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Amendments Proposed in EMA Rules Decried by Attorneys

By J. Todd Foster State: Florida Topic: Top - 59 views - Average time spent on item: 3 minutes
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The Florida Division of Workers' Compensation will hold a public hearing Dec. 6 on proposed amendments to its rules on expert medical advisers — rules that claimants' and defense attorneys alike call "lawful" and want repealed.



Geoff Bichler

The amendments are to implement statutory changes made by House Bill 613, which the Legislature passed March 3 and made effective Oct. 1.

The legislation by Republican Rep. Jennifer Sullivan amended a 22-year-old statute to allow judges of compensation claims, in the event a certified medical adviser is "unavailable," to select "any qualified health care provider" to serve as a temporary EMA without DWC certification and to have the ultimate authority over the case.

Florida requires EMAs whenever there is a medical dispute between the worker's physician and the insurer's.

Stakeholders said Tuesday the EMA rules are fraught with logistical and constitutional issues, and remove judges from the adjudication process by appointing doctors to break the tie in medical disputes.

"It's a slap in the face of judges," said Orlando claimants' attorney Geoff Bichler, whose firm Bichler, Oliver, Longo & Fox represents many first responders and corrections officers in presumption cases.

"It takes it out of their hands and does not allow the judge to do his job. It allows the doctors to essentially decide the case," Bichler said. "This is something the Legislature should take up in the next session because of the constitutional issues with regard to access to the courts."

His partner, Paolo Longo, said he doesn't know of anyone in the system who supports the EMA statute and that the only time EMAs help are when there are complicated medical cases such as brain injuries.

Longo said the tweaks to the EMA statute, because they allow judges to pick their own providers, could create reversible error if an unqualified provider is chosen as a temporary EMA.

Florida statute cloaks the EMAs in a presumption of correctness, attorneys said. The law states: "The opinion of the expert medical adviser is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims."

Longo says "It's like Moses coming down the mountain with the tablets. Whatever they say is the gospel. Experts are supposed to aid the judge, not blind the judge."

West Palm Beach defense attorney H. George Kagan said the EMA statute is "absurd," demeaning to judges, and a waste of time and money by increasing litigation because doctors who might be unqualified are given the power to decide what often is the overarching dispute at the center of many comp cases.

"It says we're going to decide this case by a coin toss. It's just going to go to anybody. You, sir, you ma'am, can you help us decide the case? It's an expensive speed bump that adds costs and slows down the road to adjudication. Therefore it defeats its own purpose."

David Langham, deputy chief Judge of the Florida Office of Judges of Workers' Compensation Claims, said the new EMA provision raises more questions than it answers because of its vagueness.

The law says that if a certified EMA within the relevant medical specialty is "unavailable," the judge "shall" appoint "any" qualified health care provider.

"What does unavailable mean?" Langham said. "What does any qualified provider mean? Osteopaths, chiropractors, podiatrists?"

The biggest downside to the EMA statute might be the short list of providers who are certified, several stakeholders said.

The list of EMAs dwindles by the week, Langham said. Judges now have at their disposal a total of 141 doctors, said Joel Brown, press secretary to Florida Chief Financial Officer Jeff Atwater.

"A provision in HB 613 allows judges of compensation claims to assign their own EMAs without having the division to certify them," Brown said via email. "Therefore, the new law provides for a greater pool of potential EMAs."

The 141 doctors on the list of certified EMAs must cover 20 million residents in the nation's third-most populous state and across 67 counties in a worker's compensation system that last year had 67,265 petitions for benefits and 31,165 new litigated cases, Langham said.

A WorkCompCentral query of the list found just one physician on the entire Panhandle, which stretches 200 miles east to west and 50 to 100 miles north to south, and is home to 1.4 million residents. The only Panhandle physician is Dr. Christo Koullis, an orthopedic surgeon in Niceville, 66 miles east of Pensacola, whose metropolitan statistical area has nearly a half-million residents.

Langham says it's not uncommon for a compensation judge looking for an EMA who is an ear, nose and throat specialist to send Panhandle patients to South Florida for treatment of hearing loss.

Longo recalls representing a Panama City-area corrections officer with a heart condition and how he made one 1,200-mile round trip to see a physician in Miami, only to have the appointment canceled when he got there. The worker had to make a second trip.

"It's a pain in the ass to have to drive from Panama City to Miami for a doctor's appointment," Longo said. "And it happens a lot."

Eighty-one of the 141 EMAs on the list are orthopedic surgeons; none are audiologists or hearing aid specialists, optometrists, dentists, psychologists or occupational therapists, a query shows.

Langham said the EMA law makes no sense because the state is showing it does not trust judges to adjudicate medical disputes, but trusts them to pick someone who is.

"How do I know who's qualified and who's not?" he said. "What criteria should I use? Is it good enough that they're board certified? Should I look at their education and how many of these procedures they've actually done? The doctors they pick are gonna be presumptively correct. How much research do I invest to find out about this doctor? This has to stand up to appellate review."

Langham points to a bumper sticker he recently saw: "If you can't trust me with a choice, how could you trust me with a child?"

"It's a mandatory process we have to use, and we have a diminishing volume of providers to do the service," the judge said. "If we made it mandatory that you change your oil every 6,000 miles but every year we closed the garage, it just puts more and more demand on people remaining in the marketplace, whether it be car service centers or doctors."

"The doctors are going to feel that pressure and leave the list."

The public hearing will be from 10-11 a.m. Dec. 6 in Room 102 of the Hartman Building, 2012 Capital Circle S.E., Tallahassee.

The Notice of Development of Rule-making is here. A copy of the proposed rules are not yet available but will reflect other statutory changes, including updating the website address where EMAs are certified and to add final orders that a physician engaged in over-utilization can be disqualified from EMA certification.

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