

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB IBS 17-01 Workers' Compensation
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee	14 Y, 1 N	Lloyd	Luczynski

SUMMARY ANALYSIS

It is the stated intent of the Legislature that the workers' compensation system be self-executing and for the law to be interpreted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." Workers' compensation is the injured employee's remedy for "compensable" workplace injuries. Employees generally cannot sue a covered employer for workplace injuries.

Florida courts have recently found multiple parts of the workers' compensation law unconstitutional in the areas of carrier paid injured worker attorney fees, time limits on temporary wage replacement benefits (i.e., indemnity), and the right of an injured worker to pay for their own attorney. For these and other reasons, the Office of Insurance Regulation ordered a rate increase of 14.5 percent effective December 1, 2017.

The proposed committee bill (PCB) makes the following changes to the workers' compensation law:

- Permits direct payment of attorneys by or for claimants.
- Increases total combined temporary wage replacement benefits (TTD/TPD) from 104 weeks to 260 weeks.
- Fills a benefit gap that happens when TTD/TPD ends, but the injured worker is not at overall maximum medical improvement and/or no overall permanent impairment rating.
- Allows a Judge of Compensation Claims (JCC) to award an hourly fee that departs from the statutory percentage based attorney fee schedule.
 - This is only permitted if the statutory fee is less than 40 percent or greater than 125 percent of hourly rate customarily charged in the local community with the JCC determining the relevant facts.
 - If the departure fee is allowed, the JCC determines the hourly rate, using statutory factors and the number of necessary attorney hours.
 - The allowed hourly rate for the departure fee payable by the carrier is capped at \$250 per hour, subject to an annual adjustment based upon the annual percentage change in the statewide average wage.
- Makes the injured worker responsible for any remaining attorney fees if required by their retainer agreement; the retainer agreements must be filed with the JCCs, but are not subject to JCC approval.
- Allows insurers to uniformly reduce premiums by no more than 5 percent, if they file an informational-only notice within 30 days, subject to regulatory oversight.
- Creates a mechanism to fill vacancies on the Three-Member Panel; grants the Panel authority to fill gaps in statutory reimbursement when adopting schedules of maximum reimbursement allowances for medical care.
- Increases the requirements applicable to petitions for benefits; eliminates carrier paid attorney fees for services occurring before the filing a petition; attaches attorney fees 45 days, rather than 30 days, following the filing of a petition; requires a JCC to dismiss a petition for lack of specificity, without prejudice, within 10 days or 20 days, depending upon whether a hearing is required.
- Eliminates the charge based reimbursement of health care facility outpatient medical care in favor of reimbursing them at 200% (unscheduled care) and 160% (scheduled surgery) of Medicare. If no Medicare fee, then current reimbursement standards apply, which are incorporated into statute.
- Requires the authorization or denial of medical care authorization requests, unless there is a material deficiency.
- Provides for collecting additional information on attorney fees.

The PCB has no fiscal impact on state and local government revenues; a positive impact on state and local government expenditures; and positive and negative impacts on the private sector.

The PCB has an effective date of July 1, 2017.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb01a.IBS

DATE: 3/27/2017

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Recent Workers' Compensation Case Law

Recent Florida court decisions have found multiple parts of the workers' compensation law unconstitutional. They are *Castellanos v. Next Door Company*,¹ involving attorney fees; *Westphal v. City of St. Petersburg*,² and *Jones v. Food Lion, Inc.*,³ relating to temporary wage replacement benefits (i.e., indemnity); and, *Miles v. City of Edgewater Police Department*,⁴ which addresses the right of an injured worker to pay for their own attorney.

CASTELLANOS

In 2003, the Legislature removed a provision allowing the award⁵ of a reasonable hourly fee to an injured workers' attorney when the statutory percentage based fee schedule resulted in an unreasonably low fee.⁶ This limited the injured worker's attorney to a fee based solely on a percentage of the amount of benefits that the attorney obtained for their client. In 2008, the Florida Supreme Court (Court) found that the law required the award of a reasonable attorney fee because of the continued use of the term "reasonable" in the statute.⁷ In 2009, the Legislature removed any reference to reasonableness and reenacted the statutory percentage based fee schedule.⁸

In *Castellanos*, the Court held that the exclusive statutory percentage based fee schedule created an irrebuttable presumption that the schedule always results in a correct fee.⁹ The Court found this irrebuttable presumption an unconstitutional violation of the claimant's due process rights. Accordingly, the Court invalidated the statute's limitation on attorney compensation and gave the Judge of Compensation Claims (JCC) the authority to award a reasonable attorney fee, if the JCC found that the fee schedule resulted in an unreasonable fee.

WESTPHAL and JONES

In *Westphal* and *Jones*, the Court (in *Westphal*) and the First District Court of Appeal (1st DCA) (in *Jones*) recognized that there was an unconstitutional gap in benefits for certain injured workers. Temporary wage replacement benefits are only payable until the earlier of the injured worker getting as healthy as they are going to get, also called "maximum medical improvement," or when they have received 104 weeks of temporary wage replacement. Because permanent wage replacement benefits are only paid after an injured worker has reached maximum medical improvement, some injured workers were not receiving or were ineligible for wage replacement benefits while they were still disabled. This happens because they are not eligible for temporary wage replacement benefits after they have reached the 104th week and they were not yet eligible for permanent wage replacement benefits without reaching maximum medical improvement. Because there was no benefit that they could receive or sue for, the Court found that they were unconstitutionally deprived of their right to access the courts. So, the Court invalidated the 104 week limitation and replaced it with the previous

¹ *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016). Opinion below – 124 So. 3d 392 (Fla. 1st DCA 2013).

