

# STATE OF FLORIDA

## Division of Administrative Hearings



### Annual Report of the Office of the Judges of Compensation Claims **Supplement 2016-2017**

#### **The OJCC Mission:**

To maintain a statewide mediation and adjudication system for the impartial, efficient, and timely resolution of disputed workers' compensation claims.

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## Introduction

This report is issued to provide interim information regarding the state of Florida workers' compensation litigation, updated for the period July 1, 2016 through December 31, 2016 (the first half of fiscal year 2016-17). In November 2016, pursuant to section 440.45(5), Fla. Stat.,<sup>1</sup> the *2015-2016 Annual Report of the Office of the Judges of Compensation Claims* was distributed. During preparation of that report, this Office received requests for updated information regarding litigation trends. There were also requests for further explanation of data regarding attorney fees. This interim report is an effort to provide more accurate and detailed information in an accessible fashion.

Florida workers' compensation was the subject of intense debate in 2015-2016. Decisions by the Florida Supreme Court and Florida First District Court of Appeal, issued in the spring of 2016, were foundational in some of the debate. While these cases fueled discussion of Florida workers' compensation, other issues were included in various discussions as well. And, in fiscal 2016-17 there remain intriguing workers' compensation issues under consideration by the courts; and, there is some potential that the Florida Legislature may make inquiries into workers' compensation.

The Florida First District Court of Appeal rendered *Miles v. City of Edgewater Police*, 190 So.3d 171 (Fla. 1st DCA 2016)(April 20, 2016), concluded that injured workers have a constitutional right to contract for legal services. This struck the application of section 440.105, Fla. Stat., which constrained fees paid by, or on behalf of, injured workers. The Florida Supreme Court rendered *Castellanos v. Next Door Co*, 192 So.3d 431 (Fla. 2016)(April 28, 2016), concluding that the amount limitations on workers' compensation attorney fees in section 440.34(1), Fla. Stat. are unconstitutional. And, the Supreme Court issued *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016) (June 9, 2016), holding that statutory limitations on the duration of workers' compensation benefits are unconstitutional.

Also noteworthy, the Florida Third District Court of Appeal recently reversed a trial decision concluding exclusive remedy unconstitutional. Late in 2015, the Florida Supreme Court declined to review that decision. *Florida v. Florida Workers' Advocates*, 167 So.3d 500 (Fla. 3<sup>rd</sup> DCA 2015); *rev. denied, Florida Workers' Advocates v. State*, 192 So.3d 36 (Fla. 2015). Another constitutional challenge regarding sufficiency of workers' compensation benefits was decided by the Florida First District Court in 2015. The Florida Supreme Court accepted jurisdiction to review that case. However in April 2016, the Court dismissed that case without opinion. *Stahl v. Hialeah Hospital*, 160 So.3d 519 (Fla. 1<sup>st</sup> DCA 2015); *rev. granted*, 182 So.3d 635 (Fla. 2015); *review disp.* 191 So.3d 883 (Fla. 2016)(April 28, 2016).

All of these were topics of discussion within the Florida workers' compensation community. To some extent, each also received the attention of speakers at national conferences regarding workers' compensation.

In July 2016, the National Council on Compensation Insurance (NCCI) proposed an increase in Florida workers' compensation insurance rates of 19.6 percent. Some of that proposed increase (1.8%) was related to passage of Senate Bill 1402 (changes in Health Care Provider Reimbursement Manual).<sup>2</sup> A portion (15%) was related to *Castellanos*, and the remainder (2.2%) to *Westphal*.<sup>3</sup>

In August, an attorney sued NCCI, the Florida Office of Insurance Regulation (OIR) and the Commissioner of Insurance. Though brought by an attorney, the suit alleged standing based on the attorney's role as an employer, and thus a payer of workers' compensation premiums. The suit sought injunctive relief to prevent any rate increase, and alleged that the current Florida process for determining and proposing rate changes violated the Florida Sunshine Law.<sup>4</sup> On September 27, 2016, the Florida Office of Insurance Regulation announced that a rate increase would be approved if NCCI submitted an amended rate filing for 14.5% (including: 1.8% for changes in Health Care Provider Reimbursement Manual, 10.0% related to *Castellanos*, and 2.2% related to *Westphal*).<sup>5</sup> NCCI filed as directed, and the OIR issued a final order granting this increase; the rate was effective December 1, 2016.<sup>6</sup>

In late November, Leon County Circuit Judge Karen Gievers concluded that the process involved in the rate increase filing violated the Florida Sunshine Law. The ruling voided the OIR order.<sup>7</sup> The OIR sought review by the Florida First District Court, and an automatic stay resulted.<sup>8</sup> The OIR sought to extend that stay, pending the outcome of review,<sup>9</sup> which the First District Court granted.<sup>10</sup> Therefore, the rate increase became effective December 1, 2016.<sup>11</sup> There has been significant discussion as to the ultimate outcome of this litigation. The Court has expedited review, and the briefing process will be concluded in early February 2017. Therefore, a decision from the Court might be published prior to the conclusion of the 2017 Legislative Session.<sup>12</sup>

## Data Collection and Reporting

This OJCC publishes reports annually pursuant to statutory mandate. §440.45(5), Fla. Stat.<sup>13</sup> The accuracy of the data in these reports is dependent upon the efforts of district staff working in thirty-one divisions in seventeen District Offices throughout Florida. In preparing this analysis, the OJCC utilized approximately 436,102 lines of data collected by the District Offices regarding attorney fees over the ten full fiscal years 2006-07 through 2015-16, and the first six months of fiscal year 2016-17 (July 1, 2016 through December 31, 2016).<sup>14</sup> The *2005-06 OJCC Annual Report* described prior data flaws resulting from outdated hardware, outdated software, and long neglect of staff training prior to the transfer of the OJCC to the DOAH in 2001. The data examined for this report, despite those efforts, suggested data errors persist. Therefore a population of data entries was recently manually audited, and corrected. These efforts involved a significant investment of time<sup>15</sup> by the following OJCC central staff: Stephanie Hayes, Esq., Julie Hunsaker, Patrick Bickford, Tammy Galey, Debbie Golden, Irish Gilbert, Tina Hammons, Josh Henderson, Melissa Moody, Paula Nickel, and Cory Strickland. For this report, 12,732 lines of data were manually audited and the figures confirmed or corrected, as detailed in this chart.

Fiscal Year	Volume Audited	Percent Audited	Removed	Corrections	Error rate %
2006-07	2324	4.7%	242	324	24.4%
2007-08	2008	4.1%	44	138	9.1%
2008-09	1727	3.8%	56	87	8.3%
2009-10	1322	3.2%	34	83	8.9%
2010-11	1059	2.9%	27	74	9.5%
2011-12	1045	2.8%	23	76	9.5%
2012-13	917	2.5%	18	43	6.7%
2013-14	754	2.1%	24	54	10.3%
2014-15	669	1.9%	27	46	10.9%
2015-16	663	1.9%	15	31	6.9%
2016-17	244	0.7%	40	15	22.5%

As a result of that audit process, the claimant attorney fees previously reported by the OJCC have changed. This is due to the removal of some duplicate fee orders in the database, and the correction of other entries through the significant audit process. As a result, the figures were adjusted as follows:

Fiscal Year	Originally Published Claimant Attorney Fees	Adjusted Claimant Attorney Fees	Difference	% Change
2006-07	\$191,197,443	\$192,000,014	\$802,571	0.42%
2007-08	\$188,701,256	\$188,782,141	\$80,885	0.04%
2008-09	\$181,660,686	\$182,223,562	\$562,876	0.31%
2009-10	\$176,996,765	\$177,350,478	\$353,713	0.20%
2010-11	\$157,081,084	\$157,380,907	\$299,823	0.19%
2011-12	\$152,848,003	\$152,574,905	(\$273,098)	-0.18%
2012-13	\$151,889,627	\$151,785,123	(\$104,504)	-0.07%
2013-14	\$141,858,184	\$141,860,173	\$1,989	0.00%
2014-15	\$136,180,202	\$136,243,567	\$63,365	0.05%
2015-16	\$136,461,404	\$136,573,637	\$112,233	0.08%
2016-17 projected.	\$186,922,028	\$186,922,028	\$0	0.00%
2016-17 to date	\$93,461,014	\$93,461,014	\$0	0.00%

Audit efforts are ongoing,<sup>16</sup> and there is expectation that these figures will be revised again in the *2016-17 Office of Judges of Compensation Claims Annual Report*.<sup>17</sup> The sheer volume of data renders it impractical to review data regarding every fee order uploaded. In all, there are approximately 438,923 lines of data related to fee orders uploaded, during the time period represented in the chart above. Manual audit of all such orders could require as much as 14,000 work hours. This Office is therefore working on programmatic changes to both identify data for review and to assure fewer data entry errors in the future.

## **NUMBER OF LITIGATED CASES:**

It is difficult to ascertain with absolute certainty how many “cases” are in litigation at a given moment in time. The OJCC developed and uses a proprietary database that includes a powerful case management program, the JCC Application, or “JCCA.” The ability to quantify has been markedly enhanced by this program. However, there remains one irreconcilable issue with the reporting of the “number of litigated cases.” In workers’ compensation, there simply is no clear definition for “cases.” Litigation in Florida workers’ compensation is usually instigated with a Petition for Benefits (“PFB”). Each PFB might seek a single benefit, or many benefits.<sup>18</sup> A given workers’ compensation trial might decide the issues in one PFB or several PFBs serially filed prior to trial. The overall number of PFBs filed is therefore one measure of system volume. The very nature of workers’ compensation cases often results in periods of administrative delivery of benefits to a particular injured worker, punctuated periodically with some disagreement that requires the filing of a PFB or motion. Therefore a PFB filed in any particular fiscal year<sup>19</sup> could seek resolution of an issue regarding an accident that occurred that year or perhaps many years prior.

Issues may likewise be brought before a Judge of Compensation Claims by a motion.<sup>20</sup> Arguably, motion filing might be a valid measure of volume.

Another measure of litigation volume is the “new case” PFBs filed annually. “New case” PFBs may likewise reference a date of accident that is either recent or remote, but each “new case” PFB certainly represents an accident(s) for that particular injured worker that is new to litigation, i.e. “new” to the OJCC. This metric measures “new” litigation, but ignores the intensity of litigation. Conversely, the overall PFB number may more accurately reflect litigation intensity, but ignores frequency of litigation beginning.

Because there are merits regarding the efficacy of both the “raw PFB” measure and the “new cases” measure, the OJCC calculates and reports each. Notably, each of these metrics ignores the volume of litigated cases that are instigated by motion instead of PFB. Although these motions<sup>21</sup> also represent “litigated” cases, it is believed that cases instigated by PFB filing effectively represent litigation volume trends statistically, despite the exclusion from this total of the significant volume of work presented by attorney fee, prevailing party cost, and similar evidentiary motions.

### **Gross Petition for Benefit (“PFB”) Filing**

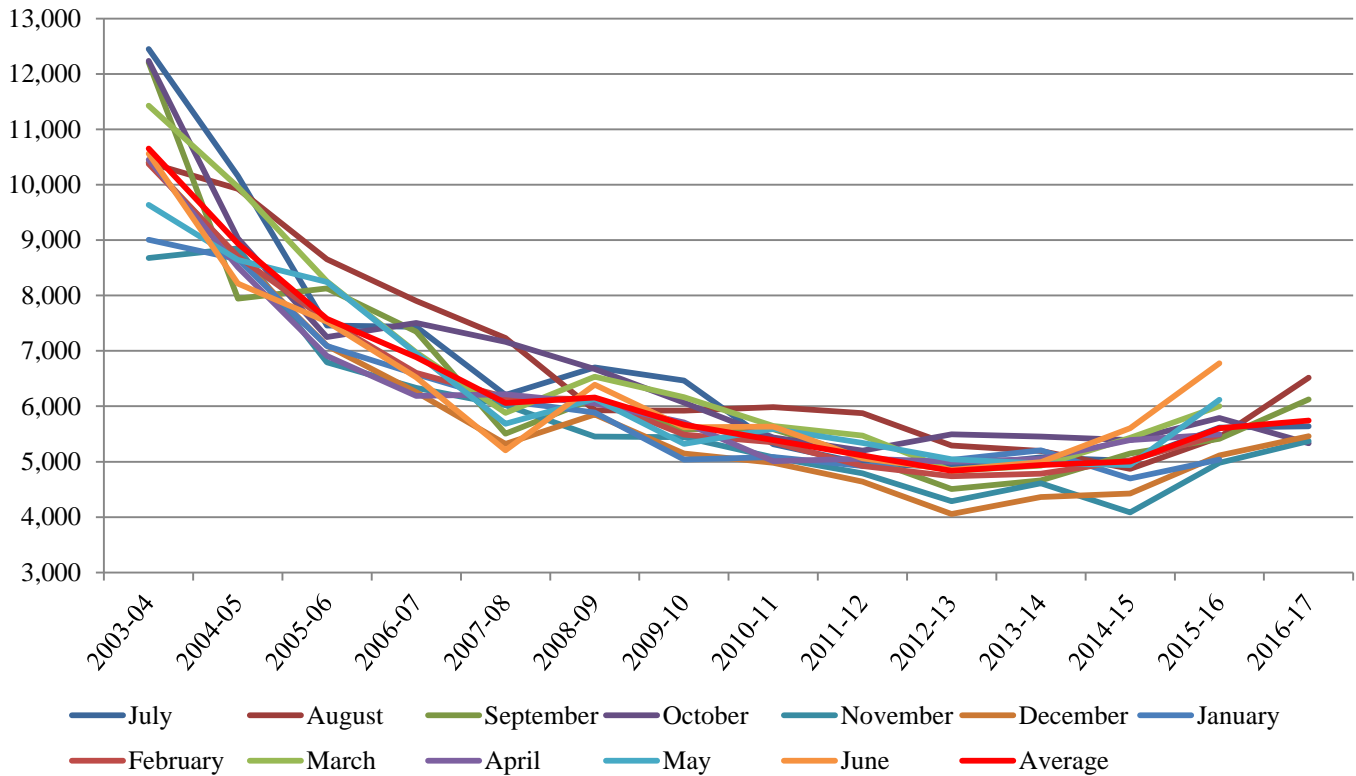
Petition filings in Florida decreased following the legislative amendments in 2003. With the exception of a slight increase in 2008-09, rates declined every fiscal year from 2002-03 through 2012-13. In 2013-14 and 2014-15, there were slight increases in petition volume. In 2015-16, there was a significant increase in petition volume, 12%. The volumes and rates for the last 14 years are at the right, as presented in the *2015-16 Office of the Judges of Compensation Claims Annual Report*.

Since July 2016, this Office has received multiple inquiries regarding the trend of petition filing to date in 2016-17. There have been questions regarding consistencies or distinctions in monthly filings, e.g. which months are “busy” versus “slow.” No such patterns have previously been identified. However, in an effort to be responsive, the monthly figures for the last 14 years have been examined for this report.

The 2016-17 figures thus far demonstrate a continued trend to increased PFB filing. However, because of the inconsistency between various months, it is impractical to conjecture the ultimate PFB volume when this fiscal year concludes June 30, 2017. However, in an effort to address these curiosities, two projections are offered. In the first, the petition volumes for the first half of each fiscal year are compared. In the second, an ultimate 2016-17 petition total has been postulated by (1) calculating the average monthly change for the first six months of 2016-17, and (2) applying that average growth rate to the remaining months of 2016-17.

In comparing fourteen years of data, month over month, the data illustrates a reasonable consistency in terms of annual increase and decrease. However, most years demonstrate variations in monthly totals. The following graph depicts the variations in monthly volumes.

Fiscal Year	Petitions Filed	% Change
2002-03	151,021	
2003-04	127,611	-15.5%
2004-05	107,319	-15.9%
2005-06	90,991	-15.2%
2006-07	82,607	-9.2%
2007-08	72,718	-12.0%
2008-09	73,863	1.6%
2009-10	67,971	-8.0%
2010-11	64,679	-4.8%
2011-12	61,354	-5.1%
2012-13	58,041	-5.4%
2013-14	59,292	2.2%
2014-15	60,021	1.2%
2015-16	67,265	12.1%

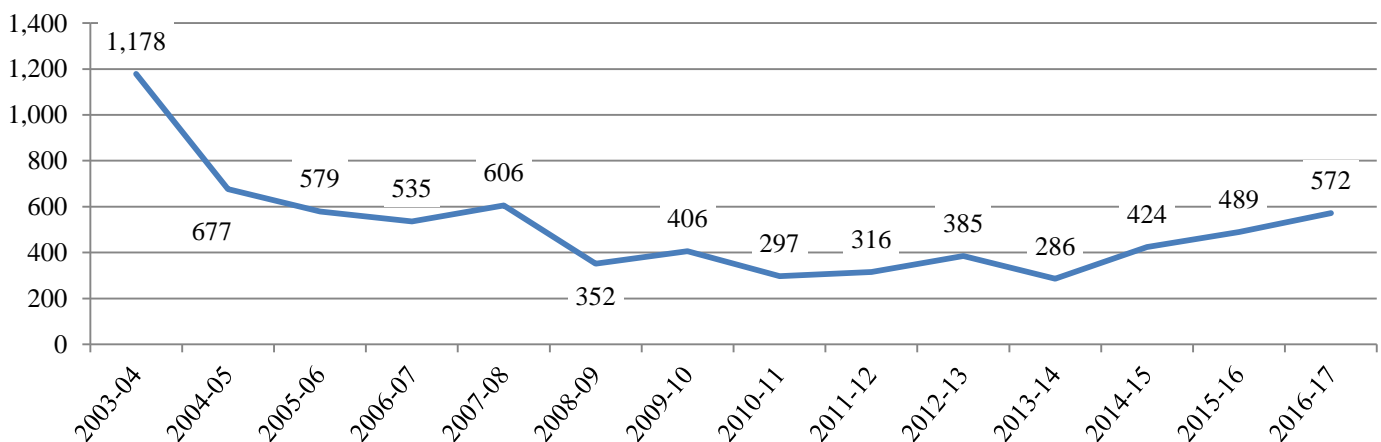


For example, the highest volume petition month was June (2), July (4) or August (5) in eleven of the last fourteen years (2016-17 unknown as yet, but August 2016 is currently the highest for the year). October was the highest monthly volume in two fiscal years. Thus, these four months consistently evidence higher filings. The highest filing month for 2014-15 and 2015-16 were each in June. The graph above is reproduced on page 29-30, but separated into quarters.

