

# Workers' Compensation Legislative & Regulatory Update

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*Volume 6, Issue 7  
December 8, 2005*

The Office of Judges of Compensation Claims (OJCC) has released its fiscal year 2004-2005 report that shows that the number of petitions for benefits has fallen by 30% since the enactment of the 2003 reforms. The report singles out the legislative changes in claimant attorneys' fees as the primary reason for the decline in legal activity. The OJCC report is also critical of the behavior of some claimant attorneys, which the office contends have used unethical means in an effort to intimidate judges into approving higher fees. The report comes as Deputy Chief Judge Scott Stephens has relinquished his post after Gov. Jeb Bush appointed him to the Thirteenth Judicial Circuit Court in Hillsborough County. The new acting deputy chief judge is Tallahassee JCC John Lazzara, who will fill the post until Bush names a replacement for Stephens.

In other news, the Division of Workers' Compensation (DWC) is continuing to negotiate with the Florida Insur-

ance Council (FIC) in an effort to resolve a challenge to a division rule that addresses the coverage status of limited liability corporate officers that are not engaged in the construction industry. Additionally, settlement talks are moving forward on the Florida Hospital Association's (FHA) challenge to a rule that would limit the reimbursements for physical implants, prosthetics, and orthotics. The DWC has notified all workers' comp carriers, self-insured employers, and third-party administrators that the maximum statewide average weekly wage will be set at \$683 as of Jan. 1, 2006. The division has also announced it will hold three town hall meetings to provide information to employers and employees on the latest developments in the workers' comp system.

In legislative developments, the House State Appropriations Committee is scheduled to hear a bill that would grant first responders certain exceptions to the changes made in the 2003 workers' compensation law. Among other things, the bill would amend the standard of

proof in cases involving occupational diseases. The bill would allow first responders to collect permanent total supplemental benefits for life in the event their employer opted out of the social security program. The bill would allow JCCs to award claimant attorney fees in excess of the attorney fee statute in certain cases. The legislature is currently in special session, which limits the number of subjects legislators can address. So far, the first responder bill is not among those subjects and is more likely to be addressed in the 2006 legislative session. The special session is scheduled to end on Friday, Dec. 9.

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## OJCC

The OJCC report covers fiscal year 2004-2005, which extends between July 1, 2004 and June 30, 2005. Therefore, while the data in the report focuses specifically on litigation activity, it also indirectly is a measure of the impact of the 2003 law changes on the workers' comp system. In 2003, lawmakers essentially took a two-prong approach to

reducing litigation including addressing claimants' indemnity benefits and claimant attorneys' fee calculations. The most substantial change in indemnity benefits came as legislators substantially raised the bar for claimants to qualify for permanent total disability benefits. Prior to the 2003 reforms, claimants could qualify for PTD benefits if it could be shown that they could qualify for Social Security disability benefits. Now the ability of claimants to qualify for PTD benefits hinges on the ability to work in sedentary employment within a 50 mile radius of his residence.

Legislators took a more targeted approach to reduce direct litigation costs by modifying claimant attorneys' fees. Specifically, lawmakers eliminated hourly fees with the exception that allows claimant attorneys to collect up to \$1,500, based on an hourly rate of \$150 per hour, for one medical-only claim per date of accident. Legislators retained the statutory fee schedule that allows claimant attorneys to receive 20% of the first \$5,000 in benefits, 15% of the following \$5,000, and 10% of remaining benefits paid in the first 10 years after the date the claim was filed, and 5% on any further benefits. Currently, there are numerous cases working their way through the court's challenging the fee changes.

The annual report measures litigation activity by the workload of the judges and mediators and the amount of fees paid to attorneys. The report is silent on the impact of the 2003 reforms on indemnity and medical costs or the

severity of claims since the law does not call for the OJCC to collect that data.

Looking first at the JCCs' workload, the number of petitions for benefits has fallen by 30% since the implementation of the 2003 reforms. In 2004-2005, the number of filed petitions was 107,000, which is a 16% drop from the 124,000 petitions filed in 2003-2004. By comparison, in 2002-2003, the OJCCs received a total of 150,000 petitions. Of the new cases filed, 71% fall under the new law, although half the filed petitions still represented pre-2003 claims.