² *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016). Opinion below – 122 So. 3d 440 (Fla. 1st DCA 2013).

³ *Jones v. Food Lion, Inc.*, 202 So. 3d 964 (Fla. 1st DCA 2016).

⁴ *Miles v. City of Edgewater Police Department*, 190 So. 3d 171 (Fla. 1st DCA 2016).

⁵ There are multiple circumstances that require an award of attorney fees, but the one that leads to most attorney fee awards is when a prevailing claimant has employed an attorney in the matter. s. 440.34(3), F.S.

⁶ Ch. 2003-415, L.O.F.

⁷ *Emma Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008).

⁸ Ch. 2009-094, L.O.F.

⁹ In *Castellanos*, the attorney secured a benefit of about \$850 and was due only \$164.54 for 107 hours of work. This works out to \$1.53, per hour.

statutory limit of 260 weeks. This restored the law to the 1993 statute. However, the Court did not provide a solution for the unconstitutional gap in benefits; it just extended the number of weeks, which makes it less likely that an injured worker would be affected by it.

MILES

Finally, the 1st DCA issued an opinion in a case that holds another portion of the workers' compensation law on attorney fees unconstitutional. In *Miles*, the Court invalidated a limitation on attorneys accepting payment directly from the injured worker or others on the injured worker's behalf. Before this case, an injured worker, and anyone paying on their behalf, was prohibited from directly paying for their own attorney.¹⁰ The attorney was only paid by the employer/carrier¹¹ and only if they won the case. In fact, it was a criminal offense for an attorney to take a payment from an injured worker for legal representation. The 1st DCA found that the right to freedom of speech requires that the injured worker be able to choose to speak to the courts through an attorney and the right to freedom of contract permits the worker to retain an attorney. So, the 1st DCA struck down the prohibition on attorneys accepting payment directly from their client.

Financial Impact of the Cases and Overview of the Rate Filing

The National Council on Compensation Insurance, Inc. (NCCI), the organization that files workers' compensation rates for approval by OIR and use by all workers' compensation insurance carriers doing business in the state, requested approval of a 19.6 percent increase in rates to become effective October 1, 2016, for in-force, new and renewal policies. NCCI's rate request sought a 15 percent increase based *Castellanos*, alone.¹² OIR proposed to approve a 14.5 percent increase effective December 1, 2016, for new and renewal policies. NCCI filed an amended request on October 4, 2016, in compliance with OIR's proposal and on September 27, 2016, OIR issued an order approving a 14.5 percent increase effective December 1, 2016.¹³ The rate increase was allocated, as follows:

<i>Castellanos</i>	10.1 percent
<i>Westphal and Jones</i>	2.2 percent
<u>Increase in provider reimbursement</u>	<u>1.8 percent</u>
Total	14.5 percent ¹⁴

However, on November 23, 2016, the rate increase was blocked by a court order due to violations of the Sunshine Law and Public Records Law.¹⁵ OIR and NCCI have appealed the court order. Pursuant to Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure and a stay issued by the 1st DCA, the court order will not go into effect while the appeal is pending. Accordingly, the rate increase became effective on December 1, 2016. Oral arguments in the case were held before the 1st DCA on February 22, 2017. As of March 10, 2017, there has been no opinion issued.¹⁶

The rate increase is estimated to increase annual premiums over \$528 million (\$368 million assignable to *Castellanos*) in the first year. The portion attributable to the cost impact of *Castellanos* is controversial and is expected to continue to develop in subsequent years, which would lead to

¹⁰ ss. 440.105(2)(c) and 440.34(1), F.S.

¹¹ Workers' compensation insurers are referred to as carriers. "Carrier" means any person or fund authorized under s. 440.38 to insure under this chapter and includes a self-insurer, and a commercial self-insurance fund authorized under s. 624.462, s. 440.02(4), F.S.

¹² The NCCI rate request also includes an estimated increase in costs associated with the Court's decision in *Westphal* and the Legislature's ratification of the Workers' Compensation Health Care Provider Reimbursement Manual [HB 7073 (2016)].

¹³ *Revised Workers' Compensation Rates and Rating Values as Filed by the NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.*, Case No. 191880-16, <http://www.floir.com/siteDocuments/NCCI191880-16-FOORF.pdf> (Fla. OIR Sept. 27, 2016).

¹⁴ The components of the rate increase are compiled together for the net increase. Therefore, the total amount of the increase exceeds the sum of the three components (i.e., rates are increased by 10.1 percent, then by 2.2 percent, and then by the final 1.8 percent for an overall increase of 14.5 percent).

¹⁵ *Order on Non-Jury Trial and Final Judgement Providing Declaratory and Injunctive Relief*, Case No. 37 2016 CA 002159 (Fla. 2nd Cir. Nov. 23, 2016).

