The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

BANKING AND INSURANCE
Senator Flores, Chair
Senator Steube, Vice Chair

MEETING DATE: Tuesday, December 13, 2016
TIME: 10:00 a.m.—12:00 noon
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Steube, Vice Chair; Senators Bracy, Braynon, Farmer, Gainer, Garcia, Mayfield, and Thurston

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	Overview of the Committee Jurisdiction		Presented
	Presentation on Workers' Compensation Insurance		Presented
	Other Related Meeting Documents		

FLORIDA SENATE COMMITTEE ON BANKING AND INSURANCE

JURISDICTIONAL OVERVIEW

CHAIR
SEN. ANITERE FLORES

VICE CHAIR
SEN. GREG STEUBE

MEMBERS
SEN. RANDOLPH BRACY
SEN. OSCAR BRAYNON
SEN. GARY FARMER, JR.
SEN. GEORGE GAINER
SEN. RENE GARCIA
SEN. DEBBIE MAYFIELD
SEN. PERRY THURSTON, JR.

FLORIDA SENATE

Committee of Banking and Insurance

Jurisdiction – Financial Services Industry

- State chartered financial institutions
  - Banks, credit unions; etc.
- Regulation of credit, debt, and lending activities
  - Consumer finance
  - Credit counseling and debt management services
  - Debt Collection
  - Deferred presentment loans and payday loans
  - Mortgage brokers and loan originators
  - Title loans
- Securities
- Money services businesses
  - Check cashers & money transmitters

FLORIDA SENATE

Committee on Banking and Insurance

Jurisdiction – Insurance

- Insurance companies
- Insurance agents
- Insurance products
  - Health insurance
  - HMO contracts
  - Liability Insurance
  - Life insurance
  - Long-term care insurance
  - Medical malpractice insurance
  - Property insurance
  - Title insurance
  - Workers' Compensation
  - Bail Bonds
  - Viatical settlements

Committee on Banking and Insurance

Insurance-Related Entities Created by the Legislature

- Citizens Property Insurance Corporation.
- Joint underwriting associations
  - Entities created for motor vehicle insurance, workers' compensation, and medical malpractice liability insurance.
- Insurance guaranty associations
  - Entities created for property and casualty insurance, life and health insurance, health maintenance organizations, and workers' compensation.
- Florida Birth Related Neurological Injury Compensation Association
- Florida Hurricane Catastrophe Fund
- Florida Surplus Lines Service Office

FLORIDA SENATE

Financial Services Commission

Gov. Rick Scott, CFO Jeff Atwater, A.G. Pam Bondi, and A.C. Adam Putnam

- Oversees the Office of Financial Regulation and the Office of Insurance Regulation.
  - Adopts rules for OIR and OFR.
  - Selects the Commissioner for each office.
    - Majority vote of the FSC required with Governor and CFO on prevailing side.
- In 2002, the Legislature made the Insurance Commissioner appointed, rather than elected.
- Previously, the Insurance Commissioner was an elected position, the state Treasurer, a position eliminated by a 1998 Constitutional amendment.

FLORIDA SENATE

Department of Financial Services

Jeff Atwater, Chief Financial Officer

- Primary Functions
  - State treasury.
  - Rehabilitation and liquidation of insurers.
  - Licensing and regulation of insurance agents and agencies.
  - Consumer services.
  - Investigates and enforces compliance with workers' compensation laws.
  - State Fire Marshal
  - Investigates theft and misuse of state funds, insurance fraud, and fire, arson, and explosions.
  - Risk management of claims against state agencies and universities.
  - Holds unclaimed property that escheats to the state and returns it to owners.
  - Regulates funeral homes and cemeteries.

FLORIDA SENATE

Office of Insurance Regulation

David Altmaier, Insurance Commissioner

- Primary Entities Licensed and Regulated
  - Insurance companies
  - Warranty associations
  - Premium finance companies
- Primary Functions
  - Solvency oversight
  - Approval of rates and forms
    - Rates may not be excessive, inadequate, or unfairly discriminatory.
    - Forms must comply with Florida law.
  - Market conduct examinations and market research

FLORIDA SENATE

Office of Financial Regulation

Drew Breakspear, Commissioner

- Primary Functions
  - Regulate state-chartered financial institutions to ensure compliance with state and federal law.
    - Includes banks and credit unions.
  - Regulate non-depository consumer finance entities.
    - Includes mortgage brokers and mortgage lenders; consumer finance companies; money service businesses (money transmitters, check cashers, deferred presentment providers; etc.); retail installment sales; title loan companies; and collection agencies.
  - Regulate the sale of securities in Florida to enforce compliance with state law.
  - Investigate financial fraud.

Florida Senate Committee on Banking and Insurance

Workers' compensation Rate Regulation in Florida and other States

CHAIR
SEN. ANITERE FLORES

VICE CHAIR
SEN. GREG STEUBE

MEMBERS
SEN. RANDOLPH BRACY
SEN. OSCAR BRAYNON
SEN. GARY FARMER, JR.
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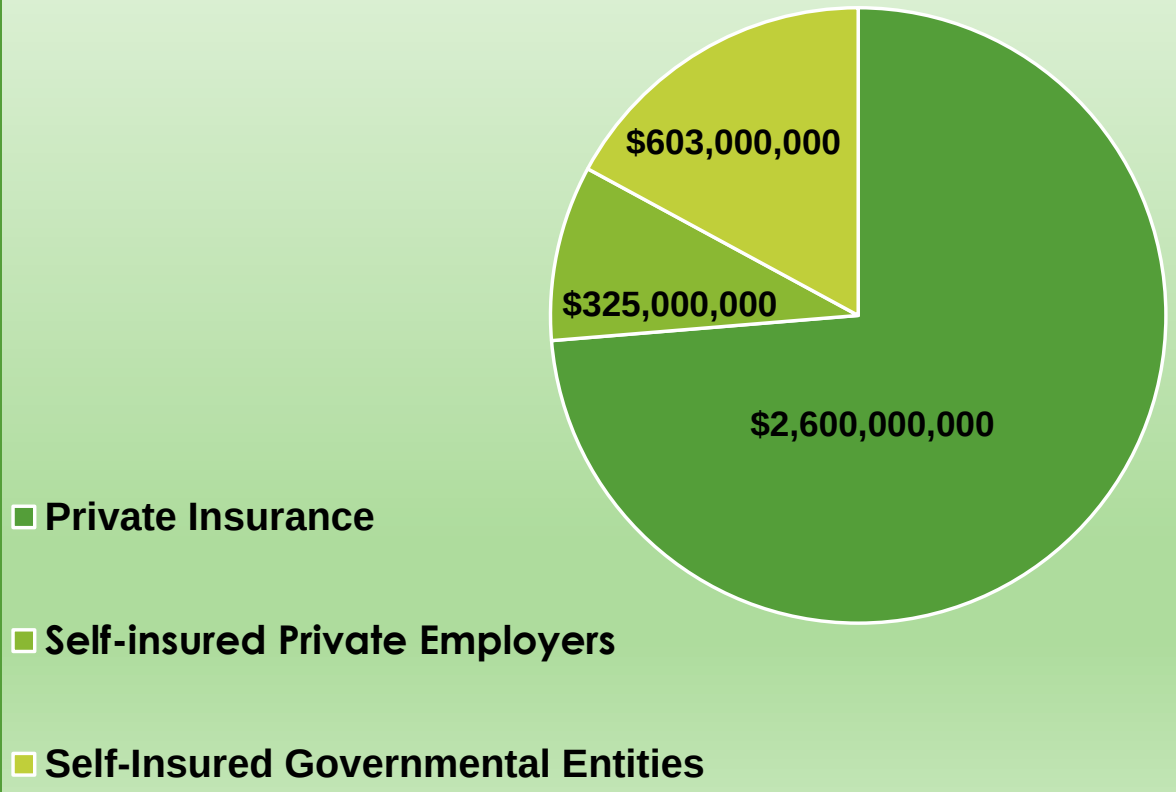
SEN. RENE GARCIA
SEN. DEBBIE MAYFIELD
SEN. PERRY THURSTON, JR

FLORIDA SENATE

Overview of the Florida Workers' Compensation Market

2015 Florida Workers' Compensation Premium Base



Overview of the Florida Workers' Compensation Market

› 2015 Top Workers Compensation Insurers
  – Six of the top 10 insurers are domiciled in Florida.
  – The 10 insurers wrote over 40% of the direct written premium.

Insurer and State of Domicile	
1. Bridgefield Employers Ins. Co. (FL)	6. RetailFirst Ins Co (FL)
2. Technology Ins Co Inc (NH)	7. Amerisure Ins Co (MI)
3. FCCI Ins Co (FL)	8. FFVA Mutual Ins Co (FL)
4. Zenith Ins Co (CA)	9. Comp Options Ins Co Inc (FL)
5. Associated Industries Ins Co Inc (FL)	10. American Zurich Ins Co (IL)

Overview Florida Workers' Compensation Market

Florida Workers' Compensation Joint Underwriting Association (FWCJUA)

- FWCJUA, the residual market or insurer of last resort, reported $25M in written premium and 2,429 policies in 2015.
- FWCJUA's premium, as a percentage of the total Florida market premium, is 1%, which suggests that the voluntary market or private market continues to absorb the vast majority of the workers compensation business in Florida.

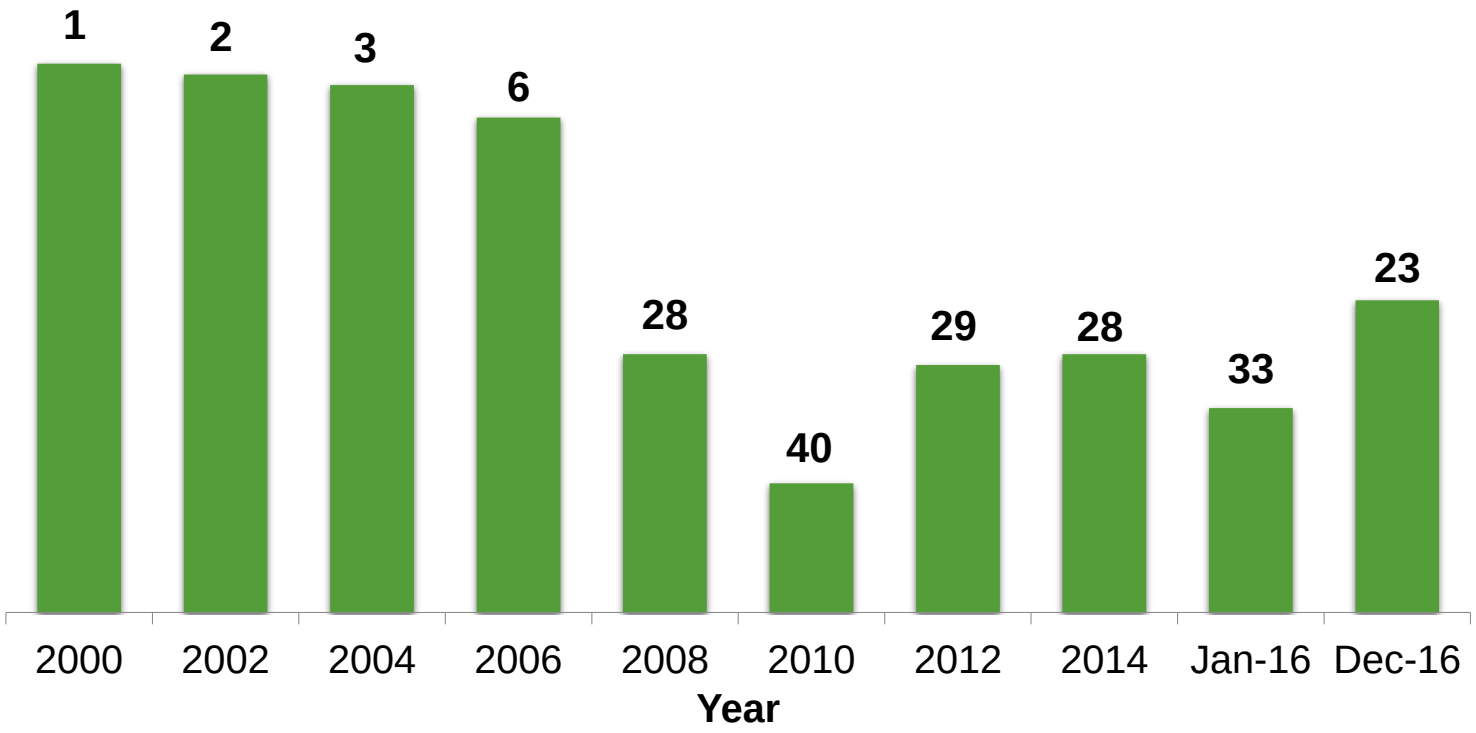
Brief Background on 2003 Reforms

- In 2003, the Florida Legislature enacted significant reforms to address affordability and other issues, such as:
  - Revised benefits and compensability;
  - Eliminated discretionary hourly fees for attorney. Retained the contingency fee schedule for awarding attorney fees, based on benefits secured (20% for the first $20,000; 15% for the next $5,000; and 10% of the remaining benefits during the first 10 years; and 5% of the benefits secured after 10 years.);
  - Revised dispute resolution process; and
  - Authorized the Department of Financial Services to impose fines on insurers that engage in patterns or practices of unreasonable delay in claims handling.
- In July 2003, the Office of Insurance Regulation (OIR) required NCCI to make a filing to reflect the NCCI's estimated cost savings of 14% associated with this legislation and in August 2003, the OIR approved the filing.

FLORIDA SENATE

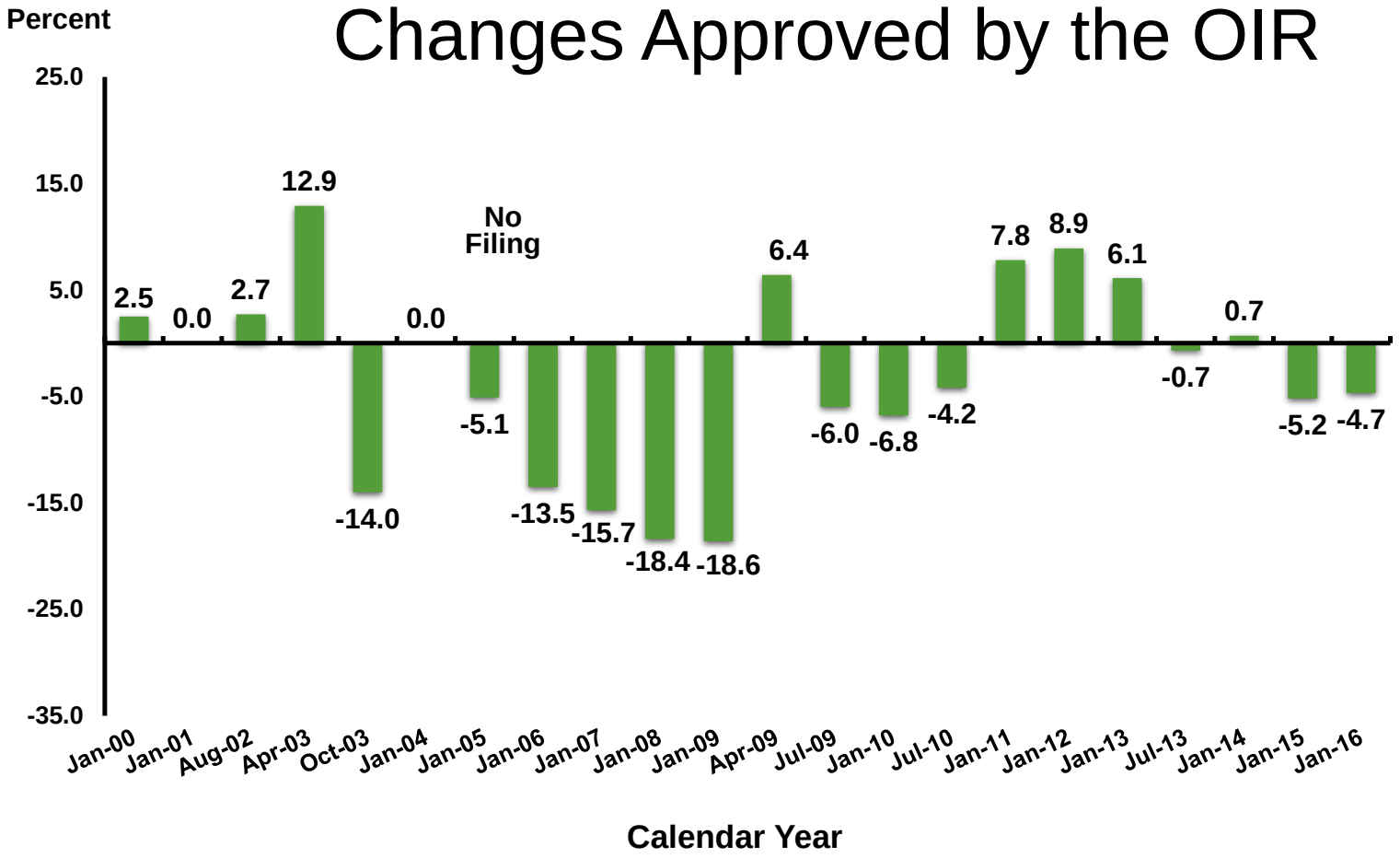
OREGON'S STATE PREMIUM RATE RANKINGS - HOW DOES FLORIDA COMPARE?

(1 is Highest Cost, 51 is Lowest Cost)



FLORIDA SENATE

Florida Workers' Compensation Rate Changes Approved by the OIR



NCCI's Rate Filing, Effective December 1, 2016

- May 2016. Rate filing submitted to the Office of Insurance Regulation (OIR) requesting a 17.1% increase. This filing included a 15% increase as the first-year impact attributable to the 2016 *Castellanos* case, which reinstated hourly attorney fees, and an increase that was a result of updates in the provider fee schedule enacted during the 2016 Session.

- June 2016. An amended rate filing was submitted to include an estimated 2.2% impact of the *Westphal* decision, which increased the maximum temporary total benefit duration from 104 to 260 weeks, resulting in a request for an overall 19.6% increase in rates.

- September 2016. OIR issued order disapproving the pending rate filing and advised NCCI it would approve a 14.5% rate increase if NCCI submitted an amended filing with additional information. NCCI complied and OIR approved a 14.5% overall combined statewide increase in rates effective December 1, 2016.

- November 23, 2016. A court order invalidated the 14.5% rate increase approved by OIR due to violations of the Sunshine Laws. The order was stayed and the rate went into effect December 1, 2016.

NCCI's Rate Filing, Effective December 1, 2016

- ***Castellanos v. Next Door Company***
  - In April 2016, the Florida Supreme Court ruled, "*…that the mandatory attorney fee schedule in section 440.34 of Florida Statutes, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process*."
  - The Court ruled that a judge of compensation claims must allow a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable fee. However, the court emphasized that the fee schedule remains the starting point.
  - In this particular case, the fee awarded to Castellanos' attorney amounted to $1.53 per hour for 107.2 hours of work. As a result of this ruling, the statutory caps are eliminated and judges may award hourly fees in addition to the statutory fees.

NCCI's Rate Filing, Effective December 1, 2016

- ***Westphal v. City of St. Petersburg***
  - In June 2016, in the case of *Westphal v. City of St. Petersburg,* the Florida Supreme Court 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.
  - The statute provides that entitlement to temporary total disability benefits ends when a totally disabled worker reaches the date of maximum medical improvement (MMI), or after 104 weeks, whichever occurs earlier. Then, the permanent rating would be determined. In this case, the worker did not reach MMI prior to the expiration of the 104-week limitation on benefits.

FLORIDA SENATE

FLORIDA WORKERS' COMPENSATION RATING LAW

- Workers' compensation rate filings must be approved by OIR before they become effective.
- The statutory standard for approving rates in Florida and many states is that the rate may not be "excessive, inadequate, or unfairly discriminatory." In making this determination, OIR is required to consider certain factors, such as:
  - Past loss and prospective loss experience within and outside the state;
  - A reasonable margin for underwriting profits and contingencies;
  - Dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers;
  - Investment income on unearned premium reserves and loss reserves; and
  - Past and prospective expenses, both countrywide and those applicable to this state; and all other relevant factors within and outside this state.

FLORIDA WORKERS' COMPENSATION RATING LAW

- Florida law requires every workers' compensation insurer to file with the OIR its full rates (benefits, expenses, profits, and contingencies) and classifications which the insurer proposes to use. However, an insurer may satisfy this obligation by becoming a member of a licensed rating organization that makes such filings on its behalf.
- Currently, all workers' compensation insurers are members of the NCCI, the sole licensed rating or advisory organization in the state.
- NCCI files more than 600 risk classifications that cover all types of employment. A manual rate per $100 of payroll is developed for each risk classification that reflects the hazards associated with that particular job. This rate is multiplied by the employer's payroll to determine the unadjusted premium. This amount is further multiplied by the employer's experience modification factor to determine the adjusted premium.
- Optional plans insurers may use to compete based on price may include deviations, dividends, retrospective rating plans, and large deductibles that are subject to OIR's approval.

Regulatory Oversight of Workers' Compensation Rating System in Florida

- OIR licensure and regulation of insurers and rating/advisory organizations, which includes financial and market conduct exams.
- Multistate Exams of NCCI by State Regulators.
  - Last exam report (for 2006-2010) issued 2012. Another multistate exam is in progress.
- Peer Review of NCCI Ratemaking Process.
  - Florida law requires the Financial Services Commission to contract for an independent actuarial peer review and report of the ratemaking processes of any licensed rating organization that makes rate filings for workers' compensation insurance at least once every other year. Last report issued in December 2015.
- Florida law requires OIR to submit an annual report to the Legislature that evaluates competiveness of Florida's market.

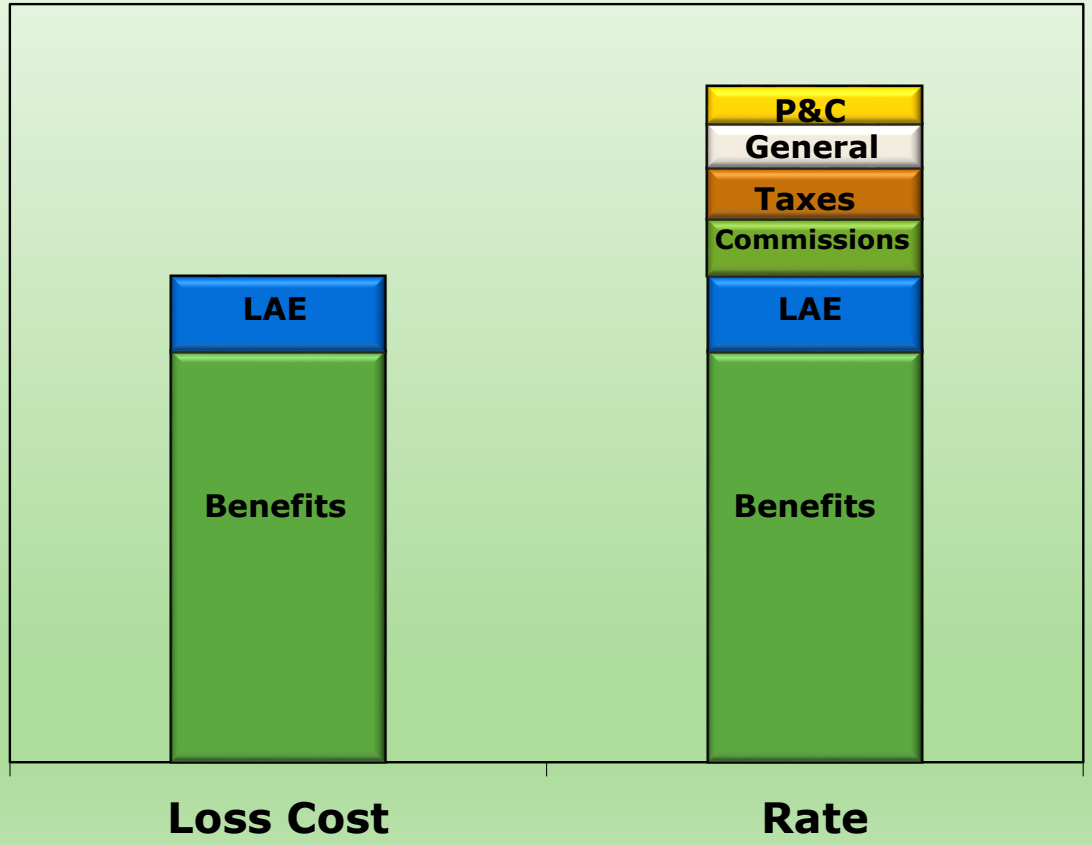
Regulatory Oversight of Workers' Compensation Rating System in Florida

- Government-in-the-Sunshine Laws includes public meeting requirements (s. 286.011, F.S.) and record requirements (s. 119.01, F.S.).

- Government in the Sunshine provisions relating to workers' compensation are currently being litigated.
  - Section 627.093, F.S., provides that s. 286.011, F.S., is applicable to every rate filing, approval or disapproval of filing, rating deviation from filing, or appeal from any of these regarding workers' compensation and employer's liability insurance.
  - Section 627.091, F.S., provides that whenever the committee of a recognized rating organization meets to discuss the necessity for, or a request for, Florida rate changes, the determination of rates, the rates to be requested, and any other matters pertaining specifically and directly to such Florida rates, such meetings are subject to the public meeting requirements of s. 286.011, F.S.
  - Section 627.291, F.S., provides that every rating organization and insurer shall furnish to any insured affected by a rate made by it all pertinent information as to such rate.

FLORIDA SENATE

Loss Cost vs Full Rate



RATEMAKING TERMS

- **Loss Adjustment Expense:**
  Expenses of an insurance company which are directly chargeable to the settlement of claims such as the cost of investigating cases, defending law suits, etc.

- **Production Expense:**
  Commissions to agents, billing and premium collection, costs of preparing policies

- **General Expense:**
  Audits, general administration, inspections

- **Taxes, Licenses, and Fees:**
  Various premium taxes, filing fees

- **Profit and Contingencies:**
  Combined with investment income earned on loss and unearned premium reserves

FLORIDA SENATE

SURVEY OF STATE WORKERS' COMPENSATION RATING LAWS

- Systems used include loss costs or competitive rating, administered or full rates (such as Florida), and exclusive state funds.
- Loss Costs are all of the components of a rate excluding expenses and profits. It is the rate the insurer must charge to cover the losses associated with covering all benefit cost for a given year.
- 38 states use some type of loss costs system in which a rating or advisory organization files the rates that are projected to cover losses, while each insurer is required to separately file the remaining components of the rates needed to cover expenses and profit, known as loss costs multipliers.

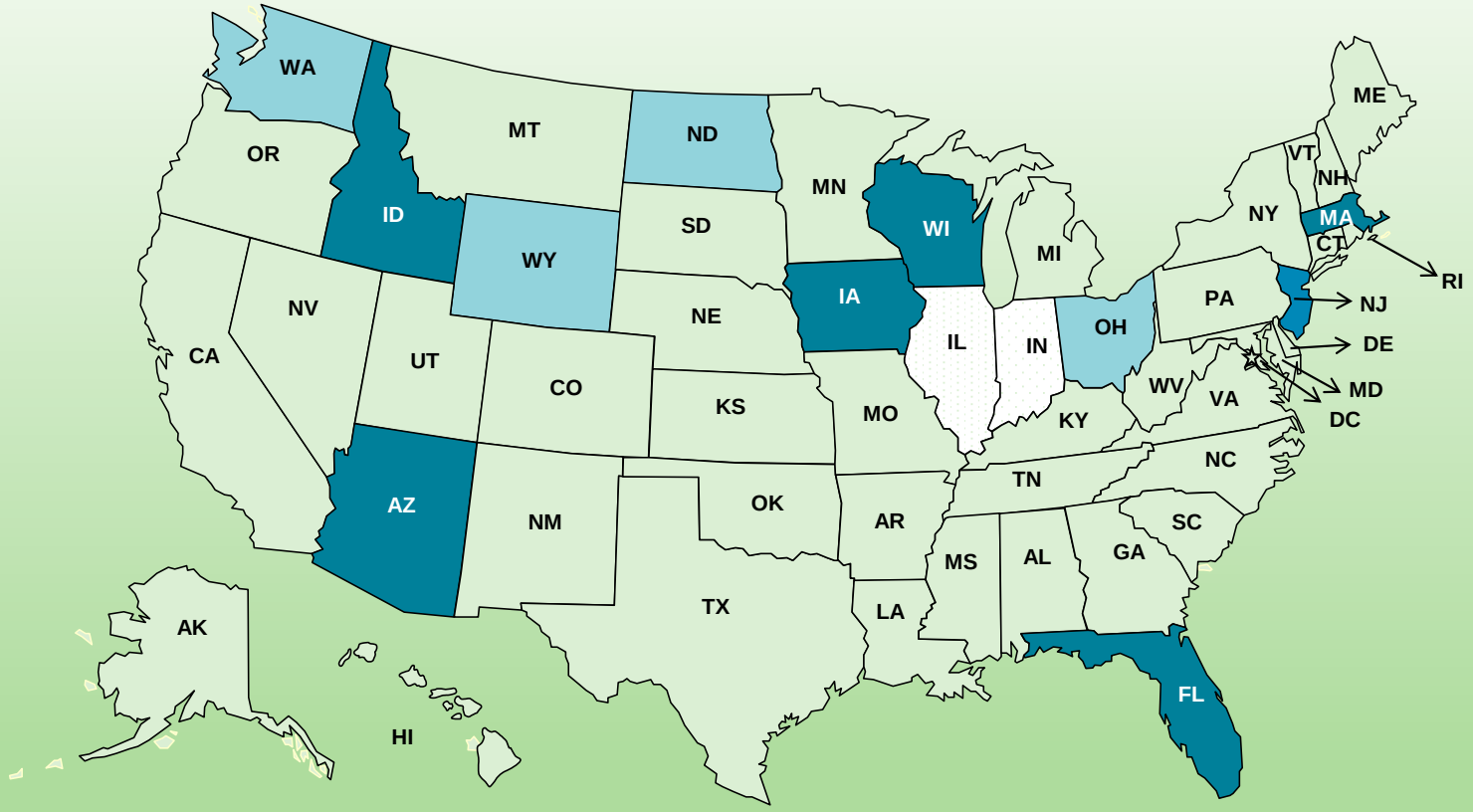
FLORIDA SENATE

STATE WORKERS' COMPENSATION RATING LAWS

- Seven states use an administered or full rates for which a rating or advisory organization files the full rate.
  - *Arizona, Florida, Idaho, Iowa, Massachusetts, New Jersey, and Wisconsin*
- Two states allow loss costs and full rates (Illinois and Indiana)
- Four states have monopolistic or exclusive state funds, that are quasi-governmental entities. (North Dakota, Ohio, Washington, and Wyoming)

FLORIDA SENATE

WORKERS' COMPENATION RATING SYSTEMS

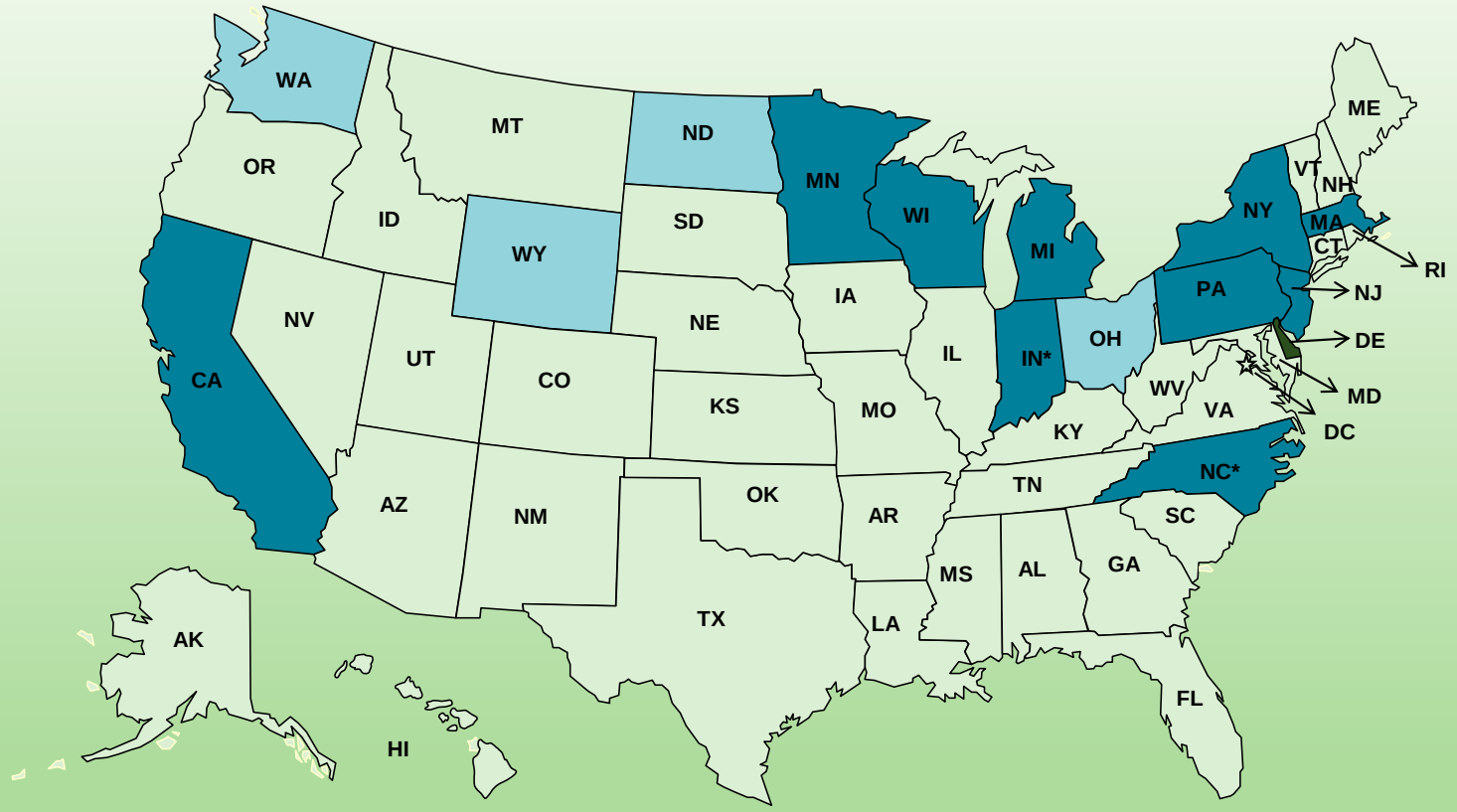


Loss Cost States 38	Full Rate States 7	Both Loss Cost and Rate States (2)	Monopolistic States (4)

Workers' Compensation Rating and Advisory Organizations

- Generally, a rating or advisory organization will file loss costs or full rates on behalf of insurers because of its ability to collect and evaluate aggregate claims data.
- The NCCI is a licensed rating organization or advisory organization for workers compensation in 36 states.
- 11 states use an independent local rating or advisory organization.

STATES THAT USE NCCI SERVICES



*NCCI provides services in Indiana and North Carolina

Supreme Court of Florida

No. SC13-2082

MARVIN CASTELLANOS,
Petitioner,

vs.

NEXT DOOR COMPANY, et al.,
Respondents.

[April 28, 2016]

PARIENTE, J.

This case asks us to evaluate the constitutionality of the mandatory fee schedule in section 440.34, Florida Statutes (2009), which eliminates the requirement of a reasonable attorney's fee to the successful claimant. Considering that the right of a claimant to obtain a reasonable attorney's fee has been a critical feature of the workers' compensation law, we conclude that the mandatory fee schedule in section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States

Constitutions as a violation of due process. See art. I, § 9, Fla. Const.; U.S. Const. amend. XIV, § 1.[1]

This issue arises out of a question certified by the First District Court of Appeal to be of great public importance,[2] which we rephrase as follows:

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1. Castellanos challenges the constitutionality of the statute on numerous grounds, arguing that it violates the right of access to courts under article I, section 21, of the Florida Constitution; the separation of powers doctrine; due process; equal protection; the right to contract and speak freely; the right to be rewarded for industry; and constitutes an unconstitutional taking of property. We decide the constitutional issue in this case on the basis of the constitutional rights of the claimant under due process and do not address the other grounds raised.

2. The following question was certified by the First District:

> WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE, AND CONSISTENT WITH THE ACCESS TO COURTS, DUE PROCESS, EQUAL PROTECTION, AND OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS.

Castellanos v. Next Door Co./Amerisure Ins. Co., 124 So. 3d 392, 394 (Fla. 1st DCA 2013). We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

Clearly this issue is affecting numerous claimants. Since Castellanos, the First District has certified that its disposition in eighteen additional cases passes upon the same question: Joe Taylor v. Rodney Gunder Plastering & Stucco, LLC, No. 1D15-5895, 2016 WL 1579228 (Fla.1st DCA Apr. 20, 2016); Stephens v. Dominos Pizza, No. 1D12-3239, 2016 WL 1169975 (Fla. 1st DCA Mar. 24, 2016); De Mesa v. Dollar Tree Stores, Inc./Sedgwick CMS, No. 1D15-5635, 2016 WL 1169978 (Fla. 1st DCA Mar. 24, 2016); Shannon v. Hillsborough Area Reg'l Transit Auth. et al., 184 So. 3d 665 (Fla. 1st DCA 2016); Perez v. Univision Network LP/Sentry Claims Service, 184 So. 3d 653 (Fla. 1st DCA 2016); Weimar v. L'Oreal USA S/D, Inc., 176 So. 3d 1288 (Fla. 1st DCA 2015); Rankine v. AMR Corp., 176 So. 3d 392 (Fla. 1st DCA 2015); Zaldivar v. Prieto, 174 So. 3d 1126 (Fla. 1st DCA 2015); Gallagher Law Grp., P.A. v. Vic Renovations, 174 So. 3d 1124 (Fla. 1st DCA 2015); Zaldivar v. Dyke Indus., Inc., 168 So. 3d 336 (Fla. 1st

WHETHER SECTION 440.34, FLORIDA STATUTES (2009), WHICH MANDATES A CONCLUSIVE FEE SCHEDULE FOR AWARDING ATTORNEY'S FEES TO THE CLAIMANT IN A WORKERS' COMPENSATION CASE, IS UNCONSTITUTIONAL AS A DENIAL OF DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The Petitioner, Marvin Castellanos, was injured during the course of his employment with the Respondent, Next Door Company. Through the assistance of an attorney, Castellanos prevailed in his workers' compensation claim, after the attorney successfully refuted numerous defenses raised by the employer and its insurance carrier. However, because section 440.34 limits a claimant's ability to recover attorney's fees to a sliding scale based on the amount of workers' compensation benefits obtained, the fee awarded to Castellanos' attorney amounted to only $1.53 per hour for 107.2 hours of work determined by the Judge of Compensation Claims (JCC) to be "reasonable and necessary" in litigating this complex case.

DCA 2015); Ferrer v. Truly Nolen of Am., Inc., 164 So. 3d 700 (Fla. 1st DCA 2015); Flores v. Vanlex Clothing Corp., 160 So. 3d 961 (Fla. 1st DCA 2015); Mayorga v. Sun Elecs. Int'l, Inc., 159 So. 3d 1032 (Fla. 1st DCA 2015); Leon v. Miami Dade Pub. Schs., 159 So. 3d 422 (Fla. 1st DCA 2015); Gonzalez v. McDonald's, 156 So. 3d 1127 (Fla. 1st DCA 2015); Diaz v. Palmetto Gen. Hosp./Sedgwick CMS, 146 So. 3d 1288 (Fla. 1st DCA 2014); Pfeffer v. Labor Ready Se., Inc., 155 So. 3d 1155 (Fla. 1st DCA 2014); Richardson v. Aramark/Sedgewick CMS, 134 So. 3d 1133 (Fla. 1st DCA 2014).

Castellanos had no ability to challenge the reasonableness of the $1.53 hourly rate, and both the JCC and the First District were precluded by section 440.34 from assessing whether the fee award—calculated in strict compliance with the statutory fee schedule—was reasonable. Instead, the statute presumes that the ultimate fee will always be reasonable to compensate the attorney, without providing any mechanism for refutation.

The right of a claimant to obtain a reasonable attorney's fee when successful in securing benefits has been considered a critical feature of the workers' compensation law since 1941. See Murray v. Mariner Health, 994 So. 2d 1051, 1057-58 (Fla. 2008). From its outset, the workers' compensation law was designed to assure, as the current legislative statement of purpose provides, "the quick and efficient delivery of disability and medical benefits to an injured worker." § 440.015, Fla. Stat. (2009).

Yet, while the Legislature has continued to enunciate this purpose, in reality, the workers' compensation system has become increasingly complex to the detriment of the claimant, who depends on the assistance of a competent attorney to navigate the thicket.[3] Indeed, as this Court long ago observed, allowing a

3. To name just a few of the ways in which the workers' compensation system has become increasingly complex and difficult, if not impossible, for an injured worker to successfully navigate without the assistance of an attorney: (1) the elimination of the provision that the workers' compensation law be liberally construed in favor of the injured worker, § 440.015, Fla. Stat.; (2) reductions in the

claimant to "engage competent legal assistance" actually "discourages the carrier from unnecessarily resisting claims" and encourages attorneys to undertake representation in non-frivolous claims, "realizing that a reasonable fee will be paid for [their] labor." Ohio Cas. Grp. v. Parrish, 350 So. 2d 466, 470 (Fla. 1977).

We reject the assertion of Justice Polston's dissenting opinion that our holding "turns this Court's well-established precedent regarding facial challenges on its head." Dissenting op. at 53 (Polston, J.). It is immaterial to our holding whether, as Justice Polston points out, the statutory fee schedule could, in some cases, result in a constitutionally adequate fee. It certainly could.

But the facial constitutional due process issue, based on our well-established precedent regarding conclusive irrebuttable presumptions, is that the statute precludes every injured worker from challenging the reasonableness of the fee award. See Recchi Am. Inc. v. Hall, 692 So. 2d 153, 154 (Fla. 1997) (clarifying that its holding "invalidates the irrebuttable presumption altogether," including as

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duration of temporary benefits, § 440.15(2)(a), Fla. Stat.; (3) an extensive fraud and penalty provision, § 440.105, Fla. Stat.; (4) a heightened standard of "major contributing cause" that applies in a majority of cases rather than the less stringent "proximate cause" standard in civil cases, § 440.09(1), Fla. Stat.; (5) a heightened burden of proof of "clear and convincing evidence" in some types of cases, §§ 440.02(1), 440.09(1), Fla. Stat.; (6) the elimination of the "opt out" provision, §§ 440.015, 440.03, Fla. Stat.; and (7) the addition of an offer of settlement provision that allows only the employer, and not the claimant, to make an offer to settle, § 440.34(2), Fla. Stat.

applied to certain situations). It is the irrebuttable statutory presumption—not the ultimate statutory fee awarded in a given case—that we hold unconstitutional.

The contrary approach embraced by Justice Polston's dissenting opinion, which leaves open the possibility of an as applied challenge to the statute on a case-by-case basis, would be both unworkable and without any standards for determining when the fee schedule produces a constitutionally inadequate fee. Simply put, the statute is not susceptible to an as applied challenge, but instead fits into our precedent governing the constitutionality of irrebuttable presumptions, which is a distinct body of case law that differs from the typical "facial" versus "as applied" cases cited by Justice Polston's dissent.

We also reject the assertion of Justice Canady's dissenting opinion that we "fail[] to directly address the actual policy of the statute." Dissenting op. at 41 (Canady, J.). Rather, it is Justice Canady's dissent that fails to acknowledge that a reasonable attorney's fee has always been the linchpin to the constitutionality of the workers' compensation law.

It is undeniable that without the right to an attorney with a reasonable fee, the workers' compensation law can no longer "assure the quick and efficient delivery of disability and medical benefits to an injured worker," as is the stated legislative intent in section 440.015, Florida Statutes (2009), nor can it provide workers with "full medical care and wage-loss payments for total or partial

disability regardless of fault and without the delay and uncertainty of tort litigation." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991).

The statute prevents every injured worker from challenging the reasonableness of the fee award in his or her individual case—an issue of serious constitutional concern given the critical importance, as a key feature of the workers' compensation statutory scheme, of a reasonable attorney's fee for the successful claimant. Accordingly, we answer the rephrased certified question in the affirmative, quash the First District's decision upholding the patently unreasonable $1.53 hourly fee award, and direct that this case be remanded to the JCC for entry of a reasonable attorney's fee.

I. FACTS AND PROCEDURAL HISTORY

In 2009, Marvin Castellanos, then forty-six years old, suffered an injury during the course of his employment as a press break operator for Next Door Company, a manufacturer of metal doors and door frames located in Miami, Florida. Castellanos requested medical treatment, and Next Door authorized him to seek treatment at the Physician's Health Center in Hialeah, Florida, the health insurance clinic designated for medical diagnoses by Next Door's workers' compensation insurance carrier, Amerisure Insurance Company. At the clinic, Castellanos was diagnosed with multiple contusions to his head, neck, and right

shoulder. A doctor requested authorization of medically necessary treatment, including x-rays, medications, and physical therapy.

Next Door, as the employer, and Amerisure, as Next Door's insurance carrier (collectively, the "E/C"), failed to authorize its own doctor's recommendations, and Castellanos subsequently filed a petition for benefits, seeking a compensability determination for temporary total or partial disability benefits, along with costs and attorney's fees. The E/C filed a response to the petition, denying the claim based on sections 440.09(4) (intentional acts) and 440.105(4)(b)9. (fraud), Florida Statutes (2009), ultimately asserting that Castellanos was responsible for his own injuries.

The parties subsequently filed a stipulation, in which the E/C raised twelve defenses. A final hearing was then held before the JCC, in which numerous depositions, exhibits, and live testimony were submitted for consideration.

In its Final Compensation Order, the JCC determined that Castellanos was entitled to be compensated by the E/C for his injuries and was therefore entitled to recover attorney's fees and costs from the E/C. The JCC explicitly found that Castellanos' attorney was successful in securing compensability and defeating all of the E/C's defenses, and retained jurisdiction to determine the amount of the attorney's fee award.

Based on the JCC's finding of compensability, Castellanos filed a motion for attorney's fees, seeking an hourly fee of $350 for the services of his attorney. Section 440.34, however, strictly constrains an award of attorney's fees to the claimant's attorney, requiring the fee to be calculated in conformance with the amount of benefits obtained.

Specifically, subsection (3) of section 440.34 was amended in 2009 to remove the longstanding requirement that the fee be "reasonable" and instead to provide, except for disputed medical-only claims, that the fee equal the amount provided for in subsection (1), which sets forth the following sliding scale fee schedule:

> A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section. The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this subsection or subsection (7).

§ 440.34(1), Fla. Stat. (emphasis added). Application of the fee schedule in this case resulted in a statutory fee of $1.53 per hour.

In support of his motion for attorney's fees, which argued that an award limited to the statutory fee would be unreasonable and manifestly unjust, Castellanos presented expert testimony from attorneys James Fee and Brian Sutter. Fee testified that there is "no way on this planet" that Castellanos could have prevailed in obtaining benefits "without the skilled and tenacious representation" of an attorney, based on "the onslaught of defenses that were asserted." He agreed that the 107.2 hours claimed by Castellanos' attorney were reasonable and necessary and an "exceedingly efficient use of time" given that "this was a very difficult case."

Sutter testified that it is "absolutely illusory to think" that a claimant could present his case without counsel "because of all the dangers and pitfalls" of the workers' compensation law. He further stated that fees under $2.00 an hour, such as the statutory fee in this case, are "absurd" and "manifestly unjust," and "would provide an extreme chilling effect" that would "prevent any attorney from handling a similar case in the future."

Attorney Jeff Appell testified as an expert witness on behalf of the E/C. When asked what percentage of workers' compensation cases showed claimants to be successful in prosecuting their claims without an attorney, Appell responded

that, although he regularly reviewed JCC orders, "I can't say that I've seen one that's been entirely successful," and, "as far as litigating a complicated case throughout, I honestly haven't seen it." He agreed that a statutory fee as low as the one in this case was "an unreasonably low hourly rate" and "an absurd result."

After hearing the testimony and considering the evidence and the law, the JCC issued an order awarding fees, finding that Castellanos "ultimately prevailed in obtaining a finding of compensability, a necessary precursor to obtaining benefits." According to the JCC, in order to obtain this result, Castellanos "had to overcome between 13 and 16 different defenses raised by the E/C throughout the course of litigation." The JCC further found that it was "highly unlikely that [Castellanos] could have succeeded and obtained the favorable result he did without the assistance of capable counsel."

Constrained to the statutory fee schedule, however, the JCC found that Castellanos was limited to an attorney's fee of $164.54, based on the application of the conclusive fee schedule to the actual value of benefits secured of $822.70. Nevertheless, in its order, the JCC "fully accept[ed] the notion that 'Lawyers can't work for $1.30 an hour,' " and stated that Castellanos' attorney "is an exceptionally skilled, highly respected practitioner who has been awarded as much as $350 to $400 an hour for his success in workers' compensation cases." The JCC, in addition, found that "[t]here is no question . . . that the 107.2 hours

expended by his firm . . . were reasonable and necessary," and that these hours constituted an "exceedingly efficient use of time," which was "wholly consistent with the 115.20 defense hours documented" by counsel for the E/C.

But as an executive branch official, the JCC had no authority to address Castellanos' claim that section 440.34, and the resulting $1.53 hourly fee, was unconstitutional. See Ariston v. Allied Bldg. Crafts, 825 So. 2d 435, 438 (Fla. 1st DCA 2002) ("A JCC clearly does not have jurisdiction to declare a state statute unconstitutional or violative of federal law."). Castellanos thus appealed the JCC's order to the First District, raising the constitutional claim.

The First District affirmed the JCC's decision to award "only $164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits," holding that "the statute required this result" and that the court was "bound by precedent to uphold the award, however inadequate it may be as a practical matter." Castellanos, 124 So. 3d at 393. In so doing, the First District recognized that there were important constitutional issues presented by this case that warranted this Court to determine the constitutionality of the current attorney's fee statute. Id. at 394. We granted review and now hold that the statute is unconstitutional under both the state and federal constitutions as a violation of due process.

II. ANALYSIS

Our review of the constitutionality of section 440.34 is de novo. See Graham v. Haridopolos, 108 So. 3d 597, 603 (Fla. 2013). We begin our analysis by tracing the history of awarding attorney's fees to the claimant under our state's workers' compensation law, culminating in the Legislature's 2009 elimination of the requirement that the fee be "reasonable." Then, we consider whether the statute, as amended in 2009, creates an unconstitutional, irrebuttable presumption in violation of due process of law. Finally, concluding that the statute is unconstitutional, we address the remedy.

A. History of Awarding Attorney's Fees to the Claimant Under Florida's Workers' Compensation Law

In 1935, the Legislature adopted the workers' compensation law to provide "simple, expeditious" relief to the injured worker. Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968). As an integral part of that goal from 1941 until 2009, the Legislature provided for an award of a reasonable attorney's fee to an injured worker who was successful in obtaining workers' compensation benefits.

In the eighty years since the enactment of the workers' compensation law, however, the statutory scheme has become increasingly complex. And although the Legislature has now eliminated any requirement that attorney's fees awarded to

an injured worker prevailing in his or her claim for benefits must be "reasonable," the Legislature's expressed intent for the workers' compensation law has remained unchanged:

> It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as 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. . . . The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. . . . It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker.

§ 440.015, Fla. Stat. (emphasis added).

In Murray, 994 So. 2d at 1057, which was the last time this Court addressed the attorney's fee provision, we summarized the statutory history of awarding attorney's fees to the claimant, explaining that the Legislature initially adopted this provision to ensure that the injured worker, rather than his or her attorney, would actually receive the bulk of the compensation award. We stated:

> The theory underlying the Act was that a claimant did not need an attorney and could alone navigate the procedures to obtain the benefits to which he or she was entitled under the law. Thus, originally, when a claimant hired an attorney, the claimant's attorney fee was the obligation of the claimant. The Legislature, however, was concerned that the bulk of the compensation benefit go to the claimant, not his attorney. Accordingly, to protect a claimant's compensation award, the Legislature, from the original adoption of the Act, gave the JCC or relevant administrative body, however denominated at the time, approval oversight of the amount a claimant paid to his attorney. See ch. 17481, § 34, Laws of Fla. (1935).

Id. (citation omitted).

In 1941, as it became clear that an injured worker needed the assistance of an attorney to navigate the workers' compensation system, the Legislature significantly revised the workers' compensation law to "mandate[] that in some instances, the employer/carrier should pay for the claimant to have an attorney." Id. At that time, the Legislature provided as follows:

> If the employer or carrier shall file a notice of controversy as provided in Section 20 of this Act, or shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the injured person shall have employed an attorney at law in the successful prosecution of his claim, there shall, in addition to the award for compensation, be awarded [a] reasonable attorney's fee, to be approved by the Commission which may be paid direct to the attorney for the claimant in a lump sum. If any proceedings are had for review of any claim, award or compensation order before any Court, the Court may allow or increase the attorney's fees, in its discretion, which fees shall be in addition to the compensation paid the claimant, and shall be paid as the Court may direct.

Ch. 20672, § 11(a), Laws of Fla. (1941) (emphasis added).

"As the First District noted regarding a subsequent version of this provision, 'The legislative determination that a fee is payable by the employer/carrier in the circumstances enumerated in [this subsection] reflects a public policy decision that claimants are entitled to and are in need of counsel under those conditions.' " Murray, 994 So. 2d at 1058 (quoting Pilon v. Okeelanta Corp., 574 So. 2d 1200, 1201 (Fla. 1st DCA 1991)). Indeed, the First District has stated that, especially in

a "lengthy and expensive contest" with an E/C, a claimant proceeding "without the aid of competent counsel" would be as "helpless as a turtle on its back." Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985) (quoting Neylon v. Ford Motor Co., 99 A.2d 664, 665 (N.J. Super. Ct. App. Div. 1953)).

This Court, in Ohio Casualty Group, noted that the award of a "reasonable attorney's fee" was

> enacted to enable an injured employee who has not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer. If the services of an attorney become necessary, and the carrier is ordered to pay compensation, attorney's fees must be assessed against the carrier so that the benefits awarded the employee will constitute a net recovery. Thus, in adding attorney's fees to the injured worker's compensation award, [the provision] discourages the carrier from unnecessarily resisting claims in an attempt to force a settlement upon an injured worker. In addition, if the worker has a meritorious case, an attorney will be inclined to represent him, realizing that a reasonable fee will be paid for his labor and not deducted from perhaps a modest benefit due the claimant. Conversely, if the attorney believes the claim is frivolous, he would be inclined to decline representation.

350 So. 2d at 470 (emphasis added) (citations omitted).

This Court has long recognized the factors to be considered in determining the reasonableness of an attorney's fee award under the statute. In Florida Silica Sand Co. v. Parker, 118 So. 2d 2, 4 (Fla. 1960), this Court concluded that Canon 12 of the Canons of Professional Ethics, the predecessor to rule 4-1.5 of the Rules Regulating The Florida Bar—the ethical rule governing attorneys' fees—was a "safe guide in fixing the amount of [E/C-paid] fees" awarded to the claimant. This

Court noted that the Florida Industrial Commission had promulgated a minimum schedule of fees to be used as a guide by the JCC and found that "[s]uch a schedule is helpful but is not conclusive." Id. at 5. "Innumerable economic factors," this Court stated, "enter into the fixing of reasonable fees in one section of the State and in one community which might not be present in others." Id.

In addition to the minimum schedule, this Court explained that "it appears to us that supplemental evidence should be presented." Id. This Court specifically noted the principle that, "especially in this type of matter[,] fees should be carefully considered so that on the one hand they will not be so low as to lack attraction for capable and experienced lawyers to represent workmen's compensation claimants" while, "[o]n the other hand, they should not be so high as to reflect adversely on the profession or in actuality to enter disproportionately into the cost of maintaining the workmen's compensation program." Id. at 4.

Then, in Lee Engineering, this Court rejected the strict application of a contingent percentage of the benefit award based on a schedule of minimum fees, holding that a "schedule of fees . . . was helpful but unreliable" and remanding for the determination of a reasonable attorney's fee. 209 So. 2d at 458-59. According to this Court, a statutory fee schedule is "less sensitive to the changing needs of the program," and, "in the absence of a stipulation or other evidence, is not an appropriate method for fixing a fee in Workmen's Compensation cases." Id. at

458. Reaffirming Florida Silica Sand, this Court concluded that the factors set forth in Canon 12 of the Canons of Professional Ethics, the predecessor to rule 4-1.5, must be considered to determine whether an attorney's fee is reasonable and stated that findings by the JCC to support the award are required. Id. at 458-59.

Ironically, the Lee Engineering decision was a response to what this Court perceived as "excessive" attorney's fees. Id. at 457. In 1977, responding to this Court's decision in Lee Engineering, the Legislature significantly revised section 440.34 to add discretionary factors the JCC must consider when increasing or decreasing the fee, but also added a statutory formula to be used as the starting point for determining a reasonable attorney's fee award for a successful claimant:

> (1) If the employer or carrier shall file notice of controversy as provided in s. 440.20, or shall decline to pay a claim on or before the 21st day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the claimant ~~injured person~~ shall have employed an attorney at law in the successful prosecution of the claim, there shall, in addition to the award for compensation, be awarded a reasonable attorney's fee of 25 percent of the first $5,000 of the amount of the benefits secured, 20 percent of the next $5,000 of the amount of the benefits secured, and 15 percent of the remaining amount of the benefits secured, to be approved by the judge of industrial claims, which fee may be paid direct to the attorney for the claimant in a lump sum. However, the judge of industrial claims shall consider the following factors in each case and may increase or decrease the attorney's fee if in his judgment the circumstances of the particular case warrant such action:
>
> (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (b) The likelihood, if apparent to the claimant, that the acceptance of the particular employment will

> preclude employment of the lawyer by others or cause antagonisms with other clients.
>
> (c) The fee customarily charged in the locality for similar legal services.
>
> (d) The amount involved in the controversy and the benefits resulting to the claimant.
>
> (e) The time limitation imposed by the claimant or the circumstances.
>
> (f) The nature and length of the professional relationship with the claimant.
>
> (g) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (h) The contingency or certainty of a fee.

Ch. 77–290, § 9, at 1293-94, Laws of Fla. (statutory additions underlined; statutory deletions struck-through).

"Thus, to determine a reasonable fee, the JCC applied the formula and then increased or decreased the amount after consideration of the factors in order to determine a reasonable fee." Murray, 994 So. 2d at 1059. As the First District noted, the sliding fee schedule "embodies a legislative intent to standardize fees." Fiesta Fashions, Inc. v. Capin, 450 So. 2d 1128, 1129 (Fla. 1st DCA 1984).

Two years after codifying the Lee Engineering factors, the Legislature again significantly amended the statute, in 1979, to limit entitlement to "a reasonable attorney's fee from a carrier or employer" to three conditions:

> (a) Against whom he successfully asserts a claim for medical benefits only, if the claimant has not filed or is not entitled to file at such time ~~which does not include~~ a claim for disability, permanent impairment, ~~or~~ wage-loss, or death benefits, arising out of the same accident; or

(b) In cases where the deputy commissioner issues ~~concludes by the issuance of~~ an order finding that a carrier has acted in bad faith with regard to handling an injured worker's claim and the injured worker has suffered economic loss. For the purposes of this paragraph, "bad faith" means conduct by the carrier in the handling of a claim which amounts to fraud, malice, oppression, or willful, wanton or reckless disregard of ~~for~~ the rights of the claimant. Any determination of bad faith shall be made by the deputy commissioner through a separate fact-finding proceeding; or

(c) In a proceeding where a carrier or employer denies that an injury occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability ~~coverage~~.

Ch. 79-312, § 15, at 1657, Laws of Fla. (statutory additions underlined; statutory deletions struck-through).

The Legislature also revised section 440.34(4) to provide a penalty to restrict payment for services only to fees approved by the JCC:

> Any person: (a) [w]ho receives any fees or other consideration or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the deputy commissioner, the commission, or court; or (b) [w]ho makes it a business to solicit employment for a lawyer or for himself or herself in respect of any claim or award for compensation, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Ch. 79-312, § 15, at 1658, Laws of Fla. (statutory additions underlined). Then, in 1980, the Legislature revised section 440.34(2) to include language intended to limit the amount of the attorney's fee award: "In awarding a reasonable attorney's fee, the deputy commissioner shall consider only those benefits to the claimant the attorney is responsible for securing." Ch. 80-236, § 14, Laws of Fla.

In 1993, the Legislature again revised the statute, this time to reduce the percentage amounts for attorney's fees in the sliding schedule:

> [A]ny attorney's fee approved by a judge of compensation claims for services rendered to a claimant must ~~shall be~~ equal to 20 ~~25~~ percent of the first $5,000 of the amount of the benefits secured, 15 ~~20~~ percent of the next $5,000 of the amount of the benefits secured, 10 ~~and 15~~ percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.

Ch. 93-415, § 34, at 154 Laws of Fla. (statutory additions underlined; statutory deletions struck-through).

A decade later, setting the stage for the current statute, the Legislature in 2003 implemented other changes to the workers' compensation law following the 2003 Governor's Commission on Workers' Compensation Reform. Among the many changes made in that legislation to the entire workers' compensation law, the Legislature deleted reference in the attorney's fee provision to consideration of the reasonable fee factors; required the fee to be based on the benefits secured; and restricted the JCC's authority to approve fee awards based only on a statutory formula, while also providing for an alternative fee of a maximum of $1,500 if the claimant successfully asserted a claim solely for medical benefits. Ch. 2003-412, § 6, Laws of Fla.

In Murray, 994 So. 2d 1051, this Court was asked to consider the constitutionality of the 2003 amendments to the attorney's fee statute, which

deleted the Lee Engineering factors to be used in determining whether the fee award was reasonable. Murray involved a claimant who hired an attorney and prevailed after the employer and its insurance carrier denied workers' compensation benefits. Id. at 1053-54. The JCC then calculated the claimant's award of attorney's fees in accordance with the statutory formula, finding that although the claimant's counsel expended eighty hours of reasonable and necessary time on the case, the ultimate fee award was governed by the statutory formula set forth in section 440.34(1). Id. at 1054. Thus, the JCC awarded attorney's fees in the amount of $684.84. Id. at 1055.

Noting that this equated to an hourly rate of only $8.11 because of the low monetary value of the benefits obtained, the JCC commented:

> Given that this was a very complex case, with difficult issues, very contingent, required a highly skilled practitioner and that [the claimant's] attorney enjoys an outstanding reputation as a highly skilled and experienced workers' compensation practitioner, an attorney fee of $8.11 per hour would on its face . . . hardly appear to be "reasonable." It would appear to be "manifestly unfair."

Id. at 1055-56 (quoting Murray v. Mariner Health, OJCC Case No. 04–000323DFT (Fla. Div. of Admin. Hearings Compensation Order filed Jan. 17, 2006) at 5). Evidence in Murray also showed that the E/C paid its attorney $16,050—135 hours at $125 an hour—in the unsuccessful effort to resist paying benefits. Id. at 1055.

After the First District affirmed the $8.11 hourly fee award for the claimant's attorney, this Court held that the statute was ambiguous—section

440.34(3) stated that the claimant was entitled to a "reasonable attorney fee," while section 440.34(1) stated that any attorney's fee approved by the JCC "must equal" the statutory formula. Id. at 1057. "It is obvious," this Court stated, "that applying the formula in all cases will not result in the determination of reasonable attorney fees in all cases." Id. To the contrary, applying the formula will in some circumstances "result in inadequate fees," while in other circumstances, "applying the formula will result in excessive fees." Id.

Recognizing the principle of statutory construction that it will construe statutes in a manner that avoids a holding of unconstitutionality, this Court declined to consider the constitutional challenge. Id. at 1053. Instead, this Court resolved the statutory ambiguity in favor of section 440.34(3), holding that the claimant was entitled to recover a reasonable attorney's fee; that a reasonable attorney's fee for a claimant was to be determined using the factors set forth in rule 4-1.5 of the Rules Regulating The Florida Bar, rather than using the statutory formula; and that reasonable attorney's fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined using the factors set forth in rule 4-1.5. Id. at 1061-62.

Following Murray, the Legislature in 2009 removed any ambiguity as to its intent. Deleting the word "reasonable" in relation to attorney's fees, the Legislature provided that a claimant is entitled to recover only "an ~~a reasonable~~

attorney's fee in an amount equal to the amount provided for in subsection (1) or subsection (7) from a carrier or employer." Ch. 2009-94, § 1, Laws of Fla. (statutory additions underlined; statutory deletions struck-through). Subsection (1) requires the fee to be calculated in strict conformance with the fee schedule, and subsection (7) applies solely to the $1500 flat fee for "disputed medical-only claims."

The Legislature has, thus, eliminated any consideration of reasonableness and removed any discretion from the JCC, or the judiciary on review, to alter the fee award in cases where the sliding scale based on benefits obtained results in either a clearly inadequate or a clearly excessive fee. Confronted again with a constitutional challenge to the statute, we must now determine whether the complete elimination of any ability of either the JCC or the reviewing court to deviate from the statutory formula, even when the amount of the fee is determined to be unreasonable, is unconstitutional. We hold that it is.

B. Violation of Due Process

Section 440.34 provides a fee schedule that must be followed in every case by the JCC in calculating and awarding attorney's fees, based on the amount of benefits recovered by the claimant. The statute does not allow for any consideration of whether the fee is reasonable or any way for the JCC or the judiciary on review to alter the fee, even if the resulting fee is grossly inadequate—

or grossly excessive—in comparison to the amount of time reasonably and necessarily expended to obtain the benefits.

Stated another way, the statute establishes a conclusive irrebuttable presumption that the formula will produce an adequate fee in every case. This is clearly not true, and the inability of any injured worker to challenge the reasonableness of the fee award in his or her individual case is a facial constitutional due process issue.

In considering the constitutionality of the statute, we do not view the absolute limitation from the point of view of the attorney's rights, because the attorney always has the option to refuse representation, especially in complex low-value claims. Rather, we view the conclusive irrebuttable presumption in the context of the complete frustration of the entire workers' compensation scheme designed to provide workers with "full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991). We accordingly reject the argument that Castellanos, as the claimant rather than the attorney, lacks standing to raise the constitutional violation.

As the First District has explained, the injured worker, rather than the attorney, is the "true party in interest." Pilon, 574 So. 2d at 1201. A "barrier to review a decision to award a fee," the First District stated in Pilon, "could

ultimately result in a net loss of attorneys willing to represent workers' compensation claimants." Id. This in turn would result "in a chilling effect on claimants' ability to challenge employer/carrier decisions to deny claims for benefits and disrupt the equilibrium of the parties' rights intended by the legislature in enacting section 440.34." Id.

Because Castellanos has standing to challenge the constitutionality of the statute, we turn to the merits of his argument. This Court has set forth the following three-part test for determining the constitutionality of a conclusive statutory presumption, such as the fee schedule provided in section 440.34: (1) whether the concern of the Legislature was "reasonably aroused by the possibility of an abuse which it legitimately desired to avoid"; (2) whether there was a "reasonable basis for a conclusion that the statute would protect against its occurrence"; and (3) whether "the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption." Recchi, 692 So. 2d at 154 (citing Markham v. Fogg, 458 So. 2d 1122, 1125 (Fla. 1984)).

In Recchi, this Court fully adopted the reasoning of the First District, which concluded that a statute violated the constitutional right to due process where it provided no opportunity for an employee working in a drug-free workplace program to rebut the presumption that the intoxication or influence of drugs

contributed to his or her injury. Id. "According to the district court of appeal, the irrebuttable presumption failed the three-pronged test because the expense and other difficulties of individual determinations did not justify the inherent imprecision of the conclusive presumption." Id. (citing Hall v. Recchi Am. Inc., 671 So. 2d 197, 201 (Fla. 1st DCA 1996)).

The same, and more, can be said of the conclusive presumption in section 440.34. We address each prong of the due process test to explain why.

1. Whether the Concern of the Legislature was Reasonably Aroused by the Possibility of an Abuse Which it Legitimately Desired to Avoid

As to the first prong, one of the Legislature's asserted justifications for the fee schedule is to standardize fees. See Alderman v. Fla. Plastering, 805 So. 2d 1097, 1100 (Fla. 1st DCA 2002) ("Section 440.34(1), Florida Statutes[,] reflects a legislative intent to standardize attorney's fee awards in workers' compensation cases."). The conclusive presumption certainly does that, although it does so in a manner that lacks any relationship to the amount of time and effort actually expended by the attorney. As the First District has recognized, a fee schedule has typically been considered merely a starting point in determining an appropriate fee award. See, e.g., Fumigation Dep't v. Pearson, 559 So. 2d 587, 590 (Fla. 1st DCA 1989) ("For purposes of determining an attorney's fee award under section 440.34(1), Florida Statutes, a starting point in the analysis is the amount of benefits obtained for the claimant by his attorney."); Martin Marietta Corp. v. Glumb, 523

So. 2d 1190, 1195 (Fla. 1st DCA 1988) ("Although the amount of benefits obtained is a significant factor, it is not determinative of the maximum amount that can be awarded as a fee.").

To the extent the Legislature was also concerned about the excessiveness of attorney's fee awards, however, this is not a reasonable basis for the unyielding formulaic fee schedule. Other factors, such as Rule Regulating The Florida Bar 4-1.5, already prevent against excessive fees. That Rule provides a number of factors to be considered as a guide to determining a reasonable fee, including, among many others, "the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly." R. Reg. Fla. Bar 4-1.5(b)(1)(A). In fact, since Lee Engineering, this Court has made clear that it does not condone excessive fee awards.

The effect of the limitation on the fee amounts paid to claimants' attorneys is revealed in the mandatory annual reporting of all attorney's fees to the Office of the Judges of Compensation Claims, as required by section 440.345, Florida Statutes. The report demonstrates the one-sided nature of the fees paid, with claimants' attorneys consistently receiving a lower percentage of the total fees than defense attorneys and the gap only increasing over the past decade:

Fiscal Year	Aggregate Fees	Claimant %	Defense %
02-03	$430,705,423	48.91%	51.09%
03-04	$446,472,919	48.23%	51.77%
04-05	$475,215,605	44.43%	55.57%
05-06	$507,781,830	41.04%	58.96%
06-07	$478,640,476	39.95%	60.05%
07-08	$459,202,630	41.09%	58.91%
08-09	$459,324,903	39.55%	60.45%
09-10	$456,566,882	38.77%	61.23%
10-11	$428,036,787	36.70%	63.30%
11-12	$416,870,962	36.67%	63.33%
12-13	$418,775,099	36.27%	63.73%

State of Fla. Div. of Admin. Hearings, 2012-2013 Annual Report of the Office of the Judges of Compensation Claims at 31. Further, claimants' attorneys are prohibited by statute from negotiating a different fee with the claimant, and the JCC is precluded from approving a different fee—even if the negotiated rate would actually produce a more reasonable fee than the statutory fee schedule. See § 440.34(1), Fla. Stat. ("The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or

agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter which provides for an attorney's fee in excess of the amount permitted by this section."). In fact, it is a crime for an attorney to accept any fee not approved by the JCC, which is of course constrained to award a fee only pursuant to the statutory fee schedule. See § 440.105(3)(c), Fla. Stat. ("It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.").[4]

2. Whether There was a Reasonable Basis for a Conclusion That the Statute Would Protect Against its Occurrence

4. We note that the First District Court of Appeal recently concluded in an as-applied constitutional challenge to sections 440.105 and 440.34 that the restrictions in those sections are unconstitutional violations of a claimant's right to free speech, free association, petition, and right to form contracts, and held "that the criminal penalties of section 440.105(3)(c), Florida Statutes, are unenforceable against an attorney representing a workers' compensation client seeking to obtain benefits under chapter 440, as limited by other provisions." Miles v. City of Edgewater Police Dep't, No. 1D15-0165, at 25 (Fla. 1st DCA Apr. 20, 2016). The issue of the constitutionality of that provision is not before us.

Even assuming, however, that the first prong of the due process test is satisfied because the Legislature desired to avoid excessive fees, there is no reasonable basis to assume that the conclusive fee schedule actually serves this function—as required by the second prong of the test. Excessive fees can still result under the fee schedule, just as inadequate ones can—for instance, in a simple and straightforward case where the claimant obtains a substantial amount of benefits. See Murray, 994 So. 2d at 1057. The fee schedule does nothing to adjust fees downward when the recovery is high, even if the time required to obtain significant benefits was relatively minor and the resulting fee is actually excessive.

As this Court stated in Murray:

> In some cases such as the present case, the amount of benefits is small, but the legal issues are complex and time consuming, and require skill, knowledge, and experience to recover the small but payable benefits. In other cases, the amount of benefits is substantial, but the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience. In the former case, a mandatory, rigid application of the formula results in an inadequate fee; in the latter, such application of the formula results in an excessive fee.

Id. at 1057 n.4.

The First District has also observed that a customary fee based on an hourly rate is likely to be more significant in a case in which the value of the attorney's services greatly exceeds the financial benefit obtained on behalf of the client. See Alderman, 805 So. 2d at 1100. For example, the work necessary to establish a

connection between chemical exposure and respiratory illness might not bear a reasonable relationship to the benefit obtained, and to apply the statutory formula in such a case might result in a fee that is inadequate and unfair. See Glumb, 523 So. 2d at 1195. In other words, the elimination of any authority for the JCC or the judiciary on review to alter the fee award completely frustrates the purpose of the workers' compensation scheme.

3. Whether the Expense and Other Difficulties of Individual Determinations Justify the Inherent Imprecision of a Conclusive Presumption

But even if none of that were true, the third prong of the test for evaluating a conclusive presumption—that the feasibility of individual assessments of what constitutes a reasonable fee in a given case must justify the inherent imprecision of the conclusive presumption—certainly weighs heavily against the constitutionality of the fee schedule. Indeed, the JCC in this case actually made these individual determinations, but the inherent imprecision of the conclusive presumption prevented both the JCC and the First District from doing anything about the unreasonableness of the resulting fee.

Courts have, in fact, long operated under the view that the fee schedule was merely a starting point, and judges of compensation claims have determined, awarded, and approved attorney's fees without undue expense or difficulty to avoid unfairness and arbitrariness since the reasonable attorney's fee provision was adopted in 1941. Under prior versions of the statutory scheme, the JCC considered

legislatively enumerated factors, and, after the deletion of these factors, continued to consider whether the fee was reasonable and not excessive. See, e.g., S. Bell Tel. & Tel. Co. v. Rollins, 390 So. 2d 93, 95 (Fla. 1st DCA 1980); E. Coast Tire Co. v. Denmark, 381 So. 2d 336, 339-40 (Fla. 1st DCA 1980). This type of review to control abuse, limit excessive fees, and award reasonable fees provides no basis for concern about abuse.

The cases cited in opposition are readily distinguishable. Although the United States Supreme Court held that the unreasonably low fee provisions at issue in those cases passed constitutional muster despite the existence of a fee schedule, the judiciary still had discretionary authority to raise or lower the final fee according to articulated standards—unlike the conclusive presumption established by section 440.34.

For example, the Longshore and Harbor Workers' Compensation Act (LHWCA), the federal statutory workers' compensation scheme, which provides benefits to maritime workers, prohibits an attorney from receiving a fee unless approved by the appropriate agency or court. This provision has been upheld by the United States Supreme Court. See U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 721-26 (1990) (upholding the LHWCA provision, as incorporated into the Black Lung Benefits Act of 1972, against Fifth Amendment Due Process challenge).

Unlike the conclusive fee schedule in section 440.34, however, the Code of Federal Regulations creates factors to guide the adjudicator in awarding a fee "reasonably commensurate with the necessary work done." Triplett, 494 U.S. at 718. In other words, the fee provision in the LHWCA does not establish a conclusive irrebuttable presumption without consideration of whether the fee is "reasonable," but actually allows for the award of a "reasonable attorney's fee"—the precise constitutional problem with section 440.34.

In addition, in the federal cases cited in Triplett, the fees were intentionally set low due to the simple and non-adversarial nature of the services required—a far cry from the complex nature of Florida's current workers' compensation system. Indeed, Florida's workers' compensation law has become increasingly complex over the years. As a result of the complexity of the statutory scheme, the JCC specifically concluded in this case that it was "highly unlikely that [Castellanos] could have succeeded and obtained the favorable results he did without the assistance of capable counsel."

The stated goal of the workers' compensation system remains to this date the "quick and efficient delivery of disability and medical benefits to an injured worker" so as "to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." § 440.015, Fla. Stat. This case, and many others like it, demonstrate that despite the stated goal, oftentimes the worker experiences

delay and resistance either by the employer or the carrier.[5] Without the likelihood of an adequate attorney's fee award, there is little disincentive for a carrier to deny benefits or to raise multiple defenses, as was done here. This is the exact opposite of the original goal of the attorney's fee provision, as this Court recognized long ago. See Ohio Cas. Grp., 350 So. 2d at 470 ("[I]n adding attorney's fees to the injured worker's compensation award, Section 440.34, Florida Statutes (1975), discourages the carrier from unnecessarily resisting claims in an attempt to force a settlement upon an injured worker.").

While the E/C's attorney is adequately compensated for the hours reasonably expended to unsuccessfully defend the claim, as here, the claimant's attorney's fee may be reduced to an absurdly low amount, such as the $1.53 hourly rate awarded to the attorney for Castellanos. In effect, the elimination of any

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5. Several related cases arising out of the First District, which are currently pending in this Court, illustrate that this is not an isolated case. In each of these cases, there was either an outright denial of benefits or multiple defenses raised by the E/C, and in each case, the attorney for the E/C expended a number of hours equal to or exceeding the hours expended by the claimant's attorney.

For example, in Diaz v. Palmetto General Hospital, No. SC14-1916 (Fla. Apr. 28, 2016), the statutory fee award was $13.28 per hour for 120 hours of work deemed to be necessarily and reasonably expended by the attorney for the claimant. The E/C's attorney spent 175 hours litigating the case, which was found to be a reasonable amount of time given its complex nature. Just as in this case, the JCC in Diaz found that the injured worker would not have recovered benefits without the aid and assistance of an attorney.

requirement that the fee be "reasonable" completely eviscerates the purpose of the attorney's fee provision and fails to provide any penalty to the E/C for wrongfully denying or delaying benefits in contravention to the stated purpose of the statutory scheme.

And although there is a "mutual renunciation of common-law rights and defenses by employers and employees alike," § 440.015, Fla. Stat., the employer under the workers' compensation law has the prerogative to raise a whole host of defenses to denying benefits, while the employee is at the mercy of the E/C in being required to see the doctors that are chosen by the E/C. As this case shows, to navigate the current workers' compensation system, after a denial by the E/C of benefits, would be an impossibility without the assistance of an attorney. The JCC explicitly found as much in this case.

Virtually since its inception, the right of a claimant to obtain a reasonable prevailing party attorney's fee has been central to the workers' compensation law. While the incentive for an attorney to represent a claimant in a relatively high-value case is readily apparent, the exact opposite is true in a low-value complex case, such as this one.

But the conclusive fee schedule prevents all injured workers—whether they have small-value or high-value claims—from presenting evidence to prove that the fee is inadequate in any given case. Without the ability of the attorney to present,

and the JCC to determine, the reasonableness of the fee award and to deviate where necessary, the risk is too great that the fee award will be entirely arbitrary, unjust, and grossly inadequate. We therefore conclude that the statute violates the state and federal constitutional guarantees of due process.[6]

C. Statutory Revival

Having concluded that the statute is unconstitutional, we must consider the remedy until the Legislature acts to cure the constitutional infirmity. "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994).

Accordingly, our holding that the conclusive fee schedule in section 440.34 is unconstitutional operates to revive the statute's immediate predecessor. This is the statute addressed by this Court in Murray, where we construed the statute to provide for a "reasonable" award of attorney's fees.

With Murray as a guide, a JCC must allow for a claimant to present evidence to show that application of the statutory fee schedule will result in an unreasonable

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6. Although Castellanos has also raised a strong argument based on the state constitutional right of access to courts in article I, section 21, of the Florida Constitution, because we conclude that the due process challenge is dispositive, we do not address the many other constitutional challenges to the statute.

fee. We emphasize, however, that the fee schedule remains the starting point, and that the revival of the predecessor statute does not mean that claimants' attorneys will receive a windfall. Only where the claimant can demonstrate, based on the standard this Court articulated long ago in Lee Engineering, that the fee schedule results in an unreasonable fee—such as in a case like this—will the claimant's attorney be entitled to a fee that deviates from the fee schedule.

III. CONCLUSION

The right of an injured worker to recover a reasonable prevailing party attorney's fee has been a key feature of the state's workers' compensation law since 1941. Through the 2009 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. Accordingly, we answer the rephrased certified question in the affirmative, quash the First District's decision upholding the patently unreasonable fee award, and direct that this case be remanded to the JCC for entry of a reasonable attorney's fee.

It is so ordered.

LABARGA, C.J., and QUINCE, and PERRY, JJ., concur.
LEWIS, J., concurs with an opinion.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.
POLSTON, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., concurring.

Over years of operation, construction, writing and rewriting, the Florida workers' compensation system has become increasingly complex and difficult to navigate without the assistance of one having specialized training. It is fair to say that the system once designed and intended to fairly distribute and allocate risk and economic burdens with reduced conflict and confrontation has rapidly expanded into an arena of such conflict and confusion that legal counsel is not only helpful, but it is now essential for the protection of workers. This need for representation has been well recognized as Florida's workers' compensation system has moved from the once quick and efficient delivery of necessary medical treatment and wages into the current maze of reduced benefits and a contentious process for the recovery of those benefits.

Now the workers' compensation program has emasculated the attorney fee provision to the extent that a mandatory fee schedule creates an irrebuttable presumption with regard to attorney fees that eliminates any consideration of

whether the attorney fee is adequate for workers to actually obtain competent counsel in these cases. Thus, circumstances such as this case result in providing counsel attorney fees in an amount of $1.53 per hour, which is clearly unreasonable and insufficient to afford workers the ability to secure competent counsel, and the irrebuttable or conclusive presumption with regard to attorney fees violates the three-pronged analysis applicable to determine constitutionality here. This irrebuttable or conclusive presumption violates the constitutional right to due process. See Recchi America Inc. v. Hall, 692 So. 2d 153 (Fla. 1997); Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984).

Additionally, where workers face the exclusive remedy under Florida's workers' compensation statutes, but are then denied the ability to secure competent counsel due to the totally unreasonable attorney fees provision, the legislation operates to unconstitutionally deny Florida workers access to our courts. As stated in Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973):

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries . . . .

CANADY, J., dissenting.

The fee schedule in section 440.34, Florida Statutes, embodies a policy determination by the Legislature that there should be a reasonable relationship between the value of the benefits obtained in litigating a workers' compensation claim and the amount of attorney's fees the employer or carrier is required to pay to the claimant. This policy violates none of the constitutional provisions on which the petitioner relies. Accordingly, I dissent from the majority's invalidation of this statutory provision.

In reaching the conclusion that the statute violates due process, the majority fails to directly address the actual policy of the statute. Instead, the majority assumes—without any reasoned explanation—that due process requires a particular definition of "reasonableness" in the award of statutory attorney's fees. The definition assumed by the majority categorically precludes the legislative policy requiring a reasonable relationship between the amount of a fee award and the amount of the recovery obtained by the efforts of the attorney. Certainly, this legislative policy may be subject to criticism. But there is no basis in our precedents or federal law for declaring it unconstitutional.

Although the Legislature long ago made provision for the award of attorney's fees to workers' compensation claimants, we have never held that—as the majority asserts—"a reasonable attorney's fee [is] the linchpin to the

constitutionality of the workers' compensation law." Majority op. at 6. And we have never held that it is unreasonable to require that an award of attorney's fees be commensurate with the benefits obtained. The policy adopted by the Legislature in section 440.34 may be subject to criticism, but it unquestionably has a rational basis.

This case illustrates the rationale for the legislative policy requiring that a fee award be commensurate with the recovery obtained. Here, the value of the claim was $822.70, and the claimant sought attorney's fees in the amount of $36,817.50—a fee nearly 45 times the amount of the recovery. Of course, an argument can be made that an award of fees in an amount so disproportionate to the recovery is necessary and appropriate to allow the effective litigation of a complex low-value claim. And a counter argument can be made that such disproportionate fee awards impose an unwarranted social cost. But the question for this Court is not which side of this policy debate has the best argument, but whether the policy adopted by the Legislature violates some constitutional requirement.

Our precedents and federal law provide no authority to support the proposition that due process—or any other constitutional requirement relied on by the petitioner—requires that statutory fee awards fully compensate for the effective litigation of all claims. Under the American Rule, parties must ordinarily bear the

expense of obtaining their own legal representation. Inevitably, under the American Rule, obtaining the assistance of an attorney for the litigation of low-value claims—whether simple or complex—often is not feasible. Given the undisputed constitutionality of the American Rule, there is no impediment to a legislative policy requiring that the amount of statutory fee awards be reasonably related to the amount of the recovery obtained. See Florida Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1149 (Fla. 1985) ("We find that an award of attorney fees to the prevailing party is 'a matter of substantive law properly under the aegis of the legislature,' in accordance with the long-standing American Rule adopted by this Court.")

The majority's reliance on the "three-part test for determining the constitutionality of a conclusive statutory presumption," majority op. at 26, to invalidate the statute is unjustified because the majority misunderstands the test and misapplies it in the context presented by this case. The majority's decision ignores the background of the three-part test. When that background is considered, it becomes abundantly clear that the majority has misapplied the test in this case.

The three-part test was first referred to by this Court in Gallie v. Wainwright, 362 So. 2d 936, 943-45 (Fla. 1978), where we rejected a claim that statutory and rule provisions limiting the availability of bond pending appeal by criminal defendants established an irrebuttable presumption that transgressed the

requirements of due process. The three-part test referred to in Gallie was derived from Weinberger v. Salfi, 422 U.S. 749, 752-53 (1975), which reversed a lower court's decision "invalidating [9-month] duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners." The lower court had held the statutory requirements invalid on the ground that they constituted an irrebuttable presumption that violated due process.

In Salfi, the three parts of the test utilized by the majority here were simply elements considered by the Court in determining whether the challenged statutory provisions comported with "standards of legislative reasonableness." 422 U.S. at at 776-77. Salfi relied on "[t]he standard for testing the validity of Congress' Social Security classification" set forth in Flemming v. Nestor, 363 U.S. 603, 611 (1960): " 'Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as (Social Security), we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.' " Salfi 422 U.S. at 768. Salfi also cited Richardson v. Belcher, 404 U.S. 78, 84 (1971), which, in rejecting a due process challenge to a provision of the Social Security Act, said: " 'If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then

the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.' " Salfi, 422 U.S. at 768-69.

Accordingly, the Salfi Court's reasoning was—unlike the majority's reasoning here—highly deferential to the legislative judgment underlying the challenged statutory provision:

> Under those standards [of legislative reasonableness], the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions . . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is [1] whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, [2] could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and [3] that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.

Salfi, 422 U.S. at 777.

The particular elements of the rational basis analysis in Salfi were based on the particular justification advanced by the Social Security Administration for the duration-of-relationship requirement—that is, as a "general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights." 422 U.S. at 780. The Court concluded that this concern was undoubtedly "legitimate," that it was "undoubtedly true that the duration-of-relationship

requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death" and that "Congress could rationally have concluded that any imprecision from which [the requirement] might suffer was justified by its ease and certainty of operation." Id.

It is readily apparent that the framework of the three-part analysis does not fit the context presented by the case on review here. Section 440.34 does not embody a prophylactic requirement akin to the eligibility requirement in Salfi. Section 440.34 thus does not present any question of "inherent imprecision." Id. at 777. By definition, the rule of proportionality embodied in the statute precisely and comprehensively protects against fee awards disproportionate to the recovery obtained. The award of such disproportionate fees is the very evil that the Legislature sought to eliminate. In its application of the inapposite three-part test, the majority simply ignores this fundamental point. Beyond that, the majority applies the elements of the test in a manner totally contrary to the manner in which Salfi applied them and totally at odds with the general rule "that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Id. at 768 (citing Nestor, 363 U.S. at 611).

It should not be ignored that Salfi reversed the lower court's application of the irrebuttable presumption doctrine and took pains to distinguish and limit earlier

cases that had relied on that doctrine to invalidate legislation. 422 U.S. at 771-72. In doing so, the Court expressed its strong concern that an expansive application of the irrebuttable presumption doctrine—like the application by the lower court—would turn that doctrine "into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Id. at 772. Underlying this concern is the reality that any legislative classification can be characterized as an irrebuttable presumption. The majority here has applied a test extracted from Salfi in a manner that flies in the face of the central concern expressed by the Court in Salfi justifying its reversal of the lower court. The line of reasoning adopted by the majority unquestionably has the potential to become a "virtual engine of destruction for countless legislative judgments" previously understood to be constitutional.

Although some of our prior cases have relied on the three-part test derived from Salfi, we have never applied that test to find a statutory provision unconstitutional in circumstances that have any similarity to the circumstances presented here. In Recchi America Inc. v. Hall, which is briefly discussed by the majority, the underlying legislative policy—as expressly stated in the statute—was that no workers' compensation would be payable for an injury occasioned primarily by the employee's intoxication. With that legislative policy in view, we

upheld the invalidation of a statutory irrebuttable presumption that an employee's injury was caused primarily by intoxication if the employee was working in a workplace with a drug-free workplace program and tested positive for alcohol or drugs at the time of injury. We concluded that "the conclusive presumption created a high potential for inaccuracy" and emphasized that the injured worker in the case "was injured when a coworker tripped and jabbed a long steel apparatus into the back of his head." Recchi, 692 So. 2d at 154-55.

Leaving aside the question of whether our analysis in Recchi is consistent with Salfi—which we did not mention—Recchi is readily distinguishable from the case now on review. Here, there is no expressly stated legislative policy regarding attorney's fees that might be implemented through a process of individualized determinations analogous to the expressly stated legislative policy regarding causation that was addressed in Recchi. No process of individualized factual determinations could better serve the legislative purpose of establishing proportionality between fee awards and recoveries obtained than does the statutory fee schedule.

Finally, I agree with Justice Polston that the majority "turns this Court's well-established precedent regarding facial challenges on its head[.]" Dissenting op. at 53 (Polston, J.)

I would answer the rephrased certified question in the negative and approve the decision of the First District.

POLSTON, J., concurs.

POLSTON, J., dissenting.

There is no conclusive presumption. The majority has rewritten the statute to avoid the standard governing facial challenges. I respectfully dissent.

In 2008, this Court issued an opinion interpreting the attorney's fees provision of Florida's workers' compensation law as amended in 2003 to include a reasonableness requirement. See Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008) (interpreting section 440.34, Florida Statutes (2003)). This Court in Murray determined that the plain language of the statute was ambiguous regarding reasonableness because subsection (1) did not include the term reasonable when providing for a mandatory fee schedule but subsection (3) did employ the term. Id. at 1061. Such ambiguity necessitated a judicial interpretation utilizing the rules of statutory construction. Id. In response to this Court's decision in Murray, the Legislature amended the statute to eliminate any ambiguity, which the Legislature is constitutionally authorized to do. Specifically, in 2009, the Legislature eliminated all references to reasonableness, rendering moot this Court's 2008 interpretation of the provision as including a reasonableness requirement. See ch. 2009-94, § 1, Laws of Fla. However, with today's decision, the majority reinstates

its prior 2008 holding by turning facial constitutional review completely on its head and rewriting the 2009 statute.

To be clear, I am not saying that a constitutional challenge to section 440.34, Florida Statutes (2009), could never succeed. In fact, I would not foreclose the possibility of a successful as-applied constitutional challenge to the attorney's fees provision based upon access to courts, depending upon the particular facts of the case involved. However, as acknowledged during oral argument, the petitioner did not raise any as-applied challenge to the statute in this Court, even given what would certainly seem to be the rather egregious facts of his case. Instead, the petitioner raised a facial challenge that lacks any merit under our precedent.

In a facial challenge, this Court has emphasized that "our review is limited." Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014). Specifically, "we consider only the text of the statute." Id. "For a statute to be held facially unconstitutional, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally applied." Id.; see also Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) ("A facial challenge to a statute is more difficult than an 'as applied' challenge, because the challenger must establish that no set of circumstances exists under which the statute would be valid."); cf. Accelerated Benefits Corp. v. Dep't of Ins., 813 So. 2d 117, 120 (Fla. 1st DCA 2002) ("In considering an 'as applied' challenge, the court is to consider the facts of the case

at hand."). Moreover, "when we review the constitutionality of a statute, we accord legislative acts a presumption of constitutionality and construe the challenged legislation to effect a constitutional outcome when possible." Abdool, 141 So. 3d at 538 (citing Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005)). "As a result, [an] Act will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some [] circumstances." Id.

Applying this well-established precedent, the facial challenge at issue here fails, even assuming that adequate and reasonable attorney's fees are constitutionally required. There are some workers' compensation cases where "the amount of benefits is substantial, but the legal issues are simple and direct, and do not require exceptional skill, knowledge, and experience." Murray, 994 So. 2d at 1057 n.4. In these high pay-off, low-effort cases, the statutory fee schedule could provide reasonable compensation for a prevailing claimant's attorney. After all, section 440.34(1), Florida Statutes (2009), provides that the attorney's fee must equal 20 percent of the first $5,000 in benefits, 15 percent of the next $5,000, 10 percent of the remaining during the first 10 years of the claim, and 5 percent after 10 years. Therefore, because there are a set of circumstances under which the attorney's fees provision could be constitutionally applied, the provision is facially constitutional under our precedent. See Fla. Dep't of Revenue v. City of

Gainesville, 918 So. 2d 250, 265 (Fla. 2005) ("[I]n a facial constitutional challenge, we determine only whether there is any set of circumstances under which the challenged enactment might be upheld.").

The majority reaches a contrary holding, not by applying our precedent regarding facial challenges, but by ignoring it altogether and never even citing the well-established standard. The majority just declares that the attorney's fees provision in Florida's workers' compensation law includes an irrebuttable presumption of reasonableness, and then it holds that this presumption is a violation of procedural due process under both the United States and Florida constitutions. But the 2009 provision does not mention reasonableness at all and, therefore, does not include any such presumption, irrebuttable or otherwise. Cf. Recchi America Inc. v. Hall, 692 So. 2d 153 (Fla. 1997) (declaring an irrebuttable presumption invalid as a violation of due process where the statute plainly and expressly included a presumption that an accident was primarily caused by the worker's intoxication if that worker's urine test revealed the presence of alcohol or drugs). Section 440.34 as plainly written prescribes a mandatory schedule for prevailing party attorney's fees. It never states that those attorney's fees have to be or should be considered reasonable. In fact, it was specifically amended post-Murray to eliminate the term reasonable, which eliminates the ability of this Court to say that the statute includes anything about reasonableness. And because the

statute does not include any presumption of reasonableness (let alone a conclusive presumption), the majority's analysis of the constitutionality of that non-existent presumption is erroneous.

The majority's decision turns this Court's well-established precedent regarding facial challenges on its head and accomplishes by the backdoor what it could not do by the front door. The majority is really deciding that reasonable attorney's fees are constitutionally required. But by rewriting the 2009 statute to include a conclusive presumption, the majority avoids the fact that the state and federal due process clauses do not require Florida's workers' compensation scheme to include reasonable prevailing party attorney's fees. The majority also invalidates a statute that might sometimes, but not all the time, be applied in a manner that denies reasonable attorney's fees. However, this Court's precedent regarding facial challenges requires that such a statute be upheld. See State v. Ecker, 311 So. 2d 104, 110 (Fla. 1975) ("While the statute might be unconstitutionally applied in certain situations, this is no ground for finding the statute itself [facially] unconstitutional.").

Accordingly, I respectfully dissent.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 1D12-3639

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Supreme Court of Florida

No. SC13-1930

BRADLEY WESTPHAL,
Petitioner,

vs.

CITY OF ST. PETERSBURG, etc., et al.,
Respondents.

No. SC13-1976

CITY OF ST. PETERSBURG, etc.,
Petitioner,

vs.

BRADLEY WESTPHAL,
Respondent.

[June 9, 2016]
CORRECTED OPINION

PARIENTE, J.

In this case, we consider the constitutionality of section 440.15(2)(a), Florida Statutes (2009)—part of the state's workers' compensation law—which cuts off disability benefits after 104 weeks to a worker who is totally disabled and

incapable of working but who has not yet reached maximum medical improvement. We conclude that this portion of the worker's compensation statute is unconstitutional under article I, section 21, of the Florida Constitution, as a denial of the right of access to courts, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time—thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

In Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management, 122 So. 3d 440, 442 (Fla. 1st DCA 2013), an en banc majority of the First District Court of Appeal valiantly attempted to save the statute from unconstitutionality by interpreting section 440.15(2)(a) so that the severely injured worker who can no longer receive temporary total disability benefits, but who is not yet eligible for permanent total disability benefits, would not be cut off from compensation after 104 weeks.[1] The judiciary, however, is without power to

1. In its decision, the First District ruled upon the following question, which it certified to be of great public importance:

> IS A WORKER WHO IS TOTALLY DISABLED AS A RESULT OF A WORKPLACE ACCIDENT, BUT STILL IMPROVING FROM A MEDICAL STANDPOINT AT THE TIME TEMPORARY TOTAL DISABILITY BENEFITS EXPIRE, DEEMED TO BE AT MAXIMUM MEDICAL IMPROVEMENT BY OPERATION OF LAW AND THEREFORE ELIGIBLE TO ASSERT A CLAIM FOR PERMANENT AND TOTAL DISABILITY BENEFITS?

rewrite a plainly written statute, even if it is to avoid an unconstitutional result. See Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment."). We accordingly quash the First District's decision.

Consistent with the views of both the petitioner, Bradley Westphal, and the principal respondent, the City of St. Petersburg, we conclude that section 440.15(2)(a) of the workers' compensation law is plainly written and therefore does not permit this Court to resort to rules of statutory construction. See Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004). Instead, we must give the statute its plain and obvious meaning, which provides that "[o]nce the employee reaches the maximum number of weeks allowed [104 weeks], or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined." § 440.15(2)(a), Fla. Stat. The statute does not—

Westphal, 122 So. 3d at 448. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. Because of our conclusion that the First District's interpretation of the statute cannot withstand scrutiny, and our holding that the statute is unconstitutional, we do not specifically answer the certified question. As our analysis in this opinion explains, to the extent the certified question simply asks whether the workers' compensation law constitutionally permits the statutory "gap" at issue, we answer that question in the negative.

as the First District erroneously concluded—provide that the worker is at that time legally entitled to permanent total disability benefits, nor does it provide that the worker is automatically deemed to be at maximum medical improvement based on the cessation of temporary total disability benefits. See Westphal, 122 So. 3d at 444.

Applying the statute's plain meaning, we conclude that the 104-week limitation on temporary total disability benefits results in a statutory gap in benefits, in violation of the constitutional right of access to courts. The stated legislative intent of the workers' compensation law is 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." § 440.015, Fla. Stat. (2009). Section 440.15(2)(a), however, operates in the opposite manner. The statute cuts off a severely injured worker from disability benefits at a critical time, when the worker cannot return to work and is totally disabled but the worker's doctors—chosen by the employer—deem that the worker may still continue to medically improve.

As applied to these circumstances, the workers' compensation law undoubtedly fails to provide "full medical care and wage-loss payments for total or partial disability regardless of fault." Martinez v. Scanlan, 582 So. 2d 1167, 1171-72 (Fla. 1991). Instead, for injured workers like Westphal who are not yet legally

entitled to assert a claim for permanent total disability benefits at the conclusion of 104 weeks of temporary total disability benefits, the workers' compensation law lacks adequate and sufficient safeguards and cannot be said to continue functioning as a "system of compensation without contest" that stands as a reasonable alternative to tort litigation. Mullarkey v. Fla. Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972). Contrary to Justice Canady's dissenting opinion, the seminal case on the meaning of the Florida Constitution's access to courts provision, Kluger v. White, 281 So. 2d 1 (Fla. 1973), specifically discussed the test for determining the constitutionality of the workers' compensation statutory scheme under the access to courts provision, article I, section 21, of the Florida Constitution. The constitutional yardstick, which we applied in Martinez and Mullarkey for determining whether an access-to-courts violation occurred as a result of changes made to the workers' compensation statutory scheme, is whether the scheme continues to provide "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job." Kluger, 281 So. 2d at 4.

Accordingly, we hold that the statute as written by the Legislature is unconstitutional. However, we conclude that this unconstitutional limitation on temporary total disability benefits does not render the entire workers'

compensation system invalid.[2] Rather, we employ the remedy of statutory revival and direct that the limitation in the workers' compensation law preceding the 1994 amendments to section 440.15(2)(a) is revived, which provides for temporary total disability benefits not to exceed 260 weeks—five years of eligibility rather than only two years, a limitation we previously held "passes constitutional muster." Martinez, 582 So. 2d at 1172.

I. FACTS AND PROCEDURAL HISTORY

In December 2009, Bradley Westphal, then a fifty-three-year-old firefighter in St. Petersburg, Florida, suffered a severe lower back injury caused by lifting

2. To the extent Justice Lewis's concurring in result opinion suggests as a remedy that chapter 440 should be "invalidated where defective," the remedy of invalidating other sections in chapter 440 beyond section 440.15(2)(a) is not properly before us. In his briefing on this matter to the Court, Westphal requested reversal of the en banc decision of the First District Court of Appeal to "either reinstate the panel decision"—which revived the pre-1994 statute that provided for the administration of 260 weeks of temporary total disability benefits—or hold "that the 104 weeks limitation on temporary disability" is "unconstitutional as applied to the facts of this case and do so prospectively." Petitioner's Initial Brief at 47. Because we hold that the statute is unconstitutional as applied to Westphal and others similarly situated, we have granted Westphal's requested relief of reversing the en banc decision of the First District Court of Appeal and will not consider an argument of the unconstitutionality of the entire workers' compensation law when the parties have not raised such an expansive remedy. Although the remedy of invalidating the entire workers' compensation law was suggested at some length by the Florida Workers' Advocates in an amicus curiae brief filed in support of Westphal, we do not consider arguments raised by amici curiae that were not raised by the parties. See Riechmann v. State, 966 So. 2d 298, 304 n.8 (Fla. 2007); Dade Cty. v. E. Air Lines, Inc., 212 So. 2d 7, 8 (Fla. 1968); Michels v. Orange Cty. Fire Rescue, 819 So. 2d 158, 159-60 (Fla. 1st DCA 2002).

heavy furniture in the course of fighting a fire. As a result of the lower back injury, Westphal experienced extreme pain and loss of feeling in his left leg below the knee and required multiple surgical procedures, including an eventual spinal fusion.

Shortly after his workplace injury, Westphal began receiving benefits pursuant to the workers' compensation law set forth in chapter 440, Florida Statutes (2009). Specifically, the City of St. Petersburg began to provide both indemnity benefits, in the form of temporary total disability benefits pursuant to section 440.15(2), Florida Statutes, and medical benefits.

Under section 440.15(2)(a), entitlement to temporary total disability benefits ends when a totally disabled injured worker reaches the date of maximum medical improvement or after 104 weeks, whichever occurs earlier. § 440.15(2)(a), Fla. Stat. The "date of maximum medical improvement" is defined in section 440.02(10), Florida Statutes (2009), as "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." Westphal did not reach maximum medical improvement prior to the expiration of the 104-week limitation on temporary total disability benefits.

At the expiration of temporary total disability benefits, Westphal was still incapable of working or obtaining employment, based on the advice of his doctors

and the vocational experts that examined him. In an attempt to replace his pre-injury wages of approximately $1,500 per week that he was losing because of his injuries, Westphal filed a petition for benefits, claiming either further temporary disability or permanent total disability pursuant to section 440.15(1), Florida Statutes (2009).

A. Judge of Compensation Claims Decision

The Judge of Compensation Claims (JCC) held a hearing on Westphal's petition and subsequently denied the claim for permanent total disability benefits based on its interpretation of City of Pensacola Firefighters v. Oswald, 710 So. 2d 95 (Fla. 1st DCA 1998), and Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011). In Oswald, the First District held that to receive permanent total disability benefits, "an employee whose temporary benefits have run out—or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be 'existing after the date of maximum medical improvement.' " 710 So. 2d at 98, abrogated by Westphal, 122 So. 3d at 448 (quoting § 440.02(19), Fla. Stat. (Supp. 1994)). The First District also observed that the statutory scheme could create a statutory gap—a period of time when totally disabled individuals would no longer be eligible for temporary total disability benefits and could not receive any disability benefits until, possibly, finally being declared eligible for permanent

total disability benefits. Id. at 97-98. In Hadley, the First District again acknowledged the concern of a statutory gap in benefits, but reaffirmed Oswald nonetheless. See Hadley, 78 So. 3d at 624-25, receded from by Westphal, 122 So. 3d at 442.

Based on this line of case law, the JCC denied Westphal's claim. In its final order, the JCC found that Westphal had not reached maximum medical improvement and that it was "too speculative to determine whether he will remain totally disabled after the date of [maximum medical improvement] has been reached from a physical standpoint." Thus, Westphal fell into the statutory gap—still totally disabled at the cessation of temporary total disability benefits, but not yet entitled to permanent total disability benefits because he could not prove that he would still be totally disabled when he reached maximum medical improvement. He was, in essence, completely cut off from disability benefits for an indefinite amount of time, unless and until he could claim entitlement to permanent total disability benefits at some future date and, even then, without any ability to recover disability benefits for his time in the statutory gap.

B. First District Panel Decision

Westphal appealed to the First District, contending that the JCC erred in determining that he was not entitled to permanent total disability benefits. He further argued that the 104-week statutory limitation on temporary total disability

benefits, as applied to him, was an unconstitutional denial of access to courts. A panel of the First District agreed with the constitutional claim, holding that the 104-week limitation on temporary total disability benefits was unconstitutional as applied to the facts of this case.

Specifically, relying on Kluger, 281 So. 2d 1, the First District panel concluded that the 104-week limitation on temporary total disability benefits was an inadequate remedy as compared to the 350 weeks available when voters adopted the access to courts provision in the 1968 Florida Constitution. The First District panel also observed that the 104-week limitation on temporary total disability benefits was the lowest in the United States. The First District panel applied its decision prospectively and instructed the JCC to grant Westphal additional temporary total disability benefits, not to exceed 260 weeks, as would have been provided under the relevant statutory provisions in effect before the 1994 amendment of section 440.15(2)(a), limiting eligibility for temporary total disability benefits to a maximum of 104 weeks.

C. First District En Banc Decision

Subsequent to the panel decision, the First District granted motions for rehearing en banc filed by the City and the State. The First District then issued an en banc decision withdrawing the panel opinion that had declared the statute unconstitutional. Setting forth a new interpretation of the statute to avoid a holding

of unconstitutionality, the First District's en banc decision receded from Hadley, 78 So. 3d 621, and abrogated Oswald, 710 So. 2d 95.

In addressing the issue of Westphal's entitlement to disability benefits, the en banc majority determined that the First District's construction of the statute fifteen years earlier in Oswald, and then again two years earlier in Hadley, was incorrect. Specifically, the First District noted that the statute requires a medical evaluation either when an injured worker reaches maximum medical improvement or six weeks before the expiration of the 104-week period of eligibility for temporary total disability benefits, whichever occurs earlier, and that the doctor must assign an impairment rating as part of this evaluation. Westphal, 122 So. 3d at 444. The First District construed the use of the phrase "permanent impairment" in section 440.15(2)(a) to signify that the worker has attained maximum medical improvement. Id. at 445-46. Accordingly, the First District held that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits." Id. at 442.

As a result of this new interpretation of the statute, which eliminated the statutory gap, the First District found it unnecessary to consider whether its prior,

now discredited interpretation of the statute in Hadley—recognizing the gap—rendered the statute unconstitutional as a denial of the right of access to courts. Id. at 447. The First District then certified the question it passed upon as one of great public importance. Id. at 448. We granted review[3] and now quash the First District's en banc decision and hold the statute unconstitutional as applied, in accordance with the prior panel opinion.

II. ANALYSIS

Both Westphal as the petitioner and the City as the principal respondent argue before this Court that the First District's previous construction of the statute in Hadley and Oswald was correct, and that the new interpretation advanced by the en banc majority in Westphal amounts to a violation of separation of powers, due process, and the principle of stare decisis. The State, which is also a respondent, agrees that the previous interpretation of the First District in Hadley and Oswald is correct, but argues that the First District's new construction of section 440.15(2)(a) is a reasonable alternative interpretation if this Court is inclined to declare the 104-week limitation on temporary total disability benefits to be invalid as a denial of access to courts. Westphal, however, argues that there is no judicial fix and that

3. Both Westphal and the City invoked this Court's discretionary jurisdiction. We consolidated the petitions but retained the two different case numbers. During briefing, we treated Westphal as the petitioner and the City as the respondent, and we accordingly employ those same designations here.

the 104-week limitation in section 440.15(2)(a), as applied to him and others similarly situated, is an unconstitutional denial of access to courts.

We thus begin our analysis by interpreting section 440.15 to determine if the First District's en banc opinion—eliminating the statutory gap—provides a permissible statutory construction, or if the First District's prior opinions in Hadley and Oswald—recognizing the statutory gap created by the Legislature—provided the correct interpretation. After concluding that the First District's en banc opinion is an impermissible judicial rewrite of the Legislature's plainly written statute, we are forced to confront the constitutional issue of whether the statute, as applied to Westphal and other similarly situated severely injured workers, is unconstitutional. Concluding that the statute, as applied, violates the access to courts provision of the Florida Constitution, we conclude by considering the appropriate remedy.

A. Section 440.15, Florida Statutes

Section 440.15, Florida Statutes (2009), governs the payment of disability benefits to injured workers. As of the 1968 adoption of the Florida Constitution, permanent total disability benefits were determined "in accordance with the facts," and the term "maximum medical improvement" was not included in the workers' compensation law. § 440.15(1), Fla. Stat. (1967). Nevertheless, the phrase "maximum medical improvement" was part of this Court's lexicon because it assisted in determining the permanence of the injury. Indeed, in 1969, this Court

noted that "[t]he date of maximum medical improvement marks the end of temporary disability and the beginning of permanent disability." Corral v. McCrory Corp., 228 So. 2d 900, 903 (Fla. 1969). At that time, section 440.15(2) provided for the payment of temporary total disability benefits for a duration not to exceed 350 weeks. § 440.15(2), Fla. Stat. (1967).

In 1979, the Legislature added the term "date of maximum medical improvement" to the statute, defining it consistently with this Court's prior 1969 construction in Corral and requiring that the date be "based upon reasonable medical probability." § 440.02(22), Fla. Stat. (1979). That statutory definition has remained unchanged to this day.

In 1990, the Legislature reduced the duration of temporary total disability benefits from 350 weeks to 260 weeks. § 440.15(2), Fla. Stat. (1990). Then, just four years later, and as part of an extensive statutory overhaul, the Legislature further reduced the duration of temporary total disability benefits from 260 weeks to 104 weeks. § 440.15(2)(a), Fla. Stat. (1994).

Accordingly, in 2009, at the time of the events giving rise to this case, section 440.15(1) provided in part:

> (a) In case of total disability adjudged to be permanent, $66^2/_3$ percent of the average weekly wages shall be paid to the employee during the continuance of such total disability. No compensation shall be payable under this section if the employee is engaged in, or is physically capable of engaging in, at least sedentary employment.

> (b) In the following cases, an injured employee is presumed to be permanently and totally disabled unless the employer or carrier establishes that the employee is physically capable of engaging in at least sedentary employment within a 50-mile radius of the employee's residence:
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> . . . .
>
> In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is not able to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to his or her physical limitation. . . . Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are eligible for permanent total benefits. In no other case may permanent total disability be awarded.

Under the plain language of this provision, permanent total disability benefits are expressly limited to "claimants with catastrophic injuries or claimants who are incapable of engaging in employment." § 440.15(1)(b), Fla. Stat. (2009). "In no other case may permanent total disability be awarded." Id.

Section 440.15(2)(a), which governs temporary total disability benefits, provided in part as follows:

> Subject to subsection (7), in case of disability total in character but temporary in quality, $66^{2}/_{3}$ percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1), and s. 440.14(3).[4] Once the employee reaches the maximum number

4. Section 440.12(1), Florida Statutes (2009), provides: "No compensation shall be allowed for the first 7 days of the disability, except benefits provided for in s. 440.13. However, if the injury results in disability of more than 21 days, compensation shall be allowed from the commencement of the disability." Section 440.14(3), Florida Statutes (2009), provides in part: "The department shall

> of weeks allowed, or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.

Under the plain language of this provision, temporary total disability benefits are payable for no more than 104 weeks, after which the worker's permanent impairment rating must be determined. "The permanent impairment rating is used to pay 'impairment income benefits,' " as distinguished from permanent total disability benefits, "commencing on 'the day after the employee reaches [maximum medical improvement] or after the expiration of temporary benefits, whichever occurs earlier,' and continuing for a period determined by the employee's percentage of impairment." Hadley, 78 So. 3d at 624 (quoting § 440.15(3)(g), Fla. Stat.).

As the First District recognized in Hadley, "[t]he statutory scheme in section 440.15 works seamlessly when the injured employee reaches [maximum medical improvement] prior to the expiration of the 104 weeks of temporary disability benefits." Id. But where "the employee is not at [maximum medical improvement] at the expiration of the 104 weeks, there is the potential for a 'gap' in disability benefits because [temporary total disability] benefits cease by

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establish by rule a form which shall contain a simplified checklist of those items which may be included as 'wage' for determining the average weekly wage."

operation of law after 104 weeks and entitlement to [permanent total disability] benefits is generally not ripe until the employee reaches [maximum medical improvement]." Id.

Analyzing these statutory provisions, and in an apparent effort to avoid the statutory gap, the First District in Westphal ultimately concluded that the Legislature's use of the term "permanent impairment" in section 440.15(2)(a) signifies that the disabled worker has attained maximum medical improvement by operation of law. See Westphal, 122 So. 3d at 445. The First District therefore held that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits." Id. at 442.

Although this Court's review of the First District's statutory interpretation is de novo, "statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." Crist v. Fla. Ass'n of Crim. Def. Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008). While we are confident that the First District en banc majority was attempting to save the statute's constitutionality by interpreting it so as to avoid a draconian result for

severely injured workers, the clear language of the statute simply does not allow us to agree with the First District's interpretation.

Rather, the previous interpretation provided by the First District in Oswald, and adhered to in Hadley, is consistent with the Legislature's plainly stated intent, which nowhere indicates that the Legislature sought to equate the expiration of temporary total disability benefits with maximum medical improvement. As stated in Oswald, under the plain language of the statute, "an employee whose temporary benefits have run out—or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be existing after the date of maximum medical improvement" in order to be eligible to receive permanent total disability benefits. 710 So. 2d at 98 (internal citation omitted).

Specifically, section 440.15(2)(a) requires an injured worker's "permanent impairment,"[5] as opposed to permanent total disability, to be determined. In addition, section 440.15(3), which pertains to "permanent impairment benefits," is the only section that discusses an "evaluation" for permanent impairment of the employee, with entitlement to such benefits to commence the day after the

5. As defined in section 440.02(22), Florida Statutes (2009), "permanent impairment" means "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."

employee reaches maximum medical improvement or his or her temporary total disability benefits expire. Permanent impairment benefits are distinct from, and not a substitute for, total disability benefits. Thus, the plain language of the statute provides for permanent impairment to be determined for purposes of impairment benefits as opposed to permanent total disability benefits.

It is clear from the statute that the Legislature intended to limit the duration of temporary total disability benefits to a maximum of 104 weeks. It is further clear that the Legislature intended to limit the class of individuals who are entitled to permanent total disability benefits to those with catastrophic injuries and those who are able to demonstrate a permanent inability to engage in even sedentary employment within a fifty-mile radius of their home. In other words, these provisions "create a gap in disability benefits for those injured workers who are totally disabled upon the expiration of temporary disability benefits but fail to prove prospectively that total disability will exist after the date of [maximum medical improvement]." Hadley, 78 So. 3d at 626 (quoting Crum v. Richmond, 46 So. 3d 633, 637 n.3 (Fla. 1st DCA 2010)).

Although this Court must, whenever possible, construe statutes to effect a constitutional outcome, we may not salvage a plainly written statute by rewriting it. See Sult v. State, 906 So. 2d 1013, 1019 (Fla. 2005) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative

enactments."). The gap in benefits caused by the Legislature's decision to reduce the duration of entitlement to temporary total disability benefits may be an unintentional, unanticipated, and unfortunate result. But even if potentially unwise and unfair, it is not the prerogative of the courts to rewrite a statute to overcome its shortcomings. See Clines v. State, 912 So. 2d 550, 558 (Fla. 2005) ("A court's function is to interpret statutes as they are written and give effect to each word in the statute." (quoting Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001))); Metro. Dade Cty. v. Bridges, 402 So. 2d 411, 414 (Fla. 1981), receded from on other grounds by Makemson v. Martin Cty., 491 So. 2d 1109 (Fla. 1986) (explaining that "courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional").

Because we hold that the statute is clear in creating a statutory gap in benefits, and thus not susceptible to the rules of statutory construction, we turn to Westphal's constitutional challenge—that the statute as plainly written results in a denial of access to courts.

B. Denial of Access to Courts

Article I, section 21, of the Florida Constitution, part of our state constitutional "Declaration of Rights" since 1968, guarantees every person access to the courts and ensures the administration of justice without denial or delay: "The

courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. (emphasis added). This important state constitutional right has been construed liberally in order to "guarantee broad accessibility to the courts for resolving disputes." Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992), receded from on other grounds by Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996).

In Kluger, this Court explained the meaning of the access to courts provision and the necessary showing for demonstrating a constitutional violation based on access to courts:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So. 2d at 4.

Prior to 1968, when the access to courts provision was adopted, the Legislature had already abolished the common-law tort remedy for injured workers and enacted a workers' compensation law "as administrative legislation to be simple, expeditious, and inexpensive so that the injured employee, his family, or

society generally, would be relieved of the economic stress resulting from work-connected injuries, and place the burden on the industry which caused the injury." Lee Eng'g & Constr. Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968). The workers' compensation law "abolishes the right to sue one's employer and substitutes the right to receive benefits under the compensation scheme." Sasso v. Ram Prop. Mgmt., 452 So. 2d 932, 933 (Fla. 1984).

Nevertheless, the fact that workers' compensation was created prior to 1968 as a non-judicial statutory scheme of no fault benefits intended to provide full medical care and wage-loss payments does not mean that changes to the workers' compensation law to reduce or eliminate benefits are immune from a constitutional attack based on access to courts. In fact, this Court in Kluger specifically discussed the alternative remedy of workers' compensation, explaining that "[w]orkmen's compensation abolished the right to sue one's employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury." Kluger, 281 So. 2d at 4 (emphasis added). In other words, as Kluger held, workers' compensation constitutes a "reasonable alternative" to tort litigation—and therefore does not violate the access to courts provision—so long as it provides adequate and sufficient safeguards for the injured employee. Id.

This Court has applied the Kluger analysis in subsequent cases that have raised constitutional challenges to the workers' compensation law based on access to courts. Citing to Kluger, this Court in Martinez explained that in order to be upheld as constitutional, the workers' compensation law must continue to provide a "reasonable alternative to tort litigation." Martinez, 582 So. 2d at 1171-72; see also Mahoney v. Sears, Roebuck & Co., 440 So. 2d 1285, 1286 (Fla. 1983) ("Workers' compensation, therefore, still stands as a reasonable litigation alternative.").

In Martinez, this Court noted that it "previously has rejected claims that workers' compensation laws violate access to courts by failing to provide a reasonable alternative to common-law tort remedies." Martinez, 582 So. 2d at 1171 (citing Kluger, 281 So. 2d at 4). Although the 1990 amendment addressed by the Court in Martinez "undoubtedly reduce[d] benefits to eligible workers," by reducing the administration of temporary total disability benefits from 350 weeks to 260 weeks, this Court concluded at that time that "the workers' compensation law remains a reasonable alternative to tort litigation." Id. at 1171-72 (emphasis added). But this conclusion was premised on the holding that the workers' compensation scheme as a whole continued to provide "injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation." Id. at 1172. That is,

under the Kluger analysis, the law at the time of Martinez, which provided for 260 weeks for temporary total disability, continued to provide adequate and sufficient safeguards for injured employees.

Therefore, although this Court has rejected constitutional challenges to the workers' compensation law in the past, our precedent clearly establishes that, when confronted with a constitutional challenge based on access to courts, we must determine whether the law "remains a reasonable alternative to tort litigation." Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282, 1284 (Fla. 1983). However, because the workers' compensation law had already been adopted in 1968, the question in this case is whether the workers' compensation law with regard to the 104-week limitation remains a "system of compensation without contest," Mullarkey, 268 So. 2d at 366, that provides "full medical care and wage-loss payments for total or partial disability regardless of fault," Martinez, 582 So. 2d at 1172 (emphasis added).

The 104-week limitation on temporary total disability benefits and the statutory gap must therefore be viewed through the analytical paradigm of Kluger, asking whether the workers' compensation law continues to provide adequate and sufficient safeguards for the injured worker and thus constitutes a constitutional, reasonable alternative to tort litigation. Kluger, 281 So. 2d at 4. The "reasonable alternative" test is then the linchpin and measuring stick, and this Court has

undoubtedly upheld as constitutional many limitations on workers' compensation benefits as benefits have progressively been reduced over the years and the statutory scheme changed to the detriment of the injured worker.

But, there must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a denial of benefits—thus creating a constitutional violation. We accordingly must review what has occurred to the workers' compensation system since the 1968 adoption of the access to courts provision, as it relates to providing "full medical care and wage-loss payments for total or partial disability regardless of fault," Martinez, 582 So. 2d at 1172, in order to determine whether we have now reached that constitutional "tipping point."

As applied to Westphal, the current workers' compensation statutory scheme does not just reduce the amount of benefits he would receive, which was the issue we addressed in Martinez, but in fact completely cuts off his ability to receive any disability benefits at all. It does so even though there is no dispute that Westphal remained a severely injured and disabled firefighter under active treatment by doctors the City selected for him. As stated in the First District's original panel opinion:

> Under this law, the City—not Westphal—had the right to select and, if appropriate, de-select, the doctors who would treat his work-related injuries. Through this statutory system of recovery, the City had the right to meet and confer with their selected doctors without Westphal's involvement, and obtain otherwise-confidential medical information—whether or not Westphal consented to such

> communications. And the City had the right to make decisions as to whether it would authorize the medical treatment recommended by the doctors of its choosing. For his part, Westphal, removed from his otherwise inherent right to select his medical providers and make unfettered decisions about his medical care, was required to follow the recommendations of the doctors authorized by his employer. Should he fail to do so, he risked losing entitlement to his workers' compensation benefits, his only legal remedy.
>
> As part of his medical care, Westphal required multiple surgical procedures, culminating in a five-level fusion of the lumbar spine. Under chapter 440, Westphal was then required to refrain from working and go without disability pay or wages—and wait. Westphal had to wait until the [City's] authorized doctors opined that he had reached maximum medical improvement, with no guarantee that such a day would ever come. But, even once he fully recovered, Westphal could not, under normal circumstances, recover disability benefits for the indeterminate waiting period.

Westphal v. City of St. Petersburg/City of St. Petersburg Risk Mgmt., No. 1D12-3563, slip op. at 7-8 (Fla. 1st DCA Feb. 28, 2013) (footnote omitted) (emphasis added), opinion withdrawn and superseded on rehearing en banc by Westphal, 122 So. 3d 440. In other words, even though doctors chosen by the City had performed multiple surgical procedures culminating in a five-level spinal fusion, because those same doctors did not render an opinion that Westphal had reached maximum medical improvement—that is, that he had reached the end of his medical recovery and would improve no further—Westphal was not yet eligible for permanent total disability benefits. And there was no way to know when those doctors would determine that he had reached maximum medical improvement, leaving Westphal

without disability benefits for an indefinite amount of time while he was still totally disabled and incapable of working.

In comparing the rights of a worker such as Westphal injured on the job today with those of a worker injured in 1968, the extent of the changes in the workers' compensation system is dramatic. A worker injured in 1968 was entitled to receive temporary total disability benefits for up to 350 weeks. See § 440.15(2), Fla. Stat. (1967). In 1990, the Legislature reduced the availability of temporary total disability benefits from 350 to 260 weeks—a 25.7% reduction of two years. See ch. 90-201, § 20, Laws of Fla. Then, in 1993, the Legislature again reduced the availability of temporary total disability benefits, this time from 260 weeks to 104 weeks—a 60% reduction. See ch. 93-415, § 20, Laws of Fla. This means that an injured worker such as Westphal is now eligible to receive only 104 weeks of temporary total disability benefits—a massive 70% reduction when compared to the temporary total disability benefits available in 1968.

It is uncontroverted that decreasing substantially the period of payments from 350 weeks to 104 weeks, standing alone, results in a dramatic reduction from almost seven years of disability benefits down to two years. Whereas almost seven years or even five years post-accident should be a reasonable period for an injured worker to achieve maximum medical improvement, clearly two years is not for the

most severely injured of workers, like Westphal, who might be in need of multiple surgical interventions.

Currently, at the conclusion of the 104-week limit, temporary total disability benefits cease, regardless of the condition of the injured worker. Therefore, rather than receive "full medical care and wage-loss payments" for a continuing disability, as the workers' compensation law was intended, an injured worker's full medical care and wage-loss payments are eliminated after 104 weeks if the worker falls into the statutory gap. This is true even if the worker remains incapable of working for an indefinite period of time, based on the advice of the employer-selected doctors.

Recognizing the constitutional implications of such a statutory scheme, Judge Van Nortwick, in his dissent in Hadley, cogently noted:

> [I]n the case of a totally disabled claimant whose rights to temporary disability benefits has expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant's cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers' Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.

78 So. 3d at 634 (Van Nortwick, J., dissenting). We have now reached that point at which "the claimant's cause of action has been effectively eliminated"—the constitutional "tipping point" of which Judge Van Nortwick forewarned.

We conclude that the 104-week limitation on temporary total disability benefits, as applied to a worker like Westphal, who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, workers such as Westphal are denied their constitutional right of access to the courts. We agree with the point our colleague, Justice Lewis, makes in his concurring in result opinion that:

> Under the plain language of the statute, many hardworking Floridians who become injured in the course of employment are denied the benefits necessary to pay their bills and survive on a day-to-day basis. The inequitable impact of this statute is patent because it provides permanent total disability benefits to the disabled worker who reaches maximum medical improvement quickly, but arbitrarily and indefinitely terminates benefits to other disabled workers—i.e., until the employee proves that he or she is permanently and totally disabled once maximum medical improvement is attained, even where there is no dispute that the employee is totally disabled at the time the temporary benefits expire, and even if maximum medical improvement will occur in the future.

Concurring in result op. of Lewis, J., at 39-40 (footnote omitted) (emphasis in original).

Sadly, Westphal's case is not an isolated one. As observed by Judge Thomas in the First District's panel opinion:

> When an employee sustains serious injuries that require prolonged or complicated medical treatment, it is not unusual for that claimant to exhaust entitlement to 104 weeks of temporary disability benefits before reaching maximum medical improvement (the status of full medical recovery)—paradoxically leaving only seriously injured individuals without compensation for disability while under medical instructions to refrain from work that cannot be ignored lest a defense

> of medical non-compliance be raised. Although this result is anathema to the stated purposes of chapter 440, providing injured workers with prompt medical and indemnity benefits, this court has held on numerous occasions that an award of permanent total disability benefits is premature until an injured worker reaches the stage of full medical recovery.

Westphal, No. 1D12-3563, slip op. at 17-18 (footnote omitted) (emphasis added).

Although Westphal has not argued at length that this Court should declare the entire workers' compensation law unconstitutional, the statutory gap cannot be viewed in isolation from the remainder of the statutory scheme. Over the years, there has been continuous diminution of benefits and other changes in the law. For example, during the same period of time in which the Legislature reduced the provision of disability benefits, the Legislature also gave employers and insurance carriers the virtually unfettered right to select treating physicians in workers' compensation cases. See § 440.13(2)(f), Fla. Stat. (2009); see also Butler v. Bay Ctr./Chubb Ins. Co., 947 So. 2d 570, 572-73 (Fla. 1st DCA 2006). Further, the right of the employee and the employer to "opt out" of the workers' compensation law, and preserve their tort remedies, was repealed. See §§ 440.015, 440.03, Fla. Stat. (2009). Other changes have included a heightened standard that the compensable injury be the "major contributing cause" of a worker's disability and need for treatment, and a requirement that the injured worker pay a medical copayment after reaching maximum medical improvement. See §§ 440.09(1), 440.13(14)(c), Fla. Stat. (2009).

The current law also allows for apportionment of all medical costs based on a preexisting condition. See § 440.15(5), Fla. Stat. (2009). As Judge Webster has observed, allowing for the apportionment of medical costs means that "injured workers will be less likely to seek medical treatment, making it more likely that they will be unable to return to the workplace." Staffmark v. Merrell, 43 So. 3d 792, 798 (Fla. 1st DCA 2010) (Webster, J., concurring). This change, Judge Webster commented, significantly reduces the benefits to which many injured workers are entitled, thereby leading to a reasonable conclusion that "the right to benefits has become largely illusory." Id.

Although this Court in Martinez, 582 So. 2d at 1171-72, upheld the 1990 version of the workers' compensation law on constitutional grounds, we wholeheartedly agree with Judge Thomas's conclusion that the current version of the law presents a materially different situation:

> We are now presented with a different iteration of the Workers' Compensation Law from that addressed in Martinez—one which today provides an injured worker with limited medical care, no disability benefits beyond the 104-week period, and no wage-loss payments, full or otherwise. And, the lack of disability compensation occurs only because the severely injured worker has not reached maximum medical improvement as to the very injury for which redress is guaranteed under the Florida constitution.
>
> The natural consequence of such a system of legal redress is potential economic ruination of the injured worker, with all the terrible consequences that this portends for the worker and his or her family. A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system

> which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust. We therefore conclude that the 104-week limitation on temporary total disability benefits violates Florida's constitutional guarantee that justice will be administered without denial or delay.

Westphal, No. 1D12-3563, slip op. at 18-19 (footnote omitted).

Thus, under the access to courts analysis articulated in Kluger, the only way to avoid a holding of unconstitutionality under these circumstances would be to demonstrate an overwhelming public necessity to justify the Legislature's elimination of temporary total disability benefits after 104 weeks for our most injured workers. See Kluger, 281 So. 2d at 4. We conclude that this showing has not been made. The statute is unconstitutional as applied.

Accordingly, the question becomes one of remedy. "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994). We therefore conclude that the proper remedy is the revival of the pre-1994 statute that provided for a limitation of 260 weeks of temporary total disability benefits. See § 440.15(2)(a), Fla. Stat. (1991). The provision of 260 weeks of temporary total disability benefits amounts to two and a half times more benefits—five years of

eligibility for benefits rather than only two—and thus avoids the constitutional infirmity created by the current statutory gap as applied to Westphal.

In this regard, we respectfully disagree with the assertion in Justice Lewis's concurring in result opinion that this remedy is insufficient because it still allows for the possibility of a statutory gap, and would therefore unconstitutionally deprive claimants of access to courts. Concurring in result op. of Lewis, J., at 35. In fact, as we have indicated throughout this opinion, we previously held that the pre-1994 statute's limitation of 260 weeks "passes constitutional muster" because it "remains a reasonable alternative to tort litigation," where a worker "is not without a remedy." Martinez, 582 So. 2d at 1171-72. Although the length of time available for the administration of temporary total disability benefits to a worker before the worker reaches maximum medical improvement does involve line drawing, the difference between a period of only two years (104 weeks) and five years (260 weeks) is significant as it relates to the time it takes a worker to attain maximum medical improvement.

III. CONCLUSION

For all the reasons explained in this opinion, we hold section 440.15(2)(a), Florida Statutes (2009), unconstitutional as applied to Westphal and all others similarly situated, as a denial of access to courts under article I, section 21, of the Florida Constitution. The statute deprives a severely injured worker of disability

benefits at a critical time, when the worker cannot return to work and is totally disabled, but the worker's doctors—chosen by the employer—determine that the worker has not reached maximum medical improvement.

Such a significant diminution in the availability of benefits for severely injured workers, particularly when considered in conjunction with the totality of changes to the workers' compensation law from 1968, when the access to courts provision was added to our Constitution, to the present, is unconstitutional under our precedent. Accordingly, we quash the First District's en banc decision in Westphal and remand this case to the First District for further proceedings consistent with this opinion.

It is so ordered.

LABARGA, C.J., and QUINCE, and PERRY, JJ., concur.
LEWIS, J., concurs in result with an opinion.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., concurring in result.

I agree with the conclusion reached by the majority that section 440.15(2)(a) is unconstitutional as applied to Bradley Westphal. Valiant judicial attempts to salvage the statute notwithstanding, the statutory gap that resulted from the limitations in section 440.15(2)(a) is a plain denial of the right of access to courts guaranteed by the Constitution of this State to Floridians who, after 104 weeks,

may still be totally disabled due to injuries received in the course of their employment.

However, at this point in time, I conclude that the remedy relied upon by the majority is insufficient. Statutory revival of the 1994 limitation, which provides for the administration of temporary total disability for 260 weeks, may provide relief for those individuals who remain totally disabled but have not been deemed permanently disabled at the end of 104 weeks. However, this remedy simply moves the goalposts without eliminating the unconstitutional statutory gap that will still persist for those who remain totally—but not permanently—disabled after 260 weeks. Therefore, I do not believe that this is a situation in which statutory revival is appropriate. Cf. B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) ("[T]he judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." (emphasis added)). In my opinion, the only appropriate remedy would be to require the Legislature to provide a comprehensive, constitutional Workers' Compensation scheme, rather than rely on the courts to rewrite existing law or revive prior law. I believe that the remedy provided today fails to fully address the problems with the Workers' Compensation scheme because it will still leave some injured Florida workers without access to benefits to which they are entitled. Thus, the majority decision leaves Florida workers in an only marginally better position than they were in prior to this matter

by failing to address and remove the inadequate alternative remedy, thereby leaving the Workers' Compensation scheme unconstitutional and in need of major reform. As I see it, such a system is fundamentally unconstitutional and in need of legislative—not judicial—reform.

Over time, the Florida judiciary has repeatedly rewritten provisions of the Workers' Compensation law to avoid a declaration of unconstitutionality. No fair-minded individual who reads these decisions can reasonably conclude that they involve simple statutory interpretation. See, e.g., Newton v. McCotter Motors, Inc., 475 So. 2d 230, 231-32 (Fla. 1985) (Ehrlich, J., dissenting) (disagreeing with the holding that section 440.16(1), which provides that for a death to be compensable under the Workers' Compensation law, it "must result within one year of the accident or must follow continuous disability and must result from the accident within five years of the accident," see id. at 230, and does not violate access to courts for deaths that occur more than five years after the accident; noting that "[b]enefits paid during the life of the worker . . . cannot, and never were intended by the legislature to, substitute as a reasonable alternative for a cause of action for wrongful death"); Rhaney v. Dobbs House, Inc., 415 So. 2d 1277, 1279 (Fla. 1st DCA 1982) (upholding statutory provision that the American Medical Association Guides to the Evaluation of Permanent Impairment shall be used to determine permanent impairment until a permanent schedule is adopted; noting

that "[a]lthough the provisions of § 440.15(3)(a)3. are not unconstitutional per se, they could be unconstitutional in their application if this section were interpreted to mean that there could be no permanent impairment unless a medical doctor testified from the AMA Guides as to a certain percentage of permanent impairment set forth therein. However, the section should not be interpreted in that fashion.").[6] I have a full appreciation for the judicial attempts to save the Workers' Compensation statute from total disaster. Florida needs a valid Workers' Compensation program, but the charade is over. Enough is enough, and Florida workers deserve better.

The judicial rewriting of a problematic statute is no more evident than in the present case where section 440.15 has been rewritten not once, but twice. See Westphal, 122 So. 3d at 444 (avoiding a constitutional challenge by holding that under section 440.15(2)(a), "an injured worker who is still totally disabled at the end of his or her eligibility for temporary disability benefits is deemed to be at maximum medical improvement as a matter of law, even if the worker may get

6. This Court has also held that the invalidation of a comprehensive revision to the Workers' Compensation law for a single-subject violation should operate prospectively to avoid "the substantial impact on the entire workers' compensation system if we were to hold [the chapter law] void ab initio." Martinez v. Scanlan, 582 So. 2d 1167, 1176 (Fla. 1991). But see id. at 1177 (Barkett, J., concurring in part and dissenting in part) ("I do not believe it is the function of the judiciary to suspend constitutional principles to accommodate administrative convenience.").

well enough someday to return to work"); City of Pensacola Firefighters v. Oswald, 710 So. 2d 95, 98 (Fla. 1st DCA 1998) (bridging the unconstitutional gap by holding that to be eligible for permanent total disability benefits, "an employee whose temporary benefits have run out—or are expected to do so imminently—must be able to show not only total disability upon the cessation of temporary benefits but also that total disability will be 'existing after the date of maximum medical improvement' "); see also Matrix Emp. Leasing, Inc. v. Hadley, 78 So. 3d 621, 632 (Fla. 1st DCA 2011) (Van Nortwick, J., dissenting) ("[B]oth the approach adopted in Oswald (and reaffirmed by the majority opinion) and the approach expressed in the dissent are judicial 'patches' crafted to attempt to avoid a material 'gap' in disability benefits for injured workers who remain totally disabled on the expiration of temporary disability benefits. In my view, our concern with this potential 'gap' is not simply a humanitarian concern for particular claimants, but is based on our interest in avoiding a potential constitutional issue."). Although both rewrites of section 440.15 may have been good faith attempts to protect injured workers, neither cures the underlying invalidity of the statute.[7] One need only consider the multiple opinions in this case to understand the essential problem.

7. Further, it is not the role of the judiciary to rewrite a problematic statute. See Brown v. State, 358 So. 2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment.").

The truth of the matter is that section 440.15 is hopelessly broken and cannot be constitutionally salvaged. The judicial branch must terminate the practice of rewriting the statute. Under the plain language of the statute, many hardworking Floridians who become injured in the course of employment are denied the benefits necessary to pay their bills and survive on a day-to-day basis.[8] The inequitable impact of this statute is patent because it provides permanent total disability benefits to the disabled worker who reaches maximum medical improvement quickly, but arbitrarily and indefinitely terminates benefits to other disabled workers—i.e., until the employee proves that he or she is permanently and totally disabled once maximum medical improvement is attained, even where there is no dispute that the employee is totally disabled at the time the temporary benefits expire, and even if maximum medical improvement will occur in the future. Where totally disabled workers can be routinely denied benefits for an indefinite period of time, and have no alternative remedy to seek compensation for their injuries, something is drastically, fundamentally, and constitutionally wrong with the statutory scheme. See Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973)

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8. Moreover, there is no way to determine how many of these injured and disabled workers actually exist. Many may choose to suffer in silence rather than fight a system that is so obviously and drastically skewed against them. Thus, the number of disabled workers who are entitled to permanent total disability benefits—but cannot receive them because they have not yet reached maximum medical improvement—may be larger than anyone knows.

("[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries.").

The reality is that Workers' Compensation benefits have been steadily chipped away and reduced by the Legislature to such an extent that intelligent, able jurists have now concluded enough is enough and declared the entire statutory scheme unconstitutional. See Cortes v. Velda Farms, No. 11-13661-CA-25, 2014 WL 6685226 at *10 (11th Cir. Ct. Aug. 13, 2014) ("As a matter of law, Chapter 440, effective October 1, 2003[,] is facially unconstitutional as long as it contains § 440.11 as an exclusive replacement remedy."), overruled for mootness and lack of standing by State v. Fla. Workers' Advocates, 167 So. 3d 500 (Fla. 3d DCA 2015). Although the majority opinion does not take this step, it too has recognized that Workers' Compensation benefits have been steadily eroded. Majority op. at 29. I submit that the time has come for this Court to uphold its sacred and constitutional duty and simply apply the words of the Legislature. In lieu of continuing to uphold the Workers' Compensation law with rewrites, judicial patches, and flawed

analyses, Chapter 440 should be invalidated where defective and the Legislature required to provide a valid, comprehensive program.

Florida families presume that when they report to work every day and perform their duties with dedication and diligence, a valid Workers' Compensation program will be in place should they ever become injured on the job and be precluded from seeking access to our courts. Indeed, the Workers' Compensation law was, at least initially, created to deliver adequate, fair, and prompt disability benefits to injured workers and balance workers' rights with business interests. However, section 440.15—both under its plain meaning, and as interpreted by the majority today—denies that critical safety net to the most seriously injured by hinging the award of permanent total disability benefits upon the attainment of maximum medical improvement, which cannot occur until a future date, but eliminates benefits until that future date arrives. I cannot vote to uphold this statute, or the interpretation of this statute, that denies such fundamental rights to the hardworking citizens of this State. It is time that both business interests and workers receive a valid, balanced program that can operate as Florida moves into its economic future.

Accordingly, I concur in result.

CANADY, J., dissenting.

I agree with the majority that Westphal should prevail on his argument—with which the City and the State agree—that the district court erred in concluding that he should be "deemed to be at maximum medical improvement, regardless of any potential for improvement[,]" Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management, 122 So. 3d 440, 446 (Fla. 1st DCA 2013), upon the expiration of his eligibility for temporary total disability benefits. Majority op. at 3-4. As the majority explains, the district court's interpretation effectively rewrites the statute. I therefore would answer the certified question in the negative. But I would reject Westphal's argument that the statutory limitation on the period of eligibility for temporary total disability benefits violates the right of access to courts provided for in article I, section 21 of the Florida Constitution.

In the foundational case of Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973), we set forth the test for determining whether an access-to-courts violation has occurred:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the [1968] Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to [section 2.01, Florida Statutes], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

(Emphasis added.) The threshold question in evaluating an access-to-courts claim therefore is whether the Legislature has abolished a right of redress that was in existence when the access to courts provision was incorporated into the 1968 Constitution.

Here, the challenged statutory provision restructures an existing right of redress. It does not abolish that right. The State argues persuasively that "today's workers' compensation system allowed Westphal substantially greater temporary total disability benefits than any 1968 statutory right provided" and that "[t]he amendment limiting temporary total disability benefits to 104 weeks, therefore, did not 'abolish' any pre-existing right." State's Answer Brief at 14. Westphal does not dispute the State's assertion that the aggregate compensation paid to him for temporary total disability benefits substantially exceeded the aggregate compensation for such benefits that would have been available under the pre-1968 law, even when the pre-1968 benefits are adjusted for inflation. Instead, he contends that "[t]his case is about weeks, not about dollars." Petitioner's Reply Brief at 9. But the decision to substantially increase weekly compensation for temporary total disability and to reduce the number of weeks that such benefits are paid is a trade-off that is a matter of policy within the province of the Legislature. The Legislature—rather than this Court—has the institutional competence and authority to make such policy judgments.

We have long recognized that the Legislature should be afforded latitude in the structuring of remedies both outside the worker's compensation context, see, e.g., White v. Clayton, 323 So. 2d 573 (Fla. 1975), and within the worker's compensation context, see, e.g., Acton v. Fort Lauderdale Hosp., 440 So. 2d 1282 (Fla. 1983). We should do likewise here and reject Westphal's access-to-courts challenge.[9]

POLSTON, J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 1D12-3563

Richard Anthony Sicking of Touby, Chait & Sicking, P.L., Coral Gables, Florida; and Jason Lawrence Fox of Bichler, Kelley, Oliver, Longo & Fox, PLLC, Tampa, Florida,

for Petitioner/Respondent

John C. Wolfe, City Attorney, Jeannine Smith Williams, Chief Assistant City Attorney, and Kimberly D. Proano, Assistant City Attorney, Saint Petersburg, Florida,

for Respondent/Petitioner City of Saint Petersburg

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9. I am inclined to agree with Judges Benton and Thomas that competent, substantial evidence does not support the determination by the Judge of Compensation Claims that Westphal did not establish that he would meet the requirements for permanent total disability when he reached maximum medical improvement. See Westphal, 122 So. 3d at 450 (Benton, J., concurring in result); id. at 459-64 (Thomas, J., concurring in result only, and dissenting in part). But Westphal has not presented any argument to us on this point.

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William Harris Rogner, Winter Park, Florida,

for Amici Curiae Associated Industries of Florida, Associated Builders and Contractors of Florida, The Florida Chamber of Commerce, The Florida Insurance Council, The Property Casualty Insurers Association of America, The Florida Justice Reform Institute, Publix Super Markets, United Parcel Service, The Florida Roofing, Sheet Metal and Air Conditioning Contractors Association, The Florida Retail Federation, The American Insurance Association, The National Federation of Independent Business, The Florida United Businesses Association, Inc., and The Florida Association of Self Insureds

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

JAMES F. FEE, JR.,

Plaintiff,

v. Case No. 2016 CA 2159

THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., etc., THE FLORIDA OFFICE OF INSURANCE REGULATION, etc., and DAVID ALTMAIER,

Defendants.
_____/

ORDER ON NON-JURY TRIAL AND FINAL JUDGEMENT PROVIDING DECLARATORY AND INJUNCTIVE RELIEF

THIS CAUSE came before the Court on November 9, 2016 for non-jury trial/evidentiary hearing on all pending matters in this Sunshine Law and Public Records Law action for declaratory and injunctive relief regarding the workers' compensation rate setting process.

The Parties

1. Plaintiff James F. Fee, Jr. [Fee] is an attorney who owns the law office of Druckman and Fee, which has

various insurance policies, including worker's compensation.

2. Defendant National Council on Compensation Insurance [NCCI] is a corporation licensed, inter alia, as a rating organization authorized to request rate changes [increases and decreases] for insurers selling worker's compensation and employer liability insurance coverage in Florida when there is a perceived need for a change in rates, either upward or downward. NCCI is headquartered in Boca Raton, Florida, where it employs more than 800 actuaries and regulatory services personnel to interact with executive branch insurance regulatory personnel in several states. As is pertinent here [Florida workers' compensation rate setting], insurers who provide employers with either worker's compensation or employer liability coverage may either submit rate filings themselves or, as is almost universally done, subscribe to a recognized rating organization such as NCCI to prepare the rate proposal for them. Historically, insurance rating matters are

done in the public eye, with public meetings noticed as specified by law, and with statutorily mandated minutes kept.

3. Defendant the Florida Office of Insurance Regulation, with its Commissioner David Altmaier [jointly, OIR] is the regulatory agency responsible for setting insurance rates.

The Pleadings

4. Plaintiff contends the NCCI and OIR defendants have violated applicable provisions of the Florida Government in the Sunshine Law [section 286.011] and the Florida Public Records Laws [Article 1, section 24 of the Florida Constitution and section 119.07(1)], provisions made applicable to the NCCI and OIR defendants in sections 627.091 and 627.291, Florida Statutes.

5. The August 10, 2016 complaint contains four counts. Counts I, III and IV seek declaratory relief against NCCI for its failures to comply with the public

meetings requirements of the Florida Government in the Sunshine Laws and its failures to provide documents to which the plaintiff claims to be entitled pursuant to chapter 119.07(1). Count II seeks declaratory and injunctive relief against to all of the defendants due to the recent worker's compensation rate setting activities which did not take place in the sunshine as required.

6. The defendants deny the allegations and claim NCCI does not have to comply with the Sunshine Laws because it no longer use a committee to prepare the rate filing submission. NCCI also contends the plaintiff lacks standing to assert the access to records issue. All defendants contend the single, publicly noticed hearing on August 16, 2016 and the OIR rejection of the initial and amended rate requests constitute sufficiently independent, compliant action that any NCCI deficiencies have been cured, a contention the plaintiff disputes.

7. As set forth more fully herein, the 2016 worker's compensation rate adjustment process was not properly open to the public, the plaintiff and his actuarial expert were not given records and information to which they were entitled, and the recently set rate increase of 14.5% - which arose from a series of mostly private interactions contrary to law - must be found to be void *ab initio*, because the lack of sunshine so permeated the process. This is consistent with the directives of the Florida Supreme Court in Tolar v. School Board, 398 So.2d 427 (Fla. 1981) and Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974). See, also, Monroe County v. Pigeon Key Historical Park, Inc., 647 So.2d 857, 861 (Fla. 3d DCA 1994) ("Tolar effectively sounded the death knell of an unadulterated Sunshine Law. [cit.om.] Governmental actions will not be voided whenever governmental bodies have met in secret where sufficiently corrective final action has been taken"). Because there was "no sufficiently

corrective final action here, the void *ab initio* result from Gradison controls.

The Hearing

8. All parties were present with counsel, and counsel gave opening statements.

Background

[Based on the parties' papers, arguments and supporting authorities, as well as the witnesses' demeanor, credibility and testimony and other evidence]

9. This case involves the intersection of the Florida workers' compensation insurance rate setting and the extent of the government in the sunshine requirement.

10. Earlier this year, the Florida Supreme Court issued opinions in two cases that had the potential to impact the solvency of the workers compensation trust fund.

11. In Castellanos v. Next Door Co., 192 So.3d 431 (Fla. 2016), decided in late April 2016, the Florida Supreme Court found the statutory attorney fee limit in

section 440.34, Florida Statutes to be unconstitutional.

12. In Westphal v. City of St. Petersburg, 194 So.3d 311, (Fla. 2016) the Florida Supreme Court ruled that the then-current limit of 104 weeks on temporary total disability benefits in section 440.15(2)(a), Florida Statutes was unconstitutional, reverting to the prior statute which established a 260-week limitation on temporary total disability benefits.

The Issues and Analysis

13. The primary issues before this Court are whether NCCI had an obligation to conduct its meetings regarding the rate increase in the sunshine and, if so, what remedy or other action is needed, and whether NCCI had an obligation to provide the plaintiff with the documents and information in section 627.291, Florida Statutes.

14. As pertinent here, the OIR is responsible for making sure that workers' compensation insurance rates

are sufficient to avoid insolvency and are not excessive where insureds would be paying more than needed.

15. Insurers who want their rates adjusted may either submit their own rate filing justifying the rate adjustment requested or they may have a licensed rating organization such as NCCI[1].

16. The Legislature has recognized the important role recognized rating organizations play, mandating in section 627.093, Florida Statutes that the rating organizations comply with Florida's Government in the Sunshine meeting requirements [section 286.011, Florida Statutes]:

> Section 286.011 shall be applicable to every rate filing, approval or disapproval of filing, rating deviation from filing, or appeal from any of these regarding workers' compensation and employer's liability insurances.

Id., supra.

[1]The evidence indicated that NCCI acts on behalf of essentially all worker's compensation insurers in Florida, more than 250.

17. More particularly, Florida's Legislature has made clear in section 627.091(6), Florida Statutes how rating organizations with responsibility for workers' compensation insurance rates must comply with the Government in the Sunshine public meeting provision:

> 6. Whenever the committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state meets to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any other matters pertaining specifically and directly to such Florida rate, such meetings shall be held in this state and shall be subject to s. 286.011. The committee of such a rating organization shall provide at least 3 weeks' prior notice of such meetings to the office and shall provide at least 14 days' prior notice of such meeting to the public by publication in the Florida Administrative Register. Section 627.091(6), Florida Statutes.

18. Section 627.091(3) also mandates that "A filing and any supporting information shall be open to public inspection as provided in s. 119.07(1)" (the Florida Public Records Law).

19. Records subject to Florida's Public Records Laws "are open for personal inspection and copying by

any person". Section 119.01 and 119.07(1), Florida Statutes.

20. Public meetings must not only be publicly noticed in advance but minutes of the meetings must be "promptly recorded, and such records shall be open to public inspection". Section 286.011, Florida Statutes.

21. Subsections 627.291(1) and (2), Florida Statutes identify the information to be provided regarding workers' compensation and employer liability coverage to insureds:

627.291 Information to be furnished insureds; appeal by insureds; workers' compensation and employer's liability insurances.—
(1) As to workers' compensation and employer's liability insurances, every rating organization and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate.
(2) As to workers' compensation and employer's liability insurances, every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or by his or her authorized representative, on his or her written request to review the manner in which such rating system has been applied in connection with the insurance afforded him or her. If the rating organization or insurer fails to grant or rejects such request within 30 days after it is made, the applicant may proceed in the same manner as if his or her application had been rejected. Any party affected by the action of such rating organization or insurer on such request may, within 30 days after written notice of such action, appeal to the office, which may affirm or reverse such action.

22. In joint pretrial statement, the parties stipulated to various facts (paraphrased here)

pertinent here, for which no proof was required,

including the following:

a. The OIR is the agency which regulates activities concerning insurers, including review and approval or disapproval of rate filings made by or on behalf of workers' compensation insurance companies.

b. NCCI is the licensed rating organization which made the workers' compensation rate filings pertinent here; the rate filings were on behalf of the large number of workers' compensation insurers which subscribe to NCCI for NCCI to make workers' compensation rate filings on their behalf.

c. Chapter 627, Florida Statutes requires workers' compensation insurers, or a licensed rating organization to which they subscribe, to file with the OIR "every manual of classifications, rules and rates, every rating plan, and every modification of any of the foregoing which it proposes to use".

d. After receiving a proposed rate filing from NCCI [or an insurer or another rating organization], the OIR must review the filing to ensure such filing complies with the chapter 627 rate standards.

e. On May 27, 2016, NCCI submitted its [post-Castellanos] workers' compensation rate filing proposing a 17.1% increase in the overall statewide workers' compensation insurance rate level; this is the original rate filing, file log no. 16-12500 in the OIR electronic system.

f. On June 30, 2016, NCCI submitted its amended [post-Westphal] rate filing to propose an additional rate increase of 2.2% [for a total proposed rate increase of 19.6%]; this is the amended rate filing in OIR file 16-12500.

g. The OIR set a public hearing to take place on August 16, 2016 on the amended rate filing. OIR sent NCCI a notice setting the hearing on July 1, 2016 and published the notice of hearing in the Florida Administrative Register on July 7, 2016.

h. The public hearing was held on August 16, 2016. A number of members of the public attended in person, and many [including actuary Stephen Alexander on behalf of the plaintiff] testified.

i. The public comments were accepted until August 23, 2016 at 5:00 p.m.

j. On September 27, 2016, OIR issued its order disapproving the pending amended 19.6% rate filing and advising NCCI if it would submit a further amended filing within one week, OIR would approve a 14.5% increase in workers' compensation insurance rates. NCCI complied and without further public hearing, OIR approved the 14.5% increase [the testimony established that this is the largest workers' compensation rate increase in at least the last six years].

k. The revised rates are set to go into effect on December 1, 2016.

23. Although not part of the parties' formal stipulated facts, the undisputed evidence established that none of the meetings at NCCI were open to the public, established that no minutes were kept and established that there was no notice to the public in advance of the meetings. Further, the undisputed

evidence established that NCCI did not provide plaintiff Fee with all of the rate-related information he requested on more than one occasion.

The Events of This Year's Rate Filing Process

24. In the past, NCCI had two committees that dealt with rate filings: the Classification and Rates [C&R] Committee and the Underwriting Committee. Some time ago, NCCI reconfigured its Underwriting Committee so that, while it still exists, it does not deal with or discuss rate filings. The C&R Committee has apparently been disbanded. NCCI contends it has delegated to a single actuary [in this case Jay Rosen] the responsibility for preparing the workers' compensation off-cycle rate filings such as the ones done this year.

25. The preparation of the NCCI rating organization rate filing entailed several NCCI meetings [including but perhaps not limited to a Phase I meeting shortly after the April 28 Castellanos ruling, a mid-May Technical Peer Review [TPR] meeting involving actuary Rosen and other actuaries, a pre-Phase II meeting with

at least actuary Rosen and NCCI official Christopher Bailey, a Phase II meeting with actuary Rosen and various NCCI regulatory services division staff including Lori Lovgren].

26. In addition to the NCCI rate related meetings, NCCI officials had a series of meetings [some in person some by phone, some with some folks present in person, others on the phone] in which the impending rate filings were discussed with OIR regulatory staff, including the Commissioner, OIR actuary Cyndi Cooper and others [including but not limited to a May 10 meeting involving NCCI personnel Lovgren, Bailey and outside counsel Maida with OIR staff, a May 27 "delivery meeting" in which NCCI personnel Bailey, Lovgren and Rosen not only handed in the original post-Castellanos filing but gave a presentation including a power point and discussion and interaction with OIR staff, a June 22 meeting with NCCI attorney Maida and "a large number" of OIR staff, including former Commissioner McCarty, Belinda Miller, new Commissioner

David Altmaier and OIR actuary Cyndi Cooper, a July 13, 2016 meeting regarding OIR actuary Cooper's requests for information].

27. Not one of the meetings listed above was publicly noticed, no minutes were made and no members of the public were present.

28. The plaintiff's requests for the statutory supporting information were not timely complied with, and the plaintiff's actuary was not allowed to make any copies of the information he was shown before the hearing. [OIR allowed actuary Alexander to look at some of the information in its files, but contrary to the public records law, did not allow him to have copies; NCCI did not provide actuary Alexander or the plaintiff with the statutorily required information].

29. Following the April Castellanos decision, NCCI began working on a rate adjustment submission, formally proposing on May 27, 2016 that the OIR authorize an increase in the workers' compensation rates of 17.1%.

30. After the June Westphal decision, NCCI submitted an amended rate filing for an additional rate increase of 2.2%, with the total proposed rate increase of 19.6%[2]. There were more meetings and conversations in conjunction with this requested increase.

31. During its preparation of the two submissions, NCCI held no public meetings and gave no notice to any interested person of meetings it was holding, NCCI also kept no minutes.

32. During the time between the release of the two Supreme Court rulings, NCCI held a number of meetings with its personnel and held a number of meetings and exchanged information in other ways with OIR staff involved in reviewing and analyzing the rate increase recommendations, both before the noticed public OIR meeting of August 16, 2016 and after.

[2]Because of the way the numbers were submitted, adding the two numbers - 17.1% and 2.2% to total 19.3% - does not give the accurate total amended rate increase proposal, which was actually 19.6%.

The Hearing

33. As directed by the Court, the parties submitted a joint pretrial statement containing a list of facts that were admitted and required no proof at the trial, excerpted above.

34. As directed by the Court, the parties submitted a joint pretrial statement containing a list of various pertinent issues of fact and law remaining in dispute. Some of the issues were repetitive and duplicate, some were not relevant. In presenting the list of factual and legal issues to be determined, the Court has taken the liberty of grouping some issues with related ones, and restating others:

a. Whether NCCI has a committee with responsibility for Florida workers' compensation rates;

b. Whether an NCCI "committee" subject to 627.091(6), Florida Statutes met to discuss matters related to the necessity for, or a request for,

Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any other matters pertaining specifically and directly to such Florida rates with respect to the original and or amended rate filing;

c. Whether any such meeting violated the requirements set forth in sections 286.011 or 627.091(6), Florida Statutes:

d. Whether any possible Sunshine Law violation relating to the original or amended rate filing was cured by OIR's public rate hearing on August 16, 2016;

e. Whether NCCI has been delegated the performance of any governmental duty or public function with respect to rate filings for workers' compensation insurance in Florida;

f. Whether NCCI acts solely on behalf of its subscribing insurers when it makes rate filings for

workers' compensation in Florida, or whether it acts in place of the OIR when it makes rate filings for workers' compensation in Florida;

g. Whether the Amended Rate Filing is void *ab initio;*

h. Whether the OIR's order approving the reviews 14.5% workers' compensation insurance rate increase is also void *ab initio;*

i. Whether, if NCCI does have a committee for purposes of 627.091(6), Florida Statutes, and that same committee meets to discuss matters related to future rate filings, and such meeting is not held in compliance with sections 627.091(6) and 286.011, Florida Statutes, such future rate filings will be void ab initio;

j. As to section 627.291(1), whether Fee is an insured, whether Fee is or was affected by the original or amended rate filing and whether Fee has standing to bring his claims;

k. As to section 627.291(1), what constitutes "pertinent information as to such rate";

l. Whether NCCI violated section 627.291(1), Florida Statutes;

m. Whether Fee is entitled under section 627.291(1), Florida Statutes to NCCI information relating to "rule" filings;

n. Whether NCCI is subject to chapter 119, Florida Statutes;

o. Whether NCCI must comply with chapter 119 with respect to Fee's request for information and records;

p. Whether the relief Fee requested as to the OIR August 16, 2016 public hearing and the OIR September 27, 2016 Order are moot;

q. Whether Fee waived his right to injunctive relief as to the October 5, 2016 final order on rate filing;

r. Whether this Court has jurisdiction to order injunctive relief against the OIR, based on its own actions or inactions or those of NCCI;

s. If attorney's fees or costs are appropriate pursuant to sections 119.12 and 286.011, Florida Statutes, which party or parties are entitled to recover them;

t. Whether NCCI provided Fee with the material appropriate to properly review the proposed original and amended rate requests for compliance with the requirements set forth in chapter 627, Florida Statutes; and

u. Whether NCCI violated sections 286.011 or 627.091(6), Florida Statutes by not providing notice to the public or giving them an opportunity to be present or heard at meetings between NCCI and the OIR.

Pertinent Legal Principles

35. Florida principles of open government, including the Sunshine Law and Public Records, are protected in statutes pertinent here [sections 286.011 and 627.091 and sections 627.291 and 119.07(1), Florida Statutes] and in Florida's Constitution, Article 1, section 24 [public records and meetings].

> The only question to be determined is whether the citizens planning commission composed of private citizens, which was established by the Town Council and the members thereof appointed by the Town Council, was subject to the government in the sunshine law.
>
> Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. The ordinary taxpayer can no longer be led blindly down the path of government, for the news media, by constantly reporting community affairs, has made the taxpayer aware of governmental problems. Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.
>
> Also such open meetings instill confidence in government. The taxpayer deserves an opportunity

> to express his views and have them considered in the decision-making process.
>
> * * * *
>
> The principle to be followed is very simple: HN3 When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State. See Florida Law Review, Government in the Sunshine by Ruth Mayes Barnes, Vol. XXIII, 361, 365 (Winter 1971).
>
> HN4 Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*. Times Publishing Co. v. Williams, 222 So.2d 470 (Fla.App.2d.1969). Florida Law Review, Government in the Sunshine by Ruther Mayes Barnes, Vol. XXIII, p. 369 (Winter 1971).

Palm Beach v. Gradison, 296 So.2d 473, 475 and 477, Florida Statutes.

36. In Palm Beach v. Gradison, 296 So.2d 473, (Fla. 1974), the Florida Supreme Court affirmed the district court's ruling that violation of the Sunshine Laws to have meetings "in the shade" meant that actions subsequently taken in public to ratify information exchanged secretly or in the shade did not cure the taint: the Sunshine Law violation's rendered the actions taken void *ab initio*. The Court noted at 477:

> [T]o prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. . . .The statute

should be construed so as to frustrate all evasive devices. Id. 477.

37. In Tolar v. School Board, 398 So.2d 427 (Fla. 1981), the Florida Supreme Court held that Sunshine Law violations could be cured if there were subsequent, final, independent action in the sunshine that was "not merely a ceremonial acceptance . . .and . . .a perfunctory ratification of secret decisions." Id. 429.

38. Relying on Tolar, and the specific facts in cases where there were clearly substantive, open, non-ceremonial public meetings, courts have found that such meetings could properly be found to have cured extant Sunshine Law violations. See, e.g. Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So.3d 755 (Fla. 2010) and Monroe County v. Pigeon Key Historical Park, 647 So. 2d 857 (Fla. 3rd DCA 1994). However, as noted in Tolar and Pigeon Key, a cure of the taint from violating the Sunshine Law only occurred where the final action was substantive and deliberative, and actually remediated the violations.

39. NCCI claims it no longer uses the same committee structure it used before and contends that because it has amended its prior committee structure and delegated the decision-making inherent in the rate filing process to a single person, Section 627.091(6) no longer applies. A deposition exhibit, a 1986 letter from then-Insurance Commissioner Gunter referred to the rate setting process as being one subject to the meeting in the Sunshine requirement was sent by the OIR in September 2014 to NCCI, reminding NCCI of the applicability of the Sunshine Law to its rate filing preparation meetings.

40. The Florida Government in the Sunshine Manual [online at http://www.myfloridalegal.com/sun.nsf/sunmanual] addresses the delegation of authority to a single individual:

> The Sunshine Law does not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego. IDS Properties, Inc.

> v. Town of Palm Beach, 279 So. 2d 353, 359 9Fla. 4th DCA 1973), certified question answered sub nom., Town of Palm Beach v. Gradiaon, 296 So.2d 473 (Fla. 1974). See also, News-Press Publishing Company, Inc., v. Carlson, 410 So.2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate *de facto* authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such public official insofar as the Sunshine Law is concerned).

Id. at 18-19. The difference is whether the one to whom authority is delegated is merely acting as a fact-finder, or is acting in a delegated decision-making role. The Manual cites numerous opinions of Florida's Attorney General to emphasize that decision making must be done in the Sunshine: AGO 74-294, 84-54, 75-41, 74-84, 90-1795-06 10-15, while fact-finding activities are not subject to the Sunshine Law: AGO 95-06, 93-78.

The Witnesses

James Francis Fee

41. Plaintiff James Francis Fee, Jr. testified

first. He is an attorney with a law firm, Druckman and Fee, P.A. He is the owner of and sole attorney with the firm.

42. Fee filed the action to bring transparency to the workers' compensation insurance rate process.

43. He was not provided with all of the information by NCCI in a timely fashion. His first request was May 20, 2016, a letter sent by certified mail after seeing an April press release regarding an analysis of the Florida Supreme Court Castellanos attorney fee ruling. Plaintiff's exhibit 1 is a copy of his letter [admitted in evidence without objection].

44. Fee was seeking the information to inform himself and be able to provide input regarding premiums his firm and other employers he represents are asked to pay and for which premium audits are done.

45. He also represents people injured at work, which can lead to legislative action. Rate setting information for stakeholders is important.

46. He renewed the request for information in a June letter [Plaintiff's 2].

47. The initial request related to the initial rate filing which was expected to go into effect August 1, 2016, but he still had not received the information.

48. Plaintiff's exhibit 3 is correspondence to him on behalf of NCCI, responding to the May and June letters; the letter is not a full and complete response.

49. Plaintiff's exhibit 4 is a letter to NCCI letter, pointing the lack of completeness of the response in plaintiff's exhibit 3 which offered only the 34 page then-pending rate filing.

50. Plaintiff's exhibit 5 is a July letter to NNCI's attorney Maida after receiving the 34 pages, requesting [again] the additional information asked for, but not received, in addition to the amended filing for the 19.6% rate increase and information

regarding compliance with the public meeting requirements, going back to 2006.

51. Plaintiff's exhibit 6 is a July 21, 2016 letter Mr. Fee wrote to the Commissioner regarding the lack of transparency. He did not receive a written response from the Commissioner, but met with the Commissioner and staff on July 27, 2016 to discuss the Sunshine Law requirement. The Commissioner and staff said they did some investigation, did not think NCCI had a committee, and said they were going forward with the public meeting. There were five or so there, Commissioner, General Counsel and three or four ladies in the room.

52. Plaintiff's exhibit 7 is a response to the letter to attorney Maida, relating to the amended rate filing.

53. Plaintiff's exhibit 9 is a response to attorney Maida's August 2 letter [Plaintiff's 8]; the public hearing was pending at the time, set for two weeks later, August 16, 2016.

54. Plaintiff's exhibit 9 also sought actuary data for Mr. Fee's actuary.

55. Apart from its role as a licensed rating organization for workers' compensation, NCCI is also the sole contracted statistical agent for the OIR as to all of the workers' compensation information, and is responsible for collecting all of that information and providing it to OIR.

56. Mr. Fee never received the actuarial information requested. He was not personally present at the August 16, 2016 rate hearing, due to his wife's health and some family time together. [He had planned the together time around a rate hearing which ended up being changed following the amended rate filing].

57. Fee had contracted with Stephen Alexander, an actuary formerly with the Consumer Advocate's office to give testimony; actuary Alexander indicated he did not have all of the information he needed to provide full input.

58. If the information Fee requested had been provided, there would have been an opportunity to determine what other information could have been helpful in developing pertinent information, which he could have done if there had been a public meeting at which the NCCI information was discussed.

59. Seventy percent of Fee's firm's cases involve representation of injured workers. He also has a workers' compensation policy for his business, his law firm. The policy holder is his firm, which insures him.

60. Actuary Alexander reviewed the rate filing at the OIR but was told he could not make copies. At some point later, after May, Mr. Alexander reviewed the amended rate filing, going to the OIR office when NCCI had not provided copies.

61. Fee does not know of any documents provided to the OIR by NCCI that he has not received, but had asked to be provided with information that was considered by NCCI and not relied upon; that information was not provided.

62. There was an issue about claim information after the 2008 Murray decision, which NCCI said was not relevant when NCCI provided OIR information from the 2003 time frame instead.

62. The deposition testimony established that there were packets of documents that Fee did not receive, he did not receive the interrogatory information. He is not sure if that information was available on the website as of August 2, 2016.

63. Fee may have visited the OIR website, but does not recall when. His request includes what the statute says he is entitled to.

64. He contends he is entitled to more than what NCCI provided to the OIR.

65. There may have been alternate filings considered and other documents mentioned during the phase I and phase II documents and TPR documents.

66. If there are internal drafts of rate filings that were being discussed, he is entitled to those

pursuant to 627.291(1) and internal correspondence relating thereto.

67. Fee is entitled to see documents relating to rates and the rate filing, even if the documents were not provided to the OIR.

68. He did not give notice of his meeting with the Commissioner about the Sunshine Law and did not know if the OIR noticed the meeting.

69. The rate filing submitted initially by NCCI was rejected and the OIR directed NCCI to submit a further submission if it did not want to pursue litigation regarding the rejection.

70. The OIR does not directly make rate filings itself; NCCI submits rate filings on behalf of insurers, not the OIR.

71. If NCCI did not exist, insurers would have to do their own filings or submit filings through another licensed rating agency.

72. Plaintiff Fee is not an actuary.

73. Actuary Stephen Alexander testified on plaintiff's behalf at the August public hearing.

74. Fee does not contend the August 16, 2016 public hearing was not properly noticed; it was noticed in the Register, but there were problems before.

75. Florida is in the lower half of premium returns in the country and returns the lowest amount of premiums. [The Oregon scale ranks the cost of workers' comp premiums; he believes Florida is between 28th and 38th].

76. Fee is aware there may be two or three insurers who do their own filings, rather than use a filing agent.

77. Fee personally sent no comments to the Commissioner, based on the Commissioner's comments at the in-person meeting, believing it would be futile.

78. Fee asked that they go forward the right way, but that was denied.

79. Mr. Alexander gave the best input he could without the full information, giving his caveat he did not have the full information available.

80. He listened to some of the hearing [transcript in the joint exhibit notebook, joint exhibit 6].

81. Mr. Alexander said it would be reasonable to set an increase of no more than 5.7% if the OIR felt compelled to do something, but would have liked the rest of the information to give a more accurate number.

82. Actuaries are bound by certain standards. Plaintiff Fee's concern and interest are in the process, and its transparency.

83. Mr. Alexander made it clear in his submissions that he lacked certain information; Fee recalls seeing that somewhere.

84. Plaintiff Fee's deposition [taken shortly before the trial] is also in evidence and was reviewed by the Court.

Cyndi Cooper

85. OIR Actuary Cyndi Cooper testified next. She reviews and analyzes documents and makes recommendations to the Commissioner. She reviews everything submitted to the OIR, and sometimes looks at outside source information to make the recommendations.

86. The statistical agent data contract between OIR and NCCI is for NCCI to gather and review outside data which OIR reviews and verifies in conjunction with a rate filing.

87. NCCI collects the data on behalf of the Office, to help review and verify the rate filings by NCCI. Primarily she relies on information provided by NCCI.

88. All of the NCCI documents are public records.

89. The OIR holds meetings with NCCI which sometimes brings documents to the meeting.

90. There was an NCCI powerpoint brought to the intial delivery meeting at the OIR office in late May, that was not made available to the public right away.

91. There are emails, but they [like the powerpoint] would only be provided if specifically requested.

92. She worked at NCCI before going to work at OIR. She is the OIR actuary.

93. She is not aware of any workers comp insurers in Florida who do not use NCCI for rate filings.

94. As to NCCI/ OIR meetings at which the rate filings were discussed, including May 16, 2016, Commissioner Altmaier was present, she does not remember if interim former insurance commissioner Kevin McCarty was present as well.

95. She identified interrogatory[3] responses as to who was invited to the May meeting between OIR and NCCI. Belinda Miller is the chief of staff, the general counsel was present, there was another deputy

[3]When she needs more information about a rate filing proposal as the OIR actuary, she sends written requests for information to the submitted of the rate filing proposal.

commissioner. The meeting was to discuss the Castellanos ruling.

96. The next OIR/NCCI meeting was May 27, 2016; the interrogatory shows who was invited, but not necessarily who was present. That meeting was a filing and delivery meeting.

97. The next OIR/NCCI meeting was June 27, 2016. Again, several were present; that meeting was to discuss the rate hearing.

98. The next OIR/NCCI meeting was July 13 2016, a phone call between her and NCCI attorneys and staff; they got clarification on some items they sent.

99. The next OIR/NCCI meeting was August 1, 2016; at that meeting the rate hearing was discussed.

100. The next OIR/NCCI meeting was a telephone call August 10; it was a call to discuss if additional information was needed.

101. The next OIR/NCCI meeting was September 20, 2016. NCCI was represented at that meeting, which was to make sure the OIR had the information needed.

102. None of those meetings mentioned were publically noticed or open to the public.

103. Plaintiff's exhibit 13 is a September 12, 2014 letter Cooper sent. She did not write the letter but signed it. She wrote the September 12, 2014 email to NCCI official Chris Bailey regarding the NCCI underwriting committee relating to the Sunshine Law requirement in section 627.091(6).

104. She does not know of any follow up.

105. Plaintiff's exhibit 21 contains four letters: June 14, 2016, June 7, 2016 letter, July 21, 2016 and July 1, 2016.

106. She requested additional information or data as an actuary so she could have more data to look at. Sometimes NCCI does not have the information or data.

107. Her deposition taken shortly before trial is also in evidence, and was reviewed by the Court.

Christopher Bailey

108. NCCI official Christopher Thomas Bailey testified next; he works for NCCI as to Florida and another state [Iowa] as a liaison with OIR.

109. He participated various meetings internally, Phase I as to the "landscape", met with the actuary, then a phase II meeting, then a technical peer review [TPR].

110. The actuary presents information to other actuaries, for questions and vetting as to assumptions.

111. This year's TPR regarding the rate filing was June 24, 2016 as to the Westphal decision. There were several actuaries and managing actuaries and several others who were invited to that meeting. It was set for an hour and a half; it was not open to the public.

112. A phase II meeting allows the responsible actuary to present the process used and answer managing

staff's questions; the May 23, 2016 meeting was for the Castellanos decision.

113. There were multiple phase II meetings and TPR meetings regarding workers' compensation rates in Florida this year.

114. There were between five and ten or more attendees present, from various NCCI departments, including the chief actuary and other actuaries, attorneys and officers.

115. There was a phase II meeting for both the Castellano and the Westphal decision; neither was open to the public.

116. None of the TPR meetings were open to the public.

117. Bailey received the Cooper letter in Plaintiff's 13 in September 2014; he is not aware of any follow up by the OIR.

118. Mr. Bailey's deposition taken shortly before trial is in evidence and was reviewed by the Court.

Lori Lovgren

119. NCCI division director Lori Lovgren testified next. She has worked with NCCI for several years, 17 years.

120. Lovgren is Bailey's manager. Lovgren has attended meetings about rate filings, including the TPR meeting relating to the original rate filing in May 2016.

121. At that meeting, the first after the Castellanos decision, there was a determination of the rate filing and this was the TPR meeting.

122. There was a TPR meeting for the amended rate filing at which there were a group of actuaries.

123. She was at the phase II meetings, there was a smaller number of folks present, from regulatory, to ask questions and find out how actuary Rosen came up with the number.

124. She attends Phase I meetings as well, first tier meetings, but there were none relating to the filings here pertinent to the two cases.

125. Preliminary issues are addressed at the Phase I meetings.

126. There was a packet of data prepare for the TPR meetings in May and the second TPR meeting.

127. There was a document for the Phase II meeting, regarding methodology.

128. She was involved in preparing the answers to the plaintiff's interrogatories regarding internal NCCI meetings and meetings between NCCI and OIR; the interrogatories are plaintiff's exhibit 30.

129. Pages 6 and 7 of the Plaintiff's exhibit 30 show several meetings between NCCI and the OIR, none of which were noticed as public meetings; the public was not present, and minutes were not kept.

130. The packets of documents used at the internal meetings were not present at the OIR meetings.

131. The NCCI powerpoint was dropped off with the initial rate filing. There were discussions about some of Ms. Cooper's [OIR] questions.

132. NCCI did submit prefiled testimony before the public hearing.

133. Jay Rosen had primary responsibility for Florida rate filings and may have asked others to run data but at the end of the day he would make the decision himself.

134. The others are staff members who assisted him with data, that consists of a variety of data.

135. This was not a normal filing, but rather in response to the two cases, with some medical information.

136. Any data Rosen ultimately used was submitted; Ms. Cooper asked for other data, which was given if available.

137. Lovgren does not know what the difference is between what Rosen looked at and what he ultimately used.

138. Exhibit A to plaintiff's exhibit 30 listed the 10 to 15 NCCI meetings relating to the rate filings.

139. Some of the meetings were internal, some were external like the delivery meeting with OIR. None of the meetings were publicly noticed.

140. The rate filings were discussed at the internal NCCI meetings.

141. Plaintiff's exhibit 16 is a 2014 letter from Foley Lardner attorney Maida to OIR actuary Cooper; Ms. Lovgren has seen the letter before. That is the only letter regarding the public meeting subject she is aware of.

142. Foley Lardner was NCCI counsel; NCCI never received a further response from the OIR.

143. Lovgren helped with the creation of the letter; NCCI was of the opinion the meetings did not need to be open to the public.

144. A C&R committee is a classification and rate committee in existence in the early 1990's, made up of insurance company subscribers.

145. The C&R committee was subject to the Sunshine Law; that committee and all of them were disbanded in 1991.

146. NCCI staff now prepares the rate filings and are not previewed by any "committee" before submission to insurance regulators.

147. There is an annual cleanup day regarding reviewing retained records. She does not know the retention period for packets used during internal meetings.

148. Lovgren says since there are no committees that perform any of the items in the statute, NCCI says

it has no responsibility under the statute to act in the sunshine regarding rate filing.

149. This rate filing authority was just with Jay Rosen; she sees no need to comply with section 6.

150. She knows insurers have certain obligations regarding rate filings and can comply with those by subscribing to NCCI.

151. The rate filing includes an interpretation of data, to see whether an increase or decrease is needed; those factors are set forth in chapter 627.

152. Plaintiff's exhibit 27 has three versions of the statistical data compilation contract between NCCI and OIR, one early in the 2000's, one in 2007 and one in 2011.

153. The data collection is separate from the licensing as a rating organization.

154. There are four different data types provided in the contracts, including claims, policy, financial and statistical.

155. There is an NCCI division for IT and data. Jay Rosen and Regulatory Services collect the data for rate filing.

156. The OIR can require NCCI to provide the data relied upon.

157. The OIR asked for the data they want and need and NCCI provides what it can.

158. As to information considered by Jay Rosen but not used, she knows it was requested but does not know if it was provided.

159. Ms. Lovgren's deposition taken shortly before trial is also in evidence, and was reviewed by the Court.

Cyndi Cooper Further Testimony

160. OIR actuary Cyndi Cooper was recalled for further testimony.

161. Cooper reviews filings by individual insurers; some use outside actuarial firms. It is common for the OIR to accommodate requests for meetings.

162. Cooper received sufficient responses from NCCI to allow her to render an actuarial opinion.

163. If Cooper did not have sufficient information, she would generally not render an actuarial opinion; when that happens, she disapproves the requested rate change.

164. She was at the August public hearing; everyone who submitted a card was allowed to speak.

165. Prior filings are on the OIR website, back to 2001.

166. Most of the rate filing information was submitted by "I-file", the OIR efiling system, except an email with some calculations that was separately provided.

167. All of the information she requested before the hearing was on the e-file site.

168. The record of the rate hearing was not closed at the end of the public comment, but was extended to August 23, 2016.

169. Cooper reviewed everything received after the hearing.

170. The recommendation Cooper made to the Commissioner was her recommendation.

171. The overall average rate increase or decrease applies equally to all NCCI subscribers, but the insurer can request a deviation higher or lower for that company; that deviation would have to be supported.

172. There are three deviations currently in effect. There is an excess rate that can be charged if the insurer and insured to higher rate if they agree before the end of the policy period. There are quite a few filings regarding large deductibles. A retrospective rating plan is adjusted based on actual losses, where the premium would not be based on the

base rate. There are self-insured workers comp employers, such as Disney and Walmart. A significant portion of the deviation market is made up of these self-insured employers, about one quarter of all workers' comp premiums and imputed premiums.

173. There has been a general decrease in workers' compensation rates since 2003.

174. Florida ranks in the middle of the pack, number 33, median rate charge.

175. The Office looked into whether NCCI had an actual committee, based on the information provided by NCCI's counsel.

176. She is not involved in the drafting of the current NCCI statistical data collection contract but is familiar with it.

177. The information submitted by NCCI relative to the data contract is public record.

178. When Cooper looked at the data to complete her analysis, she was looking at medical information.

179. The rate hearing is to make sure the public can be involved in the process, and try to coordinate very early on in the process, to make sure NCCI and the OIR are prepared and the hearing is at a convenient time.

180. NCCI presents first, then the OIR asks questions, the Consumer Advocate may participate and the public can participate, but she is not aware if the public can ask questions of NCCI re justification for the rate hike.

181. The hearing is carried online for the public to watch if they wish. All information submitted by NCCI is either online in advance publicly or is available pursuant to public record request.

182. She is familiar with the rate filing statute and knows she can ask NCCI for more information as to what they considered or relied upon.

183. Subsection 2(b) says NCCI can submit information relied upon and analyzed in support of the rate filing.

184. She does not interpret the data but analyzes it.

185. In a peer review, people challenge the analysis of the actuary.

186. Cooper does not think she needs to hear their discussion to do her analysis.

187. Cooper does not put all of her questions in writing to NCCI. She can send an interrogatory. An interrogatory is a public record.

188. There generally are no minutes taken at meetings.

189. The majority of the information is provided in writing.

190. Cooper does a lot of telephone conversations to understand things.

191. Most if not all of the information was in writing.

192. The May 27 meeting was the background information.

193. Even the meeting for the clarification meeting, the majority of the information was in writing.

194. She cannot remember every single conversation she had with them.

195. The total of all the meetings with NCCI was more than two hours.

196. A lot of the discussion had to do with the analysis of the need for an increase and the meeting.

197. She can't say if it is important for her to understand the interpretation of the NCCI folks.

Other Evidence

198. The joint exhibits 1 through 9 are in evidence, including the original and amended rate

filing and the transcript of the August 16, 2016 public OIR hearing.

199. Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 16, 21, 27 and 30 are in evidence,

200. The OIR exhibits 1 through 9 are in evidence.

201. NCCI exhibits 2, 4, 5, 6, 7, 8, 9, 10 and 11 are in evidence.

202. The depositions of Stephen Alexander, Christopher Bailey, Cyndi Cooper, James Fee and Lori Lovgren are in evidence, with their respective attached exhibits.

Findings of Fact and Conclusions of Law

The Court having carefully considered the testimony, credibility and demeanor of the witnesses, having carefully considered all of the documentary and other evidence, and being otherwise fully advised in the premises, it is hereby

FOUND as follows:

1. As a statutorily recognized workers' compensation rating organization, NCCI is required to conduct its rate filing preparation meetings in public, following proper public notice. Sections 627.091(6) and 286.011, Florida Statutes. NCCI was aware of the statutory requirement for public meetings, but instead of complying tried to delegate its way out of the Sunshine even though it was providing the same rate filing proposal envisioned by the statutes.

2. The credible evidence shows that NCCI's approach clearly involves committees, even as it tries to claim otherwise. [Even if there were no committee meetings involved, NCCI's preparation of the rate filing through even one delegated person responsible does not exempt NCCI's rate filing preparation from the public meeting requirement; only the Legislature can change the law]. That NCCI has attempted to eliminate its responsibility to have its rate preparation meetings in public by changing the configuration of its "committee" structure and delegating to a single actuary all of the

decisional responsibility of preparing the rate filing submitted on behalf of its subscribers by NCCI is an improper, ineffective way to repeal the statutes and shed its responsibility for its rate filing meetings [including the Phase I meetings, the TPR (technical peer review meetings) and the Phase II meetings].

3. The statutory public meeting requirement attaches to the licensed rating organization, in this case NCCI. Whether NCCI arranges for its historical committee to prepare the rate filing or tries to make it the responsibility solely of actuary Jay Rosen, the Legislature has in the statutes made clear the decisional work relating to the rate filing should be transparent, and controlled by the Florida Sunshine Law.

4. The preponderance of the evidence supports plaintiff Fee's contention he is entitled to the documents he requested from NCCI pursuant to sections 627.291 and 119.07, Florida Statutes.

5. The totality of the evidence supports the contentions of plaintiff Fee that NCCI violated the statutes and withheld from him information to which he was entitled pursuant to sections 627.291 and 119.07. The lack of the full information to which plaintiff Fee was entitled meant that neither he nor his actuary had the appropriate ability to meaningfully comment in the single public hearing that occurred.

6. The clear and convincing evidence demonstrated that NCCI and the OIR held a series of secret meetings, in the shade proscribed by Florida's Sunshine Law and Gradison, and not in the Sunshine as required, meetings at which decision maker NCCI [through its staff] discussed and decided the substance of the rate increases NCCI proposed.

7. Far from being the meetings in the Sunshine required by law, the meetings between the OIR staff and NCCI staff were designed to, and had the effect of shutting the public out of meaningful participation in the rate making process.

8. This is not a situation analogous to Tolar, Pigeon Key and the City of Sarasota. In those cases the public meetings that did occur were actually independent meetings in which a responsible governing entity independently addressed the merits of the issue. While the OIR may have attempted to cure the pervasive taint by rejecting the NCCI amended filing, it went further. Its directive that it would approve 14.5% is obviously based on the already inescapably tainted information. NCCI's submission of the new amended filing without the required public meeting further compounded the public injury.

9. In this situation, there are several sequential events that combined to thwart public participation in the Sunshine, involving both the absence of public meetings and the improper withholding of information:

a. First, NCCI's unilateral decision to delegate the decision-making to actuary Rosen, to use semantics to claim that it does not have to conduct its internal [Phase I, TPR and Phase II meetings with groups of its

staff] in the public eye, with the advance notice and written transcripts required by section 286.011 and is ineffective as noted in the Florida Government in the Sunshine Manual to excuse its obligation to conduct these meetings in the public eye.

b. By ignoring its separate obligation to provide plaintiff Fee with information relevant to "all information pertinent as to such rate" as specified in section 627.291 and 119.07, the plaintiff, his actuary and any other person who requested the information were not properly equipped to meaningfully participate in the August 16, 2016 meeting.

c. The numerous secret, non-noticed meetings between NCCI and OIR regarding the substance of the rate increases requested constituted further, uncurable violations of the Sunshine Law, with the damage compounded by the complete lack of any minutes or transcripts of the meetings.

d. The August 16, 2016 did not cure the taint of the built in shade from the secret meetings, especially under the circumstances here. The OIR order rejected the tainted original and amended filings, but did not stop there. Instead, after allowing NCCI not to comply with the law regarding the production of information, and after participating with NCCI in a series of secret meetings contrary to law, the OIR order indicated that if NCCI would file an amended rate increase of 14.5%, that increase [a record setter for at least the past six years if not longer] would be approved. The OIR did not direct nor provide for any public participation in that rate submission process, and ignored how the conduct of the process in more secrecy than permitted had deprived Florida's business owners and workers' compensation insureds from being meaningfully involved in the process. Stated differently, unlike the governmental public meetings in Tolar and its progeny, the OIR's actions did not cure the built in taint from the secret meetings, it compounded and increased it,

requiring the rate filing adopted and the process to be found to be void *ab initio* as proscribed in Gradison.

10. Turning to the issues of fact and law which the parties disputed and for which they sought rulings here, the questions with the pertinent answers are set forth:

a. The credible evidence shows NCCI clearly does use committees, with a series of meetings to finalize its rate flings. These committee meetings [Phase I, TPR and Phase II, and whatever else NCCI might call them in trying to avoid its public meeting responsibility should have been properly noticed, and held in the Sunshine, with proper minutes. Separately, whether NCCI had a "committee" subject to section 627.091(6) is irrelevant to its obligation to conduct the decisional rate filing preparation meetings in public. As it happens, its process includes several groups of people who meet sequentially with its delegated actuary to make the decisions and prepare the filing, which means it is clearly within the statutory

parameters of section 627.091(6) requiring the meetings to comply with section 286.011. Its secret meetings with OIR also are violative of section 286.011, Florida Statutes. Even if NCCI's decisional process were actually limited to a single actuary, that decisional process is subject to the Government in the Sunshine public meeting requirement as mandated by law, despite NCCI's preferences to exclude the public.

b. Licensed rating organization NCCI's committees/groups of people met to discuss the subjects set forth as requiring Sunshine Law meetings, i.e., matters relating to the necessity for, or a request for, Florida rate increases, the determination of Florida rates, the rates to be requested, and other matters pertaining specifically and directly to such Florida rates with respect to the original and or amended rate filing.

c. As to whether any such meeting violated the requirements set forth in sections 286.011 or 627.091(6), Florida Statutes, clearly all of the NCCI

meetings internally for Phase I, Technical Peer Review and Phase II for supervisory interaction violated both statutes, as did the secret meetings at which discussions about the rate increase took place between OIR and NCCI. There should also have been one final public meeting of NCCI regarding the rate filing proposal prepared to address the OIR order, especially since there remained unanswered the question of why NCCI did not rely on more recent claims data [which NCCI collected and maintained under its separate contract with OIR regarding statistical data] after the Murray court opinion in 2008 and relied instead upon older data from early in this century.

d. As indicated above, the Sunshine Law violations relating to the original and amended rate filings were not cured by the August 16, 2016 public rate hearing, because the needed, required information mandated by section 627.291 and 119.07(1), Florida Statutes continued to be withheld.

e. The statutes spell out the obligations of licensed rate organizations such as NCCI when acting on behalf of their subscribers in making rate filings. Further NCCI is obligated to provide OIR with supplemental information when requested, as NCCI is also separately obligated to provide workers' compensation insureds with the section 627.291 information. Because section 27.291 clearly provides plaintiff Fee with the rate to information, the "totality of factors" test described in News & Sun-Sentinel Co. v. Schwab, etc., 596 So.2d 1029 (Fla. 1992) to determine whether NCCI has a separate obligation is irrelevant here.

f. In collecting the statistical data pursuant to its contract with the OIR, NCCI acts on behalf of the OIR. When submitting its rate filings, NCCI is to be acting on behalf of its subscribing insurers in conducting its public meetings for the purpose of preparing the NCCI rate filings, generally. In this case, when preparing a further amended rate filing

directed by OIR [one NCCI had been told would result in the largest workers' compensation rate increase in several years], NCCI was acting at the direction of the OIR while acting on behalf of its subscribers.

g. The original Castellanos, amended Westphal and final amended rate filings were all tainted by the Sunshine Law violations and the public's lack of information NCCI should have provided requires the finding that the rate filings are void *ab initio*.

h. The OIR ordered 14.5% worker's compensation insurance rate increase is also void *ab initio*.

i. Whether future NCCI rate filings will be void *ab initio* cannot be determined at this time and will have to be assessed at the time in light of the then-existing facts.

j. Plaintiff Fee is an insured, has been, is and will continue to be affected by workers' compensation rate filings, and has standing to bring this action to obtain the records to which he is entitled pursuant to

section 627.291 and 119.07(1), and to compel the defendants to comply with the public meetings requirement of Florida's Sunshine Law pursuant to section 627.091(6) and 286.011, Florida Statutes.

k. "Pertinent information as to such rate", referred to in section 627.291(1), Florida Statutes refers to information used or relevant to determination of a rate under chapter 627, Florida Statutes. It includes information referred to by NCCI actuaries, whether relied upon or not, and includes claims data between the time of the Murray decision in 2008 and the present as well as the information actually looked at between the early 2000's and the time of the Murray decision. It also, obviously, includes the packets of information compiled for use by each of the NCCI groups in conjunction with any and all Phase I, TPR and Phase II group sessions relative to the increases sought as a result of the Castellanos and Westphal rulings.

l. NCCI's actions and failures to act relative to records requested but not provided to plaintiff Fee violate section 627.291, Florida Statutes.

m. To the extent NCCI information relating to "rule" filings relates to rates and how they have been applied, as required in section 627.291, Florida Statutes.

n. NCCI is subject to chapter 119, with respect to its role as a licensed rating organization in preparing a rate filing and with respect to its contractual status as the OIR agent responsible for data collection and dissemination.

o. NCCI was and is obligated to comply with chapter 119 [and section 627.291], Florida Statutes with respect to plaintiff Fee's request for information and records.

p. Fee's requests for relief as to the August 16, 2016 public hearing and the OIR September 27, 2016 OIR Order are not moot.

q. Given the inherent and non-cured violations of Florida's Sunshine Law, there has been no waiver of Fee's request for injunctive relief.

r. This Court has the requisite subject matter jurisdiction over this matter, including the request for injunctive relief necessary to prevent the effect of the unlawfully set rate increase.

s. Plaintiff Fee is entitled to recover his fees and costs, NCCI and OIR are not.

t. While NCCI belatedly and begrudgingly provided Fee with some of the information needed, NCCI did not provide a large quantity of key information requested, including the NCCI-compiled document packets used in conjunction with any Phase I, Technical Peer Review and Phase II meetings, as well as the post-public hearing meeting at which the final amended filing was prepared [all of which should have been public meetings], as well as all information referred to NCCI personnel on which NCCI chose not to rely. Also, the post-Murray

decision [2008] claims information should have been provided, as requested.

u. NCCI [and the OIR] violated sections 627.091(6) and 286.011, Florida Statutes by not providing notice to the public or giving the public an opportunity to be present or heard at meetings between NCCI and the OIR. Neither NCCI nor the OIR [nor the two acting together] is legally authorized to change the law, only the Legislature is empowered to change our laws, until the meetings in the Sunshine and Public Records laws are changed, the defendants must comply by conducting the public meetings in the Sunshine while providing the public records requested.

Based on the foregoing, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Because the multiple non-public, secret meetings held by NCCI internally and with the OIR before the August 16, 2016 public hearing and NCCI's further

violation of the Sunshine Laws after the August 16, 2016 public hearing violate Florida's Sunshine Law, the 14.5% rate increase order and the underlying amended rate filing are void *ab initio;* the increase shall not take effect on December 1, 2016. Similarly, the original Castellanos rate filing and the post-Westphal amended rate filing are null and void, *ab initio*.

2. NCCI shall promptly provide plaintiff Fee with any records not already provided, including but not limited to the packets prepared and referred to during any Phase I, Technical Peer Review and Phase II meetings relating to rate increases related to the Castellanos and Westphal cases, as well as the information considered but not relied upon by NCCI personnel relating to the 2016 off-cycle workers' compensation rate increases proposed in 2016.

3. NCCI's request for attorneys' fees and costs against plaintiff Fee is denied.

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4. As and to the extent indicated above, the plaintiff's request for declaratory relief is granted as to NCCI as to Counts I, III and IV, and his requests for injunctive and declaratory relief as to NCCI and the OIR as to Count II is granted.

5. The Court retains jurisdiction to address the amount of the Plaintiff's fees and costs. Plaintiff Fee is entitled to recover his attorney's fees and costs relating to section 286.011, Florida Statutes as to all defendants, and is entitled to recover his attorney's fees and costs relating to section 119.12, Florida Statutes as to defendant NCCI.

ORDERED this 23rd day of November, 2016 in Tallahassee, Leon County, Florida.

KAREN GIEVERS
Circuit Judge

Copies furnished to:

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FLORIDA OFFICE OF INSURANCE REGULATION

Press Release

Office Issues Final Order Approving a 14.5% Increase to Workers' Compensation Insurance Rates in Florida
Thursday, October 6, 2016

TALLAHASSEE, Fla. – The Florida Office of Insurance Regulation (Office) has issued a Final Order granting approval to the National Council on Compensation Insurance (NCCI) for an overall combined statewide average rate increase of 14.5%. This rate increase applies to both new and renewal workers' compensation insurance policies effective in Florida as of December 1, 2016.

NCCI received this approval after submitting an amended rate filing to the Office on October 4, 2016, which met the stipulations of an Order issued on September 27, 2016.

For more information about the NCCI public hearing and rate filing, visit the Office's "NCCI Public Rate Hearing" webpage. To view or download a copy of the NCCI rate filing, access the I-File Forms & Rates Filing Search System and enter File Log #16-12500 into the "Quick Search" function.

About the Florida Office of Insurance Regulation
The Florida Office of Insurance Regulation has primary responsibility for regulation, compliance and enforcement of statutes related to the business of insurance and the monitoring of industry markets. For more information about the Office, please visit www.floir.com or follow us on Twitter @FLOIR_comm and Facebook.

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OFFICE OF INSURANCE REGULATION

DAVID ALTMAIER
COMMISSIONER

Revised Workers' Compensation Rates and
Rating Values as Filed by the

NATIONAL COUNCIL ON
COMPENSATION INSURANCE, INC.
_____/

Case No. 191880-16

ORDER ON RATE FILING

On May 27, 2016, the **NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.** ("**NCCI**") filed, pursuant to Section 627.091, Florida Statutes, Revised Workers' Compensation Rates and Rating Values for consideration and review by the **FLORIDA OFFICE OF INSURANCE REGULATION** ("**OFFICE**"). The filing proposed a 17.1 percent increase in the overall rate level, to be effective August 1, 2016, on new, renewal and outstanding workers' compensation policies. On June 30, 2016, **NCCI** submitted an amended filing (the "Filing") which proposed a 19.6 percent increase in the overall rate level to become effective October 1, 2016, on all new, renewal and outstanding policies.

The **OFFICE** held a public hearing ("Hearing") on August 16, 2016, in room 412 of the Knott Building, 404 South Monroe Street, Florida Capitol Complex, in Tallahassee, Florida to provide an opportunity for members of the public to comment on the filing. Prior to the Hearing, the Filing was made available on the **OFFICE**'s website, and news releases alerted the public to the time and place of the Hearing. The **OFFICE** also provided an opportunity for any interested party to make comments by e-mail or letter.

The **OFFICE**, having considered the Filing and additional information submitted by **NCCI**, the supporting data, oral and written statements presented at the Hearing, additional testimony and public comment received, the analysis by the staff of the **OFFICE,** and being otherwise fully advised in the premises finds:

1. The **OFFICE** has jurisdiction over the parties and the subject matter of these proceedings.

2. Notice of the Hearing was published in Vol. 42, No. 131, The Florida Administrative Register on July 7, 2016, on page 3004. Notice was also sent directly to **NCCI** and to other persons requesting to be notified of such events.

3. The Filing proposes an overall increase in rate level based on the combined impact of the Florida Supreme Court's decision on April 28, 2016, in Marvin Castellanos v. Next Door Company, et al. ("*Castellanos*"), Case No. SC13-2082; the Florida Supreme Court's decision on June 9, 2016, in Bradley Westphal v. City of St. Petersburg, etc., et al. ("*Westphal*"), Case No. SC13-1930; and Senate Bill 1402 (Chapter 2016-203, Laws of Florida) that ratified the Florida Division of Workers' Compensation's updates to the *Florida Workers' Compensation Health Care Provider Reimbursement Manual*, 2015 Edition.

4. In reaction to high workers' compensation insurance premiums, the legislature enacted Senate Bill 50A (Chapter 2003-412, Laws of Florida) ("SB 50A") in 2003 to reform the workers' compensation laws of Florida. The cases decided recently by the Florida Supreme Court reviewed, in part, the constitutionality of these reforms and consequently revised the law relating to the limitations on attorneys' fees.

5. In the Filing, **NCCI** presented two analyses to quantify the rate level impact of the *Castellanos* case. The first analysis compared the average pure loss cost changes

for Florida to two regions, the Southeastern States Region and the Gulf States Region ("Loss Cost Analysis"). The second analysis reviewed the changes in average total benefit costs for claims with claimant attorney representation. The average benefit costs for these claims were compared including and excluding the top 1% of claims based on reported total incurred losses ("Benefit Cost Analysis"). For both analyses, **NCCI** defined the years 2000 to 2002 as pre-SB 50A and defined the years 2005 to 2006 as post-SB 50A.

6. In the Loss Cost Analysis, **NCCI** compared the average pure loss cost changes in Florida to the average pure loss cost changes of the two regions. Based on this comparison, **NCCI** stated that Florida's pure loss cost declined at a faster rate than the pure loss costs of the two regions from 2000-2002 to 2005-2006. Florida's average pure loss cost declined between -12.2 and -27.3 percent over and above the decline observed in the regions. As a result of this analysis, **NCCI** asserted that the *Castellanos* decision could increase overall Florida workers' compensation system costs by 13.8 percent to 37.5 percent.

7. Many factors could be contributing to the differences between Florida and the regions in the pre-SB 50A to post-SB 50A timeframes other than the change to the attorney fee structure. For example, economic climates such as the recession and housing boom, industry mixes, hurricane activity with subsequent recovery, demographic changes, and other state differences could be impacting the data used in the analysis. **NCCI** acknowledged that the difference between Florida's average pure loss cost and the regions' average pure loss costs could be due to influences unrelated to the attorney fee change in SB 50A, such as other system changes in Florida as well as other influences on the systems of surrounding states. **NCCI** did not perform an

analysis to attempt to quantify the portion of the loss cost differences attributed to the attorney fee changes versus the impact of these other potentially contributing factors. In addition, **NCCI** did not do a post reform analysis to determine whether the initial estimates of the impact of all other provisions contained in SB 50A other than the attorney fee change materialized in line with **NCCI**'s initial expectations and assumptions. **NCCI** assumed that the estimate included in the adjustments to current benefit levels for all other aspects of SB 50A was accurate as initially priced and attributed any potential excess cost savings due to SB 50A solely to the revision in attorney fees required by SB 50A. While the attorney fee change is likely contributing to the decline in Florida's average pure loss cost from the pre-reform period to the post-reform period, it is difficult to determine what portion of the difference between Florida's average pure loss cost changes and the regions' average pure loss cost changes is attributable to the attorney fee change in SB 50A. **NCCI** could not isolate the attorney fee change from all other potentially contributing factors without additional quantitative analysis and data.

8. In the Benefit Cost Analysis, **NCCI** compared the average total benefit costs (average claim size or severity) for claims with claimant attorney representation for accident years 2005-2006 to the average total benefit costs for claims with claimant attorney representation for accident years 2000-2002. **NCCI** provided this analysis including and excluding the top 1% of claims based on reported total incurred losses. **NCCI** quantified average total benefit costs on attorney represented claims and determined that these costs declined by -25.6 percent to -30.1 percent between the pre-SB 50A period and post-SB 50A period. Based on this analysis, **NCCI** asserted that the first-year impact of the *Castellanos* decision could increase overall Florida workers'

compensation benefit costs by 15.0 percent to 18.1 percent. **NCCI** attributes the entire difference of -25.6 percent to -30.1 percent in average claim size to the attorney fees required by SB 50A. The average size of a claim can be affected by a number of factors unrelated to the amount of the attorney fee as shown by the variation in average claim size before SB 50A. Additionally, the estimated increase in system costs in the Benefit Cost Analysis does not contemplate any impact on overall system costs due to changes in lost-time claim frequency. Changes in claim frequency must be combined with changes in average claim severity to fully evaluate the potential change to overall losses in the workers' compensation system. For claims with attorney involvement, when combined with a potential increase in claim severity, an increase in lost-time claim frequency could further drive up system costs whereas a decrease in lost-time claim frequency could result in an impact on the system that is less than indicated solely from the increase in severity change alone. **NCCI** stated at the Hearing that it believes the indications shown by the Benefit Cost Analysis were too low because there was no frequency impact included, but did not do a separate frequency analysis to support this assertion. In addition, if there was an impact on average claim size without attorney representation due to the attorney fee change in SB 50A then this should be evaluated as well. Lastly, similar to the Loss Cost Analysis, **NCCI** assumed that the estimate included in the adjustments to current benefit levels for all other aspects of SB 50A was accurate as initially priced and any possible excess cost savings due to SB 50A is attributed solely to the revision in attorney fees required by SB 50A. While the attorney fees required by SB 50A are likely contributing to the change in average benefit costs for claims with attorney representation from the pre-reform period to the post-reform period, it is difficult to determine what portion of the change is attributable to the

attorney fee change in SB 50A versus all other potentially contributing factors without additional quantitative analysis and data.

9. The **OFFICE** received both oral and written testimony indicating that activity on litigated claims has increased since the *Castellanos* decision. **NCCI** provided an exhibit at the Hearing demonstrating that from May 2016 to July 2016 the monthly average petitions for benefits and monthly average claims filed are up from the same period in 2015, and an insurer also submitted data to support increased litigation activity on claims after the *Castellanos* decision. Furthermore, the **OFFICE** received testimony regarding shorter claim durations, quicker return to work, and more efficiency in the system because of the changes in SB 50A. Most credited the attorney fee provision in SB 50A for these observed changes and the resulting decrease in losses, and stated that the *Castellanos* decision would reverse these changes seen in the system since 2003 resulting in claim costs increasing rapidly as a result. If the increase in litigation activity continues or further escalates and has the effect of extending claim durations, delaying return to work and possibly creating inefficiencies in the system, then there could be a more substantial increase in workers' compensation costs in the near future.

10. The proposed overall increase in rate level of 19.6 percent for new, renewal and outstanding policies in the Filing has not been justified.

11. If the Filing were amended, an alternative rate increase of 14.5 percent is justified.

WHEREFORE, in consideration of the foregoing and being otherwise duly advised in the premises, it is hereby ORDERED:

The Filing of **NCCI** is hereby DISAPPROVED. The Filing will be approved provided the Filing is amended to comply with all of the following and such amendments to the Filing are filed as soon as practicable, but no later than October 4, 2016.

A. The statewide overall rate level change for the Filing for new and renewal policies for other than the "F" classifications shall be 14.5 percent, effective December 1, 2016, which includes a 1.8 percent increase due to Senate Bill 1402 (2016), a 2.2 percent increase due to the *Westphal* decision, and a 10.1 percent increase due to the *Castellanos* decision.

B. The statewide overall rate level change for the Filing for new and renewal policies for the "F" classifications shall be 2.6 percent, effective December 1, 2016 and include a 1.8 percent increase due to Senate Bill 1402 (2016), a 2.2 percent increase due to the *Westphal* decision, and a 10.1 percent increase due to the *Castellanos* decision and shall incorporate the distribution of state and federal losses.

C. There shall be no change in rates for outstanding policies.

D. The **OFFICE** is willing to consider an additional actuarial analysis, data, and justification that **NCCI** may compile to demonstrate that a rate increase in excess of the 10.1 percent increase due to the *Castellanos* decision is necessary.

E. Any insurer may make a filing to deviate from the **NCCI** rate level pursuant to Section 627.211, Florida Statutes, and Rule 69O-189.004, Florida Administrative Code.

F. **NCCI** shall provide the **OFFICE** with an actuarial analysis similar to that provided in an annual experience filing based on the most recent available experience data including but not limited to Policy Years 2013 and 2014 and Calendar Accident Year 2015. **NCCI** shall provide this analysis to the **OFFICE** no later than January 13, 2017.

G. **NCCI** shall list and explain each and every change in the proposed manual pages, including the experience rating plan manual and the retrospective rating plan manual. These shall be shown in the summary exhibit and described by an explanatory memorandum.

To meet statutory timeframes for a December 1, 2016 effective date, **NCCI** shall file the necessary amendments to the Filing as may be required to implement the terms of this Order as soon as practicable, but no later than October 4, 2016. No rate change shall be implemented until such amendments are properly filed and final approval is issued by the **OFFICE**.

By making a filing to comply with this order, **NCCI** waives any right to any further proceedings, and the **OFFICE** will enter a final order on the Filing.

DONE and ORDERED this 27th day of September, 2016.

David Altmaier

David Altmaier, Commissioner
Office of Insurance Regulation

Copies furnished to:

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NOTICE OF RIGHTS

Pursuant to Sections 120.569 and 120.57, Florida Statutes and Rule Chapter 28-106, Florida Administrative Code (F.A.C.), you may have a right to request a proceeding to contest this action by the Office of Insurance Regulation (hereinafter the "Office"). You may request a proceeding by filing a Petition. Your Petition for a proceeding must be in writing and must be filed with the General Counsel acting as the Agency Clerk, Office of Insurance Regulation. If served by U.S. Mail the Petition should be addressed to the Florida Office of Insurance Regulation at 612 Larson Building, Tallahassee, Florida 32399-4206. If Express Mail or hand-delivery is utilized, the Petition should be delivered to 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0300. The written Petition must be received by, and filed in the Office no later than 5:00 p.m. on the twenty-first (21) day after your receipt of this notice. Unless your Petition challenging this action is received by the Office within twenty-one (21) days from the date of the receipt of this notice, the right to a proceeding shall be deemed waived. Mailing the response on the twenty-first day will not preserve your right to a hearing.

If a proceeding is requested and there is no dispute of material fact the provisions of Section 120.57(2), Florida Statutes may apply. In this regard you may submit oral or written evidence in opposition to the action taken by this agency or a written statement challenging the grounds upon which the agency has relied. While a hearing is normally not required in the absence of a dispute of fact, if you feel that a hearing is necessary one may be conducted in Tallahassee, Florida or by telephonic conference call upon your request.

If you dispute material facts which are the basis for this agency's action you may request a formal adversarial proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. If you request this type of proceeding, the request must comply with all of the requirements of Rule Chapter 28-106.201, F.A.C., must demonstrate that your substantial interests have been affected by this agency's action, and contain:

a) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

b) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

c) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action; and

d) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

These proceedings are held before a State Administrative Law Judge of the Division of Administrative Hearings. Unless the majority of witnesses are located elsewhere, the Office will request that the hearing be conducted in Tallahassee.

In some instances, you may have additional statutory rights than the ones described herein.

Failure to follow the procedure outlined with regard to your response to this notice may result in the request being denied. Any request for administrative proceeding received prior to the date of this notice shall be deemed abandoned unless timely renewed in compliance with the guidelines as set out above.

OLIVER WYMAN

ACTUARIAL PEER REVIEW

WORKERS COMPENSATION RATEMAKING PROCESSES OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC.

STATE OF FLORIDA
OFFICE OF INSURANCE REGULATION

DECEMBER 2015

CONTENTS

1

Introduction

Scope

Oliver Wyman Actuarial Consulting, Inc. (Oliver Wyman) has been engaged by the Office of Insurance Regulation, State of Florida, (the FLOIR) to conduct an independent actuarial peer review of the ratemaking processes of the National Council on Compensation Insurance, Inc. (NCCI), in Florida, as required by Section 627.285, Florida Statutes.[1,2]

Specifically, Oliver Wyman has been engaged to review the following:

1. Methodologies, thought processes, judgments and assumptions used to determine statewide rate level changes, including, but not limited to:
   - database (paid loss versus paid loss plus case reserve or other)
   - loss development methodology and selections
   - experience periods
   - trend calculations
   - premium development calculations
   - premium adjustments
   - benefit on-level adjustments
   - expense provisions
   - profit and contingencies provisions
   - impact of experience rating off-balance

2. Methodologies, thought processes, judgments and assumptions used to distribute statewide rate level changes to industry groups.

3. Methodologies, thought processes, judgments and assumptions used to determine individual workers compensation classification rates.

[1] Section 627.285 states that: "….. at least once every other year contract for an independent actuarial peer review and analysis of the ratemaking processes of any licensed rating organization that makes rate filings for workers compensation insurance, and the rating organization shall fully cooperate in the peer review. The contract shall require submission of a final report to the commission, the President of the Senate, and the Speaker of the House of Representatives by February 1."

[2] NCCI is the licensed agency responsible for collecting statistical information and submitting applications for revised workers compensation rates and rating values on behalf of NCCI's member or affiliated insurance companies.

4. Methodologies, thought processes, judgments and assumptions used to determine the impact of legislative changes, benefit-level adjustments, and legislative proposals.[3,4,5]

Overview of the NCCI Ratemaking Methodology

The result of the workers compensation ratemaking process is a revised manual premium rate for each of over 500 individual workers compensation employer classifications. The final premium rate for an individual employer is the published manual workers compensation rate multiplied by the specific employer's experience modification.[6] NCCI maps classifications into five industry groups.[7] The premium rate for each classification incorporates the combined impact of statewide average experience, the experience of the industry group to which it belongs, and the experience of the individual classification itself. The NCCI ratemaking methodology employed in Florida is composed of four general steps:

[3] Since implementation of SB 50A on October 1, 2003, there have been no material law changes affecting workers compensation costs in Florida with the exception of the Florida Supreme Court Decision, *Emma Murray v. Mariner Health and ACE USA,* and HB 903, which reversed the legislative impact of this court decision, effective July 1, 2009.

[4] Minor benefit level changes implemented in Florida periodically include adjustments to physician fee schedules, hospital fee schedules, and changes to the maximum weekly benefit.

[5] SB 662 became effective July 1, 2013. The primary intent of the legislation was to control the cost of repackaged or relabeled prescription medications when dispensed by physicians. NCCI estimated a 1% savings on medical benefits which translated into an overall savings of 0.7%. Similar legislation has been passed in other NCCI states with similar estimated savings. For example, NC SB744 became effective in August, 2014, and addressed similar issues with estimated medical savings of 0.8% and overall savings of 0.4%. Alternatively, PA Act 184 of 2014 became effective in PA in December of 2014, and addressed similar issues with estimated medical savings of 1.2% and overall savings of .64%. Of note is that NCCI is not the licensed statistical agent in PA. The Pennsylvania Compensation Rating Bureau is the licensed statistical agent in PA and estimated similar savings for a similar law in that jurisdiction.

[6] Experience rating is the final step in the process of determining premium charges for individual employers. Experience rating recognizes that the premium rate for a specific classification represents the average premium rate for all employers in that classification. Experience rating is the process by which the premium rate, for a specific employer, is adjusted to reflect that employer's own loss experience relative to the average loss experience in the employer's classification. In its simplest form, experience rating is a measurement of an employer's actual loss experience to the employer's expected loss experience. Expected loss experience is based on the average loss experience of all employers in a classification. The result of the experience rating process is the experience modification. An experience modification greater than unity, or 1.000, is commonly referred to as a "debit mod" and means the specific employer has loss experience greater than the classification average. Conversely, an experience modification less than unity is commonly referred to as a "credit mod" and means the specific employer has loss experience less than the classification average.

[7] The five industry groups are:

Manufacturing, Contracting, Office and Clerical, Goods and Services, Miscellaneous

Step 1: Calculation of Statewide Rate Change

The statewide rate change is the average rate change for all classifications combined. This step relies primarily on Aggregate Financial Call data.[8] Contributing elements to the statewide rate change include, but are not necessarily limited to:

Loss Experience: Is the actuarial forecast of the final cost of benefits for a group of claims greater than or less than what is expected in current premium rates?

Trend:[9] Are benefits increasing at a rate greater than or less than wages?

Benefit Changes: Have there been any changes to workers compensation benefits since the prior rate examination?

Claim Adjustment Expense (LAE)[10] Is the expected cost of LAE greater than or less than the provision in current premium rates?

Other Insurance Company Expenses: Is the expected cost of insurance company expenses greater than or less than provisions in current premium rates?

Taxes and Assessments: Is the expected cost of taxes and assessments greater than or less than the provisions in current premium rates?

Profit and Contingencies: Is the economic/actuarial forecast of reasonable insurance company profit greater than or less than the provision in current premium rates?

[8] NCCI collects, tabulates, checks, and edits combined statewide workers compensation experience for use in an actuarial analysis to determine, on an average statewide basis, whether rates need to be increased, or decreased. NCCI publishes detailed instructions as to how insurance carriers should respond to the various data requests.

[9] Premium rates are almost exclusively measured relative to payroll (in units of $100). There is an a priori assumption in premium rates that benefit costs (meaning the combined impact of changes to the number of claims, or frequency, and the cost per claim, or severity) will increase at the rate of wage inflation. Therefore, if actuarial analysis shows that benefit costs are increasing at a rate less than wage inflation, the indicated trend will be negative, or less than zero. Similarly, if actuarial analysis shows that benefit costs are increasing at a rate greater than wage inflation, the indicated trend will be positive, or greater than zero. If benefit costs are increasing at exactly the same rate as wage inflation, the indicated trend will be exactly zero.

[10] Claim adjustment expense is commonly referred to as loss adjustment expense (LAE). LAE is the total cost of adjusting claims, including overhead costs of maintaining a claims adjustment staff and claim defense costs. Claim defense costs generally include, but are not limited to, legal fees, court fees, and the cost of investigations. Currently, NCCI partitions the provision for LAE into Defense and Cost Containment Expenses (DCCE) and All Other Expenses (AOE). DCCE is roughly comparable to expenses previously categorized as Allocated Loss Adjustment Expense (ALAE). AOE is roughly comparable to expenses previously referred to as ULAE.

Step 2:Distribution of Statewide Rate Change to Industry Groups

NCCI distributes the statewide rate change to each of the five industry groups based on the relative loss experience of each individual industry group.[11] In many respects, allocation of the statewide rate change to the five industry groups is an exercise in experience rating at the industry group level. Actual loss experience by industry group is measured against expected loss experience. If the measurement shows that for a specific industry group actual loss experience exceeded expected, that industry group is allocated a rate level change greater than the statewide average. The converse of this statement is true as well. The weighted average of the rate changes for each of the five industry groups must equal the statewide rate change calculated in Step 1. The allocation to industry groups relies primarily on Workers Compensation Statistical Plan (WCSP) Data.[12]

Step 3: Distribution of Industry Group Rate Changes to Classifications

NCCI distributes the industry group change to each individual classification within the specific industry group. NCCI bases the distribution on the actual loss experience of each individual classification, and relies on WCSP data. The weighted average of the rate changes for all classifications in an individual industry group must equal the industry group rate change calculated in Step 2.

Note that NCCI does not directly calculate classification rates.[13] Rather, the starting point in the NCCI ratemaking process is current manual rates. The process described in steps 1, 2, and 3 above represents a rate relativity system. An overall statewide rate need is determined by examining statewide combined data, which generates an indicated statewide rate level change in step 1. If not for consideration of rate relativities, the process would stop here, and NCCI would apply the same calculated rate change to the current rate for each classification. Steps 2 and 3, however, consider how the *relative* actual loss experience for each individual classification has changed

[11] For example, if the average statewide rate change is a 5.0% increase, and the manufacturing industry group has much greater loss experience than expected, while the other four industry groups have lower loss experience than expected, the manufacturing industry group might be allocated a 10% rate increase, while the other four industry groups might be allocated a 2% rate increase. The weighted average for all five industry groups must equal the statewide 5.0% increase.

[12] WCSP data is a database of individual claim experience and policy specific information collected, tabulated, checked, and edited by NCCI. Information is collected in sufficient detail such that workers compensation experience can be allocated to individual classifications, and therefore, to the five industry groups. WCSP data is the basis for allocating the statewide rate level change to the five industry groups as well as to all individual classifications.

[13] This statement applies to industrial classifications, which comprise the bulk of the workers compensation classifications. This is not the case for Federal classifications (F-Classes). F-classes represent classifications where claims may be filed under the United States Longshoreman and Harbor Workers Act. This is a federal jurisdiction administered by Office of Workers Compensation Programs, United States Department of Labor. Workers injured on or near coastal or inland waterways have the option to file claims under either the Federal act or the Florida state act. Occupations include ship manufacturing and repair, stevedoring, etc. NCCI calculates rates for F-classes somewhat differently than for industrial classifications. Unlike industrial classifications, premium rates for F-classes are calculated directly from Workers Compensation Statistical Plan data.

since the prior rate application. In the simplest sense, if the most recently available data indicated that every classification, relative to each other, behaved exactly as expected, then the rate for every classification would be increased by the exact same amount, the calculated statewide rate change. This, of course, does not reflect reality, and illustrates the need for step 2 and step 3. These steps measure how the loss experience for each individual class changed relative to each other. This is why, even with very small or zero percent statewide rate change, some classifications might increase by 15%, and other classifications might decrease by 15%.[14]

Step 4: Calculation of Rating Values
The final step of the ratemaking process is the calculation of the required rating values for the experience rating program, retrospective rating programs[15], and other programs that individual insureds may voluntarily elect to subscribe to.

General Approach to this Review

The general approach to this review was as follows:

1. Identification of data and methodology used

2. Assessment of appropriateness of data and methodology used
   - Is the methodology a commonly applied actuarial technique?
   - Is it appropriate in the circumstances of its use by NCCI?
   - Does it meet Actuarial Standards of Practice?
   - Is data appropriate for methodologies employed?
   - What additional methodologies were available?

3. Assessment of consistency of methodologies used
   - What changes to methodology were made in the past, and why?
   - Were any changes to methodology justified with clear and unbiased communication to all parties?
   - What was the impact of the change in the methodology?

4. Is there evidence of bias in the ratemaking process?

The review process was as follows:

[14] 15% represents what is referred to as the swing limit. The swing limit is the maximum allowable change (up or down, relative to the industry group change) in any year to the rate for a single classification. Swing limits are discussed later in this report.

[15] Retrospective rating represents a type of insurance program where a specific employer's premium is based on actual loss experience under the program, subject to certain maximum and minimum premiums and limits on the cost of individual claims. Retrospective premiums are periodically recalculated for years after the actual insurance policy expired. The recalculation reflects the most recently available actual loss experience under the program.

1. Review initial documentation provided by NCCI.
2. Issue requests for additional information from NCCI.
3. Discuss questions and concerns with the Florida Office of Insurance Regulation.[16]
4. Issue Draft Report to Florida Office of Insurance Regulation.
5. Consider comments from Florida Office of Insurance Regulation and NCCI.
6. Issue Final Report

This assignment was not used as a vehicle to substitute Oliver Wyman's professional opinions for those of NCCI. Oliver Wyman conducted an objective review with the goal of identifying those areas where, in Oliver Wyman's opinion, NCCI's documentation was incomplete or where inappropriate actuarial judgments were made, or where additional investigation by NCCI into specific issues was warranted. Oliver Wyman's findings that specific processes, judgments, or assumptions are reasonable, or Oliver Wyman's lack of issue with the same, do not necessarily mean that Oliver Wyman endorses them or would take the same approach if Oliver Wyman were to conduct its own independent analysis of rate needs in the state of Florida.

Oliver Wyman's report to the FLOIR consists of the text and charts in this document.

A complete list of documents and data provided is attached at the end of this report. Applicable Considerations and Limitations are attached as well.

[16] Oliver Wyman's contact during the course of this review was Ms. Cyndi Cooper, ACAS, MAAA Actuary, Florida Office of Insurance Regulation

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Executive Summary

Principal Conclusions

1. **The NCCI ratemaking process (in Florida[17]) is based on commonly applied actuarial methodologies that are supported in actuarial literature as well as by frequency of usage by credentialed actuaries.**

   a. The NCCI ratemaking process draws from a group of actuarial methodologies employed by NCCI and other ratemaking organizations in other states.

   b. Actuarial methodologies used by NCCI are appropriate within the context of their use in the NCCI ratemaking process in Florida.

   c. Oliver Wyman considers the Standards of Practice established by the Casualty Actuarial Society as the governing body of documentation used to determine whether the NCCI ratemaking process in Florida is compliant with applicable actuarial standards of practice. Actuarial methodologies used by NCCI are consistent with:

      - The Statement of Principles Regarding Property and Casualty Insurance Ratemaking, as published by the Casualty Actuarial Society
      - The Statement of Principles Regarding Risk Classification, as published by the Casualty Actuarial Society
      - The Code of Professional Conduct, as published by the Casualty Actuarial Society
      - Elements of the NCCI ratemaking methodology are included in the current Syllabus of Examinations.

   Oliver Wyman reviewed the key elements and selected specific details of the NCCI ratemaking process. Oliver Wyman based its conclusion on this review. Oliver Wyman did not conduct an exhaustive examination of every method and calculation employed by NCCI. Additionally, while Oliver Wyman tested the behavior of certain rating values over time for reasonableness, Oliver Wyman did not examine the detailed calculations of all of these elements during this review. These issues are not material as respects the conclusion above.

[17] This report addresses the NCCI ratemaking processes and methodologies in the state of Florida, only. Unless otherwise stated, any references to the NCCI ratemaking process or ratemaking methodologies are specific to the state of Florida.

2. The NCCI ratemaking process is based on data that is appropriate as respects the actuarial methodologies used in the ratemaking process.

a. The financial call data collected by NCCI is appropriate for the actuarial methodologies used by NCCI to calculate the statewide rate change.

b. The WCSP data collected by NCCI is appropriate for the actuarial methodologies used by NCCI to distribute the statewide change to the five industry groups and the individual classifications in each industry group.

The financial call data and WCSP data are the primary data sets used by NCCI in the ratemaking process. Each set of data has advantages and limitations. The ratemaking processes employed by the NCCI tend to maximize the advantages of each set of data, and tend to minimize the impact of limitations of each set of data.

3. The general NCCI ratemaking process is consistent over time. However, judgments and assumptions as respects specific decisions on methodology and the selection of actuarial parameters may vary between rate applications.

a. The general ratemaking process employed by NCCI and the specific algorithms used in the NCCI rate application have generally been consistent over time, with the following notable exceptions.

- In 2010, NCCI implemented a material change to the method by which NCCI distributes the statewide rate change to individual classifications. This change was made in most (if not all) states where NCCI provides advisory ratemaking and statistical services, and has been generally referred to as the changes to class ratemaking. Oliver Wyman has opined in the past that this change represented a material improvement to the ratemaking process. However, there are concerns discussed in the section on recommendations.

- For rates and rating values effective January 1, 2012, NCCI changed a key element of the methodology used to determine the statewide rate indication. Specifically, the experience period was changed from the most recent two calendar-accident years to the most recent two policy years. NCCI justified this change by identifying concerns that calendar-accident year premium data will be distorted by the economic disruption. Oliver Wyman's concerns with the change, as well as specific concerns with NCCI's calculation of premium development factors (required for policy year data) were explained in detail in Oliver Wyman's prior peer review (report dated January, 2014), and will not be repeated here, except for the comment that premium development factors continued to be underestimated by NCCI in subsequent rate applications, though the impact has decreased and is likely immaterial at this point in time. The causative factor of the underestimates appear to be the inclusion of premium development data from policy years impacted by the economic disruption in the 2007 to 2009 time period. Oliver Wyman's prior peer review had recommended that the calendar-accident year based methodology be reinstated at a point in time when the difference between results using policy year data and calendar/accident year data is not material. Given that NCCI still

uses the policy year based methodology, and has consistently done so since the change was made, it is reasonable at this point to continue using this approach. However, any changes to the policy year methodology that might be proposed in the future should be thoroughly reviewed to ensure that there is a compelling reason to change and that the revised methodology does not replace one potential distortion with another.[18]

b. Certain specific judgments and assumptions vary between rate applications. In general, specific judgments and assumptions are a matter of professional actuarial opinion. There is a concern that relying on varying judgments and assumptions regarding key actuarial parameters (the most important of which is trend) rather than a consistent selection methodology over time increases the potential for generating rate level indications based on predetermined notions, rather than objective statistical measurements. Conversely, there are arguments that fixing all aspects of the ratemaking methodology may lead to illogical results when changes occur to the workers compensation system. This author, as respects statewide ratemaking, has generally recommended that methodologies and selection criteria for key actuarial parameters such as trend be fixed over time unless there is a compelling reason to change. Nevertheless, this is Oliver Wyman's professional opinion. Oliver Wyman finds nothing inherently improper with NCCI's *general approach* to ratemaking as respects this issue. Additionally, NCCI's trend selections for the most recent three rate applications (rates and rating values effective 1/1/14, 1/1/15, and 1/1/16) were reasonable.

[18] The basis for the change to policy year data was NCCI's concern that audit premium adjustments in a specific calendar year are generally due to policies not written in that year. When audit premium adjustments are consistent over time, there is minimal or no distortion to calendar-accident year data. However, the economic disruption materially changed the volume of audit premium, leading to concerns of potential distortion to calendar-accident year data. Oliver Wyman's concern in the prior peer review was NCCI's statement that:

"Policy year premium is not subject to such distortion since the audit premium adjustments are recorded in the same year the policy was written."

This statement is not correct because premium development factors, which are required for the policy year methodology, are distorted by changes to audit premium adjustments. As noted in the text, the distortion manifested itself through NCCI's consistent understatement of premium development for policy year data. NCCI effectively replaced distorted calendar-accident year data with policy year data that was subsequently distorted by understated premium development factors.

Recommendations

1. **NCCI should consider an actuarial methodology that quantitatively provides a trend selection based on observed empirical trends. Numerous approaches exist that provide reasonable results over time. Such approaches have been used by NCCI in the past. If such an approach were included in future rate applications, judgmental departures from that approach could be justified by NCCI if there were compelling reasons to do so.**

2. **Oliver Wyman's primary concern with the revised class ratemaking methodology implemented in 2010 is the substitution of theoretical excess loss ratios for actual data to provide for losses excess the $500,000 per claim limit. This concern has been addressed in past reports and will not be repeated here. However, an additional concern is the fixed $500,000 per claim limit. Over time, the impact of inflation will increase the volume of loss experience above the limit, and decrease the volume of loss experience below the limit, effectively giving more weight to the excess ratios, and less weight to empirical data. Oliver Wyman recommends that NCCI report to the FLOIR, based on Florida data, what the impact of keeping the limit fixed over time has been on the portion of available data below limit, as well as what the potential impact has been, if any, on the differentials between classification rates. If the impact is measurable, consideration should be given to inflating the limit over time to reflect the impact of severity inflation.**

3. **Embedded in the credits for small deductibles and coinsurance is a 0.9 safety factor. The purpose of the safety factor is to compensate insurers for the risk that employers who elect to participate in these programs do not reimburse insurers for the applicable deductible or coinsurance charges. The safety factor decreases the credits (and therefore increases the premium charged) for employers who elect to participate in these programs. Therefore, the lower the safety factor, the lower the credit, and the higher the premium charge. A safety factor of 1.0 has no impact on the premium credit, and a safety factor of 0.0 eliminates the premium credit altogether. The safety factor is therefore a contingency provision in addition to what is already included in the underwriting profit and contingencies provision underlying rates. NCCI explained that 0.9 safety factor dates back to the early 1990s. At that time, NCCI proposed a 0.7 safety factor and the Florida regulator approved a 0.9 safety factor. The safety factor has not been reviewed since. In this sense, the 0.9 value is not reasonable given that there is no current empirical support for this value. Oliver Wyman recommends that NCCI provide robust data on these programs that demonstrates the need for the safety factor and that NCCI then use this data to calculate an empirically based value for the safety factor in future applications.**

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Discussion

Statewide Rate Indication

Introduction

Contributing elements to the statewide rate change include

Loss Experience
Benefit Changes
Trend
Loss Adjustment Expense
Other Insurance Company Expenses
Taxes and Assessments
Profit and Contingencies

Each is discussed individually.

Loss Experience

The analysis of loss experience generates a forecast of the final expected cost of claims with dates of loss during the specified experience periods. Key considerations in this process are the selection of experience periods, database, and methods used to forecast the expected cost of claims.

Experience Period

There are generally two types of experience periods available for analysis, policy year and calendar/accident year. Each experience period has two key components: losses and premium. The definition of each component varies with the experience period under consideration. Each component, as well as other information specific to each experience period, is provided below:

Policy Year Experience

Losses: Loss experience mapped to a specific policy year is due to claims covered by policies written during that year. Policy year periods in NCCI applications are calendar years. Therefore, claims covered by policies written during 2011 generate losses associated with policy year 2011 (PY2011). Losses must be developed, or adjusted,

to a final cost basis. Loss development adjustments are required because the final cost of the group of claims associated with a specific policy year will not be known until after all claims are reported, paid, and closed. This will not occur until 50 or more years after the end of the policy year.[19] Loss development is a standard part of all NCCI applications and is discussed later in this section.

Premium: Premium mapped to a specific policy year is premium associated with policies written during the specified policy year period. Therefore, premium associated with PY2013 is the total premium associated with policies written during 2013. Policy year premium must be developed, or adjusted, to reflect the anticipated impact of premium adjustments over time. Premium adjustments are primarily due to the anticipated impact of premium audits, which generally occur within 12 months after a typical policy has expired.[20] Therefore, policy year premium used to determine the experience indication is an estimate equal to premium reported to NCCI by the insurance carriers multiplied by a premium development factor.[21]

Premium to Loss Experience Matching: Policy year experience maximizes the matching of losses to the premium insuring those losses. For PY2013, for example, a common group of insurance policies generates the loss experience and premium reported to NCCI.

Maturity of Experience: Policy year experience extends over a 24 month period because only policies written on January 1 will have claims with dates of loss exclusively in the year of writing. Using PY2013 as an example, a policy written on January 1, 2013 will provide coverage for claims with dates of loss from January 1, 2013 through December 31, 2013. On the other hand, a policy written on December 31, 2013 will provide coverage for claims with dates of loss from December 31, 2013

[19] Loss development is a standard actuarial approach and is required for the analysis of numerous types of casualty exposures besides workers compensation, such as general liability, medical professional liability, automobile liability, etc. However, loss development for workers compensation claims generally has the longest durations of all casualty exposures given that permanent total disability income benefits, the most expensive but least frequent of workers compensation claims, are payable to age 75 in Florida. In other states, benefits are for the lifetime of the claimant.

[20] Audits are typically within six months after policy expiration. An audit generally is a reassessment of payroll to determine actual payroll during the policy period. Insurers use estimated payroll to determine the initial premium payment prior to policy inception. Premium is recalculated using actual payroll. The difference between premium based on audited payroll and premium based on estimated payroll is the reason why policy year premium changes over time. NCCI uses premium development factors to incorporate the estimate of audit adjustments on policy year premium reported to NCCI by insurance carriers (see the following footnote).

[21] As noted in the preceding footnote, the auditing process requires a recalculation of policy year premium using audited (actual) payroll, causing policy year premium to change from amounts initially reported to NCCI by the insurance carriers. Premium development factors reflect the impact of the auditing process and measure the change to reported policy year premium over time. In a simple example, a factor of 1.021 multiplied against policy year premium provides an estimate of the impact of future audit adjustments. Historical premium development data is presented in Appendix A-II of the NCCI application.

through December 30, 2014. Therefore, approximately half the claims associated with PY2013 will have dates of loss in 2013. The other half will have dates of loss in 2014. The average date of loss is approximately December 31, 2013.[22]

Policy Year Data Available for the January 1, 2016 Application: The two most recent policy years available for use in the most recent rate application are PY2012 and PY2013, both with data valued as of December 31, 2014. December 31, 2014 is 12 months after the last possible date of loss (December 31, 2013) for a claim in PY2012. PY2012, valued as of December 31, 2014, is therefore said to be at a *second report*. Analogously, December 31, 2014 is the last possible date of loss for a claim in PY2013. PY2013, valued as of December 31, 2014, is therefore said to be at a *first report*. The average date of loss of claims data from policy years 2012 and 2013 is June 30, 2013.[23] This benchmark is important for a comparison with the calendar/accident year approach.

Calendar/Accident Year Experience

Losses: Loss experience mapped to a specific accident year is due to claims with dates of loss in a specific calendar year. Therefore, claims associated with accident year 2013 (AY2013) have dates of loss in 2013. Loss experience must be developed, or adjusted, to a final cost basis, just as with policy year loss experience.

Premium: Premium mapped to a specific accident year is calendar year earned premium.[24] This basis of calendar/accident year premium assumes that premium earned during a specific period provides for the cost of insuring claims with dates of loss during that same period. However, the initial calculation of earned premium is *not* adjusted for the impact of premium audits on underlying policies. Rather, premium adjustments due to audit are considered earned in the year the premium adjustments are made, rather than recalculating premium earned by the underlying policies with the audit adjustments. Therefore, once calculated, calendar year earned premium is fixed, prior to consideration of data quality edits that may be made by NCCI at future

[22] This would be the case if policies are written and incepted evenly over the year, and if claims occur evenly over the policy periods. As this is not the case, the average date of loss is generally close to, but not exactly equal to, December 31.

[23] The average date of loss of claims associated with PY2012 is December 31, 2012. The average date of loss of claims associated with PY2013 is December 31, 2013. The average of these two dates is June 30, 2013.

[24] Earned premium during a specific calendar year for an individual policy is equal to the total written premium for that policy multiplied by a ratio representing the portion of the policy term in the specific calendar year relative to the total policy term. An example is a policy written on October 1, 2013 for $100,000. $25,000 (25%) of the premium was earned in 2013, and $75,000 was earned in 2014. In the simplest sense, total calendar year 2014 earned premium that could be used in the rate application is an extension of this calculation for all policies that had any portion of their policy term in 2014.

dates. This leads to an imprecise match between earned premium and underlying loss data in calendar/accident year experience. There are two related reasons for the mismatch, explained below using AY2014 as an example:

1. AY2014 earned premium is not adjusted for the impact of future audit adjustments. Therefore, audit adjustments for policies with earned premium in 2014 are attributed to future calendar accident year data.
2. Audit adjustments in 2014 to policies without earned premium in 2014 are counted as earned premium in 2014.

Premium to Loss Experience Matching: The imprecision in the match between earned premium and underlying loss data in calendar/accident year experience is minor if the impact of audit adjustments is relatively constant over time. Essentially, the two sources of mismatch discussed above will offset one another. The mismatch of excluding or not anticipating future audit adjustments for the year in question is offset by including audit adjustments for prior years, and the impact on measured loss ratios is immaterial.

Maturity of Loss Experience: Calendar/accident year experience extends over a 12 month period because calendar year earned premium is matched to losses generated by claims with dates of loss in the specified calendar year. Using calendar/accident year 2013 (AY2013) as an example, the average date of loss is approximately June 30, 2013.[25]

Calendar/Accident Year Data Available for the January 1, 2016 Application: The two most recent calendar/accident years available for use in the most recent rate application are AY2013 and AY2014. Therefore, the average date of loss of claims data associated with a calendar/accident year approach would be December 31, 2013.[26] Therefore, calendar/accident year data is roughly 6 months more recent that available policy year data.

Comparison and Discussion

There are advantages and disadvantages to the use of either experience period. Calendar/Accident year experience represents the most recent experience available for analysis and is therefore a better indicator of current conditions.[27] Equally

[25] This is the case if premium is earned and if claims occur evenly over the calendar year. As this is usually not the case, the average date of loss is generally close but not exactly equal to, June 30.

[26] The average dates of loss of claims associated with AY2013 and AY2014 are June 30, 2013, and June 30, 2014. The average of these two dates is December 31, 2013.

[27] From a statistical viewpoint, arguments have been made that the advantage of using the more recent calendar/accident year data is somewhat offset by greater volatility because this data is six months less mature than policy year data. Oliver Wyman's experience has been that this is not an issue when examining potential variability of the indicated statewide change due to experience, trend, and benefits. The averaging process used to select loss development factors as well as the inherent variation of underlying loss experience tends to overwhelm any additional variability due to loss

important, calendar/accident year experience reduces the reliance on trend by approximately six months. This latter issue is important in situations such as Florida where trend is a selected value, rather than a calculated value using a standard methodology.

A disadvantage of calendar/accident year experience is the concern regarding the imprecise match of premium to losses. As noted earlier, in a steady state situation when the impact of audit adjustments is relatively constant over time this is usually not a material issue. Another mitigating factor is the requirement of premium development factors for policy year data. To the extent that policy year premium develops at rates greater than or less than anticipated by premium development factors, policy year premium data will essentially be mismatched as well because the anticipated impact of audit adjustments embedded in the premium development factors will have been misestimated.

Calendar/accident year experience had been the basis for rate applications in Florida since the early 1990s.[28] For rates and rating values effective January 1, 2012, NCCI changed the experience period and utilized the most recent two policy years. The underlying argument for the basis of this change was unexpectedly large and negative audit adjustments embedded in the calendar/accident year experience that was available for that application, AY2009 and AY2010.

Oliver Wyman's opinion is that this change to methodology was not warranted because the unexpectedly negative audit adjustments that NCCI asserts was not contemplated by calendar/accident year data also distorted policy year data through selected policy year premium development factors that were either too low, or possibly too high, depending on the rate application. This concern was discussed at length in Oliver Wyman's prior review. Given that NCCI continues to use policy year methods, and the distortion to premium development factors due to the period of economic disruption is well into the data history, the use of policy year methods should continue, at this point, unless there is a compelling reason to change.

Database

NCCI has several types of loss data (available from NCCI's financial calls) that may be used to forecast the final cost of claims. NCCI has historically relied on the following:

Paid Loss data

Paid Loss plus Case Reserve data

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experience that is six months more recent and therefore six months less mature. Additionally, consistent use of a specific methodology over time, as had been done in Florida for decades (before NCCI precipitated a change to policy year experience) will eliminate the impact of statistical fluctuation, no matter how small.

[28] This statement is based on documentation reviewed by Oliver Wyman in the proceedings for rates effective January 1, 2014 and rates effective January 1, 2013. Oliver Wyman did not check the methodology used in every application going back to the 1990s.

Paid loss data relies exclusively on benefit payments. Paid loss plus case reserve data relies on benefit payments and case reserves. Case reserves are the most recent estimates by claims professionals of the unpaid costs on open reported cases. Therefore, the use of paid loss data, as opposed to paid loss plus case reserve data, excludes the most recently available information on expected future costs embedded in case reserves. Paid loss data relies much more heavily on loss development factors for forecasting purposes, whereas paid loss plus case reserve data essentially substitutes case reserves, the most recently available information on the expected future costs of individual claims, for a substantial portion of paid loss development. Paid loss data is distorted by changes in claim payment (settlement) patterns while paid loss plus case reserve data is also distorted by changes to case reserve levels.

Documentation provided to Oliver Wyman indicates that NCCI has considered the impact of the changes in Florida's workers compensation environment on data used to determine statewide rate level indication, and the process, judgments, and assumptions are reasonable from an actuarial perspective.

Currently, NCCI bases the rate level indication on an average of the paid loss plus case reserve experience approach and the paid loss approach. Currently, NCCI uses paid loss data to a 19th report, after which a calculated loss development factor for a 19th to ultimate value is applied. This is the same approach as used for paid loss plus case reserve data.

Loss Development

Loss development factors (LDFs) measure the growth in losses associated with a group of claims over time. Claims are generally grouped by experience period, either policy year or calendar/accident year. LDFs are selected using some type of average of the most recent observations available. Such averages could include the most recent five observations, or the most recent five observations excluding the highest and lowest values, or the most recent three or two observations, etc. All of these averaging techniques are appropriate and reasonable in the context of the current and recent applications. NCCI has used an average of the three most recently available observations, which is reasonable.

Oliver Wyman also examined the method and calculation of what are termed the 19th to ultimate report LDFs. These factors estimate growth beyond a 19th report, the last report for which NCCI collects loss development data. The calculation and results are similar to NCCI practice in other states and are reasonable. The selected value is an all year average of available calculations.

Premium Adjustment

For accident year analysis, calendar year earned premium is matched with loss experience. A number of adjustments to earned premium data are required to bring premium to current cost levels. These include an adjustment to remove premium generated by the expense constant, an adjustment to reflect historical rate changes, and an adjustment to remove the impact on premium of variations in the effect of the

experience rating program. The adjustment procedure is a standard NCCI calculation in Florida and other states, and is reasonable.

Off-Balance

Experience rating is the final step in determining the premium rate for a specific employer. Experience rating recognizes that the manual loss cost for a specific workers compensation classification is actually the average for all employers with payroll in that classification. Relative to the manual loss cost, the actual loss experience of some employers will be greater, while actual loss experience will be lower for others. The purpose of the experience rating plan is to forecast how each individual employer will perform relative to the average for that employer's classification. The forecast is, conceptually, a very simple measurement. Each employer's recent actual loss experience is measured against what would have been expected based on the average for the employer's classification. The result of this measurement is the employer's experience modification. If an individual employer has greater than average loss experience for its classification, that employer is assigned an experience modification greater than 1.000 (also known as a debit modification). If an individual employer has lower than average loss experience, that employer is assigned an experience modification less than 1.000 (also known as a credit modification). If an individual employer is too small to be experience rated, that employer is assigned an experience modification of 1.000.

The statewide average experience modification is the average experience modification across all employers in a state. The statewide average experience modification is also known as the "off-balance" to the experience rating plan. The term off-balance is used because in theory, the statewide average experience modification should balance to 1.000. In practice, this means that total debits (additional premium) for greater than average loss experience from employers with debit (greater than 1.000) experience modifications would be equal to total credits (reduced premium) for less than average loss experience from employers with credit (less than 1.000) experience modifications. To the extent that the statewide experience modification does not average to 1.000, an "off-balance" is said to exist.

Off-balance must fluctuate over time, if only because of statistical variance, as the experience modification for each employer is a forecast based on each employer's historical experience and the historical experience of all employers in a specific classification. NCCI, as part of the ratemaking process, adjusts experience rating plan parameters to ensure that the off-balance in Florida is reasonably close to a selected target. The process of implementing such an adjustment is straightforward. NCCI will adjust underlying experience rating parameters to ensure that the selected target off-balance is achieved based on test calculations by NCCI.

To the extent that the measured off-balance in a specific experience period (policy year or calendar/accident year) differs from the target, an adjustment to the experience period premium is required. Consider a simple example using a fictitious policy year. Assume PY2013 has a measured off-balance of 0.920. NCCI selects a target off-

balance of 0.960. This means that all else being equal, had the off-balance in PY2013 been measured at 0.960, there would have been 4.3% more premium collected in PY2013 because the average experience rating modification would have been 4.3% greater (0.960/0.920 = 1.043, or 4.3%). Conceptually, this example illustrates that off-balance adjustments are revenue neutral, meaning that to the extent an off-balance adjustment increases premium expected to be collected through the experience rating plan, manual rates are decreased by the same amount. The opposite is true as well: To the extent that an off-balance adjustment decreases premium expected to be collected through the experience rating plan, manual rates are increased by the same amount. The impact of the off-balance adjustment in the example above is to decrease the PY2013 loss ratio by 4.3%. If there had been an identical impact on PY2012, then all else being equal, the statewide rate level indication would have been 4.3% lower than the indication without the off-balance adjustment.

The selection of an off-balance target is as much a policy/political issue as it is an actuarial issue. Actuarial literature suggests that an experience rating plan should be balanced. NCCI targets an average off-balance of 0.963 (for rates and rating values effective January 1, 2016). Had NCCI selected a target off-balance of 0.990, indicated rates would be approximately 3.6% lower because increasing the target off-balance from 0.963 to 0.990 will increase, through the experience rating process, premium by approximately 3.6%. Therefore, manual rates would have to be decreased by 3.6% to ensure that there is no net impact on revenue.

NCCI has argued that a lower target is necessary due to the poor performance of small employers. A lower target elevates manual rates and therefore premium charged to smaller employers, who generally will not benefit due to experience rating. Additionally, a potential issue for regulators is that increasing the target average off-balance from the current 0.963, even modestly, could create situations where some employers will swing from a credit mod (viewed favorably) to a debit mod (viewed unfavorably). This is especially important for the construction industry, where contracts possibly may not be awarded if a specific employer has an experience modification greater than some published benchmark, often 1.000.

Counter arguments would be that the smallest employers receive the least service from insurance carriers, and are therefore at a disadvantage. The impact of several percentage points on rate level potentially could have greater meaning to the smallest employers as opposed to others. Additionally, from an actuarial perspective, it is questionable as to whether an employer's experience modification should be used for the purpose of awarding contracts. There are numerous variables underlying an employer's experience modification. Most notably is the published manual rate for a specific classification is, by definition, an average, and the fact that a specific employer in a specific classification has experience greater than the average does not mean that employer has an unsafe workplace.

Large Deductible and Standard Experience

NCCI analyzes loss experience generated by large deductible policies and loss experience generated by standard polices separately. The results from each analysis

are combined to produce a statewide rate level indication. The argument to include large deductible experience is that classification rates and rating values, including experience rating parameters, are based on the experience of all employers in a state. Therefore the experience of all employers in a state should be used to determine statewide rate level. On the other hand, in other jurisdictions, large deductible experience is excluded from experience used to determine statewide rate level. The argument in these jurisdictions is that large deductible experience is generated by employers that assume such a large portion of their underlying risk exposure that published insurance rates are not relevant to them. Rather, the experience used to determine statewide rate level should be based on those employers for which published premium rates are most relevant.

Both approaches (including or excluding large deductible experience) have merit, and are reasonable.

Benefit Changes

Adjustment of Losses to Current and Expected Future Benefit Levels

Historical losses, for the purpose of the experience indication and the calculation of trend, must be adjusted to reflect changes in benefit levels at the time the losses were incurred to the period during which the prospective rates will be in effect. The NCCI calculation is a standard actuarial procedure.

Trend

Trend forecasts the anticipated annual percentage change in loss ratios. Loss ratio trends represent the combined effect of changes in the incidence of claims over time, or frequency, as well as the change in the average cost per claim, or severity, over time.

Trend, as respects workers compensation loss ratios, measures the change in loss experience relative to wage inflation. That is, a 0% loss ratio trend does not imply that workers compensation costs are not increasing. Rather, a 0% loss ratio trend implies that workers compensation costs are increasing at the same rate as wages. A loss ratio trend greater (less) than 0% implies workers compensation costs are increasing at a rate greater (less) than wage inflation.

NCCI conducted a detailed analysis of trend factors separately for medical and indemnity loss experience. Concerns regarding the judgmental selection of trend were discussed earlier in this report. As noted earlier, NCCI trend selections for the most recent applications were reasonable.

Loss Adjustment Expense

LAE is calculated as a ratio to loss, and is the sum of two components, all other expense (AOE) and defense and cost containment expense (DCCE). Countrywide ratios of AOE and DCCE to loss are calculated. The countrywide ratio of AOE is assumed to apply in Florida. The countrywide ratio of DCCE to loss is adjusted by a relativity of Florida experience to countrywide experience. The relativity is based on a comparison of the ratio of paid DCCE to paid loss in Florida to the same calculated using countrywide data. The approach in Florida is reasonable.

Other Insurance Company Expenses

Other insurance company expenses include the provisions for production expense and general expense. The provision for production expense includes commission and brokerage costs, and other acquisition costs. The methodology used by NCCI is reasonable. The resulting provisions generally do not vary by significant amounts over time.

Taxes and Assessments

Taxes and assessments are based on actual charges in Florida. The only exception is the miscellaneous tax provision of 0.30%. The miscellaneous tax provision is a catch all provision for taxes, licenses and fees not specifically provided for. It is common ratemaking practice to include this provision, and the value of 0.30% is not unreasonable.

Profit and Contingencies Provision

The profit and contingencies provision provides the insurance company the required return on equity, after taking into account the investment income earned on premium payments until losses and expenses are actually paid. The approach and model used by NCCI is a commonly applied approach. While Oliver Wyman may disagree with certain judgments and assumptions in the modeling procedure, these are issues of either policy or professional judgment, not of actuarial reasonableness. Additionally, certain benchmark parameters, such as the cost of capital target and investment income parameters, are not actuarial in nature and therefore outside the scope of this review.

Distribution to Industry Groups

NCCI distributes the statewide rate change to each of the five industry groups based on the relative loss experience of each individual industry group. The distribution is such that the weighted average final change to each industry group is equal to the statewide rate change. The industry groups are Manufacturing, Contracting, Office and Clerical, Goods and Services, and Miscellaneous. The distribution relies on a measurement, for each industry group, of actual losses to expected losses for each individual industry group. The process results in industry group differentials. The differentials are equivalent to "experience modifications" for each industry group, measuring the loss experience of each industry group relative to expectations. If each industry group performed exactly as expected, then the industry group differentials will all be 1.000, and each industry group will receive a rate change equal to the statewide average.

NCCI calculates the industry group differentials by adjusting actual losses for trend, development, experience rating, etc. Additionally, NCCI uses a credibility procedure to limit the impact of the procedure on a specific industry group with relatively low loss volume. In Florida, however, all industry groups are fully credible. The procedure is identical to procedures used in other NCCI states that Oliver Wyman has examined, and is reasonable. Note that with the application for revised rates and rating values effective January 1, 2015, wage trend adjustments were removed from the calculation of industry group differentials. The basis for this change was NCCI research showing that the impact of wage trend adjustments is not material.

Industry group differentials are not expected to vary materially from 1.000, especially for larger states such as Florida. This was the case for applications for rates effective January 1, 2015. For the most recent application, effective January 1, 2016, the industry group differential for manufacturing, contracting, and office and clerical were, 0.971, 1.030, and 0.967, respectively. These values are somewhat greater in distance from 1 than expected.

Distribution to Individual Classifications

Introduction

The final step in the ratemaking process is the distribution of the industry group changes to the individual workers compensation classifications comprising each industry group. NCCI bases the distribution on the loss experience of each individual classification. As noted earlier, the approach for industrial classifications is a rate relativity system. NCCI's application gives the appearance of a direct calculation of rates for individual classifications, but this is not precisely the case. Rather, the relative behavior of the loss experience of an individual classification (to the loss experience of all classifications in a specific industry group) is the primary determinant of the final rate for that classification.

Rates for individual classifications are calculated in a four step process:

Calculation of the pure premium
The pure premium is the expected cost of indemnity and medical benefits per $100 payroll during the period when rates will be in effect.

Conversion of the pure premium to a manual rate
The provisions for expense and profit (and contingencies) are added to the pure premiums to produce a manual premium rate.

Application of swing limits and correction factors
Rate changes to individual classifications are limited to a range of +15% to -15% around the industry group change. A final adjustment using what is termed the test correction factor ensures that the average rate change to all classifications in an industry group equals the product of the statewide rate change and the calculated industry group differential.

Disease Loadings
Loadings for diseases unique to specific classifications are applied.

Class Ratemaking

The overall process described above is the same general process NCCI has used for many years and is reasonable and actuarially sound. With respect to the detailed calculation of pure premiums underlying the rates for individual classifications, NCCI implemented material changes approximately five years ago. Oliver Wyman has opined in past peer reviews that these changes represented a material improvement to class ratemaking. This opinion has not changed. The NCCI class ratemaking methodology is reasonable and actuarially sound.

Oliver Wyman has expressed concerns regarding the substitution of theoretical excess loss ratios for actual data to provide for losses excess the $500,000 per claim limit, which is part of the changes to class ratemaking implemented by NCCI. While this approach is reasonable from an actuarial perspective, there is a concern regarding the $500,000 limit, which has been fixed since implementation of the changes and is not adjusted annually for inflation. Therefore, with the passage of time, a greater portion of class experience (due to inflation) will be above $500,000. The impact is that over time, the relative weight of excess ratios for costs above $500,000 in the calculation of class rates will increase, and the relative weight of empirical loss experience below the $500,000 limit will decrease.

Application of Swing Limits and Test Correction Factors

In Florida, the rate change to an individual classification is limited to a range within 15% of the change to the industry group to which the classification belongs. For example, if a specific industry group has a 12% rate increase, the rate change for each classification in that industry group can be no greater than 27% (= 12% + 15%) or less than -3% (= 12% - 15%). Because of the limiting procedure, as well as other processes within the ratemaking calculation, the resulting average rate change for all classifications in an industry group may not precisely equal the required industry group change. This is addressed by calculation of a test correction factor (TCF) that is applied to each individual classification rate in the industry group to ensure that the required industry group change is achieved. The calculation of the TCF is an iterative procedure, because no individual classification rate is permitted to violate the swing limit test. The TCF ensures that the impact of using swing limits is revenue neutral. Therefore, the implementation of swing limits by NCCI is actuarially sound. The precise value of the swing limit, or even the use of swing limits at all, is primarily a matter of policy with the regulator, and is dependent on the size of the range of swing in class rates that will be accepted in a specific jurisdiction.

Disease Loadings

The last step is addition of specific disease loadings for individual classifications to which disease loading apply.

Rating Values

Oliver Wyman's examination was limited to the examination of certain rating values. The calculation of these factors was not examined in detail. Rather, the factors were examined for reasonableness:

Expected Loss Rates D Ratios Excess Loss Factors

The values of these factors appear to be reasonable, notwithstanding concerns regarding the use of excess loss ratios (which are the basis for the excess loss factors) for class ratemaking.

Note that the calculation of excess loss factors was changed to better reflect the revised ratemaking methodology. The overall approach is the same, however, claims are partitioned into the categories used in the revised ratemaking methodology.

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Documentation and Information

The following is list of documents utilized for the purpose of this report. In addition to documents listed below, Oliver Wyman may have relied on internal data sources, insurance industry data sources, or other information not specifically listed below.

NCCI Annual Statistical Bulletins

Florida Workers Compensation Rate Application and related documents for rates effective January 1, 2014
- Filing Documents
- Hearing Documents
- Interrogatories and Correspondence

Florida Workers Compensation Rate Application and related documents for rates effective January 1, 2015
- Filing Documents
- Hearing Documents
- Interrogatories and Correspondence

Florida Workers Compensation Rate Application and related documents for rates effective January 1, 2016
- Filing Documents

Miscellaneous Other Documents

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Considerations and Limitations

- Data Verification (Claim and Exposure) – For our analysis, we relied on data and information provided by NCCI without independent audit. We have assumed that the data provided is both accurate and complete. The results of our analysis are dependent on this assumption. If this data or information is inaccurate or incomplete, our findings and conclusions may need to be revised.

- Rounding and Accuracy – Our models may retain more digits than those displayed. In addition, the results of certain calculations may be presented in the exhibits with more or less digits than would be considered significant. As a result, it should be recognized that (i) there may be rounding differences between the results of calculations presented in the exhibits and replications of those calculations based on displayed underlying amounts, and (ii) calculation results may not have been adjusted to reflect the precision of the calculation.

- Unanticipated Changes – Our conclusions are based on an analysis of the data and on the estimation of the outcome of many contingent events. Future costs were developed from the historical claim experience and covered exposure, with adjustments for anticipated changes. Our estimates make no provision for extraordinary future emergence of new classes of losses or types of losses not sufficiently represented in historical databases or which are not yet quantifiable.

- Uncertainty Inherent in Projections – While this analysis complies with applicable Actuarial Standards of Practice and Statements of Principles, users of this analysis should recognize that our projections involve estimates of future events, and are subject to economic and statistical variations from expected values. We have not anticipated any extraordinary changes to the legal, social, or economic environment that might affect the frequency or severity of claims. For these reasons, no assurance can be given that the emergence of actual losses will correspond to the projections in this analysis.

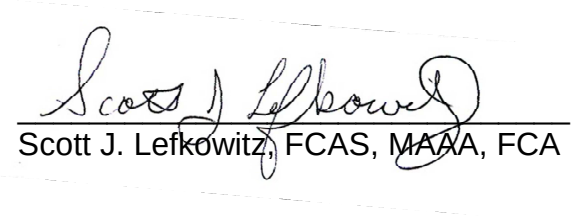
- Other Issues – Any issues not specifically addressed in this report should not be construed as acceptance by Oliver Wyman of the methodologies and judgments associated with those issues.

7

Acknowledgement

I, Scott J. Lefkowitz, am a Partner for Oliver Wyman Actuarial Consulting Inc. I am a member of the American Academy of Actuaries, a Fellow of the Casualty Actuarial Society, and a Fellow of the Conference of Consulting Actuaries.

I meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion contained herein.



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NCCI Response to the 2015 Actuarial Peer Review of the Ratemaking Process of NCCI

NCCI appreciates the opportunity to comment on the report compiled by Oliver Wyman Actuarial Consulting Inc. ("Oliver Wyman"), regarding the ratemaking process of the National Council on Compensation Insurance ("NCCI") in the State of Florida. We are pleased to note Oliver Wyman's principal conclusions that NCCI's ratemaking process in Florida is:

1) Based on commonly applied actuarial methodologies that are supported in actuarial literature as well as frequency of usage by credentialed actuaries.

2) Based on data that is appropriate as respects the actuarial methodologies used in the ratemaking process.

3) Generally consistent over time.

With regard to the specific recommendations in the Oliver Wyman review, NCCI offers the following comments:

Regarding Oliver Wyman's recommendation that NCCI consider an actuarial methodology that quantitatively provides a trend selection based on observed empirical trends

Oliver Wyman is recommending that NCCI select a trend methodology that would be "fixed over time unless there is a compelling reason to change." Oliver Wyman notes however that "there are arguments that fixing all aspects of ratemaking methodology may lead to illogical results when changes occur to the workers compensation system."

NCCI employs a number of techniques to examine historical trends and then uses actuarial judgment to select the going-forward trend assumption. Judgment is particularly appropriate in a state like Florida, where a steady state environment is rarely observed.

In NCCI's opinion, adopting a rigid standard procedure precludes the use of an approach that is most appropriate to each state's condition. Maintaining procedural flexibility allows for the selection of methodologies as indicated by diagnostic information. While NCCI might choose to implement a "standard method," the option must exist to deviate from that method – provided that full explanation is made to the regulator – when conditions require.

Regarding Oliver Wyman's recommendations related to NCCI's class ratemaking methodology

NCCI regularly reviews different aspects of the ratemaking methodology to determine if improvements can be made and will take Oliver Wyman's recommendations under advisement.

The class ratemaking methodology used in NCCI's Florida filings has been implemented and accepted in all other jurisdictions in which NCCI provides ratemaking services, except Texas, as

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well as several other independent bureau states.[1] The methodology, including the process of limiting of large claims and applying expected excess provisions, is detailed in a paper written by Thomas V. Daley and accepted for publication in the Casualty Actuarial Society's peer-reviewed journal *Variance*.[2] Another *Variance* paper by John P. Robertson describes the manner in which classifications were assigned to hazard groups in 2007.[3]

Regarding Oliver Wyman's recommendation concerning the safety factor used in the calculation of small deductible credits

NCCI is currently in the process of reviewing the safety factor that is included in the calculation of small deductible credits.

NCCI is pleased to have participated in the review process conducted under the leadership of Scott Lefkowitz and Oliver Wyman. As we examine and adopt suggestions for improvement, NCCI will continue to make it our priority to support Florida's legislators and regulators as they seek to maintain a stable and healthy workers compensation system.

[1] Texas presently utilizes an older class ratemaking methodology due to unit statistical data limitations.
[2] Daley, T.V., "Class Ratemaking for Workers Compensation: New Developments in Loss Development" *Variance*, Volume 6, Issue 2, 2012, pp.196-244. http://www.variancejournal.org/issues/06-02/196.pdf
[3] Robertson, J.P., "NCCI's 2007 Hazard Group Mapping" *Variance,* Volume 3, Issue 2, 2009, pp.194-213. http://www.variancejournal.org/issues/03-02/194.pdf

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2015

Workers' Compensation

Annual Report

FLORIDA OFFICE OF
INSURANCE REGULATION

Kevin M. McCarty, Insurance Commissioner

Table of Contents

Executive Summary

Subsection 627.211(6), Florida Statutes, mandates the Office of Insurance Regulation (Office) provide an annual report to the President of the Senate and the Speaker of the House of Representatives that evaluates competition in the workers' compensation market in the state. The report is to contain an analysis of the availability and affordability of workers' compensation coverage and whether the current market structure, conduct and performance are conducive to competition, based upon economic analysis and tests. The report must also document that the Office has complied with the provisions of Section 627.096, Florida Statutes, which requires the Office to investigate and study the data, statistics, schedules, or other information as it finds necessary to assist in its review of workers' compensation rate filings.

As mandated, the analysis presented in this report finds the following:

1. Based on a comparative analysis across a variety of economic measures, the workers' compensation market in Florida is competitive.

    a. The workers' compensation market in Florida is served by a large number of independent insurers and none of the insurers have sufficient market share to exercise any meaningful control over the price of workers' compensation insurance.

    b. The Herfindahl-Hirschman Index (HHI) - a measure of market concentration - indicates the market is not overly concentrated.

    c. There are no significant barriers for the entry and exit of insurers into the Florida workers' compensation market and based on the record of new entrants and voluntary withdrawals with no market disruptions, the Florida workers' compensation market is competitive, well capitalized and robust.

2. Of the six most populous states, Florida is one of only two where a private market insurer is the largest insurer rather than a state-created residual market entity. This degree of private activity indicates coverage should be generally available in the voluntary market. The residual market is small, suggesting the voluntary market is absorbing the vast majority of demand. Additionally, Florida's aggregate loss ratios are the second lowest among the six most populous states with only Texas having lower ratios.

3. Reforms to Section 440.34, Florida Statutes, which affected attorney's fee provisions, were a significant factor in the decline of workers' compensation insurance rates and continue to impact them.[1] It is also the case, however, that most of the improvements resulting from these legislative changes may have been realized as there were four rate

[1] In *Murray v. Mariner Health*, (Florida Supreme Court October 23, 2008), the Florida Supreme Court held that the statute in the workers' compensation law did not limit attorneys' fees under a separate subsection (3) of the law, and therefore a lawyer representing a workers' compensation claimant is entitled to a "reasonable fee." House Bill 903 was passed into law during the 2009 Legislative Session. It restored the cap on attorney fees and clarified related statutory language that the Florida Supreme Court had determined to be ambiguous. As a result, workers' compensation rates decreased further.

increases from 2010 to 2014 after seven years of decreases following the 2003 reforms. Although the dramatic decreases in rates during the seven years from 2003 to 2010 were directly attributable to action taken by the Florida Legislature in 2003, the reforms have subsequently been challenged in the courts. Notably there are several pending court cases involving workers' compensation before the Florida Supreme Court that have the potential to negatively impact the workers' compensation system in Florida.

4. Medical cost drivers, particularly in the areas of drugs, hospital inpatient, hospital outpatient and ambulatory surgical centers (ASC) are noticeably higher in Florida than the countrywide average. Legislative reform affecting the reimbursement of these services could produce substantial savings for Florida employers.

5. Affordability within the Florida Workers' Compensation Joint Underwriting Association, Inc. (FWCJUA), which is the residual market, has been an ongoing issue. Senate Bill 50-A enacted in 2003 and House Bill 1251 enacted in 2004 addressed affordability in the voluntary and residual market, respectively, and both markets remain stable. It is worth noting, however, that over the last several years both policy count and premium within the FWCJUA increased significantly, though it still remains a very small portion of the overall workers' compensation market.

6. The Office is in compliance with the requirements of Section 627.096, Florida Statutes.

Purpose and Scope

Subsection 627.211(6), Florida Statutes, mandates:

"*The office shall submit an annual report to the President of the Senate and the Speaker of the House of Representatives by January 15 of each year which evaluates competition in the workers' compensation insurance market in this state. The report must contain an analysis of the availability and affordability of workers' compensation coverage and whether the current market structure, conduct, and performance are conducive to competition, based upon economic analysis and tests. The purpose of this report is to aid the Legislature in determining whether changes to the workers' compensation rating laws are warranted. The report must also document that the office has complied with the provisions of s. 627.096 which require the office to investigate and study all workers' compensation insurers in the state and to study the data, statistics, schedules, or other information as it finds necessary to assist in its review of workers' compensation rate filings.*"

To meet these mandates, this report provides analysis of the following areas:

1. The competitive structure of the workers' compensation market in Florida by comparing select key financial performance ratios, the number of insurers actively participating in the market along with their respective market positions, and the number of insurers entering and exiting the market.

2. The availability and affordability of workers' compensation insurance in Florida. This includes an analysis of rate changes in Florida's admitted market, as well as, the rating structure existing in the FWCJUA.

3. The market structure in Florida, which includes the market concentration in Florida compared with other states, and entry and exit of insurers from the Florida market.

4. Documentation of the Office's compliance with Section 627.096, Florida Statutes, by investigating all workers' compensation carriers operating in Florida.

5. A comparison of pure loss costs for the 10 largest workers' compensation class codes for Florida compared to the other states using the National Council on Compensation Insurance (NCCI) as their statistical rating organization.

Summary of the 2014 Annual Report

In general, the 2014 Workers' Compensation Annual Report (for calendar year 2013) reached similar conclusions as the previous 11 annual reports. Specifically, this report showed:

- Florida's workers' compensation insurance market contained a large number of independent insurers, none of which had enough market share to individually exercise market control in an uncompetitive nature.
- The HHI indicated Florida's market was not overly concentrated, and consequently exhibited a reasonable degree of competition.
- There were no significant barriers for entry and exit of insurers into and from the Florida workers' compensation insurance market.
- The residual market is small relative to the private market indicating the voluntary market offers reasonable availability.
- There may be some small segments of the market which have difficulty obtaining workers' compensation insurance, including small firms and new firms.

The 2014 annual report notes that the Office approved a rate decrease of 5.2% on November 12, 2014 which became effective on January 1, 2015.

The 2015 Workers' Compensation Annual Report (for calendar year 2014) continues to examine the workers' compensation insurance market from the same perspective and provides the HHI to compare Florida's market concentration versus the other major workers' compensation markets by providing a comparative analysis of key market characteristics among the six most populous states. The five other states are: California, Illinois, New York, Pennsylvania, and Texas.

Additionally, the 2015 Workers' Compensation Annual Report presents findings on the cost drivers in the Florida workers' compensation system.

Snapshot of the Florida Workers' Compensation Market in 2014

Although the relative health and competitiveness of the Florida workers' compensation market has been well documented following the legislative reforms implemented in 2003, there may be some reason for caution moving forward.

In 2014, 256 privately-owned insurers actively wrote workers' compensation insurance in Florida. In total, these private sector insurers wrote $2,536,959,991 in premium. Moreover, during 2014, three insurers entered the Florida workers' compensation market, either as new companies or by adding the workers' compensation line of business to their certificate of authority. During 2014, five insurers voluntarily exited the Florida market. Three of these insurers merged with another insurer and as a result, withdrew their certificate of authority while the surviving entity maintained workers' compensation as a line of business on their certificate of authority. These new entrants and voluntary withdrawals had no disruptive impact on the marketplace, as should be the case in a competitive market.

Ten Largest Insurers

The largest insurer, Bridgefield Employers Ins. Co., as measured by premium written in the chart below, had 10.54% of the market, and the largest 10 insurers had a cumulative 43.16% of the market. This spread of premium across insurers suggests no one firm can be seen to have an overly dominant impact on the market. These insurers are:

Company Name	State of Domicile	Workers' Compensation Direct Premium Written	Market Share (%)	Cumulative Market Share (%)
Bridgefield Employers Ins Co	FL	$267,482,074	10.54	10.54
FCCI Ins Co	FL	133,609,821	5.27	15.81
Zenith Ins Co	CA	132,811,824	5.24	21.05
Technology Ins Co Inc	NH	127,764,932	5.04	26.08
RetailFirst Ins Co	FL	87,251,291	3.44	29.52
Comp Options Ins Co Inc	FL	82,380,240	3.25	32.77
Associated Industries Ins Co Inc	FL	72,799,918	2.87	35.64
Amerisure Ins Co	MI	67,523,519	2.66	38.30
FFVA Mut Ins Co	FL	63,054,681	2.49	40.78
Twin City Fire Ins Co	IN	60,199,153	2.37	43.16

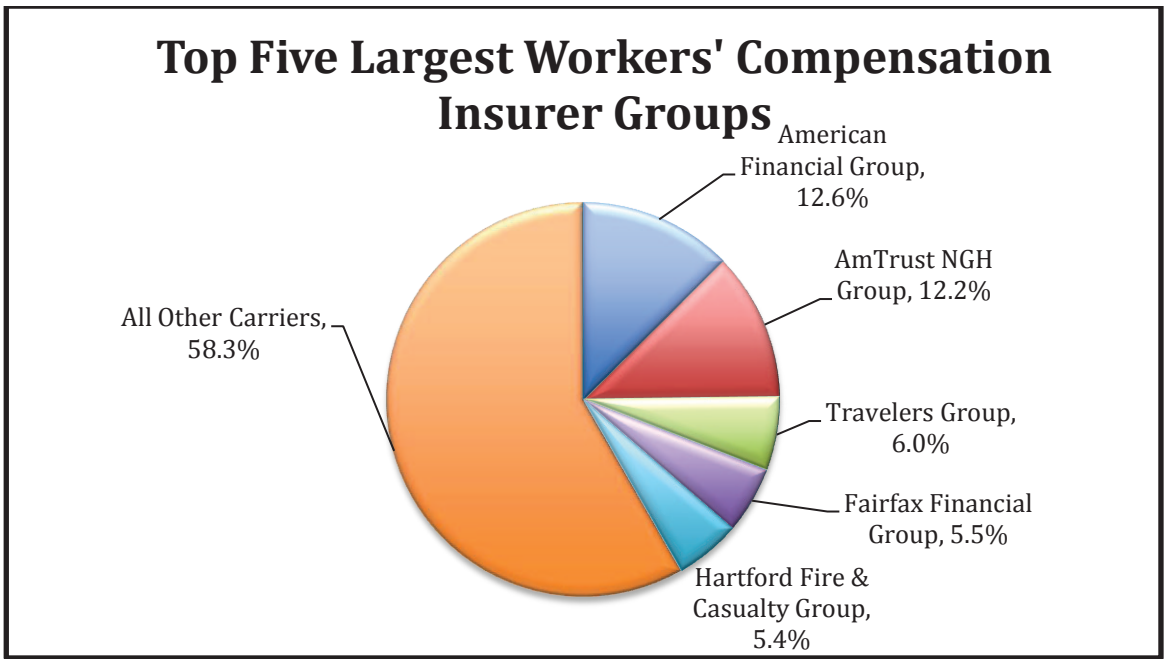
Six of these companies are domiciled in Florida with the remaining four domiciled in the eastern, mid-western and western United States. This shows the Florida workers' compensation market is not served exclusively by Florida-only companies and there is some geographical diversification.

The 10 largest companies also display a range of product line diversification. Some, such as Bridgefield, RetailFirst, and Comp Options write all, or nearly all, of their business in the Florida workers' compensation market, while the others write a broader mix of workers' compensation in other states, other lines of business, or both. The table below highlights the relative size of the Florida workers' compensation market to each of the 10 largest firm's portfolio mix of business. This mix of business by geography and line of business adds to the stability of the Florida market.

Company	Florida Workers' Comp Premium Written	Florida Workers' Comp/All Workers Comp Premium Written	Florida Workers' Comp /All Premium Written	All Workers' Comp/All Premium Written
Bridgefield Employers Ins Co	$267,482,074	95.53%	95.53%	100.00%
FCCI Ins Co	133,609,821	69.65%	38.85%	55.79%
Zenith Ins Co	132,811,824	23.77%	22.06%	92.83%
Technology Ins Co Inc	127,764,932	15.36%	13.44%	87.49%
RetailFirst Ins Co	87,251,291	100.00%	100.00%	100.00%
Comp Options Ins Co Inc	82,380,240	100.00%	100.00%	100.00%
Associated Industries Ins Co Inc	72,799,918	100.00%	50.03%	50.03%
Amerisure Ins Co	67,523,519	37.71%	19.83%	52.60%
FFVA Mut Ins Co	63,054,681	57.10%	57.10%	100.00%
Twin City Fire Ins Co	60,199,153	9.72%	4.75%	48.87%

Largest Insurer Groups

In 2014, the five largest insurer groups comprised 41.7% of the market. American Financial Group is the largest provider of workers' compensation insurance in Florida with 12.6% of the total market based on 2014 National Association of Insurance Commissioners (NAIC) Annual Statement data. The largest individual company in Florida, Bridgefield Employers Ins Co, is a member of the American Financial Group. These insurer groups are displayed on the following page:



Nine of the top 10 insurers found on page seven belong to one of the top 10 insurer groups in Florida while a few of the top 10 insurer groups do not have a company in the top 10 individual insurers such as Travelers Group. The top 10 largest insurer groups are as follows:

Insurer Group Name	Workers' Compensation Direct Premium Written	Market Share (%)	Cumulative Market Share (%)
American Financial Group	$320,254,533	12.6	12.6
AmTrust NGH Group	309,029,004	12.2	24.8
Travelers Group	152,369,692	6.0	30.8
Fairfax Financial Group	138,537,510	5.5	36.3
Hartford Fire & Casualty Group	137,727,733	5.4	41.7
FCCI Mutual Insurance Group	135,378,341	5.3	47.0
American International Group	126,242,690	5.0	52.0
RetailFirst Group	112,017,636	4.4	56.4
Zurich Insurance Group	104,419,618	4.1	60.5
Amerisure Company Group	97,487,213	3.8	64.4

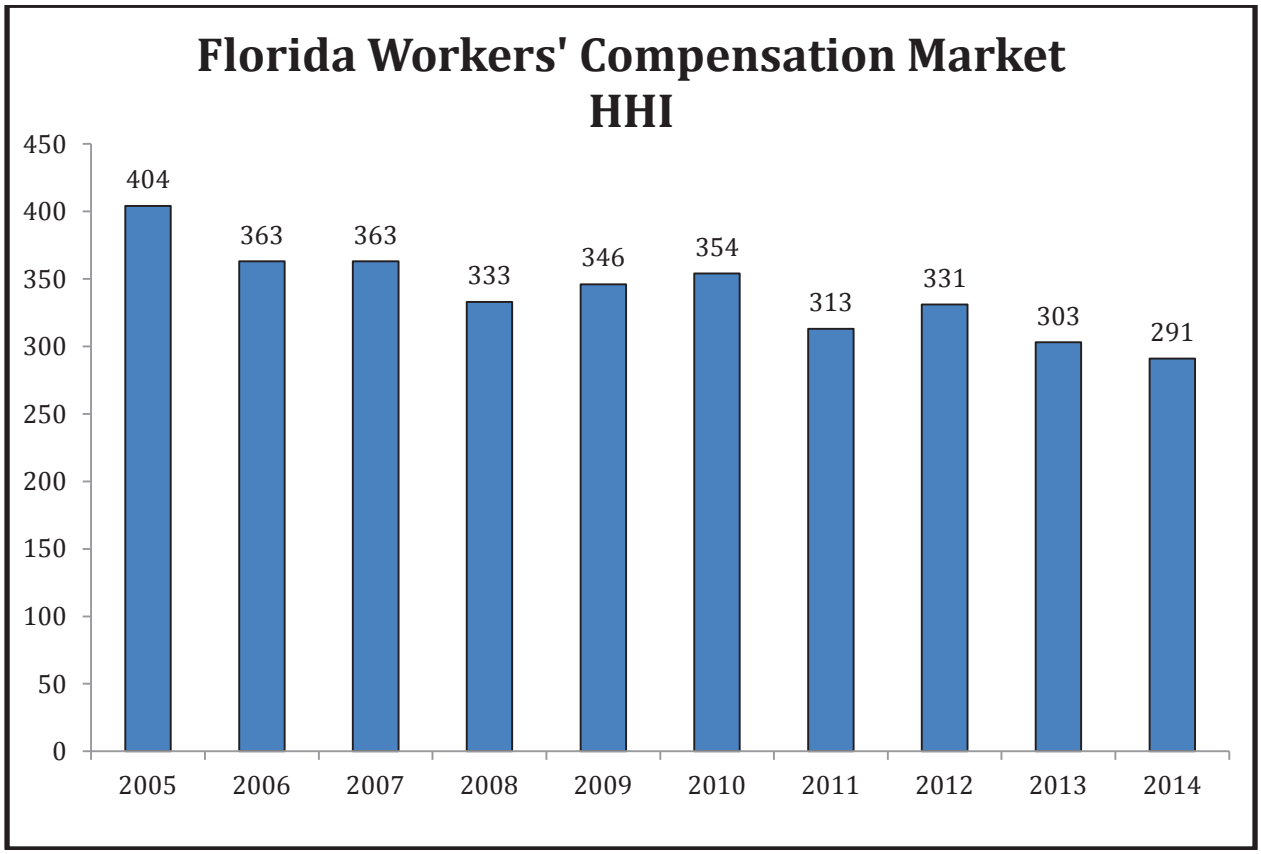
This spread of premium among insurer groups suggests no one group can be seen to have a prevailing impact on the market. This again supports the competitive aspects of the Florida workers' compensation market.

Measured Market Concentration: The Herfindahl-Hirschman Index

A widely recognized measure of market concentration can be applied to the Florida workers' compensation market. The Herfindahl-Hirschman Index (HHI) is a calculation designed to determine market concentration and first appeared in A.O. Hirschman's *National Power and Structure of Foreign Trade* published in 1945.

The HHI calculation is straightforward. The measured market share of every company operating in the identified market is squared. The highest index value is then defined as 10,000 (100 percent squared --- a monopoly), and the lowest outcome is close to zero. The U.S. Department of Justice (DOJ) uses this index when researching acquisitions and mergers for compliance with anti-trust legislation, most notably, the Sherman Anti-Trust Act of 1890. DOJ considers a result of less than 1,500 to be an "unconcentrated market" or a competitive marketplace. Results of 1,500 to 2,500 are considered "moderately concentrated." Results over 2,500 are considered "highly concentrated," and consequently, not very competitive.

The calculated HHI for the Florida workers' compensation insurance market in 2014 is 291. Following DOJ guidelines, this measure suggests a highly competitive market. Moreover, the HHI measure indicates the Florida workers' compensation market has become progressively more competitive following the legislative reforms. As the chart below shows, the calculated HHI of 404 in 2005 has declined to the 2014 value of 291.



Underwriting Strength

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 that contribute to a viable and sustainable market. Two commonly used measures are employed in this report; 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 2014, these aggregate ratios are:

- Direct Loss Ratio 55.61%
- Direct plus DCCE Ratio 63.85%

While there is natural year-to-year variation in these ratios and too much importance should not be given to year over year changes, it is worthwhile to note both of these measures are higher than reported for the Florida market in 2013 (50.77% and 57.10%) and consistent with the ratios from 2012 (55.53% and 62.89%, respectively).

Self-Insurance Funds

In addition to the private market described above, which writes over 95% of the workers' compensation insurance in Florida, coverage is also provided through self-insurance funds (SIFs)[2].

Comparison of the Six Major Market States

Florida is a large economically and demographically diverse state. To provide meaningful context on the Florida workers' compensation market as described above, it is instructive to provide a comparison to similarly situated states. This section of the report focuses on the six most populous states, and excludes SIFs. In addition to Florida, the five most populous states used here are California, New York, Texas, Illinois, and Pennsylvania.

The table on the next page highlights some of the key comparisons between the Florida workers' compensation insurance market and those of the other five states considered in this peer group.

[2] "Self-Insurance" groups are a broadly defined group of entities that include group self-insurance funds, commercial self-insurance funds and assessable mutual organizations. By the early 1990s, self-insurance funds were a dominant part of the Florida workers' compensation insurance market, capturing more than half of the voluntary market. Legislative reforms in 1993 transferred the regulation of group self-insurance to the Department of Insurance, which later became the Office of Insurance Regulation. This legislative change occurred concurrently with the formation of the FWCJUA. Together, these two changes transformed the Florida workers' compensation insurance market as self-insurance funds began converting into insurance companies. In 1994 there were 35 defined self-insurance funds, but by 2000 there were only four of these entities. There were four group self-insurance funds at the start of 2010 but the largest fund, Florida Retail Federation Self Insurer's Fund converted to a stock company in November 2010. As a result of legislation passed in 2009, the Florida Rural Electric SIF is governed by section 624.4626, F.S., which does not require the Fund to file an annual statement with OIR. Thus, the Florida Rural Electric SIF is no longer included in this report. See Appendix A for the Florida Statutes that govern SIFs that are not subject to OIR regulation. The remaining SIFs are the Florida Citrus, Business, & Industries Fund and the FRSA Self Insurer's Fund.

State	Direct Premium Written 2014	Rank By Direct Premium Written	HHI	Number of Entities Collecting Premium in 2014	Largest Provider	Largest Provider Market Share (%)	State Population Rank
CA	$11,418,599,186	1	352.64	241	State Fund	13.4	1
NY	5,261,028,762	2	2092.01	271	State Fund	45.1	4
TX	2,843,767,849	3	1669.62	283	[1]	40.1	2
IL	2,753,625,637	4	105.29	339	Private Insurer	3.4	5
PA	2,644,800,054	5	171.21	333	State Fund	8.5	6
FL	2,536,959,991	6	291.49	256	Private Insurer	10.5	3

[1] The largest writer is Texas Mutual Insurance, an insurer created originally by the Texas Legislature in 1994. It was granted independence in 2001, but still responsible for the residual market.

As expected, there is a positive correlation between state population and workers' compensation insurance written premiums—the top six states in population also rank in the top six for workers' compensation premium.

In terms of the number of insurance entities writing in each market, Florida ranks fifth with 256 private firms (not considering the FWCJUA or the two SIFs identified earlier). Florida has a comparable number of entities operating within its borders relative to other populous states.

From the perspective of market competition, the six states are compared using their calculated HHI's. For the purposes of this report, comparing the HHI among states is difficult, as the data for the self-insurance trust funds for other states must be calculated. Moreover, while some states have their state funds (market of last resort) report financial information to the National Association of Insurance Commissioners (NAIC), other states, such as Florida with its FWCJUA, do not. This report includes a calculation of Florida's HHI without the SIFs included to be comparable to the other populous states. Of the six most populous states, only Illinois (105.29) and Pennsylvania (171.21) have lower HHI indices than Florida (291.49), suggesting Florida has one of the three most competitive workers' compensation markets of the major populous states.

Dominant Firms and Competition

A particularly interesting comparison is to review the largest competitor in each of the six most populous states to determine if there is a "dominant firm." This review yields only Florida and Illinois with markets where the largest insurer is a private entity. In the other four states, the largest provider is either a state fund, or in the case of Texas, a mutual company originally created by the state and still responsible for residual market workers' compensation insurance in Texas.

Bridgefield Employers Insurance Co.'s business in Florida has the largest market share of any private insurer in the six most populous states. However, at 10.5% of the market, it is unlikely this is enough market share to create an uncompetitive marketplace.

Underwriting Strength in the Most Populous States

Finally, to provide context for the Florida market results presented earlier, a comparison of direct loss ratios across the six most populous states was conducted. The results are presented below:

State	Direct Loss Ratio	Direct Loss +DCCE
NY	74.28%	77.58%
CA	62.82%	74.84%
PA	63.48%	70.48%
IL	61.30%	68.61%
FL	55.61%	63.85%
TX	46.20%	51.63%

For 2014, Florida's loss ratios, using either measure, are the second lowest among the six most populous states. As such, the Florida market compares favorably to the other five largest states as a healthy, likely profitable market for insurers.

Workers' Compensation Rates

A comprehensive slate of reforms was passed into law during the 2003 Legislative Session. The package known as Senate Bill 50-A (Chapter 2003-412 Laws of Florida) dramatically impacted Florida's workers' compensation insurance rates. Some of these reforms included a reduction (cap) in attorneys' fees, tightening of construction industry requirements, doubling impairment benefits for injured workers, increasing the medical fee schedule, and eliminating the Social Security disability test.[3]

Subsequently, Florida's workers' compensation rates declined by 64.7% as of July 1, 2010. In 2000, Florida had the highest workers' compensation insurance rates in the country. In 2003, the Office approved a 14% rate reduction, with an additional reduction of 5.1% effective January 1, 2005. These annual rate reductions continued unabated through the rate reduction of 6.8% that took effect on January 1, 2010. The rate changes during this seven-year period include the three largest decreases ever in Florida, namely -18.6% for 2009, -18.4% for 2008, and -15.7% for 2007. These seven filings represent the state's largest consecutive cumulative decrease on record for workers' compensation rates – dating back to 1965.

Before the reforms, Florida consistently ranked as the first or second state with the highest workers' compensation rates in the country. Post-reform, Florida dropped out of the top 10 rankings. By 2008, Florida dropped to 28th place and by 2010 Florida had fallen to 40th place according to the biennial report, *Oregon Workers' Compensation Premium Rate Ranking,*

[3] "Florida Cracks Down on Construction Sites without Workers' Compensation Insurance," *Best Wire*, August 2, 2005, which utilizes information from an earlier article in *BestWire*, July 15, 2003.

published by the Oregon Department of Consumer and Business Services. However, with rate increases from 2011 to 2014, Florida has moved in the opposite direction in more recent reports. The latest Oregon report released in 2014 and based on January 1, 2014 Florida rates shows a rise to 28th highest; thus, there are 27 states with a lower average rate than Florida. The 2014 report also reflects that while Florida has risen in the rankings since 2010, the average Florida rate still remains below the national median rate at 98% of the study median rate.

On August 19, 2015, based on an annual review of the most recent data available, NCCI proposed an overall workers' compensation rate level decrease of 1.9% for the voluntary market to be effective January 1, 2016 for new and renewal policies for non-federal classifications. NCCI also proposed a decrease to the fixed expense cost applicable to every workers' compensation policy (expense constant) in Florida from $200 to $160 which when combined with the proposed rate level decrease of 1.9% resulted in a proposed overall average premium decrease of 2.2%.

The Office conducted a hearing on October 21, 2015, and heard testimony from NCCI, industry experts and the public about NCCI's rate filing. On November 3, 2015, Commissioner Kevin McCarty issued an order finding the 1.9% rate decrease was not justified and ordered NCCI to further decrease the rate level. In response to the Office's order, on November 6, 2015, NCCI filed a request for the Office to consider supplemental information related to the expense constant, indemnity trend, and profit and contingency provision. The Office issued the final rate order on November 12, 2015, ordering NCCI to submit an amended filing for a decrease of 4.7% in overall rate level for the voluntary market. NCCI submitted an amended filing on November 12, 2015 in accordance with the Office orders which was approved. This rate filing reflects the second consecutive annual decrease in rates after four consecutive rate increases from 2011 to 2014. With the rate decrease effective January 1, 2016, Florida's rates are 60.3% below what the rates were prior to the 2003 reforms.

A revised version of the *Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers* ("ASC Manual") is effective on January 1, 2016. NCCI submitted to the Office a cost impact analysis of -0.1% for the revisions to the ASC Manual on October 13, 2015. Since the manual was not adopted as of the filing date of August 19, 2015, NCCI did not include an impact for the ASC Manual changes in the January 1, 2016 rate filing. Therefore, the rate impact of -0.1% was included in the final rate order issued by the Office and is reflected in the January 1, 2016 rates.

With the implementation of the 4.7% decrease, the rate impact for the main industry groups will be as follows in the chart on the next page:

Industry Sector	Rate Adjustment 1/1/2016
Manufacturing	-7.5%
Contracting	-1.8%
Office and Clerical	-7.8%
Goods and Services	-4.4%
Miscellaneous	-4.6%
TOTAL	**-4.7%**

Florida rates remain competitive with neighboring states in the Southeast.

Cost Drivers for Workers' Compensation

There are several cost drivers in the Florida workers' compensation system that could be addressed legislatively to induce cost savings. NCCI compared the medical cost distributions for Florida versus all states combined to show that based on recent experience Florida has a higher portion of cost paid for drugs, hospital inpatient, hospital outpatient and ambulatory surgical centers (ASC). A summary of the NCCI findings is provided in the Table below with data from Service Year 2014.

Medical Cost Distributions
Florida vs. Countrywide

	Florida[1]	Countrywide[2]	Difference
Physicians	29.4%	39.7%	-10.3%
Drugs	15.5%	11.6%	+3.9%
Supplies	6.6%	7.5%	-0.9%
Other	1.9%	4.6%	-2.7%
Hospital Inpatient	18.9%	12.1%	+6.8%
Hospital Outpatient	19.4%	18.3%	+1.1%
Ambulatory Surgical Centers	8.3%	6.2%	+2.1%
Total	**100%**	**100%**	**0.0%**

[1] Source: Derived from data provided by the Florida Division of Workers' Compensation (FLDWC) for Service Year 2014
[2] Source: Derived from NCCI Medical Data Calls for Service Year 2014 for the following 37 states: AK, AL, AR, AZ, CO, CT, DC, FL, GA, HI, IA, ID, IL, IN, KS, KY, LA, MD, ME, MO, MS, MT, NC, NE, NH, NM, NV, OK, OR, RI, SC, SD, TN, UT, VA, VT, and WV

Substantial rate reductions would occur if the costs in Florida were brought in line with other states for drugs, inpatient hospital, outpatient hospital and ASC reimbursement rates.

Physician Drug Dispensing

Since 2008, more than 95% of the reimbursement dollars spent on repackaged drugs in Florida has been the result of physician dispensing. In 2013, 98% of the dollars spent were the result of physician dispensing.[4]

A by-product of repackaging/relabeling has been the average unit price of a repackaged drug can be many times that of the drug in its non-repackaged form.[5] A July 2013 study released by the Workers Compensation Research Institute (WCRI) titled *Physician Dispensing in Workers' Compensation* shows that in states like Florida and Illinois, physician dispensed drugs have been priced between 60% and 300% more than what is charged by pharmacies.

Since 2007, a number of states have addressed this developing issue by placing either an outright ban on physicians dispensing drugs (e.g. Massachusetts, New York, Texas, Montana, and Utah) or by placing price controls and using other regulatory tools to address the price disparity between repackaged and non-repackaged drugs (e.g. Arizona, California, Colorado, Georgia, and South Carolina).

In Florida, the drug repackaging issue was partially addressed by passing Senate Bill 662 effective July 1, 2013 which reduced rates by 0.7%. The primary cost reducing component of Senate Bill 662 linked the reimbursement rate of 112.5% for repackaged or relabeled drugs dispensed by a dispensing practitioner to the Average Wholesale Price (AWP) set by the original manufacturer of the underlying drug plus an $8.00 dispensing fee.

The *Florida Division of Workers' Compensation 2014 Results and Accomplishments* report shows that total payments for repackaged drugs has declined considerably in 2013 when compared to prior years, 2008 through 2012. Pharmacy repackaged total payments fell to $684,832 in 2013 compared to average payments of $1,579,600 for prior years. Physician repackaged total payments fell to $30,599,651 in 2013 compared to average payments of $50,960,414 for prior years.

Other options to reduce drug costs are:

- Restrict physician dispensing
- Lower reimbursement rate
- Lower dispensing fee
- Introduce drug formulary
- Strengthen prescription drug monitoring program

Hospital Reimbursement

Florida has a charge-based system for reimbursing hospital outpatient services. Currently, these

[4] See *Florida Division of Workers' Compensation 2014 Results and Accomplishments*, at page 46

[5] The per unit markup can be as much as 679% according to the NCCI testimony provided at the August 18, 2011 workers' compensation public rate hearing. This same testimony was again provided at the November 16, 2011 Three-Member Panel meeting.

services are, by statute, reimbursed at 75% of "usual and customary charges" for non-scheduled surgeries and 60% for scheduled surgeries[6]. The term "usual and customary charge" is not defined by Florida statute and its meaning can and does vary from state to state and among insurers. In addition, Florida workers' compensation law provides the maximum reimbursement allowances for inpatient hospital care shall be based on a schedule of per diem rates to be approved by the Three-Member Panel no later than March 1, 1994.[7]

Per Section 440.13(12)(a), Florida Statutes, the Three-Member Panel is charged with adopting schedules of maximum reimbursement allowances (MRAs) for physicians, hospital inpatient care, hospital outpatient care, ambulatory surgical centers, work-hardening programs, and pain programs. The *Florida Workers' Compensation Reimbursement Manual for Hospitals* contains the schedule of MRAs adopted by the Three-Member Panel for hospitals and establishes policy, procedures, principles and standards for implementing statutory provisions regarding reimbursement for medically necessary services and supplies provided to injured workers in a hospital setting.

Since 2007, the Division of Workers' Compensation (Division), in conjunction with the Three-Member Panel, has attempted to revise the *Florida Workers' Compensation Reimbursement Manual for Hospitals* in order to synchronize case law and statute relating to the calculation of "usual and customary charges" for hospital outpatient services. Numerous "usual and customary charge" methodologies were developed and subsequently challenged by various hospital interests[8]. However, in July 2014, a settlement agreement was reached between the Division and the hospital interests, which resulted in the hospital interests withdrawing their rule challenge. The 2014 edition of the manual, effective on January 1, 2015, replaced the 2006 edition and was adopted by reference as part of Rule 69L-7.501, Florida Administrative Code. Highlights of the revised manual include:

- Establishing MRAs for certain qualifying procedure codes for hospital outpatient services. The maximum reimbursement allowances incorporate the major components of the Division's and the Three-Member Panel's methodology for calculating a "usual and customary charge" approved at a January 9, 2013 meeting held by the Three-Member Panel.
- For hospital inpatient services, the per-diem reimbursement amount increased at trauma centers from $3,305 to $3,850.33 for surgical stays, and from $1,986 to $2,313.69 for non-surgical stays,
- For hospital inpatient services, the per-diem rates at acute care hospitals increased from $3,304 to $3,849.16 for surgical stays, and from $1,960 to $2,283.40 for non-surgical stays, and
- For hospital inpatient services, the Stop-Loss Reimbursement threshold was increased from $51,400 to $59,891.34.

For more details regarding the "usual and customary charge" methodology, see the *Three-Member Panel Biennial Report*, 2015 Edition.

[6] Section 440.13(12)(a) and (b), Florida Statutes
[7] Section 440.13(12)(a), Florida Statutes
[8] See *Three-Member Panel 2013 Biennial Report*, at page 6

Other states have moved away from charge-based reimbursement and have adopted other methodologies seen to provide more predictability and offer greater opportunity for cost containment. States such as Oregon, California, Colorado, North Dakota, South Carolina, Tennessee and Washington use the Medicare Outpatient Prospective Payment System (OPPS) as a basis for reimbursement.

In March 2014, based on proposed Florida Senate Bill 1580/House Bill 1351, NCCI estimated rates could be reduced by 3.8% if Florida reimbursed hospital outpatient care at 140% of the Medicare OPPS rates. Additionally, NCCI estimated that if Florida were to reimburse hospital inpatient care at 140% of the Medicare inpatient prospective payment system (IPPS) rates, workers' compensation rates could be reduced by 3.2%. The total estimated cost savings to the system of both changes is -7.0% [= -3.8% + -3.2%], but note NCCI issued this cost estimate prior to the approval of the 2014 edition of the *Florida Workers' Compensation Reimbursement Manual for Hospitals*; therefore, NCCI's estimated cost savings does not reflect any savings from the revised hospital manual.

More details on all the medical issues can be found in the *Three-Member Panel 2013 Biennial Report*[9]. The Report contains additional scenarios of using Medicare OPPS and IPPS rates as a basis for reimbursing hospital inpatient, hospital outpatient and ASC care. The reduction to Florida workers' compensation rates depends on the percentage above Medicare used for each type of care. According to the Report, the savings would be 7.5% [= -3.0% + -4.5%] at 140% of Medicare OPPS for hospital outpatient and ASC services and 140% of Medicare IPPS for hospital inpatient services. The savings would be 8.3% [= -3.4% + -4.9%] at 120% of Medicare OPPS for hospital outpatient and ASC services and 120% of Medicare IPPS for hospital inpatient services. Appendix C and Appendix G in the *Three-Member Panel 2013 Biennial Report* contain the NCCI cost estimates for the alternate scenarios. Again, since these cost estimates were developed prior to the approval of the 2014 edition of the *Florida Workers' Compensation Reimbursement Manual for Hospitals*, the NCCI estimated cost savings do not reflect any savings from the revised hospital manual.

Workers' Compensation Court Cases

Several court cases making their way through the judicial system have the potential to affect workers' compensation rates in Florida. The top four cases are as follows:

1) *Westphal v. City of St. Petersburg*[10]. In September 2013, on rehearing en banc, the First District Court of Appeal withdrew a panel decision in which the court declared the 104-week statutory cap on temporary total disability (TTD) benefits unconstitutional and revived prior law allowing up to 260 weeks of TTD benefits.[11] The court held that "a worker who is totally disabled as a result of a workplace accident and remains totally disabled by the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement (MMI) by operation of law and is therefore eligible to assert a claim for permanent

[9] See *Three-Member Panel 2013 Biennial Report*, at page 6, Appendix C at page 24, Appendix G at page 76
[10] Westphal v. City of St. Petersburg, 122 So.3d 440 (Fla. 1 DCA 2014) Rev. Pending SC13-1930
[11] Westphal v. City of St. Petersburg, 2013 WL 718653 (Fla. 1st DCA February 28, 2013)

and total disability benefits."[12] In this case, the claimant exhausted TTD benefits without having reached MMI, creating a "gap" period where the injured claimant would no longer receive benefits but also not be at MMI for purposes of receiving permanent disability benefits. In its opinion, the en banc court certified this case to the Florida Supreme Court for review. The Supreme Court accepted jurisdiction over the case on December 9, 2013, and held oral arguments on June 5, 2014. Status: Decision pending.

2) *Castellanos v. Next Door Company.*[13] In October 2013, the First District Court of Appeal declared the statutory attorney fee formula (s. 440.34, F.S.) unconstitutional and certified the question for review by the Florida Supreme Court. In this case, the judge of compensation claims, constrained by the statutory formula set forth in section 440.34(1), Florida Statutes (2009), awarded claimant's counsel an attorney's fee of only $164.54 for 107.2 hours of legal work.

> *440.34(1) … Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured,…. . The judge of compensation claims shall not approve a compensation order… which provides for an attorney's fee in excess of the amount permitted by this section…*

The award was calculated in strict accordance with the statutory formula applied to the $822.70 value of benefits secured by the claimant's attorney. The court upheld the constitutionality of the statute and affirmed the fee award. However, the court certified the question of "whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and federal constitutions." The Supreme Court accepted jurisdiction over the case on March 14, 2014[14], and held oral arguments on November 5, 2014. In 2008, the Supreme Court found the predecessor 2003 law vague and ambiguous and vacated the law in the Murray case. In 2009, the legislature changed one word and restored it. Status: Decision pending.

3) *State of Florida v. Florida Workers Advocates, WILG & Elsa Padgett.*[15] On August 13, 2014, a Miami-Dade circuit court judge entered an Order on Amended Motion for Summary Final Judgment, declaring the exclusive remedy provision of the Workers' Compensation Act (the Act) unconstitutional. According to the judge, the current workers' compensation law is unconstitutional because it does not provide adequate benefits to injured workers giving up their right to sue in tort and is therefore inadequate as an exclusive remedy for all injured workers. The State of Florida appealed the circuit court decision to the Third District Court of Appeal of Florida, on August 26, 2014. On October 16, 2014, the Third District Court of Appeal denied the motion of the appellee to certify a question requiring immediate resolution by the Supreme Court pursuant to Florida Rule of Appellate Procedure.

[12] Westphal v. City of St. Petersburg, 122 So.3d 440, 442 (Fla. 1st DCA 2013)
[13] Castellanos v. Next Door Company, 124 So. 3d 392 (Fla. 1 DCA 2013), Rev. Granted, SC 13-2082
[14] Castellanos v. Next Door Company, 124 So. 3d 392 (Fla. 1 DCA 2013), Rev. Granted, SC 13-2082
[15] State of Florida v. FWA, WILG & Elsa Padgett, 167 So. 3d 500 (Fla. 3 DCA 2015), Rev. pending SC15-1355

The case has its genesis in a 2012 instance where a state government worker, Elsa Padgett, sustained an on-the-job injury. After a fall, Padgett had to have a shoulder surgically replaced and was forced to retire due to complications. Padgett argued that her workers' compensation benefits were inadequate and the law unfairly blocked her constitutional right to access the court. Julio Cortes had been involved in the case originally, alleging an injury while employed by Velda Farms. The Circuit Court judge had removed the constitutional issue from the Cortes dispute. The challenge continued with two groups that had intervened and Elsa Padgett.

Status: On June 24, 2015, the Third District Court of Appeal overturned the Circuit Court ruling. It held that the plaintiffs lacked legal standing and the constitutional issue had become moot once it had been removed from the case.[16] On July 7, 2015, the plaintiffs asked the Florida Supreme Court to invoke jurisdiction over this case.[17] In an order dated December 22, 2015, the Florida Supreme Court declined to review the case.[18]

4) *Stahl v. Hialeah Hospital*.[19] On October 13, 2015, the Florida Supreme Court accepted jurisdiction in this case on appeal from the First District Court of Appeal. Appellant Stahl is challenging the constitutionality of the workers compensation law as an inadequate replacement for the tort system. Specifically, appellant asserts that the 1994 addition of a $10 copay for medical visits after a claimant attains maximum medical improvement, and the 2003 elimination of permanent partial disability (PPD) benefits, render the Workers' Compensation Law an inadequate exclusive replacement remedy for a tort action. The First District Court of Appeal disagreed, stating that the copay provision furthers the legitimate stated purpose of ensuring reasonable medical costs after the injured worker has reached a maximum state of medical improvement, and PPD benefits were supplanted by impairment income benefits.[20] Status: Petitioner has filed initial brief on the merits. Answer brief due from respondent by December 30, 2015.

Comparative Rates and Premiums

Comparing rates and premiums among states for the workers' compensation line of business is complicated by several factors. State law varies as to coverage and payment for claims, tort restrictions, and the basis for rate determination. Nonetheless, such a comparison, noting the above difficulties, can be useful.

In 2015, the Office requested from NCCI a comparison of loss cost estimates for the 10 largest class codes of workers' compensation insurance in force in the Florida market with the loss costs for the same class codes in the other 36 jurisdictions for which NCCI is the statistical rating agent. The pure loss cost was considered the metric of choice as it is calculated in a consistent manner across class codes and jurisdictions. Final allowed rates begin with the loss costs as a

[16] The State of Florida, v. Florida Workers' Advocates, et al., Case No. 3D14-2062, June 24, 2015
[17] Florida Workers' Advocates, et. al., v. The State of Florida, Case No. : 3D14-2062, July 7, 2015
[18] Florida Workers' Advocates, et. al., v. The State of Florida, 167 So. 3d 500 (Fla. 3d DCA 2015), Rev. denied SC15-1255, December 22, 2015
[19] 167 So. 3d 500 (Fla. 3 DCA 2015), Rev. pending SC15-1355
[20] Stahl v. Hialeah Hospital, 167 So. 3d 500 (Fla. 3 DCA 2015). Pending SC 15-725

foundation, and are then modified for risk loads and profit factors in different manners across jurisdictions.

Initially, there are two commonly used definitions of calculating the "largest" class codes; by exposure amounts (e.g. the amount of insured exposure in dollars) and by policy count. The analysis below is repeated for each definition.

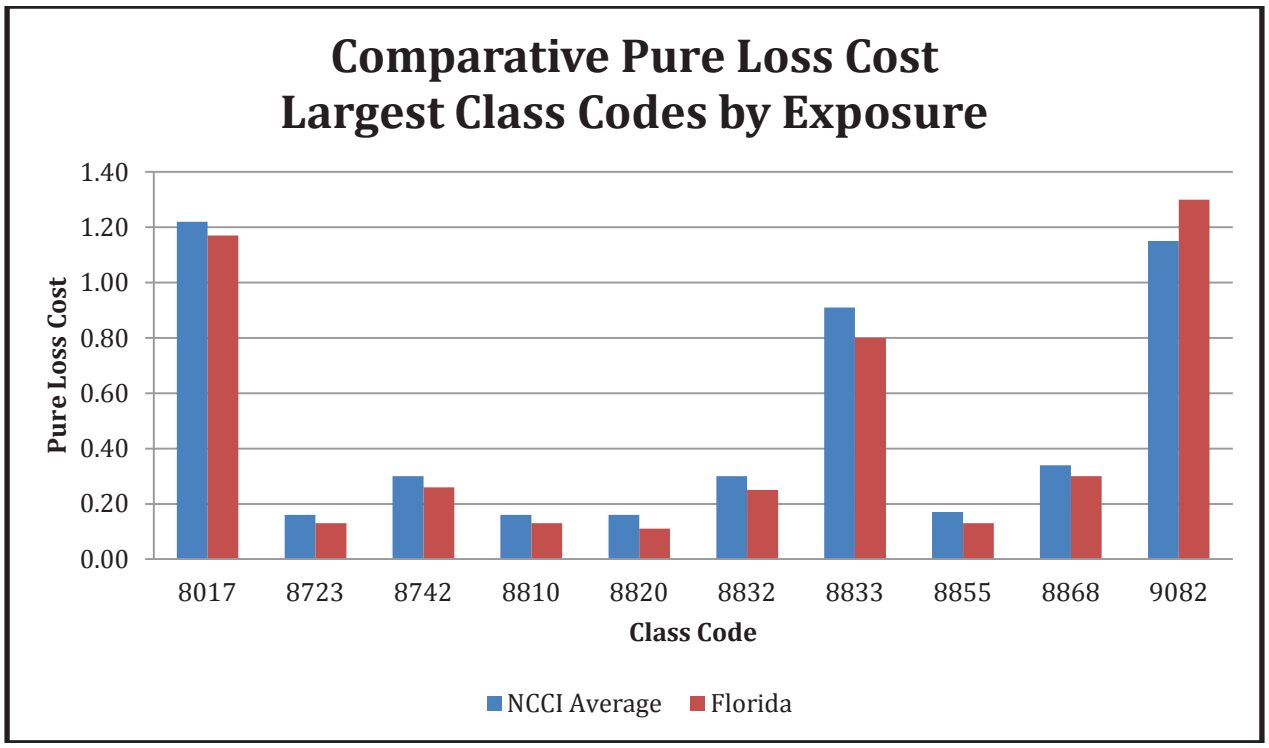
When measured by exposure, the following are reported in the next chart:

- The 10 largest class codes based on Florida exposure for Policy Years 2012 and 2013 with a description of the class code,
- The average loss cost across NCCI jurisdictions based on the most recent approved loss cost or rate filings available as of November 15, 2015 and the approved January 1, 2016 Florida rate filing,
- Florida's loss cost, and
- Florida's rank among jurisdictions (1 being highest, 37 being lowest)

Comparative Pure Loss Cost: Largest Class Codes by Exposure				
Class Code	**Class Description**	**NCCI Average**	**Florida**	**Florida Rank**
8017	STORE: RETAIL NOC	1.22	1.17	22
8723	INSURANCE COMPANIES - INCLUDING CLERICAL & SALESPERSONS	0.16	0.13	23
8742	SALESPERSONS OR COLLECTORS-OUTSIDE	0.30	0.26	24
8810	CLERICAL OFFICE EMPLOYEES NOC	0.16	0.13	20
8820	ATTORNEY-ALL EMPLOYEES & CLERICAL, MESSENGERS, DRIVERS	0.16	0.11	28
8832	PHYSICIAN & CLERICAL	0.30	0.25	23
8833	HOSPITAL: PROFESSIONAL EMPLOYEES	0.91	0.80	22
8855	BANKS AND TRUST COMPANIES - ALL EMPLOYEES, SALESPERSONS, DRIVERS & CLERICAL	0.17	0.13	27
8868	COLLEGE: PROFESSIONAL EMPLOYEES & CLERICAL	0.34	0.30	22
9082	RESTAURANT NOC	1.15	1.30	11

For this report's top 10, class code 8723 is a new addition, while class code 8033 (Store: Meat, Grocery and Provision Stores Combined-Retail, NOC) has dropped out.

Graphically, this data shows in nine of the 10 class codes, Florida's loss cost is below the NCCI average. This is similar to last year's analysis. The movement in the Florida rankings for this report when compared to last year's report is improving. No class codes had their rank deteriorate, only one class code experienced no change in rank (9082), and eight class codes had their rank improve. While there is natural year-to-year variation in loss costs, these comparisons will be observed for future trend.

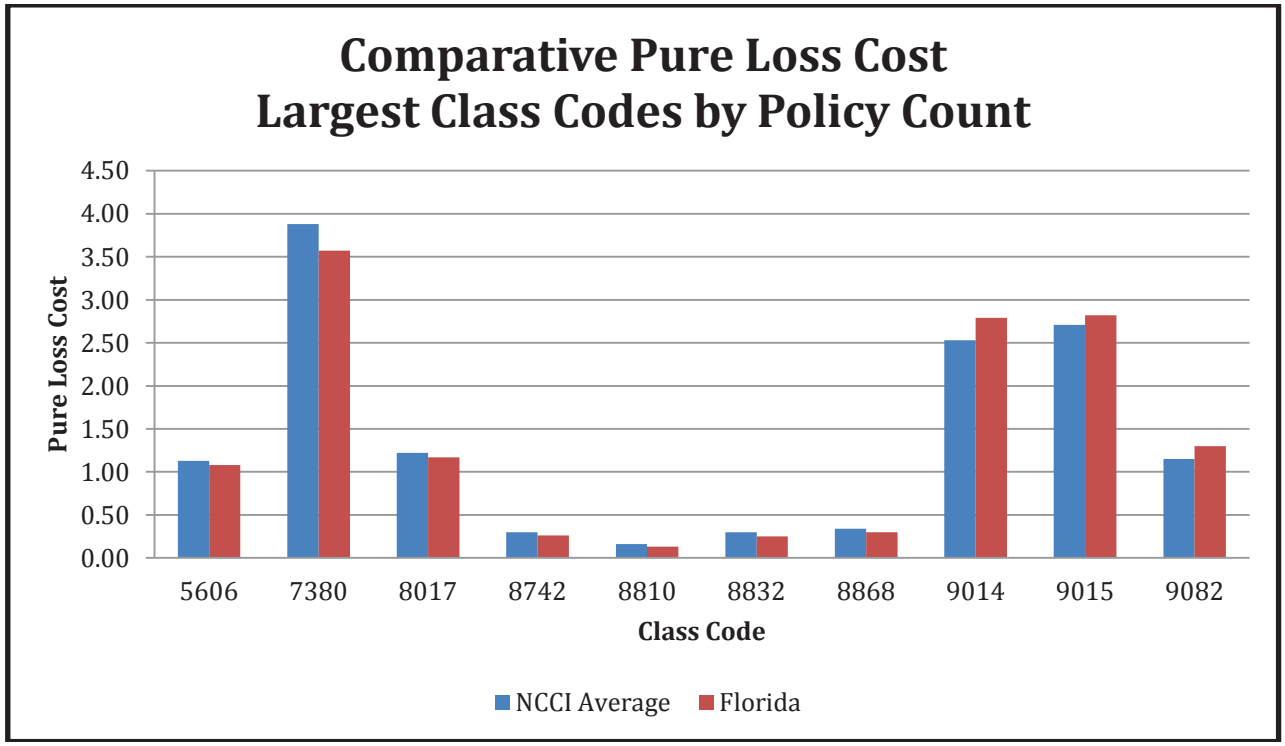


The same analysis is completed using the results generated by defining the 10 largest classes by policy count based on Florida data for Policy Years 2012 and 2013 and the results are displayed below.

Comparative Pure Loss Cost: Largest Class Codes by Policy Count				
Class Code	**Class Description**	**NCCI Average**	**Florida**	**Florida Rank**
5606	CONTRACTOR--PROJECT MANAGER, CONSTRUCTION EXECUTIVE, CONSTRUCTION MANAGER OR CONSTRUCTION SUPERINTENDENT	1.13	1.08	18
7380	DRIVERS, CHAUFFEURS, MESSENGERS AND THEIR HELPERS NOC-COMMERCIAL	3.88	3.57	20
8017	STORE: RETAIL NOC	1.22	1.17	22
8742	SALESPERSONS OR COLLECTORS-OUTSIDE	0.30	0.26	24
8810	CLERICAL OFFICE EMPLOYEES NOC	0.16	0.13	20
8832	PHYSICIAN & CLERICAL	0.30	0.25	23
8868	COLLEGE: PROFESSIONAL EMPLOYEES & CLERICAL	0.34	0.30	22
9014	JANITORIAL SERVICES BY CONTRACTORS - NO WINDOW CLEANING ABOVE GROUND LEVEL & DRIVERS	2.53	2.79	14
9015	BUILDING OR PROPERTY MANAGEMENT - ALL OTHER EMPLOYEES	2.71	2.82	15
9082	RESTAURANT NOC	1.15	1.30	11

For this report's top 10, class code 9014 is a new addition, while class code 9012 (Building or Property Management – Property Managers and Leasing Agents & Clerical, Salespersons) has dropped out.

The data for the 10 largest classes by policy count reveals Florida's loss cost was lower than the NCCI average in seven of 10 class codes. The movement in the Florida rankings for this report when compared to last year's report is mostly improving. It showed one class code experienced no change in rank (9082), one class code had a lower ranking (5606), and seven class codes improved in rank.



Florida Workers' Compensation Joint Underwriting Association

One of the most significant indicators of an availability problem in an insurance market is the size of the residual market mechanism. In Florida, the Florida Workers' Compensation Joint Underwriting Association (FWCJUA) is the market of last resort for workers' compensation insurance. Only employers that cannot find coverage in the voluntary market are eligible for coverage in the FWCJUA. Thus, the size of the FWCJUA is a measure of availability of coverage in the voluntary market.

While the FWCJUA had significant increases in the number of policies and in written premium for the past several years, the FWCJUA is still a very small portion of the total workers' compensation market in Florida. At its 2015 Florida State Advisory Forum, NCCI presented an analysis of residual market size for 26 states based on calendar year 2014 data. The NCCI analysis showed Florida had the smallest residual market as a percentage of premium for the 26

states except for Idaho. The NCCI presentation also showed the FWCJUA had fewer policies than all states included in the analysis except four: Idaho, the District of Columbia, Alabama and South Dakota. Based on calendar year 2014 data, only 2.3% of Florida policyholders obtain coverage through the FWCJUA, which represents only 1.2% of the Florida direct written premium.

The Florida Workers' Compensation Insurance Plan (FWCIP) was the residual market for Florida until the FWCJUA was created on January 1, 1994. All insurance companies writing workers' compensation in Florida funded the FWCIP. If there was a deficit in the FWCIP, then those workers' compensation carriers were assessed to cover the deficit. In 1993, the FWCIP issued 48,430 policies with written premiums of $328 million. The FWCJUA in contrast has varied from 13,933 policies in calendar year 1994 to only 522 policies in calendar year 2000, with written premium varying from $77.5 million in calendar year 2005 to $1.2 million in calendar year 2009. At the end of October 2015, the FWCJUA had 2,239 policies on its book with corresponding premiums of $27.2 million. The FWCJUA's written premium as a percentage of the total market has not exceeded 2% since 1995 and has been below 1% for most years.

From 1994 to 2003, the rate differential for FWCJUA rates versus voluntary market rates varied from 1.26 to 3.278 and was 1.429 in 2003 prior to the reforms. The creation of Tiers 1, 2 and 3 by House Bill 1251 resulted in a restructuring of the rates and surcharges used by the FWCJUA. Tier 1 is for employers with good loss experience; Tier 2 for employers with moderate loss experience and non-rated new employers; and, Tier 3 for employers not eligible for Tiers 1 or 2 (specific eligibility requirements can be obtained from the FWCJUA). Post reform, the rate differential has varied considerably. From 2004 to 2015, the Tier 1 rate differential varied from 1.05 to 1.35, Tier 2 varied from 1.20 to 2.26, and Tier 3 varied from 1.65 to 3.10.

There are surcharges in addition to the rate differential affecting the total premium paid by FWCJUA policyholders. There was a 99% surcharge applied to Sub-plan "C" premiums in excess of $2,500, an Assigned Risk Adjustment Program (commonly known as "ARAP") surcharge for experience rated policies and a $475 flat surcharge added to every policy. At the end of October 2015, the in-force policy count by tier is as follows: Tier 1 has 428 policies, Tier 2 has 943 policies and Tier 3 has 868 policies. While Tier 3 accounts for 39% of the total FWCJUA policies, it accounts for 65% of the total premium.

As of January 1, 2016, the premium for Tier 1 is 5% above voluntary rates, Tier 2 is 20% and Tier 3 is 46% (1.46 times the voluntary rates). Tier 3 is also subject to the ARAP surcharge. Additionally, all three tiers have a flat surcharge of $475. Tier 3 policyholders have a burden Tiers 1 and 2 do not have. Tier 3 policies are assessable if premiums are not sufficient to cover losses and expenses. The tier surcharges effective January 1, 2016 are at an all time low since the tier structure was created in 2004.

It is unrealistic to expect an actuary's best estimate, which is a prediction of future contingent events, will always coincide with future results. It is understood and usually explicitly acknowledged that the results for a particular year can be higher or lower than the actuary's estimate. The consequences of the results being higher or lower than the estimate affect the actuary's judgment and ultimate selections.

In a situation where an insurance entity has substantial financial resources, it may be acceptable for the actuary's estimate to be high half of the time and low half of the time, as long as over time the predictions coincide with the average result. In other words, if there is a billion dollars in surplus, the company may not be concerned if the actuary's estimate is $50 million high or low in a particular year as long as it balances over a number of years.

If, however, there is only $10 million in surplus, the company cannot afford for the estimate to be $10 million lower than the actual because they will be bankrupt. In this latter situation, the consequences of being low are more important than the consequences of being high and this will impact the degree of conservatism appropriate in the actuary's selection.

The FWCJUA has been in a situation where the consequences of reserving too low or having rates too low (i.e. retroactive assessments to policyholders) have been greater than the consequences of reserves being too high or rates too high. If the rates are too high, there may be some complaints from policyholders and others but, if there are assessments due to the rates being too low, more policyholders are affected, even those whose policy has expired. At the extreme, some of the policyholders could face severe financial distress or even be put out of business as a result of the assessment.

As a result of these circumstances, the degree of conservatism used in determining FWCJUA rates and surcharges has contributed to the level of rates needed. The main contributor to the FWCJUA rates, however, has been the level of expenses and losses incurred. Both of these were adversely impacted when the volume of FWCJUA business decreased in the late 1990s. As a result of all these factors and others, the FWCJUA rates have historically been very high in comparison to the residual markets in other states where the residual market is administered by NCCI. In recent years, the FWCJUA rate differentials by tier have declined and other states have increased the rate differentials/surcharges for their residual market such that at least 15 states now have higher rate differentials/surcharges than the weighted average FWCJUA rate differential for all three tiers.

Currently, the Tier 1 and Tier 2 rates for most employers are much more affordable than the previous sub-plans A, B and C. In addition, the Tier 3 rates have become much more affordable in recent years relative to prior years when the rate differential reached a high of more than three times the voluntary rates. Notably, while the Tier 3 rate differential has declined considerably in recent years, the Tier 3 rate differential remains high compared to the residual market rate differentials in other states.

A small residual market is desirable, but it needs to be balanced with having an affordable residual market. The FWCJUA has been small in comparison to the total voluntary market from 1997 to the present. In the recent past, the residual market share was low because the FWCJUA rates were not very affordable to many employers and the voluntary market was very competitive. The high premiums in the FWCJUA discouraged many employers from even applying to the FWCJUA. These employers decided to close their business, go without coverage (which may be unlawful), or sought the services of a Professional Employer Organization (PEO).

Coupled with a very competitive market by insurers who aggressively sought new policyholders, this created an extremely small residual market.

Ultimately, availability should not be an issue as coverage can be found in either the voluntary market or the FWCJUA, although affordability may be somewhat of an issue for employers utilizing the FWCJUA.

Florida Workers' Compensation Insurance Guaranty Association

The Florida Workers' Compensation Insurance Guaranty Association (FWCIGA) was formed in 1997 as a result of the merger of the former Florida Self-Insurance Fund Guaranty Association (FSIFGA) and the workers' compensation insurance account of the Florida Insurance Guaranty Association (FIGA). Upon the effective date of the merger, the predecessor organizations ceased to exist and were succeeded by the FWCIGA. FWCIGA provides for the payment of covered claims for insurance companies or group self-insurance funds which are declared insolvent and unable to continue making payments to injured workers. All insurance companies and group self-insurance funds are members of the FWCIGA.

According to the *Florida Workers' Compensation Insurance Guaranty Association 2014 Annual Report*, only one new insolvency impacted the Florida workers' compensation market in 2014. In March of 2014, Union American Insurance Company was liquidated. Since this carrier was in runoff for over a decade, this insolvency generated just two claims as of the date of the report and no new claims are anticipated.

For the ninth straight year in 2014, the FWCIGA Board of Directors determined that no assessment was needed to fund the cash needs for the upcoming calendar year. The Assessment has been 0.0% for insurance companies and self-insurance funds from 2006 through 2014.[21]

Composition of the Buyer

Analysis of the workers' compensation market is typically done at a high level, either at the insurer level or in market aggregates. In reality, the workers' compensation market is segmented based on a number of characteristics, such as size of employer, type of industry, past experience of the employer or the lack of experience. The market for large employers versus small employers can be markedly different. The market for construction risks is different from employers with office workers. New businesses typically face noticeable frictions in obtaining coverage owing to their lack of historical experience, which can be a measure of not only the insurance exposure but also the credit worthiness of the insured.

Employers with a combination of these characteristics can sometimes be difficult to place in the voluntary market. In some cases, coverage is related to the availability of agents in the local area and the number of insurers the local agents represent.

[21] http://fwciga.org/assessments

The Division of Workers' Compensation (Division), within the Department of Financial Services, monitors and enforces compliance with the workers' compensation laws. In fiscal year 2014-2015, the Division's Bureau of Compliance conducted 34,282 on-site inspections of an employer's job-site or business location to determine compliance with workers' compensation coverage requirements. The Bureau also issued 2,727 enforcement actions against non-compliant employers, which resulted in $6.3 million in insurance premium generated and 9,218 in new employees covered by workers' compensation insurance. The Bureau conducted 48 free training sessions and 23 webinars on workers' compensation coverage, compliance requirements and workplace safety for over 2,522 employers statewide.

The Bureau of Workers' Compensation Fraud, within the Division of Insurance Fraud, made 540 workers' compensation fraud-related arrests for fiscal year 2014-2015, an increase of 14% from the previous fiscal year. Workers' Compensation premium fraud being facilitated by shell companies, labor brokers and money service businesses (check cashing stores) continue to be a major focus of the Division's Bureau of Workers' Compensation Fraud. The fraud unit conducted many investigations into these schemes in fiscal year 2014-2015 and 16 of these investigations resulted in criminal changes. In excess of $4.3 million in restitution has been requested as a result of these investigations.

Professional Employer Organizations

According to the National Association of Professional Employer Organizations (NAPEO)[22], "Professional employer organizations (PEOs) enable clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers' compensation obligations. A PEO provides integrated services to effectively manage critical human resource responsibilities and employer risks for clients. A PEO delivers these services by establishing and maintaining an employer relationship with the employees at the client's worksite and by contractually assuming certain employer rights, responsibilities, and risk." In addition, the NAPEO notes that "the average client of NAPEO members is a small business with an average of 20 employees" though larger businesses also find value in a PEO arrangement.[23]

The PEO industry has grown rapidly since its inception several decades ago. According to the *NAPEO 2013 Annual Report*, NAPEO estimates the PEO industry grew by $8 billion to $92 billion in gross revenues in 2012. According to the industry statistics on the NAPEO website, the industry defines gross revenues as the total of its clients' payrolls and the fees PEOs charge them for taking on their human-resource activities and "approximately 700-900 PEOs are operating in 50 states".[24]

PEOs have been a part of the Florida workers' compensation market since the early 1990s, especially for small employers. The PEO market is not, however, always without challenges regarding availability of coverage from workers' compensation insurers (see the *Workers' Compensation Large Deductible Study*, National Association of Insurance Commissioners/ International Association of Industrial Accident Boards and Commissions Joint Working Group,

[22] See http://www.napeo.org/peoindustry/index.cfm
[23] See http://www.napeo.org/peoindustry/industryfacts.cfm
[24] See http://www.napeo.org/peoindustry/industryfacts.cfm

March 2006). PEOs have had an erratic history of being able to obtain coverage in the workers' compensation insurance market. In the early 1990s, coverage was difficult to obtain. By the mid-1990s, coverage was broadly available and relatively easy to obtain. In the early 2000s, coverage became scarce, and in 2003, after CNA stopped writing PEOs, coverage was nearly impossible to find. Additionally, PEOs were also a factor in several recent insurer insolvencies in Florida due to insufficient collateral on large deductible policies.

PEOs are a source of workers' compensation coverage for many employers in Florida unable to obtain coverage in the voluntary market, particularly small employers. When the premiums for the FWCJUA are considered too high by employers, the PEO market is often the only option for many employers who want to remain in business and comply with the law. A survey, conducted by the Florida Association of Professional Employment Organizations (FAPEO) in 2010 found they provided more than 69,000 companies with more than 900,000 work-site employees, representing a payroll in excess of $25 billion.[25]

Market Structure, Conduct and Performance to Promote Competition

The previous sections of this report do not suggest any obvious impediments to a workers' compensation market found to be reasonably competitive. This section concentrates on the ability of the market to promote competition.

Mandatory Rating Plans

Before discussing the methods workers' compensation insurers use to compete in the marketplace, it is useful to summarize the rating and premium pricing variations resulting from the mandatory rating plans currently in effect. The following rating plans are required of all insurers in the state of Florida:

- Coinsurance – For a reduced premium, the employer agrees to reimburse the insurer 20% of each claim up to $21,000. This option is required by Section 440.38(5), Florida Statutes. An insurer may refuse to issue a policy with a coinsurance amount based on the financial stability of the employer.
- Drug-Free Workplace Premium Credit – A 5% premium credit provided to employers certifying the establishment of a drug-free workplace program.
- Employer Safety Premium Credit – A 2% premium credit provided to employers certifying the establishment of a safety program.
- Experience Rating Plan – This plan recognizes differences between individual employers by comparing the actual experience of an individual employer with the average expected experience of employers in the same classification. The plan produces an experience modification factor that may increase or decrease premiums. An employer is eligible for this program if the average annual premium is at least $5,000.
- Florida Contracting Classification Premium Adjustment Program – A premium credit is provided for employers with one or more contracting classifications paying above average hourly wages. The credit amount increases as the average wage paid increases.

[25] The Florida Association of Professional Employer Organizations (FAPEO) 2010 Census Brochure

The credit is calculated based on payroll and hours worked information submitted by the employer to NCCI.

- Premium Discounts by Size of Policy – The premium discount plan adjusts the employer's premium to reflect the relative expense of servicing large premium policies as a percentage of premium is less than that for small premium policies. For example, the policy issuance costs for a $200,000 policy may be higher than those for a $20,000 policy, but the costs are not 10 times as high.
- Small Deductibles – For a reduced premium, the employer agrees to reimburse the insurer for each claim up to the deductible amount. Small deductibles range from $500 to $2,500 and are required by Section 440.38(5), Florida Statutes. An insurer may refuse to issue a policy with a deductible based on the financial stability of an employer because the insurer is responsible from first dollar of loss (i.e. losses below the deductible).

Optional Plans Used by Insurers to Compete Based on Price

Insurers use the following plans to compete on price:

- 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% of policies written or renewed in each calendar year.
- Deviations – Section 627.211, Florida Statutes, allows insurers 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.[26]
- 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.

[26] Prior to Florida House Bill 785 becoming law effective July 1, 2014, LRARO could not be used in Florida despite being available for use in most, if not, all other states. The bill revised Section 627.072(2), Florida Statutes, to allow a retrospective rating plan to contain a provision for negotiation of a workers' compensation premium between an employer and insurer if the employer has: (1) exposure in more than one state; (2) an estimated annual standard workers' compensation premium in Florida of $100,000 or more; and (3) an estimated annual countrywide standard workers' compensation premium of $750,000 or more. Only insurers with at least $500 million in surplus may engage in the negotiation of premiums with eligible employers.

- Retrospective Rating Plans – The final premium paid by the employer is based on the actual loss experience of the employer during the policy, plus insurer expenses and an insurance charge. If the employer implements effective loss control measures which reduce the frequency and/or severity of the amount of claims, they pay lower premiums. Before there were large deductible programs, retrospective rating plans were the dominant rating plan for large employers.
- Waiver of Subrogation – For an additional premium, the insurer may waive its right of recovery against parties liable for injury covered by the policy.

Non-Price Competition

In addition, insurers compete in ways unrelated to the determination of premium such as:

- Offering premium payment plans that vary the amount of money paid initially and through installments;
- Demonstrating the availability and effectiveness of specialized loss control;
- Demonstrating the effectiveness of their claims handling, including fraud detection;
- Paying higher agent commissions or providing other incentive programs, and/or;
- Emphasizing policyholder service in auditing, policy issuance or certificates of insurance.

Deviations

In the mid 1980's, the use of deviations as a means of competing was commonplace. From 1983 to 1985, over 40% of the market was written at deviated rates. However, by 1989 only 9% of the market was written at deviated rates. After the two-year legislatively required moratorium (1990 and 1991) on deviations, the use of deviations ceased to be a meaningful factor in the workers' compensation marketplace in Florida.

Despite the changes in Section 627.211, Florida Statutes, made by chapter law 2004-82 (Senate Bill 1926) to allow for easier approval of deviations, only three insurers have been approved for a new deviation since the law became effective on July 1, 2004. One of these was for the transfer of an existing deviation. The Office has disapproved seven deviations since July 1, 2004 for lack of justification. All three insurers with rate deviations effective in 2014 filed for renewal and received approval for continued use of the deviation. Consequently, on January 1, 2016, there will be three insurance companies with a deviation in Florida (two of the deviations are downward 10% and the other one is downward 5%).

Large Deductibles

In the early 1990's, insurers approached the Department of Insurance (Department) about filing a rating plan for large employers (defined as having $500,000 in standard premium) with more flexibility in how the premium would be determined. The justification for the flexibility would be based on the following general concepts:

- The rating plan would be used only for very large employers. Generally, these employers would be eligible to be individually self-insured.
- Rating is similar to rating for excess insurance purchased by individual self-insureds.

- The minimum deductible is $100,000 and could be in the millions. Thus, the employer would be responsible for reimbursing the insurance carrier for the vast majority of claims.

The Department ultimately agreed to these types of plans with restrictions incorporated in Rule 69O-189.006, Florida Administrative Code (formerly 4-189.006).

As large deductible programs have been implemented, there has been a dramatic shift in premiums. The typical large deductible policy will have a deductible credit ranging from 30% to 90%. Thus, the premiums paid by employers and reported by insurers will be a fraction of premiums paid for other rating plans. This means premiums in the annual statement and premiums reported for assessments and taxes are much lower than they were previously.

As the volume of large deductible policies written in Florida increased, the effect has been to lower the base for assessment and taxes such that Section 440.51(1)(b), Florida Statutes, has been revised to require reporting premiums without the deductible credit.

An ancillary effect of large deductibles has been the movement for very large employers to cease being individually self-insured and to buy an insurance policy from an insurance company with a large deductible program.

In recent insolvencies from 2009-2011, there have been problems with large deductible policies and the lack of collectible collateral. This will result in the Florida Workers' Compensation Insurance Guaranty Association (FWCIGA) paying over $50 million that will ultimately be assessed to all workers' compensation policyholders in the state of Florida. During 2012, the FWCIGA established a workgroup to study this problem and make recommendations for corrective action. The FWCIGA Board adopted the workgroup's report and submitted recommendations for legislative changes to strengthen the collateral requirements and limit the size of the deductible assumed by policyholders.

Conclusion

Based on the number of entities and market shares of actively writing companies in the market, the number of entities entering and exiting the market and the financial performance of the entities in the market, Florida's workers' compensation market can readily be characterized as a competitive market.

Availability does not appear to be a significant concern in the aggregate. The residual market is small, suggesting the voluntary market is absorbing the vast majority of demand. While not without risk, the growth of PEO usage among smaller employers has also helped with availability by making coverage more affordable.

For an employer, availability is not particularly important if the coverage is not affordable. As of January 1, 2016, the voluntary market rates have declined by 60.3% since the 2003 reform legislation was passed indicating the reform has delivered the desired result and lowered costs dramatically in the state. It is likely, however, the impact of these reforms has reached its limit. There is some concern, however, about the direction of workers' compensation rates in Florida and the ability of the state to retain its important economic competitive advantage in this area.

While the workers' compensation rate filing effective January 1, 2016 decreases Florida rates, medical cost drivers, particularly in the areas of drug costs, hospital inpatient, hospital outpatient and ASC's are noticeably higher in Florida than the countrywide average. NCCI estimates substantial savings could be achieved with legislative reforms for the reimbursement of hospital inpatient care, hospital outpatient care, and ASC care. Furthermore, Senate Bill 662 was passed in 2013 and partially addressed the drug repackaging issue, but there are additional legislative options that could be explored to further reduce drug costs in Florida. Lastly, several pending court cases have the potential to increase costs materially.

Office Certification of Compliance with Section 627.096, Florida Statutes

Section 627.096, Florida Statutes, was created in 1979 as part of the "wage loss" reform of the workers' compensation law. This statute has three basic requirements as it pertains to this report:

1. An investigation and study of all insurers authorized to write workers' compensation in Florida. The Office has accomplished this objective by its thorough review of the quality and integrity of the data submitted in the most recent NCCI filing.

2. A study of the data, statistics or other information to assist and advise the Office in its review of filings made by or on behalf of workers' compensation insurers. Also, there are public hearings regarding the NCCI filing which further allow an opportunity for third parties to register their opinions and input.

3. The statute gives the Financial Services Commission the authority to require all insurers to submit data to the Office. The NCCI has been collecting workers' compensation data in Florida for more than 50 years; therefore, the Office has contracted with NCCI to perform these statistical services for the state of Florida.

Appendix A: Florida Statutes Governing Workers' Compensation Self-Insurance Funds Not Subject to Office Regulation

Section 624.4622 – Local government self-insurance funds

- Must be comprised entirely of local elected officials
- Limited financial reporting only

Section 624.46226 – Public housing authorities self-insurance funds

- Must be a public housing authority as defined in Chapter 421
- Has a governing body which is comprised entirely of commissioners of public housing authorities who are members of the fund
- Limited financial reporting only

Section 624.4623 – Independent educational institution self-insurance funds

- Must be an independent nonprofit college or university accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or independent nonprofit accredited secondary educational institution
- Has a governing body which is comprised entirely of independent educational institution officials
- Limited financial reporting only

Section 624.4625 – Corporation not for profit self-insurance funds

- Must be a not for profit corporation located in and organized under Florida law
- Must receive at least 75% of revenue from local, state or federal governmental sources
- Has a governing body which is comprised entirely of officials from not for profit corporations that are members of the fund
- Limited financial reporting only

Section 624.4626 – Electric cooperative self-insurance fund

- Must be an electric cooperative organized pursuant to Chapter 425 and operates in Florida
- Must subscribe to or be a member of a rating organization prescribed in Section 627.231
- Has a governing body comprised of a representative from each member of the fund
- No reporting requirements

Florida Office of Insurance Regulation

Kevin M. McCarty, Insurance Commissioner

200 E. Gaines Street – Tallahassee, Florida 32399

Phone: (850) 413-3140

www.floir.com

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

12/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers Compensation

Amendment Barcode (if applicable)

Name Jim McConnaughhay

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Phone 850-224-7173

Tallahassee FL 32312
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Email

Speaking: ☐ For ☐ Against ☑ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Associated Industries of Florida

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

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12-13-2016
Meeting Date

Bill Number (if applicable)

Topic Workers' Compensation - Rating

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FUBA - Florida United Businesses Association

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers Comp

Amendment Barcode (if applicable)

Name Cyndi Cooper

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Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing OIR

Appearing at request of Chair: ☒ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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THE FLORIDA SENATE

APPEARANCE RECORD

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12-13-16
Meeting Date

Bill Number (if applicable)

Topic Workers Compensation

Amendment Barcode (if applicable)

Name Todd Thomson

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Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Northwest Florida Workers Comp Coalition

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE

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12-13-16
Meeting Date

Bill Number (if applicable)

Topic Workers Comp

Amendment Barcode (if applicable)

Name Eve Tooley

Job Title Risk Mgr - Bay Co. Bd of Commissioners

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing BAY COUNTY BOARD OF COMMISSIONERS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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THE FLORIDA SENATE

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers' Compensation

Amendment Barcode (if applicable)

Name Kimberly Syfrett

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Workers Advocates (FWA)

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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10/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers' Comp

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida AFL-CIO

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers' Compensation

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Florida Chamber of Commerce

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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THE FLORIDA SENATE

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic WORKERS' COMPENSATION

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing WORKERS INJURY LAW GROUP (WILG)

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

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12/13/16
Meeting Date

waived

Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Workers Comp

Name Jody Dove

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Speaking: ☐ For ☐ Against ☑ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing F.R.S.A. (Florida Roofing Assc.)

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☑ No

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12-13-16
Meeting Date

Bill Number (if applicable)

Topic Workers Comp

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☑ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA HOME BUILDERS & NATIONAL UTILITY CONTRACTORS OF FLORIDA

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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THE FLORIDA SENATE

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10/13/16
Meeting Date

Bill Number (if applicable)

Topic WORKERS' COMPENSATION

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA JUSTICE ASSOCIATION (FJA)

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

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12-13-16
Meeting Date

Bill Number (if applicable)

Topic NC

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing National Council of Jewish Women

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic WORKERS COMPENSATION

Amendment Barcode (if applicable)

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Speaking: ☐ For ☐ Against ☐ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing FLORIDA BUILDING MATERIALS ASSOCIATION
MANUFACTURERS ASSOCIATION OF FLORIDA
FLORIDA POULTRY FEDERATION

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

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S-001 (10/14/14)

THE FLORIDA SENATE

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12/13/16
Meeting Date

Bill Number (if applicable)

Topic Workers' Compensation

Amendment Barcode (if applicable)

Name Paul M. Anderson

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Speaking: ☐ For ☐ Against ☒ Information

Waive Speaking: ☐ In Support ☐ Against
(The Chair will read this information into the record.)

Representing Workers' Comp. Section of Fla. Bar

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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S-001 (10/14/14)

CourtSmart Tag Report

Room: EL 110 **Case No.:** **Type:**
Caption: Senate Banking and Insurance **Judge:**

Started: 12/13/2016 10:00:09 AM
Ends: 12/13/2016 11:59:18 AM Length: 01:59:10

10:00:08 AM meeting called to order
10:00:46 AM roll call
10:01:07 AM quorum present
10:01:12 AM welcome by S Flores -
10:01:31 AM Introductions of members
10:01:54 AM Senators introduce themselves and district they represent
10:03:54 AM Staff director introduces staff of committee.
10:06:57 AM Staff director introduces staff of committee.
10:06:57 AM s flores responds
10:07:13 AM Over view of committee Jurisdiction
10:07:25 AM James Knudson presenting
10:07:53 AM Oversight of financial security
10:08:36 AM Jurisdiciton over insurance
10:09:38 AM Citizens property insurance
10:09:51 AM Other entities
10:10:05 AM Assurance guarantee association
10:10:20 AM florida Hurricane catastrophe fund
10:10:58 AM Department of financial Services
10:12:39 AM Office of Insurance Regulation
10:13:00 AM Office of Financial Regulation
10:13:08 AM Office of Financial Regulation
10:13:35 AM Senator Flores
10:13:40 AM Presentation of Workers Compensation by Lisa johnson
10:14:48 AM Lisa Johnson presenting
10:15:14 AM Overview of how premiums are generated
10:15:39 AM Detects top 10 Insurers
10:17:33 AM Chart showing rate changes
10:17:59 AM Background on filing claims
10:19:30 AM Senator Flores asks for a timeline
10:19:46 AM Lisa Johnson responds
10:19:55 AM James Knudson expands on court information
10:20:13 AM S flores - requesting rate and fee
10:20:29 AM James Knudson responds
10:20:54 AM Senator Thurston
10:21:03 AM Lisa Johnson responds
10:21:48 AM Lisa Johnson continues presentation
10:27:19 AM Lisa Johnson leads in to discussion and questions
10:28:19 AM S Flores opens for questions
10:28:40 AM S Steube has question
10:28:53 AM Lisa Johnson responds
10:29:45 AM S Steube questions
10:29:54 AM L Johnson responds
10:30:33 AM S Flores
10:30:42 AM S Farmer with question
10:30:53 AM L Johnson responds
10:31:00 AM S Farmer with question
10:31:10 AM L Johnson with response
10:31:44 AM S Farmer with comments and question
10:31:59 AM L Johnson
10:32:05 AM S Farmer question of analysis
10:32:19 AM Johnson responds
10:32:54 AM Johnson responds

10:32:54 AM s Farmer question
10:33:08 AM L Johnson
10:33:13 AM S Farmer - comments of profit
10:33:23 AM L Johnson responds
10:34:05 AM S Flores interjects comment
10:34:26 AM L Johnson responds
10:34:33 AM S Farmer
10:34:38 AM S Flores
10:34:47 AM S Farmer concern on rate increase
10:34:58 AM Commissioner representative responds
10:35:21 AM S Flores
10:35:35 AM S Farmer
10:35:44 AM S Braynon with question
10:35:53 AM L Johnson responds
10:36:15 AM S Braynon
10:36:26 AM L Johnson
10:36:37 AM S Flores thanks for presentation
10:37:02 AM Appearance - Todd Thomson Vice president of Public Affairs Greater Pensacola Chamber
10:40:27 AM S Flores
10:40:31 AM S Braynon with question
10:40:44 AM Thomson responds
10:40:51 AM S Flores
10:40:56 AM S Farmer
10:41:02 AM Thomson responds
10:41:11 AM S Farmer to Thomson
10:41:19 AM S Flores
10:41:34 AM Lisa Johnson responds
10:42:13 AM S Flores with question
10:42:22 AM Todd Thomson responds
10:42:43 AM S Flores
10:42:49 AM S Gainer
10:43:20 AM S Flores
10:43:24 AM S Gainer
10:43:33 AM S Flores
10:43:50 AM Eve Tooley Panama City Bay county Board of Commissioner
10:44:35 AM S Flores
10:44:43 AM Eve Tooley
10:52:39 AM S Flores with question
10:53:56 AM E Tooley responds
10:54:40 AM S flores
10:55:06 AM Kimberly Syfrett Panama City of Florida Worker's Advocates FWA
10:59:39 AM S FloresS Mayfield with question
10:59:56 AM K Syfrett responds
11:00:49 AM S Mayfield
11:00:57 AM K Syfrett
11:02:45 AM sn
11:02:50 AM S Flores
11:03:35 AM Tom Stahl Executive Director FUBA Florida United Business Association
11:04:43 AM S Gainer
11:04:48 AM Tom Stahl
11:06:03 AM S Flores
11:06:13 AM Stahl responds
11:06:19 AM S Flores
11:06:23 AM Stahl
11:07:03 AM S Flores
11:07:17 AM Tom Stahl responds
11:08:14 AM s Flores
11:08:15 AM Tom Stahl responds
11:08:20 AM Associated Industries of Florida - Jim McConnaughhhay- lobbyist
11:14:00 AM S Flores
11:14:09 AM Jim McConnaughhay responds
11:16:51 AM S Flores

11:16:57 AM S Farmer
11:17:04 AM Jim McCaonnaughhay responds
11:17:52 AM S Farmer follows up
11:18:29 AM J McConnaughhay responds
11:19:29 AM S Farmer
11:19:38 AM S
11:20:04 AM Jim M. responds
11:20:29 AM S Farmer
11:20:33 AM S Flores
11:21:16 AM Rich Templin
11:21:41 AM Templin of Legislative of Political Director Florida AFL- CIO
11:27:12 AM S Flores
11:28:17 AM Carolyn Johnson of Florida Chamber of Commerce Tallahassee
11:31:38 AM S Flores
11:32:41 AM Christopher Smith Tampa Attorney for WILG Workers Injury Law Group
11:35:50 AM Christopher Smith
11:38:15 AM S Flores
11:38:29 AM Jody dove waive
11:38:59 AM S Flores
11:39:03 AM Kari Hebrank
11:39:13 AM Hebrank of Florida Home Builders & National Utility Contractors of Florida
11:40:05 AM S Flores
11:40:35 AM Richard Chait attorner of Florida Justice Association FJA Coral Gables FL
11:43:54 AM S Flores
11:45:09 AM Bill Hearrle ofNational Federation of Independent Business
11:48:34 AM S Flores
11:49:34 AM S Farmer with question
11:50:12 AM Bill Herrle
11:51:01 AM S Farmer comments and follow up
11:52:02 AM Bill Herrle responds
11:52:37 AM S Farmer
11:53:20 AM Bill Herrle
11:54:27 AM S Flores
11:54:32 AM Nancy Stephens florida Building Materials Association Manufacturers accociation
11:55:23 AM S Flores
11:55:31 AM Paul Anderson
11:56:06 AM Anderson is Chair Elect of Workers Compensation Section of Fl Bar.
11:58:53 AM S Flores
11:58:57 AM Meeting adjourned by Steube