

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 553 Workers' Compensation System Administration

SPONSOR(S): Government Operations Appropriations Subcommittee; Insurance & Banking; Hager

TIED BILLS: **IDEN./SIM. BILLS:** SB 860

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Reilly	Cooper
2) Government Operations Appropriations Subcommittee	11 Y, 0 N, As CS	Keith	Topp
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

House Bill 553 amends provisions relating to the administration of Florida's workers' compensation system. The changes include the following:

- Provides that stop-work orders (SWOs) and penalties assessed against a limited liability company (LLC) continue in force against successor companies of the LLC to the same extent (and under the same conditions) that they remain in force against successor companies of corporations, partnerships, and sole proprietorships.
- Clarifies the process for allowing out-of-state corporate officers to electronically apply for an exemption from coverage requirements.
- Eliminates the requirement that workers' compensation health care providers be certified by the Department of Financial Services (DFS).
- Increases timeframes for health care providers to file medical reimbursement disputes with the DFS, for carriers to respond to the petition, and for the DFS to issue a written determination.
- Continues increased benefits for injured employees with a catastrophic temporary total disability, but removes the \$700 weekly cap on such benefits, which is lower than the maximum weekly benefit allowable under the current workers' compensation law.
- Resolves a statutory inconsistency as to the penalties that may be assessed against employers or carriers for violation of reporting requirements.
- Eliminates the following requirements: (1) that the DFS approve the advance payment of workers' compensation benefits in certain circumstances; (2) that carriers submit reemployment status reports to the DFS for review; (3) that a vocational evaluation always be conducted prior to the DFS authorizing training and education for an injured employee; and (4) that the DFS serve as custodian of certain collective bargaining agreements.
- Clarifies the authority of the Florida Self-Insurers Guaranty Association under the workers' compensation law.
- Amends statutory language to accurately reflect that the DFS is responsible for monitoring and auditing workers' compensation insurers and for assessing penalties for violations.
- Amends the administrative fine that may be assessed against health care providers that engage in a pattern or practice of overutilization or otherwise violate the workers' compensation law or rules.

The bill has no fiscal impact on state and local government.

The bill is effective July 1, 2013, except as otherwise provided.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Workers' Compensation

Chapter 440, F.S., is Florida's workers' compensation law. For work-related injuries sustained by employees,¹ workers' compensation provides:

- Medically necessary remedial treatment, care, and attendance, including medicines, medical supplies, durable medical equipment, and prosthetics.²
- Compensation for disability when the injury causes the employee to miss more than 7 days of work.³

The Division of Workers' Compensation within the Department of Financial Services (DFS) provides regulatory oversight of the system.

Coverage

Whether an employer is required to have workers' compensation insurance depends upon the employer's industry (construction, non-construction, or agricultural) and the number of employees. Employers may obtain ("secure") coverage by purchasing a workers' compensation insurance policy from an insurer; purchasing coverage from the Workers' Compensation Joint Underwriting Association (for employers that are unable to purchase a workers' compensation insurance policy from an authorized insurance company); or qualifying as a self-insurer.⁴

Failure to Comply with Coverage Requirements

If an employer fails to comply with coverage requirements, the DFS must issue a stop-work order (SWO) within 72 hours of knowledge of non-compliance. SWOs require the employer to cease business operations and remain in effect until the DFS issues an Order Releasing the Stop-Work Order. Additionally, employers are assessed penalties equal to 1.5 times what the employer would have paid in workers' compensation premiums for all periods of non-compliance during the preceding 3-year period or \$1,000, whichever is greater.⁵ SWOs are issued for the following violations: failure to obtain workers' compensation insurance; materially understating or concealing payroll; materially misrepresenting or concealing employee duties to avoid paying the proper premium; materially concealing information pertinent to the calculation of an experience modification factor; and failure to produce business records in a timely manner.

To prevent a person or business from circumventing these sanctions, an SWO and associated penalties continue in force against a successor entity of a corporation, partnership, or sole proprietorship when the successor entity (1) is engaged in the same or equivalent trade or activity as the business that was issued the SWO and (2) has one or more of the same principals or officers as the business that was issued the SWO. The workers' compensation law is silent as to whether SWOs and associated penalties continue in force against successor entities of limited liability companies (LLCs).⁶

¹ The workplace injury must be the "major contributing cause" of any resulting injuries and remain the major contributing cause. "Major contributing cause" is the cause which is more than 50% responsible for the injury as compared to all other causes combined for which treatment or benefits are sought. See s. 440.09(1), F.S.

