

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1399 Workers' Compensation

SPONSOR(S): Government Operations & Technology Appropriations Subcommittee, Byrd

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	15 Y, 0 N	Lloyd	Luczynski
2) Government Operations & Technology Appropriations Subcommittee	12 Y, 0 N, As CS	Helpling	Topp
3) Commerce Committee			

SUMMARY ANALYSIS

The Legislature intends the workers' compensation system to be a self-executing system and for the law to be interpreted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." Workers' compensation is the injured employee's remedy for "compensable" workplace injuries. Employees generally cannot sue a covered employer in circuit court for workplace injuries. Benefit delivery and disputes are handled through an administrative process.

The bill makes changes to the workers' compensation law to address the delivery of benefits and system cost drivers. The bill:

- Mandates a specified notice regarding attorney fees be signed by the claimant.
- Requires a good faith effort by the claimant and their attorney to resolve disputes prior to filing a petition for benefits.
- Increases the requirements applicable to petitions for benefits.
- Requires a Judge of Compensation Claims (JCC) to dismiss a petition for lack of specificity, without prejudice, within 10 days or 20 days, depending upon whether a hearing is required.
- Provides for collecting additional information on attorney fees.
- Increases total combined temporary wage replacement benefits (TTD/TPD) from 104 weeks to 260 weeks.
- Fills a benefit gap that happens when TTD/TPD ends, but the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
- Requires the authorization or denial of medical care authorization requests, unless there is a material deficiency.
- Expands the authorization of a provider to include palliative care by providers affiliated with the authorized provider, including diagnostic testing, treatment, and limited value medical supplies.
- Eliminates the charge-based reimbursement of health care facility outpatient medical care in favor of reimbursing them at 200 percent (unscheduled care) and 160 percent (scheduled surgery) of Medicare. If no Medicare fee exists, then current reimbursement standards apply, which are incorporated into statute.
- Grants the Three-Member Panel authority to fill gaps in statutory reimbursement when adopting schedules of maximum reimbursement allowances for medical care.
- Allows insurers to uniformly reduce premiums by no more than 5 percent, if they file an informational-only notice within 30 days, subject to regulatory oversight.

The bill has an insignificant impact on state expenditures and positive and negative impacts on the private sector. See *Fiscal Analysis & Economic Impact Statement*.

The bill has an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Florida's Workers' Compensation System

The foundations of workers' compensation in the modern era are found in 19th century Europe and the Industrial Revolution. By the early 1900's, workers' compensation was making inroads in the United States. The first successful workers' compensation laws were adopted in New Jersey and Wisconsin in 1911. Florida's law was passed in 1935. By 1948, every state had a workers' compensation law. Every state continues to maintain workers' compensation; however, Texas does allow employers and employees to opt-out of the workers' compensation system and utilize the tort system.

Chapter 440, Florida Statutes, is Florida's workers' compensation law. It is the stated intent of the Legislature that the workers' compensation system be self-executing and for the law to be interpreted to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."¹ For work-related injuries, workers' compensation provides all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics.² It also provides compensation for disability³ when the injury causes an employee to miss more than seven days of work.⁴

Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.⁵ Employees generally cannot sue a covered employer for workplace injuries.⁶ The Division of Workers' Compensation within the Department of Financial Services (Division) provides regulatory oversight of Florida's workers' compensation system.

Workers' Compensation Premium Rates and Coverage Options

Workers' compensation premium rates (per \$100 of payroll) are set annually by the Office of Insurance Regulation (OIR), upon a review of rate filings made by the National Council on Compensation Insurance, Inc. (NCCI), which is Florida's workers' compensation rating organization. The premium a particular employer will pay for a workers' compensation insurance policy is dependent upon various factors, including the employer's workers' compensation loss history, total payroll, industry, and job classifications.

There are three ways for employers to obtain workers' compensation coverage. The majority of employers purchase a workers' compensation insurance policy from an authorized insurance company or they qualify as a self-insurer.⁷ Employers that are not self-insured and are unable to purchase coverage from an insurance company may purchase coverage from the Workers' Compensation Joint

¹ S. 440.015, F.S.

² S. 440.13(2)(a), F.S.

³ The use of the term "disability" in the context of workers' compensation differs from common parlance. In this context, it refers to a wage-loss, rather than a reduction in physical abilities. Section 440.02(13), F.S., defines "disability" as an "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Workers' compensation laws describe reduced physical ability in terms of "permanent impairment." Section 440.02(22), F.S., defines "permanent impairment" as "any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury."

⁴ S. 440.12(1), F.S.

⁵ "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.

⁶ S. 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.

⁷ S. 440.38, F.S.

Underwriting Association.⁸ The Joint Underwriting Association is the insurer of last resort for workers' compensation insurance, also known as the residual market provider.⁹

Injuries Covered by Workers' Compensation

Workers' compensation provides medical benefits and, in cases where the injured worker is unable to work or earn as much as he or she did before the injury, compensation for lost income (also referred to as "wage replacement" or "indemnity" benefits) for compensable workplace injuries arising out of work performed by an employee in the course and scope of employment.¹⁰ The workplace injury must be the "major contributing cause" for medical treatment and remain as such to continue medical treatment at the expense of the employer. "Major contributing cause" is the one cause that is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought.¹¹

Reporting Injuries

Employees are required to inform employers of their injury within 30 days of the injury or initial manifestation of the injury. The failure to report within this timeframe may result in the inability to claim benefits.¹² Employers are required to report a workplace injury to their workers' compensation insurance company no later than seven days after the employer has knowledge of the injury.¹³ Administrative fines are imposed against employers that do not timely report injuries.¹⁴

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.¹⁵ Medical services must be provided by a health care provider authorized by the workers' compensation insurance company prior to being provided (except for emergency care).¹⁶ When the insurance company has knowledge of a work-related injury, it will refer the injured employee to an authorized workers' compensation health care 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."¹⁷ Injured employees are entitled to one change of physician during the course of treatment for any one accident.¹⁸ After the initial examination and diagnosis, the workers' compensation health care provider is required to submit a proposed course of treatment to the workers' compensation insurance company to determine whether such treatment would be recognized as reasonably prudent.¹⁹

⁸ S. 627.311(5)(a), F.S.

⁹ For calendar year 2017, 2,558 policyholders obtained their coverage from the Joint Underwriting Association representing less than 1.0 percent of Florida's direct written premium. Florida Office of Insurance Regulation, *2018 Workers' Compensation Annual Report* (Jan. 2019), 26, available at: <https://www.floir.com/siteDocuments/2018WorkersCompensationAnnualReport.pdf> (last visited Mar. 22, 2019).

¹⁰ S. 440.09(1), F.S.

¹¹ *Id.*

¹² S. 440.185(1), F.S.

¹³ S. 440.185(2), F.S.

¹⁴ S. 440.185(9), F.S.

¹⁵ S. 440.13(2)(a), F.S.

¹⁶ S. 440.13(3)(a), F.S.

¹⁷ S. 440.13(13), F.S. 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. S. 440.02(10), F.S.

¹⁸ S. 440.13(2)(f), F.S.

¹⁹ S. 440.13(2)(e), F.S.

Cash Payments for Lost Wages and Permanent Impairments

Indemnity benefits only become payable to employees who are disabled for at least eight days due to a compensable workplace injury.²⁰ The first seven days of lost earnings may be paid retroactively to employees who are disabled for more than 21 days.²¹ These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),²² up to the maximum weekly benefit established by law.²³ For 2019, this amount is \$939.41,²⁴ which is the statewide average weekly wage (SAWW).²⁵ Payments are due every two weeks.²⁶ 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.²⁷
- 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.²⁸
- 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.²⁹

Educational and Training Benefits

Once an injured worker reaches maximum medical improvement, they may receive educational and training benefits if they are unable to earn at least 80 percent of their pre-injury income. Educational and training benefits include:

- From the Division:
 - Vocational counseling;
 - Job-seeking skills training;
 - Job analysis;
 - Transferable skills analysis;
 - Selective job placement;
 - Training and education; or
 - Other services deemed necessary and appropriate to help an injured worker return to work.

²⁰ S. 440.12(1), F.S.

²¹ *Id.*

²² An injured worker's 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.

²³ S. 440.15(1)-(4), F.S.

²⁴ Florida Department of Financial Services, *Maximum Workers' Compensation Rate, Effective January 1, 2019*, <https://www.myfloridacfo.com/Division/WC/pdf/Max-Comp-Rate-2019-Bulletin.pdf> (last visited Mar. 22, 2019).

²⁵ "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 for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity 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.

²⁶ S. 440.20(2)(a), F.S.

²⁷ S. 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. 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.*, 202 So 3d 964 (Fla. 1st DCA 2016).

²⁸ S. 440.15(3), F.S.

²⁹ S. 440.15(1), F.S.

- From the employer/carrier:
 - Indemnity benefits, which are classified as Educational and Training Temporary Total Compensation benefits that pays for lost earnings while the injured worker learns new vocational skills.

The Educational and Training Temporary Total Compensation benefit is payable to employees for up to 26 weeks, which may be extended for an additional 26 weeks;³⁰ however, injured workers may only receive Educational and Training Temporary Total Compensation benefits, temporary total disability benefits, and temporary partial disability benefits for a combined maximum of 260 weeks.³¹ Their entitlement to Educational and Training Temporary Total Compensation benefits ends at the 260th week of combined temporary benefits, regardless of whether their educational or training program is still ongoing as of the 260th week. The insurance carrier has the discretion to continue to pay the benefit beyond the 260th week, however.³²

Death Benefits

Workers' compensation also provides funeral expenses, up to \$7,500, and death benefits payable to a deceased worker's surviving spouse and dependents when an employee dies from a work-related injury, up to a maximum of \$150,000.³³

Denial of Benefits by the Carrier

Injured employees have the right to file a Petition for Benefits with the Office of the Judges of Compensation Claims for any benefit that is ripe, due, and owing.³⁴ Within 14 days of receipt of the Petition for Benefits, the workers' compensation insurance company is required to either pay the requested benefits or file a response to the petition.³⁵ Forty days after the Petition for Benefits has been filed, the Judge of Compensation Claims 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 for Benefits.³⁶ 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 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.³⁷

Overview of Worker's Compensation Rate Filings Since 2003

For rates in effect as of January 1, 2019, rates are 65.2 percent lower than the rates in effect prior to the last major reform of the workers' compensation system in 2003.³⁸ The table below illustrates each rate filing approved since 2003 (referenced on the left axis) and the relative relationship of the resulting rate level to the rate in effect prior to October 2003 (referenced on the right axis). Rate changes are usually made annually based on analysis of trend data from two recent policy years. Annual filings go into effect on January 1 of a given year. If the Legislature were to pass a bill or case law developed in the interim between annual rate filings that affected workers' compensation costs in the general range of plus or minus two percent, NCCI normally files a law-only filing with a mid-year effective date. Rate filings in the chart with effective dates other than January 1 represent law-only filings. The next annual rate filing is due in August or September 2019, for a January 1, 2020, effective date.

³⁰ S. 440.491(6)(b), F.S.

³¹ Ss. 440.15(2) and (4) and 440.491(6)(b), F.S. See *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016) and *Jones*, 202 So 3d 964 (Fla. 1st DCA 2016).

³² *Id.*

³³ S. 440.16(1)(a) and (b), F.S.

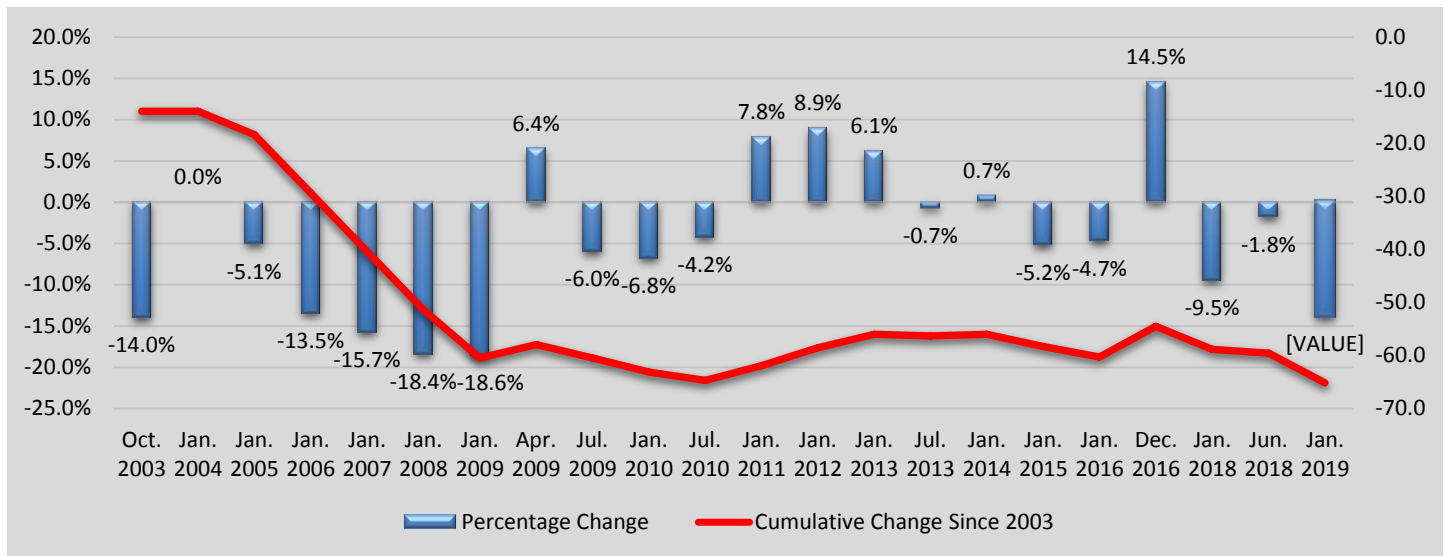
³⁴ S. 440.192(1), F.S.

³⁵ S. 440.192(8), F.S.

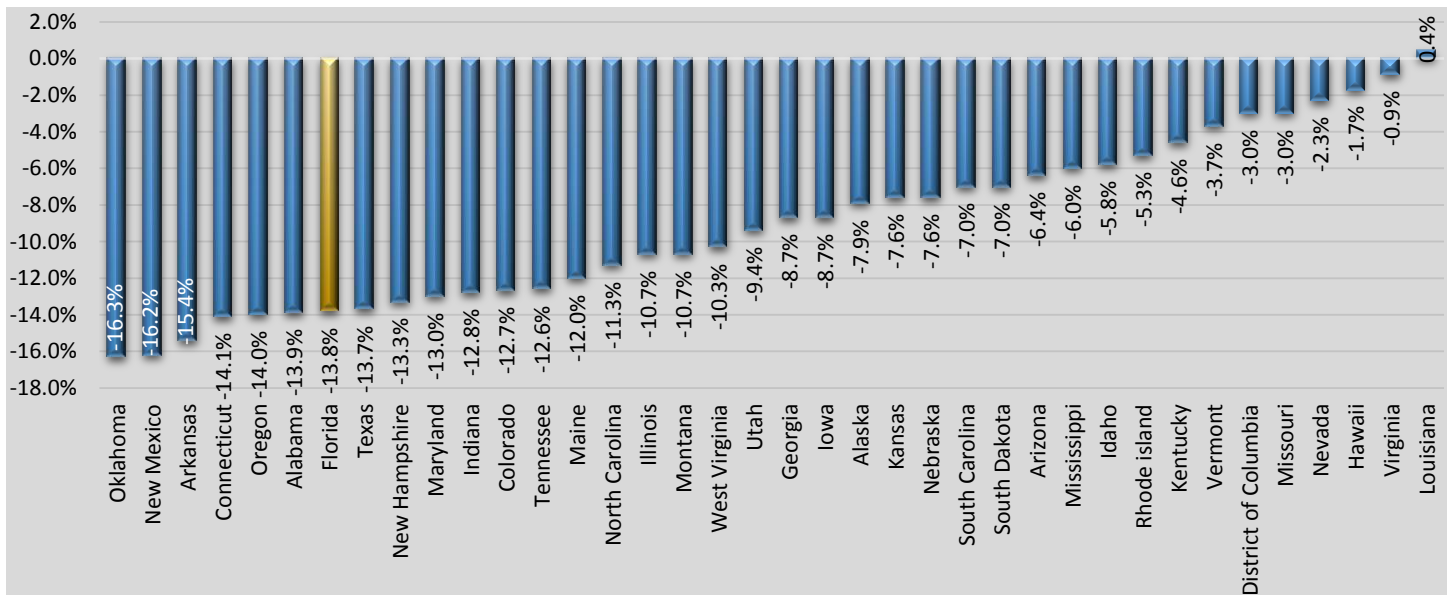
³⁶ S. 440.25, F.S.

³⁷ S. 440.34, F.S., and *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016).

³⁸ Ch. 2003-412, Laws of Fla.



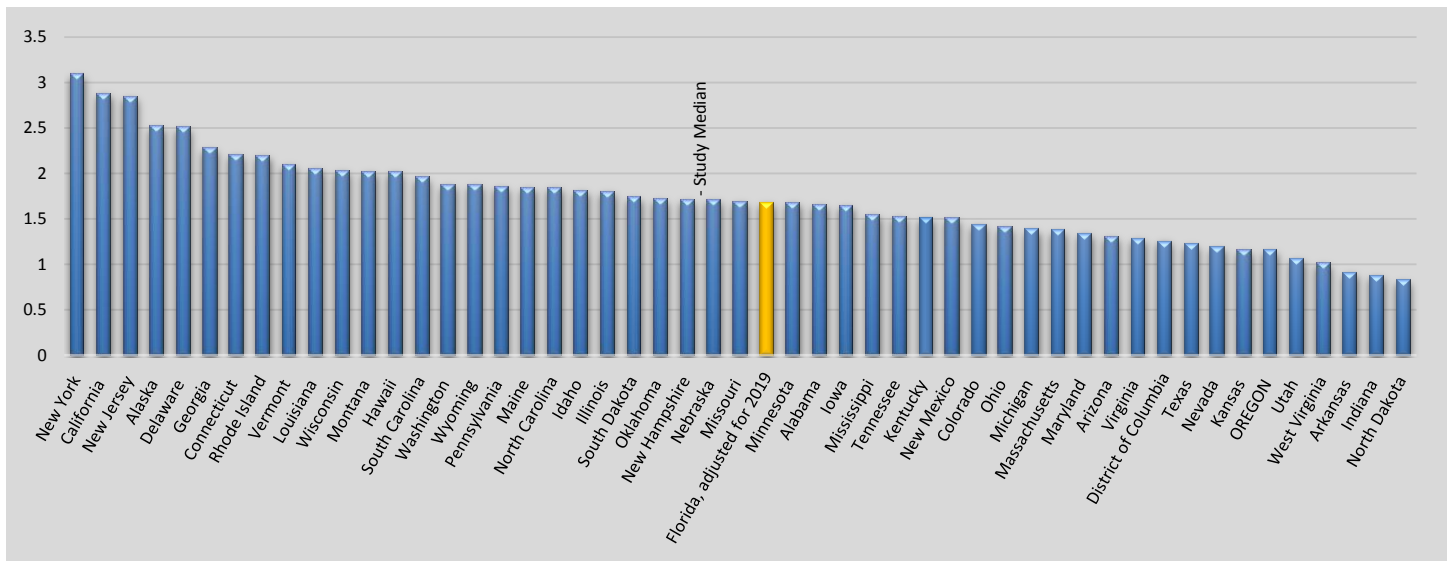
Florida's 2018 annual rate filing is consistent with national trends in reduced accident severity and frequency. The following chart illustrates the most recent approved rate change in states where NCCI participates in ratemaking.



Florida's Premium Rate Compared to the Nation

The following chart illustrates Florida's premium rate level as determined in the most recent Oregon premium rate ranking study.³⁹ The Oregon study is based on 2018 calendar year data. For the purposes of this bill analysis, the placement of Florida in the chart has been adjusted from the study finding to account for the 13.8 percent reduction that went into effect on January 1, 2019. This is an ongoing study project that Oregon publishes biennially. The next update of the study will be published in the fall of 2020. The study uses an indexed rate shown on the left axis of the chart. The states with the highest workers' compensation rates are to the left of the chart.

³⁹ 2018 Oregon Workers' Compensation Premium Rate Ranking Summary, October 2018, <https://www.oregon.gov/dcbcs/reports/Documents/general/prem-sum/18-2082.pdf> (last visited Mar. 22, 2019).



Overview of Recent Case Law

Recent Florida court decisions have found multiple parts of the workers' compensation law unconstitutional. They are *Castellanos v. Next Door Company*,⁴⁰ involving attorney fees; *Westphal v. City of St. Petersburg*,⁴¹ and *Jones v. Food Lion, Inc.*,⁴² relating to temporary wage replacement benefits (i.e., indemnity); and, *Miles v. City of Edgewater Police Department*,⁴³ which addresses the right of an injured worker to pay for their own attorney.

CASTELLANOS

In 2003, the Legislature removed a provision allowing the award⁴⁴ of a reasonable hourly fee to an injured workers' attorney when the statutory percentage based fee schedule resulted in an unreasonably low fee.⁴⁵ This limited the injured worker's attorney to a fee based solely on a percentage of the amount of benefits that the attorney obtained for their client. In 2008, the Florida Supreme Court (Court) found that the law required the award of a reasonable attorney fee because of the continued use of the term "reasonable" in the statute.⁴⁶ In 2009, the Legislature removed any reference to reasonableness and reenacted the statutory percentage based fee schedule.⁴⁷

In *Castellanos*, the Court held that the exclusive statutory percentage based fee schedule created an irrebuttable presumption that the schedule always results in a correct fee.⁴⁸ The Court found this irrebuttable presumption an unconstitutional violation of the claimant's due process rights. Accordingly, the Court invalidated the statute's limitation on attorney compensation and gave the Judge of Compensation Claims (JCC) the authority to award a reasonable attorney fee, if the JCC found that the fee schedule resulted in an unreasonable fee.

⁴⁰ *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016). Opinion below – 124 So. 3d 392 (Fla. 1st DCA 2013).

⁴¹ *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016). Opinion below – 122 So. 3d 440 (Fla. 1st DCA 2013).

⁴² *Jones v. Food Lion, Inc.*, 202 So. 3d 964 (Fla. 1st DCA 2016).

⁴³ *Miles v. City of Edgewater Police Department*, 190 So. 3d 171 (Fla. 1st DCA 2016).

⁴⁴ There are multiple circumstances that require an award of attorney fees, but the one that leads to most attorney fee awards is when a prevailing claimant has employed an attorney in the successful pursuit of the matter. S. 440.34(3), F.S.

⁴⁵ Ch. 2003-415, Laws of Fla.

⁴⁶ *Emma Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008).

⁴⁷ Ch. 2009-094, Laws of Fla.

⁴⁸ In *Castellanos*, the attorney secured a benefit of about \$850 and was due only \$164.54 for 107 hours of work. This works out to \$1.53, per hour.

WESTPHAL and JONES

In *Westphal* and *Jones*, the Court (in *Westphal*) and the First District Court of Appeal (1st DCA) (in *Jones*) recognized that there was an unconstitutional gap in benefits for certain injured workers. Temporary wage replacement benefits are only payable until the earlier of the injured worker getting as healthy as they are going to be, also called “maximum medical improvement,” or when they have received 104 weeks of temporary wage replacement. Because permanent wage replacement benefits are only paid after an injured worker has reached maximum medical improvement, some injured workers were not receiving or were ineligible for wage replacement benefits while they were still disabled. This happens because they are not eligible for temporary wage replacement benefits after they have reached the 104th week and they were not yet eligible for permanent wage replacement benefits without reaching maximum medical improvement. Because there was no benefit that they could receive or sue for, the Court found that they were unconstitutionally deprived of their right to access the courts. Therefore, the Court invalidated the 104-week limitation and replaced it with the previous statutory limit of 260 weeks. This restored the law to the 1993 statute. However, the Court did not provide a solution for the unconstitutional gap in benefits; it just extended the number of weeks, which makes it less likely that an injured worker would be affected by it.

MILES

In *Miles*, the Court 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.⁴⁹ The attorney was only paid by the employer/carrier⁵⁰ and then only if the injured worker won the case. In fact, it was a criminal offense for an attorney to take a payment from an injured worker for legal representation. The 1st DCA 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. Therefore, the 1st DCA struck down the prohibition on attorneys accepting payment directly from their client.

Medical Claim Costs

All medical claims are reported to the Division. This occurs in the form of electronic copies of every medical bill received by employer/carriers for workers’ compensation medical services provided to injured workers.

- The total charges and total paid workers’ compensation health care provider services were stable from 2010 through 2016. While charges increased 2.3 percent per year on average during the period, the amount paid for medical services decreased by 0.2 percent per year. A similar pattern is evident for average charge per line item and average paid per line item.⁵¹
- Average annual percentage change in total amount billed, by provider type (from 2011 through 2016):⁵²
 - Hospital Inpatient 6.7%
 - Ambulatory Surgical Center 6.5%
 - Medical Supplies 3.5%
 - Hospital Outpatient 3.3%
 - Dental 2.1%

⁴⁹ Ss. 440.105(2)(c) and 440.34(1), F.S.

⁵⁰ Workers’ compensation insurers are referred to as carriers. “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, F.S. S. 440.02(4), F.S.

⁵¹ Email from Brittany O’Neil, WC Policy Coordinator, Division of Workers’ Compensation, Department of Financial Services, RE: 2017 Accomplishments Report (Nov. 9, 2017).

⁵² *Id.*

- Pharmacy 1.0%
 - Health Care Provider -0.2%
 - Home Health Services -0.7%
 - Nursing Homes -7.3%
- Average annual percentage change in total amount paid within one year of the injury, by provider type (from 2011 through 2016):⁵³
 - Hospital Inpatient 7.3%
 - Hospital Outpatient 1.2%
 - Ambulatory Surgical Center -1.6%
 - Pharmacy -2.2%
 - Medical Supplies -2.4%
 - Dental -3.8%
 - Health Care Provider -4.3%
 - Home Health Services -9.0%
 - Nursing Home -9.4%

Hospital Inpatient and Hospital Outpatient

Hospital inpatient care is reimbursed based on a schedule of per diem rates, subject to a stop-loss amount above which reimbursement is made at 75 percent of the hospital's billed charge.⁵⁴ Hospital outpatient care, except for scheduled outpatient surgery, is reimbursed at 75 percent of the usual and customary (U&C) charge. Scheduled hospital outpatient surgery and ambulatory surgical center care are reimbursed at 60 percent of U&C. Note: the resulting scheduled surgery reimbursement rate is 80 percent of the rate for all other hospital outpatient care (i.e., 60% of U&C / 75% of U&C = 80%).

- Both hospital inpatient and hospital outpatient services have seen an increase in total charges and total payments from 2011 through 2016.
 - Hospital inpatient:⁵⁵
 - Charges increased 5.5 percent per year.
 - Payments increased 6.7 percent per year.
 - Hospital outpatient:⁵⁶
 - Charges increased 6.6 percent per year.
 - Payments increased 3.2 percent per year.
- The total number of hospital bills has declined annually from 2011 through 2016:
 - Total number of hospital inpatient bills declined 1.5 percent per year on average.
 - Total number of hospital outpatient bills declined 2.8 percent per year on average.
- The average amount charged and the average amount paid per hospital inpatient and hospital outpatient bill have increased significantly from 2011 through 2016. These increases have

⁵³ *Id.*

⁵⁴ Inpatient per diem rates for trauma center licensed hospitals is \$3,850.33 per day for surgical stays and \$2,313.69 per day for non-surgical stays. For other acute care hospitals, they are \$3,849.16 per day for surgical stays and \$2,283.40 per day for non-surgical stays. If the total charges, excluding implants, is \$59,891.34 or less, then the per diem rates apply, otherwise reimbursement is 75 percent of the total gross charge, excluding implants. Implants are reimbursed under a separate method. *Florida Workers' Compensation Reimbursement Manual for Hospitals, 2014 Edition* (Effective Jan. 1, 2015) <https://www.flrules.org/gateway/readRefFile.asp?refId=4109&filename=Hospital Manual.pdf> (last visited Mar. 22, 2019).

⁵⁵ *Id.*

⁵⁶ *Id.*

exceeded the “*Hospital and related services*” component of the Consumer Price Index for medical care.⁵⁷

- Hospital inpatient:
 - Average charge per bill increased 7.1 percent per year.
 - Average payment per bill increased 8.4 percent per year.
- Hospital outpatient:
 - Average charge per bill increased 9.6 percent per year.
 - Average payment per bill increased 6.2 percent per year.⁵⁸

Effect of the Bill

Petition for Benefits

- Requires the injured worker to receive and acknowledge a specific notice about workers’ compensation attorney fees prior to engaging an attorney.
- Mandates a good faith effort by the claimant and their attorney to resolve disputes prior to filing a petition for benefits.
- Provides that documentation of the signed notice and good faith effort be filed as part of a petition for benefits, subject to dismissal without prejudice to refile the petition.
- Increases “specificity” requirements applicable to petitions.

Attorney Fee Data Reports

- Requires greater specificity when reporting defense attorney fees as required by statute. For litigated claims, the total amount of attorney fees and the total number of attorney hours will be filed with the Office of the Judges of Compensation Claims. For attorney fees unrelated to litigation, only the total amount of attorney fees will be filed.

Temporary Total Disability and Temporary Partial Disability Benefits

- Increases the allowed total combined number of weeks of temporary total disability (TTD) and temporary partial disability (TPD) from 104 weeks to 260 weeks. The extension of the duration of TTD/TPD benefits also increases the opportunity for the injured worker to receive training and education. The duration of training and education benefits are not expanded, but since they are provided within the duration of TTD/TPD benefits, the timeframe in which they may be received is changed.
- Provides a limited extension of TTD benefits for up to 26 additional weeks when the injured worker reaches the maximum number of weeks but permanent benefits cannot begin because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.
 - If the injured worker is not at overall maximum medical improvement after the extended TTD benefit is exhausted, the JCC is required, upon motion, to determine the injured workers’ eligibility for permanent total disability benefits.
- Requires the provisional payment of Impairment Benefits (IBs) if the injured worker reaches the maximum number of weeks of TPD benefits (i.e., 260 weeks) but permanent benefits cannot begin

⁵⁷ For the four years ending August 2017, the “*Hospital and related services*” component of the Consumer Price Index for medical care was: 4.1 percent (2016-2107), 5.8 percent (2015-2016), 3.3 percent (2014-2015) and 3.8 percent (2013-2014). UNITED STATES Department of Labor, Bureau of Labor Statistics, *Consumer Price Index, Archived Consumer Price Index Detailed Report Information*, <https://www.bls.gov/cpi/tables/supplemental-files/home.htm> (last visited Mar. 22, 2019).

⁵⁸ In 2015, the average paid per hospital outpatient bill declined. This may be due to adoption of revised reimbursement methodology by DFS that became effective Jan. 1. 2015. See *Florida Workers’ Compensation Reimbursement Manual for Hospitals, 2014 Edition*, <https://www.flrules.org/gateway/readRefFile.asp?refId=4109&filename=Hospital Manual.pdf> (last visited Mar. 22, 2019).

because the injured worker is not at overall maximum medical improvement and/or does not have an overall permanent impairment rating.

- Pays provisional IBs consistent with the single highest permanent impairment rating and credits this amount to the carrier when final IBs payment occurs upon achieving overall maximum medical improvement and receiving overall permanent impairment rating.

Medical Care Authorizations

- Provides that carriers must authorize or deny medical authorization requests within the current three day or 10 day periods, but they are allowed to return a request for material deficiency, e.g., incomplete or improper forms or missing required documentation.
- Expands provider authorization to include:
 - Palliative care by providers affiliated with the authorized physician.
 - Testing and treatment under an authorized provider's referral for diagnostic testing or palliative care, including the provision of prescribed medical supplies or durable medical equipment with a reimbursable value of less than \$500 for such supplies or equipment, that is provided by a health care provider affiliated with the authorized physician.

Outpatient Medical Care Reimbursement

- Changes the reimbursement methodology for outpatient services provided by hospitals and ambulatory surgical centers from a charge based reimbursement to a percentage of the fee or rate established under the Medicare Outpatient Prospective Payment System (OPPS).
 - The applicable reimbursement is:
 - For hospital outpatient services, 200 percent of OPPS fee or rate, except scheduled surgery is reimbursed 160 percent of OPPS fee or rate (i.e., $200\% \times 80\% = 160\%$).
 - For ambulatory surgical center care, 160 percent of OPPS fee or rate.
 - Incorporates into statute the current reimbursement methodology adopted by the Three-Member Panel for outpatient services that are not reimbursable under OPPS. This is either 75 percent (hospitals generally) or 60 percent (hospital scheduled surgery or ambulatory surgical center care) of the statewide average charge for the applicable procedure, as derived from the Division's database of billed charges at a frequency of 50 or more charges. For procedures that lack an allowed amount under the primary or secondary method, reimbursement would occur at either 75 percent or 60 percent, as applicable, of the facility's actual billed charge.

Three-Member Panel

- Authorizes the Three-Member Panel to fill gaps in statutory reimbursement methodologies so that they may adopt schedules of maximum reimbursement allowances, as required, in a comprehensive manner.

Carrier Competition/Premium Discount

- Authorizes a carrier to depart from required premiums in a uniform way by no more than five percent, if they notify OIR of such a departure within 30 days of implementation. No review or approval is required by OIR; however, OIR may disallow the lower rate if it violates the ratemaking standards, imperils the financial condition of the carrier, or results in predatory pricing.

B. SECTION DIRECTORY:

Section 1. Amends s. 440.02, F.S., relating to definitions.

Section 2. Amends s. 440.13, F.S., relating to medical services and supplies; penalty for violations; limitations.

Section 3. Amends s. 440.15, F.S., relating to compensation for disability.

- Section 4.** Creates s. 440.1915, F.S., relating to notice regarding payment of attorney fees.
- Section 5.** Amends s. 440.192, F.S., relating to procedure for resolving benefit disputes.
- Section 6.** Amends s. 440.345, F.S., relating to reporting of attorney's fees.
- Section 7.** Amends s. 440.491, F.S., relating to reemployment of injured workers; rehabilitation.
- Section 8.** Amends s. 627.211, F.S., relating to deviations; workers' compensation and employer's liability insurances.
- Section 9.** Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

State government, as a self-insured employer for workers' compensation purposes, may experience reduced expenses in the same manner as the private sector, if the bill reduces the cost of workers' compensation coverage. See *Fiscal Comments*.

The bill requires OIR to review departure filings to determine if the filing will result in predatory pricing or imperils the financial condition of the insurer providing the filing. OIR indicates the agency will need three additional positions with a total appropriation of \$369,907. These costs are shown in the table below.⁵⁹

	Starting Salary	Estimated Benefits	Expenses	HR Services	TOTAL
Actuary	\$140,000.00	\$33,301.00	\$9,895.00	\$339.00	\$183,535.00
Sr. Actuarial Analyst	\$46,381.00	\$19,775.00	\$9,895.00	\$339.00	\$76,390.00
Senior Attorney	\$75,000.00	\$24,748.00	\$9,895.00	\$339.00	\$109,982.00
					\$369,907.00

As of January 29, 2019, OIR had a vacancy in each of the positions indicated above. These positions could be filled to implement the applicable provisions of the bill. Additionally, OIR had 39 total vacancies, of which 14 were vacant over 180 days.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

⁵⁹ Florida Office of Insurance Regulation, Agency Analysis of 2019 HB 1399, p. 5 (Mar. 15, 2019).
STORAGE NAME: h1399c.GOT
DATE: 4/9/2019

None.

2. Expenditures:

Local governments, as self-insured employers or purchasers of workers' compensation coverage, will experience reduced expenses in the same manner as the private sector, if the bill reduces the cost of workers' compensation coverage. See Fiscal Comments, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has positive and negative impacts on the private sector. Positive impacts include: public and private employers will experience reduced premiums because of reduced rates and the availability of a 5 percent summary departure from required premiums authorized by the bill. Negative impacts include: hospitals and ambulatory surgical centers may experience reduced reimbursement for outpatient services.

D. FISCAL COMMENTS:

NCCI has completed an estimate of the cost impact of the bill.⁶⁰ They estimate that it would result in a "sizable to significant decrease" in overall workers' compensation costs. NCCI defines a "sizable decrease" as "between 3.0% and 5.0%" and a "significant decrease" as "greater than or equal to 5.0%."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 9, 2019, the Government Operations & Technology Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed the requirement for DFS to develop insurance company performance measures and a rating system by November 30, 2019, and publish insurer performance ratings online beginning in the 2019-2020 fiscal year.

⁶⁰ Email from Dawn Ingham, State Relations Executive, National Council on Compensation Insurance, Inc., Re: Request for NCCI analysis of 2019 HB 1399 (Mar. 19, 2019).

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