Similarly, the lowest volume month was November (5) or December (3) in eight of the last fourteen years. (2016-17 unknown as yet, but October is currently the lowest for the year). There is no notable commonality among the remainder: September (1), October (0), January (1), February (0), March (0), April (2), May (0), June (1).<sup>22</sup>

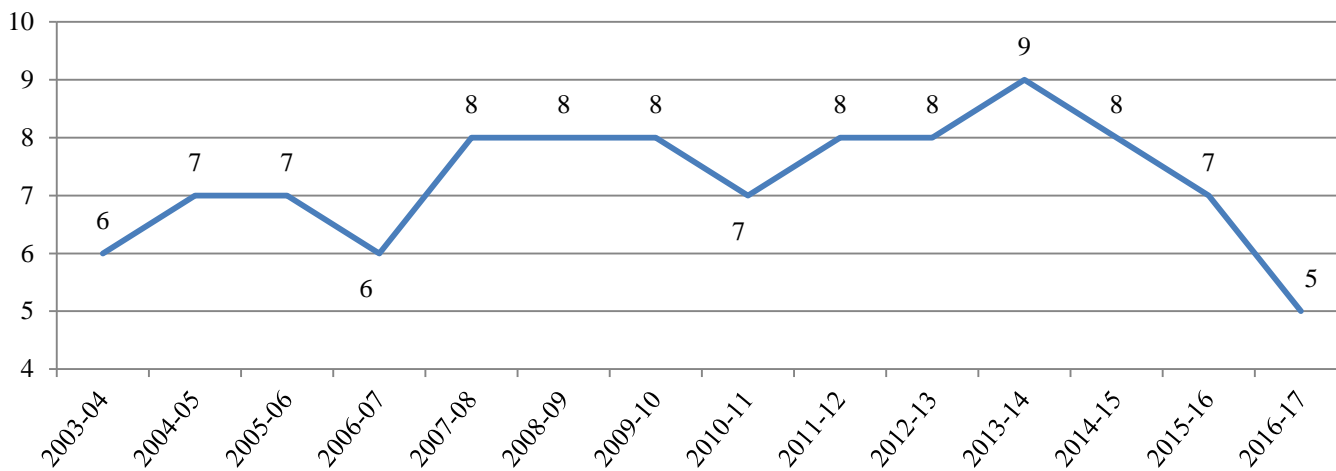
Each month was compared to the mean<sup>23</sup> for that particular fiscal year. A standard deviation<sup>24</sup> was calculated for each fiscal year, and the monthly averages compared thereto. The deviation initially decreased markedly. Following four years in a range close to 600, the deviation dropped below 400 in 2008-09 and remained reasonably consistent through 2014-15. The deviation increased noticeably in 2015-16, and the indications thus far for 2016-17 seem supportive of continued volatility in the month-to-month comparisons of petition filing volume. This signals that volume is difficult to predict for any particular month.

### Standard Deviation from the Mean



Conversely, annual consistency is demonstrated by a comparison of the number (of 12 months, except for 2016-17 for which the comparison is from a population of 6 months) of months for which the PFB filing volume was within one standard deviation from the mean for that year. The 5 months for 2016-17 could signal increased consistency (month to month within the year), as that represents 5/6 of the fiscal year thus far. If that were annualized, it would represent 10/12, the highest consistency of this comparison. Due to the lack of discernable pattern of particular months, year to year, that conclusion now is merely supposition. However, it seems indicative that 2016-17 internal consistency is at least likely to be similar to recent years, with 7-9 months within one standard deviation.

## Months Within One Deviation of the Mean



In the following projection, the PFB volumes for the first half of each of the last fourteen fiscal year are compared. From this analysis, the “weight” of the first six months of a fiscal year can be determined (“Percentage of Full” year volume). The mean<sup>25</sup> percentage of the first six months of a fiscal year, for the thirteen years between 2003-04 and 2015-16, is 50.1%. This supports that overall petition volume in the first six months of the studied fiscal years has been reasonably consistent over the past 13 years. Increasing petition volumes have occurred in each of the last three complete fiscal years (2013-14, 2014-15, and 2015-16), with the volume in 2015-16 significantly similar to the 2009-10 total. Considering only the most recent 6 year period 2009-10 through 2015-16, the data shows three years of decrease followed by three years of increase, and remarkably similar volumes at each end of the period.

Currently, petition volumes are up for 2016-17 by 6.5%. If this represents 50% of the total volume for the year, then projected volume for 2016-17 would be 68,894. This would yield an annualized rate of increase of about 2.4%. Instead, if the current trend demonstrated in this chart remains consistent, and the first half is instead 48% (approximately), then the 2016-17 total can be projected at 71,610, an annualized rate of increase of about 6.5%. From the available data, the 2016-17 PFB filing is therefore likely to be in the range of 3% to 6%. It appears likely that 2016-17 will be similar in PFB filing volume to something between 2009-10 (67,971) and 2008-09 (73,863).

Fiscal Year	Total Petitions Filed	Petitions filed 12.31	Percentage of Full	% Change
2002-03	151,021			
2003-04	127,611	66,373	52.0%	-15.50%
2004-05	107,319	54,587	50.9%	-15.90%
2005-06	90,991	45,376	49.9%	-15.2%
2006-07	82,607	42,780	51.8%	-9.2%
2007-08	72,718	37,440	51.5%	-12.0%
2008-09	73,863	36,754	49.8%	1.6%
2009-10	67,971	34,628	50.9%	-8.0%
2010-11	64,679	32,381	50.1%	-4.8%
2011-12	61,354	30,570	49.8%	-5.1%
2012-13	58,041	28,541	49.2%	-5.4%
2013-14	59,292	29,360	49.5%	2.2%
2014-15	60,021	28,932	48.2%	1.2%
2015-16	67,265	32,357	48.1%	12.1%
2016-17	unknown	34,447		6.5%

## **New Case Filing**

The volume of “new cases filed” has been tabulated only since the OJCC was transferred to the DOAH in 2001. The term “new cases filed” refers to the volume of PFBs filed, which represent the first PFB in the history of that particular accident by that particular injured worker. The rate at which “new cases” are filed is indicative of the rate at which cases are entering the OJCC litigation process.

A “new case” filed in 2016-17 could involve an accident that year, or could involve an accident that occurred years prior, even prior to the 2003 statutory amendments. It is possible that an injured worker might receive all benefits due, without any need for litigation, for many years following a work accident.<sup>26</sup> Such a case may enter litigation after many years of administrative delivery of some benefits. The OJCC has not attempted to delineate the age of accidents that enter the OJCC system as “new cases” each year.

The volume of “new cases” filed steadily declined after the 2003 statutory amendments. The rate of decline in “new cases” filing was less than the rate of PFB decline in almost every fiscal year since 2003. The exceptions are 2009-10, when “new case” filing decreased over ten percent (10%) compared to an overall PFB filing decrease of eight percent (8%). In 2013-14, 2014-15, and 2015-16 “new case” filings increased, consistent with the trend of PFB filings increasing. However, the changes in “new case” volume have consistently been less dramatic than petition filing volumes.

Fiscal Year	Total New Cases	New Cases filed 12.31	Percentage of Full	% Change
2002-03	56,869			
2003-04	44,033	20,000	45.42%	
2004-05	38,540	16,125	41.84%	-19.38%
2005-06	36,913	15,238	41.28%	-5.50%
2006-07	36,227	15,642	43.18%	2.65%
2007-08	34,481	15,158	43.96%	-3.09%
2008-09	33,995	14,482	42.60%	-4.46%
2009-10	30,525	13,199	43.24%	-8.86%
2010-11	29,804	12,601	42.28%	-4.53%
2011-12	29,358	12,247	41.72%	-2.81%
2012-13	28,912	12,018	41.57%	-1.87%
2013-14	29,771	12,746	42.81%	6.06%
2014-15	29,870	12,700	42.52%	-0.36%
2015-16	31,165	12,968	41.61%	2.11%
2016-17	unknown	13,039		0.55%

Utilizing the same analysis applied to petition filing above, the “new case” volume for 2016-17 is predicted to be between -2% and 1%. The data through December 31, 2016, currently indicates less than a 1% increase in “new case” filings. However, analysis of the last 13 years supports the conclusion that historically only about 42% of “new cases” each fiscal year are filed in the July/December period. Therefore, it is suggested that the filing rates, if consistent with historical performance, will result in an annual increase more significant than the current .55%.

## **ATTORNEY FEES**

The OJCC is required by law to approve all attorney fees paid by or on behalf of an injured worker, section 440.34, Fla. Stat.<sup>27</sup> There is no such specific requirement for the approval of fees paid by employer/carriers for their defense counsel representation.<sup>28</sup> Despite the absence of such specific requirement for defense fee approval, the broad language of section 440.105(3)(b), Florida Statutes<sup>29</sup> arguably could require OJCC approval of defense attorneys’ fees. However, this statutory authority has historically not been interpreted to require approval of defense attorneys’ fees, although some claimant’s attorneys and groups have questioned this interpretation and the fundamental fairness of fee constraint for injured workers without corresponding constraint on employers.<sup>30</sup>

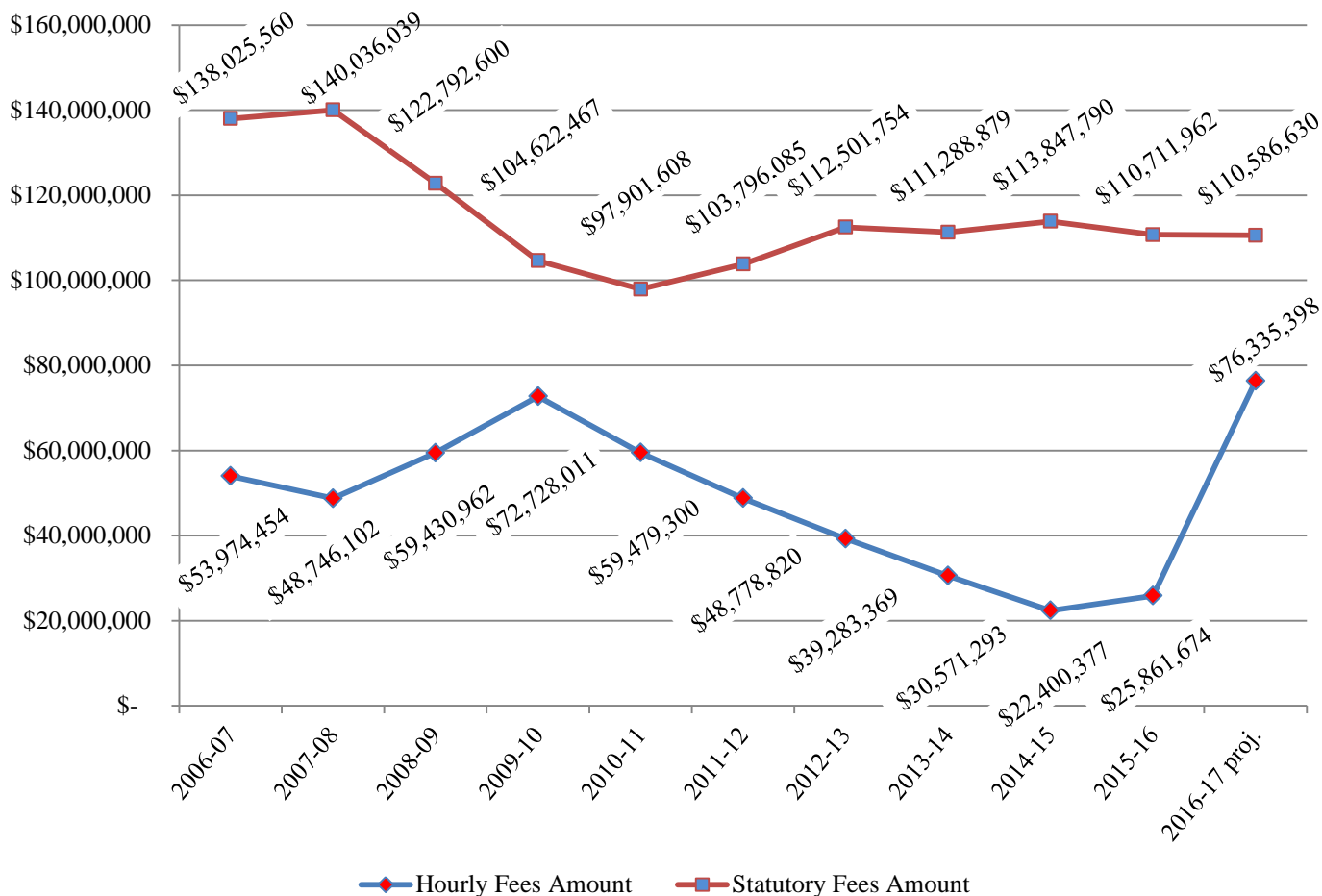
The *2015-16 OJCC Annual Report* is an in-depth examination of the Florida workers’ compensation litigation process. Preparation of the report requires hundreds of hours each fall. During the course of preparing the 2015-16 report, multiple requests were received for “updated” information regarding workers’ compensation litigation, including attorney fees approved. Many interesting questions about fees were posed, including: (1) are fees increasing or decreasing, (2) is the change more pronounced in “statutory fees” than in “hourly fees,” (3) is there any data regarding attorney fees approved, broken down to account for different legal parameters in effect for various dates of accident, and more. What follows is an attempt to address some of these questions.



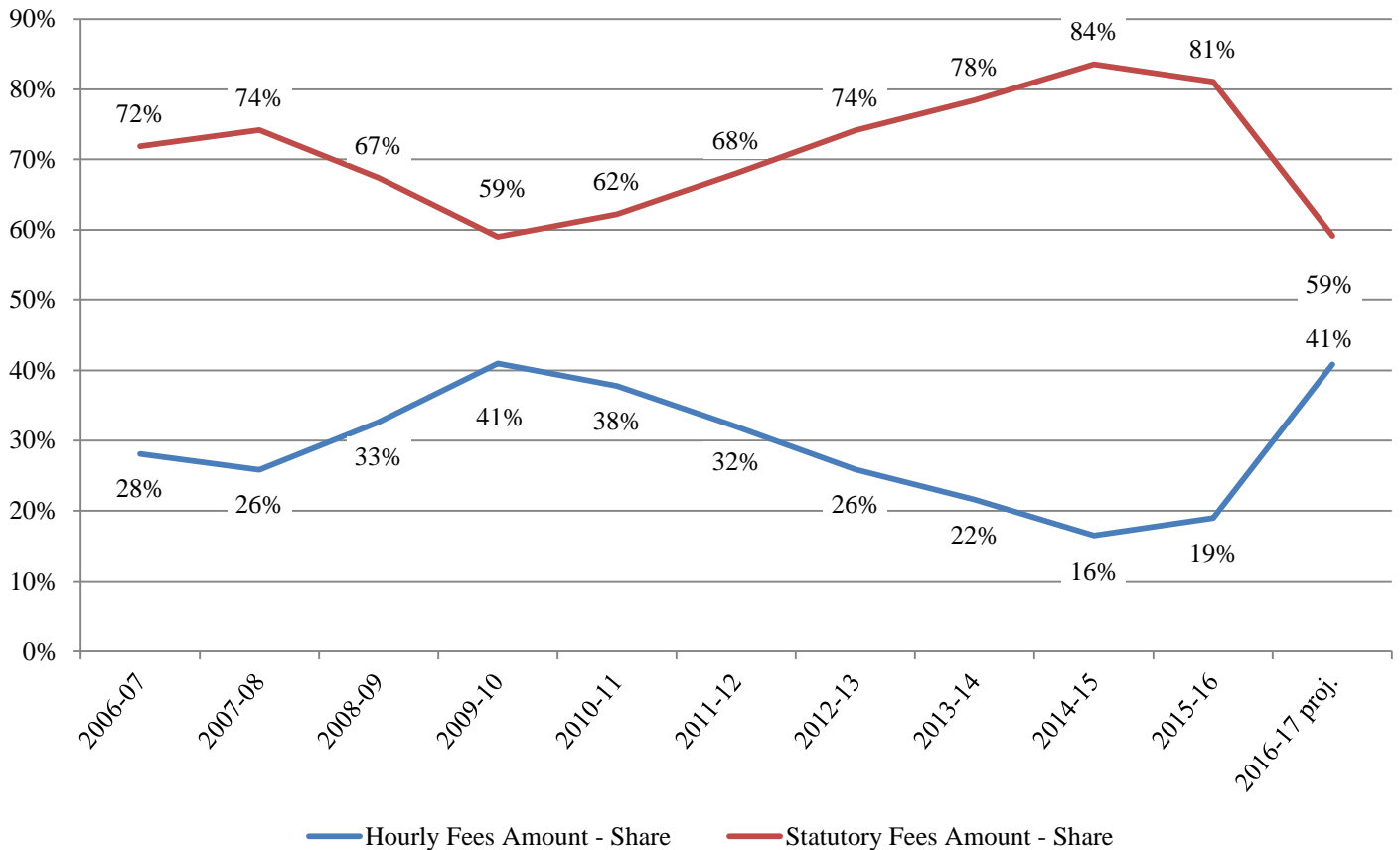
To what extent do these two categories, “statutory fees” and “hourly fees,” contribute to the overall aggregate of Claimant fees? The volume and the percentages have fluctuated. Over the ten year period studied, “statutory fees” ranged from 59% to 81% of the aggregate fee total; “hourly fees” ranged from 16% to 41%. With data for six months of fiscal 2016-17, the potential is that “statutory fees” this year may match the low end of this spectrum (59%), and “hourly fees” the high end (41%). The ten and one-half years are set forth in this chart. The 2016-17 “projected” figures for the remainder of this report were generated by multiplying the figures for the first half of 2016-17 by two.

