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# THE 1979 FLORIDA WORKERS' COMPENSATION REFORM: BACK TO BASICS\*

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## I. THEORY OF WORKERS' COMPENSATION

The rapid industrialization in Western Europe and the United States in the second half of the nineteenth century inevitably resulted in a great increase in the number of work-related injuries. At the same time remedies available to injured workers were being severely restricted.<sup>1</sup> Workers in Europe were somewhat better off than those in the United States where "only an estimated 15 percent of the injured employees ever recovered damages."<sup>2</sup> The expensive litigation process and the defenses available to the employer made it highly unlikely that a worker would recover at all much less recover actual losses, general damages, and future loss of earning capacity.<sup>3</sup> Obviously, litigation in tort was not the answer.

The response came in the form of statutory enactments which eliminated recovery in tort and substituted a new system. This system had a different philosophy than that of the very individualistic common law system.

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments

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\* The subtitle is taken from a speech given by Dr. Arthur Larson at the 3rd Annual National Symposium on Workers' Compensation, in Orono, Maine (July 9, 1979).

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1. The development of workers' compensation systems is discussed in an excellent article by Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952). See also Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156 (1967).

2. Weinstein, *supra* note 1, at 157.

3. Larson, *supra* note 1, at 223-25.

to the most appropriate source of payment, the consumer of the product.<sup>4</sup>

In exchange, then, for the certainty of compensation, the worker relinquishes the right to a jury trial and general damages. In exchange for limited liability, the employer agrees to pay without regard to fault.<sup>5</sup> The worker, of course, was not really giving up that much since he rarely recovered anyway. The employer was freed from the problems of litigation and could pass his expenses on to the consumer of his products. Though employers and employees adapt rather readily to new systems, lawyers are the slowest to adapt since fault must be disregarded and since the worker is not intended to recover the very large amounts which are occasionally awarded by juries.<sup>6</sup> Under basic compensation theory, a worker's entitlement to recovery thus depends on the answers to only two questions: (1) was his injury work-related? and (2) did his injury cause a loss in wages?<sup>7</sup> It follows inexorably therefore that a workers' compensation system will function properly if it operates almost automatically (self-executing) and if it compensates the worker for his actual losses (medical expenses and wage loss). Any importation of tort theory invites litigation with its attendant delays and expenses. Any compensation based on estimates of losses rather than on actual losses invites even more litigation and results inevitably in inequity: overpayment in some cases, underpayment in others.

The systems operating in the various United States today are almost uniformly burdened by high costs. Upon examination, one finds that these high costs are the result of litigation which in turn is the result of benefits payable on the basis of guesses. It need not have been that way. The United States might have patterned its workers' compensation system on the German model.

In 1884, Germany enacted a comprehensive package of compulsory insurance to provide coverage for sickness, accidents, old age and invalidity.<sup>8</sup> These enactments were based on an idea in stark contrast to the prevailing *laissez faire*. This was "the idea that a

4. *Id.* at 209.

5. There are exceptions to this in most state statutes providing some kind of penalty on the worker for the willful failure to use a safety appliance. FLA. STAT. § 440.09(4) (1977).

6. Larson, *supra* note 1, at 207-10.

7. *Id.* at 212-13.

8. J. BROOKS, COMPULSORY INSURANCE IN GERMANY, S. DOC. No. 66, 52d Cong., 2d Sess. 36 (1893). In this report the U.S. Commissioner of Labor describes the three forms of compulsory insurance in force in Germany: sickness, accident, and old age and invalidity. The report contains a summary of each act and the text of the act (in English). Commentary within the report will hereinafter be cited as COMPULSORY INSURANCE; the text of the Act for Insurance Against Accidents will hereinafter be cited as GERMAN ACT.

large proportion of the misfortunes, sickness, accident, and premature age are social in origin rather than individual; that a vast part of these evils spring, not from the fault of the individual, but from sources over which the individual has little or no control."<sup>9</sup> In addition to philosophy, there were political reasons for these enactments. Those reasons may be found in the history of socialist activities prior to passage of the comprehensive insurance system and particularly in the increasing influence of the Marxist socialists at the expense of the more moderate Fabian socialists.<sup>10</sup> The prime sponsor of these acts was Otto von Bismarck. In a classic political maneuver, Bismarck took the "wind from the sails of his enemies" by putting the state "fearlessly at the disposal of the laboring classes" with the "elaborate scheme of compulsory insurance of the working classes."<sup>11</sup>

This coverage was paid for by both workers and employers. Workers paid two-thirds, and employers one-third, into the Sickness Fund; only employers contributed to the Accident Fund; and workers and employers each contributed one-half to the Disability Fund.<sup>12</sup> Because of the benefit structure, workers actually contributed part of what we would consider the "premium," in contrast to the present American system. The Sickness Fund (to which the worker had contributed two-thirds) paid for medical treatment for the first thirteen weeks.<sup>13</sup> Beginning in the fourteenth week, the Accident Fund (to which only the employer had contributed) paid medical and indemnity benefits.<sup>14</sup> The worker thus had more than a three-month waiting period before his indemnity benefits began. The system was administered by representatives of employers and employees under government supervision.<sup>15</sup> The benefit structure was similar to what we know today. The injured worker was paid 66 2/3% of his previous average daily earnings "in case of complete inability to work."<sup>16</sup> And for partial disability the German system used the same guessing procedure employed in most states today; partial disability payments were "to be determined according to the measure of earning capacity that remains."<sup>17</sup> The determination of disability was made by a doctor and most often appealed by the

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9. COMPULSORY INSURANCE, *supra* note 8, at 19.

10. *Id.* at 26-29.

11. *Id.* at 29.

12. Larson, *supra* note 1, at 230.

13. COMPULSORY INSURANCE, *supra* note 8, at 91.

14. GERMAN ACT, *supra* note 8, § 5.

15. *Id.* §§ 12-42.

16. *Id.* § 5.

17. *Id.*

worker rather than the employer because "the appeal costs him nothing."<sup>18</sup>

Despite the flaw in the partial disability determination procedure, the German system was admirable. First, it was comprehensive; some part of the system was available to respond to any situation. There would be, for example, no impetus to seek a workers' compensation disability determination to provide retirement income since another part of the system addressed the question of old age. Second, employers and employees ran the system; they were the governmental agency and they could keep each other honest. The diffusion of responsibility and activities among employees, workers, lawyers, insurance carriers and government bureaus simply did not exist. And third, since a worker had comprehensive coverage, there was no particular reason to restrict coverage by denying that there was an accident or that the accident was work-related. The German act refers almost casually to insuring workers "against accidents occurring in the course of their occupations."<sup>19</sup> Even with the guessing about partial disability, the German system more nearly approached the ideal than did the British system. Almost as an inevitability, therefore, only two of the states modeled their workers' compensation laws after Germany's, while the rest used Britain's as their model.<sup>20</sup>

The British act, passed in 1897, differed considerably from the German in that it was a reluctant response to a bad situation.<sup>21</sup> The system is heavily weighted in favor of the employer. In contrast to the more off-hand attitude in the German act toward the coverage provided, the British act was careful to cover only "personal injury by accident arising out of and in the course of the employment."<sup>22</sup> In the event of negligence by the employer, the injured worker had the option of claiming compensation under the act or filing a lawsuit. And if the injury to the worker was "attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."<sup>23</sup> Such language would obviously prove fertile ground for litigation.

The British act also contained procedural roadblocks. For exam-

18. COMPULSORY INSURANCE, *supra* note 8, at 88.

19. GERMAN ACT, *supra* note 8, § 1.

20. The two states were Washington and Ohio. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 Wis. L. Rev. 57, 61.

21. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37. Note that this first act has been replaced by a national insurance system. For a discussion of this system and its relation to the United States system, see Larson *supra* note 1, at 216-17.

22. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1.

23. *Id.*

ple: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof."<sup>24</sup> Section 2 of the British act then goes on for five subsections with the minutiae of notice.

Another interesting feature is the treatment of lump sum settlements.<sup>25</sup> Under the German act, lump sums were to be paid only in "exceptional cases."<sup>26</sup> Under the British act, an employer could cash out his liability after weekly payments had been made for six months.<sup>27</sup> If the purpose of a compensation act is to prevent injured workers from becoming a burden on society, a series of weekly payments is much more likely to accomplish that aim than a one-shot payment.

Despite these drawbacks, most of the states used the British system as their model. After a period of intensive activity following the 1893 study of the German system prepared by the United States Commissioner of Labor,<sup>28</sup> New York passed an act with compulsory coverage in 1910.<sup>29</sup> The act was limited to certain "especially dangerous" employments,<sup>30</sup> and in other aspects was obviously based on the British act. New York used the familiar basis of liability, "personal injury by accident arising out of and in the course of the employment,"<sup>31</sup> and also permitted actions under common law.<sup>32</sup> New York also used the guessing procedure to determine payments for partial incapacity.<sup>33</sup> The only enforcement mechanism seems to have been an action at law brought by the injured workers.<sup>34</sup> Even as heavily overlaid with tort concepts as it was, the act was too "revolutionary" for the New York Court of Appeals and was held unconstitutional in 1911.<sup>35</sup> For the court, compensation theory was "not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea."<sup>36</sup> The court stated that if the legisla-

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24. *Id.* § 2.

25. Commonly called "washouts" in the Florida system. See ch. 79-40, § 16, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.20) in which the German choice was selected, even though the legislature was not aware of this nineteenth century background.

26. COMPULSORY INSURANCE, *supra* note 8, at 91.

27. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, sched. 1, § 13.

28. COMPULSORY INSURANCE, *supra* note 8. For a summary of this activity, see Larson, *supra* note 1, at 231-33.

29. 1910 N.Y. Laws, ch. 674.

30. *Id.* § 215.

31. *Id.* § 217.

32. *Id.* § 218.

33. *Id.* § 219-a.

34. *Id.* § 219-d.

35. *Ives v. South Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911).

36. *Id.* at 440.

ture could impose a liability on an employer solely because "his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business."<sup>37</sup> Thus, the New York act was held unconstitutional as "a taking of property without due process of law."<sup>38</sup>

This decision, however, created an uproar. The ruling enraged Theodore Roosevelt who complained that such decisions for the past twenty-five years had served as a bar to social reform.<sup>39</sup> An amendment to the New York Constitution was soon adopted that cured the constitutional defect.<sup>40</sup>

In contrast to New York, Massachusetts' first comprehensive law, passed in 1911,<sup>41</sup> was held constitutional.<sup>42</sup> The act was much more detailed than the New York act and more liberal in benefits for the worker. The act provided for an industrial accident board to make rules to carry out the act,<sup>43</sup> and also created the Massachusetts Employees Insurance Association which self-insured its subscribers under the supervision of the insurance department.<sup>44</sup> While both New York and Massachusetts paid workers at 50% of their average weekly earnings,<sup>45</sup> Massachusetts also required the employer to "furnish reasonable medical and hospital services, and medicines when they are needed."<sup>46</sup> New York referred to physicians and surgeons only to require the worker to submit himself for an examination if requested and to penalize him for refusal.<sup>47</sup> Massachusetts benefits also included a schedule for amputations,<sup>48</sup> and specifically prohibited a set off for any "savings or insurance of the injured employee" or for "benefits derived from any other source" in determining the compensation payments.<sup>49</sup> But the Massachusetts act did not differ from the New York act in substituting a statutory compensation system for actions at common law. Still, the Massachusetts Supreme Judicial Court held the act constitutional, stating

37. *Id.*

38. *Id.* at 448.

39. Weinstein, *supra* note 1, at 170.

40. *Id.* at 171.

41. 1911 Mass. Acts, ch. 751.

42. *In re* Opinion of Justices, 96 N.E. 308 (Mass. 1911).

43. 1911 Mass. Acts, ch. 751, pt. III, §§ 1-18.

44. *Id.* pt. IV, §§ 1-24. Employers could also insure with a commercial carrier. *Id.*, pt. V, § 3.

45. 1910 N.Y. Laws, ch. 674, § 219-a; 1911 Mass. Acts, ch. 751, pt. II, § 6.

46. 1911 Mass. Acts, ch. 751, pt. II, § 5.

47. 1910 N.Y. Laws, ch. 674, § 219-b.

48. 1911 Mass. Acts, ch. 751, pt. II, § 11.

49. *Id.* § 12.

that the act does not "authorize the taking of property without due process of law" in contrast to New York's decision, and that "there is nothing in [the act] which violates any rights secured by the state or federal Constitutions."<sup>50</sup>

Another early compensation law, Washington State's, was also held constitutional by the state supreme court.<sup>51</sup> The Washington act was based on the German system, which the court characterized as the "most sweeping," rather than on the English system, which the court found "least interferes with employers."<sup>52</sup> In exploring "this noble legislation," the court articulated the fundamentals of compensation theory:

Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was the cost of production, that the industry should bear the charge.<sup>53</sup>

Thus the Washington system was deliberately designed to provide sure compensation in exchange for the elimination of litigation. The court noted that the English system "had already begotten whole volumes of contests" over the meanings of words.<sup>54</sup> Rather than fall into the same trap, the Washington court opted for liberality in interpretation in exchange for an end to litigation. "Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master's premises."<sup>55</sup>

The United States Supreme Court decided the issue in favor of the validity of workers' compensation laws in 1917,<sup>56</sup> and by 1920, workers in some forty states were covered.<sup>57</sup> Florida enacted its law

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50. *In re* Opinion of Justices, 96 N.E. 308, 315 (Mass. 1911).

51. *Stertz v. Industrial Ins. Comm'n*, 158 P. 256 (Wash. 1916).

52. *Id.* at 258.

53. *Id.*

54. *Id.* The same may accurately be said of Florida as well.

55. *Id.* at 263.

56. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

57. *Brodie*, *supra* note 20, at 63.



in 1935;<sup>58</sup> the final state to act was Mississippi, in 1948.<sup>59</sup>

This brief investigation of the background of workers' compensation laws shows that these enactments were meant to deal with the great increase in work-related injuries brought about by the industrialization of Western Europe and the United States beginning in the second half of the nineteenth century. Since litigation under the tort system was both protracted in process and unpredictable in result, the legislative response was to eliminate that system and replace it with one designed to be self-executing and to replace the uncertainty of recovery but the possibility of a large recovery under the tort system with the certainty of a moderate recovery under a compensation system.

No compensation system can be entirely self-executing since there will always be some litigable issues such as whether the injured worker was an employee or an independent contractor or whether the injury was in fact work-related. But considering the many other issues which must be resolved under the tort system, a properly organized and properly staffed compensation system more nearly approaches the self-executing ideal.

The recovery to the worker has been the more difficult of these two requirements to meet, even though this difficulty is with only one part of the benefits payable. The sum due for medical benefits is readily ascertainable. The amount payable on account of death is set by statute. The compensation payable for total inability to work is set as a percentage of the preinjury wage and is also easy to calculate. The problem is partial inability to work, after the injury has healed. A worker not totally disabled is partially disabled and he or she is referred to as a "permanent partial." Deciding how to compensate such a worker is the biggest problem in workers' compensation today: there are a number of systems and all of them are invitations to litigation. Generally, a permanent partial is to be compensated according to his loss of earning power (or wage-earning capacity). One method is to make a guess about what the worker could have earned had he not been injured. Another method is to assume that a loss of earning power will result from a physical impairment and then to compensate the worker based on a guess as to his degree of impairment. Testimony can be had from an endless number of experts about loss of earning power or degree of impairment. All are still guesses and all involve litigation.

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58. The act was passed in 1935 in 3 separate bills: Ch. 17481, §§ 1-55, 1935 Fla. Laws 1456 (current version at FLA. STAT. § 440.01 (Supp. 1978)); ch. 17482, §§ 1-3, 1935 Fla. Laws 1495 (current version at FLA. STAT. § 440.01 (Supp. 1978)); and ch. 17483, §§ 1-3, 1935 Fla. Laws 1496 (current versions at FLA. STAT. § 440.02 (Supp. 1978)).

59. Brodie, *supra* note 20, at 63.

A third method of compensating a permanent partial which has not been tried anywhere in the United States, which has just been enacted in Florida, and which does not involve guesses, is called wage-loss. This method assumes, not that a degree of impairment will reflect loss of wage-earning capacity in the future, but that actual loss of earnings in the future, in relation to preinjury wages, is occasioned by the impairment resulting from the injury. This actual wage loss is what should be compensable. The workers' compensation system was instituted to compensate a worker for his inability (total or partial) to earn as much after an injury as he had earned before. The burden of maintaining a worker at a reasonable standard of living was placed on the industry (and ultimately that industry's consumers) in which the worker was injured rather than on the city or county in which the worker lived or on the worker's own resources. The logical approach to the determination of the amount of compensation should be to wait and see whether a worker does in fact suffer a loss of earning power and then compensate him for that actual loss. How the Florida Legislature arrived at this conclusion and the reasons for the large number of changes in Florida's workers' compensation law will be discussed in Part II.

## II. FLORIDA WORKERS' COMPENSATION: THE IMPETUS FOR REFORM

The underlying theory of workers' compensation in Florida, as expressed by the courts, is the same as compensation theory generally. "Workmen's Compensation . . . proceeds on the theory that economic loss to the individual by injury in line of duty should be borne in part by the industry in which he is employed in order that his dependents may not want."<sup>60</sup> In addition, the two important features of Florida's system are the same as those elsewhere: a self-executing system and compensation for loss of earning power. "[T]he Workmen's Compensation Law [is intended] to be self-executing and . . . benefits [are] to be paid without the necessity of any legal or administrative proceedings."<sup>61</sup> And, "[t]he intention of the Act is to compensate the employee for the loss of earning capacity. If the employee is injured but is able to work, he is not compensated."<sup>62</sup>

The 1979 legislative reform is an attempt to bring Florida's act more in line with its underlying theory. The retooling of the Florida law was necessitated by the high dollar cost of the current system, its well-intended but inequitable awards, and the delay of claims

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60. *Duff Hotel Co. v. Ficara*, 7 So. 2d 790, 791 (Fla. 1942).

61. *A.B. Taff & Sons v. Clark*, 110 So. 2d 428, 436 (Fla. 1st Dist. Ct. App. 1959).

62. *Allen v. Maxwell Co.*, 11 So. 2d 572, 575 (Fla. 1943).

resolution as reflected by a high level of litigation. Put another way, the act as it actually had been implemented since 1935 no longer reflected the theories on which it was based.

Costs in Florida have skyrocketed. In 1970, the average benefit paid for a nondisabling injury was \$42.29. In 1978, this amount was \$87.66, an increase of 107%. Similarly, in 1970, the average benefit paid for a disabling injury was \$1,471.53, and in 1978, was \$3,281.76, an increase of 123%. For fatalities, the average benefit paid was \$10,979.49 in 1970, and \$32,430.23 in 1978, an increase of 195%.<sup>63</sup> Because of these increases in benefits paid, premiums in 1977 were up by 238% over 1970 levels.<sup>64</sup>

The level of litigation in Florida is also much higher than in other states. A resolved claims study conducted by the National Council on Compensation Insurance indicated that there was plaintiff attorney involvement in 29.8% of the Florida cases as compared to 2.8% for Alabama cases and 3% for Wisconsin cases.<sup>65</sup> Claims resolution in Florida was slower than in Alabama or Wisconsin. Forty-three percent of the Alabama claims and 31% of the Wisconsin claims were resolved within thirty days of the injury, while only 10.1% of the Florida claims were resolved within this same period.<sup>66</sup> These figures indicate greater administrative friction in the Florida system as compared to Alabama and Wisconsin.

Given these circumstances, the 1979 legislature had to decide what its objectives were and how to achieve them. The overall goal was to reduce costs, in the form of premiums, to the employers of the state. If the system could more nearly approach the self-executing ideal, then that part of the costs attributable to litigation would be significantly reduced. Since the system seemed to function on guesses (at impairment ratings, at diminution of wage-earning capacity) and since litigation flourishes when the facts are in doubt, then the more objectivity that could be included, the more costs could be reduced. In addition, under a more nearly self-executing system, more equity could be achieved as between similarly injured workers than when each worker's award depended on the outcome and the vagaries of the adversary process.

The primary aspects of compensation theory addressed by the

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63. OFFICE OF RESEARCH AND PLANNING, DIVISION OF LABOR, FLA. DEP'T OF LABOR AND EMPLOYMENT SECURITY, FACTS ABOUT WORKERS COMPENSATION: HIGHLIGHTS FOR FOURTH QUARTER 1978 at 4-5.

64. OFFICE OF RESEARCH AND PLANNING, DIVISION OF LABOR, FLA. DEP'T. OF LABOR AND EMPLOYMENT SECURITY, WORKMEN'S COMPENSATION DATA (as of December 31) (Sept. 26, 1978).

65. National Council on Compensation Ins., Workmen's Compensation Resolved Claim Study: Preliminary Observations on Closed Claims Survey at 4 (1977) (survey available at the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

66. *Id.* at 5.

1979 reform are the "guesstimate" provisions encountered in determining indemnity levels for permanent partial disabilities and the administrative provisions used in handling a claim. It became apparent early in the hearings held by the Joint Legislative Committee on Workmen's Compensation that the permanent partial disability section of the law was considered the primary source of friction within the system. Statistics for 1978 compiled by the Bureau of Workmen's Compensation show that of the 452,556 work-related injuries in that year, only 11,827 resulted in a permanent partial disability, less than 3% of all injuries. Yet, permanent partial benefits (both compensation and medical) amounted to \$114 million of the total benefits of \$257 million paid in 1978, or 44% of the total benefits. Compensation benefits alone for permanent partial injuries amounted to \$71 million, or 28% of the total benefits paid in 1978.<sup>67</sup> In addition, a resolved claim study found that plaintiffs' attorneys were involved in over 70.7% of Florida's permanent partial cases, but in only 30% of such cases in Alabama and 17.5% in Wisconsin.<sup>68</sup>

Since the basic concept of workers' compensation is to partially compensate a worker for loss of wages caused by a work-related injury,<sup>69</sup> payments are not intended to equal wages because to do so would encourage malingering rather than provide an incentive to return to work. Statutes typically provide for payment of from one-half to two-thirds of the wages lost as a result of the injury, subject to minimum and maximum limitations.<sup>70</sup> With regard to partial disabilities, however, virtually every state has deviated from the concept of compensating actual economic loss. Under the Florida Workmen's Compensation Act as it existed prior to the 1979 legislative session, compensation for workers with permanent partial disabilities consisted of 60% of the employee's average weekly wage for a particular number of weeks according to a statutory injury schedule. However, for injuries not covered by the schedule, the notorious paragraph "u" provided a formula for calculating the number of weeks of benefits based on a physical impairment rating or percentage of diminution of wage-earning capacity, whichever was

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67. OFFICE OF RESEARCH AND PLANNING, DIVISION OF LABOR, FLA. DEP'T OF LABOR AND EMPLOYMENT SECURITY, *FACTS ABOUT WORKMEN'S COMPENSATION: HIGHLIGHTS FOR FOURTH QUARTER 1978* at 3.

68. National Council on Compensation Ins., *Workmen's Compensation Resolved Claim Study: Resolved Claim Survey at 6 (1977)* (survey available at the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

69. See Hill, *Actual Wage Loss Theory*, BUREAU OF LABOR STANDARDS, U.S. DEP'T. OF LABOR, BULL. 192, at 72 (1956).

70. CHAMBER OF COMMERCE OF THE U.S., *ANALYSIS OF WORKERS' COMPENSATION LAWS 19-23* (1979).

greater.<sup>71</sup> These latter cases frequently involved soft-tissue injuries such as back injuries. The injury schedule applied to actual loss or loss of use of members of the body, eyes, and hearing.<sup>72</sup> Both the impairment rating, which is the percentage of permanent bodily impairment sustained by the worker as established by a doctor, and diminution of wage-earning capacity, which is the percentage of lost capacity to earn wages as established by a judge of industrial claims, are difficult to measure and highly subjective.

Compensation based on a schedule or a disability rating is an arbitrary award in the nature of damages since it is made irrespective of economic loss.<sup>73</sup> A statutory schedule is intended to represent a presumption that a particular injury will result in wage loss for the specified number of weeks. However, the widespread disparity in scheduled awards from state to state indicates the invalidity of such an argument.<sup>74</sup> "The failure to anchor the award to wage-loss is the inherent weakness in the schedule concept."<sup>75</sup> In addition, the use of wage-earning capacity is necessarily arbitrary because there is no accurate method of measuring the effect of a disability on future earnings. Since the actual results are not the basis for a diminution of wage-earning capacity award, such award is again in the nature of damages rather than compensation for economic loss. "It is an unrealistic system because the real facts are not the basis for the award."<sup>76</sup> This subjective aspect is a factor in the high incidence of attorney involvement and litigation. It also results in benefit payments which bear no relationship to the economic loss of the workers. In some cases workers continue to receive compensation for weeks after returning to the same job at the same pay, while in other cases the worker's compensation is exhausted although the preinjury earning level has not been reached.

The wage-loss system, adopted by the new law, is thus a return to the basic philosophy underlying workers' compensation. Through this change, an attempt is being made to provide equity in compensation; reduce subjectivity in determining compensation; reduce the need for attorney involvement and litigation; reduce "doctor shop-

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71. FLA. STAT. § 440.15(3)(u) (Supp. 1978). The injuries most susceptible to verification and measurement are listed in subsections (a) through (t) of § 440.15(3). Examples are an amputated foot, loss of hearing, and disfigurement. The unscheduled injuries (such as back pain) fall within subsection (u). This subsection became increasingly more notorious as hearings before the House Insurance Committee continued. Sentiment built up rapidly to make sure that, if nothing else, something would be done about subsection (u).