### Litigation Outcomes:

The majority of cases continue to be resolved through settlements. Of the 107,000 filed petitions, 4,200 were dismissed as compared to the 8,000 in fiscal year 2003-2004. Eleven thousand cases were resolved before the mediation processed. The number of cases that made it to a final hearing was 2,217, which averaged 71 per judge.

Mediation continues to be the focal point of the dispute resolution process. By law, a mediation conference must be held within 130 days after a petition is filed. If a state mediator is unavailable in that time period, then a private mediation must be held at the employer/carriers' expense. In fiscal year 2004-2005, the average length of time before a mediation conference was held was 114 days, which was up slightly from the 108 days in the prior years.

In fiscal year 2004-2005, the number of mediated cases equaled 26,410, which addressed 93,000 individual petitions. Of the 26,410 cases, 11,128 were settled

prior to the mediation and 30% percent of the mediations (7,800) resulted in washout settlements. For a complete breakdown of the results of the mediation process see the accompanying table.

The OJCC report also included information on payments to attorneys. The office estimated defense attorneys received a total of \$217 million in fees, which is down from the estimated \$231 million paid in fiscal year 2003-2004. It should be pointed out that the \$217 million is a broad estimate. Employer/carriers reportedly paid defense firms \$190 million, but an undisclosed number of employer/carriers did not report their legal expenses to the OJCC. Claimant attorneys were reportedly paid \$181 million, of which 42% were attributable to pre-2003 claims.

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## First Responders

The House State Appropriations Committee has scheduled a meeting to consider **HB 141**, which would grant first responders a "preferred status" under the workers' comp law. This marks the third time the bill has been filed for legislative action. Last year, the bill failed when House Insurance Committee Chair Dennis Ross (R-Lakeland) refused to place it on the committee's agenda. NCCI estimated that if the bill passed in its current form it would increase first responders' workers' comp costs by roughly \$14 million. Most of that costs would be absorbed by state and local governments.

The bill would lower the standard of proof in cases involving occupational diseases, repetitive exposure, and expo-

sure to toxic substances. The 2003 law changed the standard of proof for such claims to clear and convincing evidence. Under the bill, first responders would only have to meet a preponderance of evidence standard. The bill would also allow claimant attorneys to receive fees in excess of the statutory fee schedule in cases involving accidents and injuries related to toxic substances and occupational diseases. Instead, a fee would be based on the following factors:

- The time and labor required, the novelty and difficulty of the issues, and the skill required to perform the legal services.
- The amount involved in the controversy and the benefits payable to the claimant.
- The experience, reputation, and the ability of the attorneys performing service.

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## Rule Activity

The FHA, the DWC, and other parties are working toward a solution to resolve a controversial change in hospital reimbursements for physical implants, prosthetics, and orthotics. At issue are changes to the Florida Workers' Compensation Reimbursement Manual for Hospitals that were approved by the Three-Member Panel on Workers' Compensation.

The three-member panel voted to impose a cap on these items at 20 percent above invoice costs including the manufacturer's shipping and handling costs. The rationale for the change is that hospitals were using the cost of

the items to exceed a \$50,000 per diem rate, which allows hospitals to receive 75 percent of usual and customary charges. The FHA states that the three-member panel fails to take into consideration the differences between hospitals in handling the costs of the devices.

The rule challenge was slated to be heard by the Division of Administrative Hearings, but the parties agreed to postpone the hearing in order to work on a negotiated settlement. According to DWC officials, those talks are moving forward and an agreement could be reached before the end of the year.

FIC also postponed an administrative hearing on a rule that addresses the coverage status of officers of a limited liability company that are not engaged in the construction industry. Rule 69L-6.023 specifically states: "A member of a limited liability company created and approved under Chapter 608, Florida Statutes, that is not engaged in the construction industry is not an "employee" of the limited liability company, for purposes of Chapter 440, Florida Statutes. The liability for compensation imposed by Chapter 440.10, Florida Statutes, does not apply as to a member of a limited liability company created and approved under Chapter 608, Florida Statutes, that is not engaged in the construction industry, unless the employer elects a waiver to the pursuit to Chapter 440.04, Florida Statutes."