¹⁶ The case docket is available at: http://jweb.flcourts.org/pls/ds/ds_docket?p_caseyear=2016&p_casenumbr=5408&pscourt=1 (last visited Mar. 10, 2017).

additional rate increases. The actual impact on attorney's fee related costs will not be known for some time.

Overview of Florida's Workers' Compensation System

The foundations of workers' compensation in the modern era are found in 19th century Europe and the Industrial Revolution. By the early 1900's, workers' compensation was making inroads in the United States. The first successful workers' compensation laws were adopted in New Jersey and Wisconsin in 1911. Florida's law was passed in 1935. By 1948, every state had a workers' compensation law. Every state continues to maintain workers' compensation; however, Texas does allow employers and employees to opt-out of the workers' compensation system and utilize the tort system.

Chapter 440, Florida Statutes, is Florida's workers' compensation law. It is the stated intent of the Legislature that the workers' compensation system be self-executing and for the law to be interpreted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."¹⁷ For work-related injuries, workers' compensation provides all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics¹⁸ and compensation for disability¹⁹ when the injury causes an employee to miss more than seven days of work.²⁰ Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.²¹ Employees generally cannot sue a covered employer for workplace injuries.²² The Division of Workers' Compensation within the Department of Financial Services (Division) provides regulatory oversight of Florida's workers' compensation system.

Workers' Compensation Premium Rates and Coverage Options

Workers' compensation premium rates (per \$100 of payroll) are set annually by OIR, upon a review of rate filings made by NCCI, Florida's workers' compensation rating organization. The premium a particular employer will pay for a workers' compensation insurance policy is dependent upon various factors, including the employer's workers' compensation loss history, total payroll, and the employer's industry.

There are three ways for employers to obtain workers' compensation coverage. The majority of employers purchase a workers' compensation insurance policy from an authorized insurance company or they qualify as a self-insurer.²³ Employers that are not self-insured and are unable to purchase coverage from an insurance company may purchase coverage from the Workers' Compensation Joint Underwriting Association.²⁴ The Joint Underwriting Association is the insurer of last resort for workers' compensation insurance, also known as the residual market provider.

¹⁷ s. 440.015, F.S.

¹⁸ s. 440.13(2)(a), F.S.

¹⁹ The use of the term "disability" in the context of workers' compensation differs from common parlance. In this context, it refers to a wage-loss, rather than a reduction in physical abilities. Section 440.02(13), F.S., defines "disability" as an "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Workers' compensation laws describe reduced physical ability in terms of "permanent impairment." Section 440.02(22), F.S., defines "permanent impairment" as "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury."

²⁰ s. 440.12(1), F.S.

²¹ "Compensable" means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment. s. 440.13(1)(d), F.S.

²² s. 440.11(1), F.S. Employers who fail to obtain required workers' compensation coverage may be sued by an injured worker in civil court. Likewise, an employee who is either exempt or excluded from workers' compensation coverage requirements may sue their employer in civil court for work-related injuries, even if the employer has coverage for their other employees.

²³ s. 440.38, F.S.

²⁴ s. 627.311(5)(a), F.S.

Injuries Covered by Workers' Compensation

Workers' compensation provides medical benefits and, in cases where the injured worker is unable to work or earn as much as he or she did before the injury, compensation for lost income (also referred to as "wage replacement" or "indemnity" benefits) for compensable workplace injuries arising out of work performed by an employee in the course and scope of employment.²⁵ The workplace injury must be the "major contributing cause" for medical treatment and remain as such to continue medical treatment. "Major contributing cause" is the one cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought.²⁶

Reporting Injuries

Employees are required to inform employers of their injury within 30 days of the injury or initial manifestation of the injury. The failure to report within this timeframe may result in the inability to claim benefits.²⁷ Employers are required to report a workplace injury to their workers' compensation insurance company no later than seven days after the employer has knowledge of the injury.²⁸ Administrative fines will be imposed against employers that do not timely report injuries.²⁹

Medical Benefits

Injured workers are entitled to receive all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics, for as long as the nature of the injury and process of recovery requires.³⁰ Medical services must be provided by a health care provider authorized by the workers' compensation insurance company prior to being provided (except for emergency care).³¹ When the insurance company has knowledge of a work-related injury, it will refer the injured employee to an authorized workers' compensation provider.

Authorized medical services and treatment are provided at no cost to the injured employee, except employees are required to pay a \$10 co-payment for medical services provided after they have reached "maximum medical improvement."³² Injured employees are entitled to one change of physician during the course of treatment for any one accident.³³ After the initial examination and diagnosis, the workers' compensation health care provider is required to submit a proposed course of treatment to the workers' compensation insurance company to determine whether such treatment would be recognized as reasonably prudent.³⁴

Cash Payments for Lost Wages and Permanent Impairments

Indemnity benefits only become payable to employees who are disabled for at least eight days due to a compensable workplace injury.³⁵ The first seven days of lost earnings may be paid retroactively to employees who are disabled for more than 21 days.³⁶ These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),³⁷ up to the maximum weekly benefit

²⁵ s. 440.09(1), F.S.