72. FLA. STAT. § 440.15(3)(a)-(t) (Supp. 1978).

73. Hill, *supra* note 69, at 72.

74. ANALYSIS OF WORKERS' COMPENSATION LAWS, *supra* note 70, at 22-23.

75. Hill, *supra* note 69, at 73.

76. *Id.*

ping" to obtain higher impairment ratings; provide an incentive for injured workers to return to work; and provide an incentive for employers to provide rehabilitation. Florida is the first state to adopt a comprehensive wage-loss system which substitutes wage-loss and impairment benefits for the injury schedule and diminution of wage-earning capacity.<sup>77</sup>

In addition to the wage-loss concept, the other thrust of the 1979 reform is aimed at substantially improving the self-executing feature of the system by upgrading the administrative capability of the Department of Labor and Employment Security. To quote one proponent, Senator Kenneth MacKay, what Florida needed was an administrator who acts "like a 600-pound gorilla" with respect to claims handling.<sup>78</sup>

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77. It has been reported that wage-loss systems have been used to some extent in Pennsylvania, Wisconsin, and Michigan. Legislative staff members from both the house and senate traveled to Wisconsin and Pennsylvania to examine their workers' compensation systems. In reality, the law in all three states is much more similar to the previous Florida law than to the new wage-loss system. All three states utilize extensive injury schedules, a concept which is inconsistent with a true wage-loss system. In addition, the definitions of wage loss in the Wisconsin and Michigan statutes are in effect nothing more than Florida's former loss of wage-earning capacity provision.

The weekly wage loss referred to in this chapter, . . . shall be such percentage of the average weekly earnings of the injured employee computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the injury, and other suitable employments, the same to be fixed as of the time of the injury, but to be determined in view of the nature and extent of the injury.

Wis. STAT. § 102.11(3) (1978).

Virtually identical language is contained in the Michigan law. According to a report by John F. Burton, Jr. and Wayne Vroman, although compensation in Michigan is in theory based on actual wage loss, "it appears that many, if not most, workers with permanent injuries sign redemption agreements with their employers. The workers receive cash settlements and the employers are released from liability for any subsequent period of wage loss." J. Burton & W. Vroman, *A Report on Permanent Partial Disabilities Under Workers' Compensation* 30 (April, 1978) (unpublished study prepared for the U.S. Department of Commerce; available from Workers' Disability Income Systems, Inc., P.O. Box 167, Olympia Fields, Ill. 60461).

On the other hand, Pennsylvania does compensate many of its injured workers on the basis of actual wage loss, according to Mr. John Urling, Director of the Bureau of Workers' Compensation, Department of Labor and Industry, Harrisburg, Pennsylvania. Furthermore, Mr. Urling and members of his staff stated, in conversation with Florida legislative staff, that they did not have any substantial problems in the administration and determination of wage-loss compensation.

78. Senator MacKay (D-Ocala): "I am just saying that I need to know that somebody is going to start acting like a 600-pound gorilla; and if we can't find that out, I am perfectly willing to move it anywhere it needs to be moved. I think that is the position we all ought to take. It doesn't matter to me where [the Bureau of Workmen's Compensation] stays. It's just got to be a different animal than it is now." Testimony at meeting of House Insurance Committee (March 7, 1979) (tape on file with House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

The high incidence of litigation and slow delivery of benefits in Florida can be partially cured by a firm, comprehensive policing of the entire system. Wisconsin, in particular, was studied as a model administrative state with regard to workers' compensation.<sup>79</sup> The new Florida law incorporates many of the administrative procedures utilized effectively in Wisconsin. The changes require greater communication between the agency and injured workers, employers and insurance carriers. The agency is required to become involved in the settlement of disputes before litigation becomes necessary. The agency is also required to monitor carrier practices and to eliminate inappropriate practices. These and other administrative changes are discussed in detail in Part III.

Further changes were made in the judicial and quasi-judicial parts of the system. Since the system was to be self-executing, it seemed irrational to refer to hearing officers as judges of industrial claims and therefore, their designation reverted to "deputy commissioners." In addition, the term "judge" seemed to connote "litigation" in the minds of injured workers, creating needless apprehension and resulting in an incentive for early attorney involvement. An extension of this feeling resulted in the demise of the Industrial Relations Commission. Since the hearings were of an administrative nature before the deputy commissioners, it seemed logical that appeal should be directly to the courts. The First District Court of Appeal, located in Tallahassee, was selected, since the public was used to appealing to Tallahassee by means of the Industrial Relations Commission. Appeals were centralized in one district in order to promote uniformity and consistency.

The 1979 amendments are found in three enactments of which two are pertinent. The major reform is contained in chapter 79-40 (Committee Substitute for Senate Bill 188); an effective date provision in chapter 79-41 (Senate Bill 1293); and the clean-up bill, chapter 79-312 (Senate Bill 669), which, among other things, shifted the effective date to August 1, 1979.

### III. SUMMARY OF THE MAIN ASPECTS OF THE 1979 REFORM

#### A. Introduction

In this section, the major changes made by the 1979 legislature will be discussed. Note that several changes affect the entire reform. Specifically, the term "workmen's" was replaced by "workers'"; the Bureau of Workmen's Compensation became the Division of Work-

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79. While in Wisconsin, members of the legislative staff learned that there are only 2 attorneys in the entire state of Wisconsin who practice workers' compensation law exclusively.

ers' Compensation as of August 1; the Judges of Industrial Claims have been renamed "deputy commissioners;" and the First District Court of Appeals has replaced the Industrial Relations Commission as the appeals body for final orders of the deputy commissioners. The other changes are explained in more detail.<sup>80</sup>

## B. Exemptions

### 1. Officers

The workers' compensation law generally requires that all employers maintain insurance for all employees. Among the several exceptions to this rule is the 1978 change in the definition of employment which allows employers of one or two employees to choose not to purchase insurance and thus to be exempt from the act.<sup>81</sup> For the purposes of this exemption, the Bureau counted corporate officers as employees even when such officers had elected to be exempt from coverage. Section 2 of chapter 79-40 changed the definition of employee in section 440.02(2)(b), Florida Statutes, to make clear that officers who elect to be exempt from coverage are not to be counted as employees.<sup>82</sup>

### 2. Volunteers

In 1978, certain volunteers were excluded from the definition of employee.<sup>83</sup> Those volunteers received the standard travel expenses provided to salaried employees in the same agency, but no other compensation. The new law states that if there are no salaried employees in the same agency, volunteers may receive the customary travel expenses paid to salaried workers in the community.<sup>84</sup>

### 3. Performers

The definition of employee also excludes independent contractors. In 1978, section 562.132, Florida Statutes, was added to the

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80. Most of the following discussion concerns the changes made in the Workers Compensation Act, ch. 440, Florida Statutes (1977 & Supp. 1978). In order for the process to be complete, however, significant changes were made in the Insurance Code — primarily in ch. 627, Florida Statutes (1977 & Supp. 1978). These changes should be considered in assessing the overall impact and significance of the 1979 amendments since each part of the system was studied and all parts were affected. Note also that Part III will describe only the major changes. Other changes will be noted briefly in footnotes. Still others will not be mentioned at all. In order to form a coherent picture of the new system, both ch. 79-40 and ch. 79-312 should be read carefully in conjunction with those parts of ch. 440 which were not amended.

81. FLA. STAT. § 440.02(1)(b)2 (Supp. 1978).

82. Ch. 79-40, § 2, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.02).

83. FLA. STAT. § 440.02(2)(d)3 (Supp. 1978).

84. Ch. 79-40, § 2, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.02).



Beverage Law to include bands, orchestras, and musical and theatrical performers within the definition of independent contractor for purposes of workers' compensation, provided that there is a written contract evidencing such relationship.<sup>85</sup> This provision was transferred from the Beverage Law to the Workers' Compensation Law, since it made better sense to put the provision in the chapter to which it applied.<sup>86</sup>

#### 4. *Subcontractors*

The last 1979 amendment relating to exemptions provides that a general contractor is responsible for workers' compensation only to employees of a subcontractor with three or more employees.<sup>87</sup> Previously, the general contractor was responsible for all employees of a subcontractor who had not secured the payment of workers' compensation to his employees.

One erroneous interpretation of this change is that if a subcontractor has three or more employees but only two on a particular job, those two are exempt from coverage since they do not become statutory employees of the general contractor. Although it is true that the general contractor would not have to cover these two employees, obviously the subcontractor must provide coverage since he employs three or more employees. As with so many other changes, the intent in adding this provision about subcontractors is to reduce costs by reducing the number of employees required to be covered.

### C. *Administrative Reforms—Executive Aspects*

The Division of Workers' Compensation in the Department of Labor and Employment Security is the agency of jurisdiction for the act. Although the intent has always been to have a self-executing system within the private sector, the high incidence of controverted claims has defeated this intent. Reduction of litigation was one of the primary goals of the new legislation. One way the 1979 amendments addressed this problem was to make it clear that the Division must "assume an active and forceful role" in the system.<sup>88</sup> The first step taken was to elevate the agency from a bureau to a division.<sup>89</sup>

Although there is no single cause for the high level of litigation, one important factor is the injured worker's uncertainty about his rights, obligations and benefits. In a California study, 74% of the

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85. (Supp. 1978).

86. Ch. 79-40, § 2, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.02).

87. *Id.* § 5 (to be codified at FLA. STAT. § 440.10).

88. *Id.* § 33 (to be codified at FLA. STAT. § 440.44).

89. *Id.*

injured workers surveyed had no previous knowledge of workers' compensation. Furthermore, three out of every four employees received little or no information about workers' compensation from the employer.<sup>90</sup> The new law attempts to eliminate much of the uncertainty by requiring much greater and quicker contact between the Division and the injured employee.

Previously, the employer was required to report an injury to his insurance carrier within seven days of actual knowledge.<sup>91</sup> The carrier then had ten days within which to notify the Division.<sup>92</sup> The new law eliminates this additional ten-day period by requiring the employer to report injuries directly to the Division within seven days of actual knowledge.<sup>93</sup> The Division has prescribed a form for this purpose. Copies of the completed form must also be provided by the employer to the carrier and the injured employee. The back of the employee's copy includes a summary of the rights, obligations and benefits of injured workers under the act. Upon receipt of the injury notice, the Division must immediately mail a more comprehensive informational brochure to the injured worker. If it appears that the injury will result in permanent impairment, the Division must then contact the worker or a family representative who will assist the worker. The Division had also been empowered to install additional toll-free telephone lines to make the Division more accessible to both workers and employers.<sup>94</sup> According to the telephone company, the single line previously in operation could not handle the large volume of incoming calls.

The 1979 amendments also provided the Division with a greatly expanded role in controverted claims. Previously, the Division had a virtual "hands-off" policy once a claim was contested. An insurance carrier choosing to controvert a claim must now file with the Division a written explanation setting forth in detail the reason or reasons why the claim is controverted. Copies of this explanation must also be sent to the employer and employee.<sup>95</sup> Furthermore, once a claim is filed, the Division must now evaluate the claim to determine if it can be resolved without a hearing and also, within ten days after the claim is filed, issue an advisory opinion as to the claimant's entitlement to benefits.<sup>96</sup> Advisory opinions of the Divi-

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90. CALIFORNIA WORKERS' COMPENSATION INSTITUTE, *LITIGATION IN WORKERS' COMPENSATION: A REPORT TO THE INDUSTRY* 3 (undated).

91. FLA. STAT. § 440.185(2) (Supp. 1978).

92. *Id.* § 440.185(4).

93. Ch. 79-40, § 14, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.185).

94. *Id.* § 33 (to be codified at FLA. STAT. § 440.44).

95. *Id.* § 16 (to be codified at FLA. STAT. § 440.20).

96. *Id.* § 15 (to be codified at FLA. STAT. § 440.19).

sion are specifically exempted from chapter 120.<sup>97</sup> The Division must notify all parties of its decision. However, this opinion is not binding though it is deemed to be a part of any proceeding on the claim.<sup>98</sup> If a party chooses to respond to the Division, this response must be included in the Division's case file on the claim.<sup>99</sup>

In addition to speeding up the notification of injury process and increasing employee awareness of the system, the new law takes into account claims handling practices of insurance carriers as a factor which affects litigation. Section 16 of chapter 79-40 requires the Division to examine its claims files on an ongoing basis in order to identify questionable claims handling techniques, questionable patterns of claims, or a pattern of repeated unreasonably controverted claims by carriers, employers, or self-insurers. If the Division concludes that such questionable techniques, patterns, or claims are being utilized as a general business practice by the carrier, these findings must then be certified by the Division to the Department of Insurance for appropriate action. In addition, the Division must publish an annual report which indicates the promptness of each carrier and self-insurer with respect to the first payment of compensation. The theory behind this provision is that late payments create friction in the system and increase litigation. By publishing this indicator of each insurer's claims handling ability, it is expected that most insurers will try to improve their performance and thus improve their standing in the report. This idea has been successfully utilized in Wisconsin and Pennsylvania. If the report indicates a practice of late payment sufficient to constitute a general business practice, the Department of Insurance, in the case of carriers, and the Division, in the case of self-insurers, must take appropriate action to halt such practice. However, the penalty for late payment of any installment of any compensation was reduced from 20% of the unpaid installment to 10%. This penalty is also now labelled "punitive" in order to prevent such penalties from being deducted as a business expense for federal income tax purposes.

