quarters to qualify for social security benefits. Additionally, employees who are injured on or after the age of 70 will receive PTD benefits during the continuance of the permanent total disability for up to 5 years.

¹⁴ NCCI correspondence, *supra* note 6.

Advance Payment of Benefits

Section 440.20(12), F.S., permits JCCs to approve (informally by letter, without a hearing) or order (after a hearing) an advance payment of compensation of up to \$2,000 to an injured employee.¹⁵ The bill provides that advance payments of compensation may be approved or ordered only when the employee has suffered a compensable injury, and precludes an advance when the employer or insurer denies compensability. The bill also provides a formula for repaying any advance payments made by self-insured employers. Specifically, the self-insured employer is authorized to deduct 20 percent of the injured employee's wages until the advance is repaid in full. NCCI informs that it does not collect the data to objectively quantify the cost impact of this change, but estimates that the overall impact on system costs would be negligible.¹⁶

The Controlled Substances Act¹⁷

Under federal law, drugs, substances and certain chemicals (collectively referred to as "drugs" in the following) are classified into five distinct schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential:

- Schedule I drugs currently have no accepted medical use in the United States.
- Schedule II drugs have a high potential for abuse, but less abuse potential than Schedule I drugs, and may lead to severe psychological or physical dependence. These drugs include oxycodone, cocaine, and methamphetamine.
- Schedule III drugs have less potential for abuse than drugs in Schedules I or II and have a moderate to low potential for physical and psychological dependence. Schedule III narcotics include combination products containing less than 15 milligrams of hydrocodone per dosage unit and products containing less than 90 milligrams of codeine per dosage unit.
- Schedule IV drugs have low potential for abuse and low risk of dependence.
- Schedule V drugs have a lower potential for abuse than Schedule IV drugs and consist of preparations containing limited quantities of certain narcotics.

To ensure that Schedule II, Schedule III, or Schedule IV drugs are being taken by injured employees as prescribed, the bill authorizes the employer or insurer to require the prescribing physician to meet with and evaluate the injured employee at medically reasonable intervals to determine the level of each controlled substance in the employee's system. Such evaluation may include testing of blood or urine. NCCI is unable to quantify the potential savings resulting from this provision due to the uncertainty regarding the number of claims that would be affected and the reduction to claim costs.¹⁸

Drug-Free Workplace Program

Employers that implement a drug-free workplace (DFW) program in accordance with the criteria set forth in s. 440.102, F.S., may be eligible for a 5 percent discount on their workers' compensation insurance premium.

Employers with a DFW program must conduct the following types of drug tests:¹⁹

- Job application drug testing.
- Reasonable-suspicion drug testing.
- Routine fitness-for-duty drug testing.
- Followup drug testing.

The bill adds post-accident drug testing to the list of required drug tests. Employees must submit to post-accident testing immediately after receiving initial treatment for their injury. The refusal to submit to such testing, absent clear and convincing evidence to the contrary, creates a presumption that the injury was occasioned primarily by the employee's drug use. The presumption may be rebutted by evidence that there is no reasonable hypothesis that the drug influence contributed to the injury. NCCI

¹⁵ The parties may also stipulate to an advance payment of compensation.

¹⁶ NCCI correspondence, *supra* note 6.

¹⁷ For information on the Federal Controlled Substances Act, see the United States Drug Enforcement website, <http://www.justice.gov/dea/druginfo/ds.shtml> (Last accessed: March 7, 2014).

¹⁸ NCCI correspondence, *supra* note 6.

¹⁹ Section 440.102(4), F.S.

notes that to the extent that DFW employers already regularly conduct post-accident drug testing immediately after the initial treatment, no change in system costs would be expected. It also states that for DFW employers that do not currently regularly require such testing, the bill could potentially decrease the number of claims that are eligible for workers' compensation benefits. Accordingly, NCCI states that the potential impact of this provision on system costs is unknown.²⁰

Under current law, one time only and prior to testing, an employer with a DFW program must give each employee and job applicant a written policy statement with specific information, including a general statement of the employer's policy on employee drug use; a general statement concerning confidentiality; the consequences of refusing to submit to a drug test; and a list of all drugs for which the employer will test, described by brand name or common name, as well as by chemical name.²¹

Section 440.102(5), F.S., lists procedures governing specimen collection and testing for drugs, including:

- Samples must be collected with due regard to an individual's privacy and in a manner reasonably calculated to prevent sample substitution or contamination.
- Specimen collection must be documented.
- Specimen collection, storage, and transportation to the testing site must be performed to reasonably preclude contamination or adulteration.
- Confirmation tests must be conducted by a licensed or certified laboratory.
- Persons collecting or taking a specimen for a drug test must collect enough for two drug tests.
- Every specimen producing a positive, confirmed test result must be preserved for at least 210 days.

Employers must deny workers' compensation benefits to employees with a confirmed, positive test result. However, all medical care provided before the denial must be paid by the insurer or self-insured employer.²²

The bill provides that employers who are in compliance with material²³ provisions of the DFW statute, but who are not in compliance with every non-material requirement, cannot be prevented from using positive test results to deny benefits, unless the non-compliance affects the validity of the test results.

Pursuant to s. 440.09(7), F.S., employers that do not have a DFW program, but have a reasonable suspicion that a workplace injury was primarily occasioned by an employee's intoxication (by drugs or alcohol), may require the employee to submit to testing for any drugs or alcohol. In such circumstances, the bill requires medical providers and entities, at the request of the employer or insurer, to collect bodily samples, including blood or urine, for drug and alcohol testing. Medical providers are required to retain all samples, follow chain-of-custody requirements, and release the samples to a licensed laboratory for testing. The bill requires the employer or insurer to pay all associated costs, regardless of the test results. NCCI anticipates that this provision would result in a negligible impact on overall workers' compensation system costs.²⁴

B. SECTION DIRECTORY:

Section 1. Amends s. 440.09, F.S., relating to workers' compensation coverage.

Section 2. Amends s. 440.102, F.S., relating to drug-free workplace program requirements.

Section 3. Amends s. 440.13, F.S., relating to medical services and supplies.

Section 4. Amends s. 440.15, F.S., relating to compensation for disability.

Section 5. Amends s. 440.20 F.S., relating to time for payment of compensation and medical bills.

Section 6. Provides an effective date of July 1, 2014.

²⁰NCCI correspondence, *supra* note 6.

²¹ Section 440.102(3), F.S.

²² Section 440.102(5) (p), F.S.

²³ Although the term "material" is not defined in the bill, *Black's Law Dictionary* (9th ed., 2009) defines the term in part to mean "Having some logical connection with the consequential facts. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."

²⁴NCCI correspondence, *supra* note 6.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

NCCI states that the bill will likely result in some cost savings, which would be partially offset by increased frictional costs. However, it is unable to explicitly quantify the impact of overall workers' compensation system costs that may result from the bill.²⁵ NCCI pricings as to specific provisions of the bill are contained throughout the bill analysis.

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:

The DFS informs that payment for some of the "related medical costs" for reasonable suspicion drug testing provided by the bill may not be contained in the Workers' Compensation Health Care Provider Reimbursement Manual.

²⁵ NCCI correspondence, *supra* note 6.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES