

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 Banking and Insurance

BILL: SB 1636

INTRODUCER: Senator Perry

SUBJECT: Workers' Compensation

DATE: March 22, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 1636 amends several provisions in ch. 440, F.S., Florida's workers' compensation law. 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 to address a potential benefit gap, if the injured worker has not reached maximum medical improvement.
- Removes the criminal penalty for claimant attorneys receiving fees that the Judges of Compensation Claims (JCCs) has not approved, thereby allowing a claimant to enter into retainer agreements with an attorney and directly pay the attorney, which codifies *Miles v. City of Edgewater Police Department*.²
- Eliminates the unrelated works exception to employer immunity provided by the workers' compensation law.
- Requires the filing of attorney retainer agreements and associated attorney fees with the Office of Judges of Compensation Claims.
- Retains the statutory fee schedule for attorney fee awards paid by an employer or carrier to a claimant's attorney.
- Revises current law to allow an alternative minimum attorney fee cap on medical-only claims of \$150 per hour, not to exceed \$1,500, in all medical only claims rather than only once per accident.
- Limits appellate fees at \$150 per hour if certain conditions are met.
- Extends the attachment of attorney fees following the filing of the petition of benefits from 30 days to 45 business days.
- Requires evidence of a good faith effort by the claimant and the claimant's attorney to resolve disputes prior to filing a petition for benefits.

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

² *Miles v. City of Edgewater Police Department*, 190 So.3d 171 (Fla. 1st DCA 2016).

- Requires greater specificity in the information provided in the petitions for benefits filed with the Office of Judges of Compensation Claims (OJCC).

The Division of Risk Management of the Department of Financial Services, the state's self-insurance pool, which includes workers' compensation claims, may experience indeterminate cost savings like other workers' compensation carriers. *See* Section V. Fiscal Impact Statement.

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

II. Present Situation:

Workers' Compensation Benefits in Florida

Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.³ Employees generally cannot sue a covered employer for workplace injuries.⁴ Employers must pay compensation or furnish benefits required by the Workers' Compensation Law when an employee suffers an accidental compensable injury or death arising out of work performed in the course and scope of employment.⁵

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.⁶ Non-emergency medical services must be provided by a health care provider that is authorized by the carrier prior to the medical services.⁷ 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."⁸ Injured employees are entitled to one change of physician during the course of treatment for any one accident.⁹ 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.¹⁰

³ "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.

⁴ Section 440.11(1), F.S. If an employer fails to secure required workers' compensation coverage, an injured worker may sue the employer 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.

⁵ Section 440.09(1), F.S.

⁶ Section 440.13(2)(a), F.S.

⁷ Section 440.13(3)(a), F.S.

⁸ 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.

⁹ Section 440.13(2)(f), F.S.

¹⁰ Section 440.13(2)(e), F.S.

Indemnity Benefits

Indemnity benefits only become payable to employees who are disabled for at least 8 days due to a compensable workplace injury.¹¹ The first 7 days of lost earnings may be paid retroactively to employees who are disabled for more than 21 days.¹² These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),¹³ up to the maximum weekly benefit established by law.¹⁴ For 2019, this amount is \$939.41, which is the statewide average weekly wage (SAWW).¹⁵ 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.¹⁶
- 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.¹⁷

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 5 years.¹⁸

Workers' Compensation Insurance Coverage

Generally, employers may secure coverage from an authorized carrier or qualify as a self-insurer.¹⁹ 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).²⁰ The (WCJUA) is the insurer of last resort for workers' compensation insurance, also known as the residual market.

¹¹ Section 440.12(1), F.S.

¹² *Id.*

¹³ 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.

¹⁴ Section 440.15(1)-(4), F.S.

¹⁵ "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 Mar. 4, 2019).

¹⁶ 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).

¹⁷ Section 440.15(3), F.S.

¹⁸ Section 440.15(1), F.S.

