

**WORKERS' COMPENSATION LITIGATION REPORT**  
**FISCAL YEAR 2001-2002**

Revised December 5, 2002

Executive Summary

The volume of cases litigated in the Office of Judges of Compensation Claims (OJCC) is a key indicator of the cost of litigation in the Florida Workers' Compensation system. In fiscal 2001-02, this measure rose substantially, by a margin greater than what would be expected from the robust job creation the state has enjoyed. It is unclear whether this is a result of legislative efforts to reduce litigation having the opposite of their intended effect, or whether there has been increased litigiousness due to external factors. In either case, the volume of litigation appears to be well in excess of the optimal level, and the overall system is therefore more costly than it needs to be. The OJCC itself has been required to do more with less

for many successive years, and its resources are now stretched to the limits. Any legislative measures that could reduce the amount of litigation would be beneficial to the employers and workers of Florida, as well as the OJCC.

Despite a nearly 60% increase in petitions system-wide since 1998, the OJCC has remained effective in adjudicating injured workers' claims with almost no

increase in resources. Fortunately, the vast majority of the 115,000 petitions for benefits filed fiscal year 2001-02 were settled between the parties. The 31 judges entered about 40,000 orders approving complete settlements, another 26,500 resolving the disputed parts of an ongoing case, and about 2,400 final decisions on the merits.

The rise in demand for the time of a fixed number of mediators and judges inevitably results in long waits for mediations and trials, which are the most unsatisfactory aspects of the OJCC's performance. Even though the system is reasonably efficient, the number of cases coming in each month is much larger than the number that can be processed. The result of making increasing demands on a fixed level of resources is that judges' schedules continue to extend farther into the future. The efficiency gains expected from improved use of information technology and quantitative management techniques are likely to be substantial, but the growth in demand for the services of the Office of Judges of Compensation Claims will result in growing delays unless the volume of litigation is curtailed or the resources expended for adjudication are expanded.

FY 2001-02 Key Data Summary	Current Year 2001-02	Change From Previous
Petitions Filed	115,367	18.76%
State Mediations Held	27,290	28.56%
Mediations Resulting in "Washout" Settlements	8,032	22.48%
Mediation Continuances	6,413	*
Orders Approving Agreements	67,245	*
Procedural Orders	84,421	*
Final Orders Entered	2,392	*
Trial continuances granted	6,590	*
Orders Entered Untimely	318	*
* Current Year Data Not Comparable With Previous Years		

Mediation has been both a success story and a source of delay. During the last fiscal year, the state's 31 mediators held about 25,000 mediation conferences, and slightly more than half resulted in settlements of all the disputed issues. As with the judges, however, the number of incoming cases is too large to expect 31 mediators to hold conferences on each one within the statutory timeframe. Indeed, even the longer 90-day period for mediation provided by the 2002 amendments to Chapter 440 is unattainable with 31 mediators. In January of 2002, many of the state mediators' calendars were booked through July. This may account for the observed increase in reliance on private mediation and for the explicit embrace of private mediation in the 2002 amendments.

While it is impossible to directly measure the cost of litigation, the available data does indicate that attorneys' fees for defending claims totaled about \$112,000,000, for the last three quarters of the fiscal year, and reported claimants' fees amounted to approximately \$223,000,000. The operating budget of the OJCC was about \$15,000,000 for the year. Thus, the observable part of the cost of litigation—payments to attorneys and the budget of the adjudicating authority combined—represents about \$350,000,000, or roughly \$3,000 per petition.

It must be noted that the workers' compensation system is vast, and the litigated cases are just the visible tip of a huge hidden iceberg. The OJCC has a comparative advantage in measuring the performance of the judges and mediators, but not in making a thorough economic analysis of the system itself. Accordingly, this report does not make substantive policy recommendations about workers' compensation law. It does, however, conclude that while the judges are reasonably efficient in handling cases, there is room for improvement. Some of the measures can be implemented administratively, and these are in process, but action from the legislature in the near term is necessary in order to prevent deterioration of service.

# Office of Judges of Compensation Claims Annual Report 2001-02

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## **Foreword**

This is the first report submitted since the 2001 amendments to Chapter 440 assigned the responsibility for record keeping and reporting to the OJCC, effective October 1, 2001. Under the Division of Administrative Hearings, the OJCC implemented a new record keeping system, intended to seamlessly integrate with the case management system being deployed in the district offices. The system uses a custom written VB6 application at the user interface, and its back end is a fully relational database, normalized to reduce redundant data and accessed via Microsoft SQL server.

The adoption of a new system has two implications for the current reporting cycle. First, the only data that is retrievable from the system itself has been entered after October 1, 2001, although a portion of the Department of Labor's database was obtained and entered at that time. As a result, the new data in this report constitutes a one-year snapshot of the system's performance, as the seasoned data that was used in the reports prepared by the Division of Workers' Compensation in prior years is not available. To display data in temporal context, therefore, information from the DWC reports is used for prior years. Second, the development of the system is a work in progress, and it was determined that the accurate capture of data would take priority over the development of extraction and analysis functions. Accordingly, the following report is built from several sources, including the monthly reports the judges file with the OJCC. To the extent the data comes from the OJCC database, in many cases it will reflect only the last three quarters of fiscal year 2001-02, and in some cases, the actual data for that period is incomplete, because the processing of the source materials for those is not complete. To facilitate comparison with other years, the three-quarter data is annualized by linear extrapolation. The incomplete data is extrapolated to full-year data through sampling techniques. In the report, any figures based on sampled or extrapolated data will be clearly identified as such, with the remainder being based on actual full-year data. It is not anticipated that the qualitative results will be different once all the full-year data is fully analyzed, but if that does occur, a supplemental report will be issued at that point.

## **Anatomy of a Workers' Compensation Claim**

Nearly all employers in the state are required to buy workers' compensation insurance that covers injuries due to job risks. The insurance provides payment for medical bills and partial wage replacement benefits when the employment is the cause of an injury or occupational disease. In return for an assurance of compensation for every job-related injury regardless of fault, workers give up the right to sue their employers for negligence.

When a worker is injured on the job, the employer is required to notify the Division of Workers' Compensation (not the OJCC) that an injury occurred. The employer's insurance carrier is then expected to determine whether there are any benefits due, and to provide them without being ordered by a judge to do so. This expectation is what is commonly referred to as the "self-executing" feature of the system. But in a substantial number of cases, the system is not self-executing. When a worker thinks there is an entitlement to a certain benefit, and the carrier disagrees, the worker becomes a claimant.

A Petition for Benefits is filed, invoking the jurisdiction of the Office of Judges of Compensation Claims.

When the petition is filed, the case is assigned by the Deputy Chief Judge of Compensation Claims (an odd title since there is no Chief Judge of Compensation Claims) to one of the judges according to the location of the accident. The employer, or more often its insurer, is required to either provide the requested benefits or file a response to the petition within 14 days of receiving the petition. In the majority of cases, the first petition is not the only one: it is not uncommon for two or more petitions to be filed while a case is pending.

After the first petition the next step is a mediation conference, which is required in most cases before a claim can go to trial. The state employs mediators, who gather the parties and their representatives in a conference room to discuss settlement, then separate the parties into different rooms, shuttling offers and counteroffers back and forth. The parties could either (1) reach agreement on some of the disputed issues, leaving others for trial; (2) reach agreement on all disputed issues, concluding the case but not the claimant's potential entitlement to other benefits that were not in dispute; (3) agree to a "washout" settlement, in which the claimant agrees to permanently extinguish all workers' compensation claims against the employer in connection with the accident, in exchange for a lump sum payment, or (4) agree on nothing, and declare an impasse. If some issues remain in dispute after the mediation, the case is set for trial and discovery begins.

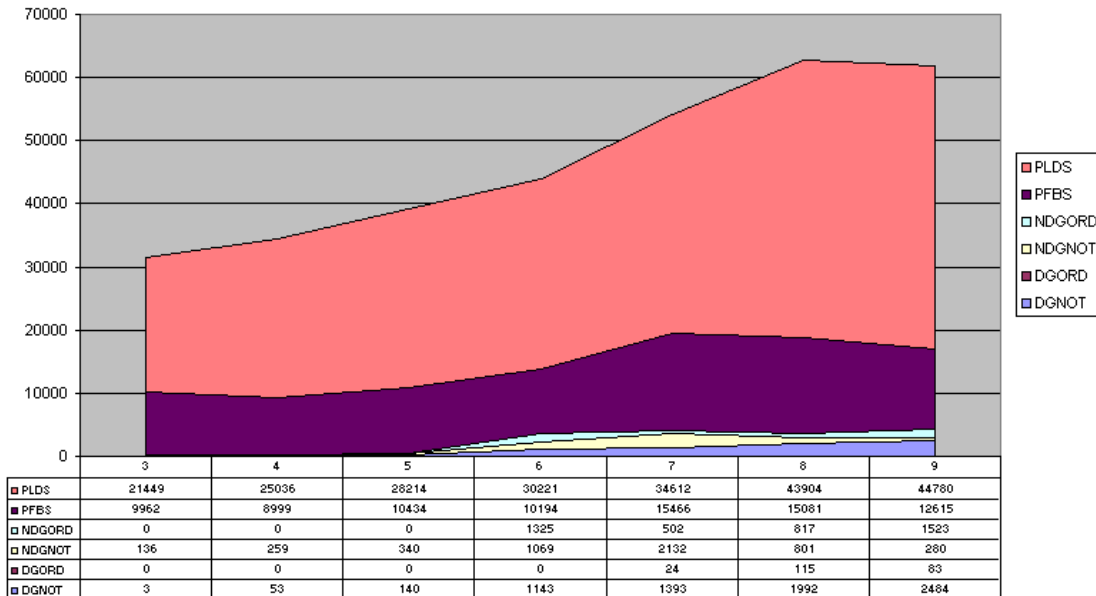
Discovery is the phase of the process in which each party discovers the evidence held by the other, or by third persons such as doctors or witnesses. In Workers' Compensation cases, a party may take depositions of potential witnesses, or may require production of documents from parties or nonparties. It is actually permissible in these cases to take discovery before mediation-- even before filing a petition-- but often discovery does not begin in earnest until after the mediation. The most complicating factor in discovery is taking depositions of doctors, who have crowded schedules and afford little time for depositions. Difficulty in scheduling depositions of doctors is the most commonly cited ground for requesting a delay of trial.