Fiscal Year	Adjusted Claimant Attorney Fees	Statutory Fees Amount	Statutory Fees Amount - Share	Hourly Fees Amount <sup>31</sup>	Hourly Fees Amount - Share
2006-07	\$192,000,014	\$ 138,025,560	72%	\$ 53,974,454	28%
2007-08	\$188,782,141	\$ 140,036,039	74%	\$ 48,746,102	26%
2008-09	\$182,223,562	\$ 122,792,600	67%	\$ 59,430,962	33%
2009-10	\$177,350,478	\$ 104,622,467	59%	\$ 72,728,011	41%
2010-11	\$157,380,907	\$ 97,901,608	62%	\$ 59,479,300	38%
2011-12	\$152,574,905	\$ 103,796,085	68%	\$ 48,778,820	32%
2012-13	\$151,785,123	\$ 112,501,754	74%	\$ 39,283,369	26%
2013-14	\$141,860,173	\$ 111,288,879	78%	\$ 30,571,293	22%
2014-15	\$136,243,567	\$ 113,847,790	84%	\$ 22,400,377	16%
2015-16	\$136,573,637	\$ 110,711,962	81%	\$ 25,861,674	19%
2016-17 proj.	\$186,922,028	\$ 110,586,630	59%	\$ 76,335,398	41%
2016-17 to date	\$93,461,014	\$ 55,293,315	59%	\$ 38,167,699	41%

These aggregate annual fee amounts are also presented in the following graph:



The percentage contribution of both “statutory” and “hourly” attorney fees is depicted in this graph:

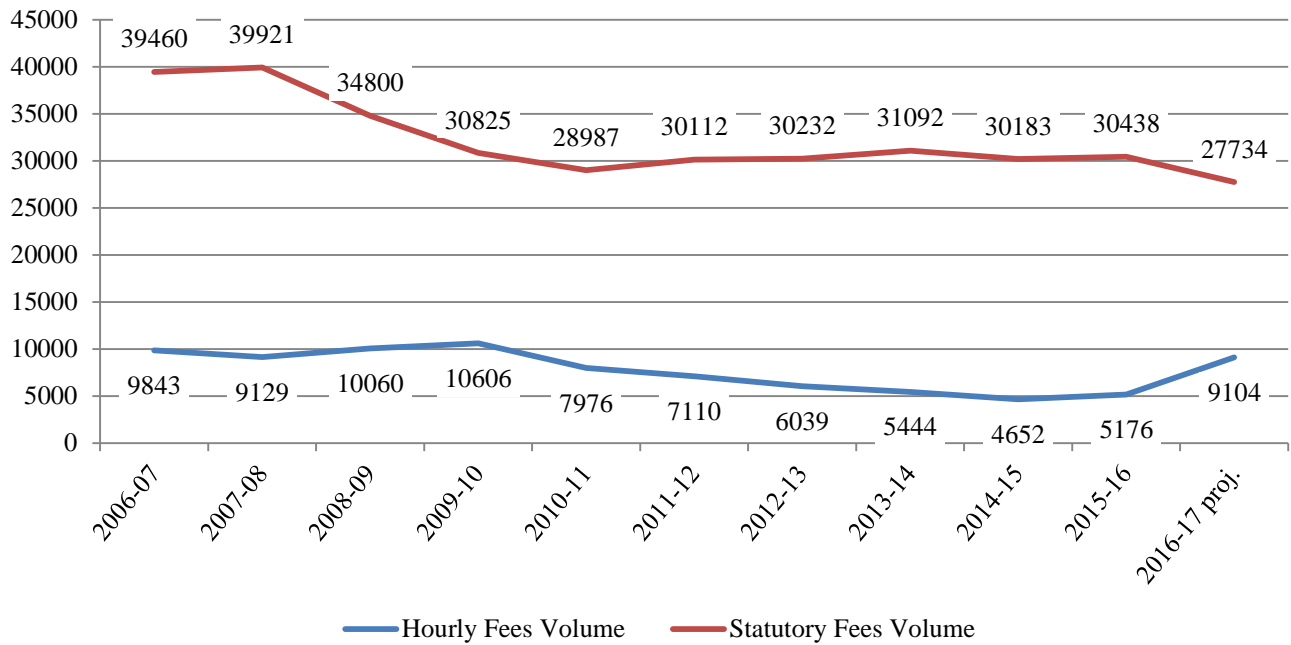


Coincidentally, the last time the 59%/41% paradigm is illustrated was in fiscal year 2009-10. The Legislature amended section 440.34, Fla. Stat. effective July 1, 2003. That amendment removed the “presumptive” statutory formula for fees, and replaced it with a more (but see section 440.34(7), Fla. Stat.,<sup>32</sup> for a potential deviation) constricted version. That effective denial of judicial discretion persisted until October 23, 2008 when the Florida Supreme Court rendered *Murray v. Mariner Health*.<sup>33</sup> That decision implied “hourly fees” back into section 440.34(1), on the logic that the word “reasonable” in that section could support no other conclusion. The Legislature reacted in the 2009 session<sup>34</sup> and removed “reasonable” from section 440.34(1), Fla. Stat.

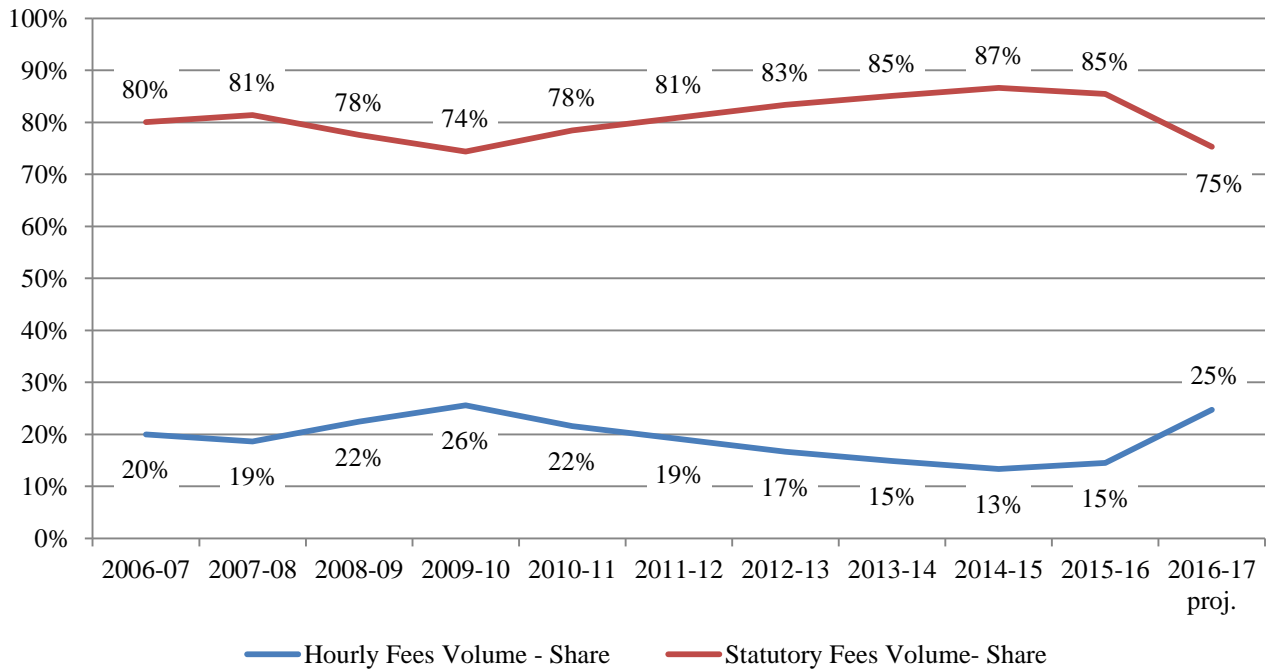
It is logical that the increased share of hourly fees in 2008-09 (in the eight post-*Murray* months, November through June) and the further increase in 2009-10 (as fees were claimed related to the existing remaining population of cases with accident dates between July 1, 2003 and June 30, 2009) could be causally related to the Supreme Court’s inference of statutory ambiguity and reinstatement of hourly fees beyond the constrained exception in section 440.34(7), Fla. Stat. As that existing population of claims and cases was resolved, and as the new cases (dates of accident after July 1, 2009) became a greater share of the overall litigation population, it is logical that the constraints of section 440.34(7) regained primacy following the 2009 amendment and that this contributed to the steady decline in hourly fee amounts as compared to statutory fee amounts.

The logic of this conclusion is illustrated by a very similar predicted increase in hourly fees as a percentage of fees overall for 2016-17. The prediction of a return to the same 59%/41% paradigm supports this logic. It is impractical, with the available data, to predict how this percentage comparison might manifest in coming years.

The volume of orders depicted in the following graph<sup>35</sup> also indicates a similar trend in 2008-09 and 2009-10 to increased motions and stipulations for attorney fees.



The volume of “hourly fee” orders demonstrated similar increase (from 22% to 26%) in 2009-10, though not as marked as the increase in “hourly fee” aggregate dollars (33% to 41%) that year, as depicted in the following graph. The increase demonstrated thus far for 2016-17 “hourly fee” orders is also consistent with the increase thus far in “hourly fee” dollar aggregates. The order volume increase predicted for 2016-17 is likewise not as pronounced as the predicted “hourly fee” dollar aggregates. It is estimated that removal of all pro se orders would alter percentages approximately (+/- 1%).



Because of the nature of workers' compensation generally, litigation occurs in a serial nature. In tort claims, by comparison, there is an injury or insult, hopefully followed by some recovery, an achievement of a legal plateau (e.g. maximum medical improvement), and then an effort to recover overall damages in a single proceeding. In workers' compensation, there is no requirement for this constrained process. In workers' compensation, claims for various benefits may be pled at any time after an injury or illness. It is not uncommon for multiple various issues to be litigated, with individual claims or petitions, for years following a work accident.<sup>36</sup> It may therefore be informative to understand the timing of fee awards or agreements in workers' compensation. The figures for the last ten full fiscal years demonstrates a trend to more rapid resolution of fee disputes following accidents or illnesses. The average days between the date of accident and the entry of a fee order shows consistent decline over the studied years.

It has been historically common for settlement fees to be based upon the statutory formula; therefore, the population of "statutory" fees includes the vast majority of settlements. The declining average in that category, alone, might be interpreted as a more rapid "closure" rate for claims. However, the similar decline in the age of cases in which "hourly fees" are awarded or approved seems to support that generally fee issues are being resolved or adjudicated more rapidly.

Fiscal Year	Average Days DOA to Order - Overall	% Change	Average Days DOA to Order - Statutory	% Change	Average Days DOA to Order - Hourly
2006-07	1120		1035		1462
2007-08	1139	1.7%	1051	1.5%	1528
2008-09	1066	-6.4%	985	-6.3%	1346
2009-10	1007	-5.5%	914	-7.2%	1280
2010-11	990	-1.7%	862	-5.7%	1454
2011-12	953	-3.7%	822	-4.6%	1507
2012-13	978	2.6%	864	5.1%	1550
2013-14	937	-4.2%	837	-3.1%	1512
2014-15	952	1.6%	846	1.1%	1644
2015-16	888	-6.7%	782	-7.6%	1509
2016-17 to date	875	-1.5%	763	-2.4%	1217

## **Statistical Definitions**

In statistical measure, there are three "averages" that are generally deemed worthy of discussion. This will be anathema to some, who recall that "average" is a term generally used to describe when some quantity of figures is added together and then the total is divided by the quantity of figures added.

But, statistics does have three kinds of "averages," and the one just described is referred to more specifically as the "Mean." This is most easily illustrated by an example involving 9 numbers: 1, 2, 5, 5, 7, 8, 9, 12, 100. If these 9 figures are added, the result is 149, and when that is divided by 9, the result is 17 (rounded up to the nearest whole number). It is technically accurate to say of this population that the "Mean" is 17. It would also be accurate to describe the 100 figure as an "outlier." That single figure is causing a significant upward change in the "Mean" of this set. If it were not included, the "Mean" of the remaining 8 would be only 6 (rounding down to the closest whole number). Thus, the influence of "outliers" is potentially significant.

The second "average" used in statistics is the "Median." The "Median" measures a population of numbers by essentially listing the figures in order (1, 2, 5, 5, 7, 8, 9, 12, 100) and determining which figure is in the center, or middle, of the distribution. In this example, the median is 7, with four figures above it and four below it. This statistical average is less affected by "outliers," and instead finds a mid-point of the population of figures.

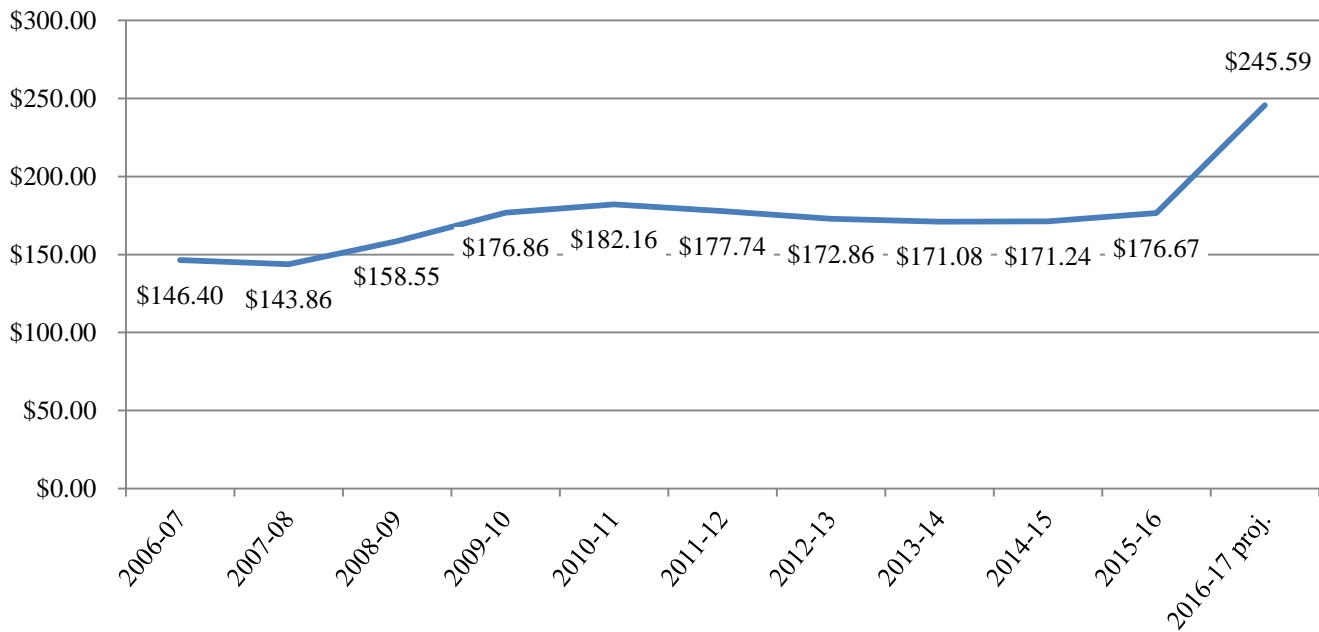
The third "average" used in statistics is the "Mode." It measures the volume of appearances within a population of numbers. This measure merely examines a population (1, 2, 5, 5, 7, 8, 9, 12, 100) and expresses which number is most often included in the population. The "Mode" of this example is 5. The "Mode" is likewise less subject to the influence of "outliers" than the "Mean." Additionally, the "Mode" may better express contributory influence on the whole population better than "Median," which may very well be an otherwise random figure coincidentally found at the center of a distribution.

Therefore, in discussing what is occurring with an "average" of some aggregate population of numbers, each of these various types of average may describe the population. Because each describes the population differently, each has some credibility in the effort of characterizing the set. Each has been applied herein to an analysis of "hourly" attorney fees.

The Mean “hourly fee” rate per hour is illustrated in this table and the graph that follows:

Fiscal Year	Hourly Fees Volume	Hourly Fee Rate - Mean	% Change
2006-07	9843	\$146.40	
2007-08	9129	\$143.86	-1.7%
2008-09	10060	\$158.55	10.2%
2009-10	10606	\$176.86	11.5%
2010-11	7976	\$182.16	3.0%
2011-12	7110	\$177.74	-2.4%
2012-13	6039	\$172.86	-2.7%
2013-14	5444	\$171.08	-1.0%
2014-15	4649	\$171.24	0.1%
2015-16	5176	\$176.67	3.2%
2016-17 proj. <sup>37</sup>	9104	\$245.59	39.0%

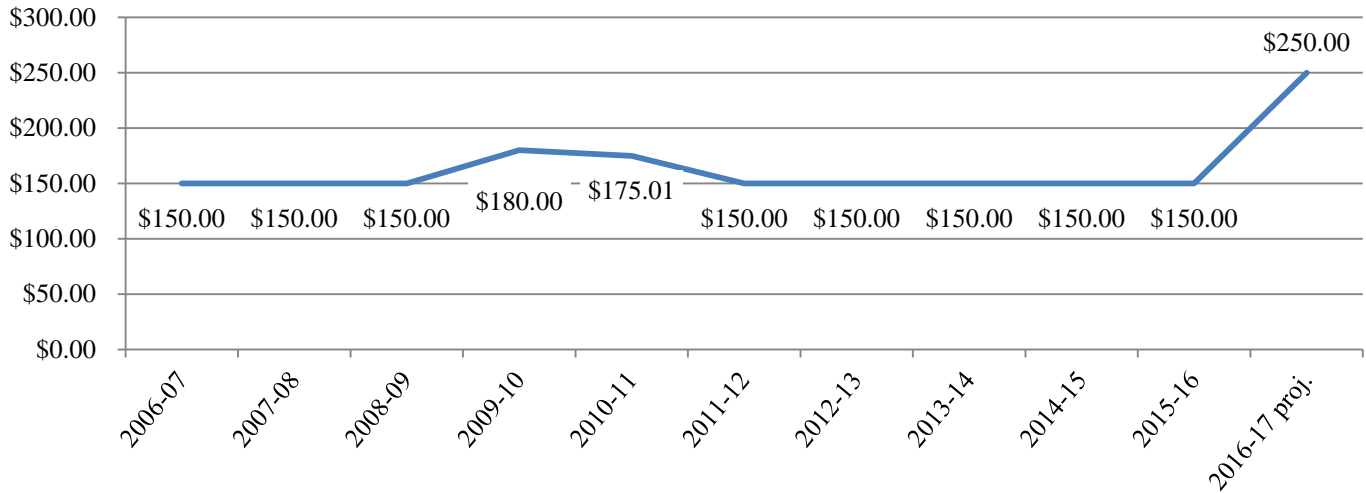
### Hourly Fee Rate - Mean



The Median “hourly fee” rate per hour<sup>38</sup> is illustrated in this table and the graph that follows:

Fiscal Year	Hourly Fees Volume	Hourly Fee Rate - Median	% Change
2006-07	9843	\$150.00	
2007-08	9129	\$150.00	0.0%
2008-09	10060	\$150.00	0.0%
2009-10	10606	\$180.00	20.0%
2010-11	7976	\$175.01	-2.8%
2011-12	7110	\$150.00	-14.3%
2012-13	6039	\$150.00	0.0%
2013-14	5444	\$150.00	0.0%
2014-15	4649	\$150.00	0.0%
2015-16	5176	\$150.00	0.0%
2016-17 proj. <sup>39</sup>	9104	\$250.00	66.7%