¹⁹ Section 440.38, F.S.

²⁰ Section 627.311(5)(a), F.S.

Florida Workers Compensation Rating System

The Office of Insurance Regulation (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. The OIR must approve or disapprove rates in the voluntary market prior to becoming effective.²¹ 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.²² 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.²³ 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.²⁴ All workers' compensation insurers in Florida have chosen to become members of the NCCI.

Florida's Workers' Compensation Trends

In 2017, 242 commercial insurers actively wrote workers' compensation insurance in Florida. In total, these private sector insurers wrote approximately \$3.2 billion in premium.²⁵ In 2016, Florida workers' compensation rates were ranked 33rd highest in the United States, in other words, 32 states had higher rates.²⁶ Subsequently, in 2018, Florida rates were ranked 21st highest.²⁷ During the period reviewed in the prior ranking report (January 1, 2016 rates) and the period in the current 2018 report, Florida has approved:

- A 14.5 percent increase in rates due to the combined effect of the Florida Supreme Court's decision on April 28, 2016, in *Marvin Castellanos v. Next Door Company, et al.* and Senate Bill 1402 (Chapter 2016-203, Laws of Florida) that ratified the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition.
- A 1.80 percent decrease attributable to the effects of the Federal Tax Cuts and Jobs Act, effective June 1, 2018.
- A 9.8 percent rate level decrease, effective January 1, 2018.
- A 13.8 percent rate level decrease, effective January 1, 2019.²⁸

²¹ Section 627.101, F.S.

²² Section 627.151, F.S.

²³ Section 627.211, F.S.

²⁴ Section 627.091, F.S.

²⁵ OIR, *2018 Workers' Compensation Annual Report*, pg. 6 (Jan.15, 2019).

<http://floir.com/siteDocuments/2016WorkersCompensationAnnualReport.pdf> (last viewed Mar. 4, 2019).

²⁶ Oregon Department of Consumer and Business Services, *2016 Oregon Workers' Compensation Premium Rate Ranking*, (Dec. 2016), available at <https://www.oregon.gov/dcbs/reports/Documents/general/prem-rpt/16-2083.pdf> (last viewed Mar. 17, 2019).

²⁷ Oregon Department of Consumer and Business Services, *2018 Oregon Workers' Compensation Premium Rate Ranking Summary* (Oct. 2018) available at <https://www.oregon.gov/dcbs/reports/Documents/general/prem-sum/18-2082.pdf> (last viewed Mar. 5, 2019).

²⁸ See OIR fn. 3 at pg. 14-16.

Even after considering the impact of *Castellanos* and *Westphal* decisions, the NCCI noted that other factors at work in the marketplace combined to contribute to the indicated decrease, which included reduced assessments, increases in investment income, and declines in claim frequency.²⁹

Cost Drivers

According to the National Council on Compensation Insurance, there are several cost drivers in the Florida workers' compensation system that the Legislature could address to induce cost savings.³⁰ 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.³¹

Litigation Costs

Section 440.34, F.S., requires the reporting of all fees paid to attorneys for services rendered to the OJCC. The OJCC reported³² that during 2017-2018, a total of \$453,179,191 was incurred on combined claimant attorneys' fees and defense attorneys' fees in the Florida system. The following OJCC table provides a snapshot of fees for the fiscal years 2002-2017.

Fiscal Year*	Aggregate Fees	Percentage Claimant Fees	Percentage Defense Fees
2002-03	\$427,359,212	49.29%	50.71%
2003-04	441,907,794	48.73%	51.27%
2004-05	470,178,488	44.91%	55.09%
2005-06	498,541,260	41.80%	58.20%
2006-07	468,584,023	40.80%	59.20%
2007-08	448,862,202	42.04%	57.96%
2008-09	450,941,100	40.28%	59.72%
2009-10	446,653,869	39.63%	60.37%
2010-11	416,404,259	37.72%	62.28%
2011-12	395,294,706	38.67%	61.33%
2012-13	392,784,121	38.67%	61.33%
2013-14	379,222,338	37.41%	62.59%
2014-15	370,772,783	36.73%	63.27%
2015-16	378,573,902	36.05%	63.95%
2016-17	439,609,031	42.24%	57.76%
2017-18	453,179,191	43.84%	56.16%
*2017-18 Office of Judges of Compensation Claims Annual Report			

²⁹ Office of Insurance Regulation, Order on Rate Filing, (Nov. 2, 2018), available at <https://www.floir.com/siteDocuments/NCCI232557-18-OORF.pdf> (last viewed Mar. 13, 2019).

³⁰ See OIR fn. 3 at pg. 16.

³¹ See *Id.*

³² OJCC, *2017-2018 Annual Report*, (available at <https://www.jcc.state.fl.us/JCC/publications/reports/2016AnnualReport/Index.html#>) (last viewed Mar. 12, 2019).

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*,³³ involving attorney fees; *Westphal v. City of St. Petersburg*,³⁴ relating to temporary wage replacement benefits (i.e., indemnity); and *Miles v. City of Edgewater Police Department*,³⁵ which addresses the right of an injured worker to pay for their own attorney.

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 irrebuttable 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 (1st DCA) held that statutes governing payment of attorney's fees in workers' compensation proceedings "are unconstitutional violations of a claimant's rights to free speech, free association and petition" and "also represent unconstitutional violations of a claimant's right to form contracts."³⁶ In *Miles*, the 1st DCA 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.³⁷ The attorney was only paid by the employer/carrier,³⁸

³³ *Castellanos v. Next Door Company*, 192 So.3d 431 (Fla. 2016).

³⁴ *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016).

³⁵ *Miles v. City of Edgewater Police Department*, 190 So.3d 171 (Fla. 1st DCA 2016). No. SC04-2349

³⁶ *Miles*, 190 So.3d at 184.

³⁷ Sections 440.105(2)(c) and 440.34(1), F.S.

³⁸ 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, F.S.

and only if they prevailed. The Court 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.

Aravena v. Miami-Dade County

The Court held that county employees who work for different departments and at different locations, answer to different supervisors, and have primary assignments involving different duties and functions are engaged in unrelated works triggering the exception to workers' compensation immunity in s. 440.11(1), F.S.³⁹ A county employee engaged as a crossing guard was killed as a result of the traffic lights not operating properly. The Court concluded that a school crossing guard and the traffic signal repair personnel charged with maintaining the traffic signals at the intersection where the school crossing guard was working were engaged in unrelated works and that the wrongful death claim of the school crossing guard's husband is not barred by worker's compensation immunity.⁴⁰

2003 Workers' Compensation Reforms

In 2002, Florida had the second highest premiums in the country.⁴¹ 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.

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, 10 percent of the remaining amount of the benefits secured and to be provided during the first 10 years, and 5 percent of the benefits secured after 10 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

³⁹ *Aravena v. Miami Dade County*, 928 So.2d 1163 (2006).

⁴⁰ *Id.*

⁴¹ See Oregon Department of Consumer and Business Services fn 2.

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.⁴² 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 for employers.⁴³ After the implementation of the rate decrease, effective January 1, 2019, Florida's rates are 65 percent below what the rates were prior to the 2003 reforms.⁴⁴

Administration of the Workers Compensation System in Florida

The Division of Workers' Compensation

The Division of Workers' Compensation within the Department of Financial Services is responsible for administering ch. 440, F.S., except for the provisions under the jurisdiction of the Office of the Judges of Compensation Claims. These functions include the enforcement of coverage requirements,⁴⁵ administration of workers' compensation health care delivery system,⁴⁶ data collection,⁴⁷ and assisting injured workers, employers, insurers, and providers in fulfilling their responsibilities under ch. 440, F.S.⁴⁸

Office of the Judges of Compensation Claims

The OJCC is responsible for resolving workers' compensation benefit disputes.⁴⁹ Injured employees may file a petition for benefits with the OJCC for any benefit that is ripe, due, and owing.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³

⁴² Sections 440.34 and 440.105, F.S.

⁴³ OIR, Final Order on Rate Filing (Aug. 12, 2003) available at <http://www.floir.com/siteDocuments/NCCI.pdf> (last viewed Mar. 3, 2019).

⁴⁴ See OIR fn. 3, p. 15.

⁴⁵ Section 440.107(3), F.S.

⁴⁶ Section 440.13, F.S.

⁴⁷ Sections 440.185 and 440.593, F.S.

⁴⁸ Section 440.191, F.S.

⁴⁹ Section 440.192, F.S.

⁵⁰ Section 440.192(1), F.S.

⁵¹ Section 440.192(8), F.S.

⁵² Section 440.25, F.S.

⁵³ Section 440.34, F.S., and *Castellanos v. Next Door Company*, 192 So.3d 431 (Fla. Apr. 28, 2016).

III. Effect of Proposed Changes:

Petitions for Benefits

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. If a petition is filed for medical benefits, the bill requires that the petition must include details demonstrating that such benefits have specifically been denied by the adjuster responsible for determining whether benefits are payable to the claimant. If a petition requests alternate or other medical care, current law requires a copy of the report from the physician making the recommendation for alternate or medical care be attached to the petition for benefits. The bill requires that the physician’s report include specific allegations and statements of fact supporting the specific denial by the adjuster handling payment of benefits to the injured employee.

Section 7 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.

Under current law in s. 440.192(2), F.S., a petition for benefits must specifically itemize or identify facts related to the compensation claim. The bill amends this requirement by providing that a petition for benefits specifically identify or itemize the following:

- The Florida county, or if the accident occurred outside Florida, the state where the injury occurred; current law requires the location of the occurrence.
- In a claim for permanent benefits, the specific date of maximum medical improvement and the specific date that such permanent benefits are claimed to begin.
- The specific amount of compensation claimed and the methodology used to calculate the average weekly wage. The bill establishes a rebuttable presumption that the average weekly wage and corresponding compensation calculated by the employer or carrier is accurate.
- The signed attestation regarding attorney fees created by Section 6 of the bill.
- Evidence demonstrating a good faith attempt to resolve the dispute.

The bill provides that if a petition for benefits is not dismissed for lack of specificity, a JCC may exercise independent discretion to determine whether the claimant or the claimant’s attorney made a good faith effort to resolve the dispute. If the JCC determines the claimant or the claimant’s attorney did not make a good faith effort to resolve the dispute before filing the petition for benefits, the JCC must dismiss the petition and may impose sanctions which may include assessment of attorney fees payable by the claimant’s attorney.

The bill specifies that the dismissal of any petition or portion of a petition under subsection (5) 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 10 days after the motion is filed, or if good cause for a hearing is shown, within 20 days after hearing on the motion.

Fellow-Employee Immunity

Section 4 amends s. 440.11(1), F.S., to repeal current law that provides that fellow-employee immunity does not apply to employees of the same employer when each is operating in furtherance of the employer's business but are assigned primarily to unrelated works within private or public employment.

Currently, s. 440.11, F.S., limits an employer's liabilities to the benefits provided under the Workers' Compensation Law. This limitation of employer liabilities makes workers' compensation benefits the exclusive remedy for most employee work-related deaths and injuries. The same immunities from liability also apply to each employee of the employer when the employee is acting in furtherance of the employer's business and the injured employee is entitled to receive workers' compensation benefits. The current law provides exceptions when such immunities do not apply, and it is the exception to fellow-employee immunity for employees assigned to unrelated works that the bill repeals. Thus, under the bill, workers' compensation benefits will be the exclusive remedy for work-related death or injuries caused by fellow employees assigned to unrelated works.

Temporary Benefits

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.

The bill also requires that an employee must receive permanent impairment benefits if the employee has not reached maximum medical improvement before receiving the maximum number of weeks of temporary disability benefits. The permanent impairment benefits will be based on an estimated impairment rating. The bill does not specify who will calculate the estimated impairment rating. Under current law, permanent impairment benefits are available after a doctor certifies that the employee has reached maximum medical improvement and applied an impairment rating based upon uniform permanent impairment rating schedule an employee must be certified by a doctor as having reached maximum medical improvement.

Section 2 amends s. 440.93(3), F.S., regarding benefits for mental and nervous injuries, to provide conforming changes necessitated by the revisions the bill makes to increase the number of weeks of temporary benefits available under s. 440.15, F.S.

Section 11 amends s. 440.491(6)(b), F.S., regarding training and education of injured workers, to reference the now required 260 weeks of temporary benefits.

Attorney Fees

Section 9 amends s. 440.25(4), F.S., to provide that attorney fees do not attach until 45 business days after a petition for benefits is filed with the JCC. Under current law, attorney fees do not attach until 30 calendar days after the date the carrier or employer receives the petition.

Section 10 amends s. 440.34, F.S., regarding the award of attorney fees for a claimant paid by the employer or carrier. The bill retains the statutory fee schedule for attorney fee awards, which

states that the attorney fee paid by an employer or carrier to a claimant's attorney may not exceed:

- Twenty percent of the first \$5,000 of benefits secured.
- Fifteen percent of the next \$5,000 of benefits secured.
- Ten percent of the remaining amount of benefits secured to be provided during the first 10 years after the date the claim is filed.
- Five percent of the benefits secured after 10 years.

The bill does not allow the award to the claimant of a fee that deviates from the statutory attorney fee schedule, as currently may occur in accordance with the decision of the Florida Supreme Court in *Castellanos v. Next Door Company*.

If a JCC finds that the attorney fee schedule results in an effective hourly rate of less than \$150 per hour for a disputed medical-only claim, the bill authorizes the JCC to award to the claimant an alternative attorney fee payable by the employee or carrier not to exceed \$1,500, based on a maximum hourly rate of \$150 per hour.

The bill provides a claimant's attorney may not be awarded an attorney fee in excess of \$150 per hour related to an appellate proceeding.

The bill states that attorney fees may not be awarded based on claimant attorney hours reasonably related to a benefit upon which the claimant did not prevail or if the JCC determines the claimant did not make a good faith effort to resolve the dispute before filing the petition for benefits, regardless of whether the petition is dismissed.

Elimination of Requirements Related to JCC Approval of Attorney Fees

Section 3 amends s. 440.105(3)(c), F.S., to exempt attorneys retained by an injured employee and receiving a fee or other consideration from the injured employee under contract with the employee from the criminal prohibition against receiving any fee, consideration, or gratuity in connection with a proceeding under the Workers' Compensation Law that is not approved by a JCC.

Section 8 amends s. 440.20(11)(c), F.S., to eliminate the requirement that settlement agreements be approved by a JCC as to attorney fees paid to the claimant's attorney. The bill requires the parties to submit the amount of the settlement and the attorney fees and costs paid by the claimant to the claimant's attorney. The bill also requires payment of lump sum settlements be made within 14 days of the date the JCC mails the order approving the settlement allocation's recovery of child support arrearages required by s. 440.20(11)(d), F.S.; current law requires payment within 14 days after the JCC mails the order approving attorney fees. The First District Court of Appeals held in *Miles v. City of Edgewater Police Department/Preferred Governmental Claims Solutions*, that the restrictions on a claimant's ability to retain counsel in s. 440.34, F.S., are unconstitutional.

Section 10 amends s. 440.34(1), F.S., to provide that retainer agreements between a claimant and claimant's attorney are not subject to JCC approval. Such agreements must, however, be filed with the JCC. Attorneys retained by injured employees must report to the JCC the amounts of

attorney fees they receive. The bill does not provide any enforcement mechanism to ensure compliance with these reporting requirements. The bill deletes current law prohibiting a JCC from approving a compensation order, joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or other agreement related to workers' compensation benefits which provides for an attorney fee in excess of the statutory schedule.

Attestations Related to Claimant's Attorney Fees

Section 6 creates s. 440.1915, F.S., to require an injured employee or other party making a claim to execute a signed attestation regarding the worker's obligation to pay his or her own attorney fees. The bill provides that the injured worker may not engage an attorney or other representative or proceeding with a petition for benefits while represented by an attorney unless the injured employee or other party making a claim for benefits, prior to engaging an attorney or other representative, attests by signature that he or she reviewed, understands, and acknowledges the following disclosure:

“The workers' compensation law requires you to pay your own attorney fees. Your employer and/or its insurance carrier are not required to pay your attorney fees except in certain circumstances. Even then, you may be responsible for paying attorney fees in addition to any amount your employer or its carrier may be required to pay or agree to pay, depending on the details of your agreement with your attorney. Carefully read and make sure you understand any agreement or retainer for representation before you sign it.”

Section 9 amends current law in s. 440.25(4)(h), F.S., which requires the parties to exchange and file with the JCC, at least 15 days before an expedited resolution hearing under s. 440.25(4)(h), F.S., a pretrial outline of all issues, defenses, and witnesses. The bill requires the claimant's attorney to include with the pretrial outline a personal attestation detailing his or her hours to date. The personal attestation must specifically allocate the hours by each benefit claimed and account for hours relating to multiple benefits in a manner that apportions such hours by percentage, in whole numbers, to each benefit.

Effective Date

Section 12 provides an effective date of July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The Florida Supreme Court in *Castellanos v. Next Door Company* ruled that the mandatory attorney fee schedule in s. 440.34, F.S., “is unconstitutional as a violation of due process under both the Florida and United States Constitutions.”⁵⁴ As a remedy, the Court revived the statute’s predecessor, which allowed for the award of an alternative attorney fee if application of the statutory fee schedule did not result in a reasonable attorney fee award.⁵⁵

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will provide greater guidance and specificity in the administration of various provisions of ch. 440, F.S., which may reduce administrative and litigation costs, thereby reducing the costs of workers’ compensation costs of employers.

According to the National Council on Compensation Insurance (NCCI) implementation of the bill could result in a decrease of rates in the range of 3 percent or more.⁵⁶

C. Government Sector Impact:

Department of Financial Services

The Division of Risk Management of the Department of Financial Services is a provider of workers’ compensation benefits to participating state agencies and public universities. Provisions of the bill relating to specificity, rebuttable presumption regarding the calculation of average weekly wage by the employee/carrier, and evidence of a good faith effort to resolve disputes prior to filing a petition for benefits, have the potential to improve efficiency in claims processing. The fiscal impact of the bill is indeterminate at

⁵⁴ *Castellanos v. Next Door Co.*, 192 So.3d 431 at 449 (Fla. 2016).

⁵⁵ *Castellanos*, 192 So.3d 431 at 448.

⁵⁶ NCCI, *Preliminary Cost Impact Analysis of SB 1636*, (Mar. 20, 2019) (on file with Senate Banking and Insurance Committee).

this time. The bill may reduce workers' compensation costs paid by the Division of Risk Management.⁵⁷

Office of the Judges of Compensation Claims

The OJCC indicates that they will need to modify the current reporting system to incorporate filing of attorney fees associated with retainer agreements.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 440.02, 440.093, 440.105, 440.11, 440.15, 440.1915, 440.192, 440.20, 440.25, 440.34, and 440.491.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁵⁷ Department of Financial Services, Analysis of SB 1636 (Mar. 17, 2019) (on file with Senate Committee on Banking and Insurance).