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The One-Two Punch that Could Roll Back Workers' Compensation Reforms

By

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Florida employers have benefited enormously since the sweeping system overhaul provided by the Workers' Compensation Reform Act of 2003. They have enjoyed a rate decrease averaging more than 60 percent, a sharp drop in litigation, less fraud, strong competition by insurers, and a slowing in the ever-climbing cost of medical care.

Injured workers have has also benefited: lower frequency of injuries, better benefits when injured, and better access to specialist medical care.

All this has been a welcome change from the past when Florida had one of the worst workers' compensation systems in the country.

But here is a warning for employers: prepare for much higher costs ahead.

In the last year, the reform provisions have suffered a one-two punch that could bring the system to its knees again, giving rise to a more chaotic workers' compensation climate and much higher costs. And this will hit at the same time that Florida employers are already reeling from the widespread U.S. and global economic downturns.

The good news is that legislators and employers could intervene now to prevent this impending crisis. The bad news is that if history is any guide, they are unlikely to do so.

In the 2003 Reform, when this important social safety net had been pushed to the limit, there was no longer availability and affordability of workers' compensation insurance. That has been the typical cycle for workers' compensation reform, and one that could well be repeated if we are not vigilant. We now have the opportunity to stop the hemorrhaging from occurring rather than waiting until the hemorrhaging has almost killed the patient until we react.

The First Blow

The first punch to the system came in November's Florida Supreme Court decision in *Murray v. Mariners Health/ACE USA* (*Murray*), which eliminated the statutory caps on claimant attorney fees. This was a serious blow to one of the pillars of the reform. Prior to 2003, open-ended hourly attorney fees were a perverse incentive contributing to Florida's workers' compensation claim costs being 40 percent higher than any other U.S. state.

This court decision has had an immediate impact on Florida businesses. In the wake of this decision, the National Council on Compensation Insurance (NCCI) has recommended an 18.6 percent rate increase over the next two years in Florida workers' compensation premiums, with half of that being effective by March 1, 2009.

It gets worse. *Murray* could apply to all workers' compensation cases which are currently in litigation where the injury occurred after October 1, 2003. This is potentially a massive retrospective cost to employers. Dino A. Fabrizio, President of Lighthouse Programs, Risk Transfer Holdings, Inc., notes that it will take two years before the extent of the increase in litigation can be assessed. He emphasizes that the prospect of retrospective litigation opens employers to significant potential liabilities − liabilities that are completely unfunded.

The *Murray* decision by the Supreme Court was the result of some ambiguity in the statutes governing workers' compensation. It is possible that the upcoming legislative session could eliminate the statutory ambiguity that led to the Court's decision. What might be done by the legislature, given all their other priorities at this time, is an open question.

The Second Blow

The second threat to the ongoing health of the workers' compensation system is no less dire, but is attracting far less public notice since it is relegated to a more obscure area of workers' compensation. The technical nature of the proposed threat to employers means that when awareness arrives in the form of increased rates, it is likely to be a surprising and very costly blow to employers.

A new workers' compensation hospital outpatient fee schedule, tied to Medicare, is being proposed by the Division of Workers' Compensation and the Three Member Panel, both of which are under the umbrella of the Department of Financial Services (DFS). Informed critics think this change could increase expenses to employers by an order of magnitude of between $250 and $400 million a year and put in place incentives that would increase medical utilization of high-cost hospital and specialist services. It is precisely such over-use of expensive medical services that is widely recognized as the primary driver of higher costs for workers' compensation medical care. And worse still, according to experts at Florida State University, once such incentives are in place, a pattern of excessive use of high-cost medical services has proven to be impossible to reverse in Florida, even when financial incentives for over-use lessen.

These proposed changes started in a purported and possible premature response to *One Beacon Insurance v. Agency for Health Care Administration*, a court decision which found that the statutory obligation of employers to pay "usual and customary" charges means that payment should be the average fees being charged by facilities in the area for comparable treatment. Setting payments at "usual and customary charges," as the Florida statute has done for workers' compensation payments to certain medical providers, has proven to be treacherous for others. This is essentially the fundamental issue in the recent litigation of New York's Attorney General Cuomo against United, Aetna, Ingenix, and others. DFS hoped to create some transparency by translating the "usual and customary" language of the statute, as that phrase is interpreted by the Appeals Court, into a fee schedule.

On the surface, looking to the Medicare system for a foundation of consistency and order would seem to be a sound direction. But more careful analysis shows that the cure being proposed is worse than the disease. Here are just some of the costs and effects independent experts have predicted:

- With the proposed fee schedule, some Florida hospitals will have their emergency room payments reduced by as much as 39 percent. (This number has been calculated by independent experts who have been analyzing DFS data and the potential economic effect of the proposed rule on hospitals.) Their expert conclusion: many Florida hospitals will be significantly impacted by the proposed fee schedule. Florida hospitals' total charges for workers' compensation ER visits are expected to be about $50 million in 2009. The proposed fee schedule would so sharply reduce ER payments for some local hospitals that a funding crisis might likely result. Hospitals depend on these revenues to keep their emergency department doors open. This change will place an additional financial burden on Florida hospitals, which are already stressed by overflowing ER waiting rooms as the number of uninsured swell due to employment cut backs.

