WORKERS' COMPENSATION LITIGATION REPORT
FISCAL YEAR 2002-2003

Executive Summary

More than 150,000 Petitions for Benefits were filed with the Office of Judges of Compensation Claims (OJCC) during Fiscal Year 2002-03, an increase of 30.71% over the previous year. Last year, the relatively modest 18.76% litigation growth rate was seen as evidence the system was in crisis. This year's report, which pertains to the period after the Governor and Legislature started planning the reforms but before the reforms took effect, shows that the urgency of reform was not overstated. By improving its efficiency for the second consecutive year, however, the OJCC was able to absorb the additional volume with virtually no increase in resources. Remarkably, the Judges made provision for collection of at least $11 million—two thirds of its total annual budget—in delinquent child support arrearages deducted from the proceeds of case settlements.

FY 2002-03 Key Data Summary	Current Year 2002-03	Change From Previous
Petitions Filed	150,801	30.71%
State Mediations Held	29,253	7.19%
Mediations Resulting in "Washout" Settlements	8,121	1.11%
Mediation Continuances	2,755	-57.04%
Orders Approving Agreements	71,555	6.41%
Procedural Orders	94,177	11.56%
Final Orders Entered	2,762	15.47%
Trial continuances granted	6,507	-1.26%
Percent of Final Orders more than 30 days after hearing	12.20%	-1.10%
Child Support Arrearages Collected	$11,031,544	n/a

The past year was successful, but the future is uncertain. A 31% growth rate is not manageable—it corresponds to a doubling in volume every 2.6 years. Some increase in litigation would be expected from Florida's relatively strong economy and rising numbers of jobs and housing starts, but those factors explain only a fraction of the explosive growth of workers' compensation litigation. It remains to be seen whether the 2003 amendments will prove effective in reducing litigation to a sustainable level. Since the amendments did not take effect until after the fiscal year was over, it is too soon to tell.

The OJCC itself has been required to do more with less for yet another consecutive year. It has continued to increase its efficiency to the extent possible, and the empirical measures show there has been some degree of success in this regard. In every category, the output level of the office was higher than in previous years, with no increase in personnel. Fortunately, the vast majority of the 150,801 petitions for benefits filed fiscal year 2002-03 were settled between the parties. The 31 judges entered about 42,000 orders approving complete settlements, another 29,500 resolving the disputed parts of an ongoing case, and 2,762 final decisions on the merits.

The mediation service similarly saw increases in efficiency and improvements in timeliness measures, but the supply of state mediators is still far outmatched by the demand for their services. The mediation service has benefited from the 2002 statutory amendments, which erected more realistic time periods and provided an automatic (though costly) overflow mechanism. During the last fiscal year, the state's 31 mediators held about 29,000 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 time frame. Indeed, even the longer 90-day period for mediation provided by the 2002 amendments to Chapter 440 is unattainable with 31 mediators. The "90 or private" rule in effect during the most recent fiscal year required cases to be mediated privately if state mediators were not available to hold a mediation within 90 days of the commencement of the case. Private mediation has a higher percentage of case resolution success, but it is much more costly (over $500 per mediation compared to $135). It stands to reason that private mediation will be worth the extra cost in some circumstances, but the process the statute uses to determine which cases go to private mediation results in inefficient choices.

While it is impossible to directly measure the cost of litigation, the available data does indicate that attorneys' fees for defending claims totaled about $220,000,000, for the fiscal year, and reported claimants' fees amounted to approximately $205,000,000. The operating budget of the OJCC, including the mediation service, was about $16,000,000 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 $441,000,000, or roughly $2,900 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, identify some areas in which efficiency can be increased. The judges are increasingly efficient in handling cases, and use of information technology to reduce costs and increase performance continues. But the bulk of administrative measures that can improve efficiency will be exhausted during the coming year, as electronic filing systems are implemented. Considerable improvements in efficiency could still be realized by a few legislative measures. At the least, some apparently unintentional impediments to sensible case management that exist in the statute should be repealed; there are some new approaches that could increase efficiency as well. The system can do a much better job of giving prompt, accurate, and fair resolutions to benefits disputes with only minor procedural changes to the statute.

Office of Judges of Compensation Claims Annual Report 2002-03

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Foreword

This is the second report submitted since the 2001 amendments to Chapter 440 assigned the responsibility for record keeping and reporting to the OJCC, effective October 1, 2001. With the support of 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 development of one year's experience has two implications for the current reporting cycle. First, it is still the case that the only data that is retrievable from the system itself has been entered after October 1, 2001. Unlike last year's report, therefore, this report has a full year of data to analyze, without need for annualization or extrapolation. It is still the case that the ability to draw conclusions about trends is limited by the non-comparable nature of data generated before 2001. Second, experience has taught that some of the data definitions have needed to be reworked, so some of the data is not comparable even with prior year data contained in the same system. Accordingly, It is still true that this report is only slightly more than a one- year snapshot of the system's performance. As before, it is built from several sources, including the monthly reports the judges file with the OJCC, and self-reported data collected from carriers and other claims handling entities. No independent checking mechanism for the self- reported data exists.

Anatomy of a Workers' Compensation Claim[1]

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 in the Department of Financial Services (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.

[1] This section is unchanged from the 2001-02 annual report available at http://www.jcc.state.fl.us

When the petition is filed, the case is assigned by the Deputy Chief Judge of Compensation Claims (the statute actually directs the Chief Judge of Compensation Claims to assign cases but there is no such office) 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.

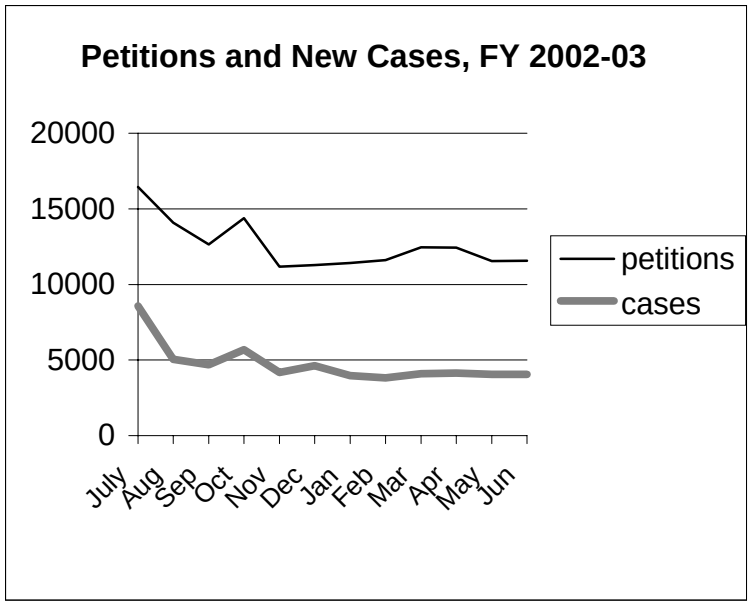
Discovery is the phase of the process in which each party discovers the evidence held by the other, or by third persons such as doctors or witnesses. In Workers' Compensation cases, a party may take depositions of potential witnesses, or may require production of documents from parties or nonparties. 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 judges. But trying and deciding cases is 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 has risen quickly, threatening the ability of the offices to attend to their primary functions.

When some of the management functions of OJCC were undertaken by DOAH pursuant to the 2001 amendments to Chapter 440, the original conception was to have all litigants file all the papers pertaining to every case in the central clerking office in Tallahassee. All papers would be imaged using high-speed scanners and made available on the Internet. Unfortunately, the system DOAH had developed for its comparatively low volume of cases (about 5,000 administrative law cases cases filed in Fiscal Year 02-03 with over 56,000 cases commenced in OJCC during the same period) was not scalable and in December of 2002 it was necessary to scale back the plan for budgetary reasons. Beginning in January 2003, only petitions, responses to petitions, and judges' orders were processed by the central clerking office. All other documents were filed directly with the assigned judge. Accordingly, there are no figures for the total volume of pleadings processed as there were last year. This graph displays the number of petitions filed and number of new cases filed for each month of the fiscal year.



The chart displays the effect of the 2002 amendments, which removed the requirement that a petition be presented to the Employee Assistance Office 30 days prior to its filing with OJCC. Prior to the amendment, cases that arose during June would have to wait until July to be filed. Thus, when the waiting period was eliminated July 1, 2002, the June cases that had been waiting out their 30 days could be filed immediately, and the cases that naturally arose during July could also be filed immediately. This led to an

expected one-time spike of nearly double the usual volume of petitions, followed by the expected stabilization, albeit at a higher rate than had been seen before.

There are 31 judges in the state currently. Each judge has an executive secretary, a district deputy clerk, and an administrative secretary. For organizational purposes, a mediator is attached to each judge, so there are 31 mediators. The larger offices have a receptionist or office manager, and there are three computer support field 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.

FY 2002-03 Judge Caseload Averages	
New Cases Per Month Per Judge	155.04
Petitions Per Month Per Judge	408.86
Petitions Per Case	2.72

Amount, cost and outcomes of litigation

The amount and cost of litigation in the Florida Workers' Compensation system are very high and their growth continued to accelerate during fiscal year 2002-03. As one would expect in a system that experienced a 30% jump in volume in just one year, the costs of the system have risen commensurately. 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. Yet the report for this year has some surprising results. Claimant counsel fees appear to have declined by an aggregate of about $18 million, while at the same time the reported defense attorneys' fees were dramatically higher. The increase in reported defense attorney fees is likely due to the new data collection approach used in this reporting cycle. Previously, carriers and claims handlers were requested to report their attorney fee data, but it was possible for entities who failed to report to simply be overlooked. For 2002-03, however, a tracking system, complete with online data submission form and verification, was in place. While it is still possible the reported figure is inflated by some fee payments being reported twice, it is likely that the large difference from higher number is driven by the underreporting of past years. The OJCC is currently considering methods to resolve the data reliability issue.

Attorneys' Fees Reported During FY 2001-02		
	Claimant Attorneys	Defense Attorneys
Reported Fees	$205,406,907	$220,044,685
Previous Year (Annualized) Fees	$222,960,917	$112,609,227
2000-2001*	$210,329,360	$100,100,000
1999-2000*	$222,690,750	$95,300,000
* data from the Department of Labor and Employment Security Workers' Compensation Litigation Report		

The claimant side attorneys' fees are similarly self- reported, but the requirement that a judge approve the fees and ascertain that a fee data sheet is submitted limits potential

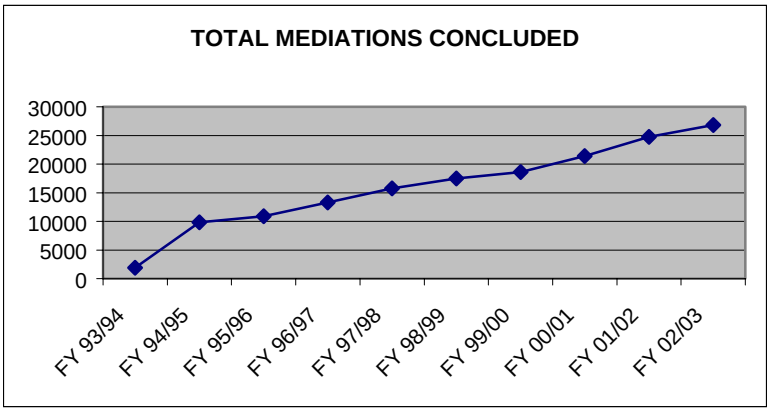
sources of bias. What appears to be a decline in the total amount of fees paid to claimants could in fact be a manifestation of underreporting. Or, it could be the case that the fee payments have actually declined by that amount. That would not seem consistent with the dramatic increase in the number of petitions field, but it certainly cannot be ruled out. These data reliability issues result from year-to-year incomparability and can be expected to subside as the same data collection process is employed consistently from this point forward.