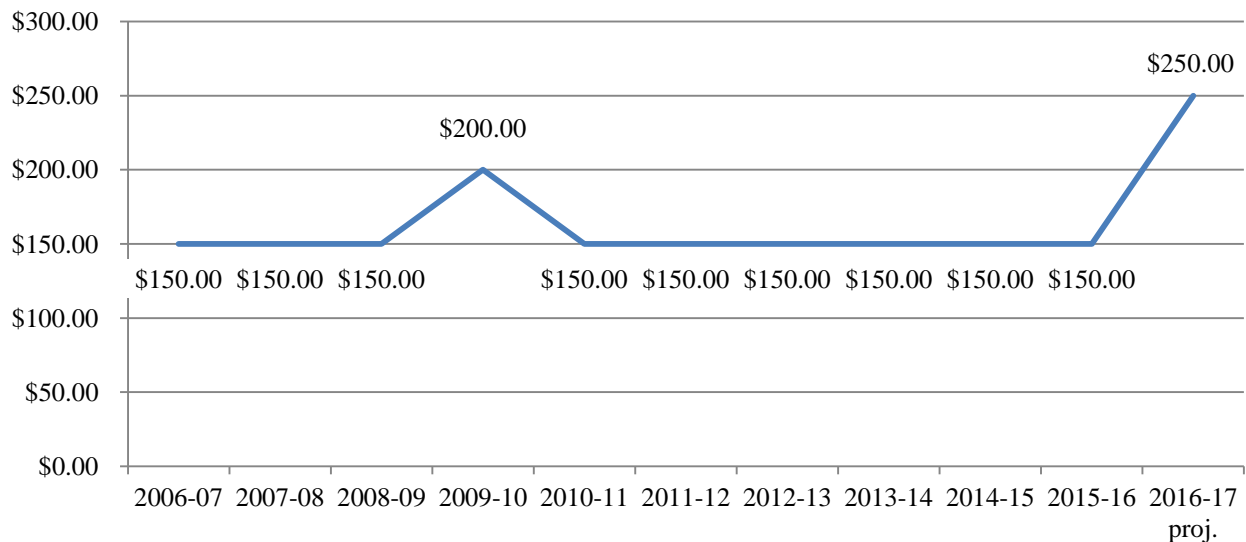
## Hourly Fee Rate - Median



The Mode “hourly fee” rate per hour is illustrated in this table<sup>40</sup> and the graph that follows:

Fiscal Year	Hourly Fees Volume	Hourly Fee Rate - Mode	% Change
2006-07	9843	\$150.00	
2007-08	9129	\$150.00	0.0%
2008-09	10060	\$150.00	0.0%
2009-10	10606	\$200.00	33.3%
2010-11	7976	\$150.00	-25.0%
2011-12	7110	\$150.00	0.0%
2012-13	6039	\$150.00	0.0%
2013-14	5444	\$150.00	0.0%
2014-15	4649	\$150.00	0.0%
2015-16	5176	\$150.00	0.0%
2016-17 proj. <sup>41</sup>	9104	\$250.00	66.7%
2016-17 to date	4552		

## Hourly Fee Rate - Mode



## **Attorney Fees Divided by Accident Year Periods**

There have recently been three readily discernable time periods in Florida workers' compensation attorney fees. The calculation of attorney fees is controlled in most instances by the statute in effect upon the "date of accident," which may be the day of a traumatic event in some cases, or could be a date of diagnosis or disability in other cases (occupational disease, etc.). Therefore, the attorney fees awarded or approved in any fiscal year may necessarily include some volume of fees pursuant to an assortment of statutory constraints and definitions.<sup>42</sup>

### **Pre-July 1, 2003**

Prior to the legislative amendments effective July 1, 2003, there was a statutory formula for calculation of fees.<sup>43</sup> The statute delineated a presumptively correct fee, based upon application of a series of mathematical percentages to the volume of "benefits secured." This calculation was "presumptive," in that a judge of compensation claims was permitted to deviate from that fee, either increasing or decreasing, if analysis of statutorily enumerated "factors" justified the deviation. Some contended that the construction of the "factors" resulted in significant volumes of "upward deviation," but few "downward deviations."

### **July 1, 2003 through June 30, 2009**

Beginning July 1, 2003, the statutory formula was imposed as an absolute, section 440.34(1)(2003), Fla. Stat.<sup>44</sup> There was one statutory exception, for "medical only claims" (claims for medical benefits when no indemnity claim was either pending or ripe). In those instances, the statute provided for an hourly fee one time during the pendency of each accident or illness (a very limited exception). The hourly fee was limited to up to ten hours, payable at up to \$150.00 per hour, section 440.34(7)(2003), Fla. Stat.<sup>45</sup> It is this statutory imposition of \$150.00 per hour that is likely impacting the Median and Mode discussions above. Such fees were collected from employers and employees, depending upon the factual situation presented. When this statutory amendment was made in 2003, transitioning from "presumptive" to "absolute," the language in section 440.34(1)(2003) nonetheless retained a reference to the award of a "reasonable" attorney fee.<sup>46</sup> In 2008, the Florida Supreme Court concluded<sup>47</sup> that the presence of the word "reasonable" obviated the "absolute" constraint of the formula, and held that hourly fees were awardable under section 440.34(1)(2003), and outside the constraints of the exception in section 440.34(7)(2003).<sup>48</sup>

The Florida Legislature convened the following spring, and passed Council Substitute for House Bill No. 903,<sup>49</sup> which removed the words "as reasonable" from section 440.34(1)(2009).

### **Post July 1, 2009**

For accidents occurring since that time, attorney fees have been constrained to the fee formula, section 440.34(1)(2009), Fla. Stat., and the exception of the "alternative," limited (once per case), hourly fee in section 440.34(7)(2009), Fla. Stat.

Thus, having considered the how fee amounts have changed over recent years, there remain questions regarding the extent to which each of the three periods discussed above may contribute to the aggregate fee order volumes or average fee amounts demonstrated in any particular fiscal year. The following attempts to address these inquiries. The following chart depicts the "share"<sup>50</sup> of total claimant attorney fees which are "statutory" and "hourly."<sup>51</sup>

Fiscal Year	Fee Order Volume	Statutory Fees Volume	Statutory Fees Volume- Share	Hourly Fees Volume	Hourly Fees Volume - Share
2006-07	49303	39460	80%	9843	20%
2007-08	49050	39921	81%	9129	19%
2008-09	44860	34800	78%	10060	22%
2009-10	41431	30825	74%	10606	26%
2010-11	36963	28987	78%	7976	22%
2011-12	37222	30112	81%	7110	19%
2012-13	36271	30232	83%	6039	17%
2013-14	36536	31092	85%	5444	15%
2014-15	34835	30183	87%	4652	13%
2015-16	35614	30438	85%	5176	15%
2016-17 proj.	36838	27734	75%	9104	25%
2016-17 to date	18419	13867	75%	4552	25%

The OJCC Annual reports<sup>52</sup> have documented that most fees paid are related to claims with dates of accident within 10 years prior to approval date. In 2015-16, 80% of all fees ordered or approved were “related to accident dates in the ten years between January 1, 2006 and December 31, 2015.”<sup>53</sup> However, greater detail is possible. The following table demonstrates the distribution of “statutory fee” awards and approvals, distributed into the categories of the three recent time periods in Florida workers’ compensation attorney fees:

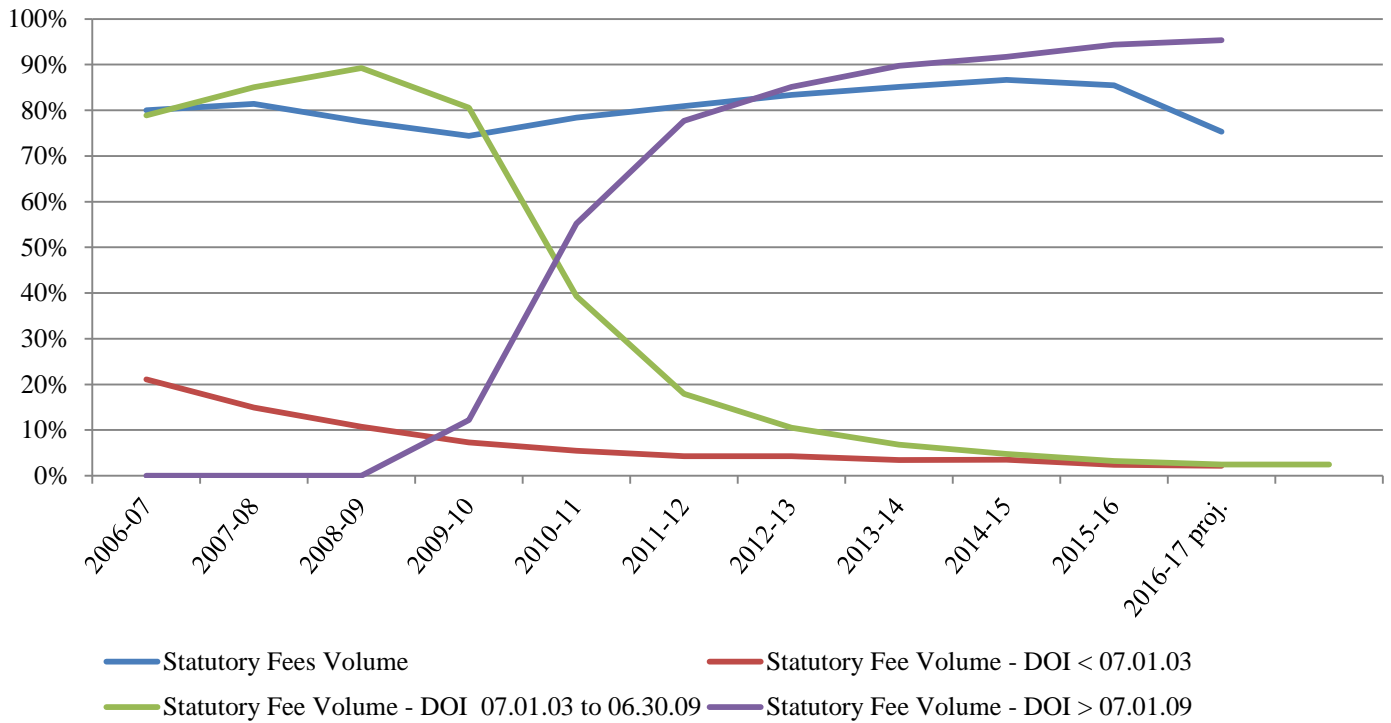
Statutory Fees Volume	Statutory Fee Volume - DOI < 07.01.03	Statutory Fee Volume - DOI 07.01.03 to 06.30.09	Statutory Fee Volume - DOI > 07.01.09
39460	8338	31122	
39921	5968	33953	
34800	3744	31056	
30825	2245	24827	3753
28987	1587	11390	16010
30112	1293	5412	23407
30232	1307	3185	25740
31092	1083	2110	27899
30183	1057	1450	27676
30438	723	980	28735
27734	608	678	26448
13867	304	339	13224

The following table demonstrates the distribution of “hourly fee” awards and approvals, distributed into the categories of the three recent time periods in Florida workers’ compensation attorney fees:

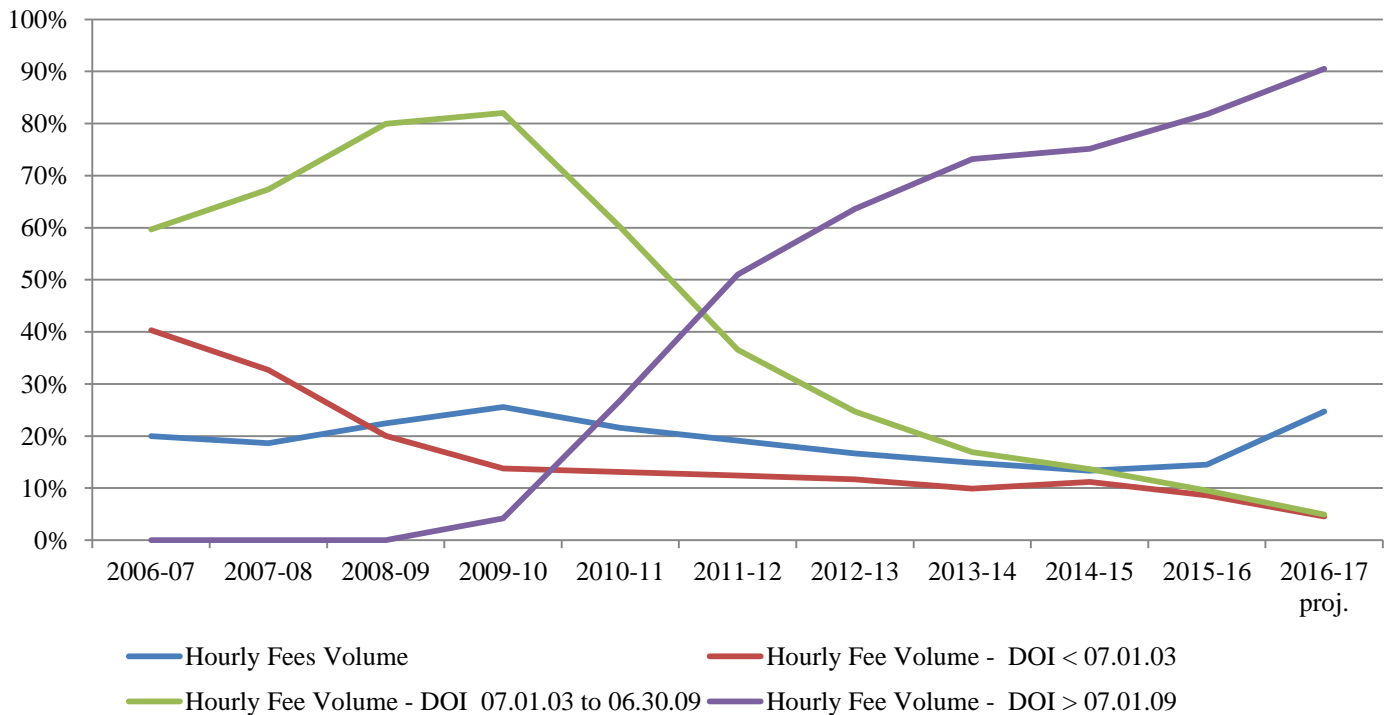
Hourly Fees Volume	Hourly Fee Volume - DOI < 07.01.03	Hourly Fee Volume - DOI 07.01.03 to 06.30.09	Hourly Fee Volume - DOI > 07.01.09
9843	3971	5872	
9129	2983	6146	
10060	2014	8046	
10606	1459	8703	444
7976	1043	4792	2141
7110	883	2599	3628
6039	705	1493	3841
5444	538	920	3986
4652	521	635	3496
5176	446	495	4235
9104	416	446	8242
4552	208	223	4121



These are perhaps both better illustrated by the percentages that each represent. The following graph illustrates the distribution of “statutory fee” awards and approvals, distributed into the categories of the three recent time periods in Florida workers’ compensation attorney fees:



The following graph illustrates the distribution of “hourly fee” awards and approvals, distributed into the categories of the three recent time periods in Florida workers’ compensation attorney fees:

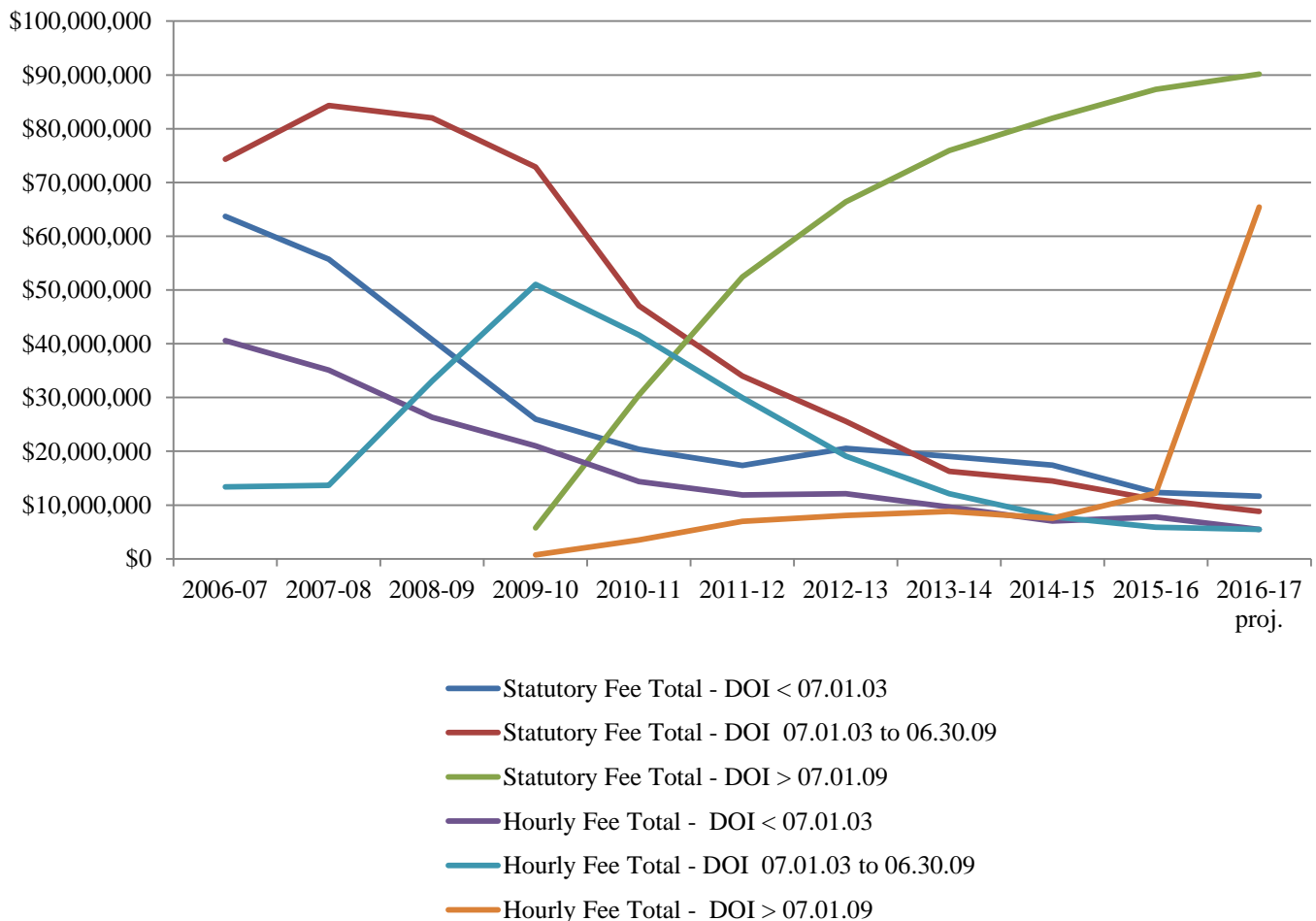


These demonstrate the change over time that each period contributes to each annual total of awarded fees.

