



# JOHNS EASTERN COMPANY, INC.

Claim Adjusters & Third Party Administrators

**SPEED AND ACCURACY**



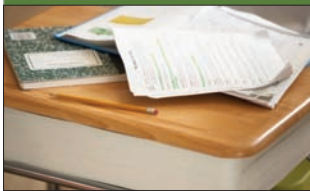
## CEU SEMINARS

2/10: "Interpreting Physical Therapy Notes" & "Evidence Based Practice" provided by Select Medical. 11:30 AM - 2 PM.

2/17: "Is it a Bite? Is it MRSA? It's Everywhere!" – Dr. Arlene Guzik, speaker. 11:30 AM - 1:00 PM.

3/7: "Common Hand & Elbow Problems in the Workplace" – Dr. George Kardashian, speaker & "IME & Potpourri" – Drs. Steve Nadler and Jared Salinsky, speakers. 8:30 AM - 11:00 AM.

For more details: E-mail Janice Augenstein at [jaugenstein@johnseastern.com](mailto:jaugenstein@johnseastern.com)



## WORKERS' COMPENSATION WATCH

### Bills Aim to Control Pricing of Repackaged Prescriptions

In recent Florida workers' compensation news, Senate Bill 668 filed by Senator Alan Hays, and its companion measure, House Bill 511, filed by a group of House members, address an area of concern for all businesses in Florida. The bills focus on pricing for repackaged and re-labeled prescriptions, responding to growing concern over physician dispensing. The bills do not prevent physician dispensing, but rather control the pricing that is charged, bringing it to a reasonable level.

The bills are identical and were kept simple at just one and a half pages each. They revise the requirement for repackaged or re-labeled prescription drugs and provide limitations on pricing to equal the average wholesale price plus a dispensing fee of \$4.18, unless a contract for a lesser amount exists.

If passed, the bills will become effective

on July 1, 2012. The staff analysis indicates that the National Council on Compensation Insurance (NCCI) estimates a rate decrease of 2.50% if the legislation passes, with a system-wide savings of \$62 million.

You can follow the bills' progress at [www.myflsenate.gov](http://www.myflsenate.gov) or at [www.myfloridahouse.gov](http://www.myfloridahouse.gov).

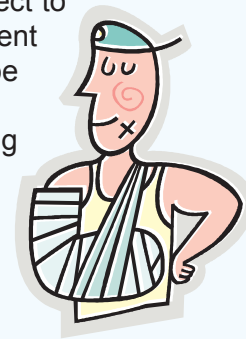
Edward M. Shaw  
FASI President



### New Average Weekly Wage Takes Effect

Florida's Department of Economic Opportunity has determined the statewide average weekly wage (AWW) paid by employers subject to the Florida Unemployment Compensation Law to be \$802.56 for the four calendar quarters ending June 30, 2011.

Accordingly, the maximum weekly compensation rate for injuries occurring on or after January 1, 2012 shall be \$803.00.



Florida Division of Workers' Compensation

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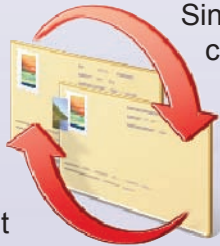
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# STATUTE-OF-LIMITATIONS DEFENSE SUFFERS A SETBACK

The First District Court of Appeals recently made a couple of decisions that are important for clients of Johns Eastern Company:

► The first case, *Omar Miranda v. Azul Plastering*, references the statute-of-limitations (SOL) defense. The claims administrator evidently sent information about the SOL to the claimant's old address. It was not returned as "undeliverable", so the claims administrator took the position that it was forwarded to the claimant's new address. The First District Court of Appeals (FDCA) disagreed and stated that there must be proof that it was forwarded. This is, in my opinion, another way that the FDCA is attempting to "do away with" the SOL defense.



► The second case, *Sherry Keeton v. Kentucky Fried Chicken*, pertains to an Expert Medical Advisor (EMA). The treating physician said that the claimant's Carpal Tunnel Syndrome (CTS) was not work-related. The claims administrator received an Independent Medical Exam (IME) that said the CTS was work-related. Since there were conflicting opinions, the claims administrator requested an EMA, which the judge subsequently ordered. The EMA said the CTS was not work-related. The claimant argued that the claims administrator was bound by their IME. The FDCA disagreed. They quoted the Statute: "If there is



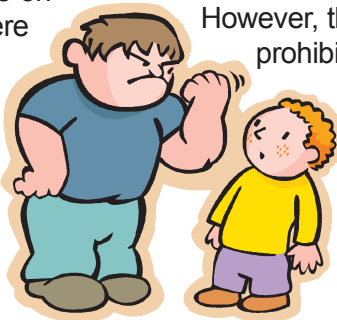
disagreement in the opinions of the health care providers ... the Judge of Compensation Claims shall, upon his or her own motion or within 15 days after receipt of a written request by either the injured employee, the employer, or the carrier, order the injured employee to be evaluated by an Expert Medical Advisor."