The most common outcome of cases is settlement, as about half of the cases settle before mediation. More than half of the 26,741 mediation conferences concluded 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.

It is hard to characterize the outcomes of cases that are decided by Judges of Compensation Claims, because only rarely are single-issue claims tried, and it is not uncommon to have decisions favoring different parties on different aspects of the controversy. A claimant might prevail on one or more benefit claims but still consider the result an utter defeat. There is no system in place to capture the outcomes of these cases in the detail that is necessary to avoid misleading oversimplifications. Accordingly, the OJCC is currently implementing a system that will allow each class of benefit claim to be tracked individually, such that it will be possible in the future to identify how frequently, for example, claims for temporary total disability arise, how often they are granted, and how often denied, and whether this result is different in Orlando from Miami.

The Mediation Program

The state mediators concluded a total of 26,741 mediations statute during fiscal year 2002-03. The entire 8.1% increase in volume over the previous year represents an efficiency gain, since there was no significant deterioration in the quality measures, and no increase in personnel or resources. In fact, due to attrition as some state mediators left to take advantage of the private mediation market created by the 2002 amendments, and due to mediator Lawrence Langer's four months of service as Judge of Compensation Claims *pro hac vice* after a judge left to enter private mediation practice, the mediation service was actually staffed at a lower level during 2002-03 as compared to the preceding year.



Among the performance measures, the most critical—and historically the most troublesome—is timeliness. It is reasonable to expect a mediator to deliver at most 1,100 mediations per year, meaning that with 31 mediators the system wide maximum capacity is 34,100 mediations annually. And due to the lack of authority to deter last- minute cancellations, the actual capacity is somewhat lower. Because the demand chronically outstrips the supply, mediators were constrained by the laws of physics to schedule their mediations ever farther into the future. Mediations are required by statute to precede trials, so delays in mediation resulted in delaying the ultimate resolution of every litigated case in the system. In January of 2002, it took an average of 205 days from the filing of a petition to hold a mediation conference.

Some relief from the mediation bottleneck came in the 2002 amendments to Chapter 440, which provided that a case must be referred for private mediation if the state mediator would not be able to conduct a mediation conference within 90 days of the filing of the petition. The goal was to reduce the mediation delays that were inherent in the prior statutory scheme. The assumption was that a sufficient supply of private mediators would arise to meet the demand for mediations, such that all mediations could be completed within 90 days.

The scheme did advance its primary goal, but at substantial and perhaps unintended cost. On the positive side, the average time to mediation dropped substantially, albeit still short of the goal. A claimant could have his or her case mediated within four months instead of seven.

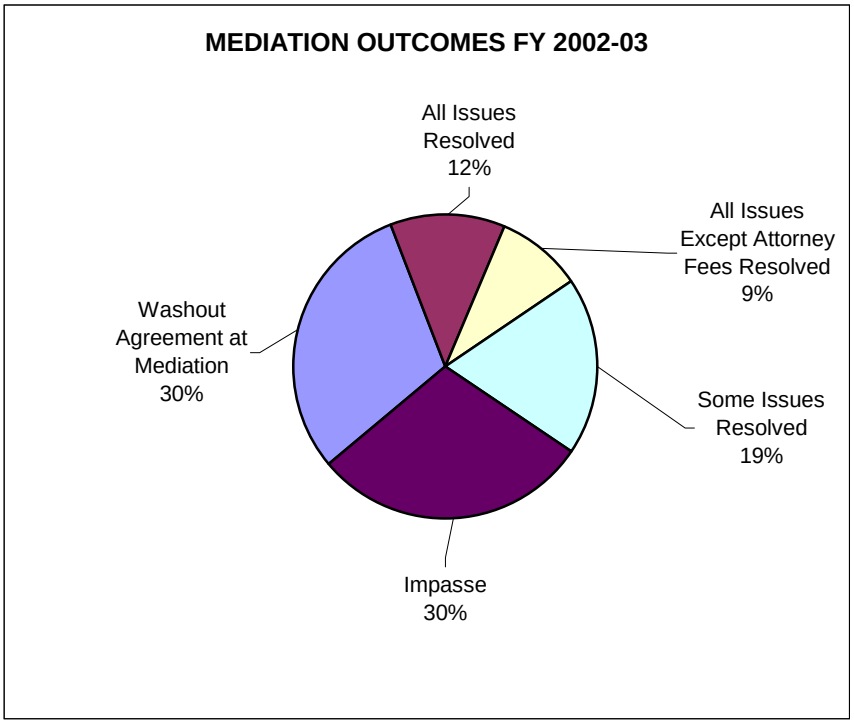
On the other hand, the cost of private mediation is high, and the supply of qualified mediators is limited. The price of private mediation predictably rose, and both of the Judges who resigned during the year opened private mediation practices, as did several of the state mediators. The mediators' fees for private mediation are four to five times what it costs the state to provide mediation on a case. And there were still not enough mediators available to get mediations done within three months.