When the trial day arrives, most of the witnesses testify by deposition rather than live. The witnesses who do appear are questioned and cross-examined, and the lawyers may make brief closing arguments. The proceedings are recorded on tape. At the conclusion, the judge reviews the depositions and notes from the testimony, and is required to make a decision within 30 days. A party who thinks there is a legal basis for overturning the judge's decision can take an appeal to the First District Court of Appeal, and if the carrier appeals from an order awarding benefits it need not pay the benefits until the appeal is over, which can be up to a year later.

## Function and Personnel of the OJCC

The OJCC's mission is to resolve disputes between persons claiming compensation benefits and the insurers of their employers. Its clerking function receives Petitions for Benefits that institute new claims and maintains files of the cases as they develop. The mediation program tries to bring the parties to an agreement resolving the dispute without the need for a judge's merit order. When mediation results in impasse, the cases are tried by the judge. But trying and deciding cases are only a portion of the judge's workload. Numerous disputes about the conduct of the litigation arise while the case progresses, and parties file motions and other pleadings to get the judge to resolve those disputes. For reasons that are not known, the volume of these pleadings is rising quickly, threatening the ability of the offices to attend to their primary functions.

The chart displays the increase in volume of documents processed by the clerk's office



from March to September of 2002. The total number of documents rose from 30,000 per month to over 60,000 per month during that period. The bulk of the documents are the pleadings and motions filed by parties, identified as "PLDS" on the chart. The next most prevalent category, PFBS, is Petitions for Benefits.<sup>1</sup> The four relatively small components are Orders and Notices, prefaced by DG if generated by the DocGen system and NDG if processed manually. The conclusion to be drawn from the graph is that it is that while the number of petitions increased 26%, the number of number of documents filed per

<sup>1</sup> Although the chart shows the number of PFBS declining after peaking in July, more recent data show the volume of PFBS is on the rise again. It was expected that a temporary surge in PFBS would occur after the 2002 amendments took effect on July 1. The prior law required that a petition be filed only after waiting 30 days from the filing of a Request for Assistance with the Employee Assistance Office, so the disputes that arose in one month did not appear in petitions until a month later. In July of 2002, however, the waiting period requirement was eliminated, so disputes arising in July as well as in June could both be filed. After the surge subsided, the volume of petitions began to rise at an annual rate comparable to the rate that prevailed over the previous nine months.

case almost doubled. These numbers point to the pressing need for relief in the form of a law that invites less litigation, as the only alternative is additional expenditure of scarce budgetary resources.

There are 31 judges in the state currently. The office locations and number of judges are listed in the table. Each judge has an executive secretary and an administrative secretary. For organizational purposes, a mediator is attached to each judge, so there are 31 mediators. In practice, mediators in multi-judge offices do not confine themselves to cases assigned to a particular judge, because the mediators use a "deep booking" approach to scheduling. Each mediator schedules three or four mediations per available time slot, because half the cases settle before mediation and a significant number are rescheduled. On some occasions, all three scheduled mediations will actually appear, and that makes it necessary for the judges in the larger offices to work together. Each mediator has one secretary. The larger offices have a receptionist or office manager, and there are three computer support personnel for the entire system. There are a variable number of clerical personnel working in the clerk's office in Tallahassee. The total number of OJCC employees is 197, and extremely valuable administrative support is provided by the administrative services director, MIS director, budget officer, personnel officer, and purchasing agent who serve both OJCC and the Division of Administrative hearings.

OJCC District Offices		
District	Location	Judges
A-Central	PANAMA CITY	1
A-East	TALLAHASSEE	1
A-West	PENSACOLA	1
B	GAINESVILLE	1
C	JACKSONVILLE	2
D	TAMPA	3
E	ST. PETERSBURG	2
F	LAKELAND	1
G	DAYTONA BEACH	1
H	ORLANDO	3
I-North	PORT ST. LUCIE	1
I-South	WEST PALM BEACH	3
J	FT. LAUDERDALE	3
K	MIAMI	5
L	MELBOURNE	1
M-North	SARASOTA	1
M-South	FT. MYERS	1

**Amount, cost and outcomes of litigation.**

The amount and cost of litigation in the Florida Workers' Compensation system are large and their growth is accelerating. The number of Petitions for Benefits filed has increased by almost 60% since 1998, and by 18% over last year. At the same time, the resources devoted to the adjudication of cases has remained essentially stagnant. The economic cost of litigation system-wide is immeasurable, but its continued increase can be inferred from observed growth in attorneys fees for both claimant and defense counsel, which are highly correlated with total litigation cost. Claimant counsel fees grew by 5.7% over the

Attorneys' Fees Reported During FY 2001-02		
	Claimant Attorneys	Defense Attorneys
Reported Fees	\$111,480,458	\$84,459,032
Reporting Basis	two quarters	three quarters
Annualized Fees	\$222,960,917	\$112,609,227
Previous Year	\$210,329,360	\$100,100,000
1999-2000	\$222,690,750	\$95,300,000

previous year, while defense fees rose by 12%. It should be noted that the attorney fee measures are derived from reports received by carriers, self-insurers, and attorneys, and no independent data-checking mechanism exists. In addition, complete data is not available, so each figure represents an extrapolation from the data that are available.

The most common outcome of cases is settlement, as about half of the cases settle before mediation. More than half of the 27,290 mediation conferences held by state-employed mediators resulted in settlements. The bulk of the remaining cases settle between mediation and trial, with less than 5% of the cases filed being tried to conclusion. Analysis of a sample of the 2,392 cases decided by the Judges of Compensation Claims indicates that in about 60% of the cases some but not all of the benefits claimed were awarded, with the remaining cases nearly evenly divided between total wins for claimant, and total wins for the defense.

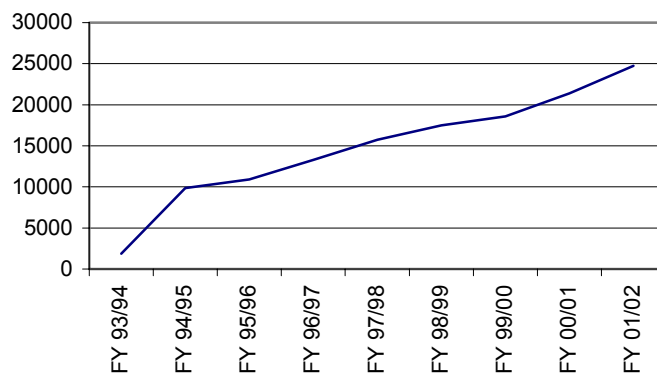
### The Mediation Program

The statute in effect during fiscal year 2001-02 required mediation conferences to be held within 21 days after the petition was filed, but in practice that has proven impossible due to the number of cases being commenced each year. Given the variability and unpredictability of the time required for each mediation, even without the time lost due

to scheduling issues, the capacity of the mediation offices is at most 1,000 per year per mediator, an average of two hours for each conference. The actual number of average mediations per mediator for the fiscal year was 880.32, which is less than the estimated maximum capacity due to the scheduling issue. Because mediations must be scheduled

far in advance, time is often reserved for cases that settle prior to mediation. The parties face no consequences from failing to appear for the state mediation if the case is settled, and those that do notify the mediator of a cancellation often do so when it is too late to schedule another mediation in its place. Private mediations avoid this problem by charging a cancellation fee for mediations cancelled shortly before the scheduled conference, but state mediators lack that authority.

**TOTAL MEDIATIONS CONCLUDED  
FY 93/94 - FY 01/02**





With about 115,000 petitions filed in the year, there is demand for 2,182 mediations per mediator, after accounting for an average of 1.7 petitions consolidated in each case prior to being mediated. The demand for state mediator time is more than twice the supply at current staffing levels. While the timeliness of mediation is improving, the average delay of 190 days remains unacceptable by any standard.

