State of Florida, Division of Administrative Hearings
Office of the Judges of Compensation Claims
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WORKERS' COMPENSATION LITIGATION REPORT
FISCAL YEAR 2004-2005

November 1, 2005

Executive Summary

FY 2004-05 Key Data Summary	Current Year	Change From Previous
Petitions Filed	107,268	-15.84%
State Mediations Held	26,410	-5.92%
Mediations Resulting in “Washout” Settlements	7,081	-3.15%
Mediation Continuances	3,333	63.70%[1]
Orders Approving Agreements	60,464	-10.04%
Procedural Orders	75,958	-11.09%
Final Orders Entered	2,606	-15.80%
Trial continuances granted	5,094	-24.35%
Orders Entered Untimely (% of final orders entered)	20%	-4%
Petitions Timely Mediated (%)	86.00%	20.41%
Average Days From Filing To Hearing	208	0.97%
Child Support Collected	$8.23m	-10.64%
Attorney Fees-Claimant	181.14m	23.44%
Attorney Fees-Defense [2]	217.10m	-6.12%
1.Change in scheduling method 2. Includes estimation for known unreported data		

In every respect but one, the past year has been very good. The Office of the Judges of Compensation Claims (OJCC) maintained a high level of productivity, well under budget. It is estimated that just over half of the full litigation cost reduction effect of the 2003 amendments has been realized in the most recent fiscal year, and by the end of FY 2005-06 the bulk of the cost reductions from the new act will have been experienced.

The attorney fee limits in the 2003 reforms have been spectacularly successful in reducing the volume and cost of litigation, with new filings declining by about 30% since the law took effect. The gains are jeopardized, however, by some attorneys’ efforts to restore their revenues by circumventing the new law. For the most part, the judges have remained steadfast in enforcing the new limits, but that has resulted in several documented instances of lawyers making false, defamatory personal attacks on a few judges, with the intention of intimidating all the judges. Not only has the Florida Bar failed to take

any action to stop this unscrupulous conduct, its Workers Compensation Section actually participated in one of the false attacks.

This year, the offices began to eliminate the backlog that had built up during the time when the structure of the attorney fee law provided an incentive to litigate extensively every issue, including those involving minimal stakes. The current petition volume is still higher than in 2000-01, but is almost 30% down from the peak in FY 2002-03 that led to the reforms.

When the reforms were implemented, it was recognized that they would take some time to work, because they would only affect accidents occurring after October 1, 2003. Fiscal year 2004-05 was thus the first full year the new law was in effect, and the first year when its effects began to be felt substantively. Last year, there was a decline in new case and new petition filings, but little decline in workload at the OJCC as the previous high rates of litigation had created backlogs of work in most districts. This year, by contrast, the workload shows signs of easing. By next year, the backlogs will be eliminated in most of the districts except Miami.

With the lower volume of new work coming in, the offices have been able to meet statutory timeframes for mediation and final hearings in the majority of cases Average times to hearing have remained steady at levels well within the statutory specification. Operationally, the OJCC was able to carry out its mission and, unlike in years past, does not report increasing difficulty. As in the previous year, the OJCC finished the fiscal year under budget by about $300,000, and collected more than half its $16 million budget in delinquent child support, totaling $8,238,113,.

Sadly, the OJCC for the first time this year is requesting the legislature take action to curtail the unethical behavior of attorneys who appear before OJCC. Chapter 440 puts the judges in the role of policing attorney fees, so a judge must reject a fee proposal that all the parties have agreed to, if it would exceed the limits. As a result, Judges have always been subjected to pressure to approve fees higher than what the law allows. But never before have the attorneys accused judges of corruption—of "fabricating evidence" and "falsifying records," of "directing" other judges how to rule, or of letting others "dictate" how they would rule. In FY 2004-05, some attorneys—including some among the Bar Section's leadership—decided to turn up the pressure on the judges. At every nominating commission meeting held during the year, one of the judges was put through the misery of defending against the worst sort of allegations that could be leveled at a judge, all of which were ultimately shown to be not just false but fabricated. The obvious objective was to intimidate the other judges into ruling the way the lawyers want. And what they want is to gut the attorney fee limitations that are the core of the 2003 amendments' cost reduction strategy. If that succeeds, all of the cost gains chronicled in this report will be reversed.

In summary, the 2003 amendments continue to result in declining litigation costs as new act cases constitute and ever-increasing part of the case mix. In 2004-05, the OJCC began clearing out a backlog of cases that built up when attorney fees often amounted to 40% of

the clients' recovery, and for the most part the judges now strictly enforce the 2003 reforms. Individually and collectively, the judges have endured ugly backlash from enforcing those attorney fee limits. For the first time this report asks the legislature for increased protection of the judges' physical security and reputational integrity. As the Governor wrote in July 2005, there seems to be a "shortage of effective policing of lawyers in some districts."

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Foreword

This is the fourth 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 development of four years' experience has two implications for the current reporting cycle. First, the data that is retrievable from the system itself has been entered after October 1, 2001. With three years of data to draw from, some conclusions about short-term trends are now possible, though it would be premature to try to make longer- term projections. Second, experience has taught that some of the data definitions have needed to be reworked, so some of the data is not comparable with prior year data contained in the same system. This is especially true since this year the data set is drawn exclusively from the case management system, as individual judges' self-reported results are no longer collected. The changeover to the all-automated data collection procedure has brought some data definition and collection problems to light, particularly as respects timeliness measures. The event that ends a case, petition, or issue is not precisely tied to the case, petition or issue so that its duration can be assessed perfectly. For example, when five petitions are filed in a case, and the first three are resolved while the last two remain pending and were tried at a later date, the measurement of how long that case was open is not clear. Assumptions need to be made in order to prevent an old, resolved petition from being counted as the starting point for measuring a time period; these procedures for trimming outliers may on occasion reject some data that legitimately belong in the sample. Accordingly, measurements of time periods are estimates, believed to be accurate but unaudited.

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 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.

When the petition is filed, the case is assigned by the Deputy Chief Judge of Compensation Claims to one of the judges according to a pre-determined process depending on 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.

When a Petition is filed, the OJCC automatically sets a mediation conference for it, if there is a state mediator available to hold a mediation within the 130 day period provided by statute. If there is no state mediator available within that time, the parties are immediately advised that a private mediation will be necessary.

A mediation conference is required in most cases before a claim can go to trial. The mediators 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.

One lingering misconception about the OJCC is that it is somehow connected with the Division of Workers' Compensation within the Department of Financial Services. The misconception results from the fact that the OJCC was part of the old Department of Labor and Employment Security prior to October 1, 2001. At that point, however, the OJCC was separated from the administrative agency and made a part of the independent adjudicating agency, the Division of Administrative Hearings (DOAH) which is located organizationally within the Department of Management Services. Thus, while OJCC maintains a cooperative working relationship with the Division of Workers Compensation, it is organizationally and functionally distinct. In particular, functions that pertain to tracking of injuries and payments in the absence of a benefit dispute are not within the scope of OJCC. The function of OJCC is limited to resolution of justiciable disputes and the matters ancillary to that responsibility. There would be obvious efficiency gains from having the OJCC co-located with the Division, or having them be part of the same department, since the current structure requires two sets of records to be maintained for each claimant. And if the OJCC cannot rely on social security numbers to identify claimants as it has since 1955, it may be unable to link the OJCC file to the Division file, so all information would need to be entered manually a second time. The obvious solution would be to have the OJCC be housed by the same department that houses the Division.

Unfortunately, the development of Florida's workers' compensation system has not led to clarity in the definition of the role of the judge in the system. The overtly paternalistic tone of earlier incarnations of the statute remains in practice, even though the legislature has removed the associated language from the Laws of Florida. As a result, the judges are required to "approve" various acts of the parties, for no apparent reason, and they are expected to enter orders directing parties to comply with their own agreements. A large portion of the time of the judges and their support staff personnel is consumed with these labors that are outside the usual concept of adjudication.

There are 17 OJCC offices, ranging in size from five judges in Miami to single-judge offices located in Pensacola, Panama City, Tallahassee, Gainesville, Daytona Beach, Melbourne, Ft. Pierce, Lakeland, Sarasota and Ft. Myers. Orlando, Tampa, West Palm Beach and Ft. Lauderdale have three judges each, and there are two judges in Jacksonville and St. Petersburg. Altogether, there 31 judges in the district offices, and one mediator is assigned to each judge. Each judge has a deputy clerk, responsible for

receiving and docketing the pleadings and orders produced during litigation of the judge's cases. In addition, two secretarial assistants provide support for each judge-mediator team.

The central office located in Tallahassee is responsible for receiving and processing Petitions for Benefits and all of the Orders of the judges, as well as general administrative support. Core administrative services such as general management services, Information technology Management, Personnel Administration, Purchasing, and Budget are provided by DOAH professional staff, freeing the OJCC to operate with a very lean and flat organizational structure. Aside from the Deputy Chief Judge responsible for OJCC, the only other administrative staff directly employed by the central office are the senior analyst, Cindy Wingler, and the Staff Counsel, Walter Havers.

The OJCC is operationally headed by the Deputy Chief Judge, who is headquartered in Tallahassee. The Deputy Chief Judge hears some cases when it becomes necessary due to recusal or a vacancy in the office. The Deputy Chief Judge reports to the Director of the Division of Administrative Hearings, who retains significant statutory authority over OJCC matters.

A significant function of the OJCC is promulgating procedural rules governing adjudication of workers' compensation cases, as mandated by section 440.45(4), Florida Statutes. In its first exercise of the rulemaking authority, DOAH and OJCC promulgated rules of procedure for workers compensation adjudication effective in February of 2003, and codified at Chapter 60Q-6 of the Florida Administrative Code. Those rules have been observed in practice, and cited as authoritative by the District Court of Appeal. In December of 2004, the Supreme Court abolished the previous body of rules adopted under its authority.

