

NJ Workers' Compensation: Senate Bill 3375

The recent introduction of Senate Bill 3375 by Senator Troy Singleton, District 7 (Burlington County) has alarmed many in the workers compensation insurance industry as a death knell to the respondent's right to direct medical care, and to control costs of workers' compensation litigation. It contains a wish list of proposals that if all were enacted, would completely change the practice of workers' compensation law as we know it, while increasing the cost of workers' compensation to both employers and insurance carriers alike. Although it does not appear that this legislation has sufficient backing to be enacted, it is certainly something that should be carefully monitored as we continue to do as attorneys who represent employers, insurance carriers and third-party administrators in the defense of workers' compensation claims.

The bill starts out with one positive proposal in these times of a pandemic in that it calls for hearings and settlements to be conducted by either telephone, or video conferencing, unless good cause is given by either the petitioner or respondent that an in-person proceeding is necessary. In the current administration of claims during a declared health emergency, most if not all proceedings are being handled in this "virtual" manner. Generally speaking, this has been working well for most concerned, and has proven to be an efficient and cost-effective way for resolving claims. Whether the courts will continue to utilize such virtual proceedings once the health emergency has ended remains an open question, but it is likely to continue for many months ahead.

From this point on in the proposed legislation, the bill seeks to change several areas of the Workers' Compensation Act involving medical care, litigation costs and attorney's fees, all of which would have a significant legal and financial impact on the workers' compensation system.

To begin, the bill seeks to remove the cap on counsel fees for any award of compensation by leaving open the final determination of fees to the judge of compensation based upon work performed that the Judge determines was "necessary for the proper presentation of the case." Such discretionary language leaves the door open to all types of abuse of the system in a hotly contested claim and may put the hearing judge in an awkward position by having to decide which side may have acted in good faith in the prosecution or defense of a given claim dispute.

The proposal also seeks to remove the certain caps on the cost of petitioner's expert fees, and again leaving it to the discretion of the hearing judge as to what costs were "necessary" to the claim. In the past, the Division has advocated for and obtained increases for petitioner evaluations, as the cost of such exams have naturally increased over time.

Another dramatic change in the determination of counsel fees being sought by this legislation is in the prosecution of motions for medical and temporary benefits. Current law allows for fees to be awarded to the successful party of a motion and it is subject to a maximum fee of 20% of benefits awarded. The 20% fee is generally awarded only in those motions that are fully litigated with testimony of witnesses. Motions that are resolved without testimony, and perhaps only with an appearance or two to address the issues, usually results in a fee of something less than 20%, depending upon the efforts that were needed to pursue the motion. This is done at the Judge's discretion. This bill seeks to change this practice by awarding a full 20% fee on any motion where medical services is denied or not promptly provided, in addition to "the actual costs in presenting the motion, including but not limited to the costs of all expert witnesses." This not only adds additional costs to the motion but takes away any judicial discretion. Once again, another potentially costly increase in the administration of claims.

The most controversial provision in this bill is in the proposed administration of medical treatment. One of

the hallmarks of the NJ Workers' Compensation Act is the obligation of the Respondent to provide medical benefits to an injured worker, as long as the injury or illness arises out of and in the course of one's employment. This is a no-fault system and is considered social legislation put in place over 100 years ago, for the health and welfare of all workers. Tantamount with the obligation to provide medical care, is the respondent/insurance carrier's statutory right to authorize the medical provider and the treatment being administered. This operates as a check and balance system. What this bill attempts to do is place unreasonable limits and restrictions on respondent's right of medical authorization, in both the communications between the medical providers and the respondent/insurance carrier, and in the oversight of the medical treatment being provided. The bill would require that all communications between the respondent/insurance carrier and the medical providers be provided to the injured worker or their legal representative. In the event a carrier wanted a nurse case manager [NCM], assigned to a claim, the NCM to have to obtain approval from either the injured worker, or their attorney, to have any communication with the treating physician. That would include attending any appointment, regardless of whether the NCM is requesting to be physically present with the injured worker during the examination, anyway, or to speak with the physician afterwards. Current protocol appropriately only requires the consent of the worker if the NCM is planning to be present in the examining room.

Finally, once medical treatment and the provider has been authorized, the bill would essentially place an undue burden on the respondent/insurance carrier from making any attempt to put the brake on excessive and perhaps unnecessary medical treatment. It does this by declaring that once medical treatment has been authorized, the respondent/insurance carrier shall not "delay or deny authorization of any treatment, diagnostic studies, procedures, therapies or medications recommended by any authorized medical care provider." (emphasis added) To further enforce this provision, the bill would require the respondent/insurance carrier to obtain a court order to de-authorize any authorized medical provider. While the bill does not prohibit the use second opinions or IMEs, the practical effect would make such efforts unnecessarily burdensome and perhaps meaningless. For example, in order to question or possibly deauthorize any medical treatment, the bill requires all treatment, testing, or even surgery to continue while the respondent/insurance carrier would have to schedule an IME, or second opinion, obtain a report that refutes the need for such treatment, and then have their attorneys file a motion with the court and obtain a court order to deauthorize any given treatment. Talk about the shifting of burdens!

While there may be some provisions in this bill that may deserve some attention in terms of how claims are administered and benefits provided, it does not require such drastic changes to the Workers' Compensation Act where current law already has provisions in place to protect injured workers from any claim abuse and requires all reasonable and necessary medical care be provided in a timely manner, subject to penalty. The Division has also amended its Rules over the years that allows for the filing of emergent motions that are addressed immediately by the court when any delay in treatment can cause irreputable harm. Finally, the communications between the patient, a physician, and an insurance carrier or its representative, are already governed by Court Rules, the rules of evidence, and both medical and legal ethical standards. This bill would do nothing more than shifting the entire balance of an already equitable system, to one side, to the detriment and greater cost of the employer.

As workers' compensation defense attorneys, we will continue to monitor legislation like this, and continue to advocate within the best interests of preserving the rights of respondents in the administration of workers' compensation claims. It is also incumbent upon employers, insurance carriers, and those who administer workers' compensation claims to remain informed about legislation that impacts workers' compensation law, and when necessary, to reach out to members of the State Senate and General Assembly and let them know of your concerns about any given legislative proposal. The following

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website: www.njleg.state.nj.us is a good reference to bookmark. It provides all information concerning the legislative process, including all introduced legislation, legislative calendars, bill status and list of legislators, along with reference materials for all NJ statutes.