² Section 440.13(2)(a), F.S.

³ Section 440.12(1), F.S.

⁴ Sections 440.38, F.S. and 627.311(5)(a), F.S.

⁵ Section 440.107, F.S.

⁶ Section 440.107(7)(b), F.S.

The bill amends s. 440.107, F.S., to provide that SWOs and accompanying penalties assessed against LLCs remain in force against successor companies to the same extent and under the same conditions that they remain in force against successor companies of corporations, partnerships, and sole proprietorships.

Exemptions from Workers' Compensation Coverage Requirements

Under Florida law, corporate officers can elect to be exempt from workers' compensation coverage requirements. Individuals who make such election are not considered "employees" for premium calculation purposes, and are not eligible to receive workers' compensation benefits if they suffer a workplace injury.

In 2012, several changes⁷ were made to eligibility requirements for a workers' compensation exemption and the exemption application process. The definition of "corporate officer" under the workers' compensation law was amended to clarify that members of non-construction LLCs who own at least 10% of the LLC are eligible to apply for an exemption. The application process was also amended, requiring electronic filing of exemption applications, with amended reporting requirements. Specifically, applicants no longer needed to provide their social security number, but were required to include their date of birth, Florida driver license number or Florida identification card number⁸ on their application. An unintended consequence of the amended data reporting requirements was to preclude out-of-state corporate officers, who would otherwise have been eligible for an exemption, from filing an electronic application, as they could not possess a Florida driver license or Florida identification card. Current practice at DFS is to accept paper applications from out-of-state applicants and issue exemptions when all other eligibility criteria are met.

To enable eligible out-of-state corporate officers to electronically submit exemption applications, the bill permits applicants to provide a "driver license number," rather than a "Florida driver license number."

Medical Care

Health Care Providers

To be eligible to receive reimbursement for services rendered to injured employees, health care providers must be certified by the DFS and receive authorization from the carrier, except in emergency situations, before providing treatment.⁹ The eligibility requirements for certification are provided in Rule 69L-29.002, F.A.C.¹⁰ The certification process requires health care providers to complete and submit an online application and correctly answer at least 95% of the review questions that accompany the DFS's Health Care Provider Tutorial.¹¹ There are 54 review questions. The tutorial and review questions are designed to satisfy the requirement of s. 440.13(1)(d), F.S., that certification of a "health care provider must include documentation that the health care provider has read and is familiar with the portions of the statute, impairment guides, practice parameters, protocols of treatment, and rules which govern the provision of remedial treatment, care, and attendance." Health care providers are permitted to retake the review question quiz as many times as necessary to obtain a score of 95% or better. For every question answered incorrectly, the health care provider is informed of his/her error and provided with the correct response. The format of the quiz, the questions presented, the order in which they appear, and the list of choices presented do not vary, and remain the same at all times.

⁷ Chapter 2012-213, L.O.F.

⁸ The Florida Department of Highway Safety and Motor Vehicles issues non-driver identification cards to State residents above 12 years of age who do not have a valid ID card, driver license or instruction permit from the State or any other jurisdiction. See <http://www.dmv.com/fl/florida/apply-id-card> (last accessed: February 12, 2013).

⁹ Section 440.13(3)(a), F.S.

¹⁰ A requirement that providers complete a five-hour course on cost containment, utilization control, and other topics as part of the certification process was repealed in 2001. See ch. 2001-91, L.O.F.

¹¹ An overview of the certification process can be found at the DWC Health Care Provider Certification Website (<https://apps8.fldfs.com/ProvCertification/default.aspx>) (last accessed: February 12, 2013).

The bill repeals the certification requirement (and DFS's responsibility to maintain a list of authorized providers) and makes conforming changes throughout ch. 440, F.S. The definition of health care provider is amended to specify that health care providers are physicians and recognized practitioners "licensed to provide" [by the appropriate licensing board] skilled services....To be eligible to receive reimbursement, health care providers must still receive authorization from the carrier before providing services.

For providers who engage in a pattern or practice of overutilization¹² or who violate workers' compensation provisions or rules, current law permits the assessment of an administrative fine of up to \$5,000 per instance of overutilization or violation. The bill amends this provision to authorize an administrative fine of \$5,000.