For future rule changes, the Director of DOAH has appointed a panel of Judges, attorneys, and other persons to serve on the DOAH-OJCC Rules Committee. The new committee will meet to propose changes in the rules, to receive proposals from the general public, to discuss proposed changes, and to make recommendations for rule adoption by the Director of the Division of Administrative Hearings.

The last function of OJCC worth mentioning is the development of the Electronic Judges of Compensation Claims (E-JCC) system, in keeping with Governor Bush's E-Government initiative. 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. While it proved impossible to implement that vision immediately given the level of resources available, it remains the long- term vision of the OJCC with one important exception. Over time, every document filed with OJCC will be rendered and transmitted electronically by the filing party, with copies transmitted to other parties electronically as well. The E-JCC system currently under development will route the document for appropriate handling and transmit the results to

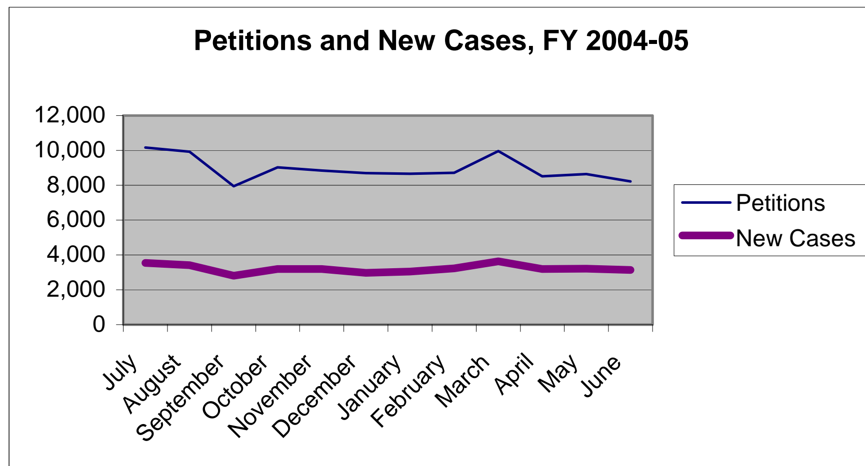
the parties, again by electronic means. The end result will be dramatic savings in terms of both time and dollars, and more importantly, the degree of accuracy will be increased significantly. The past year was a frustrating time in terms of development of the system, with disastrous security breaches in the computer system, an "upgrade" of the Microsoft products that erased the entire email server with no backup having been made by the DOAH technical staff, and the continuous diversion of resources to other priorities. The amount of potential savings of both time and money if the job were actually completed would justify the legislature in privatizing the development of the E-JCC system.

Measures of the OJCC Workload and the Impact of the 2003 Amendments

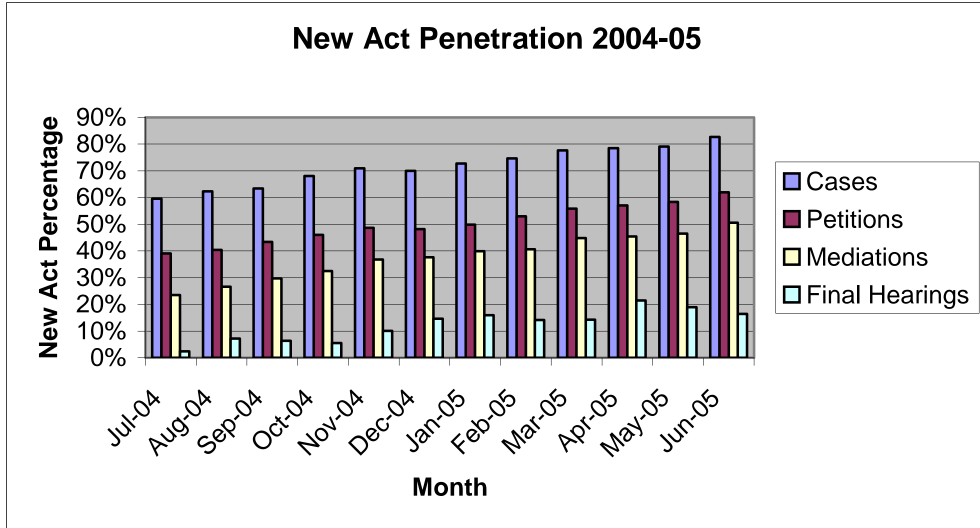
The number of Petitions for Benefits filed remains the standard leading indicator of the OJCC future workload. Roughly speaking, the petitions last year are a good indication of how many cases needed to be processed this year. It is not a perfect measure because the petitions are usually moved along on a half-year cycle, but it has in the past proven useful for planning purposes.

The petitions are documents that initiate litigation, and while they require little effort in the first three months, a mediation conference is held in the fourth month, and the final hearing is required by the end of the seventh month. In practice, however, the claimant is entitled to waive the time limits, and this often occurs. Further complicating matters is the fact that a claimant need not wait until one petition is resolved before filing another; if a new claim to benefit entitlement arises during the pendency of a case, the claimant simply files another petition. Accordingly, the lag between a change in the number of petitions filed and the volume of work performed in the OJCC offices is more on the order of eight months on average.

For FY 2004-05, the total number of petitions filed was 107,268 which represents a 16% decrease from the previous year. Coupled with last year's 15% reduction, the aggregate decrease of almost 30% in two years is remarkable. As the monthly chart shows, however, the decline was effectuated in the first three months of the fiscal year, and thereafter the level appears to have stabilized. The overall level is still higher than it was five years ago, and the OJCC has fewer employees than it did then. But if the current levels hold, it is only a matter of time before the old act cases, which require



much more time and effort by the judge's office, work themselves through the system leaving only the new act cases. At that point the overall workload for the OJCC will prove very manageable at current staffing levels, with two exceptions related to the geographic shifting of population and industry in the state. In Ft. Myers and Daytona Beach, the local growth rate is high enough to warrant a second judge in each district.



The tenacity of the old act cases is robust, but has not yet reached the level where it constitutes proof that cases are deliberately being kept open to take advantage of more generous attorney fee provisions. Almost exactly half (49.91%) of the petitions filed last year were in new act cases, but significantly more (71.6%) of the new cases opened were subject to the new law. Before concluding that work is being "churned" in old act cases, one must remember that old act cases still constitute the bulk of the total of open cases. At the close of the fiscal year, there were a total of 77,541 cases open on the books of OJCC, and of those, new act cases make up 34.6% of the total. With roughly two old act cases for every new act case, the relative prevalence of petitions in old act cases is not significant. As the chart shows, the proportion of petitions under the new act is rising at about the same rate as the proportion of new cases, lagging it by about 20% from month to month. The mediations actually held in new act cases lag by another 16%, reaching the halfway mark for the first time in June of 2005. Last year, the number of final hearings under the new law was too small to report; this year it steadily climbed to about 20% of all final hearings held. The process is slow but steady.

Amount, cost and outcomes of litigation.

The amount and cost of litigation in the Florida Workers' Compensation system remain very large but their growth has been arrested by the 2003 amendments, and next year may see an actual decrease as the old act cases constitute an ever-smaller proportion of active cases. A primary measure of litigation costs, attorney fees, actually increased during the recent year despite the second successive decline in Petition volume.

Attorneys' Fees: The Key Driver of Litigation Costs

Attorneys' fees are widely and correctly seen as a key driver of workers' compensation costs, in part because of their direct cost but more fundamentally because of the nature and amount of litigation that result from the litigation incentives built into the system. Under the statutory formula, absent extraordinary circumstances an attorney is limited to 20% of the first $5,000 of benefits secured, 15% of the next $5,000, and 10% of the remainder. Tying the attorney's pay to the amount of benefits secured aligns the interest of the attorney with that of the client—the attorney gets more only if the client gets more. The incentive structure of the statutory formula causes attorneys to focus on larger cases in which the insurer's refusal to pay is of greater economic consequence, but like all the rest of civil litigation it provides little incentive for attorneys to take on cases having small economic values.

A very different incentive structure prevailed prior to the 2003 amendments, which simply provided that the statutory formula was a requirement, not a suggestion.
In 1985, the District Court of Appeal determined as a policy matter that attorneys should have incentives to pursue very small claims on behalf of claimants, and authorized a rejection of the statutory formula in favor of an hourly rate approach under those circumstances. *Davis v. Keeto*, 463 So.2d 368 (1st DCA 1985), *review denied*, 475 So.2d 695 (Fla.1985); *Rivers v. SCA Services of Florida, Inc.*, 488 So.2d 873 (1st DCA 1986); Polote v. Meredith 482 So.2d 515, 517 (1st DCA 1986); *Martin Marietta Corp. v. Glumb*, 523 So.2d 1190 (1st DCA 1988). By the turn of the (21st) century, hourly rate fees had all but displaced the statutory formula as a means of determining payment to claimant's counsel. As an unintended consequence of the court's well meaning decisions in the *Davis* line of cases, it became commonplace for litigation to be commenced over very small stakes, with lawyers on both sides devoting hours of legal work out of proportion to the value of the benefits in controversy, often resulting in a concession by the carrier having little or no value to the claimant, but resulting in a fee predicated on an hourly rate of $200 to $300 for the attorney. It seems the clients would be interested in more prompt resolution of their cases, and thus a potential conflict of interest between lawyer and client is inherent in the hourly rate structure.