Timeliness of Mediation	
Month Filed	Avg. Days to Mediation
Jan 2002	**205**
July 02	143
Aug 02	141
Sept 02	140
Oct 02	149
Nov 02	139
Dec 02	146
Jan 03	130
Feb 03	133
Mar 03	137
Apr 03	132
May 03	130
June 03	**120**

Without question, private mediation is the optimal choice in some cases, where the increased probability of a complete settlement makes the much higher mediators' fees worthwhile. But the present system sends cases to private mediators irrespective of the circumstances; carriers pay for private mediations even when there is no justification for paying the higher price. It would be much more efficient if the supply of state mediators measured up to the demand, so that private mediation was used only when the parties made a deliberate choice to encounter the higher cost because the case itself warranted it. Carriers pay for state mediations through their assessments to the Workers Compensation Administration Trust Fund, and they pay for private mediations by writing checks directly to the private mediators. With about 151,000 petitions filed in the year, there is demand for 1,804 mediations per mediator, assuming last year's average of 2.7 petitions mediated at each conference holds. The demand for state mediator time is almost twice the supply at current staffing levels. Of course, it still remains to be seen whether the 2003 amendments will yield a reduction in the levels of litigation, and it would thus be premature to increase the number of mediators to meet a demand level that may not be there next year.

Compilation of Data Reported by Mediators	2001-02	2002-03
PFB Dismissed	1,852	2,374
Settle Before Mediation	12,282	12,470
Washout Agreement at Mediation	8,032	8,121
All Issues Resolved	2,613	3,268
All Issues Except Attorney Fees Resolved	1,816	2,444
Some Issues Resolved	4,521	5,003
Impasse	7,751	7,905
No Appearance	1,723	2,062
Rescheduled	19,348	15,972
Privately Mediated	7,565	7,182
Recessed/Reconvened	2,557	2,512
Mediation Waived	345	675
Average Days to Scheduled Mediation	135	98
Mediated Within 90 Days	n/a	11,477

The mediators' performance on outcome measures remains strong and shows modest gains of the previous year. The chart and table are compiled from the mediators' statistical reports, and the results extracted from the scheduling system itself are not materially different. Overall, less than 30% of mediations result in impasse, compared to 31.3%



last year. In 51.7 % of the mediations, the parties resolve all the issues except attorneys fees, and in 42% they resolve attorneys' fees as well. The portion of cases in which the parties eliminate the prospect of any future litigation by entering into a "washout" settlement was 30.4%, down slightly from last year. 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 government. The state mediation program also seems to be cost- effective, as dividing the OJCC's budget allocated to the mediation service ($3,970,274) by the number of mediations held (29,253) results in a unit cost of $135.72 per mediation.

Case Resolution by Judges

The Judges of Compensation Claims continue to produce a high quality output despite the rising workload. The total number of final hearings held this past year was 3,337, up more than 10% over the previous year. What makes this rise in productivity remarkable is not the fact that the collective reversal rate has not increased, but the dramatic improvement in the time-to-hearing over last year. On two key measures the legislature has emphasized in years past, continuances and untimely orders, small but real decreases were accomplished.

The Judges of Compensation Claims continue to carry workloads among the highest of any state judges. The table shows the filings per judge and trials per judge for circuit courts and county courts, using 2001-02 data from the Office of State Courts Administrator, and for the administrative law judges, using data from the Division of Administrative Hearings database. The reliability of using the number of filings as a reliable basis for comparison is compromised by the fact that the consolidation rate in workers' compensation cases is likely much higher than in other civil cases. But some conclusions can still be drawn.

Comparison of JCC Workload to other trial level judges	Judges	Filings	Per judge	Trials	Per judge
JCC (FY 02-03)	31	150,801	4864.54	3337	107.64
ALJ exc Baker Act		3018			
ALJ-Baker		1890			
ALJ- total	35	4908	140	2599	74..26
County Court exc. traffic (FY 01-02)					
civil jury				115	
civil nonjury		444703		9031	
criminal jury				1548	
criminal nonjury		954035		6975	
County- total	280	1398738	4995.49	17669	63.10
Circuit Court (FY 01-02)					
civil jury				1402	
civil nonjury		186218		805	
criminal jury				3733	
criminal nonjury		179757		354	
total	509	365975	719.01	6294	12.37

The average consolidation rate in workers compensation cases is 2.7, and if the filings per JCC were divided by 2.7 it would still be far greater than the filings per administrative law judge or circuit court judge, and roughly the same as the filings in county courts excluding traffic offenses. Traffic offenses are excluded because it could not be determined how many are handled by traffic court hearing officers rather than county judges, but obviously if traffic offenses were included, the county court numbers would be much larger. Accordingly, in terms of filings, the county court judges appear to receive the most new cases by a sizeable margin, followed by the Judges of Compensation Claims, circuit court judges, and administrative law judges respectively.

Functionally, the Judges of Compensation Claims are not precisely analogous to any of the other categories of judges. Like the administrative judges, they are not members of the judicial branch, and they have limited subject matter jurisdiction. But they decide disputes that are between private parties and would otherwise be subject to common law. They are expected to process a large number of cases like the county court judges, but they have authority to award sums of money well in excess of the jurisdictional limit of the county court judges. And they face a mix of cases that range from the straightforward, single-issue case to the complex, multiparty, conflict-of-laws and scientific evidence case that takes a few days to hear.

