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CEU SEMINAR

12/20/13:

"Indemnity & Medical Issues"

(1 hr. Law & Policy)

- Robert P. Byelick with Abbey, Adams, Byelick & Mueller, L.L.P.

11:30 AM - 1:00 PM,

Johns Eastern Company, Inc., Hurricane Room, 6015 Resource Lane, Lakewood Ranch, FL.

For more details:

E-mail Rose Rome at rome@johnseastern.com



JOHNS EASTERN COMPANY, INC.

Claim Adjusters & Third Party Administrators

WWW.JOHNSEASTERN.COM

WORKERS' COMPENSATION LAW VALIDATED

The Court ruled that the 104-week cap on TST benefits is constitutional.

In a massive 76-page decision, a bitterly divided First District Court of Appeal receded en banc from the February 2013 three-judge panel opinion in *Westphal v. City of St. Petersburg*, and reaffirmed the validity of the Florida Workers' Compensation law.

Sharply reversing course, the Court determined that the 104-week cap on temporary total disability (TTD) benefits is constitutionally sound. The Court, however, went even further. It receded from its 2011 en banc decision in *Matrix Employee Leasing, Inc. v. Hadley*, and ruled that a claimant in a TTD status at the expiration of the 104 weeks is eligible to receive PTD benefits. This mammoth opinion may not be the last word because the Court also certified the following question to the Supreme Court of Florida:

"Is a worker who is totally disabled as a result of the workplace accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical



improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?"

The question, however, might never be answered by the Supreme Court. First, the District Court certifying a question does not, by itself,

send the case to the Supreme Court for review. A party must first seek review in the Supreme Court. It remains to be seen whether the City will seek Supreme Court review. Moreover, Mr. Westphal is now the prevailing party and is unlikely to seek review in the Supreme Court. Second, there is no guarantee that the Supreme Court will accept the case even if asked. The Supreme Court is authorized to consider a certified question, but is permitted to decline to do so.

Assuming no review by the Supreme Court, we should consider the en banc decision to be a victory for the industry, albeit one with a caveat. Under *Westphal*, a claimant who remains in a TTD status at the expiration of the 104 weeks of temporary benefits becomes entitled to PTD benefits for as long as he or she remains totally disabled.

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Signed into Law



HOW MEDICARE CHANGES MAY IMPACT LIABILITY

Are Liability MSAs on the horizon? What about Medicare Advantage Plan (MAP) rights of recovery? MAP is still up in the air, with court cases being decided with conflicting opinions, reviewed by the Appellate Courts, and then denied review by the U.S. Supreme Court.

In an effort to keep up with the changing rules, a brief summary is offered here.

Threshold Change for Liability Claims Reporting to COBC

Effective October 1, 2013, the threshold for reporting claims to the COBC office is dropping from above \$5,000 to above \$2,000. If a claim settles for \$2000.01, it is reportable in the quarter beginning January 1, 2014.

Liability MSA?

Right now, Liability MSAs are not required, but be aware that CMS has already started bringing them a step closer to the liability arena. An Advanced Notice of Proposed Rulemaking with public comment has already been opened and closed. As of September 2013, a Notice of Proposed Rulemaking had been posted in the Federal Register to be followed by a 60-day public comment period, which will then be followed by the final rulemaking. One of the options of the Advanced Notice of Rulemaking provides a full formal MSA and CMS approval process for liability insurance. Another option would be to exempt liability settlements from having to consider Medicare's interest with regard to future medicals if the liability

settlement is under a certain monetary threshold.

Medicare Advantage Plans - Right of Recovery

It has been estimated that 25% of Medicare beneficiaries are enrolled in some type of MAP, and that number is expected to increase. The question has been brought before several courts concerning whether or not a MAP has the same rights of recovery as regular Medicare. Cases include:

Total TPOC Amount	TPOC Date On or After	Section 111 Reporting Required in the Quarter Beginning
TPOCs over \$100,000	October 1, 2011	January 1, 2012
TPOCs over \$50,000	April 1, 2012	July 1, 2012
TPOCs over \$25,000	July 1, 2012	October 1, 2012
TPOCs over \$5,000	October 1, 2012	January 1, 2013
TPOCs over \$2,000	October 1, 2013	January 1, 2014
TPOCs over \$300	October 1, 2014	January 1, 2015

▶ December 5, 2011 - In *Parra v. Pacificare of Arizona* and *In Re Avandia Marketing* the courts found that MAPs simply have a contractual right of recovery and not the same rights as Medicare to recover conditional payments.