§ 440.13(9)(c), Fla. Stat. (2005). See *Amos v. Gartner, Inc.*, 17 So.3d 829, 831 (Fla. 1st DCA 2009).

Nancy A. Riley, AIC  
Manager, Special Account Services

## NEW REPORT ADDRESSES STATE BULLYING LAWS

Bullying continues to be a growing issue in education law. In 2011, the President and First Lady held the "White House Conference on Bullying Prevention," where various anti-bullying laws were introduced, and numerous lawsuits were filed. Recently, a report was issued to the U.S. Department of Education titled "Analysis of State Bullying Laws and Policies." The lengthy report includes the following key findings:



► Forty-six states have bullying laws and 45 of those laws direct school districts to adopt bullying policies.

### SCHOOL LAW ALERT

However, three of the 46 states prohibit bullying without defining the prohibited behavior.

► Thirty-six states include provisions in their education codes prohibiting cyberbullying (bullying using electronic media). Thirteen states specify that schools have jurisdiction over off-campus behavior if it creates a hostile school environment.

► Forty-one states have created

model bullying policies, 12 of which were not mandated to do so under law. Three other states, including Hawaii, Montana, and Michigan, also developed model policies in the absence of state bullying legislation.

► Among the 20 school district bullying policies reviewed in this study, districts located in states with more expansive legislation produced the most expansive district policies. However, several school districts in states with less expansive laws also substantially expanded the scope and content of their policies beyond the minimum legal expectations.

The Attorneys of Sniffen & Spellman, P.A.

# MEDICARE'S EVOLVING SETTLEMENT PROCEDURES

## \$300.00 Threshold

Effective 09/06/11, if a beneficiary receives a lump sum settlement of \$300 or less and the case meets certain criteria, Medicare will not recover from that settlement.

1. Settlement must be trauma based;
2. Beneficiary has not and will not receive any other payments related to the incident;
3. Medicare has not previously issued a recovery demand letter; and,
4. Medical bills have not been paid directly on an ongoing basis.

## Fixed Percentage Option

Effective 11/07/11, if a beneficiary has a physical trauma-based liability case and receives a **total settlement of \$5,000 or less**, the beneficiary may resolve Medicare's recovery claim by paying Medicare 25% of the total liability settlement (not reduced by attorney fees and costs) instead of using the current recovery process. To be eligible, all of the following criteria must be met:

1. Must be a liability settlement, judgment, award or other payment;
2. The settlement must be for a physical-based trauma (not related to exposure, ingestion or medical implant);
3. The beneficiary must elect this option within the required timeframe and before Medicare has issued a demand letter for reimbursement; and,
5. The beneficiary must not have received or expect to receive any other settlements, judgments,

awards, or payments related to the incident.

Review [www.msprc.info](http://www.msprc.info) for full information about how to submit this request.



## Self-Calculated Final Conditional Payment Amount Option

The Centers for Medicare & Medicaid Services (CMS) is implementing an option in **February 2012** that will allow certain beneficiaries to obtain Medicare's final conditional payment amount prior to settlements involving physical trauma-based injuries where treatment has been completed. Under this option, the beneficiary or their representative will calculate the amount of Medicare's conditional payment amount using information received from the Medicare Secondary Payer Recovery Contractor (MSPRC), the

MyMedicare website, or other claims information available. The MSPRC will review this amount and, if accurate, will respond with Medicare's final conditional payment amount within 60 days.

To secure the final conditional payment amount, the beneficiary must settle within 60 days of Medicare's response.

**In order to use this option, ALL of the following criteria must be met:**

1. The liability settlement will be for a physical trauma-based injury;
2. The total liability settlement, judgment, award, or other payment will be **\$25,000 or less**;
3. The incident occurred at least **six months** before submitting the proposed conditional payment amount to Medicare; and,
4. The beneficiary demonstrates that no further treatment is expected either through a physician attestation or by certifying in writing that no case-related medical treatment has occurred for at least **90 days** prior to submitting the proposed conditional payment amount to Medicare.

