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AN INVESTIGATION OF THE ATTORNEY'S ROLE IN WORKERS COMPENSATION

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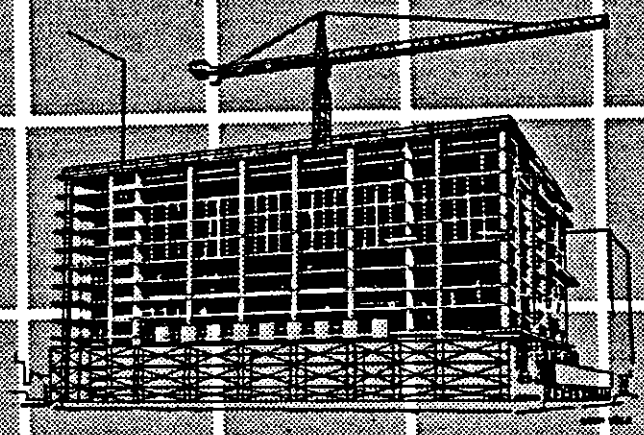

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THE ATTORNEY'S ROLE IN WORKER'S COMPENSATION

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EXECUTIVE SUMMARY

Research into the attorney's role in workers compensation has been approached along multiple paths. In the traditional mode, we have screened the literature, both locally in Florida and at the national level. We have also conducted interviews with experts and activists in the field of workers' compensation, more particularly those familiar with or associated with compensation patterns and problems in the construction industry.

We have solicited help in the form of information from State regulatory bodies dealing with workers' compensation, and from semi-autonomous research bodies who work on the issue at a grand scale. We have talked extensively with attorneys who are actively engaged in supporting the struggle for and against awards.

Finally, in a less traditional mode, we brought proponents of various sides of the issue together for a rare sharing of views and exploration of options for betterment in a much maligned system. This was structured as a round-table discussion and exchange of opinion which returned far more in knowledge to the participants than they had anticipated, and provided significant dimension and detail to the study investigators.

Conclusions were that the primary roles for Florida attorneys in workers' compensation, i.e advocacy for claimants and providers, is a function of the system (defined by statute) and diligence of its administration (regulatory implementation). The participation of attorneys and their costs can best be reduced by a stringent alignment of regulation and enforcement of its provisions. Models of experience in other states are discussed to support this theory.

FINDING'S CONCLUSIONS, AND RECOMMENDATIONS

Findings. With regard to the workers' compensation system in Florida, we find that it is defined by statute (Chapter 440 F.S.), and The Florida Department of Labor and Employment Security is the State agency charged to administer the Workers' Compensation Law in accordance with legislative intent. The present definition and administration of the system are such as to provide room for both claimant and provider advocacy in the interest of determining the merit of claims. Such room (maneuver space) has led to advocacy becoming a major driver of the system flow, a major participant in conduct of the system business. Whether that is the legislative intent is not clear.

The legislative authority for the system has changed from year to year. The legislature should consider allowing the effects of these changes to be implemented for a time to determine whether progress has been made before initiating yet another change. Some think that the issue of attorney fees as a cost has been adequately addressed in 1993 to overcome the abuses experienced in the 1970's and 1980's.

1993 was when this present study was requested. Since then, the legislative changes made that year have taken effect. It now appears that attorney fees as costs may not be within the top three problems perceived by students of worker's compensation reform. The consensus appears to be that the top problems needing legislative attention are:

1) Getting everyone to participate in this social program and eliminate or minimize the ability of employers to skirt

the system, thereby requiring a social program for all workers to be funded by only some legitimate employers.

2) Fraud by claimants.

3) Fraud or contribution thereto by medical providers.

Another item that may deserve consideration is implementation of a rule permitting sanctions against counsel for making disingenuous filings with the court. Federal trial courts have what is known as "Rule 11". This type of rule, along with strict implementation, would reign in the disingenuous and excessive practices of counsel, resulting in savings.

The potential for improvement of system effectiveness is quite large from more stringent enforcement of the existing regulatory scriptures. This would seem particularly true for the problem areas listed 1) through 3) above. We advocate a hands-off policy in terms of system change. The 1993 rewrite should be left in place with stronger enforcement at the gates which control the flow of claims. At least three years of operation under unchanged prescriptive conditions are necessary to generate a minimum of meaningful performance data. This would afford time to step up administrative oversight, improve the Ombudsman operation with more and higher qualified personnel, and study the successes of Oregon and Wisconsin at reining in runaway litigation.

Worker's Compensation is a complex issue impacting many competing interests. It has been a drain on our economic resources and a frustration to the profitable enterprise of well intentioned business. Indirectly, the system has been handicapping rather than promoting commerce of the State. To work, it must be made to work.

THE ATTORNEY'S ROLE IN THE WORKER'S COMPENSATION SYSTEM

INTRODUCTION.

This study was commissioned in 1993 before significant reform of the workers' compensation laws was undertaken by the Florida legislature. These reforms took effect in January of 1994. Most of the participants in the present study expressed a belief that the present reforms, while not perfect, will go a long way toward correcting many of the perceived problems with the system, including that of the costs of litigation, the role of attorneys in the system and attorney fees. These topics have been perennially the focus of discussion as representing aspects of the workers' compensation system in Florida which call for drastic change. Given the recent history of reform in the worker's compensation law, high hopes for the present reforms may be optimistic. The present study, although coming as it does after the 1993 reforms, has necessarily drawn on data, personal perceptions and evidence which reflect pre-reform conditions. If recent history can be taken as a guide, the results of this study will be useful to those interested in the dynamics of the workers' compensation system as well as being useful to reformers, even if, after 1993, all that is needed is fine-tuning.

The present study, funded by the State of Florida Department of Education, and conducted under the auspices of the Building Construction Industry Advisory Committee, focuses on the attorney's role in workers' compensation.

The study examines the role of attorneys and the cost of that

role, and suggests whether further changes may be in order.

THE PROBLEM.

The cost of worker's compensation has created a highly charged atmosphere among those in the construction industry. The price of doing business is ever rising and the portion of that price increase attributable to the cost of workers' compensation premiums is substantial.[1] The Florida Department of Labor and Employment Security reports that for the policy year 1989-90, Florida ranked first among the 31 states compared.[2] Although this level dropped in 1990-91, as of that reporting period, Florida ranked fifth compared with the 27 other states which were studied.[3]

High premiums are driving many contractors and subcontractors to take greater risks to remain competitive.

At the beginning of the 1993 session, Governor Chiles stated:

> "soaring workers' compensation rates are putting our small businesses out of business every day.... We have to return the system to its original purpose... [I]t wasn't designed for lawyers, it wasn't designed for doctors, it wasn't designed for insurance companies. It was designed to help employers and their workers. Let's take it back to that."

As in other areas where legal rights are at stake, attorneys currently play a central role in the functioning of the workers'

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[1] Division of Worker's Compensation, Annual Report: Fiscal Year 1994, p. 1. (hereinafter "Annual Report")

[2] See Annual Report "Florida paid out about $83 million per 100,000 workers, an amount approximately 66% above the national average of $50 million in a 31-state comparison."

[3] See Annual Report, "Policy year 1990-91 data show that Florida provided $81 million in total benefits per 100,000 workers. The figure was 57.2% above the national (27-state) average of $51 million, placing Florida fifth among other jurisdictions in the nation."

compensation system. Attorneys' fees have increased from $69 million in 1988 to $121 million in 1991.[4] Litigated workers' compensation cases increased from 6 percent in 1983 to almost 21 percent in 1990.[5] The claims process has developed a custom of attorney involvement which may or may not be value efficient. There is a feeling among many in the industry that the system may be more expensive as the result of involvement of lawyers. There is also a feeling that attorney involvement may not be cost effective. In partial response to these perceptions, the legislature addressed and reduced recoverable attorney fees in 1993.

WORKERS COMPENSATION LAW IN BRIEF HISTORICAL PERSPECTIVE.

Workers compensation laws were enacted to provide workers who were injured in the workplace, a guaranteed and defined set of benefits.[6] In exchange, workers gave up their right to bring tort claims against the employer.[7] These laws were introduced during the Industrial Revolution,[8] and are the oldest social insurance program in the United States.[9] Florida enacted its workers'

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[4] Chris Roush, "Workers' Compensation: Lawyers Vow To Fight Cost-Cutting Plan," Tampa Tribune, Feb. 15, 1995.

[5] Ibid.

[6] Timothy A. Watson and Michael J. Valen, A Historic Review of Workers' Compensation Reform in Florida, 21 Fla. St.U.L.Rev. 501 (1993); (hereinafter "Watson & Valen").

[7] Ibid.

[8] Ibid

[9] Annual Report.

compensation legislation in 1935.[10] Despite there being nearly a century of legislative history behind them in the United States, and 60 years of Florida legislative history, workers' compensation laws are far from settled today. It has even been said that "[w]hat is heralded as a solution to workers' compensation during one legislative session is maligned as the source of the problem during the next session."[11]

The more recent history of the workers' compensation law has seen repeated efforts to reform the system. These, almost annual attempts, have addressed many of the same issues: attorney fees, exaggerated medical costs, increased wage loss costs, insurance regulatory issues, and more recently dispute resolution. Significant reform has taken place in 1977, 1979, 1983, 1989, and 1990. The most recent reform which took place in 1993, and which became effective as of January 1994, has been particularly comprehensive.[12]

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[10] Annual Report, p.7.

[11] Watson & Valen, p. 504.

[12] Ibid.

ATTORNEY FEES UNDER THE FLORIDA WORKERS' COMPENSATION STATUTE.

Section 440.34, Fla. Stat.(1993) governs attorney's fees and costs in workers compensation. This statutory section was revised in the 1993 reform of the workers' compensation laws. This statutory section is reproduced here in its entirety.

> 440.34. Attorney's fees; costs
>
> (1) A fee, gratutity, or other consideration may not be paid for services rendered for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. Except as provided by this subsection, any attorney's fee approved by a judge of compensation claims for services rendered to 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. However, the judge of compensation 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 fee customarily charged in the locality for similar legal services.
>
> (c) The amount involved in the controversy and the benefits resulting to the claimant.
>
> (d) The time limitation imposed by the claimant or the circumstances.
>
> (e) The experience, reputation, and ability of the lawyer or lawyers performing services.
>
> (f) The contingency or certainty of a fee.

(2) In awarding a reasonable claimant's attorney's fee, the judge of compensation claims shall consider only those benefits to the claimant that the attorney is responsible for securing. The amount, statutory basis, and type of benefits obtained throught legal representation shall be listed on all attorney's fees awarded by the judge of compensation claims. For purposes of this section, the term "benefits secured" means benefits obtained as a result of the claimant's attorney's legal services rendered in connection with the claim for benefits. However, such term does not include future medical benefits to be provided on any date more than 5 years after the date the claim is filed.

(3) If the claimant should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the employer the reasonable costs of such proceedings, not to include the attorney's fees of the claimant. A claimant shall be responsible for the payment of his own attorney's fees, except that a claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer:

(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 a claim for disability, permanent impairment, wage-loss, or death benefits, arising out of the same accident; or

(b) In any case in which the employer or carrier files a notice of denial with the division and the injured person has employed an attorney in the successful prosecution of his claim; or

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

(d) In cases where the claimant successfully prevails in proceedings filed under s.440.24 or s.440.28.

In applying the factors set forth in subsection (1) to cases arising under paragraphs (a), (b), (c), and (d), the judge of compensation claims must only consider only such benefits and the time reasonably spent in obtaining them as were secured for the claimant within the scope of paragraphs (a), (b), (c), and (d).

(4) In such cases in which the claimant is responsible for the payment of his own attorney's fees, such fees are a lien upon compensation payable to the

claimant, notwithstanding s.440.22.

(5) If any proceedings are had for review of any claim, award, or compensation order before any court, the court may award the injured employee or dependent an attorney's fee to be paid by the employer or carrier, in its discretion, which shall be paid as the court may direct.

(6) A judge of compensation claims may not enter an order approving the contents of a retainer agreement that permits the escrowing of any portions of the employee's compensation until benefits have been secured.

Prior to the 1993 reform, the issue of workers' compensation attorney fees has generated a large number of reported cases as a look at the Florida Annotated Statutes will show. The large number of reported appellate decisions suggests there are many unsettled issues which remain in this area of the law.

Attorneys Role in Handling Workers' Compensation Claims

In broad outline, workers' compensation claimant and carrier attorneys perform the following tasks:

Claimant's Attorney

1.) give advice to injured workers with potential claims.

2.) give advice to insurance carriers.

3.) negotiations between the workers' compensation insurance adjuster and the injured worker.

4.) formal mediation of the claim.

5.) litigation (cases which are totally controverted and where the carrier did not offer treatment, e.g., catastrophic injuries).

6.) recommend medical treatment.

Carrier's Attorney.

1.) reviews and analyzes the information provided by claimant's

counsel and advises carrier about discovery, claim value, settlement and litigation.

2.) evaluate the worker's claim (through deposition and medical records) and inform carrier. (make settlement recommendation and pay compensation voluntarily where the claim is not controverted.

3.) Pre-Trial Hearing.

4.) formal mediation of claim.

5.) litigation.

WORKERS' COMPENSATION AND THE CONSTRUCTION INDUSTRY.

Throughout the period from 1983 to 1993, the construction industry has exhibited the hightest rate of workers' compensation claims for lost-time work injuries.[13] Workers' compensation cases arising in the construction industry have a relatively high liklihood of litigation.[14] As a result, the construction industry has been particularly affected by skyrocketing rate increases, so much so that some in the industry fear that the workers' compensation laws are "making felons out of contractors" because they cannot afford to stay in business and pay the ever increasing premiums. As a result, many of the contractors who remain in the system have been driven to misrepresent exemptions, misrepresent independent contractor status, or falsify evidence of coverage and

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[13] Annual Report, p. 139.

[14] Fournier, Gary M., and Barbara A. Morgan,."Factors Affecting the Litigation of Workers' Compensation in Florida," Final Report Prepared for the Florida Division of Workers' Compensation, Florida State University, Tallahassee, Feb. 1995; (hereinafter Fournier & Morgan).

thus completely finesse the statutory requirements.[15] Many others have taken themselves out of the system altogether. They refuse to pay the premiums and choose to role the dice by working without being covered by workers' compensation insurance.

The effect on the system is manifold: 1.) Those contractors who remain in the system have been forced to pick up the costs of the reduced premiums which have not been paid by those contractors who do not pay. 2.) The contractors without workers' compensation run the risk of detection and the civil and criminal penalties which are attached thereto. 3.) Those within the system cannot be competitive in bid situations against those who are finessing the workers' compensation requirement. A system which gives a competitive edge to outlaws will not be supported. It is therefore reasonable to assume that competition will suffer as a result of extra costs for those who comply, and quality will suffer due to insufficient markup to deal with contingencies which can then result in cutting corners.

The good news for the construction industry is that if the 1993 reforms exhibit the desired results, it is estimated that insurance rates for the year 1994 will exhibit between a 15.1 and a 19.0 percent decrease for certain sectors of the industry.[16]

ATTORNEY-SPECIFIC OR SYSTEMIC PROBLEM.

The attorney's role in the functioning of the workers' compensation system has been perceived by many in the construction

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[15] FIU Roundtable Discussion.

[16] Annual Report, p.15.

industry to be a significant factor in the precipitous rise in cost of worker's compensation.[17] For example, an award of $1.75 million to an attorney who recovered $17.6 million was not found to be excessive although the fee award equaled $2,700 per hour.[18] Understandably, the construction industry which exhibits a high incidence of injury, is particularly sensitive to the issue of large attorney fee awards which are perceived to be driving up their costs.

While there remains concern over attorney fees, since 1993 it does not appear that attorney fees are perceived by those in the industry to be one of the more important issues. Prior to 1993, however, those in the construction industry who perceive that there is a problem with attorneys' involvement in workers' compensation claims are not alone. At that time, and perhaps with the 1993 reforms looming on the legislative horizon, there was some candid self-criticism of the attorneys' involvement from within the bar itself. According to one source, the attitude of workers' compensation attorneys had changed since the nineteen seventies when attorneys would identify what benefits the claimant might be entitled to and try to get them paid. Nowadays, according to this source, attorneys aim to "work the case to death."[19]

Whatever the circumstances of this increase in the attorneys'

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[17] FIU Roundtable Discussion.

[18] What An Idea, Inc. v. Sitko, 505 So.2d 497 (Fla. 1st DCA 1987).

[19] Gerald A. Rosenthal, Esq., "The Spirit of '93" News & 440 Report, Worker's Compensation Section of The Florida Bar, Vol. XVI, No.2, Fall 1993.

role in increased workers' compensation litigation may be, the facts prior to the 1993 reforms are startling. The Florida Department of Labor and Employment Security, in its annual report for fiscal year 1994 states that:

> Attorney involvement and litigation continue to be significant factors in the workers' compensation system. The proportion of litigated claims more than tripled from 6% in 1983 to 21% in 1990. Between calendar years 1988 and 1993, the number of orders issued by the Judges of Compensation Claims increased by over 80%. Attorney fees more than doubled between 1988 and 1992, increasing from nearly $70 million to over $142 million over the period. From 1988 to 1993, claimants consistently paid out well over half of the fees directly, and in all but two of the six years that percent paid by claimants was over 60%.

Is the perception that attorney involvement in workers' compensation claims has been a major factor in driving up the costs of the system correct or is the system itself responsible for the increased level of attorney involvement?

Workers' Compensation attorneys representing claimants believe that the costs of attorney fees represent only a small percentage of the costs of workers' compensation claims.[20] They maintain that attorney involvement has increased because insurance companies are turning down benefits to injured employees at a higher rate.[21]

While it is true that the workers compensation laws maintain a presumption in favor of the claimant such that doubts are resolved in the claimant's favor,[22] attorneys representing carriers

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[20] FIU Roundtable Discussion.

[21] Roush, op. cit.

[22] 57 Fla. Jur 2d, Workers' Compensation, §7 (1985).

have maintained that there may be an inherent bias toward claimants and claimants attorneys. In fact, until the latest procedural reforms were put into effect, judges of compensation claims were accountable to the workers' compensation bar.[23]

Nevertheless, workers' compensation litigation in Florida, while significant, is not out of proportion to that in other states and attorney fees for workers' compensation is calculated similarly in other states.[24] In 1990, attorney involvement in workers' compensation cases in Florida was approximately 21 percent.[25] Nevertheless, this involvement is a significant cost driver.

What may be more significant is something which is much harder to measure, namely, what effect attorney involvement may have in expanding workers' compensation claims. Attorney involvement may cause a delay in payment to the claimant and a corresponding tendency for the claimant to become obsessed with his or her case and consequently develop rigid attitudes which act to abort an easy settlement.[26]

While it is easy to point a finger at one group, and attorneys are admittedly an easy target, the medical professionals, insurance carriers, state administrators, and wide-eyed claimants, are at

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[23] Stephens, Steven Scott, "Who Judges the Judges? The New Process For Appointment and Retention of Judges of Compensation Claims," Fla. Bar Journal, Vol LXIX, No. 1, January 1995, p. 12-17.

[24] Fournier and Morgan, p. 3, see Appendix comparing Attorney Fee statutes across several states.

[25] Ibid.

[26] Rosenthal, op. cit.

various times each responsible for driving up the costs of worker's compensation or for the ineffective working of the system.[27] Like attorney fees, medical payments have exhibited a similar spiraling out of control. According to the Florida Department of Labor and Employment Security"

> Total payment for all dates of injury exceeded payments made in 1993 by more that $170 million or 11.2%. Medical payments in fiscal year 1994 increased by $194 million, about 31% more than the amount paid in this benefit category in fiscal year 1993. This is a substantial increase in medical payments considering that payments in the other benefit categories, namely indemnity and lump-sum settlements, actually decreased in fiscal year 1994 relative to 1993. Indemnity payments in 1994 were about $4.5 million or 0.9% less than was paid in 1993, while settlement payments decreased by $19.5 million or 4.8% over the same period.

Medical costs are now being targeted as one of three main cost drivers of the system.[28] The fact that the rising costs of workers' compensation premiums are being attributed to several different groups involved with the system and that, at least as far back as 1977,[29] the business community in Florida expressed many similar concerns about high premium rates and the cost of attorneys' fees suggest that the problem is systemic in nature and not isolated to one group of participants or another. The system has been fluid due to almost annual changes.

Prior to 1993 the evolution of the attorney's role in worker's compensation was most significantly the result of the evolution in

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[27] FIU Roundtable Discussion

[28] FIU Roundtable Discussion.

[29] Watson & Valen, p. 504.

the law itself.[30] Workers' Compensation attorneys may be "victims in a system that doesn't work well."[31] Prior to 1993, it might be said that:

> The system as it now stands, rewards role-playing rather than punishing it. If we [i.e. workers' compensation attorneys] are to be true to our profession of advocacy, then we are obliged to represent our clients to the best of our ability. If that requires some tap dancing in the case, so be it. Problem is, it should not have to be that way.[32]

This question can be posed with respect to the role of all the major players in the worker's compensation system, medical professionals, insurance carriers, claimants, judges, and administrators.[33] Are they all "victims in a system that doesn't work well?"

Studies of states such as Oregon, and Wisconsin, which have experienced success in reducing workers' compensation litigation, and thereby reducing attorney fees, have attributed this reduced cost to the structure of the workers' compensation systems themselves. In Oregon, for example, costs were reduced by implementing features within their systems which "combine to create reasonable certainty about what is owed, stimulate prompt payment by employers and insurers, and discourage the use of partisan

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[30] Rosenthal, op. cit., p.1.

[31] Ibid.

[32] Ibid.

[33] Boden, Leslie I, Reducing Litigation: Evidence From Wisconsin, Workers Compensation Research Institute, WC--88-77, December 1988.

experts in favor of treating physicians." [34] Oregon's system(ic) changes which combine to reduce litigation are 1.) written guidelines 2.) active agency participation 3.) incentives to use non-partisan experts and 4.) independent state evaluators for determining disability ratings.

On a more fundamental level, it has been observed that the concept of Workers' Compensation is incompatible with the advocacy system. Our socio-economic system is in conflict with the social welfare based Workers' Compensation.[35] Attorneys are advocates; they are also business people. Their work, however much in the service of justice, contains a profit motive. It therefore gives rise, in some instances, to "putting in as many hours as possible" on a case, and "puffing".[36] As long as any regulated system in the United States is presented to the public and its supporting professionals the very nature of American economic enterprise is to look for holes in the system and gain advantage. Unless we intend to restructure our fundamental economic priorities we must look to the restructuring and redesign of the system itself in order to achieve a system which works. Few believe that the 1993 Reforms have solved the problem, although, there is a feeling that this reform is a step in the right direction.[37]

It is important to keep in mind the purpose of the Worker's

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[34] Ibid.

[35] FIU Roundtable Discussion.

[36] Rosenthal, op. cit.

[37] Fournier & Morgan.

Compensation laws as being an exchange between employees and employers of certain rights in order to protect both parties.[38] While reducing litigation is a laudable goal, it is not an end in itself. If employees cannot or will not hire legal counsel there is the possibility that they will not receive all benefits to which they are entitled.[39]

While it seems obvious that more attorney fees are obtained on cases which are controverted than on those which are not, the majority of cases are settled by agreement and without resorting to litigation.[40] Workers' Compensation attorneys posit that if insurance carriers were more willing to pay legitimate claims, attorney fees would be reduced dramatically.[41] Once a case is disputed and brought into the adversary system costs quickly escalate. There are pre-trial hearings, hearings before a judge of compensation claims, appeal to the First District Court of Appeal and possibly to the Supreme Court of Florida.[42] These recalcitrant carriers have much to do with high fees. Should they (carriers) be penalized attorney fees for controverting claims, the disincentive to dispute even the most frivolous claim could result in attorney fee savings but higher payment of less than legitimate

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[38] See Fournier & Morgan and Annual Report.

[39] Boden, op. cit.

[40] Fournier and Morgan.

[41] FIU Roundtable Discussion.

[42] Fournier and Morgan, p.3.

claims.

The 1993 Reforms.

It is widely believed that the 1993 reforms will have a significant effect on reducing both the litigation costs and the litigation activity.[43] However, data to support this perception will not be available until 1997. One of the problems with the entire issue of the attorney's role in workers' compensation is in evaluating the effects of the available data. Over the history of workers' compensation legislation in Florida, the law has experienced regular changes. In particulary with respect to the 1993 changes, it has made it difficult, if not impossible, to evaluate whether the 1990 changes to the law have affected the cost of litigation, the attorney's role in the operation of the system and attorney fees. Some attorneys believe that had the wage loss system had been in effect longer, there would have been a recongizable change in the attorneys' role in the system.[44] This view is supported to some extent by the available data.[45] Without data which can be analyzed over sufficient time, it is difficult to determine whether the wage loss system would have been a cost saver or a significant driver of costs. The role of the present reforms are expected to have a significant effect on litigation, attorney fees and consequently on the attorney's role in the sytem. For this reason, further tinkering with the role of attorney and

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[43] Ibid.

[44] FIU Roundtable Discussion.

[45] Annual Report, p.2.

attorney fees within the workers' compensation system should be discouraged until sufficient time has elapsed to be able to evaluate the effects of the reforms.[46]

Some aspects of the 1993 reforms which are expected to have a significant effect on litigation, attorney fees and the attorney's role in the system and the attendant costs thereof are the establishment of the Employee Assistance and Ombudsman Office (EAO) and the corresponding use of compulsory mediation; a reduction in the attorney fee awards allowed including fee multipliers; and managed care. In addition, procedural changes such as the new process for the appointment and retention of Judges of Compensation Claims[47] as well as the use of video teleconferencing for oral argument before the First District Court of Appeal which handles workers' compensation cases. Following is a brief discussion and comments regarding these new developments.

--Reduction of Attorney Fees and Fee Multipliers.

There is an added incentive to resolution of claims for claimant attorneys in that attorney fees have been reduced from 25 percent to 20 percent for the first $5,000 in benefits and fee multipliers have been reduced by 5 percent. It is believed that this will expedite resolution of smaller claims of $5,000 or less.[48]

--Compulsory Mediation/Ombudsman.

The addition of compulsory mediation was an important addition

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[46] Fornier & Morgan, p.3.

[47] Stephens, op. cit.

[48] Annual Report, p. 13.

of the 1993 reform. The Division of Workers' Compensation is now authorized to intervene to resolve disputes prior to the filing of a petition for benefits.[49] Mediation requires settlement discussions which can resolve disputes without the costly procedures of litigation. This has been a successful strategy in other states.[50]

Studies from other states have shown that strong administrative oversight is important to the operation of a workers' compensation system. (see Wisconsin Study). The creation of the Ombudsman position in the Division of Worker's Compensation seems to have a great potential for creating the type of position which is needed to allow a strong administrative oversight of the system. Although it is in its infancy, the Ombudsman process as implemented seems predestined to failure. Problems include the fact that the Ombudsman position is severly under funded. The appointed ombudsmen are perceived to be inexperienced, and underpaid. The perception of claimants attorneys, carriers attorneys and others is that the Ombudsman system as presently administered has caused confusion and increased costs to a system already overburdened by both. The claimant's bar sees the Ombudsman as simply an added step in the process. An added step brings an added cost.

--Managed Care.

A detailed discussion of Managed Care is outside the parameters of the present study. Briefly put, Managed Care is aimed at

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[49] Annual Report, p. 13.

[50] Ibid.

reducing an employer's premium by providing a discount of up to 10 percent and fostering the injured worker's return to the workplace as quickly as is medically feasible.[51] However, in terms of its effect on litigation, attorney fees, and the attorney's role in the system, managed care is perhaps the most controversial aspect of the 1993 reform. Claimants' attorneys believe that this issue will be "litigated to death." It will obviously be difficult to gauge the advantages of this new provision until after such time as the legal challenges have been resolved. This is another example of why repeated overhaul of the system before the effect of changes can be analyzed against meaningful data is a bad practice.

CONCLUSION.

The workers' compensation system in Florida has been the subject of intense debate, controversy, and complaint over the years. Much of the complaints have come from members of the construction industry, an industry which is particularly vunerable to the costs of workers' compensation. This controversy was not isolated to Florida. Other states which have studied the problem of the costs of their respective systems and which have focused on the reduction of workers' compensation litigation tend to show that system structure is the key to containing costs. The cost of litigation, attorney fees, and the attorney's role in the workers' compensation system are an effect not a cause of the problem. Restructuring of the system and implementation of those changes does have a tendency to reduce litigation. If these studies are correct,

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[51] Annual Report, p.13.

they point toward the conclusion that the high cost of attorney fees is simply an epiphenomenon of a systemic problem; and when and if the right systemic changes are made, the costs of attorney fees will correspondingly be reduced.

Changes to the system structure are inevitable. The 1993 reform may herald the beginning of just such a needed systemic change. However, the only way to measure whether the current reforms are successful is through data collection and analysis.. Some fine-tuning, as is suggested by the present study, may yet be in order, however, the legislature should proceed with caution in taking up further revisions to the present legislation in regard to attorney fees until such time as the effects of the reforms can be measured over time.

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TABLE OF APPENDICES

APPENDIX A

FLORIDA'S INSURANCE RATES AND EMPLOYER COSTS

from: Florida Division of Workers' Compensation Annual Report
Fiscal Year 1994, pp 124-127.

FLORIDA'S INSURANCE RATES AND EMPLOYER COSTS

The cost of workers' compensation insurance is the best measure of the employers' costs of the program. Although a substantial proportion of benefits in Florida are paid for by self-insurers, data on the costs to self-insuring employers of providing these benefits are sparse. This is particularly true of data that relate the self-insuring employers' costs to a common denominator -- such as costs per $100 of payroll. As a result of the paucity of data for self-insurers, this section concentrates on the costs of workers' compensation insurance.

Florida's Insurance Rates

A logical point to begin an examination of the workers' compensation insurance rates in Florida is 1978. At that time, there was great concern about the costs of the Florida workers' compensation program, which led to the 1979 enactment of the wage-loss approach to permanent partial disability benefits. The first several years after the wage-loss approach was adopted, insurance rates plunged in Florida, as shown in Panel A of Table 37. After four successive cuts between August 1979 and January 1982, insurance rates were down 36.3% from their 1978 level. The January 1982 rates were the lowest for the period since 1979. They were followed, however, by two increases in rates later in 1982, and then by yearly increases from 1984 to 1990 -- and all but one of these increases was a double-digit jump. By January 1990, rates were 114.5% above the 1978 rates (and were up more than 200% from the January 1982 rates).

The reactions to the rapid increases in insurance rates included a number of changes in the Florida workers' compensation statute during the late 1980's and early 1990's, reflected in the curtailing of wage-loss benefits effective July 1, 1990 and a 25% decrease of insurance rates in September 1990. The legislation that mandated the 25% decrease in September 1990 froze those rates until January 1992. Once the mandated freeze melted, Florida rates increased 21.2% in January 1992 and 7.2% in January 1993. As the rates climbed higher, further legislation was deemed necessary to stem the tide of the spiraling increase in workers' compensation costs. Thus, in a special session in November of 1993, the legislature enacted significant reforms to Florida's law, culminating in an overall benefit level decrease of 10.6%, effective January 1, 1994.

The end result of all the rate changes in Florida since 1979 is that Florida's rates as of January 1994 were 86.8% higher that they were in 1978. Panel B of Table 37 provides a national perspective to which the changes in Florida can be compared. Of interest is that, nationally, workers' compensation insurance rates had several years of moderate increases or small decreases between 1979 and 1984, then experienced a number of years with average increases of about 10% a year. The countrywide rates increased 126.7% between 1978 and 1993 --significantly more than the 86.8% increase in Florida rates during the same period.

The increase in Florida's insurance rates relative to national insurance rates has been a source of concern for employers. One reason that Florida employers were so concerned about the insurance rates as of 1978 was that the state's costs of insurance were 76.2% above the national average, and Florida's costs ranked third among 47 jurisdictions with comparable data.[1] The decrease in Florida rates that followed the 1979 reforms significantly improved Florida's costs relative to those elsewhere in the nation. By 1984 (the first year after 1978 for which comparable data are available), Florida's costs

TABLE 37

Effective Date	Percentage Change from Previous Rates	Cumulative Change from January 1, 1978 Rates[a]
Panel A: Florida's Workers' Compensation Insurance Rate Revisions, 1979-94		
August 1, 1979	-15.0	-15.0
January 1, 1981	-5.1	-19.3
July 1, 1981	-15.6	-31.9
January 1, 1982	-6.5	-36.3
September 1, 1982	+10.0	-30.0
December 1, 1982	+10.7	-22.5
March 1, 1984	+10.1	-14.7
January 1, 1985	+18.7	+1.3
January 1, 1986	+11.8	+13.3
January 1, 1987	+3.0	+16.7
January 1, 1988	+12.9	+31.8
January 1, 1989	+26.2	+66.3
January 1, 1990	+29.0	+114.5
September 1, 1990	-25.0	+60.9
January 1, 1992	+21.2	+95.0
January 1, 1993	+7.2	+109.0
January 1, 1994	-10.6	+86.8
Panel B: Countrywide Changes in Workers' Compensation Premium Level, 1979-93		
1979	+6.4	+6.4
1980	+2.9	+9.5
1981	-2.1	+7.2
1982	-1.4	+5.7
1983	+1.7	+7.5
1984	+0.4	+7.9
1985	+12.2	+21.1
1986	+8.9	+31.9
1987	+9.6	+44.5
1988	+8.9	+57.4
1989	+6.1	+67.0
1990	+12.1	+87.2
1991	+7.4	+101.0
1992	+10.0	+121.1
1993	+2.5	+126.7

Source: 1979 - 1980 data: National Council on Compensation Insurance, Annual Statistical Bulletin, 1990 edition, pp. 7, 18.
1981 - 1994 data: National Council on Compensation Insurance, Annual Statistical Bulletin, 1994 edition, pp. 6, 18.

Notes: [a]Cumulative change figures computed by John F. Burton, Jr., Timothy P. Schmidle, and Cliff Schmidt.

were only 23.2% above the national average, and Florida ranked 11th among the 47 jurisdictions with data.

In most years since 1984, Florida's workers' compensation insurance rates have increased more rapidly than those nationwide, as is evident from the data in Table 37. By 1989 (the latest year for which comprehensive data allowing interstate comparisons are available), Florida's workers' compensation insurance rates were 55.7% above the national average, and the state ranked fourth among the 47 jurisdictions with data. The Table 37 data on Florida and national developments between 1989 and 1993 suggest that Florida's costs were even further above the national average in 1993 than at any time since 1979, with the exception of September 1990.

What Explains the Changes in the Florida Workers' Compensation Insurance Rates?

One major complicating factor in measuring and explaining changes in the employers' costs of workers' compensation insurance is the inevitable lag in the availability of relevant data. For example, the employers' costs of workers' compensation insurance in a particular year are not known until several years later, when data are published on important factors that influence costs, such as dividends, premium discounts, deviations from published manual rates, and the effect of experience rating.[2]

Another example of a significant lag is the time between the enactment of a legislative change and the date when the effects of that change are known. For example, major changes in the Florida workers' compensation law were made that were effective July 1, 1990. However, the 1990 change in the wage-loss benefits only applied to injuries that occurred after that effective date. For a relatively serious injury, the date of maximum medical improvement (MMI) is likely to be a year or more after the date of injury, and so the 1990 law changes only began to have significant effects in 1991. Moreover, since many permanent partial disability cases pay benefits for several years after the date of MMI, the effects of the 1990 law will take many years to work their way through the system. We now have several years of information to analyze for wage-loss cases, and there is some positive evidence that the 1990 reforms relating to wage-loss were having an effect in reducing the number of wage-loss cases and the costs associated with those cases. These issues are addressed in our analysis of the 1990 reforms later in this section of the report. However, because there is a significant lag on the reporting of benefit costs, the full effect of the 1990 legislative changes will still not be known for several years.

As a result of all these delays, we currently know much more now about what was causing the costs of workers' compensation insurance to increase in Florida during the 1980's than we do about the effect of the legislative changes in the 1990's. At one level, we know the employers' costs of insurance were increasing in the 1980's because total benefits (cash plus medical benefits) per 100,000 workers increased substantially during the decade. This was documented in the analysis on Total Benefits earlier in this section.

At a more refined level of analysis, we can identify the sources of cost increases in Florida during the 1984 to 1988 period from research summarized in a 1992 publication by the Workers Compensation Research Institute (WCRI).[3] Significant factors increasing costs in Florida during this period were found to be: (1) an extended duration of temporary total disability benefits, (2) a greater frequency of wage-loss claims, and (3) the size of wage-loss claims and lump-sum settlements (or washouts). The rapid growth in wage-loss expenditures was in

turn attributed to a series of liberalizing court decisions, uncertainty about this type of benefit, attorney involvement, and the parties' increasing willingness to resolve cases through washouts coupled with adjudicators' progressively greater willingness to permit the practice to resume.

The question left unanswered by the WCRI study was whether the 1990 amendments would reduce costs. The changes specifically noted in the study as potentially significant were the reduction in the maximum duration of temporary total disability benefits, the introduction of a less generous formula to calculate weekly wage-loss benefits, the limits on the scope of required vocational rehabilitation, and the exclusion of fringe benefits from the calculation of pre-injury wages. The authors also noted that the 1990 law eased the criteria for judges to approve washouts of wage-loss benefits, but indicated that there was no clear long-run likely impact of this change on costs.

Substantial evidence on the actual effects of the 1990 amendments will not be available for several years because of the significant lags discussed above. Even then, we can measure outcomes through 1993 only, as major reforms effective 1994 will override the effects of the 1990 reforms. The preliminary evidence on wage-loss benefits, presented in the section Effects of the 1990 Legislative Reforms, suggests the reforms had some initial success in reducing permanent disability cases and limiting costs.

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[1] The comparisons of the employers' costs of workers' compensation insurance in Florida with the costs in other states is based on data in Tables 17A, 17B, 17C, and 17D from the Technical Supplement to the FY 1991-1992 Annual Report.

[2] Some of the relevant data, such as dividends, are published with a one-year lag, while other data, notably information on manual premium and standard premium (used to calculate the effect of experience rating) are not available until several years after the year in which insurance costs are being measured.

[3] Richard A. Victor, John A. Gardner, Daniel Sweeney, and Carol A. Telles, Cost Drivers in Six States (Cambridge, MA: Workers Compensation Research Institute, 1992). The WCRI study was discussed at more length in the Technical Supplement to the FY 1991-1992 Annual Report.

APPENDIX B

LITIGATION IN THE FLORIDA SYSTEM

from: Florida Division of Workers' Compensation Annual Report
Fiscal Year 1994, pp 140-143.

Under the tort system for workplace injuries used before the advent of workers' compensation, it was necessary to demonstrate employer negligence in order for an employee to receive benefits. This process of proving employer negligence was felt to be overly cumbersome and expensive, in part, because it required an attorney and the use or threat of court proceedings. One of the basic premises associated with the introduction of workers' compensation was that it would make the workplace liability system more efficient and effective by eliminating the need to demonstrate employer negligence. It was thought that this would eliminate the substantial legal expenses associated with demonstrating employer liability. Today, employer negligence is no longer a concern of the workplace liability system in most states. Nevertheless, the workers' compensation system still has substantial attorney involvement and litigation, primarily regarding issues related to the extent of injury.

In Florida, attorney fees are a significant cost factor in the workers' compensation system. The Division stores claimant attorney fees in a database comprised of orders received from the judges of compensation claims. Table 43 shows the total number of cases and total claimant attorney fees for the years 1988-1993, with breakouts indicating claimant attorney fees

TABLE 43
Claimant Attorney Fees Paid by Year of Order 1988 - 1993

Year of Order_	Total # of Cases	Carrier Paid Attorney Fees	Claimant Paid Attorney Fees	Total Attorney Fees
1988	16,693	$ 30,460,362	$ 37,881,517	$ 68,341,879
1989	20,311	$ 39,196,391	$ 47,781,773	$ 86,978,164
1990	25,160	$ 43,421,898	$ 62,634,419	$ 106,056,317
1991*	28,244	$ 46,102,184	$ 76,849,742	$ 122,951,926
1992*	29,900	$ 60,305,889	$ 81,747,996	$ 142,053,885
1993*	30,128	$ 51,601,560	$ 89,506,580	$ 141,108,140

*Preliminary data

Source: Division of Workers' Compensation Judges Orders Database.

Note: Totals are subject to change from previously reported levels due to orders being vacated or amended by the Judges of Compensation Claims.

paid by the carrier as opposed to those paid by the claimant.[1] These data represent fees paid out in the year of the order to show system payouts by calendar year; data by year of accident would fail to reveal meaningful information for this scenario. There is a 51% increase between 1988 and 1990 (the latest year for which data are considered mature) in the number of cases with orders issued. Between 1988 and 1993, the data show a five-year increase of over 80% in the number of cases. Total attorney fees grew by 55% between 1988 and 1990. Preliminary data reveal that total attorney fees more than doubled between 1988 and 1992, soaring from nearly $70 million to over $142 million. Since fees are growing at a faster pace than the number of cases, the average attorney fees paid per case are increasing over time. As orders continue to be received for years 1991-1993, these increases in the number of cases and in attorney payouts can only become greater. During the six years shown in Table 43, the percentage of claimant attorney fees paid by carriers fluctuated between 37% (1993) and 45% (1989) of the total attorney fees, with no definitive pattern to reflect a trend upward or downward at this stage; however, the data do reflect that claimants have consistently paid out well over half of the fees directly, and in all but two of the six years the direct payout was over 60%.

Opinions vary on the correct interpretations of such substantial legal expenses. While some see it as a cost necessary to achieve the appropriate settlement for injured workers, others view it as simply increasing employer costs with reduced net benefits to injured workers. Notwithstanding the interpretation of attorney involvement, it is useful to examine its trend and to compare Florida's experience to other states. The most useful data for these purposes is from the National Council on Compensation Insurance (NCCI), which collects data only from the voluntary market. As indicated in Table 44, in 1990 over one in five (20.9%) Florida workers' compensation claims involved the services of an attorney. Compared to other states in the table, there was less attorney involvement in Florida than in Georgia or Massachusetts. Louisiana and Oregon had roughly comparable usage of attorneys, while Michigan and Minnesota had less attorney involvement. Pennsylvania stands out from all of these states with attorneys involved in only 4.9% of cases in 1990. Although there may be other reasons for this vast difference, a major factor is Pennsylvania's labor union-oriented workforce that utilizes labor representatives to plead contested cases. Additionally, the language of a labor contract agreement ordinarily specifies how workplace injuries are resolved, thereby eliminating the need for an independent litigator.

One of the striking features of the data in Table 44 is that Florida has had a very significant increase in the percentage of litigated claims over the eight-year period. Between 1983 and 1990 the litigation rate more than tripled. Massachusetts and Georgia had small, but still notable, increases. Apparently due to a series of changes in its workers' compensation law, Michigan was the only state that had less attorney involvement in 1990 than it had in 1983. The table also shows Oregon was the only state, besides Michigan, that had less attorney involvement in 1990 than in 1989. This change follows a major reform effort that made reduced attorney involvement an explicit goal. Although data for years after 1990 is unavailable from NCCI at the present time, analysis of the growth trend in Florida's litigation rate - from 6% in 1983 to almost 21% in 1990 - coupled with the 80% growth in the number of cases reported on judges orders between 1988 and 1993, leave little doubt that litigation has continued to be a cost driver in Florida since 1990.

TABLE 44
Percentage of Claims With Attorney Involvement 1983 - 1990

STATE	1983	1984	1985	1986	1987	1988	1989	1990
Florida	6.0	7.7	7.7	9.6	13.2	16.0	17.4	20.9
Georgia	11.1	11.9	13.7	21.5	18.5	19.7	22.9	29.5
Louisiana	16.0	12.8	11.8	13.0	11.5	14.7	16.5	19.9
Massachusetts	10.6	11.7	13.9	13.3	13.1	15.7	18.7	26.8
Michigan	14.8	12.5	13.7	12.1	10.8	10.9	11.2	10.7
Minnesota	6.4	7.7	7.6	8.2	10.4	10.3	10.2	13.1
Oregon	15.1	16.5	18.5	20.5	19.4	20.2	22.5	18.5
Pennsylvania	3.1	4.1	4.2	3.3	4.3	4.2	4.4	4.9

Source: National Council on Compensation Insurance, Workers' Compensation Claim Characteristics, 1992, Update B.

Note: Data are developed from a random sampling of indemnity claims, a data collection program known as the Call for Detailed Claim Information. Data for 1991-1993 were unavailable at the time of printing.

Increased attorney involvement and escalating attorneys fees in workers' compensation cases are significant costs to the system. Like other states highlighted in Table 44, Florida looked to legislative reform to address the continuous growth in litigation. The 1993 reform legislation targeted litigation as a cost driver and sought to reduce the litigation rate and associated costs through the establishment of the Employee Assistance and Ombudsman Office (EAO). The Division now has the authority to intervene and attempt to resolve disputes between parties prior to the initiation of the hearing process. As staffing is completed and processes are streamlined for the new EAO in early fiscal year 1995, the success rate for early dispute resolution should continue to increase.

A research study of litigation in the Florida workers' compensation system is under way. Part of this study will focus on multivariate analysis of litigated versus non-litigated cases over the last decade to determine if there is a profile of a litigated case that significantly distinguishes it from non-litigated cases. If so, this will be one component used to identify the factors leading to attorney involvement in order to focus early intervention efforts on the most potentially litigious cases. The study will also include overall litigation rates for Florida claims over the last decade. These rates, when combined with updated NCCI data for Florida, will help to clarify how well the voluntary market litigation rates represent the total market litigation rates. This is an important consideration due to the fact that less than one-fourth of Florida's market is voluntary, and the only state-to-state comparison data currently available on litigation rates is that provided by NCCI. This comprehensive research study is scheduled for completion in the Spring of 1995.

[1] Attorney fees paid by carriers for their own attorneys have never been reported to the Division; however, Section 440.345 of the new statute requires that **all** attorney fees must be reported annually and summarized for presentation to the Workers' Compensation Oversight Board. The Division is developing rules for collecting these data, as well as data for "medical only" cases, on LES Form DWC-51, which will be due by March 31 of each year and covers data for the previous calendar year.

APPENDIX C

INTERVIEWS

GERALD A. ROSENTHAL by William A. Ferron
JAMIE MILLER by William A. Ferron

Summary of interview conducted with Gerald A. Rosenthal
Board Certified Workers' Compensation Lawyer

Interviewer: William A. Ferron
Interviewee: Gerald A. Rosenthal
Law Offices of Gerald A. Rosenthal, P.A.
Location : 1645 Palm Beach Lakes Blvd.
Suite 350
Palm Beach, Fl. 33401-2289
Date: Nov. 11, 1994

The interview took the form of a recorded discussion, and was conducted at Mr. Rosenthal's office. I introduced myself to Mr. Rosenthal and stated my reasons for being there. Mr. Rosenthal has been responsible for writing the exam for lawyers to become state certified for Workers' Compensation practice. He has also written books on the subject of Workers' Compensation and Disability.

We opened the discussion with me making reference to the published article which he had written and the candid opinions which he had expressed in this article. Mr. Rosenthal began his response by saying that probably because of the success of his law practice he could afford be more candid and objective than others who might be involved in this issue. He went on to say that he has been practicing Workers' Compensation Law for twenty-two (22) years and his practice has approximately eleven hundred (1,100) clients which makes his firm probably the largest Claimant Workers' Compensation law firm in South Florida.

Mr. Rosenthal is therefore of the opinion that his experience has given him a very good grasp of the position from the legal perspective and also from the perspective of the other side of the fence. I then asked him whom he considered as the other side of the fence? His reply was that industry who must make a profit was the other side of the fence. Mr. Rosenthal stated that given the benefit of the doubt that all are acting in good faith, then there are only two indispensable parties involved in the Workers' Compensation issue, the employer and the worker.

The employers' obligation as seen by Mr. Rosenthal was to provide benefits for the injured worker while still being able to make a profit. The workers' obligation was to take advantage of the benefits which are provided by the employer and also to rehabilitate himself so as to be able to return to work in a timely manner. This he considers as the original theory behind the Workers' Compensation system and that the system was never designed to replace the damage which results from an injury. As an example Mr. Rosenthal stated that if you are injured on the job Workers' Compensation only pays a portion of the damages, it does not pay full reimbursement, while on the other hand if you are injured in an auto accident you can get everything such as loss of income, pain

and suffering, loss of your wife's services and compensation for many other damages. Workers' Compensation however only provides you with medical care and a portion of the wages you were earning when you got hurt, sixty-six and two thirds (66 2/3 %) percent.

Mr. Rosenthal went on to say that the expressed benefits are very narrow, however the real problem is that the laws were written so badly that it allowed the lawyers to come in and apply interpretation to such things as "medical care" what exactly does it mean? The reasons for the laws being so inartfully written is two fold as he see them. For one the creators of the laws are not the ones who are most familiar with what really happens down in the trenches. Secondly political expediency also plays a significant role in the amendments which takes place in the statutes from time to time. For example the 1994 law has reduced the benefits to the worker by 80% in order to reduce premiums, however Mr. Rosenthal see this only as cost shifting. The cost is just being transferred from the employer to the public at large because it becomes highly likely that with cuts in benefits of this magnitude, the worker if he is unable to go back to work will most likely end up in some kind of social program.

Medical costs as Mr. Rosenthal sees it is the major cost driver of the cost of Workers' Compensation, and if all the employee benefits were taken away, initially premiums would fall but would continue to rise because of the high cost of medical services. He stated that the premium dollars for Attorneys fees from 1989 to 1990 went from four (4%) percent to two (2%) percent. However this cannot be looked at in such a narrow context because as benefits rise for the injured worker with representation, the actual dollar figure has gone up substantially. This Mr. Rosenthal says clearly makes the legal profession a cost driver of the system. This he says however must be looked at in the context of whether the represented claimant has gotten benefits which are reasonable and necessary.

I then commented to Mr. Rosenthal that advocacy was not unique to Florida therefore the cost of Workers' Compensation should then be along the same lines as out neighboring states. His response was that many of these states have a state fund and there is no advocacy and no special interests thus there is no litigation. In some states like Georgia he went on to say, the benefits are so small that lawyers are not interested in becoming involved while in other states there is a cap on attorneys fees which provides very little incentive for lawyers to become involved. The role of advocacy he pointed out was to get the maximum benefits allowable by the courts for the client which put the problem not fully on the legal community but also within the courts and how the laws are structured.

My next question to Mr. Rosenthal was that seeing the reform which had taken place in other states and also the perception that his profession was one of the major cost drivers of the system because of the lawyers visibility, if it would not be in the lawyers best interest to self impose some form of restrictions on the contributions which they make to drive cost in the system. His response was that in 1990 he was the lobbyist for the advocacy legal community who voluntarily reduced its fee structure by one third and also reduced the future liability fee. The legal community he believes have put enough restrictions on themselves by reducing their income and therefore they are still cost

drivers but to a far less extent than what is claimed. Mr. Rosenthal went on to say that a cost driver which is constantly ignored by the state and the employer is the cost of his adversary, the lawyer representing the employer. While the employee's attorney has to win his case to get paid the employer's lawyer gets paid by the hour and thus there is no incentive to resolve the case quickly. One of the suggestions of the claimant attorneys in the 1994 reform debate was to have the defense attorneys fees regulated as is the case with the claimant attorneys fees. However my response was that a counter by the claimant attorneys could be that because you must win to collect then it is essential for you to win large settlements in order to make up for the cases which you do not win. He admitted to this claim but insisted that it was in his best interests to have the case settled early where there is no incentive on the claimant attorney's part.

Mr. Rosenthal went on to say that he would close by saying that as long as there was advocacy allowed in the system, not only from the defense lawyers stand point but also from the insurance industry and the claimants side cost would always be driven up. The only way to reform the system was to rewrite the laws and make them more specific and less open to interpretation thus reducing the role of the advocate.

The discussion ended on the note that we would keep the lines of communication open and any new information which becomes available would be communicated to me. I then thanked him for his time.

Summary of interview conducted with the Florida Workers Compensation Coalition

Conducted by: William A. Ferron
Date: Sept. 20th. 1994
Location : 2875 South Ocean Blvd.
Suite 215
Palm Beach, Fl. 33480
President : Jamie Miller

The interview took the form of a discussion and was conducted during the course of the Coalition's monthly Board meeting. I was introduced to the board members by Mr. Miller who also stated the reason for me being there.

Mr. Miller stated that the organization was started approximately 4 years ago because the Sub and Speciality Contractors felt that they were being driven underground by the rising cost of Workers Compensation Insurance. His group is part of a state wide affiliation of the major speciality and sub trades from across the state. There are no dues but members do contribute from time to time to defray the costs associated with the work that is being done. He went on to compare the cost of insuring in Florida with some other states. He stated that in New York for example the rates were half of those being paid in this state. The organization prepared a position paper which they presented to the Florida Legislature last year and which the organization says has resulted in them gaining some concessions from the legislature in regards to the whole workers compensation issue and its reform. It is their plan to be back in front of the legislature again this year, their major objective being 1) the elimination of exemptions, 2) the reduction of the Attorneys role and 3) the reduction of the role of the Chiropractor.

Mr. Miller began by stating that the attorney saw his role in the whole Workers Compensation process as being that of protecting the rights of the injured worker, however the coalition saw the attorneys role as going beyond that. He went on to state that attorneys were costing the system $800,000,000 last year which was approximately 20% of the $4 Billion in premiums collected, and that their involvement in the claims process had gone up over 400% over the last 4 years. He also stated that one out of every four cases which was disputed ended up being litigated. He argues that for meaningful reform to take place in this state, we would have to do as all the other states which have successfully initiated reform have done. That is to eliminate the special interest and return the system to the two parties who it was originally intended for namely the employer and the injured employee.

The major problem with the system as the group sees it is the laws relating to exemptions. This in their view is what has bonded the coalition together. They would like to see them eliminated altogether. The state of New York was again cited as having no exemptions and thus having lower rates. They feel that the fact that some employers are abusing the exemptions loop hole in the law amounts to fraud and also gives this employer an unfair advantage over the employer who were

covering his employee. They demanded from the legislatures that the exemptions be repealed or that they would withdraw from the system causing it to collapse. They thought that this was being passed in the special session last year however it was repealed shortly after it was passed.

The role of the G.C. or Prime was discussed next and it became evident that there was an adversarial relationship here and that both parties did have similar priorities. The coalition's position is that it is in the interest of the G.C. for the system to remain as is especially if the G.C. was mainly a broker who hires the cheapest source that he can find. The problem as they see it is that if there is someone working on the site who is not covered and gets injured then fraud is committed in order to give this worker coverage and this ultimately drives up the cost of this system. However a member of the coalition went on to qualify the opinion on the General Contractors and stated that the practice of have large number of uncovered workers was less prevalent in the commercial construction market.

The group stated that in preparing their position paper they had examined the successful reform program of Connecticut and Oregon. They found out that the major cost drivers in the system were medical in the over-utilization of services especially when the case is litigated. They stated an example where the state of Minnesota conducted an experiment in which it took two persons and had a doctor break an arms on both persons in identical places. They were then sent to be treated at the same hospital one under workers compensation and the other stating that his injury was not job related. It turned out that the worker under workers compensation was charged 250% more than the other person. The second major cost driver as seen by the group is litigation cost. The 21day rule was then used to illustrate how the attorney can drive up his involvement and ultimately his cost.

In concluding Mr. Miller stated that they believed that the system could be reformed by using a panel of doctors to determine when an injured worker is able to return to work. This system is referred to as the Gatekeeper system. They believe that the current system where a judge who is not necessarily skilled in handling workers compensation matters is the one handing down the awards leaves too much room for legal maneuvering. They are recommending that Florida should follow the system of Oregon which totally eliminated the attorney and went to a seven step arbitration process before an attorney can become involved.

The discussion ended on the note that we would keep the lines of communication open and any new information which becomes available would be communicated to me.

APPENDIX D

I Attorney's Fees: A 50-State Review - NCCI Study Updated January 10, 1994 (pp 1-20)

II States With Caps on Attorney's Fees - NCCI Study (pp21-22)

ATTORNEY'S FEES
A 50-STATE REVIEW
Updated January 10, 1994

ALABAMA (25-5-90)

Alabama limits attorney's fees to 15 percent of any compensation awarded to a plaintiff. Attorney representation of a plaintiff must be approved by the judge who will also fix the fee of the attorney. Defendants are required to report all attorney's fees and litigation expenses. (Amended 1992)

ALASKA (23-30-145)

Alaska requires board approval for the payment of attorney's fees and imposes a floor of 25 percent on all awards up to the first $1,000 of compensation and a 10 percent floor on all sums in excess of $1,000. On controverted claims, attorney's fees must be paid by the employer/carrier in addition to the compensation award. On non-controverted claims and with board approval, attorney's fees are paid out of the compensation award. If an employer fails to file timely notice of controversy or fails to pay benefits within 15 days of being due, the board may award reimbursement of court costs including a reasonable attorney fee in addition to the compensation award.

ARIZONA (23-1069)

In Arizona, upon commission approval, attorney's fees are awarded by the commission out of a compensation award and are limited to 25 percent up to ten years from the date of the award and up to five years from the date of the final award in cases solely involving loss of earning capacity. When awards are paid in installments, attorney's fees are limited to no more than 25 percent of each installment. Commission decisions on attorney's fees are subject to the normal appeals process.

ARKANSAS (§ 11-9-715)

Upon commission approval, attorney's fees awarded claimants are limited to 30 percent of the first $1,000; 20 percent of awards between $1,000 and $3,000; and 10 percent of awards over $3,000. For claims that are controverted, attorney's fees are divided into equal halves paid by the employer/carrier and by the claimant out of the compensation award. Non-controverted claims with attorney involvement are paid out of the compensation awarded. For successful claimant appeals, the law provides for attorney's fees to be divided equally between the employer/carrier and the claimant; maximum fees are set as follows: $250 for appeals to the full commission; $500 for appeals to the Arkansas Court of Appeals or Supreme Court. The commission may also award attorney's fees of $200 on controverted change of physician requests. The commission is also authorized to approve lump-sum attorney's fees even in cases where the compensation award is payable on an installment basis.

CALIFORNIA (Labor §§ 4555, 4651.3, 4903, 5410.1, 5814.5)

The appeals board may award reasonable attorney's fees to the employee when his or her payment of compensation has been unreasonably delayed or refused or when an employer fails to secure payment of compensation. The appeals board may also award reasonable attorney's fees to an applicant when a) a party is unsuccessful in reducing the amount of permanent disability benefits previously awarded or b) when a petition filed with the appeals board is subsequently denied wholly by the appeals board. A reasonable attorney's fee is considered a lien against compensation.

COLORADO (8-43-403)

Under Colorado law, attorney's contingent fees are considered unreasonable if they exceed 20 percent in unappealed contested cases but the law provides for an appeals process to the director if such appeal is made within 180 days of the final order. The law provides significant latitude to the Director for making judgments on whether fees are to be deemed reasonable. The law also prohibits contingent fees for permanent disability medical benefits that have already been incurred. In cases where medical benefits are the only contested issue, the statute requires an agreement for reasonable fees and allows for contingent fees subject to the approval of the director. The law also requires that all workers compensation cases involving an attorney have a written fee agreement specifying the fee arrangements and signed by both parties.

CONNECTICUT (31-300, as amended by P.A. 93-228; 31-327)

Connecticut statute allows for reasonable attorneys fees to be awarded by the commissioner in cases where: 1) compensation has been unduly delayed (later than 35 days) by the employer/carrier; 2) the employer/carrier has unreasonably contested liability; or 3) the employer/carrier discontinued or reduced compensation payments without notice and approval of the commissioner. The law does not define "reasonable" and states that all attorney's fees are subject to the approval of the commissioner who may make the award directly in favor of the attorney. Attorney's fees may be combined with an award or may be a separate award.

DELAWARE (19 §§2126, 2127)

Attorney's fees for services performed before the Industrial Accident Board are capped in Delaware at 30 percent of the award or $2,250 whichever is less and are "taxed as a cost against the party." This cap does not apply to appeals.

DISTRICT OF COLUMBIA (36-330)

In D.C., attorney's fees are capped at 20 percent of the actual benefit secured.

For cases where the employer/carrier did not pay a claim within 30 days and the claimant successfully prosecutes the claim, reasonable attorney's fees are awarded in addition to the compensation award in lump sum and paid directly by the employer/carrier to the attorney.

Where an additional amount of compensation is controverted, the mayor may award a reasonable attorney's fee based upon the difference between the amount awarded and the amount paid in addition to the amount of compensation. In cases where the degree or length of disability is controverted, the employer/carrier may be assessed reasonable attorney's fees for claimant's counsel in addition to the compensation award. All other attorney's fees would not be assessed against the employer/carrier. In cases where the claimant is obligated to pay, an approved attorney's fee is paid out of the compensation award. Employer/carriers responsible for attorney's fees must pay all legal costs including mileage and witnesses as approved by the mayor in addition to the compensation award. Under D.C. law, attorneys that charge fees that are not approved by the mayor or that solicit workers compensation business may be subject to a fine of up to $1,000 and/or imprisoned for up to one year.

FLORIDA (440.34; 440.345; 440.32; as amended by S.B. 12C)

Florida law limits approved attorney's fees to 20 percent of the first $5,000; 15 percent of the next $5,000 in awards; and 10 percent the remaining amount of 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. However the judge may increase or decrease the awarded attorney's fees for particular circumstances.

Claimant's attorney fees are awarded only on those benefits awarded to the claimant that the attorney was responsible for securing and do not include future medical benefits provided after five years after the claim was filed.

The law states that claimants are responsible for paying their own attorney's fees, which shall be paid out of the compensation award in the form of a lien. Claimants are allowed to recover attorney fees in addition to their compensation award in certain circumstances which include: when the claimant is awarded medical benefits only; when the employer/carrier files a notice of denial with the division and the claimant must hire an attorney to secure benefits; or when the employer/carrier unreasonably denies compensability. Attorney's fees on appeals may be assessed to the employer/carrier as determined by the court.

All workers compensation attorneys fees must be reported to the Division.

In addition, judges have the authority to assess court costs, including reasonable attorney's fees, against the offending attorney for proceedings that are deemed to be frivolous.

GEORGIA (34-9-108; 34-9-22)

In Georgia, attorney's fees above $100 are subject to approval by the Board and must not exceed 25 percent of the claimant's award. For cases brought without reasonable grounds, the Administrative Law Judge (ALJ) may assess adverse attorney's fees against the offending party. In cases where the employer is determined to have not complied with the law, without reasonable grounds, the board may award reasonable "quantum meruit" attorney's fees to be paid by the employer in addition to any compensation award. Under Georgia law, attorneys

that charge fees that are not approved by the board or that solicit workers compensation business are guilty of a misdemeanor and may be fined up to $5,000.

HAWAII (§386-93; §386-94, as amended by Act 301 [1993][H.B.1662])

Hawaii law allows the director of labor and industrial relations to assess attorney's fees against the employer/carrier held liable for compensation, if the employer/carrier has appealed a decision and lost. In cases that are brought without reasonable grounds, the director may also assess the cost of proceedings against the party initiating the action. The law does not define reasonable and requires that all awards of attorney's fees be approved by the director and are paid out of the compensation award. Under Hawaii law, attorneys that receive fees that are not approved by the director shall be fined up to $10,000.

IDAHO (72-804)

Idaho allows for reasonable attorneys fees to be awarded by the commission in addition to the compensation award in cases where: 1) the employer/carrier has unreasonably contested a claim; 2) compensation has been neglected or refused by the employer/carrier; or 3) the employer/carrier discontinued compensation payments without reasonable grounds. Attorney's fees awarded to claimants are fixed by the commission.

ILLINOIS (820 ILCS 305/16a & 310/16a [OSHA])

In Illinois, attorney's fees are generally limited to 20 percent of the amount of compensation awarded; however, for fatalities, total disability and partial disability cases the fees are capped at 20 percent of the award due by statute for 364 weeks of permanent total disability based on the employee's average weekly wage prior to the accident and subject to maximum weekly benefits. All attorney's fees are recoverable only from compensation actually paid to a claimant. Attorney's fees are not allowed for undisputed medical expenses or for temporary total disability unless compensation is delayed, refused or terminated and is obtained with attorney assistance. Illinois law also details undisputed cases in which nominal attorney's fees of $100 may be awarded.

INDIANA (22-3-4-12)

Attorney's fees in Indiana are subject to the approval of the industrial board and are paid by the employer in addition to the amount of the compensation award when it is determined that the employer acted in bad faith or without diligence in settling a claim. Such fees may not be less than $150.

IOWA (86.39)

Iowa law requires that all attorney's fees for workers compensation claims and appeals must be approved by the industrial commissioner or district court judge.

KANSAS (44-536, as amended by S.B. 307 [1993])

Upon approval by the director, attorney's fees awarded claimants must be reasonable and are limited to 25 percent of the portion of compensation recovered which is less than $10,001; 20 percent which is greater than $10,000 and less than $20,001 and 15 percent which is in excess of $20,000 whichever is less, in addition to actual expenses incurred. This schedule also applies in cases where the compensation award exceeds the written offer made prior to representation, but applies only to the amount of compensation in excess of the original written offer. In cases where the compensation award is not disputed or does not exceed the written offer, attorney fees are limited to $250 or a reasonable amount.

However, for fatalities, total disability and partial disability cases attorney's fees are based on the compensation award due by statute beyond 415 weeks of permanent total disability based on the employee's average weekly wage prior to the accident and subject to maximum weekly benefits. For settlements, the law authorizes the director to review and award reasonable attorney's fees within specific guidelines.

Attorney's fees are not allowed for vocational rehabilitation or for medical expenses except where an allowance is made for future medical treatment. Kansas also prohibits attorney's fees paid for temporary total disability unless compensation is delayed, refused or terminated and is obtained with attorney assistance.

Kansas law requires that all attorney's fees shall be paid out of the compensation award except in cases where an attorney is involved subsequent to the final disposition of a claim for review and modification and no additional compensation is awarded, the attorney fees are fixed by the director and are paid by the employer or the workers compensation fund, if the fund is liable for compensation by law.

KENTUCKY (342.320)

For original claims, Kentucky limits attorney's fees to 20 percent of the first $25,000; 15 percent of the next $10,000 and 5 percent of any remaining amount awarded and actuarially determined on past and future benefits as laid out in the law; this applies to claims that are reopened as well. The ALJ is authorized to fix a reasonable fee that may not exceed the statutory maximums but may be reduced and the ALJ may deny or reduce the fee upon proof of solicitation. For non-disputed claims, attorney's fees are limited to $750. Attorney's fees may be paid directly to the attorney out of the award in lump sum or out of the claimant's personal funds -- the claimant has the right to choose how the attorney is paid after having the option explained.

LOUISIANA (23:1141)

In Louisiana, all attorney's fees are subject to approval by a hearing officer and are limited to 20 percent of the first $10,000 of any award and 10 percent of any award in excess of $10,000. All attorney's fees are to be paid from the compensation award as determined by the hearing officer.

MAINE (39-A §325)

Maine requires that each party in a dispute is responsible for their own costs and attorney's fees. All attorney's fees are subject to approval by the board and may not exceed 30 percent of the benefits accrued, after deducting reasonable expenses, or may not be based on a weekly benefit that is higher than two-thirds of the state average weekly wage at the time of injury. Fees may be increased or decreased at the discretion of the board. Maine law also establishes a fee schedule for lump-sum settlements subtracting specified costs and limiting such fees to 10 percent of the first $50,000 settlement; 9 percent of the first $10,000 over $50,000; 8 percent of the next $10,000 over $50,000; 7 percent of the next $10,000 over $50,000; 6 percent of the next $10,000 over $50,000; and 5 percent of any amount over $90,000 of the settlement.

MARYLAND (9-731; 101 §57)

Attorney's fees in Maryland must be approved by the commission and are paid out of the compensation award. The law also specifies that attorney's fees may be paid in a lump sum which would, therefore, reduce the weekly benefit until the amount of the lump sum is paid off. In such lump sum payments of attorney's fees, the commission must state the dollar amount and number of weeks that the reduced benefits must be paid by the employer/carrier or the Subsequent Injury Fund, as appropriate. If the commission determines that a case was brought without reasonable grounds, the cost of proceedings will be assessed against the party initiating the action.

MASSACHUSETTS (152:13A)

In Massachusetts, when compensation benefits are contested and the employee prevails, the insurer is liable for the claimant's attorney's fees. When an insurer contests initial liability for a claim by not paying benefits within 21 days of receipt of the claim but then pays the claim by agreement, the insurer must also pay an attorney's fee of $700; if the insurer contests the benefits, the attorney's fee is $500. When an insurer contests initial liability for a claim by not paying benefits within 21 days of receipt of the claim but then is ordered to pay the claim, the insurer must pay an attorney's fee of $1,000.

For cases when an insurer files to reduce or discontinue benefits or contests the benefits, the ALJ may order the insurer to pay the attorney's fees of $700 if finding in favor of the claimant and $350 if the order reflects an amount different from that submitted on both sides. If an insurer contests and then pays benefits that are scheduled for or decided by hearing, it must pay $3,500 in attorney's fees.

Insurers are liable for attorney's fees of $1,000 on appeals when the insurer has initiated the appeal, but employees are responsible for their own attorney's fees if they have initiated the appeal. For settlements, attorney's fees are to paid as a percent of the settlement as follows: 15 percent if the case is settled without an acceptance or finding of insurer liability and 20 percent if the settlement is reached subsequent to an acceptance or finding of insurer liability.

If an insurer unsuccessfully contests the continuance of compensation for injuries occurring prior to November 1, 1988, the insurer must pay a reasonable attorney's fee for the hearing; any other attorney's fees provided claimant's for injuries prior to that date are to be determined by the employee and the attorney. For cash awards, the insurer may reduce the first month's payment by the amount of the cash award as long as the employee still receives 78 percent of the benefit payment.

The dollar amounts listed in the law are changed the first of October each year by the percentage change in adjusted benefits from the preceding year. Attorney's fees are reduced by 50 percent if the employee's attorney fail to appear and, in most cases, the ALJ has discretion for increasing or decreasing attorney's fees depending on circumstances. The law also prohibits the inclusion of attorney's fee in any calculations for premium rates.

MICHIGAN (418.858)

In Michigan, maximum attorney's fees are set by rule, but are limited by statute to ensure that they are not based on a weekly benefit that is more than two-thirds of the state average weekly wage at the time of injury. For cases heard after March 31,1986, attorney's fees are based upon the compensation award according to a contingency fee schedule as established in promulgated rules. When fees are requested in excess of those provided by rule, the director may award the fees by special order. Fees for cases decided by the appellate commission are assessed on no more than 104 weeks of the period the case was pending.

MINNESOTA (176.081, 176.133)

Minnesota allows attorney fees of up to 25 percent of the first $4,000 of compensation awards and 20 percent of the next $60,000 without requiring approval. Attorney's fees for the recovery of medical or rehabilitation benefits are assessed against the employer/carrier if such fees exceed the contingent fee in connection with the contested benefits. Attorney's fees for the same injury are cumulative and are capped at $13,000. Attorney's fees are only allowed for disputed claims or portions of claims and attorneys are required to file a fee statement with the commissioner or judge. The law allows the commissioner or judge to approve excess fees in certain circumstances and provides guidelines for making such determination and allows for the adoption of rules on such matters. Disputed attorney's fees are subject to appeal.