Similarly, the aggregate dollar amounts that each of the three periods contributed to the overall fees in each category has changed over time. The change is predictable, based upon the tendency of cases to resolve either through recovery or settlement. Thus, the population of active cases will tend to naturally shift to more recent cases. This table breaks down the total “statutory” and “hourly” totals for each fiscal year into the three recent time periods in Florida workers’ compensation attorney fees:

Fiscal Year	Statutory Fee Total - DOI < 07.01.03	Statutory Fee Total - DOI 07.01.03 to 06.30.09	Statutory Fee Total - DOI > 07.01.09	Hourly Fee Total - DOI < 07.01.03	Hourly Fee Total - DOI 07.01.03 to 06.30.09	Hourly Fee Total - DOI > 07.01.09
2006-07	\$63,712,983	\$74,312,577		\$40,615,986	\$13,358,468	
2007-08	\$55,721,101	\$84,314,938		\$35,091,730	\$13,654,372	
2008-09	\$40,786,945	\$82,005,655		\$26,340,979	\$33,089,983	
2009-10	\$25,972,689	\$72,887,126	\$5,762,653	\$20,987,808	\$51,024,115	\$716,088
2010-11	\$20,353,763	\$47,083,399	\$30,464,446	\$14,364,217	\$41,599,904	\$3,515,179
2011-12	\$17,361,478	\$33,995,231	\$52,439,375	\$11,857,944	\$29,957,742	\$6,963,135
2012-13	\$20,557,381	\$25,543,756	\$66,400,617	\$12,110,451	\$19,102,897	\$8,070,021
2013-14	\$19,070,175	\$16,253,695	\$75,965,010	\$9,640,239	\$12,132,620	\$8,798,435
2014-15	\$17,397,227	\$14,499,685	\$81,950,879	\$6,999,651	\$7,841,272	\$7,559,454
2015-16	\$12,368,696	\$11,027,572	\$87,315,694	\$7,769,559	\$5,889,669	\$12,202,446
2016-17 proj.	\$11,660,289	\$8,797,407	\$90,128,935	\$5,467,875	\$5,464,380	\$65,403,142
2016-17 to date	\$5,830,144	\$4,398,703	\$45,064,467	\$2,733,938	\$2,732,190	\$32,701,571

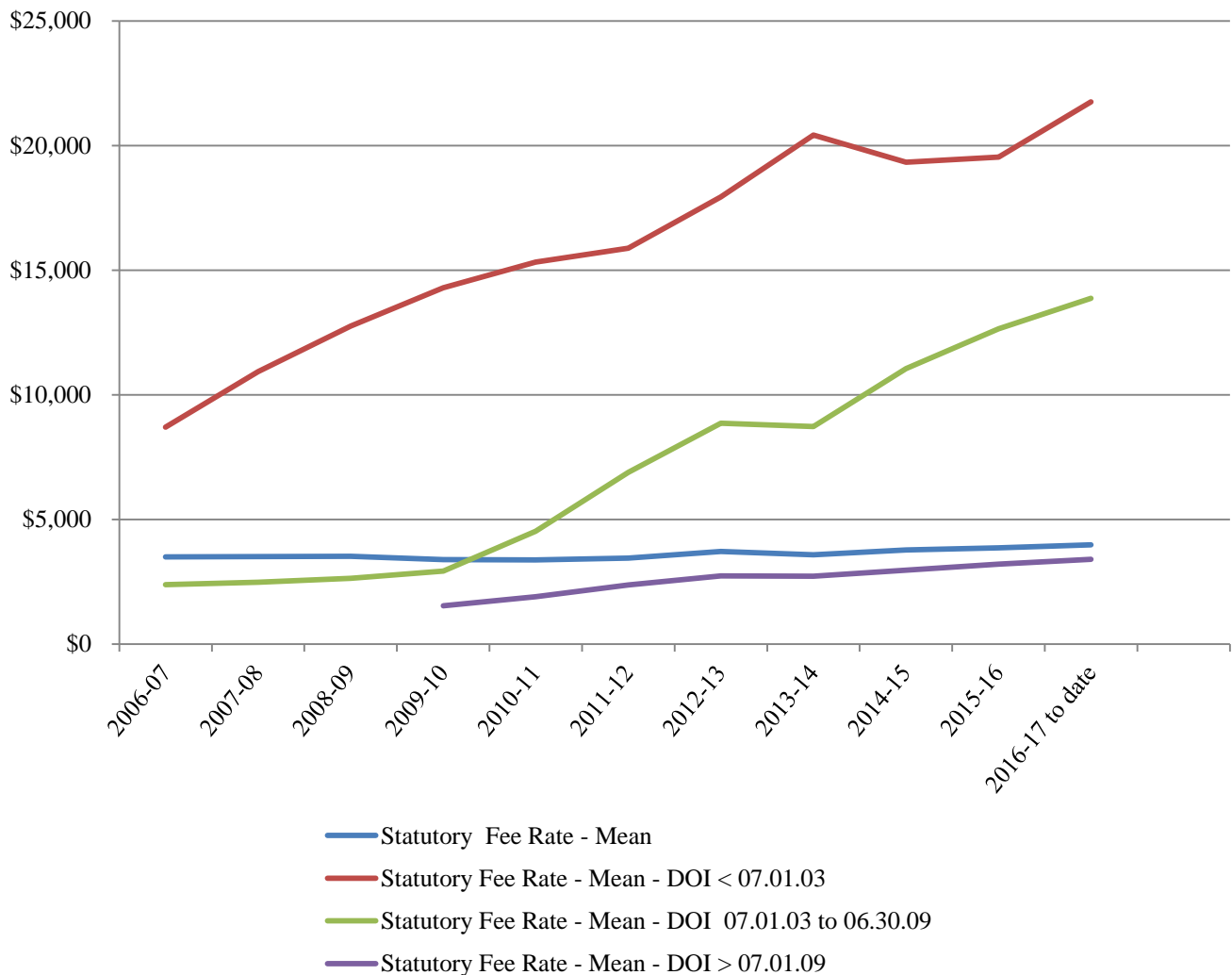
Represented differently, these figures are illustrated in this graph:



The three averages expressed above can likewise be separated into the three recent time periods in Florida workers' compensation attorney fees. This chart displays the Mean of statutory attorney fees divided into these time periods:

Fiscal Year	Statutory Fees Volume	Statutory Fee Rate - Mean	Statutory Fee Rate - Mean - DOI < 07.01.03	Statutory Fee Rate - Mean - DOI 07.01.03 to 06.30.09	Statutory Fee Rate - Mean - DOI > 07.01.09
2006-07	9843	\$3,498	\$8,704	\$2,388	
2007-08	9129	\$3,508	\$10,928	\$2,483	
2008-09	10060	\$3,529	\$12,762	\$2,641	
2009-10	10606	\$3,394	\$14,294	\$2,936	\$1,535
2010-11	7976	\$3,377	\$15,327	\$4,525	\$1,903
2011-12	7110	\$3,447	\$15,884	\$6,894	\$2,371
2012-13	6039	\$3,721	\$17,938	\$8,860	\$2,735
2013-14	5444	\$3,579	\$20,418	\$8,724	\$2,723
2014-15	4649	\$3,772	\$19,330	\$11,052	\$2,961
2015-16	5176	\$3,859	\$19,540	\$12,646	\$3,212
2016-17 to date	9104	\$3,987	\$21,754	\$13,876	\$3,408

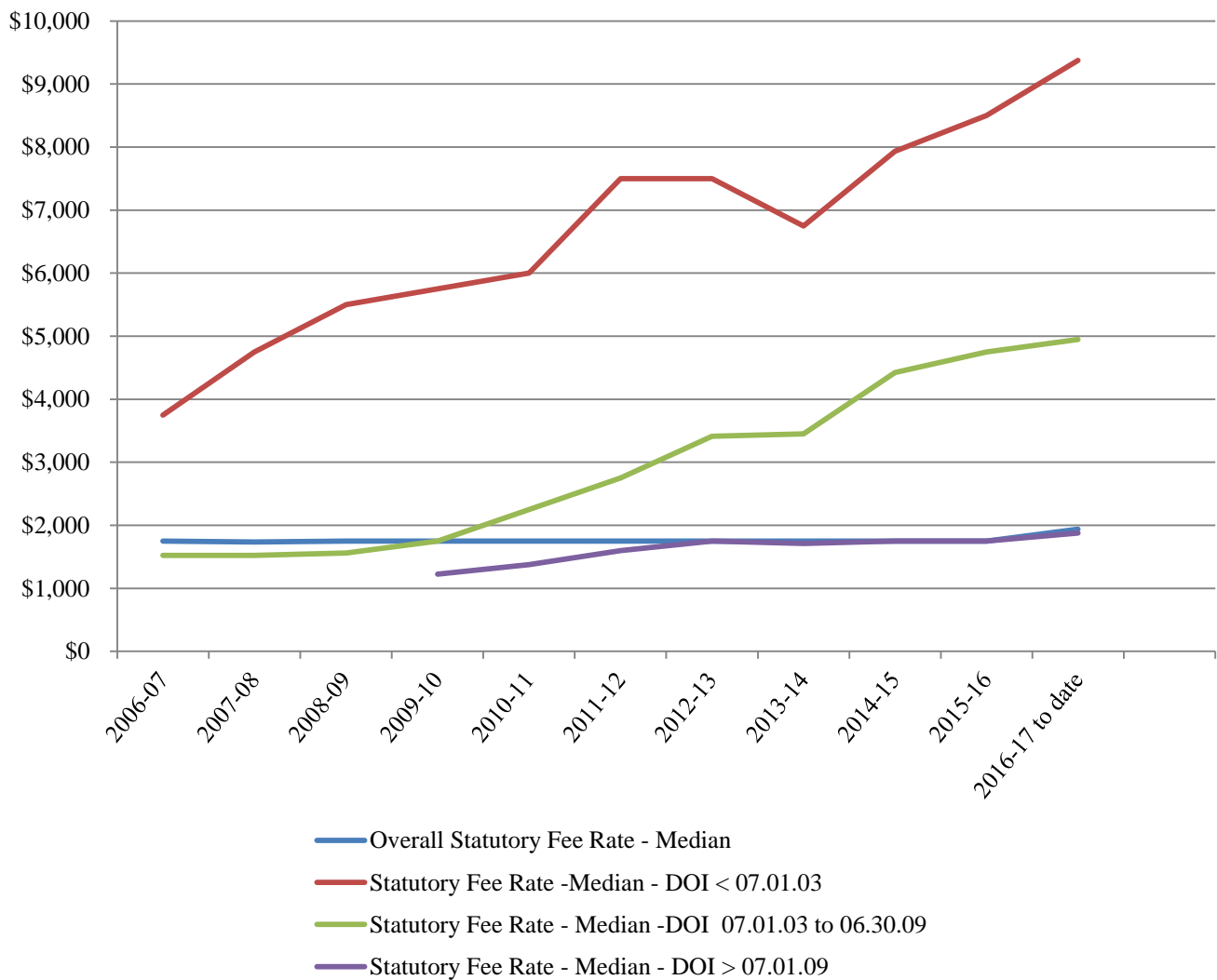
Represented differently, these figures are illustrated in this graph:



This chart displays the Median of statutory attorney fees divided into these time periods:

Fiscal Year	Statutory Fees Volume	Overall Statutory Fee Rate - Median	Statutory Fee Rate -Median - DOI < 07.01.03	Statutory Fee Rate - Median - DOI 07.01.03 to 06.30.09	Statutory Fee Rate - Median - DOI > 07.01.09
2006-07	9843	\$1,750	\$3,750	\$1,525	
2007-08	9129	\$1,735	\$4,750	\$1,525	
2008-09	10060	\$1,750	\$5,500	\$1,563	
2009-10	10606	\$1,750	\$5,750	\$1,750	\$1,225
2010-11	7976	\$1,750	\$6,000	\$2,250	\$1,375
2011-12	7110	\$1,750	\$7,500	\$2,750	\$1,600
2012-13	6039	\$1,750	\$7,500	\$3,413	\$1,750
2013-14	5444	\$1,750	\$6,750	\$3,451	\$1,713
2014-15	4649	\$1,750	\$7,932	\$4,425	\$1,750
2015-16	5176	\$1,750	\$8,500	\$4,750	\$1,750
2016-17 to date	9104	\$1,940	\$9,376	\$4,950	\$1,875

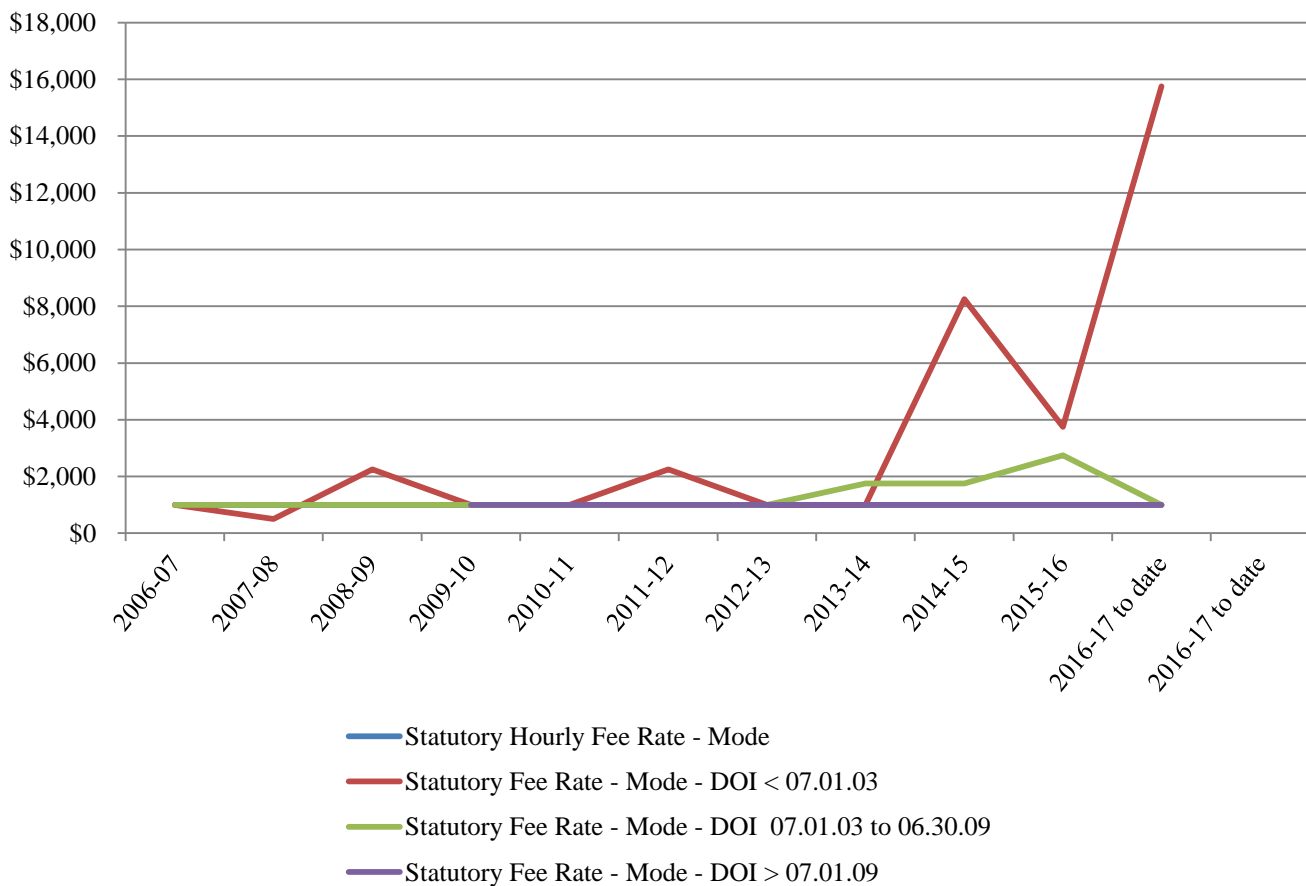
Represented differently, these figures are illustrated in this graph:



This chart displays the Mode of statutory attorney fees divided into these time periods:

Fiscal Year	Statutory Fees Volume	Statutory Hourly Fee Rate - Mode	Statutory Fee Rate - Mode - DOI < 07.01.03	Statutory Fee Rate - Mode - DOI 07.01.03 to 06.30.09	Statutory Fee Rate - Mode - DOI > 07.01.09
2006-07	9843	\$1,000	\$1,000	\$1,000	
2007-08	9129	\$1,000	\$500	\$1,000	
2008-09	10060	\$1,000	\$2,250	\$1,000	
2009-10	10606	\$1,000	\$1,000	\$1,000	\$1,000
2010-11	7976	\$1,000	\$1,000	\$1,000	\$1,000
2011-12	7110	\$1,000	\$2,250	\$1,000	\$1,000
2012-13	6039	\$1,000	\$1,000	\$1,000	\$1,000
2013-14	5444	\$1,000	\$1,000	\$1,750	\$1,000
2014-15	4649	\$1,000	\$8,250	\$1,750	\$1,000
2015-16	5176	\$1,000	\$3,750	\$2,750	\$1,000
2016-17 to date	9104	\$1,000	\$15,750	\$1,000	\$1,000

Represented differently, these figures are illustrated in this graph:

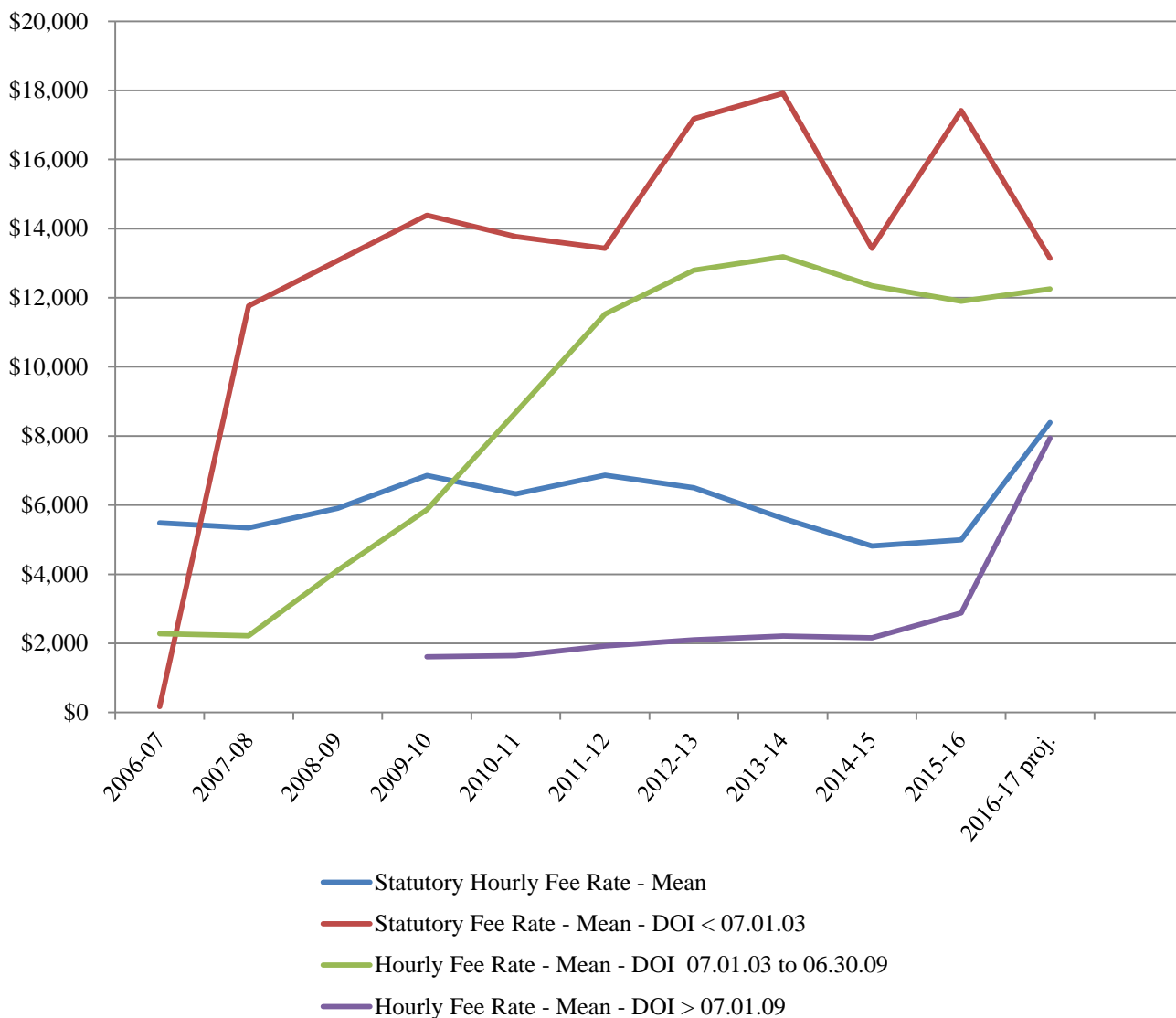


It is suggested that the demonstration of increased Mode is likely of limited relevance in this context.

