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A HISTORIC REVIEW OF WORKERS' COMPENSATION REFORM IN FLORIDA

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I. INTRODUCTION

CONTEMPORARY workers' compensation laws originated during the Industrial Revolution to compensate workers for injuries suffered in the workplace.¹ The underlying concept was simple. In the event of a workplace injury, regardless of fault, workers forfeited the right to sue their employers in exchange for a guaranteed and defined set of benefits.² Despite its original simplicity, however, workers' compensation has evolved into a complicated and confusing system. An entire secondary industry is now needed to process compensation claims, originally intended as self-executing. Employers have become frustrated with increased premiums, and employees complain of reduced benefits. Caught in the middle, policymakers attempt to balance these competing interests in an environment of intense political pressure.

Florida, like most states, has made almost annual efforts to "reform" workers' compensation. A close look at those attempts, however, reveals that little has actually changed. Since 1979, every piece of legislation has addressed attorneys' fees, medical costs, dispute resolution mechanisms, wage loss, and insurance regulatory issues. Yet, workers' compensation costs continue to rise. In addition, the process has become increasingly adversarial and employee benefits continue to decline.

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1. William E. Sadowski et al., *The 1979 Workers' Compensation Reform: Back to Basics*, 7 FLA. ST. U. L. REV. 640, 641-48 (1979); see also Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 228-31 (1952); James Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156, 156-67 (1967); Paul Z. Gurtler, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 HAMLIN J. PUB. L. & POL'Y 127, 133 (1989).

2. The fundamentals of workers' compensation are discussed in a speech given by John F. Burton, Jr. See John F. Burton, Jr., *Workers' Compensation: The Fundamental Principles Revisited*, in WORKERS' COMPENSATION DESK BOOK V8-V15 (1992).

This Article offers a general historical background of the development of workers' compensation and chronicles the major reforms that occurred during the 1977, 1979, 1983, 1989, and 1990 legislative sessions. The Article then examines the proposals presented during the 1993 regular session because, although the Legislature did not pass these proposals, they provide a framework for addressing future reform. The Article also briefly summarizes a revision to the Workers' Compensation system adopted by the Legislature in a November 1993 Special Session. Lastly, this Article concludes with a discussion of significant issues that remain unresolved in Florida and their implications for future legislative reform.

II. HISTORY OF THE DEVELOPMENT OF WORKERS' COMPENSATION

Workers' compensation originated in Europe during the late 1800s.³ As the Industrial Revolution advanced, countries began to recognize and address the frequent and severe injuries to factory workers. They developed programs that provided workers with medical care for on-the-job injuries and compensated them for lost wages while they recovered. Two primary models developed during this time: one in Germany and one in England.⁴

In 1884, Germany created a workers' compensation system as part of an overall package of benefits addressing health insurance, old age care, and invalidity care.⁵ Employers paid the costs of this workers' compensation system.⁶ Employees received sixty-six and two-thirds percent of their salary in indemnity or disability benefits, with disability determinations made by physicians.⁷

The British created their system in 1897, featuring a more spartan set of benefits.⁸ The system covered only workplace injuries resulting from the employer's negligence;⁹ it did not cover injuries caused by the employee's negligence.¹⁰ In addition, employees had the option of either a tort action or a workers' compensation claim.¹¹

It was another twenty years before American industry followed its European counterparts. Interestingly, only two states patterned their workers' compensation programs after Germany's model: Washington and Ohio.¹² Instead, most states chose the British model.¹³

3. See Sadowski, *supra* note 1, at 642.

4. *Id.* at 642-45.

5. *Id.* at 642.

6. *Id.* at 643.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 644.

