The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL:	SB 2072
INTRODUCER:	Senator Richter
SUBJECT:	Attorney's Fees/Workers' Compensation
DATE:	March 21, 2009
REVISED:	03/25/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	**Favorable**
2.			JU	
3.			GA	
4.				
5.				
6.				

I. Summary:

Prior to the 2003 reforms, Florida was ranked as having the highest or second highest workers' compensation insurance premiums nationwide. The Legislature enacted significant changes to the workers' compensation laws in 2003 that were designed to increase the affordability and availability of coverage, expedite the dispute resolution process, provide greater compliance and enforcement authority to combat fraud, and revise certain indemnity benefits for injured workers.[1] This legislation continued the contingency fee schedule for attorney's fees, but eliminated hourly fees.

In October 2008, the Florida Supreme Court in *Murray v. Mariner Health and ACE USA* determined that the attorney's fee schedule, when read with a provision that entitles certain prevailing claimants to "a reasonable attorney's fee," creates an ambiguity as to whether the fee schedule is the sole basis for determining a reasonable attorney's fee.[2] The court concluded that the fee schedule is not the sole basis, and held that the factors set forth in a Florida Bar rule for determining attorney's fees (which includes the discretionary factors removed from the workers' compensation statute in 2003), were to be applied to determine a "reasonable attorney's fee" when the term is not otherwise defined. This decision eliminated workers' compensation attorney fee caps and allowed hourly fees in Florida.

Based on the outcome of this case, the Office of Insurance Regulation (OIR) approved a 6.4 percent increase in workers' compensation rates filed by the National Council of

[1] Chapter 2003-412, L.O.F.

[2] *Murray v. Mariner Health and Ace USA*, 33 Fla. Law Weekly S845 (Oct. 23, 2008).

Compensation Insurance, effective April 1, 2009, which will offset some of the 18.6 rate reduction that was effective January 1, 2009.

The bill clarifies that the attorney's fee schedule provisions in ch. 440, F.S., are to be calculated based solely on the fee schedule, except in certain medical-only cases.

This bill substantially amends the following section of the Florida Statutes: 440.34.

II. Present Situation:

Workers' Compensation Market Prior to 2003 Reforms
In 2000, Florida had the highest premiums in the country, and in 2001, Florida was ranked second only to California. In 2003, the National Council on Compensation Insurance (NCCI) identified the following major cost drivers in the workers' compensation system in Florida:

- High frequency of permanent total disability (PTD) claims—five times higher than the national average;
- High medical costs for permanent partial disability (PPD) claims—nearly two times higher than the national average;
- High medical costs for temporary total disability (TTD) claims—80 percent higher than the national average; and
- Relatively high hospital costs.

The NCCI noted that attorney involvement was significant in Florida and helped explain the major cost drivers. For example, when attorneys were not involved, the difference in claim costs between Florida and the national average was minimal. When attorneys were involved, Florida's claim size was nearly 40 percent higher than the national average.

Attorney Fees
The 2003 reforms eliminated the hourly rates, except for certain medical-only claims, and continued the use of the contingency fee schedule in awarding attorney fees. In 2003, the NCCI estimated that the limitations on attorney fees would result in an estimated 2 percent savings. Since the implementation of the 2003 reforms, the Office of Insurance Regulation (the OIR) has approved six consecutive decreases in workers' compensation rates, resulting in a cumulative decrease of the overall average rate by more than 60 percent.

Section 440.34, F.S., governs attorney's fees in workers' compensation. Pursuant to subsection (1), a fee may not be paid for a claimant unless approved as reasonable by a judge of compensation claims (JCC) or a court having jurisdiction over the proceeding. Further, an attorney's fee approved for benefits secured on behalf of a claimant must equal 20 percent of the first $5,000 of the amount of benefits secured, 15 percent of the next $5,000 of the amount of benefits secured, 10 percent of the remaining amount of the benefits secured and to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.

As an alternative to a contingency fee, the JCC may approve an attorney's fee not to exceed $1,500, only once per accident, based on a maximum hourly rate of $150 if the judge of

compensation claims determines that the fee schedule, based on benefits secured, and fails to fairly compensate the attorney for a disputed medical-only claim.