At the same time, the statutory percentage formula continued to serve as a basis for attorneys' fees in cases where that method yielded a higher fee than the hourly method. Because the attorneys systematically demanded hourly fees as a minimum, the JCC ruled that fees based on the statutory formula should be reduced when they resulted in inordinately high hourly rates for the attorneys, only to be reversed by the appellate court. *Alderman v. Florida Plastering*, 805 So. 2d 1097 (1st DCA 2002). Accordingly, with the apparent encouragement of the appellate court responsible for the stewardship of the state's workers' compensation system, the attorneys claimed entitlement to an hourly rate based fee, or a statutory percentage based fee, whichever was higher.

It is easy to see that an attorneys' fee structure that guarantees a "reasonable" hourly rate as a minimum and also holds out the prospect of a windfall (the fee in the *Alderman* case amounted to $847 per hour, and the hourly rate the court upheld in *What an Idea, Inc., v.*

Sitko, 505 So. 2d 497, 498 (1st DCA 1987) exceeded $2,700), creates a structure that systematically overcompensates attorneys for each case they undertake. Mathematically, if the minimum allowable fee equals the "reasonable" rate, the average fee will be higher than the "reasonable" fee. In fact, under *Davis-Alderman* workers compensation attorneys became among the highest paid in the state, at the same time that the courts were demanding neither competence nor ethical behavior from the attorneys.[1] Of course, the majority of attorneys maintain both competence and ethics on their own accord, as that is the essence of professionalism, but the ones who were not similarly constrained were given free rein because Chapter 440 gives the judges no power to redress unethical behavior occurring before them. The growth of the "side stipulation" attorney fee transaction provides the evidence of that.

There are cases under the old act holding that an attorney can collect an hourly-based fee from a carrier when the percentage- based fee is inadequate, *Davis,* and there are cases holding that an attorney can collect the percentage based fee from his own client. *Alderman.* But under the *Davis-Alderman* cases the methods are "either- or." There is no case holding an attorney can do both in the same case. There is no case in which the district court of appeal has permitted an attorney to deliberately structure a transaction in such a way as to take more than the statutory percentage of his client's recovery. Under the pre-2003 law, however, such an arrangement was often proposed by the attorney, and only rarely rejected by the judges.

The core of the side stipulation transaction was an agreement by the carrier to provide some compensation benefit that it had failed to provide, triggering the employee's right to have his lawyer paid by the carrier, rather than by the employee, for securing that benefit. The value of the benefit would typically be so low that a percentage-based fee for securing the benefit would be insignificant, invoking the hourly method of fee calculation established under *Davis.* Then, the case would be settled, sometimes for less than the amount of the "fee" just negotiated, and the attorney would still take a percentage of the settlement amount. The end result would be that the fee received by the lawyer for the case would significantly exceed the statutory percentage, and at least part of the excess would be directly deducted from the client's share of the recovery.

There cold be cases in which it could be proper for an attorney to take a fee from the carrier for one part of the case, and then charge his client a full percentage fee at the subsequent settlement. For example, if the lawyer secured a particular benefit, and the carrier was required to pay a fee for that, and then cut off all benefits, contending the accident was not job-related, a full percentage fee would legitimately be chargeable against any subsequent settlement. But it would be unarguably inappropriate to deliberately structure a transaction artificially to achieve the goal of taking more from the client than the statute permits.

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[1] *Pace v. Miami-Dade County School Bd.*, 868 So.2d 1286 (1st DCA 2004). This is not to imply that the court is at fault for the lack of ethical policing of attorneys; as the *Pace* decision emphasizes it would be up to the legislature to confer that authority on judges of compensation claims, and the legislature has not done that.

For example, if a carrier determines that its exposure in a case is $15,000 and offers to settle the case for that amount, the attorney could allocate $2,250 for attorney fees under the statutory formula, leaving $13,750 for the client. Or, the attorney could claim that his hours justify a "side fee" from the carrier in the amount of $5,000, allocating $10,000 to the claimant's settlement, of which he could take $1,750, leaving the client $8,250. The attorney would thus take a total of $6,750, or 45% of the total recovery. From the carrier's perspective, it pays $15,000 either way, and the attorney agrees on behalf of his client to the 45%, so all the parties before the judge agree to the transaction as structured.

The rationale offered (at first, at least) for structuring transaction in this manner was that (using the above hypothetical) the case had a $15,000 settlement value *because* there was a $5,000 carrier-payable attorney fee exposure under *Davis- Alderman*. Even in the cases in which it is true, that argument does not justify taking more of the client's money than the permitted percentage. First, any increment in the case's value due to a fee-shifting event (or any other reason) belongs to the client, not the attorney. The attorney would be entitled to take a statutory percentage of the windfall for himself, not the whole thing. Second, the rationale was recently rejected by the Supreme Court, which disciplined a lawyer making essentially the same argument. *Florida Bar v. Kavanaugh* 30 Fla. L. Weekly S630, Fla., Sep 15, 2005. The conflict of interest involved in negotiating a separate attorney's fee while the client's settlement is being negotiated is obvious, as the carrier is indifferent to the allocation, the claimant relies on his own attorney's advice, and so the allocation is determined arbitrarily based on the word of the attorney. Most disturbing is the fact that almost never is the client credited by the "side" fee against the percentage fee the lawyer charges the client. It is as if the case belonged to the attorney, not the client.

Accordingly, the attorney fee practice under the old act can be summarized as follows: the statutory percentage was applied only when it resulted in a windfall for the attorney; when the statutory formula resulted in a low hourly rate the attorney could switch to an hourly methodology as a minimum, and when circumstances permitted the attorney could combine the methods to take 40% or more of the client's recovery. The first two of these provisions constitute the *Davis-Alderman* rule established by the district court of appeal, while the third has never to date been approved by any appellate court. Elementary arithmetic shows that the attorneys were able to receive a rate of compensation for themselves that on average exceeded the "reasonable" hourly rate, because the reasonable rate was in fact a floor. The 2003 amendments expressly intended to change that by limiting compensation for attorneys to the proportional formula in all cases.

Attorneys Fees and Litigation Costs Under the 2003 Amendments

If attorneys' fees are a true driver of workers' compensation costs, one would expect to see litigation levels rise while the *Davis-Alderman* fee structure was in place, and decline when it was legislatively repealed in a manner that would eliminate side stipulation abuses was well. Indeed, the amount of defense attorney fees declined this year, to an

estimated[2] $217 million, down from $231 million last year. But this year's claimant attorney fee figure is $181,145,232, a 23% increase over last year's reported levels. There are two possible reasons for the reported increase.

First, a significant number of attorney fees during the year came from "old act" cases. Although most of the new cases filed last year were new act cases, about half the new petitions were filed in old act cases. Of the reported attorney fee orders, 29.2% came from old act cases, but these accounted for 41.75% of the attorney fee dollars paid.

Second, it was noted in last year's report that the figure seemed anomalous, as it represented a decline of 28% from the previous year. That was such a large decrease that under- reporting was suspected. A number of measures were implemented to prevent under-reporting this year, and the currently reported figure is quite reliable. Under Administrative Order 2005-3, the *rendition* of an order was defined as the electronic transmission of the order to the OJCC database system. Thus, to be legally effective, an order had to be transmitted to the OJCC system which automatically captured the necessary data from the order *and put the order on public display*. Any attorney fee orders that were inadvertently not reported to the OJCC in previous years would be absent from the totals for those years, but under the new system the attorneys would not have the protection of a valid judge's order approving the fee unless it were published on the internet and subject to data capture in the process. This created a strong incentive to make sure every order was reported and displayed.

To keep matters in perspective, this year's attorney fee level is only slightly down from the level reported two years ago. Thus, if the potentially anomalous report of last year is not considered, a small decline in attorney fees being paid is consistent with the notion that they are being reduced by new act cases, but the new act cases have yet to comprise a significant portion of the cases being resolved.

Experience in the relatively small number of cases that are being resolved under the new law, however, gives ample evidence that the practitioners see the new act as a significant factor in reducing their revenues. Some have responded with legal attacks on the statute, while others have responded with personal attacks on the judges responsible for enforcing the statute.

Efforts to Nullify Attorney Fee Limits of the 2003 Amendments: Legal Attacks on the Statute

Given the high fees payable to claimant attorneys before the 2003 amendments, one would expect an entitlement mentality to develop. Unsurprisingly, at least some of the lawyers refuse to simply accept the new limitations on their ability to extract revenue

2. Defense attorney fees reported by the deadline amounted to $189,761,613.49, but a number of identified payors had not reported. Estimation of their fee payments was performed based on previous years' reports, adding $27 million to the total.

from their clients' cases. These efforts have taken on several distinct forms. One is to ask the courts to strike or eviscerate the statute, and another is to find ways to circumvent the limits in practice. The progress of both of these approaches should be monitored by the legislature.

With respect to attempts to secure a judicial repeal of the legislation, it is not the role of this report to comment on any specific case, but only to outline the arguments being made for the information of the legislature. There are two kinds of arguments being advanced to defeat the proportionality law. One is based on a claim of unconstitutionality, and the other is based on the idea that one word—"reasonable"—trumps all the other words in section 440.34.

The ostensibly constitutional arguments are not well-articulated. One argument is that the constitutional guarantee of access to courts requires the state to provide a fee structure that makes it economically worthwhile for attorneys to undertake every workers compensation claim, no matter how low the stakes. In essence, it is an effort to constitutionalize the *Davis- Alderman* approach to fees that the legislature specifically discarded in 2003. But there are multiple problems with that. Twenty-five years ago, the Supreme Court unanimously held that the legislature had authority to regulate attorney fees in workers compensation. *Samaha v. State*, 389 So. 2d 639 (Fla. 1980); see also *Yeiser v. Dysart,* 267 U.S. 540 (1925). The only case in which "access to courts" was a basis for striking part of chapter 440 struck only the tort immunity provision, and even that was reversed by the Supreme Court. *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993).