The hourly fees are represented in averages of the aggregate award, and in averages of the effective hourly rate awarded. This chart displays the Mean of hourly attorney fees divided into these time periods:

Fiscal Year	Statutory Fees Volume	Statutory Hourly Fee Rate - Mean	Statutory Fee Rate - Mean - DOI < 07.01.03	Hourly Fee Rate - Mean - DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Mean - DOI > 07.01.09
2006-07	9843	\$5,484	\$173	\$2,275	
2007-08	9129	\$5,340	\$11,764	\$2,222	
2008-09	10060	\$5,908	\$13,079	\$4,113	
2009-10	10606	\$6,857	\$14,385	\$5,863	\$1,613
2010-11	7976	\$6,327	\$13,772	\$8,681	\$1,642
2011-12	7110	\$6,861	\$13,429	\$11,527	\$1,919
2012-13	6039	\$6,505	\$17,178	\$12,795	\$2,101
2013-14	5444	\$5,616	\$17,919	\$13,188	\$2,207
2014-15	4649	\$4,815	\$13,435	\$12,348	\$2,162
2015-16	5176	\$4,996	\$17,421	\$11,898	\$2,881
2016-17 proj.	9104	\$8,385	\$13,144	\$12,252	\$7,935

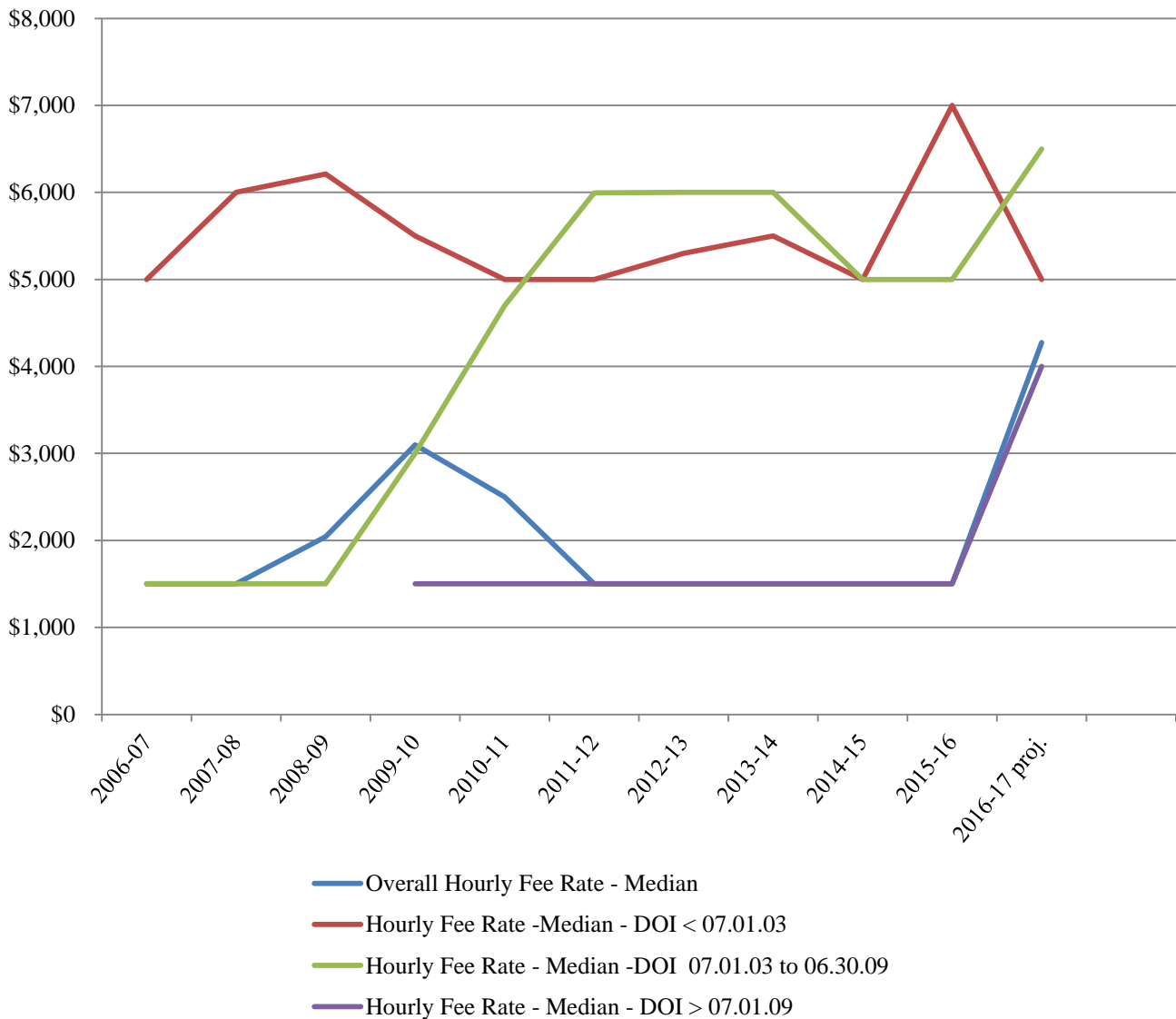
Represented differently, these figures are illustrated in this graph:



This chart displays the Median of hourly attorney fees divided into these time periods:

Fiscal Year	Hourly Fees Volume	Overall Hourly Fee Rate - Median	Hourly Fee Rate - Median - DOI < 07.01.03	Hourly Fee Rate - Median -DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Median - DOI > 07.01.09
2006-07	9843	\$1,500	\$5,000	\$1,500	
2007-08	9129	\$1,500	\$6,000	\$1,500	
2008-09	10060	\$2,044	\$6,210	\$1,500	
2009-10	10606	\$3,100	\$5,500	\$3,000	\$1,500
2010-11	7976	\$2,500	\$5,000	\$4,698	\$1,500
2011-12	7110	\$1,500	\$5,000	\$5,994	\$1,500
2012-13	6039	\$1,500	\$5,300	\$6,000	\$1,500
2013-14	5444	\$1,500	\$5,500	\$6,000	\$1,500
2014-15	4649	\$1,500	\$5,000	\$5,000	\$1,500
2015-16	5176	\$1,500	\$7,000	\$5,000	\$1,500
2016-17 proj.	9104	\$4,275	\$5,000	\$6,500	\$4,000

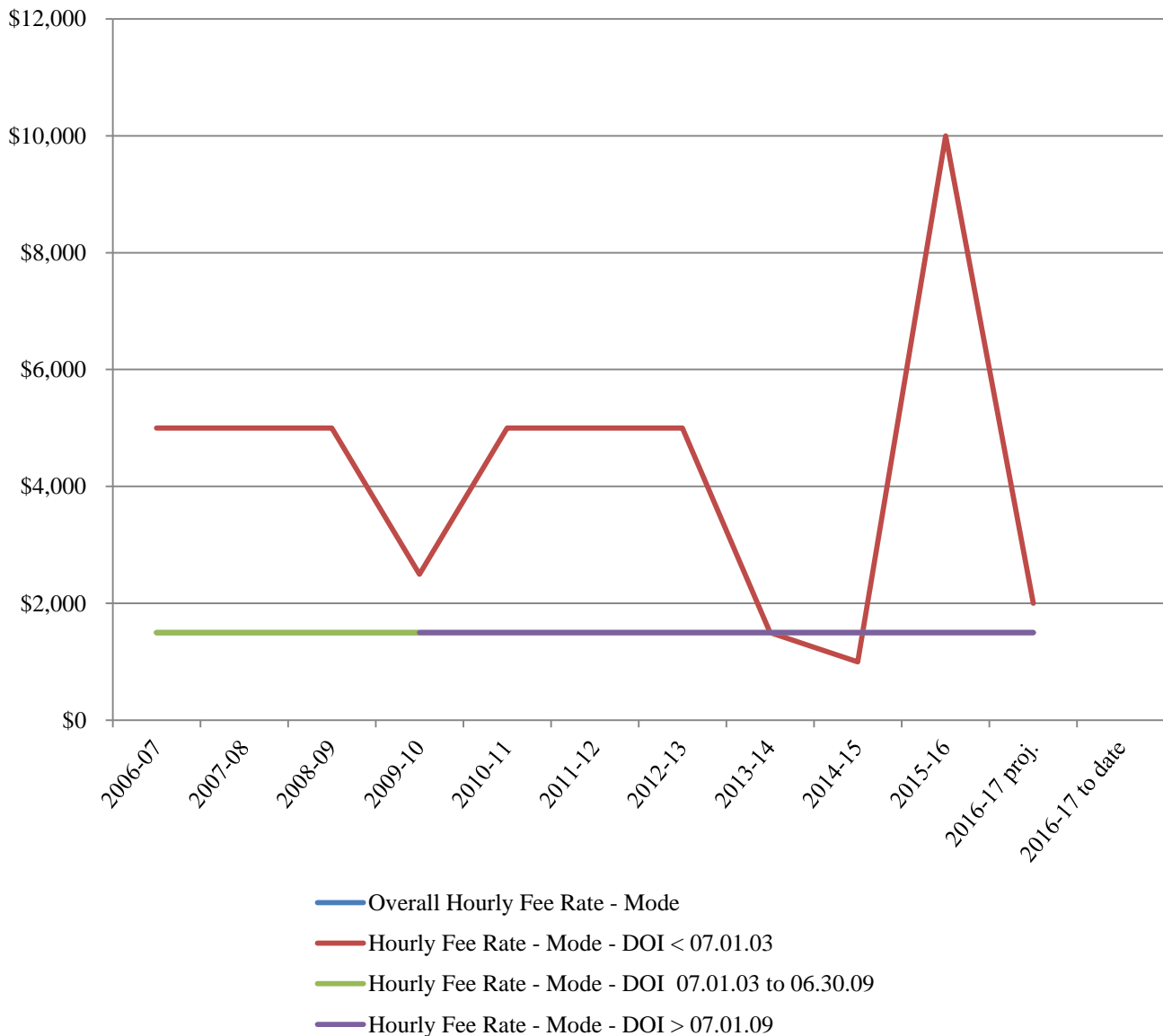
Represented differently, these figures are illustrated in this graph:



This chart displays the Mode of hourly award fees divided into these time periods:

Fiscal Year	Hourly Fees Volume	Overall Hourly Fee Rate - Mode	Hourly Fee Rate - Mode - DOI < 07.01.03	Hourly Fee Rate - Mode - DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Mode - DOI > 07.01.09
2006-07	9843	\$1,500	\$5,000	\$1,500	
2007-08	9129	\$1,500	\$5,000	\$1,500	
2008-09	10060	\$1,500	\$5,000	\$1,500	
2009-10	10606	\$1,500	\$2,500	\$1,500	\$1,500
2010-11	7976	\$1,500	\$5,000	\$1,500	\$1,500
2011-12	7110	\$1,500	\$5,000	\$1,500	\$1,500
2012-13	6039	\$1,500	\$5,000	\$1,500	\$1,500
2013-14	5444	\$1,500	\$1,500	\$1,500	\$1,500
2014-15	4649	\$1,500	\$1,000	\$1,500	\$1,500
2015-16	5176	\$1,500	\$10,000	\$1,500	\$1,500
2016-17 proj.	9104	\$1,500	\$2,000	\$1,500	\$1,500

Represented differently, these figures are illustrated in this graph:

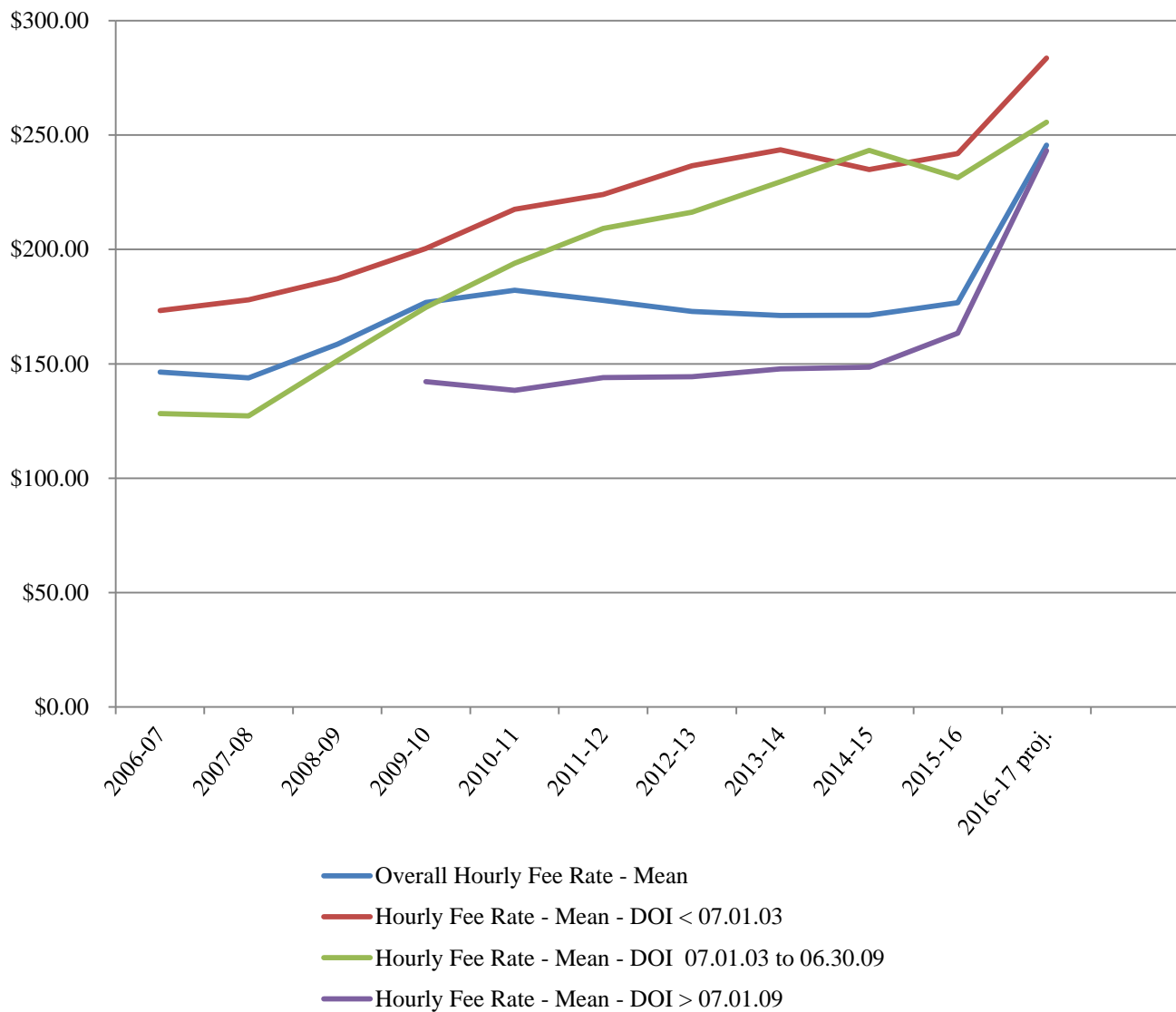




This chart displays the Mean of hourly attorney fee rates divided into these time periods:

Fiscal Year	Hourly Fees Volume	Overall Hourly Fee Rate - Mean	Hourly Fee Rate - Mean - DOI < 07.01.03	Hourly Fee Rate - Mean - DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Mean - DOI > 07.01.09
2006-07	9843	\$146.40	\$173.33	\$128.19	
2007-08	9129	\$143.86	\$177.99	\$127.29	
2008-09	10060	\$158.55	\$187.25	\$151.37	
2009-10	10606	\$176.86	\$200.46	\$174.66	\$142.25
2010-11	7976	\$182.16	\$217.54	\$193.99	\$138.45
2011-12	7110	\$177.74	\$223.96	\$209.19	\$143.96
2012-13	6039	\$172.86	\$236.60	\$216.23	\$144.31
2013-14	5444	\$171.08	\$243.50	\$229.61	\$147.80
2014-15	4649	\$171.24	\$234.95	\$243.29	\$148.55
2015-16	5176	\$176.67	\$241.91	\$231.41	\$163.41
2016-17 proj.	9104	\$245.59	\$283.61	\$255.62	\$243.13