Timeliness of Mediation	
Month Filed	Avg. Days to Mediation
Jan 2002	205.21
Feb. 2002	201.14
Mar. 2002	197.34
Apr. 2002	193.67
May 2002	197.24
Jun 2002	190.09

Application of a basic queuing model to the mediators' workflow shows how it quickly becomes impossible to complete mediations within 21 (or even 90) days. Starting from a new mediator's first day with a clean slate, she receives 182 requests for time per month, but has only 85 to give. So the first month's demand fills up the time available in the first two months. When the second month's requests come in, the second month is already booked, so the third and fourth months become booked. The third month's requests would be scheduled for the fifth and sixth months by the same logic.

In order to counteract the ever-increasing waiting time for mediation, and to minimize lost time due to reserving time for mediations that prove unnecessary, mediators typically book three mediations in each available time slot. Triple-booking gives mediators 250 time slots per month to offer, but that still is not enough to stem the advance of the calendaring, because many mediations are rescheduled one or more times, thus occupying more than one time slot. And the unpredictability of the no-show rate renders triple booking a risky process, as sometimes all three mediations

cancel, while other times all three sets of parties and lawyers show up, expecting the mediator's undivided attention for the specified time.

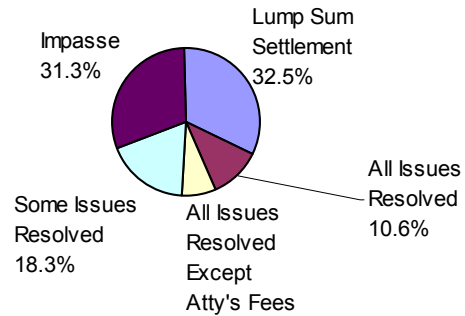
If the question of timeliness were unimportant, the performance of the mediation service would be highly satisfactory. Overall, less than 32% of mediations result in impasse, while 32.5% result in terminating the litigation *and* the prospect of future litigation between the parties. The remaining third of mediations results in settlement of some or all of the disputed issues, without finally settling all the claimant's rights under the statute. While the degree of success in resolving claims does vary across the state, there is no district in which the impasse rate is appreciably over 50%, and only in one district is it over 44%. The quality of the result suggests that the mediation process works well, is staffed by conscientious and skilled professionals, and is a valuable service of state

Compilation of Data Reported by Mediators

PFB Dismissed	1852
Settle Before Mediation	12282
Washout Agreement at Mediation	8032
All issues resolved	2613
All issues except Attorney Fees Resolved	1816
Some Issues resolved	4521
Impasse	7751
No Appearance	1723
Rescheduled	19348
Privately Mediated	7565
REC/REC	2557
Mediation Waived	345
Average Days to Scheduled Mediation	135
Mediation Within 21 Days	1055

government. The state mediation program also seems to be cost-effective, as dividing the OJCC's budget allocated to the mediation service (\$3,035,502) by the number of mediations held (27,290) results in a unit cost of \$111.23 per mediation. Excluding overhead allocations and considering only the mediators' salary, the personnel cost per mediation is \$77.24.

MEDIATION OUTCOMES, FY 01-02



The timeliness problem could only be addressed by employing more state mediators or by providing a greater role for private mediation. It should be noted that the proportion of mediations yielding complete settlements has declined as mediators have been pressed to accomplish ever increasing numbers of mediations. Expecting the mediators to conduct their mediations more quickly does not seem to be the solution.

The 2002 amendments will have some interesting and unpredictable effects on the mediation service. The legislature has mandated that mediations be held within 90 days of the petition being filed, and has ordered carriers to pay for private mediations within that time frame if state mediators are not available. The consequent jump in demand for private mediation services, coupled with the mandate to carriers to pay for it, is expected to cause a rise in the price of private mediators' time. Many of the state mediators appear to expect that as well, as nearly a third of them have resigned to pursue private mediation practice. Early reports indicate that sufficient private mediators are not available to get cases mediated within 90 days, but market forces can take time to work. The rise in the cost of private mediation will likely attract more mediators to the field, such that it is possible the 90-day requirement will be observable in practice.

### Case Resolution by Judges

In a recent address to the OJCC, Chief Justice Anstead praised the thoroughness of the judges' final orders he had seen. The affirmance rate of the judges collectively is in excess of 80%, further suggesting that the work product of the office is of high quality. A review of a sample of judges' orders by the Deputy Chief Judge reaches a similar conclusion. There is no sign that judges are rushing their work out to meet deadlines, although in the vast majority (87%) of cases the orders are issued within the 30 days afforded by statute.

At the same conference where Justice Anstead spoke, two of the judges of the First District Court of Appeal also expressed the view that thorough explication of the reasons for decision was necessary in each judge's order. The appeals court requires the judges to be meticulous in examining the record and testimony, and to explain the reasoning for their decisions in detail. The result is that the final compensation order in a typical case is rarely less than ten pages long, often over twenty, and occasionally over one hundred.