▶ July 12, 2012 - The court decision in *In Re Avandia* is overturned by the Third Circuit Court of Appeals, with a finding that MAPs do have the same recovery rights as Medicare including the right to pursue a Private Cause of Action for double damages under the MSP, for conditional payments that are not reimbursed.

▶ April 15, 2013 - The Supreme Court denied certiorari to the *In Re Avandia* case, which likely will have a huge impact on the rights of Medicare Part C plan, and the obligations to report claims to

those plans and reimburse them. This leaves standing the Third District Court of Appeals ruling that MAPs do have the same recovery rights as Medicare including the right to pursue a Private Cause of Action for double damages under the MSP, for conditional payments that are not reimbursed.

▶ April 19, 2013 - The Ninth Circuit confirms the decision on *Parra* and finds that MAPs do not have the same rights of recovery as Medicare and can recover conditional payments through the contractual rights route.

Humana, Inc., which offers

varied Part D and Medicare Advantage benefits, recently filed lawsuits in four jurisdictions seeking to exercise its priority right to recover conditional payments. The resulting decisions may be enough to compel the U.S. Supreme Court to eventually hear the issue.

Statute of limitations for Conditional Payment Recovery

One of the components of the SMARTAct took effect on July 10, 2013. The SMARTAct, also known as H.R. 1845, provides that six months after enactment, an action for recovery of conditional payments cannot be brought unless it is less than three years after the date of the receipt of notice of a settlement, judgment, award or other payment by CMS/DHHS.

James Boelter
Liability Quality Assurance Manager
Johns Eastern Company, Inc.

JOHNS EASTERN EMBRACES NEW SIU PARTNERSHIP

Command Investigations brings new investigative technologies to the table to help adjusters fight fraud.

Johns Eastern has partnered with Command Investigations, LLC to support its newest SIU & anti-fraud initiatives.

As Johns Eastern's SIU Department, Command Investigations will spearhead all suspect claim investigations and fraud reporting to the respective state fraud bureaus. In addition, core statutory responsibilities include all regulatory compliance requirements, CEU accredited training, public awareness program hosting and on-site SIU consultation.

Complementing core investigative services include surveillance, background investigations, investigative canvasses and field investigations.

"This new partnership will provide Johns Eastern Company with a dedicated SIU and Anti-Fraud team that will enhance and complement the existing quality claims review process already established to identify, investigate, report and deter suspect claims. We are very excited about this renewed business partnership and look forward to many successes," said Beverly Adkins, Executive Vice President with Johns Eastern.

SIU Department Mission Statement

To Aggressively and Proactively Deter, Detect, Investigate and Report Insurance Fraud.

- Deter by denying fraudulent claims
- Detect through superior fraud awareness & training
- Investigate to the highest of ethical standards
- Report suspect & fraudulent claims

of senior investigators and managers reunited to form Command Investigations. Johns Eastern's past SIU platform had much success, including hundreds of thousands of dollars in documented claim savings, tens of thousands in restitution orders and numerous arrests and convictions.

Command Investigations' SIU Department has leveraged every ounce of this historical success going forward. This includes the newest investigative technology platforms, methodologies and techniques that are being employed to enhance and support Johns Eastern's current SIU program.

New SIU and proprietary investigative technologies include:

- Claims Buzz™ enhanced social media investigations
- Restitution Management Program™
- Quick Check™ instant online background searches
- Command Center interactive customer portal
- Smart Surveillance™ featuring predictive behavioral modeling

Johns Eastern's SIU Department will continue to cultivate and promote a culture of fraud awareness.

Steve Cassell
Command Investigations, LLC



The Johns Eastern and Command Investigations business relationship is not new. The entire Command Investigations SIU Department and senior management team previously operated Johns Eastern's SIU program as RSight Investigations. This partnership lasted until 2010 when the company was sold. After a two-year hiatus, this core group

WORKERS' COMPENSATION CASES FACE CHALLENGES

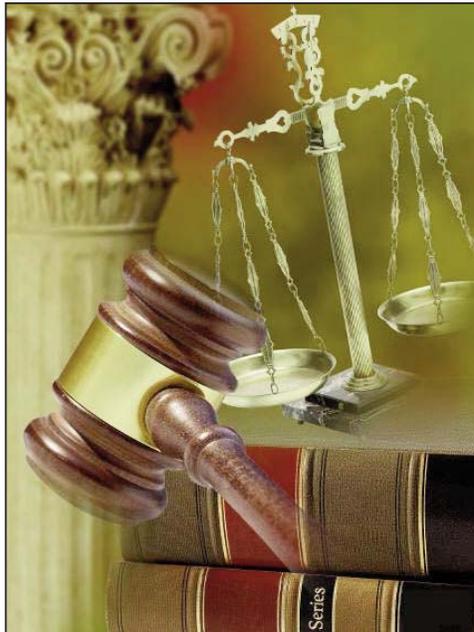
Claimants' attorneys are using the Constitution to oppose legislation that limits benefits and restricts lawyer fees.