Medical Reimbursement Disputes¹³

The DFS is responsible for resolving medical reimbursement disputes between health care providers and insurance carriers. Providers have 30 days from receipt of notice of disallowance or adjustment of payment from a carrier to file a dispute petition (Petition for Resolution of Reimbursement Dispute Form¹⁴) with the DFS. Carriers have 10 days from receipt of the provider's petition to submit to the DFS all documentation substantiating the carrier's disallowance or adjustment; otherwise they waive all objections to the petition. The DFS has 60 days from receipt of all documentation to issue a written determination. The provider or the workers' compensation carrier, or either party's designated representative, may contest the DFS's determination by filing a request for administrative hearing under ch. 120, F.S.¹⁵

The bill expands timeframes relating to a health care provider's election to contest the disallowance or adjustment of a payment by a carrier as follows:

- Increases from 30 to 45 days after receipt of such notice from a carrier the time within which a health care provider may petition the DFS to resolve the dispute.
- Increases from 10 to 30 days after receipt of the health care provider's petition the time within which the carrier must submit to the DFS all documentation substantiating the carrier's disallowance or adjustment; otherwise, the carrier waives all objections to the petition.
- Increases from 60 to 120 days after receipt of all documentation the time within which the DFS must provide the parties with a written determination of whether the carrier properly adjusted or disallowed payment.

Indemnity Benefits

Workers' compensation indemnity (monetary) benefits are payable to employees who miss at least 8 days of work due to a covered (compensable) injury. However, indemnity benefits are payable retroactively from the first day of disability (to include compensation for the first seven days missed) to employees who miss more than 21 days of work due to a compensable injury.¹⁶ Such benefits are

¹² Section 440.13(1)(k), F.S., defines "Instance of overutilization" as a specific inappropriate service or level of service provided to an injured employee that includes the provision of treatment in excess of established practice parameters and protocols of treatment established in accordance with the workers' compensation law.

¹³ See s. 440.13(7), F.S.

¹⁴ Rule 69L-31.003, F.A.C.

¹⁵ The DFS informs that the current dispute resolution timeline may not provide sufficient time for a health care provider to refile a petition when the initial petition is incomplete or otherwise defective, for a carrier to respond to a petition, or for the DFS to issue a determination. Due to an increased volume of petitions, *supra*, the average number of days for the DFS to resolve a case has increased from 24 days to over 81 days. DFS correspondence, *supra*, on file with staff of the Insurance & Banking Subcommittee.

¹⁶ Section 440.12(1), F.S.

generally payable at 66 2/3% of the employee's average weekly wage, up to the maximum weekly benefit established by law¹⁷ (\$816 per week¹⁸ in 2013). Indemnity benefits are generally payable for a maximum of 104 weeks, with specified exceptions.¹⁹

For catastrophic temporary total disability,²⁰ the workers' compensation law provides for increased indemnity benefits (80% of the employee's average weekly wage) for up to six months from the date of injury. Section 440.15(2)(b), F.S., limits such increased benefit to a maximum of \$700 per week. Since 2007, the maximum compensation rate in Florida's workers' compensation system has been greater than \$700. Accordingly, employees could actually receive less compensation for a catastrophic temporary total disability than they would for a non-catastrophic injury.²¹

The bill removes the \$700 cap on the maximum weekly benefit for catastrophic temporary total disability benefits.

Advance Payment of Workers' Compensation Benefits

Section 440.20(12), F.S., permits Judges of Compensation Claims or, under certain conditions, the DFS to approve the advance payment of workers' compensation benefits to injured employees. In cases in which the carrier and employer have stipulated to an advance payment in excess of \$2,000, DFS approval of the advance payment is required.

The bill makes the approval of advance payment of workers' compensation benefits the sole province of Judges of Compensation Claims, and removes the DFS from the approval process in all circumstances.

Insurer Performance Standards

Insurers are required to pay the first installment of compensation for total disability (temporary total disability or temporary partial disability) or death benefits or deny the claim within 14 days after the employer receives notification of the injury or death, when disability is immediate and continuous for 8 or more days after the injury.²² Medical, dental, pharmacy, and hospital bills properly submitted to the insurer must be paid within 45 calendar days after receipt.²³ The DFS ensures compliance through electronic databases and carrier audits, and imposes administrative penalties against insurers that do not achieve a minimum 95 percent performance standard²⁴ as to either the timely payment of indemnity benefits or timely payment of medical bills.²⁵

Penalties for carrier failure to timely pay medical bills are provided for in two sections of the workers' compensation law. The DFS assesses penalties under s. 440.20(6), F.S.,²⁶ and does not utilize the penalty provisions of s. 440.13(11)(b), F.S. Accordingly, the bill deletes the penalty language in s. 440.13(11)(b), F.S.

