

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 903 Workers' Compensation Attorney's Fees

SPONSOR(S): Flores and others

TIED BILLS: IDEN./SIM. BILLS:

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Insurance, Business & Financial Affairs Policy Committee, Reilly, Cooper.

SUMMARY ANALYSIS

In 2003, Florida enacted workers' compensation reform legislation (ch. 2003-412, L.O.F.). At that time, Florida's workers' compensation insurance rates consistently ranked as the most expensive or second most expensive in the country.

The 2003 legislation retained a contingency fee schedule for attorney's fees, but removed a listing of factors a judge of compensation claims (JCC) was required to consider and upon which the JCC could increase or decrease the amount of the award.

Since enactment of this comprehensive reform legislation, the Office of Insurance Regulation (the OIR) has approved six consecutive decreases in workers' compensation rates, resulting in a cumulative decrease of the overall statewide average rate by more than 60 percent.

In October 2008, the Florida Supreme Court in Murray v. Mariner Health and ACE USA determined that the attorney's fee schedule as amended, when read together 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.

Based on this decision, the OIR has approved a 6.4% increase in workers' compensation rates effective April 1, 2009.

House Bill 903 amends the attorney's fee schedule to permit fees on the first \$5,000 of benefits secured to be "less than or equal to" 20 percent of the first \$5,000 of benefits secured. Under current law, the fee must equal 20 percent of the first \$5,000 in benefits secured.

This bill should have no more than a minimal fiscal impact on state and local governments.

The bill takes effect upon becoming a law.

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

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## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Florida's Workers' Compensation System**

In the early part of the decade, Florida consistently had the most expensive or the second most expensive workers' compensation rates in the country.<sup>1</sup>

In 2003, workers' compensation reform legislation (ch. 2003-412, L.O.F.) was enacted in an attempt to significantly reduce system costs. The legislation made changes to various aspects of the workers' compensation law (ch. 440, F.S.) including:

- Revising eligibility for permanent total disability benefits and eliminating the social security eligibility standard;
- Requiring the workplace accident to be the "major contributing cause" of the resulting injury;
- Strengthening anti-fraud provisions;
- Increasing medical reimbursements for physicians and for surgical procedures and revising other reimbursement provisions;
- Increasing permanent impairment benefits from 50 to 75 percent of the temporary total disability benefit;
- Increasing the maximum death benefit;
- Retaining an attorney's fee schedule, but deleting from the statute the following list of factors<sup>2</sup> a judge of compensation claims could consider to increase or decrease the amount of the fee:
  - The time and labor required the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
  - The fee customarily charged in the locality for similar legal services.
  - The amount involved in the controversy and the benefits resulting to the claimant.
  - The time limitation imposed by the claimant or the circumstances.

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<sup>1</sup> In 2000, Florida had the highest workers' compensation premiums in the country, and the second highest in 2002. See Oregon *Workers' Compensation Premium Rate Rankings for 2000, 2002*.

<sup>2</sup> These factors were set forth in *Lee Eng'g. & Constr. Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968) and subsequently incorporated into s. 440.34, F.S. *Lee Eng'g.* applied Canon 12 of the Canons of Professional Responsibility [the predecessor to rule 4-1.5(b) of the Rules Regulating the Florida Bar].

- The experience, reputation, and ability of the lawyer or lawyers performing services.
- The contingency or certainty of a fee.

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 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. The judge is prohibited from approving fees in excess of "the amount permitted by this section."

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.

Since the 2003 legislation, the Office of Insurance Regulation has approved six consecutive decreases in workers' compensation insurance rates, resulting in a cumulative decrease of the overall statewide average rate by more than 60 percent.<sup>3</sup> From 2002 to 2008, Florida's workers' compensation premium rate index decreased from \$4.47 per \$100 of payroll to \$2.20 per \$100 of payroll.<sup>4</sup> In 2008, 26 states had higher workers' compensation premiums than Florida.<sup>5</sup>

### **The Florida Supreme Court's Decision in *Emma Murray v. Mariner Health and ACE, USA*<sup>6</sup>**

In *Murray*, a nursing assistant injured while lifting a patient suffered a uterine prolapse and underwent a hysterectomy. In response to 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 by ch. 2003-412, L.O.F. 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,<sup>7</sup> and prohibits approval of an attorney's fee in excess of the "amount permitted by this section."

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<sup>3</sup>Office of Insurance Regulation Press Release dated October 29, 2008. Found at: <http://www.floir.com> (last accessed March 4, 2009).

<sup>4</sup>Oregon Department of Consumer and Business Services, "Workers' Compensation Premium Rate Ranking Report" for 2002 and 2008 (biennial report). Found at: <http://egov.oregon.gov/DCBS/> (last accessed March 3, 2009).

<sup>5</sup>*Id.* Subsequent to publication of the 2008 Oregon report, there have been two further rate decreases in Florida.

<sup>6</sup>994 So.2d 1051 (Fla. 2008).

<sup>7</sup>Subsection (1) provides that any attorney's fee approved by a judge of compensation claims 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 the benefits secured, 10 percent of the

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 (the 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 subsection (3), which specifically pertains to situations in which attorney's fees can be awarded, controls over subsection (1), which addresses the calculation of attorney's fees in general. Additionally, the Court stated that the "reasonable attorney's fee" language of subsection (3) would be rendered meaningless if it were construed as being controlled by the fee schedule of subsection (1), as application of the fee schedule would result in excessive fees in some cases and inadequate fees in others.

Thus, the Court concluded that reasonable attorney's fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined using rule 4-1.5(b) of the Rules Regulating the Florida Bar. This rule sets forth factors to be considered as guides in determining a reasonable fee, including the *Lee Engineering factors* that had been removed from the workers' compensation statute in 2003. Accordingly, the prevailing claimant was entitled to recover a reasonable attorney's fee of \$16,000.

### **Effect of the Bill**

House Bill 903 amends the attorney's fee schedule to permit fees on the first \$5,000 of benefits secured to be less than or equal to 20 percent. Current law provides for attorney's fees of 20 percent of the first \$5,000 of benefits secured. Further, 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, attorney's fees in workers' compensation will be calculated in the manner they had been from the effective date of the 2003 reform up to the decision in *Murray*.

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 434, F.S., relating to attorney's fees in workers' compensation.

**Section 2.** Provides for the bill to take effect upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

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remaining amount of the benefits to be 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.

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The Office of Insurance Regulation approved a 6.4% increase in workers' compensation rates based upon the Florida Supreme Court's decision in Murray. House Bill 903 will likely result in a workers' compensation rate filing seeking to unwind this increase.<sup>8</sup>

**D. FISCAL COMMENTS:**

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

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill amends the attorney's fee schedule to permit the fee on the first \$5,000 of benefits secured to be "less than or equal to" 20 percent. Currently, s. 440.34(1), F.S., provides that the fee must be 20 percent of the first \$5,000 of benefits secured. As the bill does not provide guidance as to how a judge of compensation claims is to determine the percentage to be applied in calculating the fee payable on the first \$5,000 of benefits secured, it appears to introduce subjectivity into the calculation of attorney's fees and require consideration of external factors, such as those set forth in *Lee Engineering* and which were used to determine a "reasonable attorney's fee" in Murray. The sponsor of the bill has informed staff that she will offer an amendment to eliminate this change.

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<sup>8</sup> Correspondence from the National Council on Compensation Insurance (NCCI) on file with staff of the Insurance, Banking & Financial Affairs Policy Committee.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**