The degree of thoroughness required by the appellate court renders deciding cases and writing orders very time-consuming, but that is what judges do. It is not the source of delay, which as mentioned above, is the most unsatisfactory aspect of the system today. The source of delay is the extensive amount of non-judicial labor imposed upon the judges by current practice. Judges are unnecessarily engaged in regulating the attorney-client relationship, spending time approving the attorney's contract of representation and every fee every claimant's attorney receives. Judges are asked by the parties to "approve" stipulations that govern the conduct of litigation, even when there is no need to take action to enforce the stipulation. In short, judges are currently performing a lot of unnecessary, clerical functions. If freed of those duties, it would then be possible to evaluate whether the existing number of judges is sufficient to make timely dispute resolution a realistic expectation. While it is true that time-to-hearing has been improving in recent months, as shown in the table, this results primarily from the judges placing increased emphasis on resolving cases quickly and secondarily from administrative measures designed to eliminate unnecessary work. As the volume of cases increases, however, it will not be possible to maintain the downward trend.

Timeliness of Scheduled Final Hearings	
Month filed	Days to Final Hearing
Jan 02	345.37
Feb 02	327.62
Mar 02	308.02

Mediations have not been possible within statutory timeframes, and in many districts took six months or more. Trials often took place nearly a year after the case was filed, and appellate proceedings could extend that by another year. On a more positive note, the 6,590 trial continuances granted are lower than in previous years. The judges are aware of the importance of timeliness in resolving cases, and are taking observable action to improve time-to-resolution.

It should also be observed that the current structure of attorney fee payments gives counsel for both sides incentives to prolong litigation and make it more costly, and the difficulty in scheduling doctors' depositions is a frequently cited extrinsic cause of delay.

### **Administrative Measures Being Implemented**

Since being merged with the Division of Administrative Hearings (DOAH), the OJCC has seen a remarkable upgrade in its technological capabilities and now has a new vision for the use of technology to support and measure the business of the office. DOAH had developed an integrated case management and reporting system which was able to generate routine judges' orders automatically, eliminating some of the tedium. In addition, the DOAH system images and stores the documents filed in a case, making them available over the internet to anyone who is interested. It was expected that the DOAH system would readily adapt to the OJCC and support the work of the offices.

The vision of the DOAH system for workers' compensation cases is sound, and it remains the long-term plan. In the short term, however, adaptation of the existing DOAH processing system to the much larger volume of paper processed by OJCC, compounded by the unexpected rapid rise in the volume of paper flow since the merger, is too

expensive to be implemented fully. Unlike the DOAH proceedings, which interest a broad range of people, in a typical workers' compensation case only the parties themselves are interested in seeing the file. Accordingly, the value of imaging every document and making it available online is lower in the case of OJCC documents, and OJCC is moving to adopt a document-information model in place of a document-image model. Instead of a four-page initial order, for example, parties will receive a postcard with the name of their assigned judge and a reference to a document (available on the web or in paper by request) containing the terms they must follow. Since the initial orders all say the same thing, except for the judge's name, it makes more sense to send it only when necessary.

The rulemaking process will implement other administrative measures that should reduce demands on the judges' time. For example, documents shall not be filed unless they request some specific action by the judge. Judges will not be asked to approve stipulations when they are made, only when there is a problem. Judges will not approve contracts of representation. Judges will be able, at their option, to rule on motions without necessarily holding a hearing. Of course, the authority to promulgate rules administratively is controversial, and the Workers Compensation Section of the Florida Bar has filed a proceeding in the Florida Supreme Court seeking to halt the administrative process. That action is pending at this time.

### **Unattainable Statutory Requirements**

The statutory time frames for mediation and final hearing are not realistic given the current staffing levels. These have been exhaustively addressed in the sections above and need not be repeated here. Other than those time limits, there are no other requirements that judges cannot fulfill.

### **Recommended Changes or Improvements.**

A number of measures for addressing the workload, and hence the timeliness question, are being implemented administratively as mentioned above. Improving office automation support and promulgating rules of procedure that minimize unnecessary paper handling are currently in process and expected to realize sizeable efficiency gains. There remain matters that require legislative action.

1. Change the venue provision to specify the trial shall be held in the district in which the claim arose, unless the Deputy Chief Judge orders otherwise. The existing venue provision is inflexible and results in multiple proceedings for the same worker-- sometimes even the same employer-- if different accidents occur in different counties. In addition, the current statute requires the judges to travel from county to county within their districts to hear cases, sometimes driving in excess of an hour each way to hear a fifteen minute case. It would be much more efficient and less costly to require the litigants to come to the judge, rather than vice versa.