Generally, a workers' compensation claimant is responsible for paying his or her own attorney's fees. However, under s. 440.34(3), F.S., a claimant is entitled to recover a "reasonable attorney's fee" from the carrier or employer in the following circumstances: 1) claimant successfully asserts a claim for medical benefits only; 2) claimant's attorney successfully prosecutes a claim previously denied by the employer/carrier; 3) claimant prevails on the issue of compensability, which was previously denied by the employer/carrier; and 4) claimant successfully prevails in proceedings related to the enforcement of an order or modification of an order.

Prior to the passage of the 2003 act, some claimant attorneys argued that by only applying the fee cap to the claimant's attorney, and not the defense attorney, it places the employee at a competitive disadvantage in litigating the claim. In justifying such limits, the courts have relied on the legitimacy of the legislature's objective of protecting the injured worker's interest and the rationality of regulating only workers' attorneys as a reasonable means of furthering this objective. However, the prohibition on the claimant's attorney collecting a fee, unless approved by the court, has been upheld on the basis that the statute serves a legitimate state interest in affording a worker necessary minimum living funds.[3]

After the enactment of 2003 act, the workers' compensation statute's facial constitutionality was upheld in *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506 (Fla. 1st DCA 2006). In so ruling, the First District stated:

> The Legislature did not encroach upon the powers of the judiciary by amending section 440.34(1), F.S., to restrict the payment of fees to a percentage of the benefits secured. Workers' compensation is a creature of statute governed by the provisions of chapter 440, F.S..[4] The Legislature may limit the amount of fees that a claimant's attorney may charge because the state has a legitimate interest in regulating attorney's fees in workers' compensation cases.[5] Furthermore, the legislature is charged with setting forth the criteria it deems will further the purpose of worker's compensation law and will result in a reasonable fee.[6] Therefore, section 440.34(1), F.S., does not violate the separation of powers doctrine. Nor does section 440.34(1), F.S., violate the equal protection clause or the due process clause, which, inter alia, protects the right to be represented by counsel. In limiting fees to a percentage of the benefits secured, section 440.34(1), F.S., bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant.[7] Section 440.34(1), F.S., is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers' compensation proceeding, and sets forth a definite formula for determining attorney's fees so as to protect the claimant's interest in retaining a substantial portion of the benefits secured. Therefore, section 440.34(1), F.S., does not deny a claimant equal protection, due process, or the right to be represented by counsel.

[3] *Samaha v. State*, 389 So.2d 639 (Fla. 1980).
[4] *Globe Sec. v. Pringle*, 559 So. 2d 720, 722 (Fla. 1st DCA 1990).
[5] *Samaha v. State*, 389 So.2d 639, 640 (Fla. 1980).
[6] *See id.; see also Schick v. Dep't of Agric. & 4 Consumer Servs*., 599 So. 2d 641, 644 (Fla. 1992).
[7] *See Samaha*, 389 So.2d at 640.

Emma Murray v. Mariner Health and ACE, USA[8]

The fee schedule provision in s 440.34, F.S., was overturned by the Florida Supreme Court in October 2008. In *Murray*, a nursing assistant was injured while lifting a patient. In response to the claimant's petition for workers' compensation benefits, the employer and its insurance carrier asserted that no benefits were owed, as the injury did not arise out of or in the course of employment. After a hearing, the judge of compensation claims (JCC) found for the claimant and awarded $3,244.21 in benefits.

Pursuant to s. 440.34(3), F.S., the claimant was entitled to recover "a reasonable attorney's fee," as she had successfully prosecuted a claim that had been denied. In determining "a reasonable attorney's fee," the claimant's attorney asserted that the JCC should consider the *Lee Engineering* factors that had been removed from the statute in 2003.[9] The employer and insurance carrier, however, asserted that s. 440.34(1), F.S. controlled the fee calculation. This subsection requires that any fee "paid for a claimant" must be approved as reasonable by the JCC, "must equal" the contingency fee schedule, and prohibits approval of an attorney's fee in excess of the "amount permitted by this section."