Reporting Requirements

¹⁷ Sections 440.15(1)-(4), F.S.

¹⁸ See "Informational Bulletin DFS-04-2012" (December 10, 2012). Available at <http://www.myfloridacfo.com> (last accessed: February 12, 2013).

¹⁹ Section 440.15, F.S.

²⁰ The loss of an arm, leg, hand or foot, an injury that renders the employee a paraplegic, paraparetic, quadriplegic, quadriparetic, or the loss of sight in both eyes. See s. 440.15(2)(b), F.S.

²¹ The maximum compensation rate is set in s. 440.12(2), F.S., and is equal to 100% of the statewide average weekly wage.

²² Section 440.20(2)(a), F.S.

²³ Section 440.20(2)(b), F.S.

²⁴ Increased penalties are assessed against carriers that fail to achieve a minimum 90% performance standard for the payment of either medical or indemnity benefits.

²⁵ Section 440.20, F.S.

²⁶ Carriers that maintain a performance standard of between 90% and 95% are assessed a \$25 penalty for each bill not timely paid that is below the 95% performance standard. Carriers with a performance standard of less than 90% are assessed a \$50 penalty for each bill not timely paid that is below the 90% performance standard.

Section 440.185, F.S., sets forth reporting requirements for employees, employers, and carriers. For example, employees must inform their employer of the injury within 30 days after the initial date of manifestation of the injury, except as otherwise specified. Employers are required to report an injury or death to their workers' compensation insurer within 7 days of having knowledge of the injury. Insurers must then report the injury to the DFS within 14 days.

Currently, the workers' compensation law contains inconsistencies as to the penalties that may be assessed against employers or carriers that violate reporting requirements. Section 440.185(9), F.S., provides for an administrative fine of up to \$1,000 per violation and, for employers that fail to timely submit more than 10% of notices of injury or death within a calendar year, an administrative fine of up to \$2,000 per violation. Section 440.593(4), F.S., which concerns electronic reporting, authorizes the DFS to assess a civil penalty of up to \$500 per violation. The DFS informs that it utilizes s. 440.185(9), F.S., to assess penalties for violations of reporting requirements, but that it has never assessed a penalty greater than \$500 per violation or against an employer based upon a percentage of late filings.²⁷

The bill amends s. 440.185(9), F.S., to permit an administrative fine of up to \$500 per violation, the same amount authorized under s. 440.593(4), F.S., for violations of electronic reporting requirements.

DFS Review of Reemployment Status Reports²⁸

For injured employees who are unemployed 60 days after the date of injury, are receiving certain workers' compensation benefits, and have not been provided medical care coordination and reemployment services voluntarily by the carrier, the carrier must determine whether the employee is likely to return to work and report its determination to the DFS and the employee. The DFS informs that the reports it receives vary from carrier to carrier, and that the DFS review of these reports is of marginal value. The DFS further reports that it has access to medical and claims data that would allow it to identify and reach out to injured employees in need of rehabilitation services and, thus, carrier submission of reemployment status reports is unnecessary.²⁹

The bill repeals the requirement that carriers submit reemployment status reports for review by the DFS.

Reemployment Services: Vocational Evaluations

The DFS is required to conduct training and education screenings of injured employees upon referral of the carrier or employee request. Pursuant to s. 440.491(6), F.S., an employee must submit to, and the DFS must pay for, a vocational evaluation even when the employee has decided on a suitable reemployment training plan that has been approved by the DFS. As an example, the DFS reports the case of a mechanic who, due to injuries suffered, would not be able to resume his career as a mechanic. Even though the employee expressed interest in receiving training as a security guard, DFS was required to pay for a vocational evaluation. The evaluation, which cost \$1,045, recommended a short-term program for the injured employee to become a security guard. The total cost of the training was \$434. DFS informs that the average cost of a vocational evaluation exceeds \$1,000.³⁰

The bill eliminates the requirement that a vocational evaluation be conducted before the DFS authorizes training and education, but provides the DFS with the flexibility to conduct vocational evaluations when necessary and appropriate.