For contested claims in which the employee prevails, the employer/carrier must pay the employee an amount equal to 25 percent of that portion of the attorney's fees which has been awarded that is over $250. A retainer agreement between employee and attorney is required for attorney's fees to be awarded. If the amount of any compensation award is equal to a previous offer made by the employer/insurer but not accepted by the employee, the employee must pay an additional 25 percent of the portion of the attorney's fees awarded over $250.

In cases where attorney's fees are approved for supplementary benefits, 25 percent of the portion of the fee over $250 is added to the employee's benefit, rather than deducted.

Attorneys violating any of this law are guilty of a gross misdemeanor.

MISSISSIPPI (71-3-63)

Mississippi law limits attorney's fees to 25 percent of the total compensation award. Attorney's fees must be approved by the commission or court and are considered a lien on compensation. Anyone receiving a fee not approved by the commission is guilty of a misdemeanor. Fees awarded for additional legal services performed before any superior court may exceed the 25 percent limit. The commission is authorized to consider other factors in awarding a fee, to make such awards on the basis of fairness to both attorney and client and to approve voluntary attorney fee contracts between attorney and client. The law allows partial lump sum settlements sufficient to cover attorney fees when a compensation award becomes final.

MISSOURI (287.260)

In Missouri, fair and reasonable attorney's fees may be allowed by the commission as a lien on compensation if legal services are found necessary and may be paid in lump sum or in installments. Attorney's fees, and any disputes over them, are determined by the commission.

MONTANA (§§39-71-611, 612, 613, 614)

Montana requires insurers to pay reasonable costs and attorney's fees if the insurer unreasonably denied liability or terminated benefits and the compensation court deems that the claim is compensable and reasonable. The insurer also must pay attorney's fees for contested claims in which increased benefits are awarded. Attorney's fees are determined by the judge and are based on factors including the time spent by the attorney and customary legal fees, subject to a department-established maximum. An attorney must submit fee arrangements to the department. Attorneys violating fee regulations are liable for forfeiture of the right to any fee.

NEBRASKA (48-125, 48-198)

The Nebraska workers compensation court allows a reasonable attorney fee for awards given pursuant to proceedings brought as a result of an employer's refusal to pay compensation or medical benefits or delays such payment past 30 days of notice. A reasonable attorney's fee, payable to the employee is also allowed when an employer requests a review of an award and fails to receive a reduction in the award, to be taxed as costs against the employer. If an employee requests a review and obtains an award or increase in award, the court may allow a reasonable attorney's fee to be taxed as costs against the employer. Interest is assessed against the employer when attorney's fees are allowed for cases of late or nonpayment of compensation. The court determines the amount of the attorney fees to be paid from, but not in addition to, the award or judgement.

NEVADA (616.544)

Nevada's workers compensation statutes contain no language expressly allowing or prohibiting attorney's fees. The state does allow a reasonable attorney's fee to be paid by a party who has been found to petition for a frivolous appeal or one that has been brought without reasonable grounds.

NEW HAMPSHIRE (281-A:44, as amended by Ch. 105 [1993] [HB 418])

In disputes over the amount of a workers compensation benefit that is appealed and determined in favor of the claimant, the claimant is entitled to reasonable counsel fees and costs as approved by the board or court and 10 percent annual interest, computed from the date of injury, on that portion of the award which is contested. All attorney's fees must be approved and determined by the commissioner who may consider such as factors customary fees, nature, length and complexity of service performed, among others in making a determination.

NEW JERSEY (34:15-26; 34:15-28.1)

Attorney's fees in workers compensation cases are determined and fixed by the bureau or the court. It is unlawful for an attorney to contract for or receive any larger sum that the amount determined by the bureau or court. For cases where the employer/carrier unreasonably or negligently delays or refuse to pay a claim within 30 days, which gives rise to a rebuttable presumption of unreasonable or negligent conduct according to the law, the claimant is liable for an additional amount of 25 percent of the amount due plus any reasonable legal fees incurred as the result of the delay.

NEW MEXICO (52-1-54, 52-3-47 [Occupational Disease])

Attorney's fees and costs on behalf of a claimant for a single claim may not exceed $12,500, regardless of the number of attorneys the claimant employs. The workers compensation judge may exceed this maximum amount by up to $2,500 upon determining that a claimant, an insurer or an employer acted in bad faith with regard to the claim and as a result the employee or employer has suffered economic loss. The cost of attorney's fees are to be borne equally by the worker and the employer, with certain exceptions. A reasonable attorney's fee is based upon the portion of benefits the attorney is responsible for securing. No attorney's fee is paid in cases to determine whether a claimant's disability has increased or diminished unless the claimant is successful in establishing that the disability has increased, or if the employer is unsuccessful in establishing that the disability is diminished.

The director or judge may appoint an attorney to aid the judge in cases where the claimant is not represented by an attorney and can set a reasonable fee. In approving a compensation settlement, the judge determines and fixes a reasonable fee for the claimant's attorney. In cases where compensation is refused and the injury was later determined to be compensable, the judge is directed to take several factors into account in determining a reasonable fee: if an employer made an offer that was greater than the amount awarded, the employer is not liable for his/her 50 percent share of the claimant's attorney's fee; if the employer made an offer that was less than the amount awarded, the employer must pay 100 percent of the

attorney's fee.

NEW YORK (Workers Compensation §§24, 225)

New York requires board approval for attorney's fees. Approved fees are liens upon the benefits ordered, but are paid only in the manner fixed by the board. It is a misdemeanor to accept fees in an amount not determined by the board.

NORTH CAROLINA (97-90, as amended by Ch. 530 [1993] [HB 278])

Attorney's fees in North Carolina are subject to the approval of the industrial commission. Attorneys must file fees with the commission which are subject to appeal. Under the law, it is considered a Class 1 misdemeanor for any person to receive a fee without commission approval or to solicit employment for lawyer or by a lawyer in workers compensation cases.

NORTH DAKOTA (65-02-08, as amended and reenacted by HB 1163)

All attorney's fees in North Dakota must be in accordance with schedules of fees adopted by the bureau. The law directs the bureau to establish rules setting a reasonable maximum hourly rate and a maximum fee to compensate claimant's attorneys following the constructive denial of a claim (failure to issue an administrative order within 60 days notice of a claim), notice of informal decision or issuance of an administrative order reducing or denying benefits. All attorney's fees and costs must be paid from the bureau general fund in case where: 1) the employee has prevailed in dispute resolution; 2) the dispute is referred to arbitration; 3) the employee has prevailed after reconsideration of an informal decision; 4) the employee has prevailed after an administrative hearing; 5) there has been constructive denial of a claim, the bureau only pays attorney's fees from the occurrence of the constructive denial until the bureau issues a notice of an informal decision or an administrative order; and 6) as provided by administrative rule. The bureau may deny attorney's fees for frivolous claims.

OHIO (4123.06; as amended by H.B. 107 [1993])

Ohio law directs the industrial commission to adopt rules concerning the fair payment of attorney's fees and concerning the prevention of attorney solicitation, with the intent of promoting orderly and expeditious determination of claims. The law authorizes the commission to approve the lump sum payments of attorney's fees and to require the disclosure of all fees received by attorneys in compensation cases. The commission has the authority to suspend from workers compensation practice as specified, attorneys who violate commission rules.

OKLAHOMA (85 §30)

For workers compensation cases brought without reasonable grounds or where benefits have been denied without reasonable grounds, the court may assess total costs of the proceeding against the party initiating the proceedings or unreasonably denying the benefits. Claims for legal services are determined by the court on a "quantum meruit" basis but may not exceed

10 percent of the amount of the award for temporary disability and 20 percent for permanent disability or death benefits. Attorney's fees for temporary disability are paid periodically and for permanent total are paid periodically at the rate of 20 percent of each weekly check to the claimant until the attorney fee is paid off. Attorney's fees for permanent partial disability awards may be paid in a lump sum deducted from the end of the award. Attorney's fees for death benefits may be paid in lump sum which shall be paid off by deducting 10 percent from the periodic compensation payments.

OREGON (656.388)

In Oregon, attorney's fees must be approved and fixed by the referee, board, or court and payments to claimants' attorney are in the form of a lien upon any compensation award. The statute directs the board to establish a fee schedule for attorneys representing workers and for insurers or self-insured employers. If attorney's fees have already been approved by the board for a claim, the board will not approve any other attorney's fees for the same proceeding. Insurers and self-insured employers are required to report on attorney salaries and legal costs annually to the director.

PENNSYLVANIA (77 P.S. §996; §998; as amended by S.B. 1 [1993])

Pennsylvania law allows attorney's fees to be awarded, in addition to the award for compensation, in cases that where the insurer has contested liability, which includes petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, when the matter is determined in favor of the claimant. The law provides that the cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer. The law authorizes the referee to determine such fees on the basis of such factors as amount of time and effort involved, complexity of the issues, skill required and the duration of the proceedings, among others.

For cases that are contested over the amount of compensation due after the insurer has made payment, attorney's fees are to be based only on the difference between the final award and the amount of compensation paid by the insurer.

Attorney fees, subject to approval by the board, are limited to 20 percent of the compensation award whether or not allowed as part of a judgement. Hearing officials do, however, have the discretion to allow for reasonable fees in excess of 20 percent upon cause.

RHODE ISLAND (28-33-3; 28-33-25.1; 28-35-32; as amended by H.B. 6024 [1993])

Under Rhode Island law, employees who successfully prosecute petitions for compensation are entitled to the costs of the proceeding, including attorney fees, that shall be assessed against the employer by the judge/court. Such fees shall also be granted to employees who successfully defend proceedings seeking to reduce or terminate workers compensation benefits. In addition, the law provides that medical service providers who successfully prosecute petitions for the payment of medical expenses shall also be awarded attorney's fees assessed against the employer. Attorney's fees may not be awarded for petitions for lump sum commutation. The law stipulates that attorney's fees must be consistent with the services rendered. The law bars attorneys from accepting any fees for the proceedings in question other than those approved by the appropriate tribunal.

In lump sum cases, Rhode Island law limits attorney's fees to 15 percent of the lump sum settlement and all attorney's fees are subject to the approval of the workers compensation court.

SOUTH CAROLINA (42-15-90)

South Carolina requires all attorney's fees to be approved by the commission. According to the statute, it is a misdemeanor offense for attorneys to charge or receive fees that are not approved or to solicit employment or for persons to solicit on behalf of an attorney. Those convicted under this statute may be fined up to $500 and/or serve up to one year in prison.

SOUTH DAKOTA (62-7-36 [Ch. 380 §5, 1993])

Attorney's fees in South Dakota are limited to 25 percent of the disputed amount arrived at by settlement; 30 percent of the disputed amount awarded by a Labor Department hearing or circuit court appeal; and 35 percent of the disputed amount of a successful appeal in the supreme court. Attorney's fees may be paid in lump sum on the present value of the award at the time of settlement.

TENNESSEE (50-6-226)

Attorney's fees incurred by claimants in Tennessee are: limited to 20 percent of the amount of the compensation award; subject to court approval; and are to be paid by the party employing the attorney. Violation of the provisions of this section is deemed an unlawful practice and renders attorneys liable to disbarment.

TEXAS (§§408.185, 408.221, 408.222, as adopted under the Labor Code by Ch.269 (1993)(HB 752)

In Texas, all attorney's fees paid to claimant's counsel, including contingency fees, must be approved by the workers compensation commission or court. Except when an insurer unsuccessfully disputes a commission determination that an employee is entitled to supplemental income benefit, attorney's fees are limited to 25 percent of the claimant's award and are paid from that award. The law provides guidelines in determining reasonable attorney's fees including such factors as time and labor, complexity and customary charges. The law directs the commission to promulgate rules providing guidelines for maximum attorney's fees. Attorney's fees are prohibited in fatality cases or lifetime income benefit cases in which the insurer has admitted liability. Insurer's attorney's fees must also be approved by the commission and be determined to be reasonable and necessary based on the same guidelines as for claimant's attorney's fees.

UTAH (35-1-87)

Utah law authorizes the industrial commission to fully regulate and fix attorney's fees.

VERMONT (Ti 21 §678)

Vermont allows successful claimants to recover reasonable attorney's fees that are assessed by the commissioner against the employer/carrier. Claimants that successfully appeal claims are also entitled to reasonable attorney's fees as approved by the court and to 12 percent

annual interest on the contested portion of the claim.

VIRGINIA (65.2-311, 65.2-714)

In Virginia, all attorney's fees, whether for the employer, the employee or the insurer are all subject to the approval and award of the Commission. If a recovery is made, either by judgment or by settlement, claimant's attorney's fees and expenses are apportioned pro rata between the employer and the employee or his/her representative. For contested claims that are held compensable and benefits are awarded to a third party insurance carrier or health care provider, the commission will approve a reasonable fee to the employee's attorney from the sum awarded to the benefits awarded to the third party insurance carrier or health care provider.

WASHINGTON (51.52.120, 51.52.132)

Washington limits attorney's fees to 30 percent of the increase in the workers compensation award that was secured by the attorney's services and requires all such fees to be fixed by the director. For appeals in which the outcome is successful for the claimant, reasonable attorney's fees are fixed by the board for attorney's services in the appellate proceedings and may consider the fees fixed by the
director. It is unlawful for the an attorney to charge or receive any fee in excess of that fixed by the board and violations are deemed a misdemeanor.

WEST VIRGINIA (23-5-5)

West Virginia limits all attorney's fees to 20 percent of the benefits paid during a period of 208 weeks on all cases since 1975. Attorney's fees in excess of this amount are deemed unlawful and unenforceable and would render the attorney subject to disciplinary action.

WISCONSIN (102.26)

Claimant's Attorney's fees are authorized and fixed by the department and may not exceed 20 percent of the amount of a compensation award. In uncontested cases, the fee charged may not exceed 10 percent or $100 of the amount awarded. The limitation of fees applies to the combined charges of attorneys, solicitors, representatives and adjusters who knowingly combine their efforts toward the collection of a claim. The board may authorize payment directly to the attorney.

WYOMING (27-14-602, 27-14-608, 27-14-615)

If an employee has court-appointed counsel in a hearing by examiner, district or supreme court proceedings, the court may allow a reasonable attorney's fee. An attorney who receives any additional fee from the claimant is guilty of a misdemeanor and faces a fine of up to $750 and/or up to six months in prison. If the employer or division prevails in court, the fees do not affect the employer's experience rating. No fee is allowed for claims that are frivolous and without legal of factual justification.

