

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 Committee on Appropriations

BILL: SB 1582

INTRODUCER: Senator Bradley

SUBJECT: Workers' Compensation Insurance

DATE: April 12, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Sanders</u>	<u>Hansen</u>	<u>AP</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1582 amends several provisions in ch. 440, Florida Statutes, Florida's workers' compensation law, and ch. 627, F.S., the Insurance Code, which governs the rate making approval process for many, but not all, providers of workers' compensation coverage. The bill:

- Codifies *Westphal v. City of St. Petersburg*,¹ by increasing temporary total disability benefits and temporary partial disability benefits from 104 weeks to 260 weeks.
- Amends the attorney fee provision to require the Judge of Compensation Claims (JCC) to consider certain factors in determining if the attorney fees should be increased or decreased, based on a maximum hourly rate of \$250. The bill removes the criminal penalty for claimant attorneys receiving fees that are not approved by the JCCs, thereby allowing claimants to enter into retainer agreements. The bill eliminates the attorney fee cap of \$1,500 on medical-only claims.
- Requires greater specificity in the information that must be provided in petitions for benefits filed with the Office of Judges of Compensation Claims (OJCC), such as the specific date of maximum medical improvement and the specific date that such permanent benefits are claimed to begin.
- Clarifies that deadlines within multiple provisions relating to medical care are based on business days, not calendar days. For example, the bill requires carriers to authorize or deny medical authorization requests within three business days.
- Revises the workers' compensation rating law. Currently, Florida law requires carriers, or rating organization filing on their behalf, to file an administered rate or full rate. The bill implements loss costs rating, which requires each insurer to seek approval for rates based on aggregate claim information filed by a rating organization with individual company data (loss costs multipliers), being used for the final rate, subject to approval by the Office of Insurance Regulation (OIR).

¹ *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016).

- Limits defense and cost containment expenses of insurers to 15 percent of incurred losses, and provides that excessive defense and cost containment fees must be returned to policyholders.

The bill will increase costs of the OIR by \$883,118, which includes an annual appropriation of \$783,118 for staffing needs and \$100,000 in nonrecurring funds for information technology enhancements to implement the provisions of this bill.² In addition, the Office of Judges of Compensation Claims will incur a \$25,000 nonrecurring expense for reprogramming and temporary staffing needs. On the other hand, the Division of Risk Management, the state's self-insurance pool, which includes workers' compensation claims, may experience cost savings like other workers' compensation insurance providers. *See* Section V. Fiscal Impact Statement.

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

II. Present Situation:

Florida's Workers' Compensation Trends

In 2015, 242 commercial insurers actively wrote workers' compensation insurance in Florida. In total, these private sector insurers wrote \$2.6 billion in premium.³ In 2014, Florida rates were ranked 28th highest in the United States. In 2016, Florida rates were ranked even lower at 33.⁴

*Medical-Only and Indemnity Claims*⁵

Approximately 75 percent of claims in Florida are medical-only and the average cost is \$1,378. Medical-only claims represent ten percent of losses. In contrast, 25 percent of the claims in Florida are lost-time claims and the average cost is \$39,296. Lost time claims represent 90 percent of total losses.

Cost Drivers

According to the OIR, there are several cost drivers in the Florida workers' compensation system that the Legislature could address to induce cost savings.⁶ The OIR noted that NCCI compared the medical cost distributions for Florida versus 37 states combined to show that based on recent experience Florida has a higher portion of cost paid for drugs, hospital inpatient, and ambulatory surgical centers.⁷

² Email from Richard Fox, Budget Director, Office of Insurance Regulation (April 10, 2017) (on file with Senate Appropriations Committee).

³ OIR, *2016 Workers' Compensation Annual Report*, pg. 6 (Jan. 2017).

<http://flor.com/siteDocuments/2016WorkersCompensationAnnualReport.pdf> (last accessed April 4, 2017) (on file with Senate Banking and Insurance Committee).

⁴ Oregon Department of Consumer and Business Services, *2016 Oregon Workers' Compensation Premium Rate Ranking Summary* (Oct. 2016) http://www.cbs.state.or.us/external/dir/wc_cost/files/report_summary.pdf (last accessed on April 4, 2017) (on file with Senate Banking and Insurance Committee).

⁵ NCCI, *Workers' Compensation October 1, 2016, Law-Only Rate Filing Overview* (On file with Senate Banking and Insurance Committee).

⁶ See OIR fn. 1 at pg. 15.

⁷ See id.

Attorney Involvement

Attorney involvement is approximately 25 percent on lost-time claims.⁸ Since claimant attorney involvement is reported to NCCI as indemnity, a medical-only claim with claimant attorney involvement would be reported as a lost-time claim.⁹ For lost-time claims with attorney involvement, the cost on average is approximately three times more than lost-time claims without attorney involvement.¹⁰

Section 440.34, F.S., requires the reporting of all fees paid to attorneys for services rendered to the OJCC. The OJCC reported¹¹ that during 2015-2016, a total of \$378,573,902 was incurred on combined claimant attorneys' fees and defense attorneys' fees in the Florida system. This represents a small increase, about two percent, from the 2014-2015 aggregate fee total of \$370,772,783. The 2015-2016 aggregate fee total is also very similar to the 2013-2014 aggregate total of \$379,222,337. Both claimant and defense fees decreased in 2014-2015, more significantly on the claimant side. Both figures increased in 2015-2016, more significantly on the defense side. The following OJCC table provides a snapshot of fees for the period of 2002-2016.

Fiscal Year	Claimant Attorney Fees	Percent Change	Defense Attorney Fees	Percent Change
2002-03	\$210,660,738		\$216,698,474	
2003-04	\$215,322,360	2.21%	\$226,585,434	4.56%
2004-05	\$211,157,073	-1.93%	\$259,021,415	14.32%
2005-06	\$208,369,260	-1.32%	\$290,172,000	12.03%
2006-07	\$191,197,443	-8.24%	\$277,286,580	-4.41%
2007-08	\$188,701,256	-1.31%	\$260,160,496	-6.21%
2008-09	\$181,660,686	-3.73%	\$269,280,414	3.51%
2009-10	\$176,996,765	-2.57%	\$269,657,104	0.14%
2010-11	\$157,081,084	-11.25%	\$259,323,175	-3.83%
2011-12	\$152,848,003	-2.69%	\$242,446,703	-6.51%
2012-13	\$151,889,627	-0.63%	\$240,894,494	-0.64%
2013-14	\$141,858,184	-6.60%	\$237,364,154	-1.47%
2014-15	\$136,180,202	-4.00%	\$234,592,581	-1.17%
2015-16	\$136,461,404	0.21%	\$242,112,498	3.21%

Underwriting Performance of Carriers¹²

According to the OIR, “an important measure of the health of an insurance market is the underwriting performance of the insurers in the market; that is, the combination of pricing, risk management, and application of effective underwriting guidelines contributing to a viable and

⁸ See NCCI fn. 3 at pg. 9.

⁹ See *id.*

¹⁰ See *id.*

¹¹ OJCC, *2015-2016 Annual Report*, available at <https://www.jcc.state.fl.us/JCC/publications/reports/2016AnnualReport/Index.html#> (last viewed Mar. 30, 2017).

¹² See OIR fn. 1 at pgs. 9-10.

sustainable market.” Commonly used measures employed by the OIR in the 2016 Workers’ Compensation Annual Report include the loss ratio (defined as direct losses incurred divided by direct premiums earned) and a broader measure that includes direct losses incurred and defense cost containment expenses (DCCE) incurred as a percentage of direct premiums earned. Ratios approaching or exceeding 100 for either measure are not considered profitable. For the Florida workers’ compensation market in 2015, these aggregate ratios based on National Association of Insurance Commissioners (NAIC) Annual Statement data are:

- Direct Loss Ratio 57.76 percent; and
- Direct plus DCCE Ratio 65.32 percent.

While there is year-to-year variation in these ratios, both of these measures are fairly consistent with the ratios (57.90 percent and 66.14 percent, respectively) based on 2014 NAIC Annual Statement data.

The combined ratio is another common measure of underwriting performance. Combined ratios measure underwriting profitability and are generally defined as the sum of losses and expenses divided by earned premium. Typically, dividend payments are included as an expense item in quantifying combined ratios. The NCCI’s presentation at its 2016 State Advisory Forum shows that the Florida workers’ compensation combined ratio for private carriers and self-insureds has been trending down for the past several years.

The Accident Year Combined Ratios for Florida

Accident Year	Combined Ratio
2010	124%
2011	115%
2012	106%
2013	98%
2014	96%

A combined ratio less than 100 percent indicates that insurers are achieving an underwriting gain for workers’ compensation. When the combined ratio is greater than 100 percent, insurers are paying out more in losses and expenses than they are collecting in premiums. Insurers may profit in years where the combined ratio is greater than 100 percent because the ratio does not include investment income.

Recent Florida Supreme Cases

Recent Florida court decisions have found multiple parts of the workers’ compensation law unconstitutional. They are *Castellanos v. Next Door Company*,¹³ involving attorney fees; *Westphal v. City of St. Petersburg*,¹⁴ relating to temporary wage replacement benefits (i.e., indemnity); and *Miles v. City of Edgewater Police Department*,¹⁵ which addresses the right of an injured worker to pay for their own attorney.

¹³ *Castellanos v. Next Door Company*, 192 So.3d 431 (Fla. 2016).

¹⁴ *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016).

¹⁵ *Miles v. City of Edgewater Police Department*, 190 So.3d 171 (Fla. 1st DCA 2016).

Castellanos v. Next Door Company

In April 2016, the Florida Supreme Court (Court) rendered its decision in *Castellanos v. Next Door Company*. The Court concluded that:

The right of an injured worker to recover a reasonable prevail party attorney's fee has been a key feature of the state's workers' compensation law since 1941. Through the enactment of a mandatory fee schedule, however, the Legislature has created an irrebutable presumption that every fee calculated in accordance with the fee schedule will be reasonable to compensate the attorney for his or her services. The \$1.53 hourly rate in this case clearly demonstrates that not to be true. We conclude that the mandatory fee schedule is unconstitutional as a violation of due process under both the Florida and United States Constitutions.

As a result of this ruling, judges may deviate from the statutory fee schedule if it results in an unreasonable fee.

Westphal v. City of St. Petersburg

Subsequently, in June 2016, the Court, in the case of *Westphal v. City of St. Petersburg*, found the 104-week statutory limitation on temporary total disability benefits unconstitutional because it causes a statutory gap in benefits in violation of an injured worker's constitutional right of access to courts. The Court reinstated the 260-week limitation in effect prior to the 1994 law change.

Miles v. City of Edgewater Police Department

The First District Court of Appeals (1DCA) held that statutes governing payment of attorney's fees in workers' compensation proceedings violated the claimant's First Amendment rights, and thus were unconstitutional. In *Miles*, the 1DCA 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.¹⁶ The attorney was only paid by the employer/carrier¹⁷ and only if they won the case. The 1DCA 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.

Recent Rate Filing by the National Council on Compensation Insurance

In response to the two 2016 Court opinions, on May 27, 2016, the National Council on Compensation Insurance (NCCI), the rating organization that files rates on behalf of workers' compensation insurers, submitted a rate filing with the Office of Insurance Regulation (OIR)

¹⁶ Sections 440.105(2)(c) and 440.34(1), F.S.

¹⁷ Workers' compensation insurers are referred to as carriers. Section 440.02(4), F.S., provides that the term "carrier" means any person or fund authorized under s. 440.38, F.S., to insure under this chapter and includes a self-insurer and a commercial self-insurance fund authorized under s. 624.462. .

requesting a 17.1 percent increase in rates.¹⁸ As part of the filing, the NCCI requested a 15 percent increase as the first-year impact attributable to the 2016 *Castellanos* case and a 1.8 percent increase caused by updates in the medical provider fee schedule enacted during the 2016 Session.¹⁹ The combined estimated impact of the two components on premiums is an increase of \$623 million in premiums.²⁰ However, on June 30, 2016, NCCI amended its rate filing to include the estimated 2.2 percent impact of the *Westphal* decision, resulting in a filing requesting a 19.6 percent increase in rates or an estimated \$714 million increase in premiums.²¹

On September 27, 2016, the OIR issued its order disapproving the pending 19.6 percent rate filing and advised NCCI it would approve a 14.5 percent rate increase or \$528 million increase in premiums if NCCI submitted an amended filing within one week.²² The NCCI complied and on October 5, 2016, the OIR approved a 14.5 percent increase in rates effective December 1, 2016, applicable to both new and renewal workers' compensation insurance policies.²³

On November 23, 2016, a court order invalidated the 14.5 percent overall combined statewide average rate increase approved by the OIR,²⁴ due to NCCI's violations of the Sunshine Laws relating to public records and meetings, as required under ch. 119, F.S., and s. 627.291, F.S. The appeal is pending in the 1DCA. The order is stayed pursuant to an order issued by the 1DCA on December 12, 2016.²⁵ Oral argument was held on February 22, 2017.²⁶ The 1DCA has not rendered an opinion.²⁷

2003 Reforms

In 2000, Florida had the highest premiums in the country, and was ranked second highest in 2002.²⁸ In response to a downturn in the Florida economy and uncertainties in the marketplace, some insurers were not issuing new policies or renewing policies, or significantly tightening their underwriting requirements. Many small employers were forced to secure significantly more expensive coverage in the Florida Workers' Compensation Joint Underwriting Association ("insurer of last resort") due to availability issues.

¹⁸ NCCI, *Analysis of Florida Workers Compensation Rate Filing Proposed Effective 8/1/2016* (May 27, 2016).

<http://floir.com/Sections/PandC/NCCIHearing.aspx> (last accessed April 4, 2017).

¹⁹ See NCCI fn. 17 at pg. 1.

²⁰ See NCCI, *NCCI Proposes Florida Workers Compensation Rate Increase Effective August 1, 2016* (May 27, 2016).

http://floir.com/siteDocuments/NCCI-FL_Filing_Release-8-1-16.pdf (last accessed Apr. 14, 2017) (on file with the Senate Committee on Banking and Insurance).

²¹ NCCI, *NCCI Amends Pending Florida Workers Compensation Rate Filing to +19.6% Proposed Effective October 1, 2016* (July 1, 2016)(On file with the Senate Committee on Banking and Insurance)

²² OIR, *Order on Rate Filing Case No. 191880-16* (Sept. 27, 2016).

²³ OIR, *Final Order on Rate Filing Case No. 191880-16* (Oct. 5, 2016).

²⁴ Order on Non-Jury Trial and Final Judgement Providing Declaratory and Injunctive Relief, *James F. Fee, Jr., v. the National Council on Compensation Insurance, Inc., et al., The Office of Insurance Regulation et al., and David Altmaier*, Case No. 2016 CA 2159 (Fla. 2nd Jud. Cir. 2016).

²⁵ Order of the Court December 12, 2016, *National Council on Compensation Insurance v. James F. Fee, Jr.*, Case Nos. 1D16-5408 & 1D16-5416 (Fla 1st DCA 2016).

²⁶ Oral Argument, February 22, 2017, *Nat'l Council on Compensation Insur. v. James F. Fee, Jr.*, Case Nos. 1D16-5408 & 1D16-5416 (Fla 1st DCA 2016), <http://oavideo.1dca.org/OAPlayer.aspx?ID=2293&CaseID=68332&File=165408.smil>

²⁷ Conversation with 1st DCA Clerk's Office (April 7, 2017) (Senate Committee on Appropriations).

²⁸ See Oregon Department of Consumer and Business Services fn 2.

In 2003, the Workers' Compensation Research Institute and the NCCI identified major cost drivers in Florida's workers' compensation system and compared Florida with national averages. These cost drivers included higher medical costs for types of claims, higher frequency of permanent total disability claims, and relatively high hospital costs as compared to national averages. The NCCI noted that attorney involvement in Florida was significant and helped explain the major cost drivers. When attorneys were not involved, the difference in claims costs between Florida and the national average was minimal. However, when attorneys were involved, Florida's claim size was nearly 40 percent higher than the national average. Prior to 2003, the average Florida claim cost was \$39,000. In contrast, the countrywide average was \$29,000.

Prior to the 2003 reforms, the JCCs used a three-tier fee schedule to award attorney's fees based upon the amount of benefits secured. Generally, the fees would 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, ten percent of the remaining amount of the benefits secured and to be provided during the first ten years, and five percent of the benefits secured after ten years. However, the JCCs had the discretion to increase or decrease the attorney's fee without any dollar limitation, based on the following factors:

- Time and labor involved;
- Fee customarily charged in the locality for similar services;
- Amount involved in controversy and the benefits resulting;
- Time limitation imposed by claimant or circumstances;
- Experience, reputation, and the ability of the attorney; and
- Contingency or certainty of a fee.

In 2003, the Florida Legislature enacted significant reforms intended to address the availability and affordability of coverage for employers. These reforms were designed to reduce the overall costs to the system by expediting the dispute resolution process, reducing attorney fees, providing greater enforcement tools to combat fraud, revising standards for compensability and benefits, and changing medical services and reimbursements. The 2003 reforms continued the use of the contingency fee schedule in awarding attorney's fee. However, any additional hourly fees were eliminated and the JCCs were prohibited from approving any agreement related to benefits, which provided for an attorney's fee in excess of the amount permitted under the fee schedule.²⁹ As an alternative to the contingency fee schedule, the JCC were authorized to approve an attorney's fee not to exceed \$1,500 once per accident if the JCC determined that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney for a disputed medical-only claim.

In late 2003, in response to the passage of the reforms, the OIR approved a rate filing submitted by the NCCI that resulted in a 14 percent rate decrease, which represented a \$420 million decrease in workers' compensation insurance costs for employers.³⁰ Since the implementation of the reforms, the Office of Insurance Regulation (OIR) has approved workers' compensation rate decreases totaling over 60 percent.

²⁹ Sections 440.34 and 440.105, F.S.

³⁰ OIR, Final Order on Rate Filing (Aug. 12, 2003) available at <http://www.flair.com/siteDocuments/NCCI.pdf> (last viewed Mar. 30, 2017).

Administration of the Workers Compensation System in Florida

The Division of Workers' Compensation within the Department of Financial Services is responsible for administering ch. 440, F.S. These functions include the enforcement of coverage requirements,³¹ administration of workers' compensation health care delivery system,³² data collection,³³ and assisting injured workers, employers, insurers, and providers in fulfilling their responsibilities under ch. 440, F.S.³⁴ Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.³⁵ Employees generally cannot sue a covered employer for workplace injuries.³⁶

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.³⁷ Medical services must be provided by a health care provider authorized by the carrier prior to being provided (except for emergency care).³⁸ When the carrier 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."³⁹ Injured employees are entitled to one change of physician during the course of treatment for any one accident.⁴⁰ After the initial examination and diagnosis, the workers' compensation health care provider is required to submit a proposed course of treatment to the carrier to determine whether such treatment would be recognized as reasonably prudent.⁴¹

Indemnity Benefits

Indemnity benefits only become payable to employees who are disabled for at least eight days due to a compensable workplace injury.⁴² The first seven days of lost earnings may be paid

³¹ Section 440.107(3), F.S.