Attorneys representing Florida claimants appear to be making a concerted effort to challenge past legislation that limits benefits to injured workers and restricts attorney fees by asserting that such measures are unconstitutional. Recently, a few of these challenges have come to a head.

In *Russ v. Brooksville Health Care Center*, 109 So. 3d 1266 (Fla. 1st DCA 2013), the claimant filed a motion seeking approval of an hourly attorney's fee retainer agreement. Because Florida law prohibits claimants from contracting with an attorney on an hourly fee basis, the claimant also requested an evidentiary hearing to establish a constitutional challenge to the attorney fee statute. The judge of compensation claims (JCC) denied the motion, finding it lacked jurisdiction to decide constitutional issues. The claimant petitioned the First District Court of Appeal (DCA).

The First DCA reversed the decision, finding that the JCC departed from the law and caused irreparable harm by denying the claimant an evidentiary hearing. The court said even though the JCC lacks jurisdiction to rule on constitutional issues, the claimant should still be permitted to make a record for the appellate court to review. The court did not reach the constitutional issues asserted, stating those issues were premature.

Additionally, in *Jacobson v. SouthEast Personnel Leasing, Inc.*, 1D12-1103 (Fla. 1st DCA 2013), a claimant appealed an order granting the employer/carrier's Motion to Tax Costs and denying the claimant's Motion to Approve a Retainer Agreement with his attorney. In appealing the Motion to Approve the Retainer Agreement, the claimant challenged the constitutionality of sections 440.105(3)(c) and 440.34 insofar as those sections precluded him from contracting for legal services to defend the employer/carrier's Motion to Tax Costs.



The First DCA concluded that to the extent those sections prohibit the claimant from retaining counsel to defend a Motion to Tax Costs, those sections are unconstitutional.

Accordingly, the First DCA found a claimant may contract with an attorney to defend against the motion.

In *Westphal v. City of St. Petersburg*, 1D12-3563 (Fla. 1st DCA 2012), the

First DCA determined section 440.15(2)(a) (which limits a claimant to 104 weeks of temporary disability benefits) is unconstitutional as applied to the claimant. The court found the claimant should be entitled to 260 weeks of temporary total - what he would have been entitled to under the pre-1994 amendments.

The court has since issued a new en banc decision, retreating from its prior finding that the 104-week "cap" on temporary disability benefits was unconstitutional. The court also construed this provision as allowing an injured worker to immediately seek and, potentially, establish entitlement to permanent total disability benefits if (1) s/he has exhausted the 104 weeks and (2) remains totally disabled. In other words, "an injured worker who is still totally disabled at the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement as a matter of law, even if the worker may get well enough someday to return to work."

In addition, arguments attacking the constitutionality of workers' compensation law are being asserted throughout the state. At least one case is pending in a county court challenging the constitutionality of the 2003 amendments to section 440.

Overall, the First DCA, by virtue of its recently issued opinions, has shown it is taking constitutional challenges seriously. As a result, a constitutional challenge could become an issue in virtually every workers' compensation case. Only time will tell what the effect of these challenges will be.

Meredith Sasso, Esq.
Broussard & Cullen, P.A.

FLORIDA GOVERNOR SIGNS DRUG REPACKAGING BILL

The new law implements cost controls on practitioner dispensed repackaged drugs.

Florida Governor Rick Scott has signed into law Senate Bill 662, which implements cost controls on practitioner dispensed repackaged/re-labeled drugs that went into effect July 1, 2013.

Senate Bill 662 outlines a separate fee schedule and processes for re-labeled/repackaged drugs dispensed by a dispensing practitioner (a physician or practitioner other than a licensed pharmacist or pharmacy permitted by law to dispense), and requires all claims submitted for repackaged/re-labeled drugs to be billed with the underlying National Drug Code (NDC) of the original manufacturer.



In addition, the bill also removes language permitting application of a carrier/Pharmacy Benefit Manager (PBM) contracted rate to a pharmacy or dispensing practitioner bill presented from a provider which does not have a direct contract with a carrier or their agent/PBM.

The bill amends the current FL WC Statute 440.13(12)(c), which expands the Florida state fee schedule for prescription drugs to now be based upon the dispensing type/entity and dispensed drug.