FIC is objecting to the rule on the basis it that it does not treat non-construction members of a limited liability company the same as non-con-

struction corporate officers. Under Chapter 440.012(15)(b), for officers of a limited liability company to be exempt from coverage requirements they must own 10% of the company. Rule 69L-6.023 does not include the 10% requirement. Additionally, Chapter 440.012(15)(b), states that LLC officers in the construction industry are considered employees unless they elect to become exempt. Under the rule, non-construction LLC officers would not be considered employees unless they elect to be included in the definition of an employee for workers' comp coverage purposes.

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## DWC Town Meetings

Chief Financial Officer Tom Gallagher has announced that the DWC will hold three town hall meetings to update employers and employees on the latest legislative and regulatory activity. The participants will also have an opportunity to ask regulators questions about any recent developments including the recent rate reduction. The meetings will be held between 6:00 p.m. and 8:00 p.m. at the following locations:

- December 13 – In Fort Myers at the Florida Gulf Coast University Student Union Ballroom—10501 FGCU Boulevard South.
- December 14 – In Tampa at the USE/Busch Gardens Embassy Suites—3705 Spectrum Boulevard.
- December 15 – In Orlando at the City of Orlando City Council Chamber Room—400 S. Orange.

# JCC Tables

**Table 1: OJCC Litigation Report Summary**

**Executive Summary**

Key Data Summary	Fiscal Year 2004-2005	Change from Previous Year	Fiscal Year 2003-2004
Petitions Filed	107,268	-15.84%	124,548
State Mediations Held	26,410	-5.92%	34,613
Mediations Resulting in Settlements	7,081	-3.15%	9,314
Mediation Continuances	3,333	63.70	2,775
Orders Approving Agreements	60,464	-10.04	62,213
Procedural Orders	75,958	-11.09%	85,434
Final Orders Entered	2,606	-15.80	3,095
Trial Continuances Granted	5,094	-24.35	6,734
Orders Entered Untimely (percent of final orders entered).	20%	-4%	24%

**Table 2: State Mediation Date**

Action	Fiscal Year 2004-2005	Fiscal Year 2003-2004
Petitions for Benefits Dismissed	4,253	8,032
Settlement before Mediation	11,128	12,483
Washout agreement at Mediation	7,081	9,314
All issues resolved	2,188	3,706
All issued resolved except attorneys' fees	2,986	2,703
Some issues resolved	3,526	5,641
Impasse	8,816	9,400
No appearance	2,231	3,602
Rescheduled	16,150	26,301
Recessed or Reconvened	2,327	2,682
Mediation waived	30	579
Average Days to Scheduled Mediation	114	108
Mediations Within 130 Days	79,937	22,845

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## Upcoming Events:

**WORKERS' COMPENSATION EDUCATIONAL SEMINARS**

Monday, May 8 – Ft. Lauderdale (Location TBD)  
 Tuesday, May 9 – West Palm Beach, Marriott West Palm Beach  
 Wednesday, May 10 – Tampa (Location TBD)  
 Thursday, May 11 – Ocala, Hilton Ocala

Tuesday, May 16 – Jacksonville, Radisson Riverwalk Hotel  
 Thursday, May 18 – Orlando, Caribe Royale  
 Tuesday, May 23 – Tallahassee, Hermitage Center  
 Thursday, May 25 – Ft. Walton Beach, Ramada Plaza Beach Resort

**SPRING FORUM ON WORKERS' COMPENSATION**

Friday, May 19 – Orlando, Caribe Royale

**WORKERS' COMPENSATION EDUCATIONAL CONFERENCE**

Sunday-Wednesday, August 13-16 – Orlando, Orlando World Center Marriott

*For more information on these events contact the Florida Workers' Compensation Institute at 850.425.8156, or visit [www.fwciweb.org](http://www.fwciweb.org).*