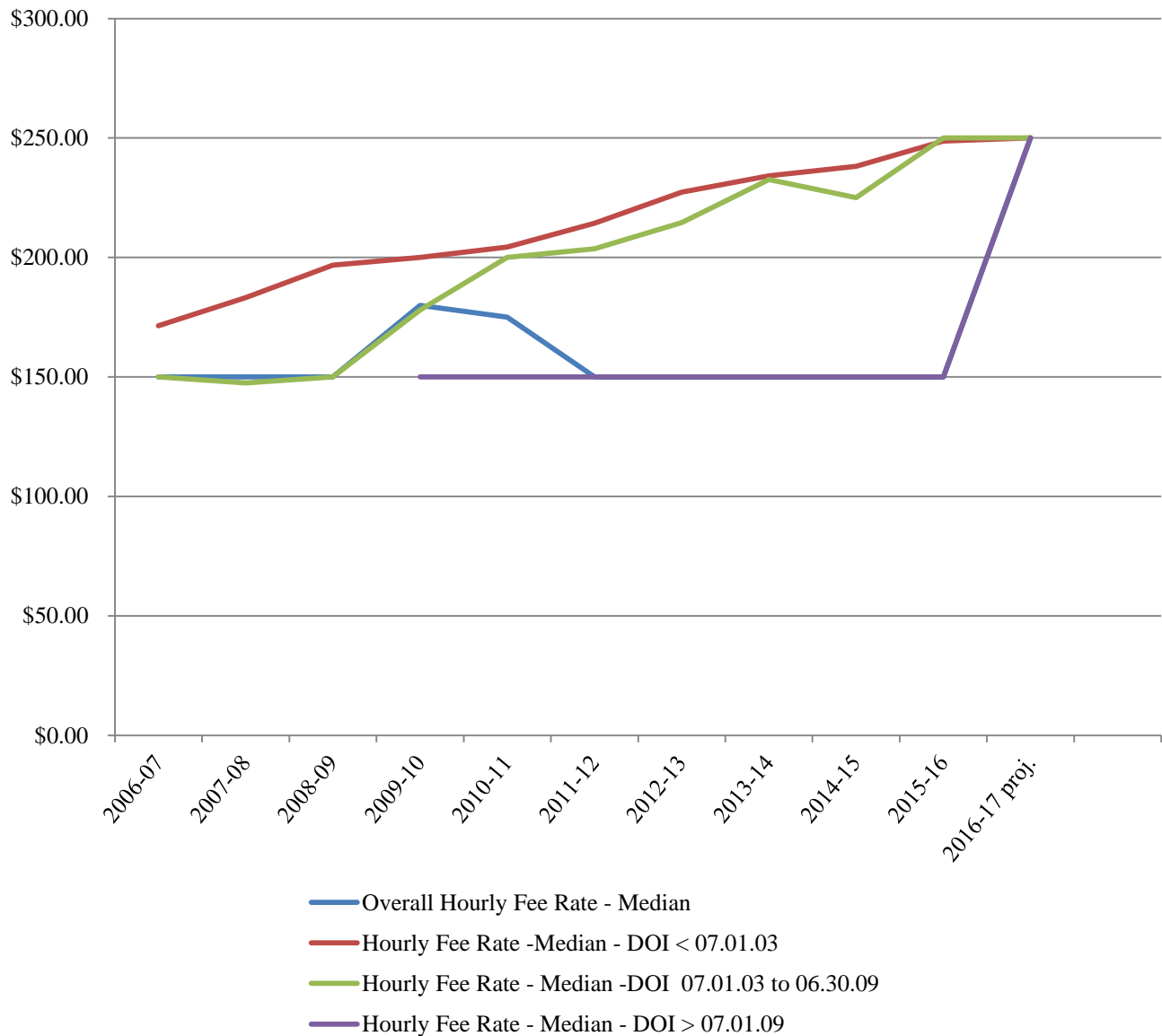
Represented differently, these figures are illustrated in this graph:



This chart displays the Median of hourly attorney fee rates divided into these time periods:

Fiscal Year	Hourly Fees Volume	Overall Hourly Fee Rate - Median	Hourly Fee Rate - Median - DOI < 07.01.03	Hourly Fee Rate - Median -DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Median - DOI > 07.01.09
2006-07	9843	\$150.00	\$171.43	\$150.00	
2007-08	9129	\$150.00	\$183.22	\$147.49	
2008-09	10060	\$150.00	\$196.79	\$150.00	
2009-10	10606	\$180.00	\$200.00	\$178.00	\$150.00
2010-11	7976	\$175.01	\$204.30	\$200.00	\$150.00
2011-12	7110	\$150.00	\$214.29	\$203.58	\$150.00
2012-13	6039	\$150.00	\$227.27	\$214.59	\$150.00
2013-14	5444	\$150.00	\$234.23	\$232.60	\$150.00
2014-15	4649	\$150.00	\$238.10	\$225.00	\$150.00
2015-16	5176	\$150.00	\$248.71	\$250.00	\$150.00
2016-17 proj.	9104	\$250.00	\$250.00	\$250.00	\$250.00

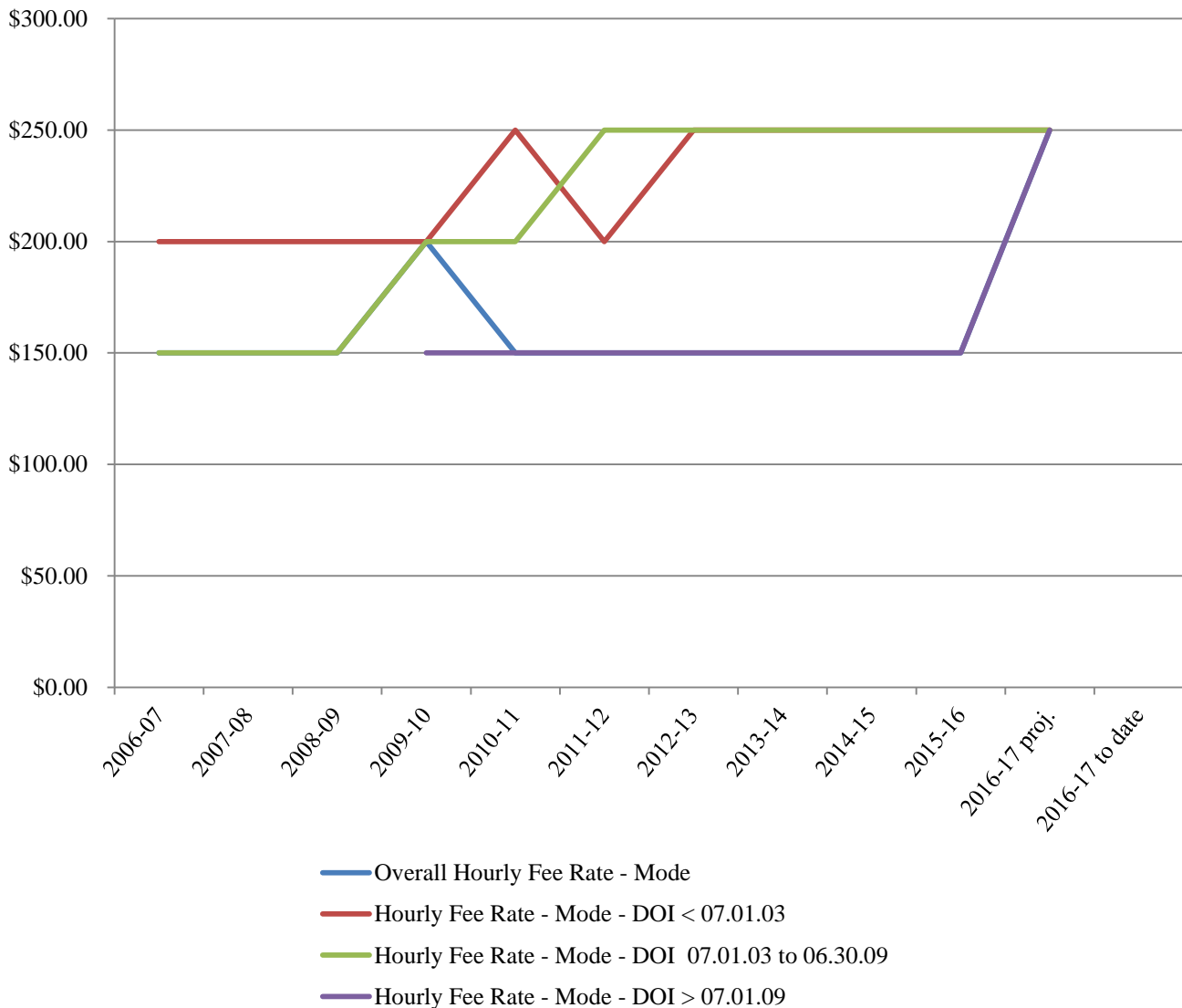
Represented differently, these figures are illustrated in this graph:



This chart displays the Mode of hourly attorney fee rates divided into these time periods:

Fiscal Year	Hourly Fees Volume	Overall Hourly Fee Rate - Mode	Hourly Fee Rate - Mode - DOI < 07.01.03	Hourly Fee Rate - Mode - DOI 07.01.03 to 06.30.09	Hourly Fee Rate - Mode - DOI > 07.01.09
2006-07	9843	\$150.00	\$200.00	\$150.00	
2007-08	9129	\$150.00	\$200.00	\$150.00	
2008-09	10060	\$150.00	\$200.00	\$150.00	
2009-10	10606	\$200.00	\$200.00	\$200.00	\$150.00
2010-11	7976	\$150.00	\$250.00	\$200.00	\$150.00
2011-12	7110	\$150.00	\$200.00	\$250.00	\$150.00
2012-13	6039	\$150.00	\$250.00	\$250.00	\$150.00
2013-14	5444	\$150.00	\$250.00	\$250.00	\$150.00
2014-15	4649	\$150.00	\$250.00	\$250.00	\$150.00
2015-16	5176	\$150.00	\$250.00	\$250.00	\$150.00
2016-17 proj.	9104	\$250.00	\$250.00	\$250.00	\$250.00

Represented differently, these figures are illustrated in this graph:

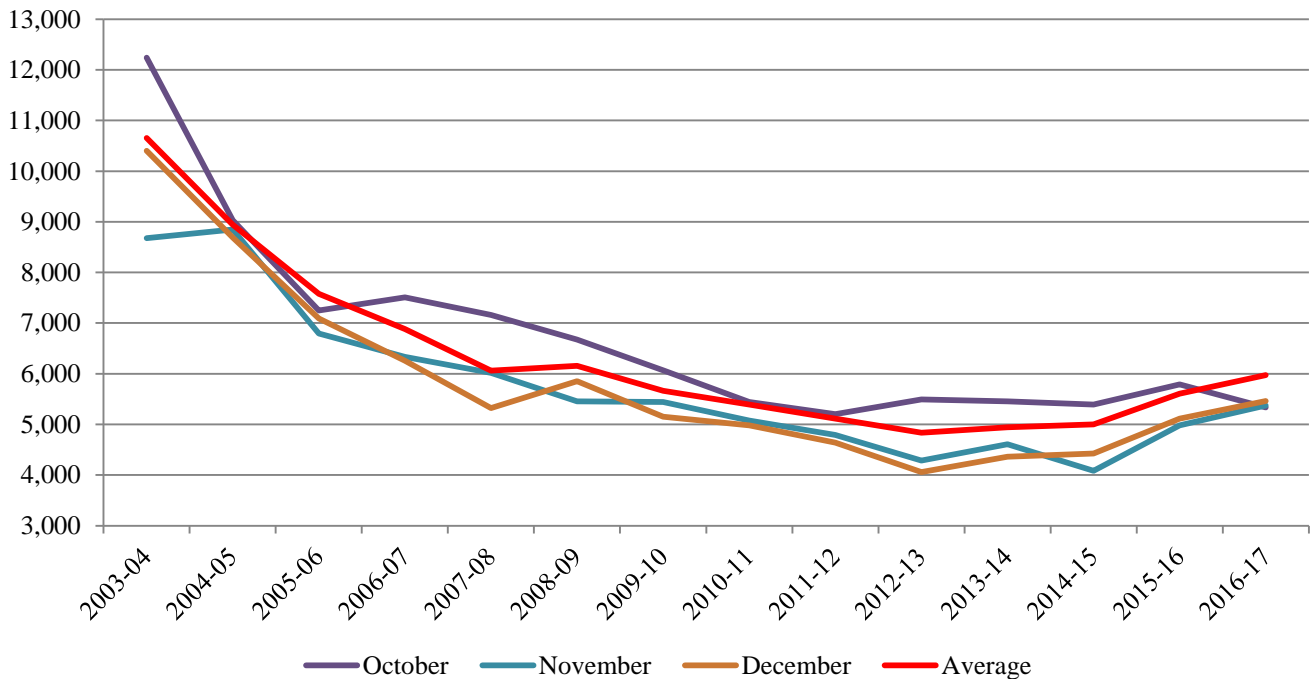
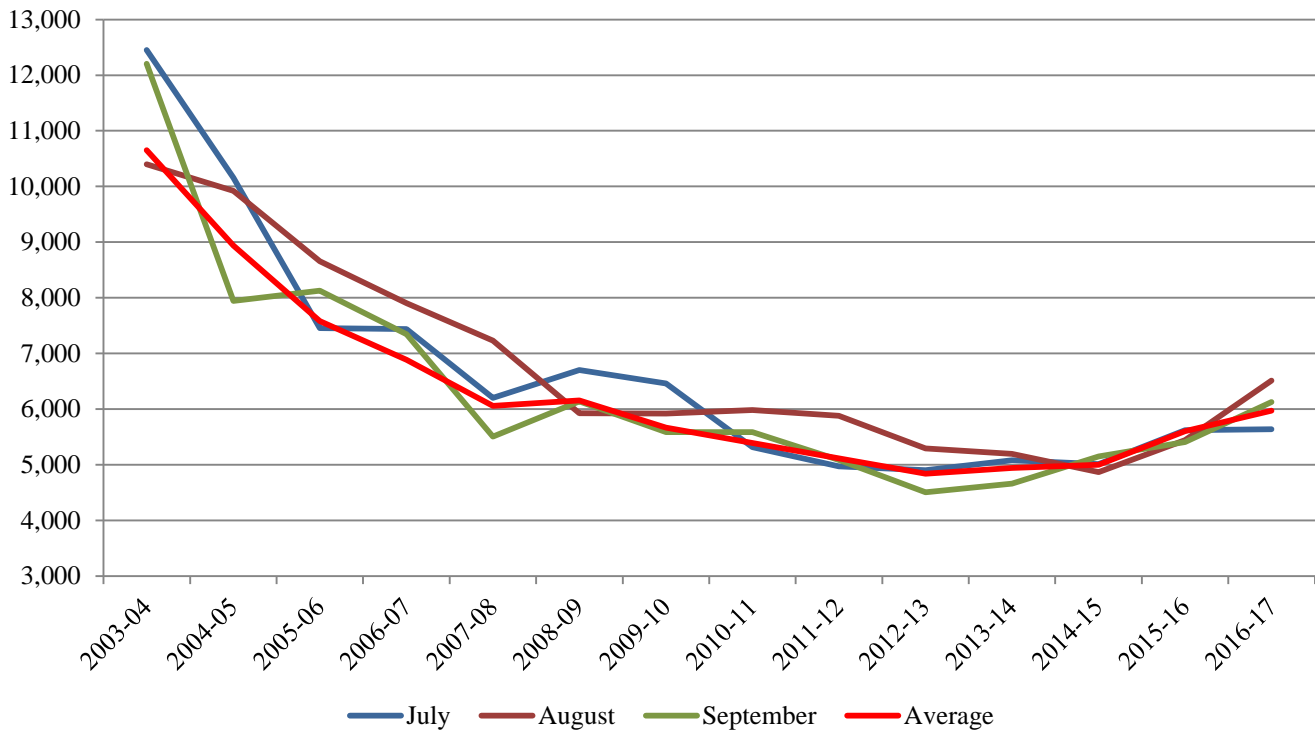


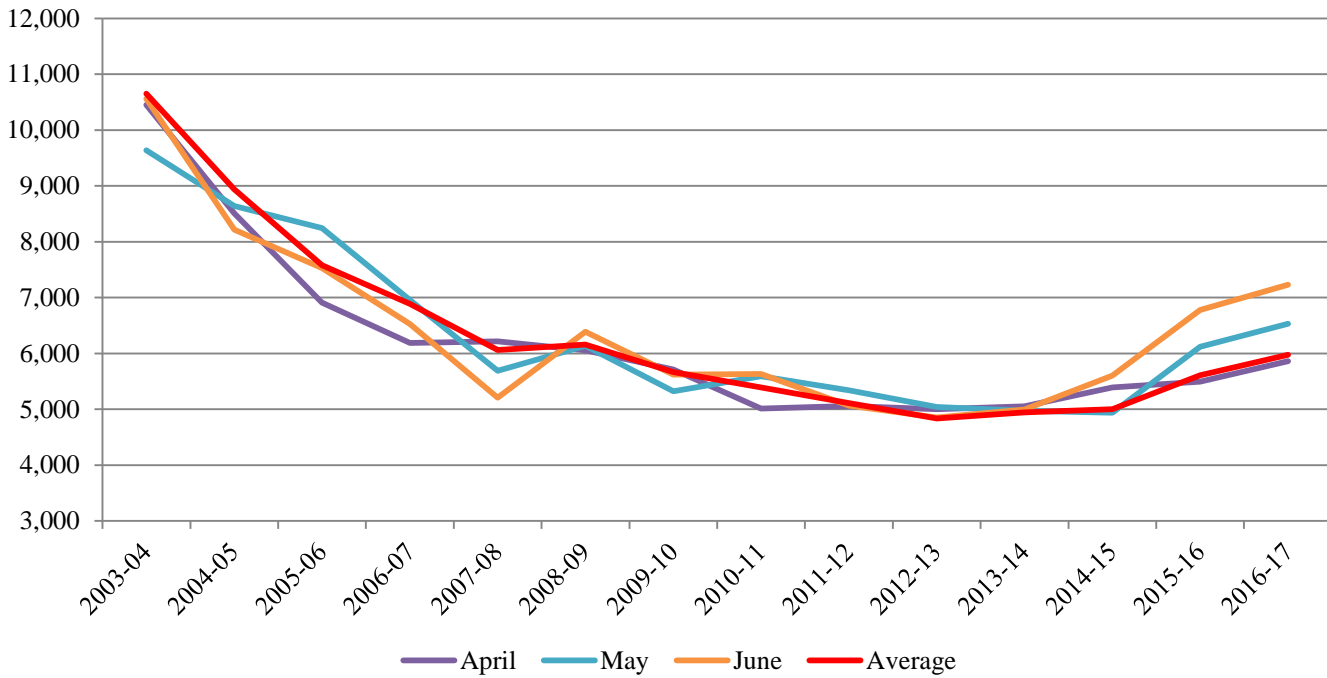
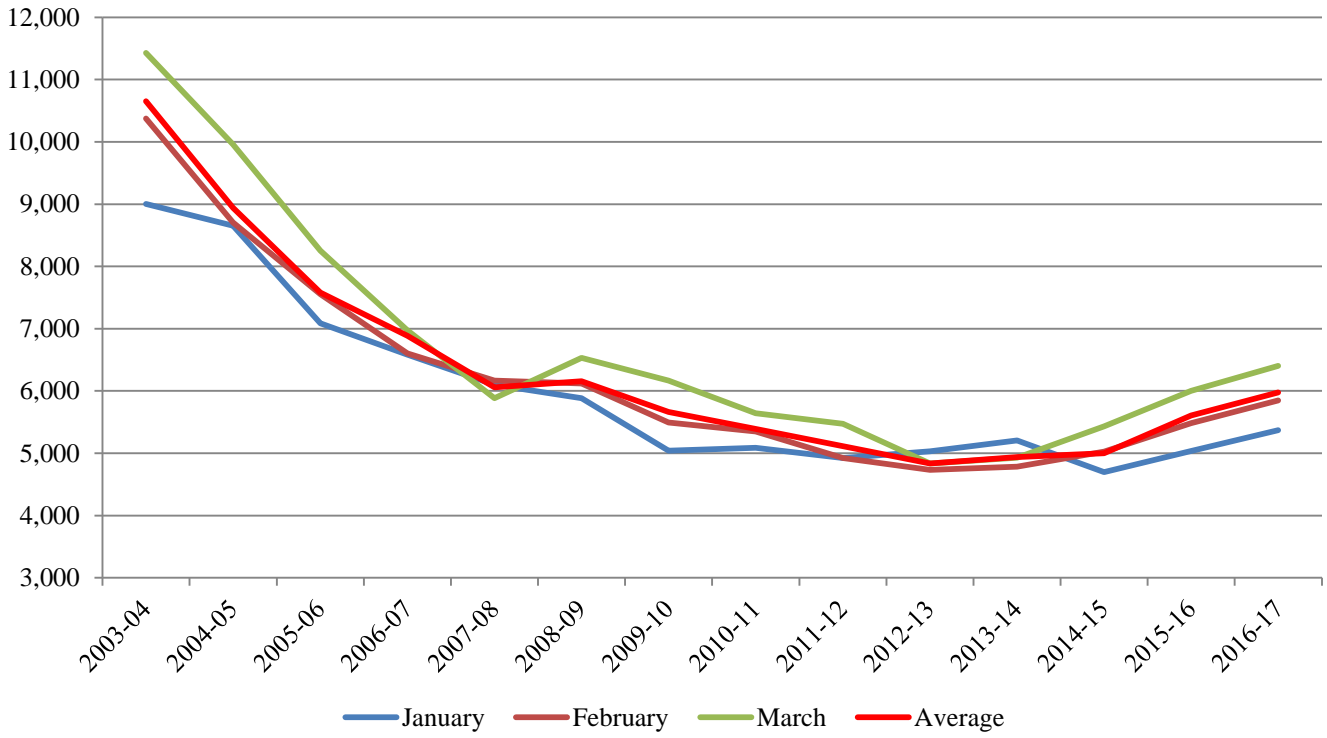
## **CONCLUSION**