²⁶ *Id.*

²⁷ s. 440.185(1), F.S.

²⁸ s. 440.185(2), F.S.

²⁹ s. 440.185(9), F.S.

³⁰ s. 440.13(2)(a), F.S.

³¹ s. 440.13(3)(a), F.S.

³² s. 440.13(13), F.S. The date of maximum medical improvement is the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability. s. 440.02(10), F.S.

³³ s. 440.13(2)(f), F.S.

³⁴ s. 440.13(2)(e), F.S.

³⁵ s. 440.12(1), F.S.

³⁶ *Id.*

³⁷ An injured workers' average weekly wage is an amount equal to one-thirteenth of the total amount of wages earned during the 13 weeks immediately preceding the compensable accident. s. 440.14(1), F.S.

established by law.³⁸ For 2016, this amount is \$863, which is the statewide average weekly wage (SAWW).³⁹ Payments are due every two weeks.⁴⁰ Indemnity benefits fall into one of four categories: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability.

- Temporary partial disability and temporary total disability benefits are payable for up to a combined total of 260 weeks.⁴¹
- Permanent partial disability benefits are payable as impairment income benefits that are provided for a variable number of weeks depending upon the value of the injured worker's permanent impairment rating pursuant to a statutory formula.⁴²
- Permanent total disability benefits are payable until the age of 75, unless the work-related accident occurs after the worker's 70th birthday, then the benefit is paid for five years.⁴³

Educational and Training Benefits

Once an injured worker reaches maximum medical improvement, they may receive educational and training benefits, if they are unable to earn at least 80 percent of their pre-injury income. Educational and training benefits include:

- From the Division:
 - Vocational counseling;
 - Job-seeking skills training;
 - Job analysis;
 - Transferable skills analysis;
 - Selective job placement;
 - Training and education; or
 - Other services deemed necessary and appropriate to help an injured worker return to work.
- From the employer carrier:
 - Indemnity benefits, which are classified as Educational and Training Temporary Total Compensation benefits that pays for lost earnings while the injured worker learns new vocational skills.

The Educational and Training Temporary Total Compensation benefit is payable to employees for up to 26 weeks, which may be extended for an additional 26 weeks;⁴⁴ however, injured workers may only receive Educational and Training Temporary Total Compensation benefits, temporary total disability benefits, and temporary partial disability benefits for a combined maximum of 260 weeks.⁴⁵ Their

³⁸ s. 440.15(1)-(4), F.S.

³⁹ "Statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported to the Department of Economic Opportunity for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. s. 440.12(b), F.S.

⁴⁰ s. 440.20(2)(a), F.S.

⁴¹ s. 440.15(2) and (4), F.S. Section 440.15(2)(a), F.S., specifies that temporary total disability benefits are payable for 104 weeks; however, the Florida Supreme Court has found this provision unconstitutional and the statute has reverted to 260 weeks of temporary total disability benefits pursuant to this case law. *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. Jun. 9, 2016). Section 440.15(4)(e), F.S., provides that temporary partial disability benefits; however, the 1st DCA applied the holding in *Westphal* to these benefits finding the limitation unconstitutional and reverted the limitation to the 260 weeks previously allowed. *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

⁴² s. 440.15(3), F.S.

⁴³ s. 440.15(1), F.S.

⁴⁴ s. 440.491(6)(b), F.S.

⁴⁵ ss. 440.15(2) and (4) and 440.491(6)(b), F.S. See *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. Jun. 9, 2016) and *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

entitlement to Educational and Training Temporary Total Compensation benefits ends at the 260th week of combined temporary benefits, regardless of whether their educational or training program is still ongoing as of the 260th week. The insurance carrier has the discretion to continue to pay the benefit beyond the 260th week, however.⁴⁶

Death Benefits

Workers' compensation also provides funeral expenses, up to \$7,500, and death benefits payable to a deceased worker's surviving spouse and dependents when an employee dies as a result of a work-related injury, up to a maximum of \$150,000.⁴⁷

Denial of Benefits by the Carrier

Injured employees have the right to file a Petition for Benefits with the Office of the Judges of Compensation Claims for any benefit that is ripe, due, and owing.⁴⁸ Within 14 days of receipt of the Petition for Benefits, the workers' compensation insurance company is required to either pay the requested benefits or file a response to the petition.⁴⁹ Forty days after the Petition for Benefits has been filed, the Judge of Compensation Claims will notify the parties that a mediation conference has been scheduled. The mediation will take place within 130 days after the filing of the Petition for Benefits.⁵⁰ If mediation is unsuccessful in resolving the claim, a final hearing must be held within 90 days of the mediation. The overall time limit for dispute resolution from the date of the Petition for Benefits to the issuance of a final order is 240 days. Generally, an injured worker that prevails on a Petition for Benefits is entitled to an award for a reasonable attorney's fee payable by the carrier.⁵¹

Attorney Fee Costs

Despite the legislative intent that the workers' compensation system be self-executing, it is sometimes necessary for an injured worker to dispute the adjustment or denial of their claim through a petition for benefits filed with the Office of the Judges of Compensation Claims (OJCC). Due to the complex nature of the law, such injured workers employ an attorney to handle their petition in the vast majority of cases (as do employer/carriers). For fiscal years 2010-2011 through 2014-2015, injured workers were represented by attorneys in about 89 percent of cases.⁵²

