

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 Judiciary Committee

BILL: CS/SB 2072

INTRODUCER: Judiciary Committee and Senators Richter and Baker

SUBJECT: Attorney's Fees/Workers' Compensation

DATE: April 17, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Burgess</u>	<u>BI</u>	Favorable
2.	<u>Johnson/Maclure</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Prior to reforms in 2003, 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 which 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*, 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 This decision eliminated workers' compensation attorney's fee caps and allowed hourly fees in Florida. Based on the outcome of this case, the Office of Insurance Regulation approved a 6.4-percent increase in workers' compensation rates filed by the National Council of Compensation Insurance, effective April 1, 2009, which will offset some of the 18.6-percent rate reduction that was effective January 1, 2009.

The bill substantially revises the claimant's attorney fee provisions by exempting lump sum settlements from the contingency fee schedule, increasing the fee schedule for the remaining claims, and allowing hourly rates in addition to the fee schedule. The bill also provides that the

¹ Chapter 2003-412, L.O.F.

² *Murray v. Mariner Health and Ace USA*, 994 So. 2d 1051 (Fla. 2008).

fees for the claimant's attorney may be increased up to the fee paid by the employer or carrier to the employer's or carrier's attorney if it is determined that the employer or carrier engaged in bad faith denial of benefits, unreasonably delayed furnishing benefits, or unreasonably continued or increased litigation expense. It appears that the claimant's attorney fee award may no longer be subject to approval by the judge of compensation of claims, because the bill repeals the current statutory provision that makes it unlawful to receive a fee that has not been approved by the judge of compensation claims.

This bill substantially amends the following sections of the Florida Statutes: 440.20, and 440.34. The bill repeals section 440.105(3)(c), Florida Statutes.

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.

Workers' Compensation Attorney's 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's fees. In 2003, the NCCI estimated that the limitations on attorney's fees would result in an estimated 2-percent savings. Since the implementation of the 2003 reforms, the Office of Insurance Regulation (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, fails to fairly compensate the attorney for a disputed medical-only claim.³

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; or 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. 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.⁴

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 court stated:

The legislature did not encroach upon the powers of the judiciary by amending section 440.34(1) 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, Florida Statutes. 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. Furthermore, the legislature is charged with setting forth the criteria it deems will further the purpose of workers' compensation law and will result in a reasonable fee. Therefore, section 440.34(1) does not violate the separation of powers doctrine. Nor does section 440.34(1) 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) bears a reasonable relationship to the state's interest in regulating fees so as to preserve the benefits awarded to the claimant. Section 440.34(1) is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers'

³ Section 440.34(7), F.S.

⁴ *Samaha v. State*, 389 So. 2d 639 (Fla. 1980).

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) does not deny a claimant equal protection, due process, or the right to be represented by counsel.⁵

Murray v. Mariner Health

The fee schedule provision in s 440.34, F.S., was overturned by the Florida Supreme Court in October 2008 in the case of *Murray v. Mariner Health*.⁶ 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.⁷

After the claimant prevailed at the hearing, the JCC had to address the issue of attorney's fees. The claimant argued that under s. 440.34(3), F.S., she 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*⁸ factors that had been removed from the statute in 2003. 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 and "must equal" the contingency fee schedule, and prohibits approval of an attorney's fee in excess of the "amount permitted by this section."⁹

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 (80 hours at \$200 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.¹⁰

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.¹¹ 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.

⁵ *Lundy*, 932 So. 2d at 509-510 (internal citations omitted).

⁶ *Murray v. Mariner Health and Ace USA*, 994 So. 2d 1051 (Fla. 2008).

⁷ *Id.* at 1054.

⁸ The Florida Supreme Court, in *Lee Engineering & Const. Co. v. Fellows*, 209 So. 2d 454, 458-459 (Fla. 1968), set out six factors to consider in determining a reasonable attorney's fee award in a workmen's compensation claim when there is not a stipulation fixing a dollar value for the attorney's fees.

⁹ Section 440.34(1), F.S.

¹⁰ *Murray*, 994 So. 2d at 1056

¹¹ *Id.* at 1057

In applying the first rule, the court said that the reasonable fee requirement of subsection (3) is controlling over the attorney's 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's fees from the employer/carrier and thus controls subsection (1) which generally refers to attorney's fees.¹²

In applying the second rule, the court stated if it construed subsection (3) as being controlled by the attorney's 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.¹³

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 stated that the *Lee* case controlled the decision here. Accordingly, the prevailing claimant was entitled to recover a reasonable attorney's fee of \$16,000.¹⁴

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 the schedule 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.

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

Post 2003 Reform Data

Recent information provided by the Office of the Judges of Compensation Claims indicates that, on average, claimant's attorney fees are higher than defense attorney fees per claim. For fiscal year 2007-08, the average defense attorney fee per claim was \$2,563, and the claimant's attorney fee per claim was \$5,231 for fiscal year 2007-08.¹⁵

In April 2009, the Workers' Compensation Research Institute (WCRI) released a prepublication study titled *Did the Florida Reforms Reduce Attorney Involvement?*¹⁶ A summary of the key questions and findings is provided below:

¹² *Id.* at 1061.

¹³ *Id.* at 1061.

¹⁴ *Id.* at 1061-1062.

¹⁵ Correspondence from the Office of Judges of Compensation Claims, dated March 26, 2009, to professional staff of the Senate Committee on Banking and Insurance.

¹⁶ Savych, Bogdan and Victor, Richard. 2009. *Did the Florida Reforms Reduce Attorney Involvement?* Cambridge, MA: Workers' Compensation Research Institute.

- Did the Florida reform reduce the ability of a worker to retain an attorney? According to the WCRI, 38 percent of the workers were able to retain attorneys for a sample of cases analyzed during the period between October 2003 and September 2004 versus 43 percent before the reforms (October 2000 – September 2003). This 5 percent reduction could be attributed to the limit on hourly fees or to the impact of other reforms, such as reforms relating to permanent total disability or permanent partial disability, or other factors. If the characteristics of cases are controlled, the report concludes that the difference or reduction in the percentage of workers who engaged attorney before and after the reforms was 3.6 percent.
- Did the reform reduce the ability of workers to retain attorneys in cases where the attorney fee is likely to be small? The WCRI concluded that a significant portion of the workers were able to engage attorneys, even for attorney fees of less than \$500. If the case characteristics are controlled, the results are mixed. For example, for PPD under \$1,500 and/or lump sum cases of under \$2,500, respectively, the reduction in attorney involvement is 1 percent, which is not statistically significant. For PPD cases under \$1,500 and/or lump-sum cases under \$2,500, the attorney involvement is lower by 2.5-3.4 percent.

III. Effect of Proposed Changes:

The bill provides the following changes to ss. 440.20, and 440.34, F.S., respectively, relating to the award of claimant attorney fees:

- Exempts attorney's fees related to lump sum settlements from being awarded pursuant to the contingency fee schedule mandated under s. 440.34, F.S. Instead, an attorney's fee for a settlement could be up to 33 1/3 percent of any recovery up to \$1 million; plus 30 percent of any portion of the recovery between \$1 million and \$2 million; plus 20 percent of any portion of the recovery exceeding \$2 million, pursuant to Florida Bar Rule 4-1.5. Currently, over 80 percent of benefits secured in litigated cases are resolved by lump sum settlements.
- Provides that fee awards paid by employers and carriers for the claimant's attorney are to be calculated based on the following schedule which is substantially higher than the current fee schedule (depicted below these changes):
 - 25 percent of the first \$5,000 of the amount of benefits secured,
 - 20 percent of the next \$5,000 of the amount of benefits secured, and
 - 15 percent of the remaining amount of the benefits secured.

The current statutory fee schedule provides the following fees based on benefits secured:

- 20 percent of the first \$5,000,
- 15 percent of the next \$5,000,
- 10 percent of the remaining amount of the benefits secured 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.

However, the fee schedule proposed in the bill does not cap a claimant's attorney's fee, because the bill provides that the fees for the claimant's attorney may be increased up to the fee paid by the employer or carrier to the employer's or carrier's attorney if it is determined that the employer or carrier engaged in bad faith denial of benefits, unreasonably delayed furnishing benefits, or unreasonably continued or increased litigation expense.

The bill prohibits carriers from recouping through the ratemaking process claimant attorney fees that they pay.

The bill specifies that, “unless the parties agree otherwise,” claimant attorney’s fees shall be determined by the judge of compensation claims. The bill repeals s. 440.105(3)(c), F.S., which currently prohibits a person from receiving a fee, consideration, or gratuity for services rendered in a workers’ compensation proceeding without the approval of a judge of compensation claims. It may be unclear, based upon these two elements of the bill, under what conditions and to what extent the judge of compensation claims will continue to have a role in approval of fees.

