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WORKERS COMPENSATION

Fla. comp case may lead to higher costs

BY SHEENA HARRISON

Insurers and employers are awaiting a rehearing on whether Florida's limit on temporary workers compensation benefits is unconstitutional, arguing that an earlier ruling could raise the state's comp system costs by \$65 million a year.

Though an earlier ruling in *Bradley Westphal v. City of St. Petersburg et al.* applies only to Florida, claimant attorneys and advocates could see the case as a model to challenge temporary total disability benefit time limits in other states, said Trey Gillespie, senior workers comp director in Austin, Texas, at the Property Casualty Insurers Association of America.

"I suspect that the plaintiffs bar in those jurisdictions will look at the *Westphal* decision and try to see if some of the legal arguments are ... applicable" in other states, Mr. Gillespie said.

It also is likely that employers would see higher experience modification factors and premiums for their Florida workers comp policies, since *Westphal* as it stands would increase claim costs, said Pati Caldwell, senior risk consultant with Willis North America Inc. in Tampa, Fla.

In February, Florida's 1st District Court of Appeals ruled that a 104-week limit on TTD benefits was unconstitutional and left injured workers without recourse if their benefits ran out before being declared eligible for permanent total disability benefits. *Westphal* involved a permanently disabled firefighter who received no disability payments for nine months after his TTD benefits ran out.

The court granted Mr. Westphal 260 weeks of TTD benefits based on Florida's TTD time limit that was in effect before the 104-week limit was enacted in 1994.

An en banc rehearing of the case was ordered following a request from several insurance and trade groups, including PCI, the American Insurance Association, the National Federation of Independent Business, Publix Super Markets Inc., the Florida Chamber of Commerce, Associated Builders and Contractors of Florida and United Parcel Service Inc. A date for the rehearing has not been set.

Rather than striking down the 104-week limit, Florida could use legislative or judicial measures to devise a safety net for injured workers who have not been declared permanently disabled after their temporary benefits run out, said Ken Stoller, Washington-based assistant general counsel for the AIA. "It seems like the appropriate response —instead of invalidating the current system — should have been to create a stop-gap measure for claimants who haven't reached maximum medical improvement," Mr. Stoller said.

In an analysis last month, NCCI Holdings Inc. said the original ruling in *Westphal* could increase Florida workers comp costs by 2.6%, or \$65 million a year. The longer benefit duration would affect mainly claims that receive at least 98 weeks of temporary disability benefits, which represent about 7% of Florida's temporary indemnity benefit costs, according to Boca Raton, Fla.-based NCCI.

James F. Fee Jr., president of Florida Workers' Advocates, contends that the earlier ruling in *Westphal* benefits only severely injured workers and would not significantly affect insurers and employers if it is upheld. "Only the most severely injured of individuals end up in a situation where there are medical opinions to support payment after 104 weeks," said Mr. Fee, who is a partner at Miami-based law firm Druckman & Fee P.A.

While Ms. Caldwell agreed *Westphal* affects a small subset of workers, she said the original ruling would result in higher benefit costs and could delay settlements.

Although *Westphal* is being reheard, insurers already have paid extended TTD benefits to workers reaching the 104-week limit that was struck down, Ms. Caldwell said.

If *Westphal* is upheld, it likely would affect only open and future workers comp claims, said Sal Richardson, managing partner for litigation at the law firm Adelson, Testan, Brundo, Novell & Jimenez in Fort Lauderdale, Fla.

However, he said reaffirming *Westphal* could prompt more attempts to roll back workers comp reforms in Florida during the past several years.

Westphal "is being used as a catalyst, I think, to review all of those decisions," Mr. Richardson said.

WESTPHAL FALLOUT

According to an April report by NCCI Holdings Inc.:

- February decision by the Florida 1st District Court of Appeal in *Bradley Westphal v. City of St. Petersburg* would raise Florida workers compensation system costs by \$65 million, or 2.6%, annually, by extending temporary total disability benefits.
- *Westphal* would raise Florida's TTD benefit time limit to 260 weeks from 104 weeks, if upheld in a rehearing by the appellate court.
- About 7% of Florida comp claims would see longer benefits as a result of the ruling.