Injured workers that prevail in a lawsuit before the OJCC to enforce their entitlement to workers' compensation benefits are generally awarded payment of their attorney's fees against the employer/carrier. The attorney's fee is calculated based on a formula provided in s. 440.34, F.S. This has been referred to as the statutory fee schedule for employer/carrier paid claimant attorney fees. Prior to October 1, 2003, the JCC was authorized to depart from the statutory fee schedule and increase or decrease the attorney fee award based on listed factors. As part of the 2003 workers' compensation reform passed by the Legislature,⁵³ the authority of the JCC to depart from the statutory fee schedule was removed. It was briefly revived by case law⁵⁴ in 2008, but was again removed by legislative action.⁵⁵ On April 28, 2016, the Florida Supreme Court revived the JCC's authority to award a fee that departs from the statutory fee schedule.⁵⁶ This is commonly referred to as the *Castellanos* decision. Pursuant to *Castellanos*, the JCC again has the authority award a reasonable fee.

⁴⁶ *Id.*

⁴⁷ ss. 440.16(1)(a) and 440.16(1)(b), F.S.

⁴⁸ s. 440.192(1), F.S.

⁴⁹ s. 440.192(8), F.S.

⁵⁰ s. 440.25, F.S.

⁵¹ s. 440.34, F.S., and *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. Apr. 28, 2016).

⁵² STATE OF FLORIDA, DIVISION OF ADMINISTRATIVE HEARINGS, *2014-2105 Annual Report of the Office of the Judges of Compensation Claims*, 16. <https://www.jcc.state.fl.us/JCC/publications/reports/2015AnnualReport/Index.html> (last visited Oct. 5, 2016).

⁵³ Ch. 2003-412, L.O.F.

⁵⁴ *Emma Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008).

⁵⁵ Ch. 2009-94, L.O.F.

⁵⁶ *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. Apr. 28, 2016). The Florida Supreme Court held that the irrebuttable statutory presumption in favor of the fixed statutory fee schedule is an unconstitutional violation of the claimant's due process rights.

The JCCs collect detailed information regarding claimant attorney fee costs; however, only a portion of this data is recorded in their electronic database. While the JCC can readily produce much of the information that they collect related to awards of claimant attorney fees, they cannot readily produce the attorney's hourly rates and number of hours the attorney claimed to spend on the matter. These two pieces of information may be critical in the future to understanding how attorney behavior changed following *Castellanos* and whether there is an increase in litigation costs, as a result.

The following information is based on data reported by the JCCs⁵⁷ and the Workers' Compensation Research Institute (WCRI). Changes in this information going forward can quantify the impact of the *Castellanos* decision and may identify any developing policy issues that may need legislative consideration.

Number of Petitions for Benefit Received by JCCs

Fiscal Year	Number of Petitions Received	Average Number of Petitions Received Monthly
2010-11	64,679	5,390
2011-12	61,354	5,113
2012-13	58,041	4,837
2013-14	59,292	4,941
2014-15	60,021	5,002
2015-16	67,265	5,605

Amount of Attorney Fees Reported by JCCs, by Party Type

Pursuant to statute, the JCC's receive insurance carrier defense fee information. Carriers and their representatives are required to report their annual defense costs by September 1st each year. This information is self-reported, aggregated, and unaudited. There are no controls to avoid duplicate reporting (third party administrators and carriers are both self-reporting). Nor is there categorization of the reported defense costs or definitions governing what constitutes a reportable defense cost, including whether the cost is related to pending litigation. Accordingly, the accuracy of defense costs filed with and reported by the JCCs is unknown.

Fiscal Year	Claimant Attorney Fees	Percent Change	Defense Attorney Fees	Percent Change	Claimant and Defense Combined	Percentage Claimant	Percentage Defense
2010-11	\$157,081,084		\$259,323,175		\$416,404,259	37.72%	62.28%
2011-12	\$152,848,003	-2.69%	\$242,446,703	-6.51%	\$395,294,706	38.67%	61.33%
2012-13	\$151,889,627	-0.63%	\$240,894,494	-0.64%	\$392,784,122	38.67%	61.33%
2013-14	\$141,858,184	-6.60%	\$237,364,154	-1.47%	\$379,222,337	37.41%	62.59%
2014-15	\$136,180,202	-4.00%	\$234,592,581	-1.17%	\$370,741,896	36.73%	63.27%
2015-16	\$136,461,404	0.21%	\$242,112,498	3.21%	\$378,573,902	36.05%	63.95%

⁵⁷ State of Florida Division of Administrative Hearings, 2015-2016 Annual Report of the Office of the Judges of Compensation Claims, <https://www.jcc.state.fl.us/JCC/publications/reports/2016AnnualReport/Index.html#>.