Comparing the number of cases tried also yields an imperfect measure of relative workloads, because cases are not all the same. Litigants do not invest much time in trial preparation for low stakes cases, so those trials do not take as long or require as much post-trial work. The typical workers' compensation hearing is longer than a county court trial but not as long as a circuit court trial, where there is often a jury involved. The degree of complexity and quasi-judicial labor involved in an average workers compensation case is approximately equal to the average administrative law case, although the administrative law cases have a much higher variance: while some of them are very simple, a small number of administrative law cases (for example hospital Certificate of Need cases) are more complex than anything litigated before the OJCC. Nevertheless, trials per judge is a better measure of job demands than filings per judge, because it is not affected by rates of consolidation or settlement. Using this measure, the Judges of Compensation Claims hold by far the largest number of trials in a year, with an average of 108. Administrative Law Judges hold an average of 74 trials a year. County court judges hold an average of 63 non-traffic trials a year (plus an indeterminable number of traffic trials), and Circuit court judges hold an average of 12 trial per year. Despite the imperfection of the measures employed, therefore, it is easy to conclude that the Judges of Compensation Claims face workloads at least as demanding as those of any other judges in the state.

It remains true that the judges are limited by a number of external constraints that impair efficiency. The statute still requires as a practical matter that every case be handled in the full litigation mode, as the "expedited hearing" procedure is literally never invoked. The perception of the judges is that the appeals court still requires a lengthy explication of every piece of evidence accepted and rejected, resulting in orders that are unnecessarily time consuming to prepare and torturous to read. The District Court of Appeal in its case

of *Chavarria v. Selugal Clothing*[2] held that an order could be affirmed without explicitly addressing each piece of evidence, but the court also stated "we do note the obvious--the JCC who is thorough enough to note reasons for acceptance of certain medical testimony will make clear that he or she has not simply ignored contrary opinions. An order thus drafted should be well- provisioned for appellate review." As a result, most judges will continue to produce the lengthy and detailed orders that have historically been seen as necessary.

It is not, however, the writing of detailed orders that is the source of the most troublesome inefficiency in the OJCC. It is the extensive non-judicial labor imposed upon the judges by current practice. Judges are unnecessarily engaged in regulating the attorney- client relationship. Although the new rules have reduced the time spent approving the attorney's contract of representation, judges still must approve every fee every claimant's attorney receives. Similarly, even though the new rules provide that parties should not ask judges to routinely "approve" stipulations that govern the conduct of litigation, counsel frequently do so and judges frequently accommodate them. 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 improved markedly over the last year, this results primarily from opening the mediation bottleneck and from the judges placing increased emphasis on resolving cases quickly. As the volume of cases increases, however, it will not be possible to maintain the downward trend.

Last year, it was noted in the annual report that the existing structure of attorney fee payments gives counsel for both sides incentives to prolong litigation and make it more costly. The underlying incentives were addressed in the 2003 amendments, eliminating from the claimant's attorney's perspective the desirability of over litigating cases. Defense attorneys and in some cases carriers may still have incentives to prolong litigation, but at least now there will be someone (in addition to the judge) trying to move the case to resolution. As with the mediation service, only time will tell whether the 2003 amendments have the desired results, and it is too early at this point to recommend any changes in resource investment or in substantive policy, until the new statute is given a chance to work.

Administrative Measures Being Implemented

In August of 2002, the Division of Administrative Hearings (DOAH) and OJCC jointly commenced a rulemaking process implementing the 1994 and 2001 amendments which directed that rules for workers' compensation procedure were to be promulgated administratively by the OJCC. After a series of public hearings in various locations around the state, and active solicitation of the participation of the Judges of Compensation Claims and other interested parties, the new procedural rules took effect February 23, 2003.

[2] 840 So. 2d 1071 (1st DCA 2003)

Despite all of the controversy surrounding the administrative promulgation of rules, the new rules were not radically different from the previous rules that were drafted by the Bar and adopted by the Supreme Court. There were, however, a few changes that helped decrease the amount of non-judicial labor required of judges, and increased the flexibility afforded judges in conducting their cases. For example:

- Removed the provision for submitting contracts of representation to the judges for approval,
- Removed the requirement that hearings be held on every motion,
- Limited the practice of requesting that judges "approve" stipulations between the parties,
- Afforded judges control over the circumstances under which parties or witnesses could appear by telephone, and
- Provided for entry of a summary final order when there were no factual disputes requiring trial.

It is anticipated that the new rules will continue to reduce unnecessary work in the coming years.

On January 1, 2003, a Procedural Modification Plan was implemented to reverse the growing overbudget condition resulting from the implementation of a labor- intensive system for processing documents. When the OJCC was merged with DOAH, attempts were made to deploy a process model which had worked well for the small, centralized, low volume administrative law agency. Unfortunately, the system was not scalable and did not function in the context of the large, high-volume, decentralized OJCC. What resulted was the disruption of a surprisingly efficient, if inelegant, system for adjudicating large numbers of cases, and labor expenditures significantly in excess of budgeted amounts.

Under the original conception, every document filed in every case was to be sent to a central clerking office, where one worker would open the mail and stamp the document received. A second worker would then prepare the document for scanning, by redacting the social security number and other non-public information and removing any staples. A third worker would load a batch of documents into a high-speed scanner and capture an electronic image of the batch of documents in a computer. The fourth worker would separate the batch of documents on the computer back into the original documents, and the fifth worker would check the computer image against the paper document. A sixth worker would then read information from the image and type the information into the database application. A seventh worker would then either mail the documents to the assigned judge, or dispose of them. If the document being processed was a petition, an initial order assigning the case to a judge was printed and mailed to all parties. Meanwhile, the litigants were required to mail a copy of each document they filed to the assigned judge, whose staff would receive, docket, and file the copies. The essential part of the work being done in Tallahassee was being duplicated in the district offices.

