

NCCI Proposes Increase in Florida Workers Compensation Rates in Response to Florida Supreme Court Decision

Overview of Emma Murray Decision

On October 23, 2008, the Florida Supreme Court issued its opinion in the case of *Emma Murray vs. Mariner Health Inc. and ACE USA*, No. SC07-244 (“*Emma Murray*”). The Supreme Court interpreted the statutory attorney fee changes included in Senate Bill 50A (“SB 50A”), a comprehensive workers compensation reform bill implemented on October 1, 2003. Prior to the Supreme Court’s decision in *Emma Murray*, the lower courts had in several cases concluded that SB 50A limited claimant attorney fees to a schedule based on benefits secured. Hourly fees were only permitted in medical only cases and capped at \$1,500.

The Supreme Court concluded that the SB 50A language purporting to limit claimant attorney fees is ambiguous and as a result, looked to sources outside Florida statute to interpret the meaning of “reasonable attorney’s fee”. The Court held that a reasonable attorney’s fee is determined based on factors in the rules regulating the Florida Bar, including time spent. The impact of the Supreme Court’s decision is to eliminate the statutory caps on claimant attorney fees intended by the Florida Legislature and to return Florida to pre-SB 50A law on claimant attorney fees, namely hourly fees.

NCCI Proposes Rate Increase in Response to Emma Murray Decision

NCCI estimates that the full impact of *Emma Murray* will be an increase in overall Florida workers compensation system costs of 18.6%. NCCI anticipates that it will take two years for the full impact to be realized, and therefore proposes a first year increase of half of the full impact. This equates to a proposed first year rate level increase of 8.9% in overall system costs.

On November 14, 2008, NCCI submitted its filing for a proposed first year rate level increase of 8.9% to the Office of Insurance Regulation (OIR). NCCI proposed that the increased rates will apply to new and renewal policies that are effective on or after March 1, 2009. Additionally, NCCI proposed that the increased rates will apply to all policies in effect on March 1, 2009 on a pro-rata basis through the remainder of the term of these policies.

Reform History

This proposed rate increase follows six workers compensation rate decreases approved in Florida subsequent to the enactment of SB 50A. The cumulative overall impact of these six rate decreases is -60.5%. As a result of the rate decreases, Florida has improved from having either 1st or 2nd highest rates in the country pre-SB 50A to an estimated 10th lowest in the country.

High attorney compensation was one of the key cost drivers that influenced system costs in Florida prior to SB 50A. NCCI pre-reform data showed that when attorneys were not involved, the difference in average claim costs between Florida and countrywide was minimal. When attorneys were involved, Florida’s average claim cost was nearly 40% higher than countrywide. After SB 50A, Florida’s average claim cost for claims with attorneys has dropped.

Rate Impact of Emma Murray has Three Components

NCCI originally estimated a decrease of 2.1% in overall system costs for the first year impact of the claimant attorney fee provisions contained in SB 50A. An unexpected impact on claim frequency in that first year and additional claim frequency declines and claimant attorney behavioral changes over the next several years have resulted in a much larger cumulative impact for the changes in claimant attorney fee compensation. A breakdown of the components follows.

A. Change in Lost-Time Claim Frequency for Claims with Claimant Attorney Representation

The enactment of SB 50A has had a significant impact on the frequency of workers compensation claims with attorney representation in Florida. NCCI has attributed a portion of the decline in the number of claims with attorney representation to the limitations placed on claimant attorney compensation in SB 50A. NCCI estimates that the decrease in the lost-time

claim frequency rate for claims with attorney representation due to the changes in claimant attorney compensation contained in SB 50A was -6.4% per year, or -23.2% over the four year period (2003 to 2007). The decision in *Emma Murray* is expected to reverse this impact.

B. Change in Average Costs Per Case for Claims with Claimant Attorney Representation

The *Emma Murray* decision is also expected to have an effect on the average costs per case with claimant attorney representation. Data subsequent to the reform, as well as feedback from stakeholders, has indicated that cases with attorney representation are being settled quicker post-SB 50A due in part to the changes in how claimant legal expenses are now set. In addition, the average time in which workers return to work has shortened since the enactment of SB 50A. The total adjusted average costs per case with claimant attorney representation prior to the enactment of SB 50A (accident years 2000 through 2002) compared to post-SB 50A (accident years 2005 and 2006) reveals a change of -15.7% in the average costs. The decision in *Emma Murray* is expected to reverse this impact.

C. Change in Claimant Attorney Fees

The *Emma Murray* decision is anticipated to result in claimant attorney compensation reverting back to pre-SB 50A levels. NCCI estimates that claimant legal expenses will increase by 38.9% from the current level.

SB 50A Savings Associated with Claimant Attorney Fee Changes Will Unwind Over 2 Years

The SB 50A savings associated with claimant attorney fee changes are based on four years of post-reform data through 2007. While some of the SB 50A impacts were felt in the first year post-reform, others occurred in subsequent years. There was little claimant attorney behavioral incentive to change in the first two years post-SB 50A since the majority of incoming cases continued to have pre-reform dates of accident and were compensated with hourly fees. Significant claimant attorney behavioral changes did not occur until 2006 and 2007.

Post-*Emma Murray*, NCCI does not expect that it will take four years to unwind the SB 50A savings associated with claimant attorney fee changes. The claimant attorney behavioral incentive post-*Emma Murray* is to immediately return to pre-SB 50A behavior.

NCCI anticipates that the full impact of *Emma Murray* will not however occur in the first year, as it may take some time for claimant attorney firms to increase staff to handle additional litigation, to get additional advertising in place to notify injured workers of the willingness of the claimant's bar to take cases, and for those in the workplace who may get injured to become aware of the change in the environment and to respond to increased claimant attorney involvement. As a result, NCCI proposes to split the full impact of *Emma Murray* over two years, and to include only the first year impact in this filing.

Retroactive Impact of Emma Murray Decision is Not Part of Proposed Rate Increase

This filing only addresses the expected increase in Florida workers compensation system costs for accidents occurring on or after March 1, 2009. However, the decision in *Emma Murray* is also expected to increase overall system costs in the state for accidents occurring prior to March 1, 2009 that have not yet been settled. Because workers compensation ratemaking is prospective only, insurers are not afforded the opportunity to recoup premium to cover such unforeseen increases in system costs. Therefore, it is expected that a significant unfunded liability will be created due to the retroactive impact of this court decision. NCCI will be evaluating the magnitude of the unfunded liability, and will provide additional information at a later date.

The OIR is expected to schedule a public rate hearing in December.