Instructions for this process will be posted on the MSRRC website at [www.msprc.info](http://www.msprc.info) by 01/15/12. This is an initial step in providing beneficiaries and their representatives with Medicare's conditional payment amount prior to settlement. CMS plans to expand this option as it gains experience with the process.

**James Boelter,**  
Liability Quality Assurance Manager  
TPA Operations

# TASK FORCE AIMS TO PUMP UP 'HEART LUNG BILL'

Potential changes are in the works to section 112.18, Florida Statutes (F.S.), commonly referred to as the "Heart Lung Bill". Section 112.18 was enacted in 1965, and only presumed hypertension, heart disease or tuberculosis compensable for firefighters. In 1999, state law enforcement officers were added as a covered class. In 2002, all law enforcement and correctional officers became eligible, as defined in section 943.10(1), (2), and (3), F.S.

While already deemed costly claims for public employers, the 2002 amendments brought a substantial increase in the number of claims brought pursuant to section 112.18. Part of the pension reform bill enacted last year included the creation of an eight-member task force to develop findings and issue recommendations on the disability presumptions, including section 112.18.

The task force was instructed to address the fiscal impact of the presumptions; the manner in which other states handle presumptions; proposals for change to the disability presumptions; and evidentiary standards and burdens of proof for overcoming the presumptions (including consideration of risk factors and epidemiological data).

While the task force report was not final at the time this article was written, sources close to the process have relayed potential areas of suggested change, the most significant of which (specific to 112.18) are outlined below.

## **Limitations on Covered Employees:**

▶ The employee must be employed for 10 years with the current employer and must be under 37 years of age to be eligible for the presumption.

## **Pre-Employment Physical:**

▶ Clarifying what specific findings on a pre-employment physical exam amount to evidence of hypertension, heart disease, or tuberculosis.

## **Clarifying Conditions Covered:**

▶ Narrowing the "heart disease" component of the presumption specifically to "coronary artery disease" and requiring disability and permanent impairment.  
▶ Limiting "hypertension" to arterial or cardiovascular and requiring disability and permanent impairment.



## **Attempts to Define Disability:**

▶ Employee must miss 14 straight days of work to be covered.  
▶ Expanding the definition of disability to include the assignment of an impairment rating.  
▶ Subsequent periods of disability wouldn't result in a new accident date.

## **Rebutting the Presumption:**

▶ Lowering the standard for rebutting the presumption to preponderance of the evidence.  
▶ Elevating standard for rebutting the presumption to clear and convincing.  
▶ Allowing risk factors and epidemiological data to be used to rebut the presumption.

▶ No presumption if the employee has ever used tobacco products.  
▶ Including firefighters in section 112.18(1)(b).

## **Miscellaneous:**

▶ Creating an impairment rating schedule for presumption claims.  
▶ Eliminating entitlement to workers' compensation benefits for presumptive conditions if the employee is covered by an employer's health insurance program.

In addition to the pending task force report, there are two proposed bills which would change section 112.18, Florida Statutes. They are House Bill 365 and Senate Bill 910.

## **Limitations on Covered Employees:**

▶ A requirement that the claimant work for the employer for at least 5 years before they are entitled to the presumption, and be 37 or younger.

## **Rebutting the Presumption:**

▶ Change the standard from competent evidence to a preponderance of evidence.  
▶ Allow consideration of risk factors and epidemiological data relating to such things as cholesterol, body mass index, history of tobacco and alcohol use; and other medical conditions.

## **Miscellaneous:**

▶ Modifying section 112.18(1)(b)(1) to include firefighters.

A majority of the task force proposals, coupled with the changes proposed by the House and Senate bills, would represent significant savings to state and local governments. Of course, the real impact will not be known until the session is over.

Karen J. Cullen, Esq.  
Broussard & Cullen, P.A.

# FREE SEMINARS TO ENHANCE WORKPLACE SAFETY

The Florida Department of Financial Services, Division of Workers' Compensation, has announced the dates for the upcoming Workers' Compensation and Workplace Safety Employer Seminars.

The free classes are available to employers, business owners and others responsible for ensuring that the proper Workers' Compensation Insurance and Safety in the Workplace is a priority.

Workers' Compensation topics will include a review of key statutory definitions, insurance coverage requirements, exemptions, contractor responsibilities and enforcement provisions. Workplace Safety topics will include direct and indirect costs, inspections, and Florida fatalities.