By October of 2002, the volume of papers being processed in the assembly-line fashion exceeded 65,000 per month, and despite hiring evening and weekend shifts the backlog

continued to grow. The additional labor cost resulted in a projection over nearly $800,000 over budget. The Deputy Chief Judge of Compensation Claims formulated the procedural modification plan and advocated its adoption, which gained consensus in November 2002.

The procedural modification plan implemented two primary principles. First, each paper would be processed only once, in the location that would have a comparative advantage. Petitions and Orders would be processed in Tallahassee, and the remainder of the documents would be filed with the assigned judge. Second, a document information model would displace the document image model. That is, the emphasis would change from storing pictures of paper documents to storing the information contained in the documents. For example, storing a picture of a three-page Notice of Mediation Conference is entirely unnecessary when the only function of that paper is to specify the time, date, and place of the conference. In practical terms, that meant that instead of running every Notice of Mediation Conference through the seven step imaging process, a docket entry would record the date and time of the appointment and the notice itself would exist only in the judge's file.

On January 2, 2003, the OJCC sent a notice detailing the procedural modification plan to every attorney, carrier, or unrepresented party that had a case pending. Parties were advised that it would no longer be necessary to file every document twice. The volume of paper moving through the system was literally cut in half overnight. There was no change in the practice at the judges' offices, since they had been receiving and filing the paper pleadings all along. The office did lose the benefit of having every paper available on the Internet, but the petitions and orders were still viewable.

As the plan took hold, the temporary workers who left were not replaced and the labor cost declined significantly. It was still necessary to seek a budget amendment for the excess funds that had been spent in the last half of calendar year 2002, and on April 1, 2003, a budget amendment in the amount of $380,000 was approved.
After reducing the OPS labor contingent to the point where it was sustainable within budget, some further efficiency gains were necessary in order to keep up with the reduced volume of paper processing. A business process modeling study was conducted, leading to the formulation of a three-part strategy: first, replace the assembly line paper processing approach with a regional accountability model; second, use direct data transfer to the U.S. Postal Service for high volume mailing, and third, propel the electronic filing project toward the anticipated launch at the beginning of 2004.

The regional accountability process is simple. Every clerical worker in Tallahassee is assigned to support one or more of the district offices. When mail comes in, it is sorted according to the district office where the case is pending, and the clerk assigned to that district is responsible for its timely processing. This process not only reduces the number of workers who need to handle a document from six to three, it has the added benefit of developing persistent working relationships between the central clerking office workers and the personnel in the district offices. Productivity per person has risen measurably since this organizational structure was adopted.

In studying the office's business process model, it became evident that there were a few functions that were repetitive and ripe for automation. In particular, every time the OJCC opens a new case, it sends out an initial order advising the parties which judge has been assigned to the case. And since scheduling a mediation in each case is a legal requirement, a notice of mediation conference is sent out in each case as well. The district offices had been sending out Notices of Mediation Conference, and it was estimated that 40% of the 31 mediation secretaries' time was spent generating and mailing these notices.

Since the data necessary to generate the initial orders and the mediation notices was entered into the case management system, the solution was to have the system transmit its data directly to the United States Postal Service. The USPS Mail On Line service receives the data, prints "mail merge" documents, and delivers them, all for a cost less than postage alone. For mediation notices and initial orders, it was decided that postcards would sufficiently convey the necessary information; accordingly mailings that had previously cost over $1.00 per unit were reduced to $0.24 per unit, including printing, postage, and handling. The process is not fully automated: one employee in Tallahassee spends less than two hours each morning downloading the data to the Postal Service's website. But that replaces 31 secretaries spending almost half their days mailing the notices. And the service has proven very reliable and effective, saving about $0.75 on each of over 200,000 mailings per year. For fiscal year 2002-03, the system was not implemented until the last quarter, but during that period alone 38,574 mediation notices and 17,331 initial orders were transmitted via the Mail On Line service.

Automating the mediation notices also freed up the time of the mediation secretaries. Toward the end of the fiscal year, the position of mediation secretary was eliminated and a new position at the same pay scale, titled District Deputy Clerk, was created in each judge's office. The judges' case management process is highly paperwork intensive, and the mediation service is relatively less so. Accordingly, it was beneficial to refocus the support staff on the processing of cases and their papers, although the judges still remain able to assign administrative support to the mediators as they see fit.

The final phase of the efficiency improvement strategy is deployment of an electronic filing system that integrates into an issue-level tracking case management system. When the system is fully operational, litigants will submit all their documents to the OJCC via the Internet. All of the submitted documents will be processed electronically, with clerical staff only reviewing the documents and docket entries for appropriateness.

The key to the updated system is issue-level tracking. Historically, acquisition of data about cases for both management and system evaluation purposes has been impaired by the multifarious nature of workers compensation claims. Unlike other varieties of litigation, in workers compensation various issues can be raised and dispensed at various times, because a worker's recovery from an accident is ongoing and unpredictable. For example, a worker by definition is unable to successfully attain both temporary total disability (TTD) benefits and permanent total disability (PTD) benefits, because the

categories are mutually exclusive for any given time period. But the same accident could give rise to a period of eligibility for TTD and a subsequent period of eligibility for PTD. Accordingly, if the OJCC tracks data at the case level, it loses a lot of information that would be useful in managing cases, and in responding to the legislature's request for data and analysis.

The answer is to track each issue raised in each case separately. While this does involve a certain amount of expense, the investment will repay itself in terms of better information for managerial and analytical purposes. One petition may raise issues of TTD, medical authorization, and attorneys' fees, and the judge (or the parties by agreement) may resolve the different issues at different times. Accordingly, the OJCC defines a "case" as an individual worker's individual accident, as identified by the date the accident occurred. Multiple petitions can be filed in each case, and each petition can contain multiple issues. So a petition is just a container for a set of issues, and a case is a container for petitions. The action each judge is ultimately expected to take on a case is defined by the set of issues that have been registered.

Tracking issue-by-issue requires a reliable way to record when an issue is added to, or deleted from, a case. This is why electronic filing is an essential element of the planned approach. The issues that can be raised have been enumerated in a taxonomy of issues, identified by a general type of issue (i.e. Monetary Disability Payments), a subtype of issue (i.e., Temporary Total Disability), and issue details (the period for which the claim is made and anything else the claimant wants to say about the issue).

The electronic filing forms use standard Adobe PDF documents. A filer finds the appropriate form on the OJCC website, fills in the information directly in his/her own browser, and submits the form to OJCC by clicking a button on the form. The OJCC web server then records the submission and returns a confirmation—consisting of the original document with an electronic time/date stamp—to the sender's browser. The sender can print the confirmation or store it in his/her electronic file. High-volume senders who want to integrate the OJCC process with their internal management systems can obtain technical specifications from OJCC, which their programmers can use to create direct data transfer interfaces.

For Petitions, the statute still requires a separately signed document in the file, so it is necessary for a claimant to sign the confirmation document and deliver it to the office of the assigned judge, who will verify it has been signed and activate the case. Claimants or counsel who lack Internet access are referred to the nearest location of the Employee Assistance Office (EAO) maintained by the Division of Workers' Compensation in the Department of Financial Services. The OJCC and EAO are in the process of providing public access to computers provided by the OJCC in the offices of the EAO, where trained specialists can assist any employees in filing their petitions.

The bulk of the documents normally filed in the course of litigation do not directly change the set of issues that are pending in a case, and so the case management system needs only to record the type of document that is being filed, its filing date, and the

location (URL) on the Internet where it can be viewed and/or printed. Thus, for documents other than petitions, responses, or stipulations affecting the issue set, all that is required is to submit the document in PDF format as an attachment to an e-mail message sent to the OJCC filing address. If the e-mail is properly formatted, the document will be automatically routed to the proper URL for filing, and the docket entry will be created, all without human intervention.

The efficiency gains from this system —for litigants as well as for the OJCC—will be tremendous once full adoption is realized. Freed of menial clerical tasks, OJCC staff will be refocused on matters requiring human judgment and delivery of customer service will improve dramatically. While the system has been carefully designed to operate alongside with the paper-based system now in place, it will make it possible for judges' offices to cease keeping paper-based files for new cases as soon as they are comfortable doing so. The paper files' storage and retrieval costs will decline over time to almost zero.

The most immediate benefits to the litigants will be the reduction in postage costs and the elimination of delay. Documents filed in the current paper system require an original mailed to the judge, and copies to the other parties. Under the electronic system, the document is e-mailed to the OJCC at zero marginal cost, and the OJCC server forwards the document (or more precisely, the Internet address where the document can be viewed) to every other party. Service is automatic and there is an electronic record, eliminating the need for certificates of service.

Another benefit of integrating electronic filing with the case management system will be accurate, instantaneous data for management purposes. For example, it will be possible to say with a high degree of confidence how often petitions are filed for medical benefits only, or how often settlement amounts exceed $250,000. In total, the benefits of the issue level tracking system will far outweigh the incremental costs. The bulk of the investment in computer hardware has been purchased over the preceding two years, so very little new investment is necessary. The costs, therefore, are limited to ongoing software development and the cost of the transitional process, which are already accounted for in the budget. For a time, the old and new systems will need to run side-by-side to make sure the new system reliably gives the same results. During that time, the residual costs of the old system will continue to be in effect, and the costs of the new system will be paid as well. But the transition is planned to end by July 1, 2004, and thereafter the direct costs will decline substantially.

A note of caution is in order. Once the new system is fully implemented, the OJCC will have deployed every high-yield efficiency improvement measure that exists. Further efficiency gains will result from fine-tuning of existing processes, but the dramatic efficiency gains that enabled the office to absorb a 30% workload increase on top of a 20% increase cannot be expected to continue into the future. As mentioned in the introduction, if filings continue to increase at the same rate, the volume of work will overwhelm the efficiency gains within one or at most two years. Of course, if the 2003 amendments have the intended effect, the volume of litigation will actually decrease and the system will stabilize.

Unattainable Statutory Requirements

Over the last fiscal year, the statutory time frame requiring 90 days to mediation was not attainable, despite the existence of the automatic overflow mechanism erected by the 2002 amendments. On the surface, it would appear that directing every case to secure private mediation if the state mediator was not available within 90 days would result in mediations consistently occurring within that period. But (1) the statute did not provide any consequence for the failure of the parties to complete mediation within 90 days after being directed to do so, and (2) the supply of private mediators was not sufficient in some parts of the state to conduct the mediations within the specified time. This should not be an issue in Fiscal Year 03-04, however, since the 2003 amendments extended the period to 130 days, and most jurisdictions are able to deliver a mediation (public or private) within 130 days.

The statutory time frame for bringing cases to final hearing is unintelligible and thus difficult to satisfy. The 2003 amendments inserted "allowing the parties sufficient time for discovery" to qualify the requirement that a hearing be held within 90 days after mediation, converting what was an objective, quantifiable standard into something that is not a standard but a vague direction. Similarly, providing that " the claimant may waive the time frames within this section for good cause shown" seems internally inconsistent, since using the term "claimant may waive" typically means the claimant has a choice, but the phrase "good cause shown" would seem to deny the claimant the same choice.

Recommended Changes or Improvements

The OJCC recommendations for legislative action are largely unchanged from last year. While it is recognized that the substantive reforms were necessary in order to avert a deepening crisis, the procedural components of those reforms were both insubstantial and unhelpful in terms of improving dispute resolution. The following measures which need to be addressed should not materially alter the balance of interests, and should improve efficiency, timeliness, and accuracy.

1. **Venue.** Current law requires that a hearing be held "in the county where the accident occurred" unless the parties otherwise agree. When a claimant has two or more accidents in different counties, this provision prevents consolidating the cases unless the parties agree, which they sometimes do not. This is not only inefficient, but it creates the risk of inconsistent adjudications. 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. All this is easily fixed by deleting statutory references to where the hearing must take place and allowing the OJCC to determine the most equitable and efficient location by rule or order.

2. **Attorneys' Fees.** The 2003 amendments have eliminated discretion to approve attorneys' fees in excess of the statutory schedule, and there is no reason to refuse to approve fees that are within the schedule. Accordingly, the requirement that attorneys' fees be approved by a judge is an anachronism, inconsistent with the attorney fee scheme in the current law. It is not an application of discretion or judgment, but rather an automatic function. Approval of fee stipulations is very time consuming, and we want the judges spending their time on things that require judgment. Accordingly, the legislature is requested to delete all requirements that judges approve stipulated attorneys' fees, or in the alternative, delegate this function to the mediators instead of the judges. Under current law, when represented parties reach a washout settlement, the judge has no authority to disapprove the substantive terms of the settlement, but is limited to determining whether to approve attorney fees and ascertaining that proper provision has been made for any child support indebtedness that exists. In cases where the claimant's attorney certifies there is no child support indebtedness, there would be no need for judge involvement in a settlement if the unnecessary requirement of fee approval were deleted. Some have claimed the fee approval provision is necessary to protect claimants, but 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. **Petitions.** 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 14-day period in which to act.

4. **Time frames.** 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. The stakes in most workers' compensation disputes are sufficiently high that they exceed the jurisdictional limit of county courts, and would thus be adjudicated in the circuit courts if not assigned to the administrative system of the OJCC. But the JCCs try nine times as many cases per judge per year as the circuit courts, and one and one-half times as many as the DOAH administrative law judges. Currently, the delays in the system are contrary to its fundamental purpose. A system that purports to provide income replacement benefits promptly after a job- related accident simply cannot do that when it accepts a 130-day wait for a mediation followed by a 90-day wait for a hearing. In order to meet a 90-day hearing time frame, 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. It is recognized that the 2003 amendments, are intended to reduce the volume of litigation, and if this occurs, the OJCC will improve its time performance to the extent possible.

5. **Expedited Hearings.** The current law's expedited hearing procedure[3] is potentially valuable but currently useless. Because it essentially requires parties to stipulate in advance that the case is worth less than $5,000, it is never used. The result is that all cases, even those with very low stakes or very high urgency, are placed on the long full-litigation track, taking at least 180 days to get to hearing. Cases should be presumed to be small until shown to be large, not vice versa. One change that could profoundly improve the flow of cases through the system would be to eliminate the $5,000 limit for the expedited hearing track.

6. Rulemaking Procedure. 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 contradicting others. 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 has promulgated procedural rules, but the Office's authority to do so remains controversial. The Supreme Court dismissed without prejudice the action filed by the Workers' Compensation Section of the Florida Bar, challenging the OJCC's authority to make procedural rules on constitutional and statutory grounds. Yet the Florida Bar Workers' Compensation Rules Committee continues to refuse to recognize the authority of the OJCC to make procedural rules for workers' compensation cases, and is proposing an entirely different set of rules to the Supreme Court. Evidently, 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. In addition, express authorization to delegate certain functions, such as approval of settlements, to mediators would improve the efficiency of the office.

7. **Filing Fee.** 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,

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

[3] Section 440.25(4)(h), Florida Statutes (2003)

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, applicable only to petitions after the first one, 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.

8. **Electronic Filing.** Expressly authorize the Office to require electronic filing by counsel and carriers. While arguably this can be accomplished with rulemaking, explicit statutory authority would eliminate the uncertainty that might exist if the rules were challenged in court. 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.

9. **Education.** Consider funding of the education and research functions that have been assigned 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.

Conclusion

The Office of Judges of Compensation Claims has been able to carry out its mission in fiscal year 2002-03, attaining performance gains in the face of greater-than-expected increases in the volume of work. The quality of results achieved by the two activity centers, mediation and decision of cases, remains high. But the most remarkable development of the past year is the collection of two-thirds of the OJCC's entire budget in the form of child support allocations recovered from claimants who were settling their cases but had unpaid child support obligations.

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 although it has been improving due to efficiency measures recently, it can only be expected to deteriorate if the volume continues to increase at current rates. 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 maintain its current level of service during the disruption associated with changing to a new filing system, and during the time it will take for the effect of the 2003 amendments to be realized. If the new statute is not voided or eviscerated by the courts, a decline in the volume of litigation – or at least a slowing of its rate of increase—can be expected. Most provisions of the 2003 amendments will only apply to accidents occurring after October 1, 2003, so it will be at least a year before the "new law cases" make up a detectable proportion of the overall case mix. As noted in this report last year, the ability of the office to continue its performance level depends on legislative action that stems the rising tide of cases. The Governor and Legislature rose to the occasion and passed a law that has some prospect of providing the needed relief. Over the next two years, we will learn whether the new law is having its intended effect.

Respectfully submitted,

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Office of Judges of Compensation Claims