PFB and “new case” filing rates are increasing, but are projected to increase less in 2016-17 than in 2015-16. Attorney fees are increasing. It is unknown whether the indicated rates of fee increase will be sustained. Anecdotally, there is suggestion that fee stipulations and motions were withheld to some extent in 2015-16 in anticipation of Supreme Court action. It is possible that some portion of increased activity in the first six months of 2016-17 represents activity that was withheld, and which will therefore not be as likely to be sustained. However, the data does indicate increase. More will be known when the fiscal year concludes, the historical data has been further audited, and the 2016-17 Annual Report is released.

## Appendix 1

The distribution of various monthly figures is discussed on page 6. That chart, tracking the twelve monthly figures, and annual average, for 14 years is somewhat congested. To allow easier comparison, the chart is reproduced here for each of the four quarters, e.g. first quarter – July, August, September.





## Endnotes

- <sup>1</sup> Section 440.45(5), Fla. Stat.: “Not later than December 1 of each year, the Office of the Judges of Compensation Claims shall issue a written report to the Governor, the House of Representatives, the Senate, The Florida Bar, and the statewide nominating commission summarizing the amount, cost, and outcome of all litigation resolved in the previous fiscal year; summarizing the disposition of mediation conferences, the number of mediation conferences held, the number of continuances granted for mediations and final hearings, the number and outcome of litigated cases, the amount of attorney’s fees paid in each case according to order year and accident year, and the number of final orders not issued within 30 days after the final hearing or closure of the hearing record; and recommending changes or improvements to the dispute resolution elements of the Workers’ Compensation Law and regulations. If the Deputy Chief Judge finds that judges generally are unable to meet a particular statutory requirement for reasons beyond their control, the Deputy Chief Judge shall submit such findings and any recommendations to the Legislature.”
- <sup>2</sup> There has been little debate regarding the necessity or propriety of this portion of the increase.
- <sup>3</sup> See, *NCCI Proposes Nearly 20% Florida Workers Comp Rate Increase*, Insurance Journal, July 5, 2016, <http://www.insurancejournal.com/news/southeast/2016/07/05/418940.htm>, last visited January 6, 2017.
- <sup>4</sup> See, *NCCI, Florida OIR and Commissioner Named in Lawsuit*, The Workers’ Compensation Institute, August 12, 2016, <http://www.wci360.com/news/article/ncci-florida-oir-and-commissioner-named-in-lawsuit>, last visited January 6, 2017.
- <sup>5</sup> See, *Office Takes Action on Workers’ Compensation Insurance Rates*, Florida Office of Insurance Regulation, September 27, 2016, <http://www.flair.com/PressReleases/viewmediarelease.aspx?id=2177>, last visited January 6, 2017.
- <sup>6</sup> See, *Office Issues Final Order Approving a 14.5% Increase to Workers’ Compensation Insurance Rates in Florida*, Florida Office of Insurance Regulation, October 6, 2016, <http://www.flair.com/PressReleases/viewmediarelease.aspx?id=2179>, last visited January 6, 2017.
- <sup>7</sup> See, *Judge voids 14.5 percent workers’ comp rate increase*, FloridaPolitics.com, November 23, 2016, <http://floridapolitics.com/archives/227843-workers-comp>, last visited January 6, 2017.
- <sup>8</sup> See, *Judge Karen Gievers and Florida's Broken Workers' Comp System*, sunshinestatenews.com, December 2, 2016, <http://www.sunshinestatenews.com/story/judge-karen-gievers-and-broken-florida-workers-comp-system>, last visited January 6, 2017.
- <sup>9</sup> See, <http://www.flair.com/siteDocuments/NCCIAppealOIRMotiontoReinstateorExtendStay12082016.pdf>.
- <sup>10</sup> The Court’s electronic docket states: “The motions filed by appellant, National Council on Compensation Insurance, Inc., on December 5, 2016, and appellant Florida Office of Insurance Regulation, on December 8, 2016, seeking to stay the order on appeal, **are granted** and the lower tribunal’s November 23, 2016, Order on Non-Jury Trial and Final Judgment Providing Declaratory and Injunctive Relief, is stayed pending the outcome of this appeal. The appeal **shall proceed on an expedited basis**. The record on appeal shall be filed on or before December 30, 2016, and appellants shall file their initial briefs on or before January 11, 2017. The answer brief shall be filed no later than January 23, 2017. **The reply brief(s) shall be filed no later than February 2, 2017**. No extensions of time shall be entertained by this court on any matter absent a bona fide showing of emergency circumstances.” (Emphasis added).
- <sup>11</sup> Appeals court allows workers’ compensation premium hike to take effect, floridapolitics.com, December 1, 2016, <http://floridapolitics.com/archives/228147-workers-comp-3>, last visited January 6, 2017.
- <sup>12</sup> The session begins March 7, 2017 and will adjourn no later than May 5, 2017.
- <sup>13</sup> See endnote 1.
- <sup>14</sup> It is clear from this in-depth analysis that the data contains flaws (see endnote 14). The OJCC is in the process of rectifying those flaws. For this reason, it is suggested that the averages of data are likely more reliable (because of their statistical and summary nature) and worthy of reliance.
- <sup>15</sup> Conservative estimates support that this report represents an investment of at least 400 work hours. Efforts continue to audit the figures herein. Currently, there are fee order data sets that reflect \$0.00 in fees, but which capture other data. It is believed that the vast majority of these are orders approving *pro se* settlements. These are approximately 6% of the fee data analyzed (settlement, stipulation and attorney fee orders uploaded) for the 10.5 fiscal years in this report. They are overwhelmingly in the “statutory fee” category (which also supports the hypothesis that they are largely *pro se* settlements) and are distributed as follows: 2016-17 = 684 orders or 2%; 2015-16 = 1,549 orders or 5%; 2014-15 = 1,663 orders or 6%; 2013-14 = 1,767 or 6%; 2012-13 = 1,751 or 6%; 2011-12 = 1,767 or 6%; 2010-11 = 1,957 or 7%; 2009-10 = 2,420 or 8%; 2008-09 = 2,728 or 8%; 2007-08 = 3,091 or 8%; 2006-07 = 3,269 or 8%. These figures total 22,646 orders with \$0.00 fee amounts. During the period July 1, 2006 through December 31, 2016, 19,946 *pro se* settlement orders were uploaded. Therefore, following the audit of these entries, which is underway, it is likely that the volume of “fee orders” will be decreased notably as a result of removal of the *pro se* settlement orders from those totals. It is also probable that data on some fee orders will be corrected through this process and aggregate statutory fee totals for each year will change.
- Additionally, there are data entries for orders that reflect no values for any category of collected data including settlement amount, attorney fees, benefits secured or hours. These total 1,658 entries within the data analyzed herein, equivalent to about .5%. It is believed that these entries reflect orders later vacated or uploaded in error. These are distributed as follows: 2016-17 = 51 orders; 2015-16 = 54 orders; 2014-15 = 161 orders; 2013-14 = 266; 2012-13 = 174

orders; 2011-12 = 208 orders; 2010-11 = 184 orders; 2009-10 = 194 orders; 2008-09 = 98 orders; 2007-08 = 208 orders; 2006-07 = 60 orders. As these are audited further, it is possible that some portion of them will likewise be removed from the “volume” of fee orders calculation.

*Id.*

The auditing of 12,732 entries mentioned required approximately 400 work hours. It is estimated that audit of the approximate 24,304 entries identified as questionable due to \$0.00 dollar amounts will require approximately 800 work hours, or the equivalent of 20 full work weeks. Approaching the issue as a team, however, the process should conclude well before the conclusion of the fiscal year.

For example, it is common for a PFB to contain a claim for past medical care (payment for care by a medical provider or providers) and a claim for future medical care (authorization of a particular medical provider or specialty, i.e. orthopedic surgeon) and a claim for some form of lost-wage (“indemnity”) benefit, such as temporary total or temporary partial disability benefits. Many PFBs seek payment of attorneys’ fees and costs, and penalties and interest are commonly claimed when any form of indemnity is sought.

Questions have been raised regarding why the OJCC reports data on a fiscal year basis. Some in industry voice frustration in comparing their data to OJCC data, caused by their use of calendar years and the OJCC use of fiscal years. The OJCC reports fiscal year data pursuant to the legislative mandate in section 440.45(5), Fla. Stat.: “(5) Not later than December 1 of each year, the Office of the Judges of Compensation Claims shall issue a written report to the Governor, the House of Representatives, the Senate, The Florida Bar, and the statewide nominating commission summarizing the amount, cost, and outcome of all litigation resolved in the *previous fiscal year*.” (Emphasis added).

Motions for attorneys’ fees, advances, and appointment of an expert medical advisor are commonplace in Florida workers’ compensation. Motions for contribution or modification are also heard, though they are not as common as other motions.

The appropriate method to seek determination of attorney fee entitlement or amount is usually by motion. Rule 60Q-6.124. The same is true for certain motions seeking appointment of an expert medical advisor, prevailing party costs, and otherwise. Therefore, a significant volume of each JCCs workload comprises these significant motions that require evidentiary hearings.

It is thus difficult to confidently predict filing volumes for the remaining 6 months of 2016-17.

The average (see statistical definitions, page 12) generated by combining the 12 months in each fiscal year and dividing by 12. The exception being 2016-17 in which 6 months were combined and divided by 6 to calculate the monthly average as of December 31, 2016.

The standard deviation illustrates the dispersion of a set of data. The extent to which a set of data (the months in a year) remain within one standard deviation from the mean, may be indicative of consistency in the data set.

See endnote 23.

This is mentioned in a concurring opinion in *Westphal v. St. Petersburg*, 122 So.3d 440 (Fla. 1<sup>st</sup> DCA 2013).

Section 440.34(1)(2003), Florida Statutes, provided in part: “A fee, gratuity, or other consideration may not be paid for services rendered for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the Judge of Compensation Claims or court having jurisdiction over such proceedings.”

The issue of defense fee approval has been discussed in a variety of forums in recent years. Although there is the implied penalty provision in section 440.105(3)(b), Florida Statutes, the Deputy Chief Judge has not found statutory authority upon which the OJCC could require submission of employer/carrier attorney fee billings for pre-approval by the assigned JCC. This investigation has included consultation with the Workers’ Compensation Section of The Florida Bar and the leadership of the Florida Workers’ Advocates. Substantial time has also been invested in legal research and analysis by this Office.

Section 440.105(3)(b), Florida Statutes provides: “It shall be unlawful for any attorney or other person, in his individual capacity or in his 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 Chief Judge of Compensation Claims.”

This disparity was noted by the Court in *Miles v. City of Edgewater Police*, 190 So.3d 171 (Fla. 1<sup>st</sup> DCA 2016).

In determining whether a fee is “statutory” or “hourly,” the Office of Judges of Compensation Claims is dependent upon data submitted by attorneys. For no apparent reason, some attorneys submit a document with fee motions and stipulations called a “general document filing.” This appears to be a redundancy, in which data from elsewhere in the record is restated. Unfortunately, a trend has been identified in which information in these “general document filings” contradicts rather than restates information elsewhere in the record. Therefore, District Staff may be confused in their duties and erroneously stated data may be mistakenly accepted. Cases for which a volume of hours expended was uploaded were deemed to be “hourly” fee orders. This may be erroneous, but any error is likely the result of faulty information provided by the parties. Any fee for which no hours were captured was deemed to be a “statutory” fee order.

Section 440.34(7)(2003): “(7) If an attorney’s fee is owed under paragraph (3)(a), the judge of compensation claims may approve an alternative attorney’s fee not to exceed \$1,500 only once per accident, based on a maximum hourly rate of \$150 per hour, if the judge of compensation claims expressly finds that the attorney’s fee amount provided for in subsection (1),



based on benefits secured, fails to fairly compensate the attorney for disputed medical-only claims as provided in paragraph (3)(a) and the circumstances of the particular case warrant such action.

*Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008).

<http://laws.flrules.org/2009/94>, Last visited January 6, 2017.

Of course, as the pro se orders are identified and removed from volume, this may change these percentages somewhat. One might be for “compensability,” in other words a decision that it is or is not the responsibility of a particular employer. Later, it is not uncommon for there to be claims for specific medical care, alternative medical care, or temporary indemnity benefits. Later still, there may be litigation over degree of permanency, entitlement to palliative care, or entitlement to permanent indemnity benefits.

These figures in each table, labelled “proj.” for projected figures, were calculated by doubling the figures demonstrated in the first six months of the fiscal year, July through December.

It is suggested that the parameters of the “alternative” fee in section 440.34(7)(2003), and the statutory imposition of \$150.00 per hour cannot be ignored in evaluating the relevance of these Median figures.

These figures in each table, labelled “proj.” for projected figures, were calculated by doubling the figures demonstrated in the first six months of the fiscal year, July through December.

It is likewise suggested that the parameters of the “alternative” fee in section 440.34(7)(2003), and the statutory imposition of \$150.00 per hour cannot be ignored in evaluating the relevance of these Mode figures.

These figures in each table, labelled “proj.” for projected figures, were calculated by doubling the figures demonstrated in the first six months of the fiscal year, July through December.

Although only these three periods are defined for the purposes of this report, other periods could be defined. Statutory fees have been altered prior to 2003. The percentages were changed in 1994. Thus a period might be “October 1, 1994 through July 1, 2003,” instead of simply “prior to July 1, 2003.” Likewise, the statutory formula has not always been in the statute, and so the period prior to formula fees might be defined. However, with the passage of time, fee orders have been demonstrated to primarily address dates of accidents in the ten years prior to a particular order. And, the vast majority address accident dates within 20 years prior. Therefore, investment of analysis regarding the influence of this very small population of very old orders as a separate group is not appropriate.

Section 440.34(1)(2001) “(1) A fee, gratuity, or other consideration may not be paid for services rendered for a claimant in connection with any proceedings arising under this chapter, unless approved as reasonable by the judge of compensation claims or court having jurisdiction over such proceedings. Except as provided by this subsection, any attorney's fee approved by a judge of compensation claims for services rendered to a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. However, the judge of compensation claims shall consider the following factors in each case and may increase or decrease the attorney's fee if, in her or his judgment, the circumstances of the particular case warrant such action: (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. (b) The fee customarily charged in the locality for similar legal services. (c) The amount involved in the controversy and the benefits resulting to the claimant. (d) The time limitation imposed by the claimant or the circumstances. (e) The experience, reputation, and ability of the lawyer or lawyers performing services. (f) The contingency or certainty of a fee.”

Section 440.34(1)(2003): “(1) A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved 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 which provides for an 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 subsection or subsection (7).” This is commonly referred to as the “20/15/10” formula. Prior iterations were referred to similarly with phrases such as the “25/15/10” formula.

Section 440.34(7)(2003): “(7) If an attorney's fee is owed under paragraph (3)(a), the judge of compensation claims may approve an alternative attorney's fee not to exceed \$1,500 only once per accident, based on a maximum hourly rate of \$150 per hour, if the judge of compensation claims expressly finds that the attorney's fee amount provided for in subsection (1), based on benefits secured, fails to fairly compensate the attorney for disputed medical-only claims as provided in paragraph (3)(a) and the circumstances of the particular case warrant such action.

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<sup>46</sup> Section 440.34(1)(2003): (1) 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 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. (Emphasis added).

<sup>47</sup> *Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008).

<sup>48</sup> It is critical to remember that legislative enactments typically apply prospectively only. Thus, the 2003 amendment changed fees only on case in which the date of injury occurred after July 1, 2003. Judicial conclusions such as that in *Murray* have retroactive effect, changing the application of law to cases dating back to that legislative change. Thus, *Murray* in 2008 had an effect on any unsettled cases back to July 1, 2003. Likewise, the *Castellanos* decision in 2016 affected any unsettled cases back to July 1, 2009.

<sup>49</sup> <http://laws.flrules.org/2009/94>, Last visited January 6, 2017.

<sup>50</sup> Of course, as the pro se orders are identified and removed from volume, this may change these percentages somewhat.

<sup>51</sup> As the figures change through further audit, these percentage shares may likewise change. See endnotes 14 and 16.

<sup>52</sup> Available at [www.fljcc.org](http://www.fljcc.org), under the "publications" tab.

<sup>53</sup> 2015-16 Annual Report of the Office of Judges of Compensation Claims, <https://www.fljcc.org/JCC/publications/reports/2016AnnualReport/Index.html>, page 35.