Average Attorney Fee

Reported by JCCs⁵⁸

Fiscal Year	Number of Claimant Attorney Fee Awards on Petitions for Benefit	Average Claimant Attorney Fee Awarded on Petitions for Benefit ⁵⁹	Number of Defense Attorney "Cases" Reported by Employer/Carriers	Average Annual Defense Attorney Fee per "Case" Reported by Employer/Carriers
2010-11	32,325	\$3,731	n/a	n/a
2011-12	33,173	\$3,657	n/a	n/a
2012-13	32,431	\$3,645	n/a	n/a
2013-14	32,993	\$3,399	n/a	n/a
2014-15	31,545	\$3,517	67,898	\$3,496.52
2015-16	32,762	\$3,520	73,268	\$3,201.38

Reported by WCRI

Time Frame		Average Defense Attorney Fee Cost per Lost Time Claim, on Claims with >\$500 in Fees	Percentage of Lost Time Claims with Defense Attorney Fee Cost >\$500	Average Total Cost per Lost Time Claim ⁶⁰
12 Months Maturity	2011-2012 ⁶¹	\$4,222	28%	\$22,634
	2013-2014 ⁶²	\$4,612	27%	\$23,582
	2014-2015 ⁶³	\$4,460	27%	\$24,227
36 Months Maturity	2009-2012 ⁶⁴	\$7,143	42%	\$35,674
	2011-2014 ⁶⁵	\$6,857	40%	\$35,639
	2012-2015 ⁶⁶	\$6,784	40%	\$35,495

Medical Claim Costs

All medical claims are reported to the Division. This occurs in the form of electronic copies of every medical bill received by employer/carriers for workers' compensation medical services provided to injured workers.

- The total charges and total paid workers' compensation health care provider services were stable from 2010 through 2014. While charges increased 1.9 percent per year on average during the

⁵⁸ Average Claimant Attorney Fee Awarded represents the award at the conclusion of litigation over a petition filed with the JCCs. Average Annual Defense Attorney Fee per Reported Case represents the calculated average defense attorney fee per case using aggregate defense attorney payments self-reported by carriers and third party administrators to the JCCs for the given year. These two attorney fee figures are for general comparison purposes only and are not based on the same periods or cases.

⁵⁹ For injuries after September 30, 2003.

⁶⁰ WCRI includes the following in Average Total Cost per Lost Time Claim: Average Medical Payment per Claim, Average Indemnity Payment per Claim, and Average Benefit Delivery Expense per Claim, which, among other things, includes defense attorney fees).

⁶¹ Rui Yang, *CompScope Benchmarks for Florida, 14th Ed.* (October 2013), 53 and 54, and *CompScope Benchmarks for Florida, 14th Ed.: The Databook* (October 2013), 19, http://www.wcrinet.org/result/bmcscope_multi14_FL_result.html.

⁶² Rui Yang & Roman Dolinschi, *CompScope Benchmarks for Florida, 15th Ed.* (April 2015), 62, 74, and 76 *CompScope Benchmarks for Florida, 15th Ed.: The Databook* (April 2015), 20, http://www.wcrinet.org/result/bmcscope_multi15_FL_result.html.

⁶³ Rui Yang & Roman Dolinschi, *CompScope Benchmarks for Florida, 16th Ed.* (April 2016), 54 and 55, and *CompScope Benchmarks for Florida, 16th Ed.: The Databook* (April 2016), 20, http://www.wcrinet.org/result/bmcscope_multi16_FL_result.html.

⁶⁴ Rui Yang, *supra* note 61.

⁶⁵ Rui Yang & Roman Dolinschi, *supra* note 62.

⁶⁶ Rui Yang & Roman Dolinschi, *supra* note 63.

period, the amount paid for medical services decreased by 0.6 percent per year. A similar pattern is evident for average charge per line item and average paid per line item.⁶⁷

- Average annual percentage change in total amount billed, by provider type (from 2011 through 2014):⁶⁸
 - Hospital Outpatient 5.3%
 - Ambulatory Surgical Center 4.0%
 - Hospital Inpatient 3.7%
 - Pharmacy 3.5%
 - Home Health Services 2.7%
 - Medical Supplies 0.6%
 - Dental 0.6%
 - Health Care Provider -1.1%
 - Nursing Homes -2.0%

- Average annual percentage change in total amount paid within one year of the injury, by provider type (from 2011 through 2014):⁶⁹
 - Home Health Services⁷⁰ 30.5%
 - Ambulatory Surgical Center 8.2%
 - Hospital Outpatient 6.3%
 - Hospital Inpatient 6.0%
 - Nursing Home 3.2%
 - Pharmacy -8.1%
 - Health Care Provider -8.4%
 - Dental -9.2%
 - Medical Supplies -15.4%

*Hospital Inpatient and Hospital Outpatient*⁷¹

Hospital inpatient care is reimbursed based on a schedule of per diem rates, subject to a stop-loss amount above which reimbursement is made at 75 percent of the hospital's billed charge.⁷² Hospital outpatient care, except for scheduled outpatient surgery, is reimbursed at 75 percent of the usual and customary (U&C). Scheduled hospital outpatient surgery and ambulatory surgical center care are reimbursed at 60 percent of U&C. Note: the resulting scheduled surgery reimbursement rate is 80 percent of the rate for all other hospital outpatient care (i.e., 60% of U&C / 75% of U&C = 80%).