- Increased potential for fraud and abuse, as well as much higher costs for routine care. Under the proposed fee schedule, Florida hospitals would have powerful financial incentives to set up workers' compensation clinics inside the hospital itself. It is not widely understood that clinics set up as part of the hospital can charge a "facility fee" of roughly $1,600 or more per patient over what it would cost employers if the injured worker were treated in a free standing

doctor's office. This is also an area of widespread fraud and abuse that is currently being investigated by Medicare's Office of Inspector General.

- Chaos for injured workers and treating surgeons. With the proposed fee schedule, Florida will have three different ways to pay for workers' compensation surgery: one way when the surgery is performed in an ambulatory surgery facility, another payment scheme if the surgery is done in a hospital outpatient surgery, and a third scheme if the surgery is performed in a hospital and the patient stays overnight. Critics call this simply crazy. It is also likely to significantly drive up costs, because complex surgeries done on an inpatient basis will cost employers two times more than if they were done in same-day surgeries.

- In some cases, injured workers will not be able to get the timeliest, best, and most advanced care. As a result, employers' lost-time costs will soar. A number of experts point out that Medicare's outpatient surgery fees, the basis on which DFS is proposing that hospitals be paid, does not pay for the latest techniques that get the injured back to work quickly.

The state defends its choice with a report by NCCI that assesses the impact of this measure as revenue neutral. Numerous experts in the system have raised their voices in strong dissent. They point out that the very basis for NCCI's optimistic projections is an outdated (1994-1996 data) study on physicians' responses to Medicare payment cutbacks, an analysis that even the U.S. Congressional Budget Office, in its recent studies, now says is not to be relied upon.

Rather than getting into the excruciating detail of dueling actuarial projections, one need only look to the concrete example of California to see the extent of the market mayhem that could ensue. California adopted a similar, but less radical, workers' compensation fee scheme tied to Medicare a few years ago. (Florida's plan calls for adjusting the Medicare fees Florida-specific multipliers of 174% for outpatient surgeries and 395% for other outpatient services.) But surgery costs have soared in California and the state's rating agency recently recommended a premium hike of 17.8%, an increase largely caused by a spike in utilization of surgery. Moreover, the method being proposed by DFS would likely lock in an annual 14 percent increase in Florida's charges for outpatient services, the over-all rate Florida hospitals' outpatient charges have been increasing each year. This price inflation alone would cost Florida employers $38 million a year – every year, cumulatively.

Law of Unintended Consequences at Play

Gary M. Fournier, Professor of Economics at Florida State University, has stated that locking in a payment system that provides huge financial incentives for hospital-based care will lead to increased utilization of surgery and other hospital-based procedures. Many in the industry agree with that assessment, noting that the system provides an alluring incentive that will likely have the effect of driving more outpatient procedures from competing cost-effective ambulatory surgery centers into more costly inpatient hospital procedures. "This is a gift to hospitals," says Dr. Richard Johnson, MD, MPH, President and CEO of Lakeside Occupational Medical Centers, Inc. He notes that despite the fact that hospital-based outpatient services are more costly than

non-hospital owned outpatient services, many stand-alone practices might be forced to move into the more costly hospital settings simply to survive.

A quick look graphically demonstrates the perverse incentives that will result in a "trickle up" migration to higher-priced services. The "facility fee" of $1600 that hospital-based clinics are permitted to charge on top of the physicians' fee for professional services rendered is a fee that is not able to be charged in non-hospital settings. If hospital-based workers' compensation clinics gain a 10% to15% market share, it will result in yearly cost increases of millions more to employers. Some employers are also concerned about how increased in-patient proceedings could affect the ability of injured workers to return to their jobs quickly. Injured workers being treated on an in-patient basis are likely to believe their injuries are more serious and may not heal in the same manner as those treated on an outpatient basis.

Vincent Drucker, CEO of FairPay Solutions, Inc. notes that hospitals are reimbursed nearly two times more for high tech devices and implants when reimbursed by Florida's inpatient surgery fee schedule than if the same surgery is done on a same-day basis under the outpatient fee schedule being proposed by DFS. A shift to higher cost inpatient procedures would represent a cost increase of at least $37 million a year, according to FairPay's analysis.

Joseph Paduda, principal of Health Strategy Associates, notes that workers' compensation is already the most profitable line of business for Florida hospitals, delivering gross margins in excess of 50 percent. He states, "The already sky-high profits hospitals are making on workers' comp in Florida … make comp the best payer by far in the Sunshine State. This methodology makes it even more lucrative."

What's Best for the Injured Worker?