States with Caps on Attorney's Fees

Listed below are states that place a cap on the amount of attorney's fees awarded in workers compensation cases. Please note that this is listing is a simplified overview and should not be considered complete information. Specifically, please note that most states allows the workers compensation administrators and judges the discretion to deviate from these caps and that many states allow attorney's fees only on the amount of the award in dispute.

Alabama	15%
Arizona	25%
Arkansas	30% on first $1,000 20% on awards between $1,000 and $3,000 10% on awards over $3,000
Colorado	20%
Delaware	30% of award or $2,250 whichever is less
District of Columbia	20%
Florida	20% on first $5,000 15% on next $5,000 in awards 10% on remaining benefits up to 10 years 5% on benefits secured after 10 years
Georgia	25%
Illinois	20%
Kansas	25% on first $10,000 20% on next $10,000 15% on remaining benefits
Kentucky	20% on first $25,000 15% on next $10,000 5% on remaining benefits
Louisiana	20% on first $10,000 10% on remaining benefits

Maine	30% cap on all awards 10% on first $50,000 in lump sum settlements 9% on next $10,000 in lump sum settlements 8% on next $10,000 " " 7% on next $10,000 " " 6% on next $10,000 " " 5% on remaining benefits over $90,000 " "
Massachusetts	15% on settlements without insurer liability 20% on settlement with insurer liability
Minnesota	25% on first $4,000 20% on next $60,000 Attorney's fees capped at $13,000 on same injury
Mississippi	25%
Oklahoma	10% on temporary disability awards 20% on permanent disability or death benefits
Pennsylvania	20%
Rhode Island	15% in lump sum cases
South Dakota	25% on settlement 30% on award from Dept. of Labor or Circuit Court Appeal 35% on successful appeal to Supreme Court
Tennessee	20%
Texas	25%
Washington	30%
West Virginia	20%
Wisconsin	20% for contested cases 10% for uncontested cases

APPENDIX E

EXTRACTS

from: Factors Affecting the Litigation of Workers' Compensation in Florida, Gary M. Fournier and Barbara A. Morgan, Florida State University, February, 1995.

The effect of the above reforms on legal costs and litigation can be tested by the inclusion of time period dummies in any statistical model, such as those specified in Section I below. Alternatively, if the sample size is sufficiently large, separate models can be estimated for individual years. Similar analyses could be applied to the most recent reforms, summarized in Florida Senate Committee on Commerce (1993). Although beyond the scope of the dataset utilized in this report, these reforms will probably have a significant effect on both litigation costs and litigation activity. A move toward an even more informal dispute resolution process was made by the creation of an Employee Assistance and Ombudsman Office, which attempts to revolve disputes before an employee can file a claim with a judge of compensation claims. Mandatory mediation is required of all claims prior to a hearing before a judge of compensation claims. In addition, the concept of managed care was introduced as a means of containing medical costs. The managed care system also has an internal grievance procedure so that employees can find satisfaction without resort to legal outlets. Finally, the 1993 reforms attempted to control legal costs directly by reducing the fee schedule for attorneys' fees by 5 percent.

Changes in other dimensions of the workers' compensation law may also affect the litigation process and can be explicitly modeled. For example, changes in the method by which benefits are allocated or calculated will influence subsample analysis by disability type. Throughout most of the period under study, the wage loss system, adopted in 1979, was in effect. Under this system, the employee receives a percentage of lost wages based on what he or she is able to earn after injury. This percentage varies depending on whether the disability is classified as permanent total, permanent partial, temporary total, or temporary partial. Impairment benefits are confined to a limited range of permanent impairments. Changes to this system were introduced in 1989 and 1990. Wage loss payments were reduced if the employer could prove the existence of actual job openings that claimants are capable of performing. In other words, income that could have been earned was included in the determination of wage loss benefits. In 1990 the formula to calculate wage loss benefits was changed and the maximum time employees were eligible to earn such benefits was reduced. In that year, the Legislature also departed from the strict wage loss schedule and adopted an impairment schedule that tied benefits to the impairment rating. In 1993, even more extensive changes were introduced, with permanent impairment and supplemental benefits provisions replacing the wage loss system. To correctly assess the determinants of litigation activity, such fundamental changes in the law need to be and can be controlled for in subsample analysis.

Litigation and Workers' Compensation

Significant litigation exists both in Florida and nationwide within the workers' compensation system, despite the fact that it is intended to be an employer-carrier monitored system. Attorney involvement in workers' compensation cases in Florida was approximately 21 percent in 1990, a figure not out of line with that in many other states.[4] Although concern over the extent and cost of this litigation activity is widespread, only a very few studies have

[4] National Council on Compensation Insurance (1993).

examined the litigation process within workers' compensation in a systematic way, and none have used the approach suggested in the present study.

Boden (1992) draws from the literature on dispute resolution. He shows that workers' compensation adjudicators are not influenced solely by the facts of the case, but tend to split the difference between the parties' positions. This perception tends to encourage claimants to seek out attorney representation and to discourage the voluntary resolution of claims. He uses data provided by insurance companies in Maryland that includes information about the parties' final offers in both settled and adjudicated cases, as well as various indicators of severity such as whether the claimant was hospitalized, whether back surgery was done, the number of weeks of temporary disability incurred and the claimant's age. His sample is a relatively small one of 204 permanent partial disability claims for back injuries in 1981 and 1982, so the results may not generalize to other circumstances. However, the strength of the paper is in showing how the decision-making process within workers' compensation can be captured by litigation models of more general applicability.

Borba (1987) analyzes the determinants of attorney representation in workers' compensation cases from a survey of 1060 California workers with permanent injuries. Education level, union membership, seriousness of the injury and the availability of alternative sources of income are found to be positively related to the propensity to hire an attorney. Predictably, workers less satisfied with the employer's or insurer's handling of the claim are more likely to hire an attorney.

Thomason and Burton (1993) use workers' compensation claims from New York to investigate various dimensions of the administration of compensation claims. Models predicting the probability, the size of settlement and the size of any adjudicated award are estimated. Data are a sample of 977 permanent partial disability claims resulting from injuries occurring in 1972 in New York. One advantage of this dataset is that it includes several variables reflecting worker characteristics that can be expected to be predictors of settlement probability and size, but are not always available in claims data. These include age and gender of the claimant, wage, tenure with the employer and the ability to speak English. Variables reflecting insurer behavior and whether or not the claimant was represented by an attorney add to the richness of this dataset. Models also include the number of weeks the claimant was temporarily and totally disabled as a control for injury severity. The study concludes that insurer adjustment activities increase the probability that claimant and adjudicator will negotiate a settlement rather than adjudicate the claim and that claimants tend to settle for less than the amount they would receive if the claim were adjudicated.

Other Literature Using Similar Approaches

One area where economists have studied the problem of reaching agreement in cases involving medical expenses and disability is in medical malpractice. There has been a great deal of literature published dealing with the effects of tort reforms upon the medical malpractice litigation process. One might object that these cases are different because they are resolved in the state courts as civil damage suits. Despite the procedural differences, however, there is much to

be learned from malpractice cases. Research has provided some insight about how dispute resolution is affected by the bargaining environment. For instance, studies by Danzon and Lilliard(1982, 1983) developed a model of dispute resolution to simulate the effects of statutory changes in the tort system. Hughes and Savoca(1992) utilize the Florida data to examine the effect of specific reforms on the speed of resolution. They report that the implementation of the "British Rule", the practice of shifting attorney fees to losing parties, tends to shorten the duration of litigation, and at the same time it discourages the probability of a settlement. They also determined that some reforms, while intending to discourage claims from being filed by making negligence more difficult to prove, actually prolong the resolution process for cases that are filed.

The current study is fashioned in many respects after others that have proposed ways to measure litigation intensity and its determinants, e.g., Sloan, Mergenhagen, and Bovbjerg (1989, hereafter "SMB"). This study focused on determining whether medical malpractice reforms affect the probability of receiving compensation, the amount of payment, the length of time from injury to filing, and the speed of resolution. SMB obtained nationwide closed claims data from 1975-1978 from the National Association of Insurance Commissioners (NAIC), as well as 1984 closed claims data from the U.S. General Accounting Office. A variation on probit analysis known as "logistic regression" was used to estimate the probability equation, while the remaining equations were estimated by ordinary least squares.

When specifying each regression, SMB included both tort law and non-tort explanatory variables. All the tort reforms, except those affecting statutes of limitation and discovery rules, were specified by binary variables. Each variable was set equal to one if the reform was instituted in the state in which the claim was filed at the time of injury or filing. Since reforms vary over states, the variables defining the statutes are broad representations and should be interpreted as average effects.

SMB report that a reduction in the statute of limitations by one year reduces the average delay to filing, while longer statutes of limitation have a greater probability of receiving a payment. Furthermore, introducing pretrial screening panels reduces the disposition time of a claim, and greatly increases the mean payment per claim. Pretrial arbitration results in smaller average payments and a shorter disposition time frame. Reforms designed to make negligence more difficult to prove (professional standards, and informed consent rules) tended to reduce the time to filing. Meanwhile, rules affecting the use of expert witnesses tended to delay the time to filing and reduce the average payment. Limits on payments reduced the mean payment without affecting the probability of settlement. Finally, states that have a collateral offset rule tended to have a smaller proportion of claims receiving a payment that is substantially decreased as a result of the reform.

The SMB study also found some significant effects associated with economic and severity variables. The probability of receiving a payment was positively correlated to the level of medical expenses and lost wages. The mean payment rose with respect to severity, except for cases resulting in death. Moreover, payments were higher the higher the economic loss, for claimants between the age of 21-49, and for closed claims documented in 1984 relative to those

in 1975-1979 data. Finally, both the time from filing to closing and the time from injury to filing had similar patterns with respect to the nontort variables. Claims involving very young plaintiffs had the longest delay to filing, while claimants above 65 filed claims quickly. In addition, delays were associated with relatively high severity and relatively large economic losses, other things the same.

These studies, as well as many other empirical analyses of medical malpractice, could be seen as providing the research staff of the DWC with ideas for empirical modeling of workers compensation litigation. A helpful survey is by Cooter and Rubenfeld (1989). For example, the 1982 study by Danzon and Lilliard develops a model of dispute resolution to simulate the effects of reform changes upon the population. Their model is a three stage, sequential probit model in which reaching a specific stage is not independent of the other stages. First, the plaintiff decides whether or not to pursue a claim he has filed. If the claim is not dropped, the two players must come to a decision about a settlement. If they fail to settle the case goes to trial and the court determines negligence and the court award. The sequential probit determines the effects of structural parameters upon the probability of the plaintiff winning, the plaintiff's minimum ask equation, the defendant's maximum offer equation, the potential award from litigation and the potential settlement equation. This study found that court awards are positively correlated with economic loss and the severity of an injury.

It is important to acknowledge that this kind of empirical research has had a direct influence in shaping the legislative process of reform, in Florida and other states. The Danzon and Lilliard study was the first definitive empirical analysis to recommend that statutory moves such as caps on awards, periodic payment schedules, and the elimination of specified alleged damages in filing lawsuits would reduce both trial awards and settlements. The study found that legislation placing restrictions upon contingency fees would decrease the size of out of court settlements and the probability of disposition via trial litigation. At the same time, it would increase the probability a case is dropped. Finally, shorter statutes of limitations were found to have little effect on the frequency of trials.

III. Creating the dataset

We were provided with data on litigated and nonlitigated claims ("claims files") for the State of Florida for accident dates within the period 1983-92. Because our principal purpose in this study is to identify how these two types of cases differ, it is important at the outset to examine the best way to separate cases. Virtually every claim for workers compensation requires some public and private resources to resolve. What is most important is to assess which cases are most likely to be difficult to resolve or make substantial demands on the public agency.

In constructing the original data files, a claim was classified as a "litigated" case if at least one hearing was requested before a judge of compensation claims. Nonlitigated cases are defined as those without a hearing request. This definition is reasonable, however, it may lead to misclassification and make empirical analysis unreliable. The problem is that the claimants may ultimately have settled voluntarily despite a previous request for a hearing. In research we have the benefit of hindsight and can observe what transpired after all activity is completed. Access to

APPENDIX F

COMPARING ATTORNEY FEE ARRANGEMENTS
WCRI RESEARCH BRIEF, April 1989, Volume 5, Number 4

from: Workers Compensation Research Institute, Cambridge, MA
(un-numbered)

WCRI RESEARCH BRIEF

WORKERS COMPENSATION RESEARCH INSTITUTE • 245 First Street • Cambridge, MA 02141 • (617) 494-1240

APRIL 1989 — VOLUME 5, NUMBER 4

COMPARING ATTORNEY FEE ARRANGEMENTS

As policymakers contemplate reform, a common objective is to reduce the level of litigation in workers' compensation systems. In debating possible reforms, they frequently find themselves confronting a question: What is a fair and cost-effective attorney's fee? In their search for answers, they often look to other states. The Workers Compensation Research Institute has received an increasing number of inquiries about what the various states do:

- What approaches are common?
- What fees are allowed by statute?
- What fees are recovered in practice?

Table A provides this information for the twenty-five largest states (in terms of employment).

Most states have statutory language that regulates attorneys' fees. In some states, this language allows any fee that has been approved by a specified official or board. In other states, the statute limits the amounts of attorneys' fees and the situations under which they can be awarded. However, the actual practice in a particular jurisdiction may vary from that outlined in its statute. Consequently, we describe both statutory requirements and typical practices in Table A.

Attorney fee arrangements fall into several different categories. Almost all pay the attorney a percentage of the amount recovered, although the amount to which the percentage is applied varies from state to state. One state, Massachusetts, pays attorneys a fixed dollar amount in cases where the insurer has contested an issue.

States use two different approaches to percentage rates:

- A flat rate — a stated percentage of the amount recovered.
- A sliding scale — a rate that changes according to the amount recovered. Typically, the percentage falls as the amount recovered rises.

When the statute provides for a maximum percentage fee, most attorneys receive the maximum. Usually, the attorney's fee is paid out of the benefit award or settlement, but some states award it in addition to the amount recovered. This generally depends on which party brought suit and whether or not the insurer or employer has been deemed to have acted in good faith.

The definition of the amount against which the percentage applies also varies. Again, two generic approaches are used:

- The total amount recovered
- The value added by the attorney

WCRI RESEARCH BRIEF is a periodic publication of the Workers Compensation Research Institute. It reports on significant ideas, issues, research studies, and data of interest to those working to better understand and to improve workers' compensation systems.