Miscellaneous

²⁷ DFS correspondence, *supra*, on file with staff of the Insurance & Banking Subcommittee.

²⁸ Section 440.491(3), F.S.

²⁹ DFS correspondence, *supra*, on file with staff of the Insurance & Banking Subcommittee.

³⁰ *Id.*

The DFS is the custodian of collective bargaining agreements (CBAs) that contain mutually agreed upon workers' compensation provisions (e.g., providing an alternative dispute resolution system, an agreed-upon list of medical providers, etc.). Such collectively bargained provisions may not diminish an employee's entitlement to benefits under the workers' compensation law. The DFS informs that it simply receives CBAs, does not use them in any way, and rarely ever receives a request for such documents.³¹ The bill eliminates DFS's role as the custodian of CBAs.

The Florida Self-Insurers Guaranty Association (FISGA) monitors the financial strength of self-insured entities for the DFS and makes recommendations as to the qualifications to self-insure. Incorrect cross references within ch. 440.F.S. [reference to s. 440.38(1)(b)1., F.S., rather than s. 440.38(1)(b), F.S., in its entirety] create uncertainty as to the extent of the FISGA's authority. The bill clarifies the FISGA's authority by providing for the appropriate cross references.

The DFS is responsible for ensuring the timely payment of compensation and medical bills by workers' compensation carriers, for monitoring, auditing, and investigating carrier performance, and for assessing penalties for violations. Section 440.20, F.S., however, identifies the "office" (Office of Insurance Regulation) as the regulatory body with these responsibilities. The bill amends this section to correctly identify the DFS as the agency with these responsibilities.

Section 440.02(8), F.S., authorizes the Division of Workers' Compensation to establish, by rule, "standard industrial classification" (SIC) codes with respect to the construction industry. Similarly, s. 440.11, F.S., relating to exclusiveness of liability, makes reference to "Standard Industrial Code 7363." SIC codes have been obsolete since 1997 per the Federal Office of Management and Budget, and have been replaced with the North American Industrial Classification Code System (NAICS). The bill amends the workers' compensation law to remove references to SIC codes and update statutory language to provide for NAICS codes.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.02, F.S., to update outdated provisions.

Section 2. Amends s. 440.05, F.S., relating to workers' compensation exemptions.

Section 3. Amends s. 440.102, F.S., to correct a cross reference.

Section 4. Amends s. 440.107, F.S., relating to stop-work orders and penalties assessed.

Section 5. Amends s. 440.11, F.S., to update outdated provisions.

Section 6. Amends s. 440.13, F.S., relating to medical services and supplies.

Section 7. Amends s. 440.15, F.S., relating to compensation for disability.

Section 8. Amends s. 440.185, F.S., relating to penalties for violation of reporting requirements.

Section 9. Amends s. 440.20, F.S., relating to the responsibilities of the DFS to monitor, audit, and insure carrier compliance with the workers' compensation law, and the advance payments of compensation.

Section 10. Amends s. 440.211, F.S., relating to collective bargaining agreements and workers' compensation.

Section 11. Amends s. 440.385, F.S., relating to the authority of the Florida Self-Insurers Guaranty Association.

³¹ *Id.*

Section 12. Amends s. 440.491, F.S., relating to DFS review of status review reports and required vocational evaluations.

Section 13. Provides an effective date of July 1, 2013, except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that increased benefits may be available to employees with a catastrophic temporary total disability, workers' compensation indemnity costs may increase. However, only a small number of such catastrophic cases are reported each year.

D. FISCAL COMMENTS:

Administrative costs incurred by the DFS should decrease, as the DFS will no longer certify health care providers, serve as custodian of collective bargaining agreements, or approve advance payments of workers' compensation benefits.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or, reduce the percentage of a 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

On February 19, 2013, the Insurance & Banking Subcommittee considered and adopted one amendment to the bill. The amendment restored current statutory language regarding entities that are authorized to file reimbursement disputes with the Department of Financial Services.

On March 20, 2013, the Government Operations Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Restores current statutory language relating to the methodology by which state agencies reimburse the Division of Risk Management for workers' compensation benefits paid to injured state employees.

This analysis is drafted to the committee substitute as passed by the Government Operations Appropriations Subcommittee.