Section 25 of chapter 79-40 contains another provision which was adopted to encourage prompt and efficient claims handling by insurers. All carriers must now maintain a claims adjuster, either in-house or under contract, situated within the State of Florida.

Hospitals and doctors received \$126,474,207 from workers' compensation cases in 1978. This accounted for 44% of all benefits paid

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97. *Id.* § 3 (to be codified at FLA. STAT. § 440.021).

98. *Id.* § 15 (to be codified at FLA. STAT. § 440.19).

99. Ch. 79-312, § 11, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.19).

by carriers and self-insurers.<sup>100</sup> A study of claims closed in 1977 in Florida, Wisconsin, and Alabama showed that of these three states, Florida had the highest percentage of medical specialist involvement, greatest extent of hospital confinement, highest average hospital bill, and highest level of medical practitioner involvement.<sup>101</sup> Consideration of these factors led to two important health care cost containment provisions. The main provision relating to health care cost containment in the new law is the medical utilization and peer review requirement.<sup>102</sup> This provision instructs the Division to develop and implement, or to contract with a qualified entity to develop and implement, utilization review of health care services rendered in workers' compensation cases. This review includes the appropriateness of both the level and quality of the services. Instances of possible inappropriate utilization are referred to the Division. The Division then determines whether the information referred to it warrants further study by the peer review committee. Peer review is provided by a private nonprofit medical foundation under contract with the Division. The peer review committee must submit a report and recommendations to the Division. If it is determined that a health care provider improperly overutilized or otherwise rendered or ordered inappropriate medical treatment or services, or that the cost of such treatment or services was inappropriate, the Division may order the health care provider to show cause why it should not be required to repay the amount paid for such treatment or services. It is only at this point that the right to an administrative hearing under section 120.57, Florida Statutes, arises.<sup>103</sup> The procedures, reports and recommendations of utilization review and peer review are not subject to the provisions of chapter 120.

The second health care cost containment provision is also in section 8 of chapter 79-40. Under previous law, the Division adopted maximum fee schedules for both physicians and hospitals. In some cases, these schedules resulted in physicians and hospitals charging the maximum fee even though they normally charged less. The change in the law states that an individual health care provider shall be paid either his usual and customary charge or the maximum charge, whichever is less.<sup>104</sup> With respect to hospitals, the new

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100. FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, ANNUAL REPORT 1978 at 13 (1978).

101. National Council on Compensation Ins., *Workmen's Compensation Resolved Claim Study 2* (1977) (survey available at the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

102. Ch. 79-40, § 8, 1979 Fla. Laws 215, *as amended* by ch. 79-312, § 7, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.13).

103. (Supp. 1978).

104. Ch. 79-40, § 8, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.13). The

law is that a hospital shall be paid the lowest charge currently assessed for such treatment or service in the community in which the hospital is located.<sup>105</sup>

#### *D. Administration—Judicial and Quasi-Judicial Aspects*

The judicial and quasi-judicial aspects of the system were also substantially changed by the new law. The most visible change is the abolition of the Industrial Relations Commission,<sup>106</sup> effective October 1, 1979.<sup>107</sup> This step was recommended by the Commission on the Florida Appellate Court Structure which was appointed by Chief Justice England of the Florida Supreme Court. This recommendation was accepted by Chief Justice England and also by the Board of Governors of the Florida Bar.<sup>108</sup> The Commission's recommendation was made as part of its program to alleviate the growing caseload and backlog in the judicial system.

With the abolition of the Industrial Relations Commission, the new law provides a right of appeal from orders of the deputy commissioners to the First District Court of Appeal<sup>109</sup> beginning October 1, 1979.<sup>110</sup> This is contrary to the Appellate Court Structure Commission recommendation that appeals be to all of the district courts rather than to only one. There are several reasons for limiting appeals to the First District. Since the inception of the Industrial Relations Commission, workers' compensation appeals have been heard only in Tallahassee.<sup>111</sup> Splitting the cases among the district courts now would likely result in conflicts among their decisions. More important perhaps is the fact that the First District, completely inexperienced in workers' compensation law, can draw upon the staff of the Industrial Relations Commission to provide the needed expertise. Also, the entire administrative system and physical assets of the Industrial Relations Commission are in Tallahassee. This system can easily be transferred to the First District Court of Appeal and has legally been so transferred by section 1 of chapter

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maximum charge in this instance clearly refers to the schedule adopted by the Division. The word "maximum" was inserted in the 1979 bill to require the Division to "adopt schedules of maximum charges."

105. *Id.*

106. *Id.* § 46.

107. Ch. 79-312, § 1, 1979 Fla. Laws 1645.

108. Florida Bar News, Apr. 25, 1979, at 3, col. 1.

109. Ch. 79-40, § 46, 1979 Fla. Laws 215.

110. Ch. 79-312, § 1, 1979 Fla. Laws 1645.

111. Ch. 17481, § 44, 1935 Fla. Laws 1456 (current version at FLA. STAT. § 440.01 (Supp. 1978)). The original act created the Florida Industrial Commission and mandated that it have offices in Tallahassee. *Id.* As part of the Governmental Reorganization Act of 1969, the Florida Industrial Commission became the Industrial Relations Commission. Ch. 69-106, § 17, 1969 Fla. Laws 490 (current version at FLA. STAT. § 440.44 (Supp. 1978)).

79-312. In order to implement this provision, the First District also received two additional judges<sup>112</sup> and an additional appropriation of \$2,292,673.<sup>113</sup>

The judges of industrial claims have been renamed deputy commissioners,<sup>114</sup> which is what they were called prior to 1967.<sup>115</sup> The title "judge of industrial claims" is inaccurate since the initial level of hearings on a workers' compensation claim is not a trial court, although the Florida Supreme Court has indicated that this process is quasi-judicial.<sup>116</sup> It may also be true that an injured worker is more inclined to feel the need for an attorney in a hearing before a judge than before a deputy commissioner. The present judges of industrial claims were retained in office under their new title.<sup>117</sup>

A new position, the Chief Commissioner, was created by the new law.<sup>118</sup> Chapter 79-312 makes it clear that the Chief Commissioner must be an attorney, with three years experience in the practice of law in Florida.<sup>119</sup> This is the same qualification required for deputy commissioners. The Chief Commissioner is responsible for acting as liaison between the deputy commissioners and the Division of Workers' Compensation, the courts, the Florida Bar, the Workers' Compensation Advisory Council, and the Secretary of Labor and Employment Security. Additional responsibilities assigned to this position include training and orientation of new deputy commissioners, case assignments, and insuring effective administration by the deputy commissioners. The Chief Commissioner may also serve as pro haec vice deputy commissioner. The Governor is responsible for appointing the Chief Commissioner; nomination by the Judicial Nominating Commission is not necessary.<sup>120</sup>

The primary reason for the creation of this position was to provide a full-time administrator to develop efficient, effective and coordinated efforts by the deputy commissioners. Previously, the judges of industrial claims were virtually independent, with very little coordination among themselves or with other aspects of the system. Although technically the judges were part of the Bureau of Workmen's Compensation, the only contact between the two was in the areas of budget and physical facilities. Case assignments for the

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112. Ch. 79-312, § 3, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 35.06).

113. *Id.* § 4.

114. Ch. 79-40, § 35, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.45).

115. Ch. 67-554, § 2, 1967 Fla. Laws 1650 (current version at FLA. STAT. § 440.45 (Supp. 1978)).

116. *Scholastic Systems v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

117. Ch. 79-312, § 2, 1979 Fla. Laws 1645.

118. Ch. 79-40, § 35, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.45).

119. Ch. 79-312, § 19, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.45).

120. Ch. 79-40, § 35, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.45).

twenty-six judges were handled by the Senior Judge, who was also responsible for his own caseload. The Chief Commissioner replaces the Senior Judge for administrative purposes and provides the attention that is needed in this aspect of the system. However, it is clear that the Chief Commissioner has no power with respect to the decisions made by the deputy commissioners on the cases they handle.

Several procedural changes were made with respect to claim filing and hearings. During the course of legislative hearings, "shotgun" claims were frequently identified as a major problem. A shotgun claim is a form pleading which simply states that the injured worker claims all benefits to which he is entitled under the workers' compensation law. This form typically lists all of the types of benefits available under the law but does not specify the type of disability, extent of disability, or amount of compensation claimed. Such claims could previously be filed after the first seven days of disability.<sup>121</sup> Under the new law, a claim can be filed only after a specific benefit becomes due and is not paid.<sup>122</sup> The claim must state the specific compensation benefit which is due but has not been paid or is not being provided. Any claim which is not in compliance is subject to dismissal upon the motion of any interested party, the Division, or the deputy commissioners. The application for a hearing on a claim must concisely state the reasons for requesting a hearing and the questions at issue or in dispute.<sup>123</sup> Under prior law, there were no statutory requirements for the contents of such requests. In addition, in order to prevent a large backlog, hearings must now be held within ninety days after a request is filed.<sup>124</sup>

The statute of limitations on claims for medical benefits has been consolidated with the statute of limitations on claims for disability, impairment, and wage loss benefits. The only substantive change is that no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body.<sup>125</sup>

### E. Benefit Changes

Workers' compensation benefits can be evaluated by using the criteria that benefits should be adequate and equitable, and efficiently provided.<sup>126</sup> The efficiency of the delivery system was ad-

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121. FLA. STAT. § 440.25(1) (Supp. 1978).

122. Ch. 79-40, § 19, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.25).

123. *Id.* § 15 (to be codified at FLA. STAT. § 440.19).

124. *Id.* § 19 (to be codified at FLA. STAT. § 440.25).

125. *Id.* § 15 (to be codified at FLA. STAT. § 440.19).

126. J. Burton & W. Vroman, *supra* note 77, at 15-21.

ressed by the administrative reforms discussed in Parts C. and D. above. Adequacy and equity were addressed in the new law by substantial changes in the benefit structure. Judged by these two factors, Florida's old system of scheduled injuries, impairment ratings, and loss of wage earning capacity was a failure. Adequate benefits should provide substantial protection against interruption of income. Workers' compensation benefits should be based on loss of income rather than economic need since workers' compensation is an insurance program rather than a welfare program. To provide more adequate benefits, the maximum weekly benefit has been increased by the new law from 66 2/3% to 100% of the statewide average weekly wage.<sup>127</sup> This change raised the maximum weekly benefit from \$130 to \$195 per week. The statewide average weekly wage is revised annually based on the year ending June 30, and the maximum benefit is adjusted accordingly.<sup>128</sup> The new law also raised the benefits for each particular category of injury so that the benefit or the benefit plus any earnings equal at least 66 2/3% of the injured worker's preinjury gross weekly wages, as recommended by the National Commission on State Workmen's Compensation Laws.<sup>129</sup>

Equity means that workers with equal losses of earnings or earning capacity should receive equal disability benefits and workers with equally serious impairments should receive equal impairment benefits. However, the measurement both of loss of wage earning capacity and of degree of impairment is inherently difficult and certain to result in inequities. "One problem is that the measurement of impairment is at best controversial and at worst almost impossible."<sup>130</sup> Additionally, the controversy inherent in determinations of wage earning capacity and impairment ratings present serious efficiency problems. Thus the new law embraces actual wage loss as the basis of compensation in order to promote the goals of adequacy, equity, and efficiency.

### 1. *Permanent Partial Disability*

The term "permanent partial disability" has been eliminated in the new law. The act now refers to "permanent impairment and wage-loss benefits" instead. Impairment benefits will now be paid only for "permanent impairment due to amputation, loss of 80 percent or more of vision, after correction, or serious facial or head disfigurement resulting from an injury other than an injury entitling

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127. Ch. 79-40, § 7, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.12).

128. FLA. STAT. § 440.12 (Supp. 1978).

129. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (July 1972).

130. J. Burton & W. Vroman, *supra* note 77, at 19.



the injured worker to permanent total disability benefits.<sup>131</sup> The amount of the impairment benefit is \$50 for each percent of permanent impairment of the body as a whole from 1% through 50% and \$100 for each percent of permanent impairment of the body as a whole for that portion in excess of 50%. The Division must establish by rule a schedule for use in determining the existence and degree of any permanent impairment. Until such schedule is adopted, the temporary guidelines are the Guides to the Evaluation of Permanent Impairment which were developed by the American Medical Association. If an injured worker is eligible to receive an impairment benefit, the benefit is due and payable within twenty days after the carrier has knowledge of the impairment.