The JCC calculated the attorney's fee under both subsections, finding that the fee award would be $684.84 (a rate of $8.11 per hour) if calculated under the fee schedule of subsection (1), but $16,000 (135 hours at $125 an hour) if calculated under subsection (3). Finding that the fee award under subsection (3) was governed by the fee schedule of subsection (1), the JCC awarded an attorney's fee of $684.84, which was subsequently affirmed by the First District Court of Appeal.

The Florida Supreme Court reversed, finding that when subsections (1) and (3) of s. 440.34, F.S., are read together an ambiguity exists as to whether subsection (1) is the sole basis upon which to calculate a reasonable attorney's fee. As a review of the Legislative history of the attorney's fee provision, including the 2003 amendments, did not provide reasons for the changes made, the Court relied on two rules of statutory construction to clarify the ambiguity and determine legislative intent: (1) The specific provision controls the general and (2) a statute will not be construed in such a way that it renders meaningless or absurd any other statutory provision.

The court determined that when a claimant is entitled to an attorney fee award, a "reasonable" fee must be awarded pursuant to s. 440.34(3), F.S.[10] The court found that the attorney fee provisions of s. 440.34(1) create a statutory ambiguity with subsection (3) because application of the attorney fee schedule will not result in a "reasonable" fee in some cases.

The court resolved the ambiguity by applying two rules of statutory construction. First, the court said that the reasonable fee requirement of subsection (3) is controlling over the attorney fee provisions of subsection (1) because a specific statute controls over a general statute when there is a conflict. Subsection (3) refers to the specific circumstances when a claimant is entitled to attorney fees from the employer/carrier and thus controls subsection (1) which generally refers to

[8] 994 So.2d 1051 (Fla. 2008).
[9] Chapter 2003-412, L.O.F.
[10] *Murray v. Mariner Health and Ace USA*, 33 Fla. Law Weekly S845 (Oct. 23, 2008).

attorney fees. The second rule applied by the court is that a statute will not be construed in a way that renders another statute absurd or meaningless. The court said if it construed subsection (3) as being controlled by the attorney fee provisions of subsection (1), the "reasonable" fee provision of subsection (3) would be rendered meaningless and absurd because the formula does not result in a reasonable fee in all cases.

According to the court, what constitutes a "reasonable" fee is not defined by subsection (3), thus the determination is to be made by applying Rule Regulating Fla. Bar 4-1.5(b)(1). The rule contains factors to be considered in setting a reasonable fee such as the time and labor required of the attorney, the difficulty of the case, and the skill needed to perform legal services properly. The court applied these standards to workers' compensation law in its *Lee Engineering* decision and states that the *Lee* case controls the decision here. Accordingly, the prevailing claimant was entitled to recover a reasonable attorney's fee of $16,000.

As a result of this ruling, judges of compensation claims have the discretion to award attorney fees in addition to those provided by the fee schedule if the judge decides it does not result in a reasonable fee given the attorney's time and labor, the difficulty of the case, and skill needed to perform effectively. This was the law prior to the enactment of the 2003 reforms.

III. Effect of Proposed Changes:

The bill removes statutory language providing for a "reasonable" attorney's fee and specifies that fee awards cannot exceed the amount authorized by the attorney's fee schedule. Thus, attorneys' fees in workers' compensation cases will be calculated in the manner they had been from the effective date of the 2003 reform up to the decision in *Murray.*

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will result in the reinstatement of the attorney fee caps and the elimination of the hourly fees, thereby reducing premium costs for employers. Any unfunded liability for open claims for dates of accidents occurring after October 1, 2003 would still exist for the period of October 1, 2003 to the enactment date of the bill.

In regards to the enactment of the bill, the NCCI has indicated that it make a filing to "unwind" the 6.4 percent rate increase associated with *Murray* that the OIR had approved. This would translate to an overall voluntary rate decrease of 6 percent.

C. Government Sector Impact:

To the extent that government employees injured at work are entitled to recover an attorney's fee award in workers' compensation proceedings, this bill will likely decrease the attorney's fees awards paid by state and local governments.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.