A claimant's right to workers' compensation benefits is statutory, protected by the constitution to the extent that the remedy must remain a reasonable substitute for the tort remedies it displaces. *Id.* But when a person slips and falls in the local grocery store, he has no right to make the grocery store finance his claim against them, and the amount he can pay an attorney to bring the claim is limited by two factors: the percentage limits in the disciplinary rules, and the stakes involved in the case. If the person cut his leg in the fall, and has suffered the cost of a $10 bandage as the only damages from the fall, no lawyer is going to take his case. The proportionality law that applies in tort contingent fee cases has never been held unconstitutional, nor has anyone ever raised such a claim, probably for fear of having their legal competence questioned. Since the tort system routinely accepts the existence of low-stakes cases that are never brought because the economic incentive is lacking, it is hard to see how that result would be *unconstitutional* in workers compensation cases.

The better constitutional argument invokes the equal protection provisions of the federal constitution. It observes that the employers are entitled to spend unlimited amounts on legal services, irrespective of the stakes, but the claimant side is limited, thus giving the employer an uneven advantage in the adjudications. The argument was not rejected out of hand when it was cited as the basis for a discovery request. *Anderson Columbia v. Brown,* 902 So. 2d 838 (1st DCA 2005). The first response to this argument—that the legal system has always tolerated the parties' differences in ability to pay for representation and never declared it unconstitutional—would miss the fundamental point that the 2003

amendments prevent a claimant from paying his counsel more than the proportional schedule permits, even if the claimant has means and willingness to do so. Thus one of the avenues theoretically available to plaintiffs in small-stakes tort cases is blocked by law for workers' compensation claimants.

Whether this specific limitation on a workers compensation claimant's right to pay his own lawyer could amount to an unconstitutional denial of due process is an interesting question, pitting a party's right to be represented as it chooses within its means against the state's right to regulate the volume and composition of workers compensation litigation by establishing a specific economic incentive structure. But in the real world, it is of academic interest only, because the factual scenario in which it could apply is unheard of, and if the courts stay true to their numerous cases requiring actual standing in order to make a constitutional challenge, no case is likely to arise in which a determination of the merits of the argument can be made. A claimant would have to allege that he has the means and willingness to pay his own attorney in excess of the amount permitted by the proportionality law, and is prohibited from doing so. Only if that occurs could the substantive question properly be joined.

What is completely missing from even the best constitutional argument is any way to transform it into a basis for making the *carrier* pay in excess of the proportional schedule. There is no hint from the *Anderson Columbia* opinion that the claimant counsel there disclosed any intention to try to make the carrier pay in excess of the statutory limit; it reads as if the claimant argued the law was limiting the amount he could pay his own attorney. As seen below, it is not unknown for lawyers to take fees in excess of the schedule from their own clients, but their arguments are unmistakably directed toward reinstating the days of making *carriers* pay the generous hourly attorney fees under *Davis-Alderman*. But there is no constitutional right to make the carrier pay the claimant's fees in any event. If the courts were to accept any of the lawyers' efforts to reinstate *Davis-Alderman*, the legislature could simply eliminate all fee-shifting provisions in workers compensation.

There are also efforts to reinstate *Davis-Alderman* by way of creative statutory construction. The legislature, having left the word "reasonable" in the fee statute,[3] is

[3] The full text of section 440.34(1) (2003) is:
A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge of compensation claims shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement between a claimant and his or her attorney, or any other agreement related to benefits under this chapter that provides for an

contended to have implicitly authorized the judge to exercise discretion in determining what a "reasonable" fee is, and to use an hourly methodology in order to do that. The problem with this argument is all those other words that the legislature added to and subtracted from section 440.34 in the 2003 amendments. The language the *Davis* line of cases was based on was specifically repealed; by its terms the current text affords the judge no discretion in assessing the amount of the fee. While it is true that the language still says that a fee cannot be taken "unless approved as reasonable by the judge" the next sentence specifies that the fee "must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount…."

It would be disingenuous in the extreme to pretend to believe that the legislature, spending all that time and effort changing the language of the attorney fee statute, intended to leave the *Davis-Alderman* rule untouched. Given the degree of abuses being seen at the time, it is clear that the legislature subjectively intended to limit attorney fees to the proportional schedule. But that does not automatically mean the statutory argument is dishonest.

It has long been the position of the administration of the OJCC that the plain language of the statute controls over any perceived subjective intent of the legislature. Thus, if the words chosen by the legislature do not precisely effectuate their objectives, judges should apply the law as written, since that is the only approach that is fair to the litigants who do not have access to information about the subjective intent of the legislators.

Proponents of the return to the *Davis-Alderman* rule thus point out that there is no reason for the word "reasonable" to remain in the statue if, in fact, the intent is to remove all discretion on the judge's part. Opponents of that view observe that the very next sentence says what the amount "must" be, leaving no room for application of discretion. Most, but not all, of the judges have been holding that the second sentence controls, amounting to a legislative definition of what is "reasonable." The question, however, is currently pending in the appeals court in at least one case, and the judges will of course follow any result announced by the court until such time as the legislature changes the statutory language.

Efforts to Nullify Attorney Fee Limits of the 2003 Amendments: Circumvention Efforts, and Attacks on Judges on Judges Who Reject Them.

The efforts to have the limits declared unconstitutional, or read out of the law via statutory construction, may be actuated more by the lawyers' personal economic interests than by service to their clients, but at least they are within the bounds of tactics permissible under ethical rules. The circumvention approaches described in the next few

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attorney's fee in excess of the amount permitted by this section. The judge of compensation claims is not required to approve any retainer agreement between the claimant and his or her attorney. The retainer agreement as to fees and costs may not be for compensation in excess of the amount allowed under this section.

paragraphs arguably cross beyond that line. The fact that the following things occur shows that there is a serious lack of policing of the practice of law in workers compensation.

Cost Circumvention.

When attorney fees were open-ended, the attorneys argued that they were entitled to collect fees not only for lawyer time, but also for paralegal time, and at a rate that reflected not just the cost of paying the workers, but included a profit margin for the firm. In addition, lawyers often made the argument that higher hourly rates were required because of the burdensome overhead requirements they faced.

When the 2003 amendments eliminated the ability of lawyers to take in the neighborhood of 40% of their clients' recovery using the "side stipulation" artifice, some attorneys determined to reach old act fee levels by charging as "costs" the same items that had previously been claimed as attorney fees. While the result was the same—significantly more than the amount permitted under the proportional schedule would be taken as revenue by the law firm, reducing the client's recovery by an identical amount—this arrangement did not even have the appearance of taking the money from the opposition instead of the lawyer's own client. For some firms, in which paralegals do almost all of the work on cases, the firm's share of a settlement under this approach could exceed 50%, and indeed at least one was proposed in which the claimant would receive less than 20% of the settlement, but that was rejected by the judge.

A number of attorneys have taken the position that they can take any amount as "costs" whether the judge approves or not, because the judge has no "jurisdiction" over costs. While that argument has a kernel of truth, using it for that purpose is disingenuous. The judges historically have not reviewed whether external costs, such as a reporter's bill for transcribing a deposition, are reasonable. But it is a criminal offense, a statutorily defined insurance fraud, for any person to take any money "on account of services rendered" in connection with workers compensation proceedings unless the judge approves it.[4] Thus, if paralegal services are provided in connection with a workers compensation claim, payment for those services cannot be taken from the claimant without the judge's approval. It should also be obvious that the same is true regarding any other element of "costs" that builds in a profit margin for the firm, as the money ultimately falls in the lawyer's pocket.

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[4] The text of section 440.105(3)(c) (2003):

It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.

While the judge may or may not have “jurisdiction” over external costs actually paid by the attorneys to third parties, the judge still has the statutory duty to make sure the total attorney fee being taken does not exceed the permissible proportion. It seems the judge would be required by statute to reduce the proposed attorney fees by the amounts which in reality are attorney fees but were taken by the lawyer from his client’s recovery due solely to the lawyer’s decision to label them as “costs.” The ethically questionable nature of a lawyer deciding to change the labels he applies to certain items for the specific purpose of taking more of his own client’s settlement is obvious, and while a judge of compensation claims has no authority under present law to enforce the rules of professional conduct, the judge does have the duty to stay clear of actually assisting in an attorney’s questionable behavior.

Three measures are therefore suggested by OJCC in order to prevent evisceration of the attorney fee limits of the 2003 amendments. One would be to specify that all revenue to a lawyer or firm, other than reimbursement for actual external costs paid to unrelated third parties in arms’ length transactions, is counted as part of the attorney fee subject to the proportional limit. The second is to provide a more effective mechanism for policing ethical violations by attorneys without relying on the proven ineffectiveness of the disciplinary arm of the Florida Bar. The third is to make violations of Section 440.105(3)(c) punishable as felonies rather than misdemeanors. This is recommended because the head of the insurance fraud unit of the Division of Workers Compensation has advised it is difficult to get prosecutors interested in pressing nonviolent misdemeanor cases. As the next section shows, the existing sanctions and enforcement mechanisms are obviously insufficient to deter attorneys from egregious financial abuse of their own clients.

“Side Services” Circumvention

Essie Jackson was injured on the job, and retained an attorney who persuaded the employer’s carrier to pay a total of $11,750 to settle her case, fully and finally. The employer agreed to pay that much money in exchange for a discharge of workers compensation benefits, as well as any other existing rights of action Ms. Jackson may have against the employer.