In addition to any impairment benefit, a worker with a permanent partial impairment will receive wage-loss compensation if his actual wages are reduced by more than 15% after maximum medical improvement.<sup>132</sup> The new law clearly states that such compensation is to be based on actual wage loss. The only exception is that in the event an employee voluntarily limits his or her income, or fails to accept employment commensurate with his or her abilities, the wage-loss compensation would be based on the amount which the employee could have earned. In no case can the compensation be based on less than the employee's actual earnings.

The amount of the compensation is equal to 95% of the difference between 85% of the employee's preinjury average monthly wage and the employee's post-maximum medical improvement wage.<sup>133</sup> The compensation itself cannot exceed 66 2/3% of the preinjury average monthly wage. This cap becomes operative only when a worker's wage loss exceeds 85% of his preinjury wages. Since the cap coincides with the higher compensation paid under the new law for permanent total, temporary total, and temporary partial disabilities, the compensation for a worker whose wage loss is greater than

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131. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

132. *Id.* The initial eligibility requirement for wage-loss benefits is the existence of a permanent impairment "determined pursuant to the schedule." *Id.* The schedule referred to is the schedule which the Division is required to adopt for use in "determining the existence and degree of permanent impairment." *Id.* For the purposes of wage-loss benefits, the schedule is thus to be used in determining the existence of a permanent impairment. The degree of impairment is irrelevant to the issue of wage loss.

133. *Id.* Unfortunately, an attempt has been made by the opponents of the new law to interpret the wage-loss formula in two different ways. The so-called second interpretation is not an interpretation at all but a totally erroneous reading of the English language. It is amazingly illogical to read the plain words of the law to require calculating preinjury wages minus postinjury wages, multiplied by 85%, and then multiplied again by 95%. Why not simply multiply by 80.75%? Furthermore, this intentional misstatement of the formula patently ignores the clear legislative intent which is repeatedly documented in the files and tapes of the House Committee on Insurance and the Senate Committee on Commerce.

85% is the same as that for total disability. Compensation under the previous law, for all categories of disability, was 60% of the employee's average weekly wage.

For a simple illustration of the wage-loss formula, take the example of a worker whose preinjury average monthly wage was \$1,000 and whose post-maximum medical improvement average monthly wage is \$750. Eighty-five percent of the preinjury wage of \$1,000 is \$850. Subtracting the post-maximum medical improvement wage of \$750 from \$850 equals \$100. The compensation thus equals 95% of \$100, or \$95. The Division has prescribed a form for reporting wage loss by the employee to the carrier which contains this simple step-by-step method of computing the wage-loss compensation. This form must be completed for each month in which there is compensable wage loss, then signed by both employer and employee, and delivered to the carrier. Upon receipt of this form, the carrier has fourteen days within which to make the payment<sup>134</sup> or twenty-one days within which to controvert the claim.<sup>135</sup> If the carrier controverts the claim, the burden is on the employee to prove that the wage loss resulted from the injury.<sup>136</sup>

The carrier is also responsible for furnishing the employee with the Request for Wage-Loss Benefits form.<sup>137</sup> Benefits are paid monthly, up to a maximum of 350 weeks or age 65, for injuries occurring prior to July 1, 1980, and up to 525 weeks or age 65, for injuries occurring on or after July 1, 1980. The right to wage-loss benefits also terminates at the end of any two-year period after the month in which maximum medical improvement is attained unless wage-loss benefits have been payable during at least three consecutive months of this period.<sup>138</sup> Beginning with the twenty-fifth month after maximum medical improvement, the employee's actual wages will be discounted for inflation before the benefit is calculated.<sup>139</sup> The discount rate is 3% compounded annually, for injuries occurring prior to July 1, 1980. For injuries occurring on or after July 1, 1980, the discount rate will be 5%, compounded annually.

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134. *Id.* § 14 (to be codified at FLA. STAT. § 440.17), provides that the Division shall adopt such a form. The form is available from the Division of Workers' Compensation, Ashley Building, Koger Executive Center, Tallahassee, Fla. 32301.

135. *Id.* § 16 (to be codified at FLA. STAT. § 440.20).

136. *Id.* § 10 (to be codified at FLA. STAT. § 440.15).

137. Rule 38 FER 79-3.18 (Emergency Rule of Fla. Dep't of Labor & Employment Sec., Div. of Workers' Comp.).

138. Ch. 79-40, § 10, 1979 Fla. Law 215 (to be codified at FLA. STAT. § 440.15).

139. *Id.* This section states that the discount factor is to apply to all injuries occurring on or after July 1, 1979. This date should have been changed by ch. 79-312 to August 1, 1979, as the effective date was changed. But, since the act itself applies only to injuries occurring on or after the effective date of the law, August 1, 1979, the discount factor should apply only to injuries occurring on or after August 1, 1979.

The effect of discounting is both to increase the monthly benefit and extend the number of months in which the employee will receive benefits. For example, if an employee returns to work with a 25% wage loss but receives an annual cost-of-living increase of 6%, he would be below the 15% wage loss threshold after the second year. Due only to inflation, he would have been kicked out of the compensation system although it may be that he is unable to obtain better employment or increase his earnings on his own merit due to his permanent impairment. By using the discount factor, this employee's wage loss, for purposes of calculating the benefit, will again exceed the 15% threshold.

## 2. *Temporary Partial Disability*

Compensation for temporary partial disability has also been changed to the wage-loss system. Under prior law, such compensation consisted of 60% of the difference between the injured employee's preinjury average weekly wage and his wage earning capacity after the injury.<sup>140</sup> This was amended by chapter 79-40 to simply provide for a comparison with actual wages rather than wage earning capacity and then compensate the worker at the rate of 66 2/3% of the difference, rather than 60%.<sup>141</sup> However, this section was further amended by chapter 79-312 so that temporary partial disability compensation is calculated using the same formula.<sup>142</sup> If this change had not been made, an injured worker with an actual wage loss of 50% or less would receive higher benefits if classified as temporary partial rather than as permanent partial. A point of friction would then have existed in the system as injured workers attempted to obtain or remain classified with a temporary partial disability. In addition, there is no logical reason for the compensation for these two classes of disability to be different. The difference between the two is that a worker who is partially disabled receives temporary partial compensation prior to maximum medical improvement. After maximum medical improvement, the worker either is no longer disabled or is permanently partially disabled.

As in the case of permanent partial compensation, the basis of temporary partial compensation is actual wage loss, unless the employee voluntarily limits his or her income or fails to accept employment commensurate with his or her ability. The compensation can in no case be based on less than the actual earnings of the worker. The amount of the monthly compensation cannot exceed 66 2/3%

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140. FLA. STAT. § 440.15(4) (Supp. 1978).

141. Ch. 79-40, § 10, 1979 Fla. Laws 215.

142. Ch. 79-312, § 8, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.15).

of the worker's preinjury average monthly wages. Temporary partial benefits can be paid for up to five years. The termination periods and discounting factor which are contained in the permanent partial provisions do not apply to temporary partial disabilities.

### 3. *Permanent Total Disability*

For permanent total disability, prior law provided compensation in the amount of 60% of the employee's average weekly wages for the continuance of the disability.<sup>143</sup> The new law raised this compensation rate to 66 2/3% of the employee's average weekly wages. In cases involving double amputations, loss of eyes, or, under the new law, paraplegia, or quadriplegia, permanent total disability is presumed unless there is conclusive proof of a substantial earning capacity. With respect to all other disabilities, an injured worker cannot be classified as permanently totally disabled under the new law if he or she is engaged in, or is physically capable of engaging in, gainful employment. If an insurance carrier controverts a permanent total claim in these other cases, the burden is on the employee to establish that he or she is not able uninterruptedly to do even light work due to physical limitation. If an injured worker who is receiving permanent total disability compensation establishes an earning capacity, the worker will then receive wage loss benefits according to the provisions of sections 440.15(3)(a) and (b). The new law requires the Division to adopt rules to enable a permanently totally disabled worker to undertake a trial period of reemployment without prejudicing his return to permanent total status in the event that the worker is unable to sustain an earning capacity.<sup>144</sup>

### 4. *Temporary Total Disability*

Compensation for temporary total disability remains the same under the new law except for the amount of compensation which has been increased from 60% to 66 2/3% of the employee's average weekly wages.

### F. *Lump-Sum Payment of Compensation*

The old law provides for the release of an employer's liability upon the payment of a lump-sum settlement to the injured worker.<sup>145</sup> This procedure is commonly called a "washout" because it terminates the rights and liabilities of the employer and employee

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143. FLA. STAT. § 440.15(1) (Supp. 1978).

144. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

145. FLA. STAT. § 440.20(10) (Supp. 1978).

under the act. Just as it was illogical to base compensation upon prospective wage earning capacity under the prior law, it is illogical to pay a lump-sum benefit shortly after an injury has occurred when the future effects of the injury are unknown. At least one study has indicated that this procedure too often results in overpayment of claims and payment of unjustified claims.<sup>146</sup> It may also result in underpayment for the most serious injuries, particularly since a washout terminates the injured worker's right to future medical benefits. Proceeding on the theory that workers' compensation is intended to supplement the lost wages of an injured worker, the new law states that, as a matter of public policy, it is in the best interests of an injured worker to receive disability payments on a periodic basis. Washout of future medical benefits is prohibited. Washout of other benefits is permitted only in special circumstances, as when the claimant can demonstrate that a lump-sum payment will definitely aid in his or her rehabilitation or is otherwise clearly in his or her best interests and that lump-sum payment will avoid undue expense or undue hardship to any party. In addition, an employer now has the statutory right to appear at any washout hearing. The carrier must give reasonable notice to the employer of the time and date of the hearing and inform him of his right to appear and testify. Finally, a washout is entirely prohibited until at least six months after the injured employee reaches maximum medical improvement.<sup>147</sup> However, the clear legislative intent of the new law is virtually to eliminate washout settlements except for a few rare and unusual cases. The use of washouts in wage loss cases would contradict the very basis of the system; that is, the payment of compensation based on known economic loss rather than the payment based on speculative future losses.

### *G. Merger, Apportionment and the Second Injury Fund*

There are three provisions in chapter 440 of the Florida Statutes, dealing with the situation in which a worker who has a preexisting physical impairment is injured on the job.<sup>148</sup> These provisions deal with merger, apportionment, and the second injury fund.

Under the old law, a merger resulted when, because of a preexisting impairment, a greater permanent disability resulted than the second accident would have caused when considered by itself. In that case, any amounts previously received by the worker under the

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146. ASSOCIATED INDUSTRIES OF FLORIDA, WORKMEN'S COMPENSATION: "PERMANENT PARTIAL DISABILITY STUDY" OF CLOSED FILES OF CLAIMS FILED IN FLORIDA DURING CALENDAR YEAR 1977, at 5-10 (1979).

147. Ch. 79-40, § 16, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.20).

148. FLA. STAT. §§ 440.02(18), .15(5), .49(5) (Supp. 1978).

Florida act were to be deducted from the new award<sup>149</sup> or the new award was to be reduced by that percentage of the disability attributable to the preexisting impairment.<sup>150</sup> The purpose was to prevent double payments by excluding the amounts already paid or the disability resulting from the preexisting impairment. The new law does not change this situation with regard to impairment benefits,<sup>151</sup> although the impairment benefits available have themselves been changed significantly. The new material in section 440.15(5), Florida Statutes, concerns the wage-loss benefits payable for subsequent injury.<sup>152</sup> The new subsections (c) and (d) of section 440.15(5) provide that both temporary disability benefits *and* any wage-loss benefits already being received will be paid, and that any wage loss caused by the subsequent injury will be paid *in addition to* any wage loss previously payable.<sup>153</sup> These subsections recognize that the "preinjury wage" in the wage-loss context where a previous injury was involved already reflects the effects of the previous injury so that no additional apportionment is necessary.

The apportionment section under the old law was found in section 440.02(18), Florida Statutes.<sup>154</sup> The new section 440.02(18) has been amended to refer only to acceleration of death.<sup>155</sup> The "aggravation or acceleration" language relating to an existing disability has been deleted.<sup>156</sup>

The second injury fund was established to encourage the employment of people with impairments by limiting employer liability for subsequent injuries through reimbursement from the fund.<sup>157</sup> Under the old law, an employer had to meet two requirements before he could be reimbursed. He had to show knowledge of the preexisting condition before the subsequent injury occurred and he had to have at least \$3,000 of expenses before any reimbursement would occur.<sup>158</sup>

The new law changes the limitation of liability section in three ways. First, section 440.49(5), Florida Statutes,<sup>159</sup> is amended to include references to permanent impairments and wage loss.<sup>160</sup> Second, the reimbursement for permanent partial disability is no longer the last 60% of all compensation provided but rather 60% of impair-

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149. FLA. STAT. § 440.15(5)(c) (Supp. 1978).

150. *Id.* § 440.02(18).

151. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

152. (Supp. 1978).

153. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

154. (Supp. 1978).

155. Ch. 79-40, § 2, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.02).

156. *Id.* § 10 (to be codified at FLA. STAT. § 440.02).

157. FLA. STAT. § 440.49(5)(a) (Supp. 1978).

158. *Id.* § 440.49(5)(f)1.