Beyond cost, at the heart of the workers' compensation system there is the matter of the injured worker. It is the system's stated goal to care for that worker and to provide the benefits and care that will return the injured worker to maximum productivity as expeditiously as possible. It simply doesn't make sense to overlay a medical system that was designed for seniors on a working age population that requires more aggressive treatment to arrive at a level of functionality that will afford return to work in a timely fashion. Paduda notes that the Centers for Medicare and Medicaid Services has repeatedly stated their reimbursement methodology is specific to their population, and discouraged use of that methodology by other payers. He wonders why the state would require employers to pay much more for health care delivered to injured workers than the state is willing to pay for care delivered to Medicaid patients.

Drucker also sees multiple problems with adopting a Medicare-based fee schedule. He believes that Medicare's payment scheme is fundamentally flawed in terms of paying hospitals appropriately for the many types of procedures necessary to treat injured workers. He points to a mismatch between outpatient surgery that is medically appropriate for workers' compensation patients and what the Medicare fee schedule will cover and pay for. For one example, nearly 90% of those aged 60 to 69 have facet joint osteoarthritis versus only 24% aged 40 and younger. This is only one example of the many disconnects between the medical conditions and treatment needs of the workers' compensation population versus the Medicare population.

His concerns are validated by a research analysis performed by Michael Malloy and Herd Midkiff with J. Taylor & Associates, LLC, a professional service firm recognized as a leading healthcare consultant nationally, providing accounting, consulting and tax related services to clients located throughout the United States. They compared Florida hospitals' surgery costs, based on Agency for Health Care Administration data, and show markedly higher hospital costs for workers' compensation orthopedic surgeries than hospitals' costs for treating Medicare patients with roughly similar problems.

Dr. Richard Johnson of Lakeside Occupational Medical Centers notes that the Medicare system simply doesn't have a built-in mechanism for recognizing procedures and protocols that are common to occupational medicine and uncommonly used by providers treating older patients. Since Medicare provides no codes or allowable billing mechanisms for case management or the time a physician spends talking to an employer, it is easier for the physician to not spend the time on administrative return-to-work/stay-at-work planning and simply send the injured employee home.

The Wrong Tool to Fix the Problem

Numerous industry experts suggest that this fee scheme, while no doubt well-intentioned, is not only dangerous but a piecemeal approach to a problem that requires a more comprehensive solution. The time is right for a revamp of the entire medical fee reimbursement schedule for workers' compensation. It was not comprehensively done in 2003, in a fashion with checks and balances, dispute resolution in fees, and over-utilization review in a quicker fashion.

Medical costs and litigation costs are two of the largest workers' compensation cost drivers. They were two basic pillars of the cost-saving 2003 Florida comp reforms. If these pillars collapse, because of unwise reactions to these two court decisions, the predictable results are: higher costs for employers, a more contentious and prolonged series of medical treatments of injured workers, and a far more costly state to do business in for workers' compensation insurers.

If you are a business owner, manager, employer, or an insurer, call your legislator to voice your concerns. Chaos and higher costs are not inevitable, and may be avoided with a prudent legislative path that does not include adoption of a flawed Medicare-based payment system for hospitals treating workers' compensation patients.

About Florida TaxWatch

Florida TaxWatch is a statewide, non-profit, non-partisan taxpayer research institute and government watchdog that over its 30-year history has become widely recognized as the watchdog of citizens' hard-earned tax dollars. Its mission is to provide the citizens of Florida and public officials with high quality, independent research and education on government revenues, expenditures, taxation, public policies, and programs, and to increase the productivity and accountability of Florida Government.

Florida TaxWatch's research recommends productivity enhancements and explains the statewide impact of economic and tax and spend policies and practices on citizens and businesses. Florida TaxWatch has worked diligently and effectively to help state government shape responsible fiscal and public policy that adds value and benefit to taxpayers.

This diligence has yielded impressive results: in its first two decades alone, policymakers and government employees implemented three-fourths of Florida TaxWatch's cost-saving recommendations, saving the taxpayers of Florida more than $6.2 billion -- approximately $1,067 in added value for every Florida family, according to an independent assessment by Florida State University.

Florida TaxWatch has a historical understanding of state government, public policy issues, and the battles fought in the past necessary to structure effective solutions for today and the future. It is the only statewide organization devoted entirely to Florida taxing and spending issues. Its research and recommendations are reported on regularly by the statewide news media.

Supported by voluntary, tax-deductible memberships and grants, Florida TaxWatch is open to any organization or individual interested in helping to make Florida competitive, healthy and economically prosperous by supporting a credible research effort that promotes constructive taxpayer improvements. Members, through their loyal support, help Florida TaxWatch bring about a more effective, responsive government that is accountable to the citizens it serves.

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With your help, Florida TaxWatch will continue its diligence to make certain your tax investments are fair and beneficial to you, the taxpaying customer, who supports Florida's government. Florida TaxWatch is ever present to ensure that taxes are equitable, not excessive, that their public benefits and costs are weighed, and government agencies are more responsive and productive in the use of your hard-earned tax dollars.

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