The bill takes effect July 1, 2009.

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 eliminates the current fee caps and authorizes hourly fees and provides additional fees for claimant attorneys if certain conditions are met. These changes may create financial incentives for defense and claimant attorneys to increase litigation, which could result in higher workers’ compensation costs for employers.

The increase in claimant attorney fees authorized in the bill for lump sum settlements may reduce the settlement received by injured workers. It appears claimant attorney fees could no longer be subject to approval by a judge of compensation claims.

According to the Office of Insurance Regulation, the prohibition on recouping attorney fees expenses through rates will adversely impact rates in the long term. In the short term, assuming that this provision was held constitutional, one could argue that rates would be reduced for this provision alone because this would remove part of the current cost in the

system. However, in the long term, carriers will have less incentive to dispute claims and thereby incur an attorney fee that cannot be built into the rates. Thus, over time claims will rise substantially as carriers begin to pay questionable claims and allow more expensive treatment or generous benefits on legitimate claims rather than incur an attorney fee.

With regard to the proposed impact of enacting the bill, the National Council of Compensation Insurance (NCCI) has indicated that the bill will likely raise costs higher than the *Murray* decision.¹⁷

The NCCI notes, that prior to the 2003 reform, the average claimant attorney fee on lump sum settlements was approximately 15 percent. The bill more than doubles the claimant fees for lump sum settlements by increasing the fee to at least 33 1/3 percent of the lump sum settlement. The higher claimant fee structure will provide more financial incentive for greater attorney involvement in cases, which may result in more discovery, more litigation, longer case life, and longer period to provide benefits to workers. These costs would ultimately be reflected in employer rates.¹⁸

The NCCI notes that the increased attorney fees for non-lump sum settlements may adversely impact claims handling practices. For example, when the payment by the employer/carrier of claimant attorney fees is treated as a penalty (not included in the rate base), the employer/carrier may be more inclined to pay or settle even those claims where there are legitimate concerns about the claim's compensability or the appropriateness of the particular benefit. This could result in carriers paying claims in situations where fraud is suspected. As a result, claim costs would be expected to increase and ultimately reflected in employers' rates.¹⁹

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 increase the attorney's fee awards paid by state and local governments. Any increased costs may be passed on to taxpayers. (See also Private Sector Impact, above.)

VI. Technical Deficiencies:

None.

VII. Related Issues:

Chapter 627, F.S., governs the regulation of workers' compensation insurance rates by the Office of Insurance Regulation. The bill prohibits an insurer from recouping certain attorney fees of the prevailing party paid by a carrier to a claimant or claimant's attorney by amending ch. 440, F.S.

¹⁷ NCCI correspondence to professional staff of the Senate Committee on Banking and Insurance, dated April 17, 2009.

¹⁸ *Analysis of the Strike-all Amendment to Senate Bill 2072*. March 31, 2009, National Council on Compensation Insurance, Inc.

¹⁹ *Id.*

The Office of Insurance Regulation indicated that it would attempt to exclude such attorney fees from the ratemaking process; but, it would be up to the courts to decide if carriers challenge this provision.

VIII. Additional Information:

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

CS by Judiciary on April 15, 2009:

The committee substitute replaces the language of the original bill and:

- Repeals a statutory provision that currently makes it unlawful for a person to receive a fee, consideration, or gratuity for services rendered in a workers' compensation proceeding unless the fee, consideration, or gratuity is approved by a judge of compensation claims.
- Revises the fee awards paid by employers and carriers for the claimant's attorney and provides that they are to be calculated based on the following schedule: 25 percent of the first \$5,000 of the amount of benefits secured, 20 percent of the next \$5,000 of the amount of benefits secured, and 15 percent of the remaining amount of the benefits secured.
- Provides that the fees for the claimant's attorney may be increased up to the fee paid by the employer or carrier to the employer's or carrier's attorney, if it is determined that the employer or carrier engaged in bad faith denial of benefits, unreasonably delayed furnishing benefits, or unreasonably continued or increased litigation expense.
- Prohibits carriers from recouping through the ratemaking process claimant attorney fees that they pay.

B. Amendments:

None.