13. *Id.*

For instance, in 1910, New York created the first compulsory system in the United States, which closely followed the British model.¹⁴ Employees in certain dangerous jobs received fifty percent of lost wages, but employees enforced the system.¹⁵ In 1911, however, the New York courts ruled this system an unconstitutional taking of property because it imposed liability, without fault, upon the employer.¹⁶ A state constitutional amendment was adopted in 1913 to remedy this defect.¹⁷

Massachusetts adopted a compulsory workers' compensation law in 1911.¹⁸ Not only was it more detailed than the New York act, it also created an industrial accident board to administer the system and a state self-insurance fund to pay benefits.¹⁹ In addition, the Massachusetts act was more liberal in benefits than the New York act. It also paid workers fifty percent of their lost wages, but employers were required to furnish reasonable medical care.²⁰ The statute provided a detailed schedule to compensate employees for lost limbs.²¹ Finally, unlike the New York system, the Massachusetts system was ruled constitutional in its original form.²²

Despite the actions taken by New York and Massachusetts, many states still considered the concept of providing a compulsory alternative to the tort system a radical idea. To avoid constitutional concerns, many states adopted optional systems similar to the original British model. Washington, however, adopted an early workers' compensation law that more closely resembled the German system.²³

In 1917, the United States Supreme Court upheld the constitutionality of three types of workers' compensation laws: (1) a compulsory law, as readopted by New York state; (2) an elective statute passed in Iowa; and (3) a single state fund offered in Washington state.²⁴ These decisions removed most of the constitutional concerns, and state workers' compensation systems proliferated. Within three years, forty states had adopted workers' compensation systems.²⁵

14. *Id.* at 645.

15. *Id.* at 645-46.

16. *See Ives v. South Buffalo Ry.*, 94 N.E. 431, 448 (N.Y. 1911).

17. Sadowski, *supra* note 1, at 646.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 647.

24. *See Larson*, *supra* note 1, at 233.

25. *See Sadowski*, *supra* note 1, at 647.

III. REFORM IN FLORIDA: 1977-1993

During the last sixteen years, significant reform has taken place in Florida's workers' compensation law in 1977,²⁶ 1979,²⁷ 1983,²⁸ 1989,²⁹ and 1990.³⁰ A review of each of these five acts, as well as the attempted reform effort in 1993, reveal similar problems and solutions. Attorneys' fees, increased medical costs, increased wage loss costs, insurance regulatory issues, and associated procedural and organizational changes have been the subject of regular and repeated debate. What is heralded as a solution to workers' compensation during one legislative session is maligned as the source of the problem during the next session. As the following discussion will show, the most significant conceptual reform occurred in 1979 with the adoption of the current wage loss system.³¹

A. 1977 Reform

In 1977, the business community in Florida became increasingly concerned with high workers' compensation premium rates, costly attorneys' fees, overutilization of benefits, and fraud.³² Some believed changes made during a major reworking of the law in 1974 contributed to rising premium rates.³³ As a result, the 1977 legislation authorized a joint underwriting association and addressed several key areas, such as exclusions from workers' compensation benefits and increased penalties for fraud.³⁴ The most significant change, however, was to the method for calculating and determining attorneys' fees.³⁵

Before the 1977 reform, unlimited attorneys' fees could be assessed against the employer or insurance carrier if the carrier unsuccessfully challenged a claim or failed to pay a claim within twenty-one days of

26. Ch. 77-290, 1977 Fla. Laws 1284.

27. Ch. 79-312, 1979 Fla. Laws 1645.

28. Ch. 83-305, 1983 Fla. Laws 1777.

29. Ch. 89-360, 1989 Fla. Laws 2345.

30. See Ch. 90-201, 1990 Fla. Laws 894; Ch. 91-1, 1991 Fla. Laws 21; Ch. 91-2, 1991 Fla. Laws 120. The court struck down the 1990 statute, chapter 90-201, 1990 Laws of Florida. See *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). The *Martinez* case is more fully discussed *infra* section III.F. In 1991, the Legislature reenacted the legislation in a special session to address the constitutional defects.

31. Ch. 79-312, 1979 Fla. Laws 1645.

32. Stanley J. Brainerd, *1977 Workmen's Compensation Legislation*, 6 FLA. ST. U. L. REV. 471, 471-72 (1978).

33. *Id.* at 471 n.5.