Ms. Jackson’s lawyer submitted to the judge a motion for approval of an attorney fee in the amount of $1,750, which is what the proportional schedule would call for on a settlement of $10,000. The judge signed the order and sent copies to the parties; soon thereafter his office received a phone call, followed up in writing, from Ms. Jackson. She had only received $6,500, not $10,000 as stated on the order signed by the judge.

The judge set a hearing on the discrepancy, and Ms. Jackson’s lawyer appeared at that hearing with his own lawyer, leading one to wonder who was representing Ms. Jackson. Her ostensible lawyer took the position that the judge had no authority to inquire where the $3500 went, because part of it was for “costs” and part of it was for legal advice the lawyer gave Ms. Jackson on a separate matter. On that basis, the lawyer refused to be

sworn or to testify after being ordered to do so by the judge, and the judge entered an order referring the lawyer to the circuit court for contempt.

The Office of Judges of Compensation Claims, through staff counsel, filed a civil action in the circuit court for Leon County seeking enforcement of the judge's certification order. After his motion to dismiss was denied by the circuit court, the attorney involved agreed to testify before the judge of compensation claims, and the contempt proceeding was dismissed.

The attorney then testified that he had charged Ms. Jackson $3,000 for giving her legal advice with respect to the general release the workers compensation carrier required in connection with the settlement of Ms. Jackson's case. The other $500 were for "costs" consisting of hourly charges for paralegals employed by the attorney's firm. The judge found that both sums constituted attorneys' fees subject to the proportional limit, and in excess of it. He ordered the attorney to return the funds to his client, and referred the attorney to the Bar and to the Division of Workers Compensation for fraud investigation.

Previously, in a different case the judge had found that the same attorney made false statements in connection with the disposition of the child support payments required under a different client's settlement. The Bar found no probable cause to proceed in that case, but the attorney later waived any claim of confidentiality of those proceedings by disclosing them on the public record.

This form of attempted circumvention would appear to already be prohibited by the statute, which clearly prohibits taking of money from a client for any services rendered "in connection with" workers compensation proceedings without a judge's approval. And it can be expected that the Bar, faced with this egregious and easily provable violation of section 440.105(3)(c), will do its duty and take action to prevent recurrence of similar events. But the fact that it occurred in the first place is evidence that at least some lawyers perceive the Bar's disciplinary mechanisms as being inadequate.

Imaginary Benefit Basis Circumvention

In numerous cases predating the 2003 amendments, the courts were called on to address the fact that the "benefits secured" by an attorney's services may not actually be received for years. For example, obtaining permanent total disability benefits for his client may not result in any lump sum immediately being paid to the client. The benefit is a stream of cash payments stretching into the future. The court could have required the attorney to take a percentage of each payment as it was made, but instead chose to allow the attorney to calculate the present value of the future benefits and apply the formula to the present value sum. In the case of permanent total disability, the present value sum was an estimate, since no one knows exactly how long the claimant would live to keep receiving the payments. The court held that absolute certainty in the amount of future payments was not required, so long as it could be proved with "reasonable predictability" the amount could be reduced to present value and included in the base figure to which the percentage formula would be applied to calculate the fee. There was a lot of litigation

over which items, particularly quasi-medical ones, belonged in the base from which the fee was calculated. Most of that litigation subsided, however, when the hourly rate under Davis-Alderman began to displace most of the percentage-based fees.

Under the 2003 amendments, the calculation required by statute is simple. Identify the base figure—the value of the "benefits secured"—and apply the statutory percentages to it. For amounts of "benefits secured" over $10,000, the formula is simple: it amounts to 10% of the total plus $750.

On more than one occasion, however, attorneys proposed settlements which included in the base figure amounts for benefits which were never provided, and never would be provided, since the case had been completely settled. The extra amounts were added to the case paid for the settlement, and the fee was calculated based on the cash value of the settlement *plus* the "projected" value of the benefits—benefits that were never going to be provided because the claimant's right to them was extinguished by the settlement. The theory advanced by the attorney was that his "right" to an attorney fee predicated on those benefits became "vested" at the time the carrier agreed to provide them, and could be calculated on the basis of their expected net present value. If that were the case, however, it would at least be obvious that the attorney would have to credit the client with the fee predicated on those benefits, since they are among the rights being exchanged for the cash payment in the settlement transaction. Otherwise, he would be charging his client twice for obtaining the same benefits, in blatant violation of his fiduciary duty to protect the client from those who would take advantage.

More fundamentally, in cases where the carrier's "agreement" to provide certain benefits is not truly separate from the settlement process, the attorney never had any "right" to base a fee on the present value of the benefits since it was never "reasonably predictable" that the benefits would actually be paid, because they were extinguished by the settlement. Lawyers attempting this form of circumvention make the remarkable argument that the "benefits secured" are two or three times the amount they just agreed to accept in settlement. If a lawyer really agreed to settle his client's case for half or a third of its "actual" value, it would be hard to maintain a full percentage fee *on the amount not recovered* would be payable.

Either way, any scheme to inflate the "benefits secured" or to include in that figure benefits upon which a fee has already been taken would be unethical and impermissible. In one case,[5] after the judge refused to approve such a fee proposal, the parties then moved to transfer the case for binding arbitration, selecting the claimant's attorney's wife as the arbitrator. In another, the attorney took a fee of $148,268 from the carrier for securing certain benefits, including the claimant's entitlement to a future stream of disability and medical payments, using the hourly calculation method, then sought to take another $75,166 from the conversion of the stream of future benefits into a lump sum settlement, claiming the same hours. The judge's order denying the additional $75,166 was affirmed by the district court.
http://www.jcc.state.fl.us/jccdocs19/MIA/Dade/1998/025802/910648.pdf

[5] Pollock v. Southeast Frozen Foods, OJCC No. 03-044776.

Pressure on Judges to Disregard Attorney Fee Limits

Some of the finest lawyers in the state practice in workers' compensation, but there are also some of the opposite extreme. For a long time, the law was structured so that attorneys lacking in both competence and professionalism could not only succeed but prosper. In the late 1980s and early 1990s it was even true that the lawyers were in charge of the nominating commission that had the authority to reject a judge seeking reappointment at the end of a four-year term. One lawyer even threatened in writing that he would use his position on the nominating commission to retaliate against a judge in Ft. Myers if the judge's ruling was not to his liking. Needless to say, the judges were in no position to require competence, let alone professionalism, from the attorneys at that point. Historically, the Bar seems to have tolerated a lower standard of competence and ethics among workers compensation practitioners as well.

Everything began to change in 1993, when an economic crisis led the legislature to repeal the provisions that required indulgence of every doubt in favor of the claimant. The existing nominating commission was relieved of duty and a new commission consisting exclusively of outsiders was empaneled. The percentages in the proportional attorney fee statute were reduced. The judges were accountable every four years to the Governor, not to the lawyers who practiced before them.

Things started to change, but slowly. It still remains true that the judges see it as their duty to prevent an attorney's failures to work to the detriment of his or her client. Eliminating any consequences for bad lawyering places tremendous reliance on the professionalism of the individual attorneys, and fortunately most have enough pride and character to serve their clients well and honestly even though they could be paid just as well without doing that. Those attorneys are well-positioned to withstand the changes in workers compensation practice required by the 2003 amendments. Unfortunately, there are a few lawyers who simply took advantage under the prior system, and never developed the skills to survive in a system that requires actual results for clients in order to be paid.

As mentioned above, threatening to attack a judge at his reappointment hearing was a tactic in use well before the 2003 amendments. Obviously, the effectiveness of such a tactic in securing favorable rulings from a judge would depend on the threat, not its execution. A judge who is successfully attacked will not be around to issue favorable rulings; one who is unsuccessfully attacked is likely to be recused from the lawyer's subsequent cases. One would only carry out the threat of the attack in order to make the threat more credible with the other judges, who would remain in a position to render the favorable rulings.

The first set of attorney fee-related attacks was launched by a group of Miami and Ft. Lauderdale lawyers in August of 2004, when Judge Gerardo Castiello was facing his reappointment hearing. One lawyer accused the judge of "falsifying records" and

"fabricating evidence," asserting that the file box to which he was pointing contained evidence proving these claims. Another attorney accused Judge Castiello of deliberately refusing to follow the law in a particular case. The nominating commission thought the allegations were serious enough to postpone making a decision, to give the Division of Administrative Hearings time to investigate the factual claims made by the attorneys.

The DOAH investigation was conducted by its director, with the assistance of the Deputy Chief Judge of Compensation Claims. The result was that there was no evidence whatsoever of the grave claims raised, and all the complaints in reality were actuated by attorney fee cases. On the one case where the judge allegedly defied the law, *Pandiello*, the judge had been affirmed per curiam by the district court of appeal, but the lawyer making the charge had left that out of his presentation to the nominating commission. In short, the content of the attacks had simply been made up by the complainers for the purpose of either ruining the judge's career or at least making his life more difficult.

In December of 2004, the Supreme Court ruled that the Bar lacked authority to make procedural rules for workers compensation cases, leaving the authority to the OJCC. At the same time, the Deputy Chief Judge (who had argued the OJCC's position before the Supreme Court in the rules case) published the 2003-04 annual report exposing the widespread conflict of interest manifested in the side stipulation attorney fee schemes, noting that the 2003 amendments eliminated that practice. It was also at that time when cases arising under the new act began to make up the bulk of new business obtained by most of the attorneys, so that the new fee limitations first started being felt. Plans to make every judge's order publicly viewable on the internet the day after it was entered had previously been announced, and was implemented in March. One or more of the lawyers determined that attacking the Deputy Chief Judge (DCJ) would be in his or their economic interests. The absence of grounds would not get in the way.