2. Delete all requirements that judges approve stipulated attorneys' fees. The judges spend a lot of time approving attorney fee agreements between represented parties and that is not a proper function for executive branch judges. Only the Supreme Court has authority to regulate the practice of law, and the Florida Bar is the agent of the Supreme Court for that purpose. Requiring the JCCs to serve as a regulator of the propriety of attorney fees duplicates the function of the Bar and could lead to inconsistent results. More fundamentally, it is inconsistent with the model of impartial adjudicator to expect that the judge will protect a client from his own counsel in the context of a proceeding in which the counsel speaks for the client. The judges are nearly unanimous in concluding that this function is unnecessary, and ultimately ineffective in protecting the clients in any event.

3. Require Petitions to be filed first with the employer or carrier, and filed with OJCC only when the dispute is ready for OJCC action. The current procedure for presentation of claims and commencement of cases results in filing of a large number of petitions that never require OJCC action. The petitions nevertheless require processing by the clerk's office, assignment to a judge, some further processing by a judge's staff, the scheduling of a mediation conference, and mailing of notices. If the process were changed to require that a claimant must submit his or her claims to the employer or carrier first, giving a reasonable time to decide whether the claim is valid or not, the handling of unnecessary papers by the OJCC would be diminished. One suggestion is to prohibit filing of claims until after they have been presented to, and denied by, the carrier, either explicitly or by expiration of a 30-day period in which to act. It could facilitate electronic information exchange and thus lower OJCC's costs dramatically if it were required that *the carrier* file with OJCC the necessary information to commence adjudication of a claim it was denying.

4. Achieve a realistic match between performance expectations and investment in OJCC resources. At current demand levels, the Office of Judges of Compensation Claims is underfunded relative to any measure. Demand for its services have grown by 50% since 1998, largely due to robust job creation during Governor Bush's first term, but there has been no corresponding increase in resources. By comparison to the courts of the state, the number of cases per judge and cases per unit of population is much smaller than in OJCC. The same result obtains from a comparison to other large states' workers' compensation systems; California has about three times as many workers' compensation judges per unit of population. Under these circumstances, deterioration of promptness is mathematically inevitable, and erection of arbitrary time frames is no more effective than legislating a 26-hour day. While the improbability of obtaining increased funding for OJCC in a year marked by a number of high-priority contenders for each budget dollar is evident, it should be noted that funding of the OJCC is sole-sourced from the Workers' Compensation Administrative Trust Fund. Increasing promptness in adjudications would serve to reduce the cost of litigation currently paid off-budget by the same carriers who are assessed to replenish the trust fund. A clear example is afforded by the 2002 amendments and their "90 or private" mediation rule described in the next paragraph.

Nevertheless, since it may not be realistic to expect funding increases this year,<sup>2</sup> the OJCC requests that the legislature and Governor enact laws that would reduce the volume of cases and the number of documents per case that the OJCC is required to handle.

5. Revisit the 2002 amendments, in particular the “90 or private” rule. Under the rule, if a state mediator cannot hold a conference within 90 days of the petition, the carrier must pay for a private mediator. The rule is intended to advance promptness, but even if it does so, the inefficiency cost is tremendous. This simply drives the cost of most mediations off-budget, but it is paid by the same carriers who pay for state mediations via trust fund assessments. Since the cost of state mediators is much lower than that of private mediators, there would be substantial cost savings from employing more state mediators. While that would show as an expense on the OJCC budget, it would result in a corresponding (but larger) decrease in the private mediation expenditures of the carriers. Spending more in the OJCC budget would thus result in lower costs system-wide, without any reallocation of the burden of those costs. In addition, the rule has generated significant disruption in the OJCC’s mediation service, as one-quarter of the state mediators have resigned in anticipation of the rise in the cost of private mediation that would be expected when demand for the service is boosted by government action.

6. A more compact and transparent set of procedural statutory provisions would reduce litigation costs. The current statute has procedural provisions sprinkled throughout, and in some places procedural measures seem to be intended to bring about specific substantive results. If the law placed all the procedural provisions in the same part of the statute, and also was more explicit and broadly worded in granting rulemaking authority to the OJCC, the result would be better-understood procedures, reducing litigable issues. The OJCC is in the process of promulgating procedural rules, but the Office’s authority to do so is controversial. The Workers’ Compensation Section of the Florida Bar has filed an action in the Florida Supreme Court, challenging the OJCC’s authority to make procedural rules on constitutional and statutory grounds. Assuming the Supreme Court holds that the legislature may constitutionally afford the OJCC the authority to make procedural rules, it would still be beneficial to clarify the scope of the rulemaking authority by placing it in section 440.29 or 440.25 that pertain to procedure, rather than 440.45 that pertains to internal organization of OJCC.

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<sup>2</sup> The OJCC, through the Division of Administrative Hearings, requested a continuation budget for the upcoming fiscal year, not because additional resources are unnecessary, but because of the perception that the Governor and legislature would assign higher priority to the numerous other pressing issues the state faces in the current economic climate.

7. Authorize the office to institute a small filing fee to combat abuse. Currently, a minority of claimants or their counsel file an abusive number of petitions per case, since there is no disincentive to do so. To illustrate this, a list of the cases having the highest number of petitions was compiled, and the table shows the number of petitions filed in the cases having the most in each year. There are cases from the 1980s that have sixty or more petitions filed in them, and while it seems reasonable to expect that older cases might have more petitions, this does not appear to be driving the highest number of petitions per case in recent years. It is hard to imagine that 46 petitions would be necessary in one year in a case, but such a case was filed, repetitively, in 2002. The injury in that case was "I caught myself when falling through a test rack and twisted my back," potentially serious but not an unusual type of injury. It seems apparent that counsel would not file numerous successive petitions if there were some disincentive for doing that, and a small filing fee, not to exceed \$25 for a first petition and \$10 for subsequent petitions, would accomplish that. The fee could be reduced if the document is filed electronically, and waived for indigent pro se claimants. It is essential to the functioning of the filing fee that the funds not be recoverable as costs.

Year	Most Petitions Per Case
02	46
00	51
99	48
98	48
97	42
96	43
95	45
94	45

8. Authorize the Office to require electronic filing by counsel and carriers. The statute currently appears to afford litigants an option to file on paper or electronically, and given the volume of paper moving through the system, it is imperative that an effective electronic filing system be implemented. Litigants will adapt to electronic filing only when required to do so, or induced to comply by filing fees that are lowered for electronic transmission. Any authority to require electronic filing should be made contingent on establishment of open standards interoperability and public key infrastructure encryption.

9. Consider funding of the education and research functions that have been transferred to OJCC, or transference of those functions to another agency. The 2001 amendments expressly require the deputy chief judge to "establish training and continuing education for new and sitting judges," Section 440.45(3) Florida Statutes, and the current budget does not provide funding for the requirement. In addition, while the measurement and analysis of the performance of the judges and the OJCC as a whole is within the Office's current capability, the statute seems to imply that a broader analysis of the performance of the workers' compensation system is desired. At present, the OJCC is only equipped to assess the observable costs of the litigated cases, which should be a small percentage of claims if the system is working well. Determining how well the system is working, and how it could substantively be improved, requires collection and analysis of data from all the accidents, injuries, and claims, including the ones that never result in litigation. The OJCC is therefore not in the best position to gather or interpret that information. Currently, much of the data that is useful in a broader analysis is collected by the Division of Workers' Compensation, and it is respectfully suggested that the Division should be the agency making the broader substantive analysis of the system as a whole.

## Conclusion

The Office of Judges of Compensation Claims has been able to carry out its mission in fiscal year 2001-02, albeit with increasing difficulty. The most positive aspect of the office's performance has been the quality of results achieved by the two activity centers, mediation and decision of cases. The mediators have been able to finally resolve the cases of more than half the claimants who come before them, and have partially resolved a significant number as well, all at a cost much lower than the private mediation alternative. The Judges of Compensation Claims have enjoyed a strengthening reputation for fairness and impartiality, and the thoroughness and quality of their output has been praised by knowledgeable officials. The appeals court has affirmed their decisions in over 80% of appealed cases, and there are many more cases that are not appealed because even the losing party believes they are legally sustainable. The office is proud of the quality of its output, and is supported by every measure. Generating a high quality result takes time and attention to detail. This is true in connection with mediation as well as with trying and deciding cases. In the face of a rapidly growing volume of cases, at current staffing levels the only degree of freedom left in the system is in scheduling trials and mediations ever farther into the future. The delay in mediating and hearing cases is the most unsatisfactory aspect of the OJCC's performance currently, and unfortunately it can only be expected to deteriorate. Another effect of the rapidly rising workload is the increase in stress among the support staff, which is manifested by high turnover rates. It seems the OJCC serves as a training ground for entry- level support staff, who move into much higher- paying jobs in the private sector as soon as they become qualified.

The challenge the OJCC now faces is to reverse the trend toward longer times- to- resolution, getting cases mediated or adjudicated more promptly without loss of accuracy. It is expected that implementation of computer technology will help improve the timeliness measures, but in the face of dramatic increases in new filings it is unlikely the trend will be reversible at current staffing levels. Any change in the law that would result in a smaller number of disputes being litigated would be most welcome.

Respectfully submitted,

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Office of Judges of Compensation Claims  
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