- Both hospital inpatient and hospital outpatient services have seen an increase in total charges and total payments from 2011 through 2014.

⁶⁷ Florida Division of Workers' Compensation, *2015 Division of Workers' Compensation Results and Accomplishments*, 42, <http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/AnnualReportWC2015.pdf>.

⁶⁸ *Id.* at 40.

⁶⁹ *Id.* at 41.

⁷⁰ The high percentage change in Home Health Services is due to a 116.5 percent increase in Home Health Services paid in 2011 compared to 2010. The reason for this increase is not apparent from the data reviewed for this report. The average percentage increase for the remainder of the period is 1.3 percent per year, which is consistent with the changes in payment seen in the other provider types.

⁷¹ *Id.* at 44.

⁷² Inpatient per diem rates for trauma center licensed hospitals is \$3,850.33 per day for surgical stays and \$2,313.69 per day for non-surgical stays. For other acute care hospitals, they are \$3,849.16 per day for surgical stays and \$2,283.40 per day for non-surgical stays. If the total charges, excluding implants, is \$59,891.34 or less, then the per diem rates apply, otherwise reimbursement is 75 percent of the total gross charge, excluding implants. Implants are reimbursed under a separate method. Florida Workers' Compensation Reimbursement Manual for Hospitals, 2014 Edition (Effective Jan. 1, 2015).

- Hospital inpatient:
 - Charges increased 3.2 percent per year.
 - Payments increased 3.7 percent per year.
- Hospital outpatient:
 - Charges increased 5.3 percent per year.
 - Payments increased 5.1 percent per year.
- The total number of hospital inpatient and hospital outpatient bills has each declined by 4.6 percent per year on average.
- The average amount charged and the average amount paid per hospital inpatient and hospital outpatient bill have increased significantly from 2011 through 2014. These increases have exceeded the “*Hospital and related services*” component of the Consumer Price Index for medical care.⁷³
 - Hospital inpatient:
 - Average charge per bill increased 8.2 percent per year.
 - Average payment per bill increased 8.7 percent per year.
 - Hospital outpatient:
 - Average charge per bill increased 10.4 percent per year.
 - Average payment per bill increased 10.1 percent per year.

Effect of the Proposed Committee Bill

The proposed committee bill (PCB):

Attorney fees

- Repeals provisions that prohibit attorneys from accepting and the JCC from approving attorney’s fees paid directly by or on behalf of the injured worker outside of an award against the employer/carrier.
- Provides authority for attorneys to accept fees paid directly by or on behalf of the injured worker outside of an award against the employer/carrier.
- Requires the filing of retainer agreements with the JCC, but the retainers are not subject to JCC approval.
- Provides authority to the JCC to approve an attorney fee that departs from the statutory attorney fee schedule, if:
 - The statutory attorney fee schedule produces an equivalent hourly rate that is less than 40 percent or more than 125 percent of the fee customarily charged in the locality for similar legal services.
- Incorporates factors to guide the JCC when awarding a departure fee.
- Provides discretion to JCC to determine the precise hourly amount of the departure fee that is awarded, in \$10 increments.

⁷³ For the three years ending August 2016, the “*Hospital and related services*” component of the Consumer Price Index for medical care was: 5.8 percent (2015-2016), 3.3 percent (2014-2015) and 3.8 percent (2013-2014). UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Consumer Price Index, Archived Consumer Price Index Detailed Report Information*, http://www.bls.gov/cpi/cpi_dr.htm (last visited Oct. 5, 2016).

- Caps the amount the carrier must pay under a departure fee at \$250 per hour, thus limiting how much of the attorney fees would be payable by the carrier; the injured worker may be responsible for any attorney fees due after award of the statutory fee schedule amount or the departure fee, as applicable, pursuant to a retainer agreement.
- Creates a statutory adjustment of the \$250 per hour cap to occur annually. It will adjust each year by the same percentage as that year's change in the statewide average weekly wage (SAWW) and requires the Deputy Chief Judge of Compensation Claims to determine the adjusted hourly rate limit cap and publish it each year.
- Prohibits the award of carrier paid attorney fees for services provided prior to the filing of a petition for benefits.
- Extends the attachment of attorney fees following the filing of a petition for benefits from 30 days to 45 days.

Temporary Total Disability and Temporary Partial Disability Benefits

- Increases the allowed total combined number of weeks of temporary total disability (TTD) and temporary partial disability (TPD) from 104 weeks to 260 weeks. The extension of the duration of TTD/TPD benefits also increases the opportunity for the injured worker to receive training and education. The duration of training and education benefits are not expanded, but since they are provided within the duration of TTD/TPD benefits, the timeframe in which they may be received is changed.
- Provides a limited extension of TTD benefits for up to 26 additional weeks when the injured worker reaches the maximum number of weeks but permanent benefits cannot begin because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
 - If the injured worker is not at overall maximum medical improvement after the extended TTD benefit is exhausted, the JCC is required, upon motion, to determine the injured workers' eligibility for permanent total disability benefits.
- Requires the provisional payment of Impairment Benefits (IBs) if the injured worker reaches the maximum number of weeks of TPD benefits (i.e., 260 weeks) but permanent benefits cannot begin because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
 - Pays provisional IBs consistent with the single highest permanent impairment rating and credits this amount to the carrier when final IBs payment occurs upon achieving overall maximum medical improvement and receiving overall permanent impairment rating.