While the new law “appears” to have addressed inflated costs associated with practitioner-dispensed meds, one must compare the cost of the medication if the injured worker had gone to a network pharmacy, versus receiving them from his physician.

- Price of prescription if filled at an in-network pharmacy - \$31.00
- Price of prescription if practitioner dispensed - \$41.75

The \$10.75 price difference is still putting an additional 34.7% cost increase on the medication. In addition, the benefits of claims management, medical case management and a pharmacy benefit management program are completely absent from the process.

However, the bill does produce balanced savings by requiring billing and reimbursement to be based upon the underlying NDC/AWP and no longer on the inflated NDC/AWP. With the law now in effect, employers and carriers or TPAs have to evaluate the cost impact on their workers’ compensation claims.

Source: PMSI

RECENT DEVELOPMENT IN ONE-TIME CHANGE REQUIREMENT

The one-time change statute (found in section 440.13(2)(f), FL Stat.) provides that a “carrier shall authorize an alternative physician...within 5 days after receipt of the request.”

This provision came before the First District Court of Appeals (DCA) in *Bustamante v. Amber Constr. Co.*

In this case, the adjuster immediately sent a fax to the chosen doctor with authorization in response to the claimant’s one-time change request, but did not inform the claimant or his attorney until after the five-day deadline. The Court concluded that the Employer/Carrier (E/C) had not timely “authorized an alternative physician,” as (1) the adjuster merely

requested that a new physician take on the claimant (without knowing whether the doctor would), and (2) the claimant was not informed within five days of his request.

The First DCA distinguished the foregoing from the situation in *HMSHOST Corporation v. Frederic*. In that case, the Court found that the E/C’s merely providing the claimant with the name of a physician was sufficient, even though the E/C had not contacted the doctor (and did not know whether the doctor would accept the patient). The *Bustamante* court stated that, as the claimant knew the doctor’s name in the *Frederic* scenario, “she had the ability

to follow up if she heard nothing.” The claimant in *Bustamante*, however, “had no way to follow up.”

The above cases suggest that, to ensure compliance with section 440.13(2)(f), an adjuster should notify the claimant of the name of the physician who has been/will be authorized within five days of the request. While the *Bustamante* court’s reasoning indicates that the doctor must be authorized and willing to treat the claimant, the language in both decisions suggests that notifying the claimant is paramount.

Kristen Magana, Esq.
Broussard & Cullen, P.A.

JOHNS EASTERN UPGRADES CLAIMS SYSTEM TO AIM 2.0

Johns Eastern Company, Inc. is excited to share that we are developing an improved claims system providing a strategic combination of cutting-edge technology and unparalleled services. This system will add much more functionality and value for our clients and our staff. We are still several months from implementing this system but it is our desire to keep you informed every step of the way.

We are certain that our ability to manage your claims will be greatly enhanced. Here are just a few of the features you can expect:

- A claims administration system that supports all lines including Workers' Compensation, Auto, General Liability, Property, Personal Property, Professional Liability, etc.
- An integrated dashboard that can be configured by user.
- A work bench that gives you the ability to open and navigate between multiple claims within one window.
- An automated alert system that will allow us to define, track and benchmark key performance indicators.
- Enhanced reporting and filtering capabilities including Loss Triangles, Safety Analysis Reports and Litigation Reports.
- Web Reporting Module for Liability Loss Reporting.
- Integrated e-mail within our claims administration system.

We are excited about these improvements and hope you are too. If you have any questions or would like more information regarding this upgrade, please contact Beverly Adkins at badkins@johnseastern.com or Laura Lowe at llowe@johnseastern.com.

Allison Stewart
TPA Development Coordinator
Johns Eastern Company, Inc.



**YOU TOLD
US YOU
WANTED IT...**

**NOW WE'RE
MAKING IT
HAPPEN**

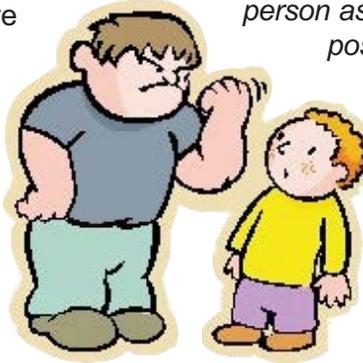
2014

**WE ARE
IMPROVING OUR
CLAIMS SYSTEM
TO BRING YOU
THE MOST
CUTTING-EDGE
TECHNOLOGY
YET!!!**

NEW LAW RESULTS IN REVISED ANTI-BULLYING POLICY

► Governor Scott signed into law HB 609, which prohibits, among other things, bullying and harassment with respect to computer-related activities in schools and even at nonschool-related activities or locations. HB 609 also includes a comprehensive definition of cyberbullying. Specifically, “cyberbullying” is defined as follows:

Bullying through the use of technology or any electronic communication, which includes, but is not limited to, any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, including, but not limited to, electronic mail, Internet communications, instant messages, or facsimile communications. Cyberbullying includes the creation of a webpage



SCHOOL LAW ALERT

or weblog in which the creator assumes the identity of another person, or the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in the definition of bullying.