The Division has partnered with the U.S. Department of Labor, Office of Safety and Health Administration (OSHA) and the University of South Florida "Safety Florida Consultation Program" in making these presentations.

Two types of training opportunities are being provided: Classroom sessions and Webinars (All seminars provide the same material and information.)

► **Classroom sessions** are scheduled from 9 AM to

Noon on the following dates (location addresses are listed on the registration form):

Feb. 7: Pensacola	March 14: Tallahassee
Feb. 10: Pompano Beach	March 20: West Palm Beach
Feb. 16: Tampa	March 27: Orlando

► **Webinars**, which can be joined via your computer and telephone, are scheduled from 2 to 3 PM on the following dates:

*Workers' Compensation:* Feb. 8, March 7, April 11, May 9, June 13

*Workplace Safety:* Feb. 9, March 8, April 12, May 10, June 14

Advance registration is required. Fliers and registration forms can be

found on the Division's Website, [www.myfloridacfo.com/wc](http://www.myfloridacfo.com/wc), by going to the "Employer" section and then to "Education Outreach / Resources".

Continuing Education Units are available to individuals licensed by the Department of Business and Professional Regulation (DBPR), Construction Industry Licensing Board (CILB) or the Electrical Contractors Licensing Board (ECLB) for all sessions, including the Webinars.



# RULE CHANGES AFFECT CURRENT & FORMER SELF-INSURERS

The Florida Department of Financial Services, Division of Workers' Compensation has made some changes to Rule 69L-5.205 (Loss Data Reporting), F.A.C. and Rule 69L-5.217 (Civil Penalties and Fines), F.A.C. effective 12/29/2011.

Clarification was made within Rule 69L-5.205, F.A.C. to former self-insurers who only have to report loss data for their final period once,



## DWC ALERT

versus the former three consecutive years. Rule 69L-5.217, F.A.C. changed the maximum allowable penalty to \$10,000 versus the former \$25,000. The changes further provide explanation on how refunds could be handled for any self-insurer who paid penalties in excess of the revised amount between 3/9/10 and the present.

Both rules may also be found via <http://www.myfloridacfo.com/wc/forms.html> or <https://www.flrules.org/gateway/ChapterHome.asp?Chapter=69L-5>.

If you have any questions, or need assistance with a refund, please call Kerry Thayer at (877) 879-9539, or e-mail [kthayer@johnseastern.com](mailto:kthayer@johnseastern.com).

**Kerry Thayer**  
Account Manager, Special Account Services



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**JOHNS EASTERN COMPANY**  
Experience. Integrity. Results

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- Karen Cullen
- Kerry Thayer



## IN THE SPOTLIGHT

**JOHNS EASTERN COMPANY PRESENTS OUR NEW CLIENTS:**

- **City of Winter Park**
- **City of Marco Island**

**WELCOME!**

- **Steve Henderson** is the new Director of Risk Management for the School District of Manatee County.
- **Sharon Walton** is the new Risk Manager for Citrus County BOCC.

- **Bonnie McFarland** is the new Risk Manager at Lee County School Board.

**CONGRATULATIONS!**

- **Jeffrey Moquin** has been promoted to Chief of Staff of Broward County School Board.

**HAPPY RETIREMENT!**

- **Cheryl Burt**, Risk Management Specialist for the School District of Manatee County, after 22+ years.

## CONSIDER THE CONSEQUENCES OF INTERNET POSTINGS

### **Moreno v. Hanford Sentinel, Inc.:** **An Internet Privacy Case Study**

The principal of a rural community high school submitted to the local newspaper a former student's extremely negative ode to the rural town, which was previously published for public consumption on the former student's MySpace account. The community reacted violently to the remarks, to the point that the former student's family chose to leave the community, closing a 20-year-old family business.

Since the ode was published without the former student's permission, and

to a lesser extent, since the ode was later removed for public consumption from the MySpace account, the former student sued the newspaper and the principal for various invasion of privacy claims and for Intentional Infliction of Emotional Distress (IIED).

The appellate court allowed the plaintiff's IIED claim to proceed, but upheld the privacy claims' dismissal.



### **Key Findings**

**EVERYONE Should Consider** Information located in public (third party) domains, and where no passwords or invitations are needed, is repeatedly held by the courts as having no expectation of privacy. The identity of the posting person is also public when attributed to a public source (MySpace, Facebook, etc.).

**Conclusion:** Consider the consequences of Internet postings.

Kevin Lewis, FCLS  
GlobalOptions Inc.