³² Section 440.13, F.S.

³³ Section 440.185 and 440.593, F.S.

³⁴ Section 440.191, F.S.

³⁵ "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.

³⁶ Section 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.

³⁷ Section 440.13(2)(a), F.S.

³⁸ Section 440.13(3)(a), F.S.

³⁹ 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. Section 440.02(10), F.S.

⁴⁰ Section 440.13(2)(f), F.S.

⁴¹ Section 440.13(2)(e), F.S.

⁴² Section 440.12(1), F.S.

retroactively to employees who are disabled for more than 21 days.⁴³ These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),⁴⁴ up to the maximum weekly benefit established by law.⁴⁵ For 2016, this amount is \$863, which is the statewide average weekly wage (SAWW).⁴⁶ Payments are due every two weeks.⁴⁷ 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.⁴⁸
- 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.⁴⁹
- 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.⁵⁰

Office of the Judges of Compensation Claims

The OJCC is responsible for resolving workers' compensation benefit disputes.⁵¹ Injured employees may file a petition for benefits with the OJCC for any benefit that is ripe, due, and owing.⁵² Within 14 days of receipt of the petition, the carrier is required to either pay the requested benefits or file a response to the petition.⁵³ Forty days after the petition for benefits has been filed, the OJCC 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.⁵⁴ 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

⁴³ *Id.*

⁴⁴ 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.

⁴⁵ Section 440.15(1)-(4), F.S.

⁴⁶ "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 (DEO) for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the DEO 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. See DFS website at

<http://www.myfloridacfo.com/division/wc/Insurer/awwrate.htm#.WOPgOMHr2Uk> (last viewed Apr. 4, 2017).

⁴⁷ Section 440.20(2)(a), F.S.

⁴⁸ Section 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).

⁴⁹ Section 440.15(3), F.S.

⁵⁰ Section 440.15(1), F.S.

⁵¹ Section 440.192, F.S.

⁵² Section 440.192(1), F.S.

⁵³ Section 440.192(8), F.S.

⁵⁴ Section 440.25, F.S.

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.⁵⁵

Workers' Compensation Coverage

Generally, employers may secure coverage from an authorized carrier or qualify as a self-insurer.⁵⁶ Employers that are not self-insured and are unable to secure coverage from a carrier may purchase coverage from the Workers' Compensation Joint Underwriting Association (WCJUA).⁵⁷ The (WCJUA) is the insurer of last resort for workers' compensation insurance, also known as the residual market.

Florida Workers Compensation Rating System

The OIR regulates workers' compensation rates pursuant to authority granted under part I of ch. 627, F.S. Florida uses a full rate system, which requires the rate to include benefits, loss adjustment expenses, commissions, taxes, general administrative expenses and profits and contingencies. Seven states use an administered pricing or full rate system.

The insurance rate is the "unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or coverage there under is multiplied to determine the premium."⁵⁸ A manual rate per \$100 of payroll is developed for each of the 600 classification codes that reflects the potential for loss associated with a group of employers engaged in the same type of business or industry. This rate is multiplied by the employer's payroll to determine the unadjusted premium. Then, the unadjusted premium is multiplied by the employer's experience modification factor to determine the adjusted premium. An experience rating compares an employer's actual losses and the losses that would be expected to occur for an average employer with a similar business.

The OIR must approve or disapprove rates in the voluntary market prior to becoming effective.⁵⁹ In determining whether to approve or disapprove a workers' compensation rate filing, the OIR considers certain statutory standards and factors specified in ss. 627.062 and 627.072, F.S.⁶⁰ The standard for approving insurance rates in Florida and most states is that the rate may not be excessive, inadequate, or unfairly discriminatory.

Florida law requires every workers' compensation insurer to file with the OIR its rates and classifications that the insurer proposes to use.⁶¹ However, the law allows an insurer to satisfy this obligation by becoming a member of a licensed rating organization, which makes such filings on its behalf.⁶² All workers' compensation insurers in Florida have chosen to become members of the NCCI.

⁵⁵ Section 440.34, F.S., and *Castellanos v. Next Door Company*, 192 So.3d 431 (Fla. Apr. 28, 2016).

⁵⁶ Section 440.38, F.S.

⁵⁷ Section 627.311(5)(a), F.S.

⁵⁸ Section 627.091, F.S.

⁵⁹ Section 627.101, F.S.

⁶⁰ Section 627.151, F.S.

⁶¹ Section 627.211, F.S.

⁶² Section 627.091, F.S.

The law and the rating plans approved by OIR allow for mechanisms for insurers to vary premiums. Insurers may use the following pricing tools to compete on price, as described below:⁶³

- Consent to Rate – The insurer and employer agree to a rate in excess of the approved rate. The insurer must limit this option to no more than 10 percent of policies written or renewed in each calendar year.
- Deviations – An insurer is allowed to file a uniform percentage increase or decrease applicable to all rates an insurer charges or to rates for a particular class or group of classes of insurance.
- Intermediate Deductibles – For a reduced premium, the employer agrees to reimburse the insurer for each claim up to the deductible amount. Intermediate deductibles range from \$5,000 to \$75,000. Similar to small deductible policies the insurer is responsible from first dollar of loss (i.e. losses below the deductible).
- Large Deductibles – Large deductible policies operate similarly to the small and intermediate deductible, but have a deductible amount of \$100,000 and above. In order to qualify for the large deductible program, an employer must have a standard premium of at least \$500,000.
- Large Risk Alternative Rating Option (LRARO) – In most states, LRARO is defined as a flexible retrospective rating plan mutually agreed to by the employer and carrier. In Florida, LRARO is a provision within the currently approved retrospective rating plan that allows for negotiation of a premium between the employer and the insurer.
- Policyholder Dividends – Insurers reward their policyholders by returning some of their profit at the expiration of the policy by issuing policyholder dividends, which may be based on the policyholder’s experience, the carrier’s experience, and other factors.

In contrast to Florida’s full rate system, approximately 38 states use a loss costs system.⁶⁴ Generally, loss costs are all of the components of a full rate, excluding expenses and profits. The loss costs represent the rate an insurer must charge in order to cover the losses associated with covering all claims for the year. Depending on the state, loss costs may or may not include all expenses associated with loss adjustment. In the majority of states where an advisory or rating organization makes a loss costs filing, an individual insurer may base their rates on their individual loss costs or the advisory loss costs modified by a loss costs multiplier. The loss costs multiplier is a factor that represents an individual insurer’s profit and expense portion of the full workers’ compensation rate.⁶⁵

III. Effect of Proposed Changes:

Section 1 amends s. 440.02, F.S., to revise the definition of the term “specificity,” thereby requiring additional information to be provided in the petition for benefits filed with the Office of Judges of Compensation Claims (OJCC). This includes specific information for each requested benefit, the specific amount of each requested benefit, and the calculation used for computing the requested benefits.

⁶³ OIR fn. 1 at pg. 30-31. .

⁶⁴ NCCI Correspondence (Dec. 6, 2016) (on file with Senate Banking and Insurance Committee).

⁶⁵ *Id.*

Section 2 amends s. 440.102, F.S., to update a cross-reference.

Section 3 amends s. 440.105, F.S., to eliminate the provision that prohibits an attorney or other person from receiving any fee from a person because of services rendered for a person in connection with any proceeding arising under ch. 440, F.S., unless such fee is approved by the JCCs.

Section 4 amends s. 440.13, F.S., to define a business day and to clarify deadlines for carriers to respond to requests for medical care. This section requires a carrier to respond to a request for a change in physician within five business days, excluding certain holidays, rather than five days. The section clarifies that a carrier must respond to a request for authorization from an authorized health care provider by either authorizing or declining the request by the close of the third business day after receipt of the request. Other provisions are amended to require responses to requests in the context of business days instead of calendar days.

Section 5 amends s. 440.15, F.S., to codify the *Westphal* decision by increasing temporary total disability benefits and temporary partial disability benefits to 260 weeks instead of 104 weeks.

Section 6 amends s. 440.192, F.S., relating to the OJCC, to require the Judge of Compensation Claims (JCC) to review each petition for benefits and dismiss any petition or portion of a petition that does not meet on its face the requirements of s. 440.192, F.S., and the definition of “specificity” under s. 440.02, F.S. Further, the petition must specify additional information regarding the location of the injury, such as Florida county, or the state, if outside of Florida. A claim for permanent benefits must include the specific date of maximum medical improvement and the specific date that such permanent benefits are claimed to begin. Additionally, the greater specificity is required for disputes regarding the calculation of average weekly wage.

Dismissal of any petition or portion of a petition under subsection (5)(a) is without prejudice. Upon a motion that a petition or portion of a petition be dismissed for lack of specificity, the JCC is required to enter an order on the motion, unless stipulated in writing by the parties, within ten days after the motion is filed, or if good cause for a hearing is shown, within 20 days after hearing on the motion.

Section 7 amends s. 440.34, F.S., to revise provisions relating to attorney fees. The bill requires the JCC to consider certain factors in each case and may increase or decrease the attorney fees, based on a maximum hourly rate of \$250 per hour, if the JCC in his or her judgment finds that the circumstances of the particular case warrant such action. The JCC must use the following factors in determining attorney fees:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services 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;
- The experience, reputation, and ability of the attorney or attorneys performing services; and
- The contingency or certainty of a fee.

This section eliminates the \$1,500 cap on medical-only claims.

Sections 8 – 16 and 18 – 21 amend ss. 624.482, 627.041, 627.0612, 627.062, 627.072, 627.091, 627.093, 627.101, 627.211, 627.291, 627.318, 627.361, and 627.371, F.S., respectively, to revise the current rating system in Florida by implementing a loss costs system. Each insurer will be required to file its own proposed rates. An insurer may satisfy this requirement by adopting the Office of Insurance Regulation’s (OIR) approved loss costs and complying with the other provisions in this part. The bill authorizes a licensed rating organization to develop and file for approval with the OIR reference filings containing prospective loss costs and the underlying loss data, and other documentation. Once the loss cost filing is approved, the rating organization would provide its member subscribers with a copy of the approved reference filing. A rating organization may file supplementary rating information and an insurer may use such information approved by the OIR. An insurer may use the approved prospective loss costs filed by a rating organization in combination with the insurer’s own approved loss cost multiplier and loss cost modifier. The bill provides technical, conforming changes. **Section 16** also revises the scope of the annual report by the OIR to include information about insurer solvency.

Section 13 amends s. 627.091, F.S., to define the following terms within this section:

- “Expenses” means the portion or a rate which is attributable to acquisition, field supervision, collection expenses, taxes, assessments, and general expenses;
- “Lost cost modifier” means an adjustment to, or a deviation from, the approved prospective loss costs filed by a licensed rating organization;
- “Lost cost multiplier” means the profit and expense factor, expressed as a single nonintegral number to be applied to the prospective loss costs other than loss adjustment expenses, which is associated with writing workers’ compensation and employer’s liability insurance and which is approved by the office [OIR] in making rates for each classification of risks used by that insurer; and
- “Prospective loss costs” means the portion of a rate that reflects historical industry average aggregate losses and loss adjustment expenses projected through development to their ultimate value and through trending to a future point in time. The term does not include provisions for profit or expenses other than loss adjustment expense.

Section 15 amends s. 627.101, F.S., to require OIR to review all required filings as to workers’ compensation and employer’s liability insurance. If the OIR determines part of the required filing does not meet applicable requirements, it may reject the portion that does not meet the requirements and approve the remainder of the filing.

Section 17 creates s. 627.2151, F.S., to define the term “defense and cost containment expenses” or “DCCE” to include the following Florida expenses of an insurer group or insurer writing workers’ compensation insurance:

- Insurance company attorney fees;
- Expert witnesses;
- Medical examinations and autopsies;
- Medical fee review panels;
- Bill auditing;
- Treatment utilization network expenses; and
- Vocational rehabilitation.

The bill establishes a cap on defense and cost containment expenses. Excessive DCCE occurs when the Florida defense and cost containment expenses for workers' compensation exceed 15 percent of Florida workers' compensation incurred losses by the insurer or insurer group for the three most recent calendar years for which data is to be filed with the OIR. Any excess DCCE must be returned to the policyholders in the form of cash or credit toward the future purchase of coverage on a pro rata basis. Refunds must be completed in one of the following ways:

- A cash refund must be completed within 60 days after entry of a final order indicating that excessive DCCE has been realized; and
- A credit to renewal policies must be applied to policy renewal premium notices that are forwarded to insureds more than 60 calendar days after entry of a final order indicating that excessive DCCE has been realized. If the insured thereafter cancels a policy or otherwise allows the policy to terminate, the insurer or insurer group must make a cash refund not later than 60 days after coverage termination. The insurer shall immediately certify to the OIR that renewal of renewal credits or refunds have been made.

For purposes of reporting, any refund or renewal credit made is treated as a policyholder dividend applicable to the year immediately succeeding the compilation period giving refund to the refund or credit.

Section 22 provides the act will take effect July 1, 2017.

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:

This bill will provide greater guidance and clarity in the administration of various provisions of ch. 440, F.S.

Carriers may incur additional, indeterminate costs associated with revising their systems to accommodate loss cost filings.

Placing caps on hourly claimant attorney fees may reduce costs to the workers' compensation system for employers and carriers.

NCCI estimates that the combination of the changes provided in the bill will result in a small to moderate decrease on overall workers compensation system costs in Florida.⁶⁶ The NCCI defines small as less than one percent and moderate as between one to three percent of system costs. According to NCCI,

- One percent impact = \$36,450,000;
- Three percent impact = \$109,350,000; and
- Five percent impact = \$182,250,000.

C. Government Sector Impact:

As indicated in the Private Sector Impact, above, NCCI estimates that the combination of the changes provided in the bill will result in a small to moderate decrease on overall workers compensation system costs in Florida.

The bill will increase costs incurred by the Office of Insurance Regulation (OIR) to implement the provisions of the bill. The OIR estimates a cost of \$838,118 to implement the act. The estimate includes an annual \$738,118 for eight full-time equivalent positions and \$100,000 in nonrecurring expenses for information technology enhancements. The Office of Judges of Compensation Claims estimates its increased costs to be \$24,720 to implement this act.

Department of Financial Services

Division of Risk Management

The Division of Risk Management (DRM) is a provider of workers' compensation benefits to state and public university employees. The DRM may be impacted in the following manner:⁶⁷

- Requiring the claimant to show the calculation for the benefits requested has the potential to increase efficiency of claim management. Frequently petitions are filed that are not definitive on the specific time or amount of benefit alleged to be unpaid. The carrier may be unable to double check or determine if an error in payment has occurred. Failure to correct this error within 30 days of the petition for benefits being filed may result in payment of attorney fees and litigation costs that exceed the amount of the unpaid benefit.
- Clarifying the number of days in terms of business days for many responsive deadlines related to medical care will provide more opportunities for the DRM to

⁶⁶ NCCI, *Preliminary Cost Impact Analysis, SB 1582* (Mar. 3, 2017) (on file with Senate Banking and Insurance Committee).

⁶⁷ Department of Financial Services, *Analysis of SB 1582* (Mar. 17, 2017) (on file with Senate Banking and Insurance Committee).

respond within statutory requirements since days DRM staff are not at work are not included.

- Limiting attorney fee awards to \$250 per hour may reduce the amount of claimant paid attorney fees paid by the DRM. Current hourly awards frequently exceed \$250. A cost reduction will only occur if the hours awarded by JCCs are not impacted by the statutory cap.
- Requiring specificity in pleadings may result in avoidance of employer/carrier paid claimant fees and enhance claim processing efficiencies.
- Changing the rating law would not affect the DRM since the DRM funds claim expenses.

Division of Workers' Compensation

The Division of Workers' Compensation (DWC) assists injured workers, employers, health care providers, and insurers in following the Florida workers' compensation rules and laws.⁶⁸ The DWC is the sole authority responsible for processing and approving workers' compensation exemption applications.⁶⁹ The DWC indicates a negligible cost of implementing rules associated with the bill; however, those costs can be absorbed within existing resources.⁷⁰

Office of Insurance Regulation⁷¹

The bill makes a substantial change in the manner workers' compensation rates are set in Florida, and therefore, it will have a significant impact on OIR's regulatory process for reviewing rates. The OIR provided the following estimate of staffing needs and costs that would be necessary to implement the bill. The total estimated fiscal impact on the OIR is \$883,118, which includes eight full time equivalent positions at a cost of \$783,118 annually and \$100,000 in nonrecurring funds for information technology enhancements.⁷²

Office of Judges of Compensation Claims (OJCC)

According to the OJCC,⁷³ the estimated nonrecurring programming costs and OPS staffing expenses associated with the implementation of the bill are \$18,000 and \$6,720, respectively, for a total estimate of \$24,720.

VI. Technical Deficiencies:

None.

⁶⁸ Division of Workers' Compensation, *About Us*, <http://www.myfloridacfo.com/division/wc/contactUs.htm> (last visited April 7, 2017).

⁶⁹ Division of Workers' Compensation, *Notice of Election to be Exempt*, <https://apps.fldfs.com/bocexempt/> (last visited April 7, 2017).

⁷⁰ Division of Workers' Compensation, *Analysis of SB 1582* (March 17, 2017) (on file with Senate Appropriations Committee).

⁷¹ Email from the Office of Insurance Regulation (Mar. 31, 2017) (on file with Senate Banking and Insurance Committee).

⁷² Email from Richard Fox, Budget Director, Office of Insurance Regulation (April 10, 2017) (on file with Senate Appropriations Committee).

⁷³ Office of Judges of Compensation Claims of the Division of Administrative Hearings, *Analysis of SB 1582* (Mar. 22, 2017) (on file with Senate Banking and Insurance Committee).

VII. Related Issues:

Assessment provisions relating to the Special Disability Trust Fund (s. 440.49, F.S.), the Workers' Compensation Administration Trust Fund (s. 440.51, F.S.), and the Florida Self-Insurers Guaranty Association, Inc., (s. 440.385, F.S.), may need to be amended to reflect the changes in the rating law and terminology provided in the bill.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 440.02, 440.102, 440.105, 440.13, 440.15, 440.192, 440.34, 624.482, 627.041, 627.0612, 627.062, 627.072, 627.091, 627.093, 627.101, 627.211, 627.291, 627.318, 627.361, and 627.371.

This bill creates section 627.2151 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.