Cyberbullying also includes the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in the definition of bullying.

The Florida Department of Education (FL DOE) quickly responded to the new legislation and issued a Revised Model Anti-Bullying Policy.

While HB 609 provides that school staff is not required to monitor nonschool-related activities, unfortunately, FL DOE did not offer guidance on this key issue. Thus, Districts will need to be cautious when analyzing whether the use of data or computer software at nonschool-related locations substantially interferes with or limits an individual’s ability to participate in or benefit from the services, activities, or opportunities offered by the District and whether such use substantially disrupts the orderly operation of District schools.

Districts should review HB 609 and the Revised Model Anti-Bullying Policy to incorporate the changes into District policy.

Sniffen & Spellman, P.A.

MAKING STRIDES AGAINST CANCER

Johns Eastern put our best foot forward on October 19th by participating in the Making Strides Against Breast Cancer 5k walk as team “Pink Strong” for the third straight year.



Johns Eastern’s offices from Florida to Pennsylvania were involved in this walk and fundraising campaign.

This year, we raised more than \$8,000 to benefit breast cancer research and awareness.

‘LAW’

Continued from page 1

When that claimant is eventually released to return to work, the entitlement to PTD benefits ends. In practice, it means that a very small number of claimants will receive at least some PTD benefits before reaching overall MMI.

But, the original Westphal decision had far-reaching and potentially disastrous consequences for the

workers’ compensation system. As noted by Judge Wetherell in his dissenting opinion, the panel decision, had it stood, “could have led to the incremental dismantling of the entire workers’ compensation system.” While the en banc opinion may not be perfect, its predecessor was far worse. Stay tuned.

Scott B. Miller
Hurley, Rogner, Miller, Cox,
Waranch & Westcott, P.A.



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FLORIDA LOWERS SDTF, WCATF ASSESSMENT RATES

The Florida Department of Financial Services, Division of Workers' Compensation is reducing the calendar year 2014 assessment rate for the Special Disabilities Trust Fund (SDTF) from 1.43% to 1.23%, in accordance with Section 440.49(9)(b), Florida Statutes. This new rate is effective January 1, 2014.

The rate is based upon the statutory SDTF assessment rate formula, an analysis of the estimated SDTF balance

as of December 31, 2013, and estimated future expenses, revenues, and assessable premiums.

In addition, the Division has also set a new assessment rate for the Workers' Compensation Administration Trust Fund (WCATF). Beginning January 1, 2014, the WCATF assessment rate will be 1.61%, which is down from 2013's rate of 1.68%.

**Florida Department of Financial Services,
Division of Workers' Compensation**

CONGRATULATIONS!

- **Jessica Rinehart** was promoted to Supervisor in Centralized Claims
- **Christine Hamilton** was promoted to Team Assistant/Adjuster Trainee
- **Bernadette Anthon** was promoted to Liability Claims Supervisor
- **Tanda Zirkle** was promoted to Liability Adjuster
- **Misty Boutieller** was promoted to Quality Assurance Administrator in our Cost Containment Department
- **Holly Christensen, Aimee Aiberg, and Traci Loftus** were promoted to Legal Adjuster

IN THE SPOTLIGHT

- **Amanda Judkins, Ian Simpson, Courtney Powell, Ann Agriesti and Kristin DeSaulniers** were promoted to Lost Time Adjuster
- **Jessica Stroup and Michelle Robinson** were promoted to Medical Only Adjuster
- **Tiffany Lamberti** was promoted to EDI Assistant

WELCOME!

- **Theresa Smalling** is the new Director of HR and Risk Management for the City of Dunedin

THE SPIRIT OF PHILANTHROPY

Johns Eastern is committed to giving back to the community through a variety of philanthropic endeavors which can now be viewed on our web site, www.johnseastern.com. Simply hold your mouse over "About Us" and click on Philanthropy to see our



charitable activities, including helping build a home for Habitat For

Humanity, sponsoring this year's Randy Rankin Scholarship Classic in Sarasota, and Feeding Empty Little Tummies in Manatee County.