159. (Supp. 1978).

160. Ch. 79-40, § 37, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.49).

ment benefits provided. If there is a wage loss, whether or not impairment benefits are payable, the employer will be reimbursed for 60% of all compensation for wage loss paid for the first five years after maximum medical improvement and 75% for all wage-loss compensation paid thereafter. Finally, though the requirement of prior employer knowledge still acts as a limitation on reimbursement, the \$3,000 limitation has been deleted.

One other change should be noted. The last sentence in section 440.02(18), Florida Statutes,<sup>161</sup> providing that compensation for temporary disability and medical benefits shall not be subject to apportionment, has been transferred to new section 440.15(5)(a), since it seemed to make better sense to have it in the latter section than in the section defining "accidents."<sup>162</sup>

In summary, the new section 440.15(5)(b) addresses both apportionment and merger.<sup>163</sup> When a compensable permanent impairment results from the acceleration or aggravation of a preexisting condition, then the employee will receive the benefits to which he is entitled for the impairment resulting from the accident alone, but the employer may still be entitled to reimbursement from the Special Disability Trust Fund if the resulting disability is greater than would have existed but for the preexisting condition pursuant to new section 440.49(7)(f)3.<sup>164</sup>

## *H. Coercion of Employees*

At the hearings conducted by the House Insurance Committee before the 1979 session began, claimants' attorneys noted that their clients often reported harassment and firings or threatened firings if a claim were filed. The 1979 amendments addressed this problem by creating a new section in chapter 440.<sup>165</sup> Section 440.205 prohibits an employer from discharging, threatening to discharge, intimidating or coercing any employee because of the employee's claim for compensation.

### *I. Attorney's Fees*

Since one of the reasons for the changes made in 1979 was the large amount of litigation, attorney's fees came under intense scrutiny. Prior to 1978, a successful claimant could recover 100% of his

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161. (Supp. 1978).

162. Ch. 79-40, §§ 2, 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

163. *Id.* § 10 (to be codified at FLA. STAT. § 440.15).

164. *Id.* § 37 (to be codified at FLA. STAT. § 440.49).

165. *Id.* § 17 (to be codified at FLA. STAT. § 440.205).

attorney's fees.<sup>166</sup> Then in 1978, section 440.34(1), Florida Statutes, was amended to require the claimant to pay 25% of the fees on claims for benefits other than medical benefits, with the remaining 75% still paid by the carrier or employer.<sup>167</sup> This was an attempt to reduce litigation. Whether a 25% reduction would have had a significant effect is now academic.

The new law requires the claimant to pay 100% of his attorney's fees on all claims for benefits except if the claim is for medical benefits only and does not include a claim for disability, permanent impairment, or wage-loss benefits; or if the carrier has acted in bad faith in handling a claim and the injured worker has suffered an economic loss; or if the employer or carrier denies that a compensable injury occurred and the claimant prevails on the issue of compensability.<sup>168</sup>

Chapter 79-312 changed the provisions of chapter 79-40 primarily by clarifying the language in the first bill in three ways. The phrase "except as provided by this subsection," was added to subsection (1) to make clear that the deputy commissioner need not adhere strictly to the formula but may take other factors into consideration either to increase or decrease the award.<sup>169</sup> These are the same factors which were added to chapter 440 in 1977.<sup>170</sup>

The other two clarifications occur in subsection (2). The first was made to make it perfectly clear that the employer or carrier would have to pay 100% of the attorney's fee on medical benefits only. The second changed the word "coverage" to "compensability" because the former was inappropriate.<sup>171</sup>

Chapter 79-312 did make a substantive change. Previous law had contained a provision making it a misdemeanor to receive a fee which has not been approved by the deputy commissioner or to solicit compensation claims.<sup>172</sup> Chapter 79-40 had not retained this provision when the language of the section was substantially reworded.<sup>173</sup> Chapter 79-312 reenacted that provision.<sup>174</sup>

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166. Ch. 20672, § 11, 1941 Fla. Laws 1691 (current version at FLA. STAT. § 440.34(1) (Supp. 1978)).

167. Ch. 78-300, § 10, 1978 Fla. Laws 847 (current version at FLA. STAT. § 440.34(1) (Supp. 1978)).

168. Ch. 79-40, § 27, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.34).

169. Ch. 79-312, § 15, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.34).

170. Ch. 77-290, § 9, 1977 Fla. Laws 1284 (current version at FLA. STAT. § 440.34(1) (Supp. 1978)).

171. Ch. 79-312, § 15, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.34).

172. Ch. 17481, § 34, 1935 Fla. Laws 1456 (current version at FLA. STAT. § 440.34(5) (Supp. 1978)). The misdemeanor was made one of the second degree in 1971. Ch. 71-136, § 365, 1971 Fla. Laws 552 (current version at FLA. STAT. § 440.34(5) (Supp. 1978)).

173. Ch. 79-40, § 27, 1979 Fla. Laws 215.

174. Ch. 79-312, § 15, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.34).



### *J. Self-Insurance*

The old law permitted an employer to self-insure and provided that the division may set the requirements.<sup>175</sup> During the months of hearings preceding the 1979 session, the members of the House Insurance Committee heard a great deal of testimony about the 25% of the employers in the state who have found self-insurance to be less costly than insurance purchased on the commercial market.<sup>176</sup>

The new law provides another way for employers to become self-insured, adds several provisions designed to ensure the financial integrity of the self-insured, and adds several other provisions to more nearly equalize the treatment of the self-insured and those employers insured under commercial policies.

Chapter 79-40 changed the permissive "may" to the mandatory "shall" to require the Division to adopt rules to permit two or more employers to qualify as a group self-insurer's fund.<sup>177</sup> The intent was to permit smaller employers to self-insure more readily.

There were several provisions addressed to financial integrity. Section 440.57, Florida Statutes, was amended to require the Division to adopt rules requiring self-insurers to maintain monetary reserves, and governing their organization and operation to ensure compliance.<sup>178</sup> In addition, self-insurers, except for state or local governmental entities, are now required to carry reinsurance.<sup>179</sup> The provisions of the Joint Underwriting Association were substantially changed. One of the changes requires self-insurers to participate in the apportionment among insurers of losses and loss adjustment expenses as of July 1, 1981. This does not apply to governmental entities, nor does it apply to public utilities.<sup>180</sup> Another provision creates a guaranty fund in the State Treasury for individual self-insurers and for all group self-insurers except governmental entities and public utilities.<sup>181</sup> The final provision concerning financial integrity requires the Division to adopt rules requiring self-insurers to file the necessary reports.<sup>182</sup>

175. FLA. STAT. § 440.38(1)(b) (Supp. 1978).

176. Materials and tapes of the meetings are available from the Committee Secretary, House Insurance Committee, 310 House Office Building, Tallahassee, Florida 32304. *See, e.g.*, Testimony of Employers, meeting of Jan. 31, 1979, on file with the Committee.

177. Ch. 79-40, § 43, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.57).

178. (Supp. 1978).

179. Ch. 79-40, § 43, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.57).

180. Ch. 79-40, § 107, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.311).

181. Ch. 79-312, § 16, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.38). Ch. 79-40, § 29, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.38), also provided for the creation of a fund, but the creation was to have been accomplished by the division by January 31, 1980. Chapter 79-312 creates the fund on the effective date of the act and provides that the division shall have rules adopted by July 1, 1980, when the fund is to become effective.

182. Ch. 79-40, § 29, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.38).

The other changes made in the 1979 session are directed at requiring self-insurers to be treated the same as employers insured under commercial policies. The first change includes self-insurers with other employers and carriers subject to Division scrutiny in the area of questionable claims handling.<sup>183</sup> The second requires self-insurers, along with other carriers, to provide safety consultations to their policyholders.<sup>184</sup> The third provision requires employers to prove to the Division, before they are permitted to self-insure, that they have sufficient "competent personnel" to handle claims and safety management.<sup>185</sup>

While some of these changes were probably originally suggested with the hope that they would restrict the expansion of the share of the market covered by self-insurance, they were adopted with the overriding intent to treat everyone fairly and out of a concern for financial stability.<sup>186</sup>

### K. Rehabilitation

The 1979 amendments were almost exclusively concerned with vocational rehabilitation since physical rehabilitation is part of the remedial treatment the employer must furnish to the injured employee pursuant to section 440.13(1), Florida Statutes.<sup>187</sup> Testimony at the hearings held by the House Insurance Committee indicated that the premiums paid by employers include a percentage for vocational rehabilitation.<sup>188</sup> This is so even though a specific percentage is not broken out in the rate filings.<sup>189</sup>

Section 440.49, Florida Statutes, was substantially changed to require the employer and carrier to provide rehabilitation services and to report the employee's progress to the Division periodically.<sup>190</sup> The Division may also entertain requests for such services and, after a hearing, require them to be provided. The rehabilitation period has been reduced from forty weeks to twenty-six weeks, but with the possibility of another twenty-six weeks, or an even longer voluntary extension. Temporary disability benefits may be paid during rehabilitation.<sup>191</sup>

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183. *Id.* § 16, (to be codified at FLA. STAT. § 440.20).

184. *Id.* § 42 (to be codified at FLA. STAT. § 440.56).

185. *Id.* § 29 (to be codified at FLA. STAT. § 440.38).

186. This latter was true because the Division of Workers' Compensation rather than the Department of Insurance is charged with supervising self-insurers. The Division's experience with insurance requirements is necessarily more restricted than that of the Department.

187. (Supp. 1978).

188. Testimony of Insurance Carriers (Jan. 31, 1979) (tape available from the Committee Secretary, House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

189. *Id.*, Testimony of Mark Trafton, Actuary for the Florida Insurance Department.

190. (Supp. 1978).

191. Ch. 79-40, § 37, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.49).

While it is not possible to quantify the cost reductions, it seems obvious that a rehabilitated person returned to some form of gainful employment is just that much less of a drain on the workers' compensation system.

### *L. Safety Management*

Section 440.56, Florida Statutes, permits the Division to conduct safety inspections and prescribe safety standards "in every employment or place of employment."<sup>192</sup> The Occupational Safety and Health Administration (OSHA) has preempted the private sector for enforcement purposes so that the Division presently provides safety consultations to private employers only on request.

As with rehabilitation, the insurance carriers testified that a percentage of the premiums charged to employers is used to provide safety management for their policyholders.<sup>193</sup> Given the OSHA preemption, the legislature decided to make the carriers specifically responsible for safety.

The new law requires carriers to provide safety consultations to each policyholder requesting one and to report to the Division annually on their programs. The Division will remain responsible for its present activities and in addition will develop guidelines for safety programs and may approve programs submitted to it.<sup>194</sup>

The cost effect of increased safety measures is not quantifiable but it stands to reason that fewer accidents mean lower costs.

### *M. Ratemaking*

In addition to all the other interested parties affected by the 1979 amendments, the insurance carriers had their share of scrutiny. It seemed obvious that the more the legislature and the Department of Insurance knew about the process of ratemaking, the more control could be exercised over that group which actually decided what the premiums would be. Suggestions for ways to better understand and regulate the ratemaking process were forthcoming from a variety of sources.

#### *1. Mandatory Rate Reduction*

The legislature's intent in beginning this massive reworking of the Workers' Compensation Act was both to halt the steady increase in premium rates and to reduce the rates immediately if possible. A

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192. (Supp. 1978).

193. Testimony of Insurance Carriers, *supra* note 217.

194. Ch. 79-40, § 42, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.56).

number of actuaries were involved throughout the process and none of them could agree entirely about the cost effects of the changes made. The independent actuary hired as a consultant to the House Insurance Committee, Dr. Lena Chang, estimated that the effect of the changes as finally enacted would be a reduction in rates of 17.3%.<sup>195</sup> Based on her report, the legislature mandated a rate reduction of 15% on the effective date of the act,<sup>196</sup> and also mandated a rate filing no later than fifteen days after the act became law to reflect this reduction.<sup>197</sup>

## 2. *Data Reporting, Methodology and the Rating Bureau*

Of course, even though the legislature has the power to mandate reductions, the exercise of the power is futile if those charged with regulating the insurance industry do not have the data, the methodology or the personnel with which to make an informed, independent assessment of the material submitted by the industry.<sup>198</sup>

To aid the Department of Insurance in collecting data, the legislature amended section 624.435, Florida Statutes,<sup>199</sup> to provide that data reported to the department annually be broken down into forms more amenable to analysis by the department's staff.<sup>200</sup>

Dr. Chang proposed a discounting methodology to be used by the Department of Insurance in its rate determinations.<sup>201</sup> This method recognizes the well-known phenomenon that in order to pay  $X$  dollars in ten years, one need invest less than  $X$  dollars today. The discounting factors used reflect the length of time over which the money will be paid out. Thus, operating expenses are paid out sooner than claims so that expenses will have a lower discounting factor than claims. The actual pay-out pattern is readily determined through statistical analysis of accumulated data. The factors

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195. L. Chang, Costing the New Florida Workers' Compensation Law 3 (June 1979) (on file with the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

196. Ch. 79-40, § 125, 1979 Fla. Laws 215.

197. Ch. 79-312, § 22, 1979 Fla. Laws 1645.

198. FLA. STAT. § 627.091 (Supp. 1978) requires every insurance carrier to file its rates with the Insurance Department. Since there are about 250 separate carriers writing compensation coverage in Florida, separate filings would be burdensome on both the carriers and the Department. Subsection (4) of § 627.091 permits the carriers to join a rating organization which in turn would make one filing covering all carriers. The organization chosen by the Florida carriers to perform this task is the National Council on Compensation Insurance (One Penn Plaza, New York, N.Y. 10001) which also serves about 30 other states in the country.

199. (Supp. 1978).

200. Ch. 79-40, § 81, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 624.435).

201. *Id.* § 94 (to be codified at FLA. STAT. § 627.072).

used are therefore accurate within very narrow ranges of deviation.<sup>202</sup>

The amendment to section 627.072, Florida Statutes,<sup>203</sup> does not require the Department of Insurance to use this methodology but does require that if the Commissioner decides not to use it, he must report his decision and "his reasons therefor to the committees of substance in the area of insurance in each house of the Legislature by March 31, 1980."<sup>204</sup>

As a further aid to the department, the legislature created a Workers' Compensation Rating Bureau within the department to "study the data, statistics, schedules, or other information as it may deem necessary to assist and advise the department in its review of filings made by or on behalf of workers' compensation and employer's liability insurers."<sup>205</sup>

### 3. *Excessive Profits*

Since Florida is the first state to adopt wage loss on a large scale, the insurance carriers have had no actual experience on which to base their actuarial predictions. The legislature has mandated a 15% rate reduction and Dr. Chang has estimated the savings at 17.3%, but since the effect of a number of changes cannot be quantified, the actual savings may well be much more. To provide for that eventuality, the legislature adopted an excessive profits provision.<sup>206</sup> The section provides that a profit will be found to be excessive if the investment income generated by loss reserves exceeds the usual profit plus 5% of earned premiums over the past three years.<sup>207</sup> Since rate filings traditionally provide for a 2.5% profit factor, the excessive profits section will effectively limit the carriers to a 7.5% profit. The legislature did not consider this unreasonable since it is three times the profit the carriers ask for and is earned on mandatory coverage.

### 4. *Sunshine Law*

Finally, the insurance carriers are to conduct their operations in the sunshine. The "Sunshine Law"<sup>208</sup> was made specifically applica-

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202. For a complete explanation of this methodology, see L. Chang, *Insurance and Rate Making: A Discounting Procedure* (June, 1979) (paper submitted to and on file with the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

203. (1977).

204. Ch. 79-40, § 94, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.072).

205. *Id.* § 98 (to be codified at FLA. STAT. § 627.096).

206. *Id.* § 104 (to be codified at FLA. STAT. § 627.215). The provision was modeled on that presently in effect for auto insurance. FLA. STAT. § 627.066 (1977).

207. Ch. 79-40, § 104, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.215).

208. FLA. STAT. § 286.011 (Supp. 1978).

ble to rate filings, and approvals, disapprovals, deviations, and appeals of rate filings.<sup>209</sup> Further, committees of rating organizations are required to hold open meetings, in the State of Florida, when discussing "the necessity for rate increases or decreases, the determination of rates, the rates to be requested, and any other matters pertaining to such rates," after three weeks' public notice.<sup>210</sup>

#### *N. The Joint Underwriting Association*

Another part of the workers' compensation system which was substantially revised was the joint underwriting plan. Considerable confusion was evident during the course of hearings before the House Insurance Committee, but the legislature's ultimate intent had a visible effect shortly after the effective date of the act. To understand the problem, some background is necessary.

Workers' compensation coverage, like auto coverage, is required by the state. Whenever insurance coverage is mandatory, the problem arises of what to do with the people in two groups which find it difficult to purchase the coverage. These groups are the "bad" risks whose accident record makes the carriers unwilling to write a policy and the "small" risks whose premiums are so small that the carriers do not want to be bothered. There are two typical responses to the need to provide the mandatory coverage. One is an assigned risk plan; the other is a joint underwriting association.<sup>211</sup> Each method provides for both kinds of risks. There seem to be two main differences. First, a joint underwriting association may require statutory authorization, while an assigned risk plan does not, although its plan of operation does require Department of Insurance approval. Second, an agent who wants to do business with a joint underwriting association must have a contract with one of the licensed servicing companies. An agent who places business with an assigned risk plan sends in the information and the premium check and the operators of the plan handle the rest of the transaction.

Florida's workers' compensation system has an assigned risk plan operated by the Florida Compensation Rating Bureau in Jacksonville.<sup>212</sup> Testimony before the House Insurance Committee indicated that approximately 40% of the plan participants were there because they were small employers, not because they were bad risks.<sup>213</sup> Two

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209. Ch. 79-40, § 97, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.093).

210. *Id.* § 95 (to be codified at FLA. STAT. § 627.091).

211. We wish to thank Mr. Bill Campbell, Workers' Compensation Administrator, Florida Department of Insurance, for his assistance in clarifying these issues.

212. P.O. Box 8899, 9570 Regency Square Blvd., Jacksonville, Fla. 32111.

213. Testimony of Mr. Bob Ferguson, Florida Manager, Florida Workmen's Compensation Rating Bureau, before the House Insurance Committee (Mar. 21, 1979) (tape on file at the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304).

circumstances made this unfair. One is that all participants are charged the maximum premium; the other is that all are subjected to an 8% surcharge, applied as the result of a decision of former Insurance Commissioner Ed Larson. This surcharge includes a 5% agents' commission and 3% for overhead. To understand why these circumstances are unfair, one must understand the ratemaking process employed in the area of workers' compensation.

Workers' compensation rates are established for the insurance industry as a whole in Florida. The National Council on Compensation Insurance, an insurance industry arm, collects data both nationally and for Florida. Based on this data the Council determines the level of rates necessary to cover claims and provides the approved profit. The filing is then made in Florida and the Insurance Commissioner either approves or rejects it. Included in the filing is a percentage for field acquisition and commission costs.<sup>214</sup> However, when the plan was established, this fact was ignored, and commissions to producing agents were included in the surcharge. This guaranteed that plan rates would be higher than those charged in the regular market. In addition, insurance carriers offer reductions in established rate levels either through a discount to large employers or by paying annual dividends. Employers purchasing coverage through the assigned risk plan therefore not only missed out on any chance for a dividend, but also were forced to pay a surcharge whether they employed safety measures or had a good accident record. This seemed patently unfair to many of the committee members, who decided to take steps to reduce the burden on the small employers covered by the plan.

This was done by significantly amending section 627.311, Florida Statutes,<sup>215</sup> which is the statutory authority for organizing a workers' compensation joint underwriting association, should the Department of Insurance decide that one is necessary.<sup>216</sup> The new plan consists of two subplans. Subplan "A" covers bad risks. To be a bad risk an employer must have demonstrated accident frequency problems, a measurably adverse loss ratio over a period of years, or a demonstrated attitude of noncompliance with safety requirements. All risks who are not "bad" risks are covered under subplan "B" which is established to cover good risks. A risk may be placed in either subplan regardless of size. Subplan "A" is surchargeable, but

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214. The current percentage is 17.5% of the first \$1,000 of premium. Conversation with Mr. Mark Trafton, Chief Actuary, Florida Department of Insurance (June 25, 1979). On total net premium the figure would be 11.71%. Not all of this amount goes to agents as commission since the figure also includes field acquisition costs.

215. (Supp. 1978).

216. Ch. 79-40, § 107, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.311).

not subplan "B." Both subplans are subject to retrospective evaluation. In this way a portion of premiums charged may be returned to the employer if the loss experience is good. This was included in order to reward risks in either subplan for favorable experience. In effect, retrospective evaluation will provide an incentive to safety management. The plan is authorized to pay commissions to producing agents not to exceed 5% of the total premium.<sup>217</sup>

The plan will operate under a board of governors named by the Insurance Commissioner, consisting of three insurers, three employers and one producing agent. Since agents in effect stand between both carriers and employers, it was presumed that they would carry the swing vote on the board if a policy disagreement arose. All aspects of the plan are subject to approval and continuous review by the Insurance Commissioner. Although the board may designate one or more servicing carriers for the plan, such designation is subject to the approval of the Insurance Commissioner. Thus, both the problem of penalizing good risks just because they are small and the problem of the surcharge were clearly addressed.

The Department of Insurance, however, has not responded to these problems by establishing the joint underwriting association authorized by chapter 79-40. Instead, the National Council on Compensation Insurance recommended, and the Commissioner approved, that the 8% surcharge be dropped.<sup>218</sup> The problem of the small, good risk is being assessed by the Department of Insurance in consultation with the National Council.<sup>219</sup> Since the implementation of the new law will be watched very carefully, the legislature may take further action if warranted. For the present, some response to the legislature's concerns is already evident.

### O. Collateral Sources

Section 627.7372, Florida Statutes, provides that in cases arising out of auto accidents, the court shall instruct the jury to deduct the value of benefits received from collateral sources from their verdict.<sup>220</sup> The definition of collateral source given in subsection (2)

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217. The plan has an additional new wrinkle. It will employ full-time safety consultants or engineers who will be available to advise insureds on safety management. The plan is also required to report annually to the legislature on actions taken to encourage safety among insureds. Servicing carriers are to provide support personnel to the plan's safety consultants and personnel for claims adjustment. The plan is meant thus to operate as a model for the industry as a whole.

218. Fla. Ass'n of Ins. Agents, Vol. IX, Bull. No. 37 at 2 (Aug. 22, 1979). In addition, a graded commission scale was adopted to replace the flat 5%. *Id.*

219. Conversation with Mr. Bill Campbell, Workers' Compensation Administrator, Florida Department of Insurance (Sept. 21, 1979).

220. (Supp. 1978).



does not specifically include workers' compensation benefits.

The problem was whether workers' compensation benefits should be set off against a recovery in tort or whether such benefits should be subject to the subrogation procedures under the Workers' Compensation Act.<sup>221</sup> The legislature decided that to the extent subrogation was a method of reducing costs in the workers' compensation system, subrogation should be encouraged. Therefore, a new subsection (3) was added to section 627.7372, providing that "benefits received under the Workers' Compensation Act shall not be considered a collateral source."<sup>222</sup>

#### IV. CONSTITUTIONALITY

Although the 1979 changes are not really radical in terms of compensation theory, they are a significant departure from the way Florida's workers' compensation system has been functioning in the past. Reaction to the reform has been decidedly mixed. Employer groups and the insurance industry seem to like it; attorneys in general are opposed. This attorney reaction is the reason for including a section on constitutionality in this article. There will probably be several challenges to the new law as soon as the appropriate case arises.<sup>223</sup> The two most likely constitutional challenges are: (1) the limited impairment schedule violates equal protection,<sup>224</sup> and (2) limiting appeals from orders of the deputy commissioners to the First District Court of Appeal in Tallahassee is constitutionally prohibited.<sup>225</sup> Although the former may have some merit, neither is patently unconstitutional.

##### A. *The Impairment Schedule and Equal Protection*

Under the old law, everyone with a permanent partial disability received some compensation.<sup>226</sup> The disability either resulted from an injury appearing on the schedule, in which case the worker received 60% of his average weekly wages for a specified number of weeks,<sup>227</sup> or from an unscheduled injury, in which case he received

221. FLA. STAT. § 440.39(2)-(4) (1977).

222. Ch. 79-40, § 115, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 627.7372).

223. At the meeting of the Workmen's Compensation Section at the Florida Bar Convention in Orlando on June 14, 1979, Terrell Sessums announced the formation of a committee whose purpose would be to screen cases to be used to challenge various parts of the new law. Dudley Burton is to be the chairman.

224. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

225. Ch. 79-312, § 1, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.25).

226. This discussion is limited to injuries causing permanent partial disabilities. Workers who become permanently totally disabled are covered under FLA. STAT. § 440.15(1) (Supp. 1978).

227. FLA. STAT. § 440.15(3)(a)-(t) (Supp. 1978).

compensation based on his disability rating, defined as the greater of either physical impairment or diminution of wage-earning capacity.<sup>228</sup> In addition, of course, the worker received medical benefits and any compensation due to temporary disability to which he was entitled.<sup>229</sup>

Under the new law, the worker still receives medical and temporary disability benefits.<sup>230</sup> However, everyone with a permanent partial impairment now receives wage-loss benefits, but only if he suffers more than a 15% loss in wages.<sup>231</sup> In addition, a distinct class of injured workers receives a lump-sum payment based on his degree of permanent impairment. This impairment benefit is payable only to those who have suffered an amputation, loss of 80% or more of vision, after correction, or serious facial or head disfigurement.

The two questions which then arise because of the creation of this class are:

(1) Is the equal protection clause of the fourteenth amendment to the United States Constitution violated if only this limited group is given a benefit payment rather than all those who have permanent impairments?

(2) Is the equal protection clause violated if only those with amputations are benefited and not those with a corresponding loss of use or if only those with facial or head disfigurement are compensated and not those with a serious disfigurement of another part of the body?

A review of the case law in this area indicates that the answer to these two questions is the same: no, the equal protection clause is not violated.

As the legislative investigation of workers' compensation proceeded in early 1979, it became clear that the members were determined to construct a system in which workers would be paid as nearly as possible on the basis of actual economic loss resulting from the injury. This determination was, of course, motivated by the high costs of the system; but it was also motivated by the finding that people with the same kinds of injury were receiving widely disparate compensation awards. As already described, the major decision was to adopt an actual wage-loss approach. In addition, however, another determination was made and that was to ensure that those really seriously injured were definitely compensated. This determination arose from two different sources. One was a reaction to the

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228. *Id.* § 440.15(3)(u).

229. *Id.*, §§ 440.13, .15(2), (4).

230. Ch. 79-40, §§ 8, 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. §§ 440.13, .15).

231. *Id.* § 10 (to be codified at FLA. STAT. § 440.15).

discovery that many people who were not seriously injured were receiving a great deal of money from the system. The second was a feeling that there is a qualitative difference among injuries and that that difference should be recognized.

The legislature determined that amputations, almost total blindness, and severe facial or head disfigurement are in a class by themselves.<sup>232</sup> The trauma, both physical and mental, the physical readjustment, the emotional anguish, and the later social interaction resulting when a limb is actually cut off is of a different order from the reactions to the loss of use of a limb. At the very least, a limb which does not function is still there. And though the probabilities may be remote, some return of function may be possible in the future because of a spontaneous process we may never be able to understand or because of a medical breakthrough or from some other reason. That probability is totally foreclosed if the limb is actually severed.

Blindness or a very severe restriction of vision is also in a class by itself because the ability to see is necessary in so many occupations. Many courageous people are functioning members of society despite being blind. But this achievement is in no way diminished by a recognition of their extraordinary efforts and of the help given by sighted people, help ranging from inventing remarkable sensory devices to matter-of-fact acceptance. Regardless of the progress our society has made, blindness remains a severe handicap.

Severe facial and head disfigurement is also in a class by itself. For some people, it might mean the end of a career in which physical appearance is important. For others, their own emotional reaction to the results of the accident might cripple their ability to function in society. And for still others, the reactions of others might be the most painful result. Facial and head disfigurement is a special kind of disfigurement because in our society clothing does not cover it up.<sup>233</sup>

The economic loss resulting from these injuries can be quantified on an actual wage-loss basis for the most part. But given the severity of these types of injuries, and given the very special kinds of problems associated with each, the legislature determined that some special recognition should be made apart from the wage-loss bene-

232. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

233. Most states have also recognized this special quality about disfigurement. See COLO. REV. STAT. § 8-51-105 (1973); CONN. GEN. STAT. § 31-308 (1979); HAW. REV. STAT. § 386-32 (1976); ILL. REV. STAT. Ch. 48, § 138.8 (1975); ME. REV. STAT. tit. 39, § 56 (1978); N.M. STAT. ANN. § 59-10-18.5 (1978); N.C. GEN. STAT. § 97-31 (1977); OHIO REV. CODE ANN. § 4123.57(c) (1978); TENN. CODE ANN. § 50-1007(c) (1978); WIS. STAT. § 102.56 (1979); Farleigh, *Disfigurement Awards Under Oregon Workmen's Compensation*, 52 ORE. L. REV. 190 (1973).

fits available to everyone.<sup>234</sup> The actual monetary award in the new section 440.15(3)(a) is not very large, but the special recognition of those who are truly injured is there.<sup>235</sup> Since these particular injuries *are* different from others, the limited impairment schedule does not violate the equal protection clause.

*B. Limitation of Appeals from Orders of the Deputy Commissioners to the First District Court of Appeal*<sup>236</sup>

As part of the 1979 changes, the legislature abolished the Industrial Relations Commission and substituted the First District Court of Appeal as the tribunal of appellate jurisdiction.<sup>237</sup> The question has been raised as to the constitutionality of limiting appeals to one part of a territorially-based system when coequal parts of the same system serve the area from which an appeal originates.

The answer is that there is no such constitutional prohibition. The hearings held by the deputy commissioners are not trials. This is notwithstanding the fact that for some years these triers of fact were called "judges of industrial claims." These hearing officers have never been article V judges; they have always been within the Department of Labor and Employment Security.<sup>238</sup> Nor has the Florida Supreme Court ever held them to be judges.<sup>239</sup> If the deputy commissioners are not judges, then they are administrative hearing officers, though exempt from chapter 120.<sup>240</sup> As such, review of their actions comes under the provisions of article V, section 4(b)(2) of the Florida Constitution which states that "[d]istrict courts of appeal shall have the power of direct review of administrative action, as prescribed by general law." There is thus no geographical

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234. The situation is analogous to that in *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974), in which the Florida Supreme Court upheld the constitutionality of the automobile no-fault act, which required exceeding a certain threshold before a suit could be brought at common law for pain and suffering. In the same way, the 1979 changes in workers' compensation require certain types of severe injuries to be incurred before impairment benefits may be paid, just as the monetary wage loss must exceed 15% of the worker's preinjury wage before wage-loss benefits may be paid.

235. For example, using the AMA Guidelines, loss of an arm would be a 60% impairment, resulting in a payment of \$3500 [(\$50 x 50 points) + (\$100 x 10 points)]. Ch. 79-40, § 10, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.15).

236. We wish to thank Stephen Kahn, Esq., Legal Counsel to the President of the Florida Senate, for his assistance in our preparation of this section.

237. Ch. 79-40, § 46, 1979 Fla. Laws 215, *as amended* by ch. 79-312, § 1, 1979 Fla. Laws 1645.

238. Previously the Department of Commerce. *See* ch. 79-40, § 35, 1979 Fla. Laws 215 (to be codified at FLA. STAT. § 440.45).

239. The closest the court ever came was in *Scholastic Systems, Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974), in which the term used was "quasi-judicial."

240. Ch. 79-40, § 3, 1979 Fla. Laws 215, and ch. 79-312, § 6, 1979 Fla. Laws 1645 (to be codified at FLA. STAT. § 440.021).

limitative. The legislature has complied with the constitution by prescribing the appellate jurisdiction for workers' compensation by general law. Nor has the legislature violated the constitutional requirement that the courts "be open to every person for redress of any injury"<sup>241</sup> since that requirement does not specify where the court must be.

Retaining the appellate tribunal in Tallahassee made both legal and practical sense to the legislature. Having all appeals go to the same court would preclude conflicting decisions among the five districts and would develop a body of expertise in one locale.<sup>242</sup> In addition, those in the workers' compensation system are already used to having appeals come to Tallahassee. And further, the Industrial Relations Commission occupied facilities which could be (and were) turned over to the First District Court of Appeal to accommodate the court's inevitable expansion.<sup>243</sup> There is thus no constitutional problem with limiting appeals to the First District Court of Appeal.

## V. CONCLUSION

In the recent speech from which we have drawn the subtitle to this article, Dr. Arthur Larson discussed two "old basics" which he felt were necessary to any properly operating workers' compensation system. These were the "centrality of the wage-loss concept" and the "maximizing of administration and the minimizing of litigation not going to the essence."<sup>244</sup> Dr. Larson pointed out that the heart of the system is "replacement of wages" and that we lost this objective when states adopted injury schedules, which were an attempt to approximate wage loss over a lifetime. At first, as in Massachusetts, these schedules were only for amputations; later came schedules for loss of use; then for partial loss of use; then for amputations and loss of use of the minor members; and finally, impairments of the body as a whole. It was very easy to lose sight of the original goal in the minutiae of the degrees of impairment, doctors, other experts, and procedural niceties attendant on what became essentially tort litigation.

Dr. Larson also stated that the lump-sum payment ruins the system. The "sinister" thing about it is that everyone favors it: employers and insurance carriers can close their files; employees get

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241. FLA. CONST. art. I, § 21.

242. The legislature created a Fifth District Court of Appeal, effective July 1, 1979. Ch. 79-413, § 1 1979 Fla. Laws 2190 (to be codified at FLA. STAT. § 35.01).

243. Ch. 79-312, § 1, 1979 Fla. Laws 1645.

244. Notes of Dr. Larson's speech are on file at the House Insurance Committee, 310 House Office Building, Tallahassee, Fla. 32304.

a big wad of cash; and the attorney gets his fee. But the objective of providing a replacement for a weekly loss in wages is not met.

In general, Dr. Larson felt that the 1979 Florida reform had gone a long way back to basics.<sup>245</sup> There are, of course, other steps that may have to be taken and other steps which ought to be taken. The inclusion in the 1979 reform of impairment benefits for those most severely injured may have to be deleted to avoid continual equal protection challenges even though we feel the provision is not unconstitutional and even though the original Massachusetts act and almost all subsequent enactments contained such a schedule. Deleting this final vestige of impairment benefits would be another step back to basic compensation theory. In the interests of further streamlining the system, the familiar categories of temporary and permanent partial and total could well be eliminated since the wage-loss provisions will operate regardless of the labels attached to the particular stage in the process.

And there are other possibilities for the future, ideas which Dr. Larson called "new basics." The first of these is the recognition of reemployment as the primary purpose of the workers' compensation system. Oregon has proposed this<sup>246</sup> and it may be worth some study

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245. He compared Florida's enactment with Oregon's HB 3125 (1979) which was actively considered but did not pass before the Oregon Legislature adjourned on July 4, 1979. He would have preferred to see Florida completely eliminate both impairment benefits and washouts as was proposed in Oregon.

246. Ore. HB 3125 (1979) reads in pertinent part:

Section 2. (1) When a worker who is employed by an employer who employs 10 or more subject workers incurs a compensable injury:

(a) The worker shall be reinstated by the employer to the former position of employment, without reduction in wage, if the worker is able to perform the primary duties of the position.

(b) If the worker is not able to perform the primary duties of the former position, the worker shall be reinstated to any other position in the employer's operation, the primary duties of which the worker is able to perform.

(c) As used in this chapter, "primary duties" are those activities which comprise the substantial amount of time for, and are essential to, the performance of that position after the employer has made reasonable accommodations for the worker's impairments.

(2) The department may require reasonable modification of the job site of a subject employer's operation if the modification would enable the worker and employer to comply with subsection (1) of this section.

(3) A worker may present a certificate of the worker's attending physician that the worker is able to perform described types of activity which shall be prima facie evidence of such ability.

(4) An employer is relieved of the obligation to reemploy an injured worker:

(a) If the worker's position has been eliminated by a reduction in force, but only so long as the reduction in force lasts; or

(b) Two years after the date of injury or aggravation, but a worker who suffers an aggravation has no reinstatement privileges unless employed by the employer at the time of the original injury.

by the Florida Legislature. The second is to take steps to coordinate all income benefits programs so that all benefits payable for being off the job would be substantially less than what the worker earned on the job. This is obviously something which will have to be studied seriously lest we become a society in which staying at home is more profitable than going to work.

In the 1979 session, the Florida Legislature made significant changes in our workers' compensation system. The motivation was twofold: while the initial reason was to reduce costs, another motivation soon assumed equal urgency and that was to do equity. The legislature has given the Division a precise and comprehensive mandate and the resources to implement this mandate to move the delivery system much closer to the self-executing ideal. And to do equity to injured workers, the legislature has made the basic assumption that any permanent disability resulting from a work-related injury should be compensable only if it has an adverse effect on the worker's postinjury wages. Thus, though loss of a leg is a terrible experience no matter whom it happens to, it matters more in economic terms to a roofer than to a lawyer. It became clear to the legislature that the two should not be treated the same. And since guesses serve only to stir up litigation and inevitably result in inequity, the obvious solution was to wait and see whether there was in fact a wage loss before compensation was paid. Though we expect to find flaws in the system which will need to be corrected, the adoption of the wage-loss concept and the strengthening of the Division should make Florida's workers' compensation system affordable, efficient, and, above all, equitable.

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(5) An employer shall not discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits, is receiving wage differential benefits or has invoked or utilized the procedures provided for in this chapter or given testimony pursuant thereto. However, nothing in this subsection prevents an employer from terminating a worker for cause unrelated to the purposes of this chapter.

(6) A worker may enforce the provisions of this section by requesting a hearing as provided in ORS 656.283.

(7) An employer is not excused from complying with this section because a vacancy does not exist or the injured worker lacks seniority to fill a position. However, if a seniority system is in use, an employer need not demote or terminate another worker with greater seniority in order to place the injured worker.

(8) The provisions of this section prevail over the terms of any collective bargaining agreement entered into after the effective date of this 1979 Act.

Section 3. When the department determines that the worker will not be able to return to the worker's previous employment, the department, as soon as is practicable, shall commence employment search, retraining or vocational rehabilitation for the purpose of reemploying the worker at a wage as close as possible to the worker's wage at the time of injury.