WCRI RESEARCH BRIEFS augment WCRI's primary publications for reporting the results of its work: RESEARCH REPORTS, SOURCEBOOKS, and WORKING PAPERS. All WCRI research publications are widely distributed to policymakers and others interested in workers' compensation issues.

WCRI is a nonpartisan, not-for-profit public policy research organization funded by employers and insurers. For further information about the Institute, its work, membership, or the material in this WCRI RESEARCH BRIEF, contact Dr. Richard B. Victor, Executive Director.

Table A. Attorneys' Fees: Statutes and Practices in Twenty-five States

State	Statute	Practice
Alabama	A maximum of 15 percent of compensation awarded if the judge approves the employment of an attorney.	The typical fee is the statutory maximum of 15 percent of the benefit award or settlement, not including voluntary payments. Judges approve the employment of attorneys in almost every instance.
Arizona	A maximum of 20 percent of up to ten years of benefits or of up to five years if loss of earning capacity is found. Subject to the approval of the commission.	The typical fee is the statutory maximum of 20 percent of the benefit award or settlement, including past temporary total disability (TTD) owed and future TTD to be paid.
California	Determined on a case-by-case basis.	The typical fee is 10 to 12 percent of the benefit award or settlement, including past TTD owed and future TTD to be paid.
Colorado	A maximum of 20 percent of the amount of contested benefits, or more if it is deemed that there were extraordinary efforts involved. Subject to the approval of the commission.	The typical fee is 20 to 25 percent of the benefit award or settlement, including past TTD owed and future TTD to be paid.
Connecticut	Subject to the approval of the commission.	The typical fee is 20 percent of the benefit award or settlement.
Florida	A maximum of 25 percent of the first $5,000, 20 percent of the next $5,000, and 15 percent of the balance of additional benefits secured by the attorney.	The typical fee is 20 percent of the benefit award or settlement, not including amounts already paid or offered. The statutory guideline is used for permanent total disability cases.
Georgia	Any fee over $100 must be approved by the board. If an attorney is retained to obtain a claimant's rights, the fee, in addition to the compensation award, is assessed to the employer.	The typical fee is 25 percent of the benefit award or settlement up to a maximum of 400 weeks of benefits, including past TTD owed and future TTD to be paid.
Illinois	No attorney's fee if the amount of benefits secured is not more than the amount offered before the attorney became involved. Otherwise, a maximum of 20 percent of the amount secured by the attorney. Only a nominal fee is allowed in the case of an undisputed specific loss.	The typical fee is the statutory maximum of 20 percent of the amount of the benefit award or settlement. The statutory rules limiting the fee base to amounts secured by the attorney are adhered to.
Indiana	An amount fixed by the board, paid out of the award unless the employer has acted in bad faith.	The typical fee is 15 to 20 percent of any benefit award or settlement, not including voluntary payments.
Louisiana	A maximum of 20 percent on the first $10,000 and 10 percent of the balance of the award. Subject to the approval of the director.	The typical fee is the statutory maximum of 20 and 10 percent of the benefit award or settlement, not including voluntary payments.
Maryland	A maximum of 20 percent on the first $7,000, 15 percent on the next $18,000, and 10 percent of the balance of the award.	The typical fee is the statutory maximum of 20, 15, and 10 percent of the benefit award or settlement, not including voluntary payments.
Massachusetts	If the insurer contests and the employee prevails before a hearing, then a minimum of two times the state average weekly wage (SAWW) plus expenses is awarded the attorney in addition to benefits. If the same goes to hearing, then a minimum of seven times the SAWW is awarded the attorney in addition to benefits. If the employee contests and prevails, then the employee pays the amount approved by the administrative law judge (ALJ). If a settlement is reached before an ALJ decision, the attorney receives 15 percent of the lump sum. If a settlement is reached after an ALJ decision, the attorney receives 20 percent of the lump sum.	The typical fee is the statutory maximum. The statutory rules regulating fee awards are adhered to.

Table A continued

State	Statute	Practice
Michigan	Fees are subject to the approval of the bureau. The maximum fee prescribed by the bureau shall not be based on a weekly benefit amount after coordination with other benefit programs that is higher than two-thirds of the SAWW at injury. For cases decided by the appellate commission, the fees shall be assessed on not more than 104 weeks of the period during which the matter was pending before the commission.	The typical fee is 30 percent of the award at hearing. If the case was contested, the fee is typically 30 percent of the accrued benefit. If the case is settled before trial, the fee is 15 percent of the first $25,000 and 10 percent of amounts greater. If the case is settled after trial, 20 percent of the settlement amount is awarded.
Minnesota	Fees that do not exceed 25 percent of the first $4,000 and 20 percent of the next $27,500 are permissible without the approval of the commissioner. Fees are calculated only on the amount of the disputed compensation.	The typical fee is the statutory maximum of 25 and 20 percent. It is not based on any amounts of ongoing or voluntary TTD payments.
Missouri	As determined by the commission.	The typical fee is 20 percent of the benefit settlement or award, but is sometimes 25 percent, depending on location. The fee base does not include voluntary benefit payments.
New Jersey	Fees are 20 percent of the judgment when it is deemed that an attorney was necessary to secure judgment, based on the amount of benefits in excess of the compensation offered or tendered.	The typical fee is the statutory maximum of 20 percent of the award, with any voluntary payment of permanent partial disability (PPD) or TTD deducted from the amount.
New York	Fees are subject to approval of the board and are a lien on any compensation awarded.	The typical fee is 10 to 15 percent of any benefit award or settlement, including past TTD owed and future TTD to be paid in a lump sum.
North Carolina	Reasonable attorneys' fees are approved by the commission and paid by the party that brings suit if it does not prevail.	The typical fee is 25 percent of the benefit award or settlement for PPD, or every fourth check for TTD, whether or not disputed.
Ohio	As approved by the commission.	The typical fee is one-third of the benefit award or settlement, including past TTD owed and future TTD to be paid.
Pennsylvania	A reasonable fee based on the difference between the final award and compensation paid, unless reasonable cause for contest is found.	The typical fee is 20 percent of any accrued benefit and/or continuing benefit settlement or award.
Tennessee	A maximum of 20 percent of the compensation award.	The typical fee is 20 percent of the award or settlement plus expenses, including past TTD owed and future TTD to be paid.
Texas	A maximum of 25 percent of the compensation award.	The typical fee is the statutory maximum of 25 percent of the benefit award or settlement.
Virginia	As approved by the commission.	The typical fee is 8 to 12 percent of any benefit award or settlement, including past TTD owed and future TTD to be paid.
Washington	A maximum of 30 percent of the increase in the award secured by the attorney's services.	The typical fee is 30 percent of the benefit award or settlement obtained from the time the attorney entered the case.
Wisconsin	A fee of 10 percent of the award if undisputed; 20 percent if disputed.	The typical fee is 20 percent of the award. The attorney receives nothing if the amount awarded is not more than that offered by the insurer.

In the first approach, the attorney receives a percentage of the amount recovered — award or settlement (either lump-sum or future periodic payments). Typically, this amount excludes payments for medical treatment and any voluntary indemnity payments previously or currently being made. However, it does include amounts in a lump sum implicitly for terminating liability for future medical treatment, and any indemnity payments not already voluntarily made.

The second approach pays attorneys for their value added. By statute, some states adopt this approach where the base used to calculate benefits is limited to the amounts that were "secured by the attorney." This is done very explicitly in states like Illinois, New Jersey, and Pennsylvania, with language that limits the base to any amounts over and above those offered or paid before an attorney was involved. And it is done implicitly in states like Alabama, Florida, Minnesota, Washington, and Wisconsin, by limiting the base to the amount of benefits in controversy.

The value-added approach is intended to discourage attorney involvement when there is little or no controversy. Most states that use it exclude from attorneys' fees amounts that have been voluntarily paid. And they exclude amounts formally offered by the defendant before an attorney entered the case. However, the approach is not always used in practice. Typically, no formal offer is made. Consistent with the statute, the attorney's fee is computed as a percentage of the total amount recovered.

APPENDIX G

ANNOTATED BIBLIOGRAPHY

ANNOTATED BIBLIOGRAPHY:

Thomas - An interesting expose which underlines historic attempts of the system (or system crafters) to eliminate lawyers from the process. The book discusses many abuses and directs attention to the trend toward mental (psychological) claims as the latest new dimension to be exploited. Fraud and abuse are highlighted although few (if any) statistics are cited to show overall impact.

"Today, all 50 states have in place workers' compensation laws which are designed to compensate injured workers regardless of fault. These no-fault systems are intended to provide a single remedy for the settlement of work related injury claims, and to eliminate the costly, time-consuming legal activities that occur in other personal injury claims. ..." 4.

"... the U.S. Chamber of Commerce has identified six basic objectives that all workers' compensation statutes and rules should recognize. ...

4. To eliminate the payment of fees to lawyers and witnesses as well as time consuming trials and appeals. ..." 4-5.

When injury classification is upgraded (generally through assistance of a lawyer) to Permanent and Totally Disabled, the resulting "universe of funding for future medical services is subject to an attorney's fee. The beauty of this program is that once the fee is awarded, the attorney gets the entire sum up front. It doesn't matter whether or not the claimant ever receives a penny's worth of additional medical service." 12.

e.g. $1.75 million fee settlement to Feuer. 20.

Mental anguish and stress alledgedly rising from denial of benefits later led to a permanent and Total classification. 31.

Fournier and Morgan - A statistically based study seeking factors or characteristics of cases that indicate or predict high levels of litigation intensity. "Litigation and its associated costs have increased dramatically in Florida in recent years. While there has been an increase in the number of workers' compensation claims, the proportion of litigated claims has more than doubled from 8.6% in 1983 to 22.8% in 1990.* The purpose of this study is to examine some of the determinants of litigation in workers' compensation cases in Florida." 1. The study is based on a data set drawn from the period 1983-1992. Selected subsamples were run for the years beginning April 1, 1987 and April 1, 1990 to illuminate trends. Sophisticated analytical techniques are used with tabular results difficult for the layman to read. Data defects have been smoothed by "right censoring" and selected dependent variables or "outcomes" are invested with values as a

function of independent variables that are the case identity or input characteristics such as wage, age, and injury type. Results to date reveal several relatively stable patterns. Litigation intensity is higher for "older claimants, claimants who earn higher pre-injury wages, and those with back injuries." 15. Also, it is shown that "cases originating in the construction industry, cases involving older workers, or back injuries are all examples of ones with relatively high liklihood of litigation." 15. A rich store of data is organized for further manipulation. Periods reflective of recent changes in the law need to be included and compared.

* Note - NCCI is cited on p. 3 reporting attorney involvement in Florida comp case as 21% in 1990, "a figure not out of line with that in many other states."

Calise - Lawyers seen to spur stress claims. Risk managers note many mental stress claims begin with physical injuries which then become mental injuries when attorneys enter the picture. They say that states with tighter compensability definitions and requirements have a lower number of stress claims. An NCCI study, "Workers' Compensation Paranoia: Mental Stress Claims," found that tighter state definition and requirement laws correlated with fewer claims filed. Stress claims tend to be more expensive than physical-injury claims because of greater attorney involvement. Oregon is cited as being four times above the national average in stress claims before a reform of the relevant laws. Resultant drop was dramatic, in all claims as well as mental stress. State reforms clearly have an effect on claims.

Calise - Employee contributions ease WC over-utilization. Employees required to pay for part of their medical care are less inclined to over-utilize it. Incentives matter. On the provider side, up-grading in diagnoses or "creep" has resulted in faster growth of comp awards than regular awards in the health care area. "The bigger the difference in sensitivity to price -- the bigger the difference in prices that are charged. Fees run with the awards.

Calise - Medicare fee schedule can cut WC costs in half. e.g. Pennsylvania capped @ 113% of Medicare reimbursement. Average state WC award is 50% greater than medicare reimbursement, Florida is only 2% greater. Fee levels vary widely from state to state, with those in the most generous double those in the least generous.

Goldfarb - Analysis of health care reforms proposed by White House indicates that physicians have the most at stake. Many cost shifting proposals are explored including mixing work related injury and with group health, requiring employee contributions or co-payments, and capping some benefits such as California did restricting the number of medical-legal evaluations. Loss of "exclusive remedy" proposals are seen as a red herring. There is some organized labor support of merging WC into standard health

care package but with provisos that unions (members?) not pay out-of-pocket expenses or give up benefits.

Haggerty - Cost of medical services discussed. Number of visits to doctor identified as key factor behind costs. Strategy explored to limit costs through threshold of visits, payment or duration of treatment prescribed as part of continuing care. Such monitoring could contain costs and be implemented without undue burden on either providers and payors or limits on medical care.

Oldstrom - Comp premiums are still on increase nationwide. But it is pointed out that comp system is unique in that employers have abilty to control (except in litigated cases) and discourage incidence of claims by fostering safer workplaces and better worker attitudes. Effective administration of claims by employers helps in early and proper resolution with no cost related callbacks.

Pillsbury, 1991 - Management oriented article in Forbes presents brief history of system getting out of control in national setting and discusses some options for the future. Without significant reform, double digit cost escalation will continue. Insurance companies are being bled to death; residual markets writing WC have increased total share of coverage from 10% to 25% in last six years. This is forcing redistribution of costs due to losses into normal market premiums. Increasing attorney involvement is seen by insurers as a major cost driver. California is cited as having $1 billion out of $6 billion total WC costs in 1988 attributable to litigation. The system, originally intended to be no-fault, has emerged as a part of our adversarial and liability fraught society. Where strong government agency has been at work as in Wiscinsin, there is a positive WC environment prompting industry to relocate there. Back in high cost areas, the "blank check" attitude of some health care practitioners needs to be curbed. The system is replete with double-billing and overcharging for services. The provision of services from start to finish needs to be far more stringently monitored and policed. The stakeholders in the system must work with the control agencies, i.e. legislatures, to regain (or initially establish) firm control.

Rules - 1993 Reform:

WC INSURER'S STANDARDS AND PRACTICES

Minimum Performance Standards - 90% rate.
Monitoring - Continuous
Auditing - Exclusions
On site unannounced > 1/3 yrs.
< 90% to be re-audited.
< 50% to be certified to licensing authority.
Re-Audit & Certification for Noncompliance-
Must pass w'in 12 months of initial failure.
2d failure results in certification.

EMPLOYEE ASSISTANCE & OMBUDSMAN OFFICE

See Section 440.191, Fla. Stat.