In May of 2005, the executive council of the workers' compensation section of the Florida Bar met in Washington, D.C. The chair-elect of the section raised the issue of the executive council taking a position on the upcoming reappointment proceedings for the Deputy Chief Judge. According to a letter subsequently written by the chair-elect, someone in the meeting alleged that the Deputy Chief Judge had been directing the judges how to rule in their cases. A resolution was sponsored by an attorney from the same district as the chair-elect, providing the executive council would oppose the renomination of the deputy chief judge on the ground that his tenure in office would have a negative effect on the independence of the judges of compensation claims. The council apparently adopted the resolution without dissent; the one suggestion that investigation would be appropriate before taking such action was summarily rejected.

The chair-elect promptly personally phoned the DOAH director to advise of the action, and the Director promptly informed the DCJ. A few days later, the Director wrote the Deputy Chief Judge that the council was rescinding its condemnation of the Deputy Chief Judge, as it had learned the factual allegations it had acted upon were simply not true. The Chair and Chair-elect of the section wrote to the judges of compensation claims,

admitting the council had acted on the basis of very serious allegations which turned out to be completely false.

The source of the serious and knowingly false allegations directed at a public official committed a blatant and deliberate violation of Bar ethics rules. Despite the fact that those false allegations were made in a Bar meeting with a Bar staff member present, and induced an arm of the Bar to make an unprecedented attack on a public quasi-judicial official, there has been to date no hint of investigation by the Bar or any other entity. If the leadership of the Florida Bar Workers Compensation section was in fact misled as it claims, each one of them would have a duty to report the individual who committed the dishonest fabrication of allegations of corruption.

Even after the section admitted its action was based on factually false charges, an attorney representing a number of the members of the Florida Workers Advocates (a group of lawyers who band together to protect their own economic interests) repeated the same claims before the nominating commission when the Deputy Chief Judge was under review. The nominating commission found the accusations lacking in credibility.

It may be the case that some of the lawyers, organizationally at least, are becoming wary of the limits beyond which they would actually be subjected to disciplinary action. When Judge John Lazzara came up for a reappointment hearing, some members of the claimants' bar spread word that they would collectively be attacking him. Judge Lazzara had been the judge on the Essie Jackson matter described above. Two lawyers notified the nominating commission they would be speaking against Judge Lazzara's reappointment.

One of those was the attorney involved in the Essie Jackson case. The other was another member of the Florida Worker Advocates.. Shortly before the hearing was to commence, both lawyers advised the commission they would not be appearing, though the firm administrator for one of them did appear.

The nonlawyer administrator testified against Judge Lazzara, claiming that the judge ruled exclusively for insurance companies, which is demonstratedly false according to OJCC records. The nonlawyer administrator also alleged that his firm was singled out for special treatment, with the judge making deeper inquiries in its fee proposals than for other firms. That part is true, but a not a valid basis for attacking the judge. The firm involved was the one that had brought Essie Jackson before the judge; he was justified in looking more carefully at their activity.

Aside from the reappointment hearings, there were other efforts to improperly pressure the judges by attacking them. In June, the Florida Bar Journal published a letter by attorney Stephen Rosen, who had chaired the lawyer-dominated nominating commission that was abolished in 1994. He apparently forgot he had served in that capacity, however, because his letter states

> Prior to 1993, a workers' compensation judge was appointed by the governor. After a four-year term, the judge went before a local district court of appeal

> nominating commission, and if that commission recommended reappointment, the governor was required, by statute, to reappoint the judge to another four-year term.

Rosen, Judicial Independence and Workers' Compensation Judges, Florida Bar Journal June 2005 at 4.

Had Mr. Rosen written that the judges were reviewed by the DCA nominating commission before 1989, that would not have been misleading. But the period from 1989 to 1993 is regarded by all responsible persons (other than the lawyers who controlled that commission) as the low point of the independence of the JCCs. It was the era when some commission members (by all accounts *not* including Mr. Rosen) used their power over the judges to try to improve their results in court. As mentioned above, one was even so brazen as to do so in writing.

Apparently, Mr. Rosen also was unaware of *Jones v. Chiles*, 638 So.2d 48 (Fla.1994), in which the Supreme Court held it unconstitutional to give the nominating commission authority to retain or terminate judges. It was not a sinister political plot by Governor Chiles, as Rosen suggests. The statute was changed while *Jones* was pending, but the *Jones* decision would have made the same change as a matter of constitutional law even if the statute had been left as it was.

What makes the Rosen article interesting is not its remarkable omissions, but rather the theme it sounds, which bears a remarkable relationship to the attacks on the Deputy Chief Judge and other judges which were later admitted to be completely false:

> [I]t is my opinion that workers' compensation judges are constantly being watched and reviewed on a daily basis by their superiors as well as other prominent players in the workers' compensation system: the governor, insurance companies, the business community, legislators, and insurance company lawyers.

Rosen's "opinion" is factually inaccurate. No one has time or inclination to read every decision of every judge; the system is far too large for that. And no intelligent observer who read even a sample of them could conclude the judges' decisions are being directed by a central authority— anyone who actually looks will see that the orders are quite diverse, with each bearing the distinctive mark of its respective individual creator. Looking at the actual output of the judges is the only responsible way to draw conclusions about the judges independence, and OJCC has made it possible for everyone who so chooses to "watch" what the judges are doing for precisely that reason. OJCC makes no apology for bringing transparency to the system: no judge should be entering any order that he or she does not want on public display. This was absolutely essential to counter the criticisms and suspicions that still linger from the days when the judges' futures were decided by a small group of the practitioners who appeared before them. The suspicion was that some lawyers received favored treatment, in some cases allowing them to violate the attorney fee limits and still obtain the protection of a judicial "approval" of the arrangement. That suspicion is no longer possible, since all the orders are on display. Nor would it be possible for any responsible observer to conclude the

judges' independence has been compromised: the *exercise* of their independence is there for all to see.

The disinformation campaign in the print media reached its peak in June 2005, when attorney Gerald Rosenthal was quoted in the South Florida Sun Sentinel saying he could not get his client a hearing date before 2007 in Miami due to the shortage of judges there. Rosenthal specifically rejected the suggestion that attorneys getting paid by the hour might have clogged the Miami dockets with overlitigation, saying attorneys fees had been reduced to the point where that could not occur. When the article appeared, Judge Hill advised that it was his case that Mr. Rosenthal had cited to the reporter, but that his staff had offered dates up to a year sooner, with the later one having been chosen by Mr. Rosenthal. Looking up the case itself, it was determined to be an "old act" case, so the suggestion that the new attorney fee limitations would affect the attorney's incentives to move that case along was wrong.

Despite the inaccuracy of its news report, the Sun-Sentinel ran an editorial republishing the errors, prompting Governor Bush to write the following response, which the Sun-Sentinel published on June 15, 2005:

> The South Florida Sun-Sentinel's June 8 editorial, "Worker's Comp," incorrectly asserts that a shortage of judges has caused delays in hearings for workers' compensation claims in Florida.
>
> This is not true. The vast majority of the cases are processed in a timely manner. In 2002, the statewide average time from filing a petition for benefits to final hearing was 345 days, faster than most civil courts. By the end of fiscal year 2004, that number was down to 1[86] days.
>
> Worker's compensation claimants are only seeing delays in isolated pockets where the lawyers do not settle their clients' cases or needlessly engage in delay tactics. The Miami district has chronically had the worst delays.
>
> It is no coincidence that the Miami district also gives lawyers the most control over the scheduling of final hearings. Overall, there aren't many cases subject to long delays at all. The problem is a shortage of effective policing of lawyers in certain districts -- not a shortage of judges.
>
> Although worker's compensation judges handle a lot of cases, the real problem is that some lawyers deliberately drag out cases -- contrary to their clients' interests -- because the cases arose before 2003 and the lawyers can charge unlimited hourly fees for those cases. And although 1,000 cases a year sounds like a lot, that is a manageable load because most of them are settled by mediators or resolved between the parties.
>
> No other jurisdiction has Miami's problem with timeliness, or a comparable level of ethics complaints directed at claimants' attorneys. And most other jurisdictions

> are handling more cases per judge -- in fact about 4,000 cases on average -- so it is obviously not the number of judges that is the cause of the Miami delays.
>
> Scott Stephens, deputy chief judge of the worker's compensation system, made this same assessment and did not request additional dollars to hire new judges. As is the case with the Florida Supreme Court's certification of judges based on a well-defined formula, Florida's Office of Judges of Compensation Claims has a similar empirical process. This process documented there was no such need this year to hire more judges.
>
> Jeb Bush, Governor, State of Florida

The final front on which the judges have been subject to attack by some lawyers is in the appeals court. Normally, of course, that is the proper place to air the question of whether the trial judge followed the law, or committed any error that the appeals court could correct. But it crosses the line into impropriety (and indeed violation of ethical rules) when "review" of a tribunal's order is occasion for making scandalous factual claims about the judge which are completely false, or when a case is used as a vehicle to attack a different official not even involved in the case.

In Forrest Bostick's case, No. 04-002582,[6] the claimant's attorney did both. The attorney proposed a settlement by which his firm would take over 45% of the proceeds, more than three times what the proportional schedule permits. Part of the firm revenue would be the money permitted under the schedule, and the rest would be "costs." In December 2004 the judge asked to see the composition of the costs but the lawyer refused to provide it, taking the position the judge had no "jurisdiction" over anything it chose to call a "cost." The judge declined to approve the proposal until the "costs" were itemized, and the attorney –in the name of his client—filed a petition for certiorari, prohibition, mandamus, and even *quo warranto*. Case No. 1D05-2243, (1st DCA, pending). The petition contended the judge was bound to approve the proposal, since she had no jurisdiction over costs, and could thus not even ask to see an itemization of what the costs were. Had it stopped there, it would merely be ethically questionable to ask the appeals court to enter an order allowing the attorney to take more of his client's money when there was no one representing the client before the court, but it did not stop there. The claimant attorney accused the judge of having surrendered her duty to apply independent judgment and simply obeying a "dictate" of the Deputy Chief Judge in the case. The petition actually claimed in writing the Deputy Chief Judge had, in an *ex parte* communication, "dictated" to Judge Lorenzen what the outcome of the case should be.