Petitions for Benefits

- Requires greater specificity when reporting defense attorney fees as required by statute. For litigated claims, the total amount of attorney fees and the total number of attorney hours will be filed with the OJCC. For attorney fees unrelated to litigation, only the total amount of attorney fees will be filed.

Three-Member Panel

- Creates a requirement that the Governor fill a vacancy on the Three-Member Panel within 45 days and requires the Chief Financial Officer (CFO) to fill the vacancy if the Governor does not make an appointment timely. The CFO's appointment period will also be 45 days. The CFO's appointee is subject to Senate ratification.
- Authorizes the Three-Member Panel to fill gaps in statutory reimbursement methodologies so that they may adopt schedules of maximum reimbursement allowances, as required, in a comprehensive manner.

Medical Care Authorizations

- Provides that carriers must authorize or deny medical authorization requests within the current 3 day or 10 day periods, but they are allowed to return a request for material deficiency, e.g., incomplete or improper forms or missing required documentation.

Outpatient Medical Care Reimbursement

- Changes the reimbursement methodology for outpatient services provided by hospitals and ambulatory surgical centers from a charge based reimbursement to a percentage of the fee or rate established under the Medicare Outpatient Prospective Payment System (OPPS).
 - The applicable reimbursement is:
 - For hospital outpatient services, 200 percent of OPPS fee or rate, except scheduled surgery is reimbursed 160 percent of OPPS fee or rate (i.e., 200% x 80% = 160%).
 - For ambulatory surgical center care, 160 percent of OPPS fee or rate.
 - Incorporates into statute the current reimbursement methodology adopted by the Three-Member Panel for outpatient services that are not reimbursable under OPPS. This is either 75 percent (hospitals generally) or 60 percent (hospital scheduled surgery or ambulatory surgical center care) of the statewide average charge for the applicable procedure, as derived from the Division's database of billed charges at a frequency of 50 or more charges. And, for those procedures that lack an allowed amount under the primary or secondary method, then reimbursement would occur at either 75 percent or 60 percent, as applicable, of the facility's actual billed charge.

Carrier Competition/Premium Discount

- Authorizes a carrier to depart from required premiums in a uniform way by no more than five percent, if they notify OIR of such a departure within 30 days of implementation. No review or approval is required by OIR; however, OIR may disallow the lower rate if it violates the ratemaking standards, imperils the financial condition of the carrier, or results in predatory pricing.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.02, F.S., relating to definitions.

Section 2. Amends s. 440.105, F.S., relating to Prohibited activities; reports; penalties; limitations.

Section 3. Amends s. 440.13, F.S., relating to medical services and supplies; penalty for violations; limitations.

Section 4. Amends s. 440.15, F.S., relating to compensation for disability.

Section 5. Amends s. 440.192, F.S., relating to procedure for resolving benefit disputes.

Section 6. Amends s. 440.25, F.S., relating to procedures for mediation and hearings.

Section 7. Amends s. 440.34, F.S., relating to attorney's fees; costs.

Section 8. Amends s. 440.345, F.S., relating to reporting of attorney's fees.

Section 9. Amends s. 440.491, F.S., relating to reemployment of injured workers; rehabilitation.

Section 10. Amends s. 627.211, F.S., relating to deviations; workers' compensation and employer's liability insurances.

Section 11. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

State government, as a self-insured employer for workers' compensation purposes, will experience reduced expenses in the same manner as the private sector, if the PCB reduces the cost of workers' compensation coverage. See Fiscal Comments, below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Local governments, as a self-insured employers or purchasers of workers' compensation coverage, will experience reduced expenses in the same manner as the private sector, if the PCB reduces the cost of workers' compensation coverage. See Fiscal Comments, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCB has positive and negative impacts on the private sector. Positive impacts include: public and private employers will experience reduced premiums because of reduced rates and the availability of 5 percent summary departure from required premiums authorized by the PCB. Negative impacts include: hospitals and ambulatory surgical centers may experience reduced reimbursement for outpatient services.

D. FISCAL COMMENTS:

NCCI has released a preliminary estimate of the impact of many of the provisions of the PCB.⁷⁴ The NCCI estimate was based upon the text of the draft PCB that was workshopped on March 7, 2017. They estimated that it would result in a "significant decrease" in overall workers' compensation costs. NCCI defines a "significant decrease" as "greater than or equal to 5.0%." The primary difference between the draft PCB and the PCB as noticed is an increase in the proposed reimbursement of outpatient medical care from 140 percent (unscheduled care) and 112 percent (scheduled surgery) to 200 percent and 160 percent, respectively. This change is expected to mitigate some of the estimated cost savings. Other smaller changes may also alter the cost savings.

⁷⁴ Email from Chris Bailey, State Relations Executive, National Council on Compensation Insurance, NCCI: Cost Analysis - FL House Insurance Subcommittee Workers' Comp. Bill Draft [sic] (Mar. 10, 2017).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES