

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: SB 1582

INTRODUCER: Senator Bradley

SUBJECT: Workers' Compensation Insurance

DATE: March 31, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	<b>Pre-meeting</b>
2.			AP	
3.			RC	

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**I. Summary:**

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

- Codifies *Westphal* by increasing temporary total and partial benefits from 104 weeks to 260 weeks.
- Amends the attorney fee provision to allow the Judge of Compensation Claims (JCC) to consider certain factors in determining if the attorney fees should be increased or decreased, based on a maximum hourly rate of \$250. The bill removes the criminal penalty for claimant attorneys receiving fees that are not approved by the JCCs, thereby allowing claimants to enter into retainer agreements. The bill eliminates the attorney fee cap of \$1,500 on medical-only claims.
- Requires greater specificity in the information that must be provided in petitions for benefits filed with the Office of Judges of Compensation Claims (OJCC), such as the specific date of maximum medical improvement and the specific date that such permanent benefits are claimed to begin.
- Clarifies that deadlines within multiple provisions relating to medical care are based on business days, not calendar days. For example, the bill requires carriers to authorize or deny medical authorization requests within 3 business days.
- Revises the workers' compensation rating law. Currently, Florida law requires carriers, or rating organization filing on their behalf, to file an administered rate or full rate. The bill implements loss costs rating, which requires each insurer to seek approval for rates based on aggregate claim information filed by a rating organization with individual company data (loss costs multipliers), being used for the final rate, subject to approval by the Office of Insurance Regulation (OIR).

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

The bill will have a fiscal impact on the Office of Insurance Regulation (OIR) of \$700,000-1,000,000.

The bill will have a fiscal impact on the Office of Judges of Compensation Claims of \$18,000-\$24,720.

## II. Present Situation:

### **Florida's Workers' Compensation Trends**

In 2015, 242 commercial insurers actively wrote workers' compensation insurance in Florida. In total, these private sector insurers wrote \$2.6 billion in premium. In 2014, Florida was ranked 28<sup>th</sup>. Subsequently, in 2016, Florida rates were ranked even lower at 33.<sup>1</sup>

### ***Medical-Only and Indemnity Claims***<sup>2</sup>

Approximately 75 percent of claims in Florida are medical-only and the average cost is \$1,378. Medical-only claims represent 10 percent of losses. In contrast, 25 percent of the claims in Florida are lost-time claims and the average cost is \$39,296. Lost time claims represent 90 percent of total losses.

### ***Cost Drivers***

According to the OIR, there are several cost drivers in the Florida workers' compensation system that could be addressed legislatively to induce cost savings. The OIR noted that NCCI compared the medical cost distributions for Florida versus 37 states combined to show that based on recent experience Florida has a higher portion of cost paid for drugs, hospital inpatient, and ambulatory surgical centers.<sup>3</sup>

### ***Attorney Involvement***

Attorney involvement is approximately 25 percent on lost-time claims. Since claimant attorney involvement is reported to NCCI as indemnity, a medical-only claim with claimant attorney involvement would be reported as a lost-time claim. For lost-time claims with attorney involvement, the cost on average is approximately three times more than lost-time claims without attorney involvement.<sup>4</sup>

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<sup>1</sup> Department of Consumer and Business Services, *2016 Oregon Workers' Compensation Premium Rate Ranking Summary* (Oct. 2016) (on file with Senate Banking and Insurance Committee).

<sup>2</sup> NCCI, *Workers' Compensation October 1, 2016 Law-Only Rate Filing Overview* (On file with Senate Banking and Insurance Committee).

<sup>3</sup> See Office of Financial Regulation Annual Report (Jan. 2017) (on file with Senate Banking and Insurance Committee).

<sup>4</sup> See NCCI *supra* note 2.

Section 440.34, F.S., requires the reporting of all fees paid to attorneys for services rendered to the OJCC. The OJCC reported<sup>5</sup> that during 2015-16, a total of \$378,573,902 was incurred on combined claimant attorneys' fees and defense attorneys' fees in the Florida system. This represents a small increase, about 2 percent, from the 2014-15 aggregate fee total of \$370,772,783. The 2015-16 aggregate fee total is also very similar to the 2013-14 aggregate total of \$379,222,337. Both claimant and defense fees decreased in 2014-15, more significantly on the claimant side. Both figures increased in 2015-16, more significantly on the defense side. The following OJCC table provides a snapshot of fees for the period of 2002-2016.

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

### *Underwriting Performance of Carriers<sup>6</sup>*

According to the OIR, an important measure of the health of an insurance market is the underwriting performance of the insurers in the market; that is, the combination of pricing, risk management, and application of effective underwriting guidelines contributing to a viable and sustainable market. Commonly used measures employed by the OIR in the 2016 Workers' Compensation Annual Report include the loss ratio (defined as direct losses incurred divided by direct premiums earned) and a broader measure that includes direct losses incurred and defense cost containment expenses (DCCE) incurred as a percentage of direct premiums earned. Ratios approaching or exceeding 100 for either measure are not considered profitable. For the Florida workers' compensation market in 2015, these aggregate ratios based on National Association of Insurance Commissioners (NAIC) Annual Statement data are:

- Direct Loss Ratio 57.76 percent
- Direct plus DCCE Ratio 65.32 percent

<sup>5</sup> Office of Judges of Compensation Claims, 2015-2016 Annual Report, available at <https://www.jcc.state.fl.us/JCC/publications/reports/2016AnnualReport/Index.html#> (last viewed Mar. 30, 2017).

<sup>6</sup> See Office of Insurance Regulation, 2016 Workers Compensation Annual Report (Jan. 2017) (on file with Senate Banking and Insurance Committee).

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

In addition to the loss ratio and the loss plus DCCE ratio, another ratio commonly reviewed to evaluate underwriting performance is the combined ratio. Combined ratios are reviewed to measure or evaluate underwriting profitability. Combined ratios can generally be defined as the sum of losses and expenses divided by earned premium. Often dividend payments are included as an expense item in quantifying combined ratios. According to NCCI’s presentation at its 2016 State Advisory Forum, the Florida workers’ compensation combined ratio for private carriers and self-insureds has been trending down for the past several years.

**The Accident Year Combined Ratios for Florida**

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

A combined ratio less than 100 percent indicates that insurers in Florida are achieving an underwriting gain for workers’ compensation. When the combined ratio is greater than 100 percent means that insurers are paying out more in losses and expenses than they are collecting in premium. Insurers could still potentially make a profit in years where the combined ratio is greater than 100 percent because the ratio does not include the income received from investments.

**Recent Florida Supreme Cases**

Recent Florida court decisions have found multiple parts of the workers’ compensation law unconstitutional. They are *Castellanos v. Next Door Company*,<sup>7</sup> involving attorney fees; and *Westphal v. City of St. Petersburg*,<sup>8</sup> relating to temporary wage replacement benefits (i.e., indemnity); and *Miles v. City of Edgewater Police Department*,<sup>9</sup> which addresses the right of an injured worker to pay for their own attorney.

***Castellanos v. Next Door Company***

In April 2016, the Florida Supreme Court rendered its decision in *Castellanos v. Next Door Company*. The Court concluded that s. 440.34, F.S., presumes that the statutory fee will always be reasonable to compensate the attorney, without providing any mechanism for appeal. 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.” In this particular case,

<sup>7</sup> *Castellanos v. Next Door Company*, 192 So. 3d 431 (Fla. 2016).

<sup>8</sup> *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016).

<sup>9</sup> *Miles v. City of Edgewater Police Department*, 190 So. 3d 171 (Fla. 1st DCA 2016).

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.

### ***Westphal v. City of St. Petersburg***

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

### ***Miles v. City of Edgewater Police Department***

The 1st District Court of Appeals held that statutes governing payment of attorney's fees in workers' compensation proceedings violated the claimant's First Amendment rights, and thus were unconstitutional as applied to her. In *Miles*, the Court invalidated a limitation on attorneys accepting payment directly from the injured worker or others on the injured worker's behalf. Before this case, an injured worker, and anyone paying on their behalf, was prohibited from directly paying for their own attorney.<sup>10</sup> The attorney was only paid by the employer/carrier<sup>11</sup> and only if they won the case. The Court found that the right to freedom of speech requires that the injured worker be able to choose to speak to the courts through an attorney and the right to freedom of contract permits the worker to retain an attorney.

### **Recent Rate Filing by the National Council on Compensation Claims**

In response to the two 2016 Supreme court opinions, on May 27, 2016, the National Council on Compensation Insurance (NCCI), the rating organization that files rates on behalf of workers' compensation insurers, submitted a rate filing with the Office of Insurance Regulation (OIR) requesting a 17.1 percent increase in rates. As part of the filing, the NCCI requested a 15 percent increase as the first-year impact attributable to the 2016 *Castellanos* case and a 1.8 percent increase caused by updates in the medical provider fee schedule enacted during the 2016 Session. The combined estimated impact of the two components on premiums is an increase of \$623 million in premiums. However, on June 30, 2016, NCCI amended its rate filing to include the estimated 2.2 percent impact of the *Westphal* decision, resulting in a filing requesting 19.6 percent increase in rates or an estimated \$714 million increase in premiums.

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

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<sup>10</sup> Sections 440.105(2)(c) and 440.34(1), F.S.

<sup>11</sup> Workers' compensation insurers are referred to as carriers. "Carrier" means any person or fund authorized under s. 440.38 to insure under this chapter and includes a self-insurer, and a commercial self-insurance fund authorized under s. 624.462. s. 440.02(4), F.S.

On November 23, 2016, a court order invalidated the 14.5 percent overall combined statewide average rate increase approved by the OIR,<sup>12</sup> due to NCCI's violations of the Sunshine Laws relating to public records and meetings, as required under ch. 119, F.S., and s. 627.291, F.S. The appeal is pending in the First District Court of Appeal. The order is stayed pursuant to an order issued by the Court on December 12, 2016.

### **2003 Reforms**

In 2000, Florida had the highest premiums in the country, and was ranked second highest in 2002.<sup>13</sup> In response to a downturn in the Florida economy and uncertainties in the marketplace, some insurers were not issuing new policies or renewing policies, or significantly tightening their underwriting requirements. Many small employers were forced to secure significantly more expensive coverage in the Florida Workers' Compensation Joint Underwriting Association ("insurer of last resort") due to availability issues.

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

Prior to the 2003 reforms, the JCCs used a three-tier fee schedule to award attorney's fees based upon the amount of benefits secured. Generally, the fees would equal 20 percent of the first \$5,000 of the amount of benefits secured; 15 percent of the next \$5,000 of the amount of benefits secured, 10 percent of the remaining amount of the benefits secured and to be provided during the first 10 years, and 5 percent of the benefits secured after 10 years. However, the JCCs had the discretion to increase or decrease the attorney's fee without any dollar limitation, based on the following factors:

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

In 2003, the Florida Legislature enacted significant reforms intended to address the availability and affordability of coverage for employers. These reforms were designed to reduce the overall costs to the system by expediting the dispute resolution process, reducing attorney fees, providing greater enforcement tools to combat fraud, revising standards for compensability and

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<sup>12</sup> *James F. Fee, Jr., v. the National Council on Compensation Insurance, Inc., etc., The Office of Insurance Regulation etc., and David Altmaier* (Fla. 2<sup>nd</sup> Jud. Cir. 2016).

<sup>13</sup> See <https://www.oregon.gov/DCBS/reports/Documents/general/prem-sum/02-2082.pdf> (last viewed Mar. 21, 2017).

benefits, and changing medical services and reimbursements. The 2003 reforms continued the use of the contingency fee schedule in awarding attorney's fee. However, any additional hourly fees were eliminated and the JCCs were prohibited from approving any agreement related to benefits, which provided for an attorney's fee in excess of the amount permitted under the fee schedule.<sup>14</sup> As an alternative to the contingency fee schedule, the JCC were authorized to approve an attorney's fee not to exceed \$1,500 once per accident if the JCC determined that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney for a disputed medical-only claim.

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

### **Administration of the Workers Compensation System in Florida**

The Division of Workers' Compensation within the Department of Financial Services is responsible for administering ch. 440, F.S. These functions include the enforcement of coverage requirements,<sup>15</sup> administration of workers' compensation health care delivery system,<sup>16</sup> data collection,<sup>17</sup> and assisting injured workers, employers, insurers, and providers in fulfilling their responsibilities under ch. 440, F.S.<sup>18</sup> Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.<sup>19</sup> Employees generally cannot sue a covered employer for workplace injuries.<sup>20</sup>

#### ***Medical Benefits***

Injured workers are entitled to receive all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics, for as long as the nature of the injury and process of recovery requires.<sup>21</sup> Medical services must be provided by a health care provider authorized by the carrier prior to being provided (except for emergency care).<sup>22</sup> When the carrier has knowledge of a work-related injury, it will refer the injured employee to an authorized workers' compensation provider.

Authorized medical services and treatment are provided at no cost to the injured employee, except employees are required to pay a \$10 co-payment for medical services provided after they

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<sup>14</sup> Sections 440.34 and 440.105, F.S.

<sup>15</sup> Section 440.107(3), F.S.

<sup>16</sup> Section 440.13, F.S.

<sup>17</sup> Section 440.185 and 440.593, F.S.

<sup>18</sup> Section 440.191, F.S.

<sup>19</sup> "Compensable" means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment. s. 440.13(1)(d), F.S.

<sup>20</sup> Section 440.11(1), F.S. Employers who fail to obtain required workers' compensation coverage may be sued by an injured worker in civil court. Likewise, an employee who is either exempt or excluded from workers' compensation coverage requirements may sue their employer in civil court for work-related injuries, even if the employer has coverage for their other employees.

<sup>21</sup> Section 440.13(2)(a), F.S.

<sup>22</sup> Section 440.13(3)(a), F.S.

have reached “maximum medical improvement.”<sup>23</sup> Injured employees are entitled to one change of physician during the course of treatment for any one accident.<sup>24</sup> After the initial examination and diagnosis, the workers’ compensation health care provider is required to submit a proposed course of treatment to the carrier to determine whether such treatment would be recognized as reasonably prudent.<sup>25</sup>

### ***Indemnity Benefits***

Indemnity benefits only become payable to employees who are disabled for at least eight days due to a compensable workplace injury.<sup>26</sup> The first seven days of lost earnings may be paid retroactively to employees who are disabled for more than 21 days.<sup>27</sup> These benefits are generally payable at 66 2/3 percent of the employee’s average weekly wage (AWW),<sup>28</sup> up to the maximum weekly benefit established by law.<sup>29</sup> For 2016, this amount is \$863, which is the statewide average weekly wage (SAWW).<sup>30</sup> Payments are due every two weeks.<sup>31</sup> Indemnity benefits fall into one of four categories: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability.

- Temporary partial disability and temporary total disability benefits are payable for up to a combined total of 260 weeks.<sup>32</sup>
- Permanent partial disability benefits are payable as impairment income benefits that are provided for a variable number of weeks depending upon the value of the injured worker’s permanent impairment rating pursuant to a statutory formula.<sup>33</sup>
- Permanent total disability benefits are payable until the age of 75, unless the work-related accident occurs after the worker’s 70<sup>th</sup> birthday, then the benefit is paid for 5 years.<sup>34</sup>

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<sup>23</sup> Section 440.13(13), F.S. The date of maximum medical improvement is the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability. Section 440.02(10), F.S.

<sup>24</sup> Section 440.13(2)(f), F.S.

<sup>25</sup> Section 440.13(2)(e), F.S.

<sup>26</sup> Section 440.12(1), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> An injured workers’ average weekly wage is an amount equal to one-thirteenth of the total amount of wages earned during the 13 weeks immediately preceding the compensable accident. s. 440.14(1), F.S.

<sup>29</sup> Section 440.15(1)-(4), F.S.

<sup>30</sup> “Statewide average weekly wage” means the average weekly wage paid by employers subject to the Florida Reemployment Assistance Program Law as reported to the Department of Economic Opportunity for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the Department of Economic Opportunity on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. s. 440.12(b), F.S.

<sup>31</sup> Section 440.20(2)(a), F.S.

<sup>32</sup> Section 440.15(2) and (4), F.S. Section 440.15(2)(a), F.S., specifies that temporary total disability benefits are payable for 104 weeks; however, the Florida Supreme Court has found this provision unconstitutional and the statute has reverted to 260 weeks of temporary total disability benefits pursuant to this case law. *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. Jun. 9, 2016). Section 440.15(4)(e), F.S., provides that temporary partial disability benefits; however, the 1st DCA applied the holding in *Westphal* to these benefits finding the limitation unconstitutional and reverted the limitation to the 260 weeks previously allowed. *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

<sup>33</sup> Section 440.15(3), F.S.

<sup>34</sup> Section 440.15(1), F.S.

## Office of the Judges of Compensation Claims

The OJCC is responsible for resolving workers' compensation benefit disputes.<sup>35</sup> Injured employees may file a petition for benefits with the OJCC for any benefit that is ripe, due, and owing.<sup>36</sup> Within 14 days of receipt of the petition, the carrier is required to either pay the requested benefits or file a response to the petition.<sup>37</sup> Forty days after the petition for benefits has been filed, the OJCC will notify the parties that a mediation conference has been scheduled. The mediation will take place within 130 days after the filing of the petition.<sup>38</sup> If mediation is unsuccessful in resolving the claim, a final hearing must be held within 90 days of the mediation. The overall time limit for dispute resolution from the date of the petition for Benefits to the issuance of a final order is 240 days. Generally, an injured worker that prevails on a petition for Benefits is entitled to an award for a reasonable attorney's fee payable by the carrier.<sup>39</sup>

## Workers' Compensation Coverage

There are three ways for employers to secure workers' compensation coverage. Many employers secure coverage from an authorized carrier or they qualify as a self-insurer.<sup>40</sup> Employers that are not self-insured and are unable to purchase coverage from a carrier may purchase coverage from the Workers' Compensation Joint Underwriting Association.<sup>41</sup> The Joint Underwriting Association is the insurer of last resort for workers' compensation insurance, also known as the residual market.

## Florida Workers Compensation Rating System

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

The insurance rate is the "unit charge by which the measure of exposure or the amount of insurance specified in a policy of insurance or coverage there under is multiplied to determine the premium."<sup>42</sup> A manual rate per \$100 of payroll is developed for each of the 600 classification codes that reflects the potential for loss associated with a group of employers engaged in the same type of business or industry. This rate is multiplied by the employer's payroll to determine the unadjusted premium. Then, the unadjusted premium is multiplied by the employer's experience modification factor to determine the adjusted premium. An experience rating compares an employer's actual losses and the losses that would be expected to occur for an average employer with a similar business.

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<sup>35</sup> Section 440.192, F.S.

<sup>36</sup> Section 440.192(1), F.S.

<sup>37</sup> Section 440.192(8), F.S.

<sup>38</sup> Section 440.25, F.S.

<sup>39</sup> Section 440.34, F.S., and *Castellanos v. Next Door Company*, 192 So.3d 431 (Fla. Apr. 28, 2016).

<sup>40</sup> Section 440.38, F.S.

<sup>41</sup> Section 627.311(5)(a), F.S.

<sup>42</sup> Section 627.091, F.S.

The OIR must approve or disapprove rates in the voluntary market prior to becoming effective.<sup>43</sup> In determining whether to approve or disapprove a workers' compensation rate filing, the OIR considers certain statutory standards and factors specified in ss. 627.062 and 627.072, F.S.<sup>44</sup> The standard for approving insurance rates in Florida and most states is that the rate may not be excessive, inadequate, or unfairly discriminatory.

Florida law requires every workers' compensation insurer to file with the OIR its rates and classifications that the insurer proposes to use.<sup>45</sup> However, the law allows an insurer to satisfy this obligation by becoming a member of a licensed rating organization, which makes such filings on its behalf.<sup>46</sup> All workers' compensation insurers in Florida have chosen to become members of the NCCI.

The law and the rating plans approved by OIR allow for mechanisms for insurers to vary premiums. Insurers may use the following pricing tools to compete on price, as described below:<sup>47</sup>

- 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 – An insurer is allowed to file a uniform percentage increase or decrease applicable to all rates an insurer charges or to rates for a particular class or group of classes of insurance.
- Intermediate Deductibles – For a reduced premium, the employer agrees to reimburse the insurer for each claim up to the deductible amount. Intermediate deductibles range from \$5,000 to \$75,000. Similar to small deductible policies the insurer is responsible from first dollar of loss (i.e. losses below the deductible).
- Large Deductibles – Large deductible policies operate similarly to the small and intermediate deductible, but have a deductible amount of \$100,000 and above. In order to qualify for the large deductible program, an employer must have a standard premium of at least \$500,000.
- Large Risk Alternative Rating Option (LRARO) – In most states, LRARO is defined as a flexible retrospective rating plan mutually agreed to by the employer and carrier. In Florida, LRARO is a provision within the currently approved retrospective rating plan that allows for negotiation of a premium between the employer and the insurer.
- Policyholder Dividends – Insurers reward their policyholders by returning some of their profit at the expiration of the policy by issuing policyholder dividends, which may be based on the policyholder's experience, the carrier's experience, and other factors.

In contrast to Florida's full rate system, approximately 38 states use a loss costs system. Generally, loss costs are all of the components of a full rate, excluding expenses and profits. The loss costs represent the rate an insurer must charge in order to cover the losses associated with covering all claims for the year. Depending on the state, loss costs may or may not include all

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<sup>43</sup> Section 627.101, F.S.

<sup>44</sup> Section 627.151, F.S.

<sup>45</sup> Section 627.211, F.S.

<sup>46</sup> Section 627.091, F.S.

<sup>47</sup> Office of Insurance Regulation, Workers Compensation Annual Report (Jan. 2017) (on file with Senate Banking and Insurance Committee).

expenses associated with loss adjustment. In the majority of states where an advisory or rating organization makes a loss costs filing, an individual insurer may base their rates on their individual loss costs or the advisory loss costs modified by a loss costs multiplier. The loss costs multiplier is a factor that represents an individual insurer's profit and expense portion of the full workers' compensation rate.

### III. Effect of Proposed Changes:

**Section 1** revises the definition of the term, "specificity," thereby requiring additional information to be provided in the petition for benefits filed with the OJCC. This includes specific information for each requested benefit, the specific amount of each requested benefit, and the calculation used for computing the requested benefits.

**Section 2** provides a technical, conforming change.

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

**Section 4** provides a definition of business day, and clarifies deadlines for carriers to respond to requests for medical care. The bill requires a carrier to respond to a request for a change in physician within 5 business days rather than 5 days. The bill clarifies that a carrier must respond, by either authorizing or declining a request for authorization from an authorized health care provider by the close of third business day after receipt of the request. Other provisions are amended to require responses to requests in the context of business days instead of calendar days.

**Section 5** codifies *Westphal* by increasing temporary total and partial benefits to 260 weeks instead of 104 weeks.

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

Upon a motion that a petition or portion of a petition be dismissed for lack of specificity, the JCC is required to enter an order on the motion, unless stipulated in writing by the parties, within 10 days after the motion is filed, or if good cause for a hearing is shown, within 20 days after hearing on the motion.

**Section 7** revises provisions relating to attorney fees. The requires the JCC to consider certain factors in each case and may increase or decrease the attorney fees, based on a maximum hourly

rate of \$250 per hour, if the JCC in his judgement finds that the circumstances of the particular case warrant such action. The bill eliminates the \$1,500 cap on medical-only claims.

**Sections 8 - 16 and 18 - 21** revises the current rating system in Florida by implementing a loss costs system. Each insurer would be required to file its own proposed rates. An insurer may satisfy this requirement by adopting the OIR's approved loss costs and complying with the other provisions in this part. The bill authorizes a licensed rating organization to develop and file for approval with the OIR reference filings containing prospective loss costs and the underlying loss data, and other documentation. Once the loss cost filing is approved, the rating organization would provide its member subscribers with a copy of the approved reference filing. A rating organization may file supplementary rating information and an insurer may use such information approved by the OIR. An insurer may use the approved prospective loss costs filed by a rating organization in combination with the insurer's own approved loss cost multiplier and loss cost modifier. The bill provides technical, conforming changes. Section 16 also revises the scope of the annual report by the OIR to include information about insurer solvency.

**Section 17** Defines the term, "defense and cost containment expenses," and establishes a cap on defense and cost containment expenses. Excessive DCCE occurs when the Florida defense and cost containment expenses for workers' compensation exceed 15 percent of Florida workers' compensation incurred losses by the insurer or insurer group for the 3 most recent calendar year for which data is to be filed with OIR. Any excess DCCE refunded to the policyholders in the form of cash or credit toward the future purchase of coverage.

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

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

**B. Private Sector Impact:**

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

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

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

NCCI estimates that the combination of the proposed changes outlined below would result in a small to moderate decrease on overall workers compensation system costs in Florida.<sup>48</sup> The NCCI defines small as less than 1 percent and moderate as between 1 to 3 percent of system costs. According to NCCI,

1% impact = \$36,450,000

3% impact = \$109,350,000

5% impact = \$182,250,000

**C. Government Sector Impact:**

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

**Division of Risk Management/Department of Financial Services**

The Division of Risk Management is a provider of workers' compensation benefits to state and public university employees. The division could be impacted in the following manner:<sup>49</sup>

- Requiring the claimant to show the calculation for the benefits requested has the potential to increase efficiency of claim management. Frequently petitions are filed that are not definitive on the specific time or amount of benefit alleged to be unpaid. The carrier may be unable to double check or determine if an error in payment has occurred. Failure to correct this error within 30 days of the petition for benefits being filed may result in payment of attorney fees and litigation costs that exceed the amount of the unpaid benefit.
- Clarifying the number of days in terms of business days for many responsive deadlines related to medical care will provide more opportunities for the Division to respond within statutory requirements since days Division staff are not at work are not included.
- Limiting attorney fee awards to \$250 per hour may reduce the amount of claimant paid attorney fees paid by the Division. Current hourly awards frequently exceed

<sup>48</sup> NCCI, *Preliminary Cost Impact Analysis, SB 1582* (Mar. 3, 2017) (on file with Senate Banking and Insurance Committee)

<sup>49</sup> Department of Financial Services, *Analysis of SB 1582* (Mar. 17, 2017) (on file with Senate Banking and Insurance Committee).

\$250. A cost reduction will only occur if the hours awarded by JCCs are not impacted by the statutory cap.

- Requiring specificity in pleadings may result in avoidance of employer/carrier paid claimant fees and enhance claim processing efficiencies.
- Changing the rating law would not affect the Division since the Division funds claim expenses.

### **Office of Insurance Regulation<sup>50</sup>**

The bill makes a substantial change in the manner workers' compensation rates are set in Florida, and therefore it will have significant impact on OIR's regulatory process for reviewing rates. The OIR provided the following estimate of staffing needs and costs that would be necessary to implement the bill. The total, estimated fiscal impact on the OIR is between \$700,000 and \$1,000,000. The following is a breakout of the estimated fiscal:

Additional Positions: 8 FTE's

Additional Rate, Salary, and Benefits: \$650,000 - \$900,000

Additional IT enhancements: \$50,000 - \$100,000

### **Office of Judges of Compensation Claims**

According to the OJCC<sup>51</sup>, the petitions for benefits (PFB) are completed using an online web-form in the vast majority of instances. This minimizes data-entry duplication at the OJCC, as issues and demographic identifiers are input by the user, whether attorney or injured worker. Implementation of this bill would be accomplished by administrative order requiring that would require the new specificity in an existing PFB data field. Unfortunately, that field as currently configured will not report on compliance, and so initially this requirement will increase the workload on the clerk's office personnel with manual review of petitions for compliance. Within 3 months (on or before October 1, 2017), the OJCC would expect to expand out PFB web-form with specific fields to accommodate the new requirements. At that stage, the compliance burden on the clerk's office would cease. The programming expense is approximately \$18,000 - \$24,720 for programming costs and personal.

## **VI. Technical Deficiencies:**

None.

## **VII. Related Issues:**

None.

<sup>50</sup> Email from the Office of Insurance Regulation (Mar. 31, 2017) (on file with Senate Banking and Insurance Committee).

<sup>51</sup> Office of Judges of Compensation Claims of the Division of Administrative Hearings, *Analysis of SB 1582* (

**VIII. Statutes Affected:**

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

This bill creates section 627.2151 of the Florida Statutes.

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

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

None.

**B. Amendments:**

None.

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

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