For "evidence" of those rather strong charges (which bear a striking resemblance to the admittedly false ones the Bar section had embraced weeks before) the attorney attached only the draft "Introducing Fast Track Settlements" document circulated by OJCC. That document was created in March 2005, months after Judge Lorenzen had begun to

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[6] The order under review in that case can be viewed at http://www.jcc.state.fl.us/jccdocs20/TPA/Hillsborough/2004/002582/2241846.pdf

question the attorney’s claim of costs, so it is unlikely to have actually influenced the judge’s position.

The fast track draft represented a proposal for a system designed to process approvals of attorney fees and child support allocations in connection with settlements on a three-day cycle. Parties would enter standardized electronic forms, and the system would present a standard electronic order to the judge, presenting all the required information so that the judge could digitally sign the order with one click of his computer mouse. But in order to automate the process, it was necessary to limit it to the routine, non-controversial settlements, and by the time the document was created Judge Lorenzen and others had made it clear that settlements containing large cost allowances would need to be looked at individually. Thus, they were not a candidate for automated handling, and according to the existing manual process. The first paragraph of the fast track document specifies that the existing settlement approval process would have to be used for cases that were not susceptible for automation. Not only was the claim that the judge allowed her result to be “dictated” by another factually false, it was created solely for a defamatory purpose.

Taken together, the personal attacks against the judges all emanate from the judges’ enforcement of the attorney fee limits in section 440.34. They all result from the lawyers involved trying to advance their own interests, sometimes at the direct expense of their clients, sometimes at the clients’ indirect expense, but never in their clients’ interests. They are too similar to each other to be independently conceived. They are all, fundamentally, unprofessional if not dishonest: in no case has there been any evidence to support the assertions made. None would have occurred if the lawyers saw the Bar’s enforcement arm as a credible threat to dishonest attorneys. And they still do not, as none of the attacks have resulted in serious inquiry, much less disciplinary action, by the Bar. In sum, the attacks show that the 2003 amendments’ attorney fee limits are working, the judges are doing their jobs enforcing them, and the Bar is not doing its job in this context. As the Governor wrote, the “problem is a shortage of effective policing of lawyers in some districts.”

It is hard to tell whether the series of attacks is having any effects on litigation costs. There do appear to be isolated instances of judges being intimidated by the spectacle, but in the main the judges remain steadfast in doing their jobs. The impact on the cost of litigation so far seems to be limited to the distraction and aggravation that result.

Litigation Outcomes

The most common outcome of cases is settlement.. Of the 107,268 petitions filed, 4,253 were dismissed, and 11,128 were resolved by the parties, prior to mediation. Thus, about 15% of cases are resolved before the mediation occurs, significantly down from settlement rates in years past. The number of mediations was down slightly at 26,410, and about half of those entered the full litigation phase. The number of cases that made it to final hearing was 2,217, an average of 71 per judge.

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. 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. Implementation of this project was delayed by numerous difficulties during the most recent fiscal year, and it is uncertain whether the DOAH will ever make the resources available to complete this part of the plan, since the incumbent DCJ is leaving to take a seat on the bench in the 13th circuit.

The Mediation Program

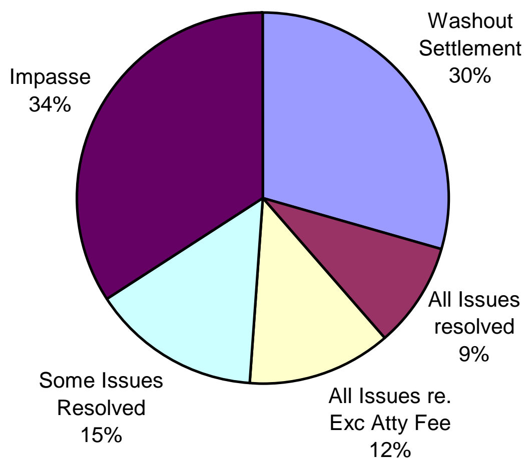
The mediation service continues to be a bright spot, handling a high volume of cases with very good results. During the fiscal year, 92,950 petitions were mediated in 26,410 state mediation conferences. The result quality from previous years has been maintained, and the timeliness problem of previous years is no more.

Timeliness of Mediations	
Fiscal Year	Days
2001-02	143
2002-03	120
2003-04	108
2004-05	114

The statute in effect during fiscal year 2004-05 required mediation conferences to be held within 130 days after the petition was filed, and in cases where the state mediators were overloaded and unable to accomplish that goal, parties were required to hold private mediations at the carrier's expense within the 130 day period. Historically, timeliness of mediations had been a problem.

During the previous year, OJCC instituted auto-scheduling of mediations. When a petition was filed, the OJCC computer system would determine whether it was necessary to schedule a new mediation for it, and if so, would automatically look at the relevant mediator's calendar. If the calendar had available time within the 130 day limit, the system would automatically place a tentative mediation appointment on the mediator's calendar, and if

Mediation Outcomes, FY 2004-05



no time was open within the 130 days, the system would issue an order referring the parties to private mediation.

During the first 40 days after the petitions was filed, the parties would be free to reschedule the mediation, and on the 40th day, the system would send out an automated order firmly scheduling the mediation for the date that was originally proposed, if the parties had not arranged for a different one. If the parties had so arranged, the mediation scheduling order would reflect the date they chose.

During fiscal 2004-05, small changes were made to the auto-scheduling system in response to the comments of staff and practitioners. The system seems to be stable and most offices have adapted to it without difficulty. The early referral to private mediation when necessary and the standardization of the mediation scheduling function resulted in significant improvement in timeliness measures. While some mediations were still held outside of the 130 day period, it was only 14% of the total. The average days from filing to mediation rose from 108 last year to 114 this year, but that is the result of the busier districts conducting more mediations right at the 130 day limit, while before they would have been sent private.

Given the 2002 amendments' provision of an overflow mechanism, and extension of the time limit to 130 days, it is not surprising that almost all mediations were timely over the last year. In addition, by advising the parties very early in the process if their cases is designated for private mediation, the vast majority of private mediations are also accomplished in the statutory timeframe.

Compilation of Data Reported by Mediators

PFB Dismissed	4253
Settle Before Mediation	11,128
Washout Agreement at Mediation	7081
All issues resolved	2188
All issues except Attorney Fees Resolved	2986
Some Issues resolved	3526
Impasse	8186
No Appearance	2231
Rescheduled	16,150
Recessed/Reconvened	2327
Mediation Waived	30
Average Days to Scheduled Mediation	114
Mediation Within 130 Days	79,937

Having surmounted the timeliness problems of the past, OJCC is pleased to report that the performance of the mediation service is highly satisfactory.
At the mediation conferences, all outstanding issues other than attorney fees were resolved 51% of the time, and in 30% of cases a washout settlement completely terminating the litigation was attained. A portion of the pending issues were resolved in 15% of the cases, and complete impasses occurred just 34% of the time. 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 40%. 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 by the number of mediations held results in a unit cost of less than $150 per mediation.

Case Resolution by Judges

Timeliness of Hearings	
Fiscal Year	Days
2001-02	345
2002-03	234
2003-04	206
2004-05	208

The Judges of Compensation Claims improved the timeliness of order, and held steady with regard to the timeliness of hearings, during FY 2004-05. The percentage of cases in which order were entered more that 30 days following the hearing decrease from 24% to 20%, still not perfect but showing steady improvement. The collective affirmance rate in the appeals court remained well above the 80% standard. Under the current statute, the standard for bringing a case to hearing is 210 days, and using conservative measurement assumptions, the offices averaged 208 days to hearing in the past year. Measurement assumptions are necessary because the statute provides a timeframe commenced when a petition is filed, and several petitions may be filed in a case, with some resolved at different times. For example, there could be five petitions in a case, and two could already be resolved when the third one is filed. Then, when the hearing is held, it could resolve the other three petitions. The conservative set of assumptions treats all the petitions as having been open unless they were previously specifically closed. Since the closures may not be all that reliable, this risks overstating the number of days to hearing, but has little or no risk of understating it. Accordingly, it is likely that the actual number of days is somewhat less, but even allowing for error, it is safe to conclude the average figure is within the statutory timeframe. It is also safe to say there is still considerable ground for improvement, as hitting the time frame on average implies some of the cases exceed the prescribed period.

Administrative Measures Being Implemented

The internal phase of the E-JCC electronic filing plan was implemented this year. Every JCC order is transmitted electronically to the central database, and any data capture necessary to meet statutory reporting requirements is completed at the point of transmission. The order is viewable on the internet the following day. The result has been to eliminate the delay in posting orders that had been troubling the central clerking staff in Tallahassee. The central clerking staff processes petitions and orders, and was instructed to give priority to Petitions, since those commence the statutory timelines. The processing of orders was delayed, and in some cases by a month or more. With the electronic order upload launched in March 2005, those delays are a thing of the past. In addition, district staff no longer need to take phone calls inquiring whether an order has been entered on a particular case. It is either visible on the website, or it has not yet been entered.

The second part of the E-JCC plan is to have litigants file their pleadings and motions electronically. This port of the plan has been plagued by implementation delays, from technical problems and security breaches to withdrawal of resources for devotion to

other priorities. The management information systems branch of the Division of Administrative Hearings has an inordinate number of strange difficulties.

Unattainable Statutory Requirements

The statutory requirement that the Deputy Chief Judge dismiss each Petition that fails to contain a social security number may be unattainable due to the district court's decision in Cagnoli v. Tandem Staffing. Review of that decision is pending before the Supreme Court, and the outcome is unknown at this juncture, but the OJCC complies with the district courts decision until otherwise directed. In any event, the social security number requirement can situationally conflict with the substantive provisions affording undocumented workers a right to have their benefit claims heard on an equal footing with legally employed workers. The OJCC makes an exception to the social security number requirement for anyone who obtains a substitute identification number from the Division of Workers Compensation, and will assist an individiual in obtaining such a number upon proper motion. Although this arrangement complies with the Cagnoli decision, it is not predictable at this point what the Supreme Court's decision will be, and it may establish different requirements.

As noted above, the requirement that judges police attorney fee transactions between claimants and their attorneys is one the judges have been able to accomplish, but with increasing difficulty. There is a real risk that some judges, eager to avoid the sort of attacks faced by Judges Castiello, Lorenzen, Lazzara, and Stephens over the past year, will quietly become soft targets for attorneys' efforts to circumvent the statutory limits on fees. Legislative action to protect the judges from recurrence of these attacks is necessary.

Recommended Changes or Improvements.

The recommendations made in previous years have not been adopted, but are still desirable. This year, the recommendations add a plea for protection from false character assassination by dishonest attorneys, add a recommendation for new judges in Ft. Myers and Daytona beach, and modify the recommendations for procedural change. Otherwise, the recommendations remain the same.

1. More Flexible Venue Provision.
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. Relief from Improper and Excessive Pressure to Circumvent Attorney Fee Limits. As described at length in the body of this report, the judges stand alone as the enforcers of the attorney fee limits imposed by the 2003 amendments. Attorneys are feeling the financial squeeze, and fighting back instead of simply complying with the law. In some cases, this results in the attorneys making scandalous and false personal attacks on the character and integrity of judges, not because they expect to be believed, but because all the judges will see what a miserable experience the attorneys can put them through if they do not play along with the creative efforts to circumvent the statute. Normally, the Bar rule against making false attacks on a public official would prevent the occurrence of such events, but in workers compensation attorneys are emboldened by lack of diligent investigation or prosecution by the Bar's disciplinary authorities. Accordingly, the legislature should take one of three actions.

a. Relieve the judges of the duty of policing fees.

This function really is one for an administrative agency to perform, not for the neutral adjudicators of the substance of the claims themselves. It is the underlying source cause of all the sleazy attacks against judges.

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. Accordingly, the legislature is requested to delete all requirements that judges approve stipulated attorneys' fees, or in the alternative, authorize delegation of this function to the administrative staff of OJCC instead of the judges. Under the new law, approval of settlements is a quintessentially bureaucratic, rather than judicial, function. It requires the protection of persons not party to the case (with respect to child support) and it requires taking an advocacy position with respect to the claimant versus his own counsel when attorney fees are assessed. Both functions are outside of the proper role for a neutral adjudicator charged with deciding between competing interests presented by the parties. 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.

There are three approaches to relieving the Judges of the clerical responsibility of processing settlements, and freeing their time for matters truly requiring quasi-judicial attention. One approach would be to substantively eliminate the provision that attorney fees and child support allocations be scrutinized. That is not recommended, however, because the collection of child support would be compromised, and though that is not

among the core functions of a workers' compensation system, it is a valuable public service which circumstances permit the system to perform at little or no cost. A second approach would be to assign attorney fee regulation to the Division- perhaps hanging the Employee Assistance Office to the Employee Assistance and affording lawyers aggrieved by EAPO actions hearings before the JCC. A third approach would be to entrust attorney fee regulation to the Bar, though history suggests that would be the equivalent to repealing the limits. A fourth approach would be to establish a right to bring qui tam actions as in medicare fraud cases against any attorney who has taken a fee in excess of the schedule, or to simply provide a civil cause of action by the client for treble damages plus punitives, in the event an attorney takes more than the permissible amount.

b. Provide OJCC with authority to punish unethical conduct by lawyers

The OJCC is hesitant to recommend that it be given authority to punish unethical behavior by attorneys, because unless extensive new resources are provided, the new duty would likely consume an inordinate amount of the time of judges and staff. Although there are many competent, ethical attorneys in the field, workers compensation has for decades been plagued by the less competent and abjectly unethical. While the Bar has made noble efforts in the past to require the same level of conduct in this field as any other, in recent years it seems unable or unwilling to extend the same level of vigorous enforcement of ethical rules in this area. Sadly, it has reached the point where a lawyer was found by a JCC to have improperly sought to take his own client's money twice for the same service, and the Bar dismissed the action without finding probable cause, accepting the attorney's assertion that the "judge did not follow the law." But the judge's order had been affirmed by the district court of appeal.

The Supreme Court has held that the legislature would have the authority to give an administrative agency the power to regulate the practice of law before it, Florida Bar v. Moses, so long as it provides sufficient standards to guide the agency's exercise of the authority. Following Moses, therefore, the OJCC reluctantly recommends that the legislature authorize it to impose sanctions on attorneys for conduct violating the code of professional conduct in connection with workers' compensation practice, after proper notice and hearing, ranging from reprimand to supervision orders, to suspension and permanent prohibition from practicing before the OJCC.

c. Raise the criminal penalties for circumventing the limits to felony status.

Attorneys who practice cost circumvention of the type described in this report may be violating section 440.105(3)(c), which provides it is a misdemeanor to take money for services rendered under Chapter 440 without first securing the approval of the judge of compensation claims. No comprehensible argument defending cost circumvention under that statute has yet been articulated, but that may be because the OJCC knows of no prosecutions filed under that section since the 2003 amendments took effect. Raising the stakes by increasing the penalty would make criminal prosecution more likely, and the question could be resolved by the courts.

3. Petitions. Require Petitions to specify exactly what benefits are claimed, and attach a dollar figure to each that would, if tendered, be sufficient to resolve the pending controversy. Permit carriers to pay the specified amount without prejudice to future action.

4. Expedited Hearings. The current law's expedited hearing procedure 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 almost 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.

5. 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. In oral argument on the Rules case, the Chief Justice remarked that she found the rulemaking authority unclear and confusing. 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.

6. 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.

7. Policy Guidance Mechanisms. The Workers' Compensation system is in need of policy guidance and direction, and the current system of policymaking by ad hoc adjudication in a single district court of appeal continues to be marked by unpredictability. This results from a defect in the statutory scheme, not from any failing on the part of the court. In a democratic system, judges should be the followers, not the leaders, on questions of policy, and the statute leaves very large gaps in which policy decisions must be made. The statute thus places the appellate court in the role of the policy stewards of the workers' compensation system, in addition to their other responsibilities for criminal law, common law, administrative law, family law, and various other kinds of cases. The appellate judges are legal experts, adept at determining whether there is legal error in a lower tribunal's decision. While they obviously should have the power of judicial review of administrative policymaking action, they should not

be required to make policy in the first instance in an area as intricate as workers' compensation. That is considered important enough to be a full-time profession in most other states, and there is nothing easier or less important about workers' compensation in Florida that renders a less thorough approach adequate here.

The administrative agency model of policy guidance, in which the agency reviews the judge's legal conclusions for policy coherence prior to the dispute reaching judicial review, is one that functions well in most other subject areas and should be considered. Every other large state has a Workers' Compensation Commission or similar body that has authority to conduct the basic review of workers' compensation trial judge decisions, and articulate the policy considerations underlying the result. Moreover, in every other area of the law judicial review is conducted by the court having territorial jurisdiction over the place where the case arose, with the potential of review by the Supreme Court in the event of conflicts among districts. The current scheme sends the public a message that workers' compensation law is not of sufficient stature to merit review by the Supreme Court on an equal footing with every other kind of case. As the number of people who interact with the workers' compensation system is larger than the numbers affected by most, if not all, other bodies of law, it seems unfortunate that the system would treat workers compensation law as less worthy than any other field. The OJCC does not request any specific policy guidance mechanism, but does suggest that the legislature address what has become the fundamental problem of administration of the workers' compensation law.

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 was remarkably successful in carrying out its mission in fiscal year 2004-2005, producing a higher volume of output, under budget, without diminution in quality of performance, while under attack. OJCC remains proud of its contribution to child support enforcement, having resulted in the collections of unpaid child support arrearages in the amount of half of its total annual budget.

The mediators continue to be able to efficiently 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, to the extent that most observers rejected out of hand the heinous accusations that were made. 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. The delays in mediating and hearing cases were cited as the most unsatisfactory aspect of the OJCC's performance two years ago, and although the timeliness record is still not perfect, the statutory timeframe it met 86% of the time. The rapid increase in new cases that predated the 2003 amendments has given way to two successive years of declines in volume, which for the first time this year began to relieve the workload in the offices. One can be optimistic that the decline in the volume of new cases, if it persists, will reduce the stress levels among the support staff, and result in lower turnover rates. The OJCC is committed to having a smaller, more professional, and better paid support staff, so it will no longer seem 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 continue its advances by effectuating the transition to a new filing system. As predicted last year, the new statute should cause a reduction in litigation if it is not voided or eviscerated by the appellate courts, and if the attorneys' pressure to permit circumvention of the new act is not allowed to succeed. Three years ago, this report implored the policymakers to stem the rising tide of cases. The Governor and Legislature rose to the occasion and passed a law intended to provide relief, and this year it appears the vision of the amendments is beginning to be realized. If the gains can be held, the OJCC will be well-positioned to continue accomplishing its mission in the future.

Respectfully submitted,

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Office of Judges of Compensation Claims
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