34. *Id.* at 476-81.

35. *Id.* at 479-80.

receiving notice.³⁶ The 1977 law introduced a fee schedule that limited attorneys' fees to twenty-five percent of the first \$5,000 of benefits secured, twenty percent of the next \$5,000, and fifteen percent of the remaining amount.³⁷ In addition, the new law codified standards found in case law that permitted a judge to increase or decrease the amount of attorneys' fees based on such factors as the uniqueness of the legal questions involved, as well as the experience, reputation, and ability of the lawyer performing the service.³⁸

B. 1979 Reform

Despite the efforts of the 1977 Legislature, within one year Florida's workers' compensation rates had risen 76.2% above the national average, the third highest among states reporting such information.³⁹ Florida employers were, on average, spending \$2.64 per \$100 of payroll on workers' compensation insurance.⁴⁰ Although workers' compensation premiums rose only 6.4% in 1979, total expenditures on workers' compensation in Florida had more than tripled, from \$75 million in 1970 to \$257 million in 1978.⁴¹

Measures to contain medical costs, attorneys' fees, claims administration, and the judicial review process served as major issues in 1979.⁴² Most importantly, however, the 1979 legislation sought to reduce costs by making a significant conceptual change in the calculation of disability benefits by adopting a method called "wage loss."⁴³

1. Wage Loss

Prior to 1979, Florida, like most states, used an "impairment" system that provided lump sum settlements for physical handicaps resulting from on-the-job injuries. Before 1979, the *Florida Statutes* contained a schedule covering injuries to most body extremities and specifying the number of weeks for which an injured worker could receive compensation.⁴⁴ A worker classified as permanently partially

36. FLA. STAT. § 440.34(1) (1976).

37. *Id.* § 440.34(1) (1977).

38. *Lee Eng'g & Constr. Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968).

39. FLA. DIV. OF WORKERS' COMPENSATION ANN. REP. 49 (1991-92) (Technical Supp.) [hereinafter WORKERS' COMPENSATION ANN. REP.].

40. *Id.*

41. John F. Burton, Jr., *The Wage-Loss Approach: Lessons from Florida*, in WORKERS' COMPENSATION DESK BOOK I-105 (1992).

42. Staff of Fla. S. Comm. on Com., CS for SB 188 (1979) Staff Analysis 1-8 (conference committee amendment April 24, 1979) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 777, Tallahassee, Fla.) [hereinafter Staff Analysis for CS for SB 188].

43. *Id.* at 2.

44. FLA. STAT. § 440.15 (1978).

disabled received 100% of his medical costs and 60% of his pre-injury average weekly wage for the number of weeks specified. For example, according to the schedule, the loss of an eye was compensable for 175 weeks.⁴⁵ Therefore, for a worker earning \$500 a week, the disability calculation for a lost eye would have been as follows: 60% X \$500 X 175 = \$52,500. This calculation applied regardless of whether the worker sustained an actual loss in earnings.

Injuries not provided for in the schedule, such as back injuries, were governed by a section of the statute that permitted a disability rating either by a physical impairment rating or reduction of wage earning capacity, whichever was greater.⁴⁶ Lack of clear guidelines for making these determinations, however, resulted in considerable litigation. The number of awards issued by the judges of industrial claims, an unrefined measure of cases not on the impairment schedule, increased from 14,076 in 1970 to 25,381 in 1978.⁴⁷

To address this problem, the 1979 Legislature adopted the wage loss principle, which allows an employee to receive a percentage of lost wages based on what the employee was able to earn after the injury. The percentage received depended on one of four disability classifications: permanent total, permanent partial, temporary total, and temporary partial.⁴⁸ For example, in cases of permanent or temporary total disability, benefits would be calculated based on two-thirds of the employee's average weekly wages for the duration of the disability.⁴⁹ In the case of a temporary partial disability, the employee would receive sixty-six and two-thirds percent of the difference between pre-injury wages and the salary and other income the employee was able to earn after the injury.⁵⁰

Impairment benefits were limited to permanent impairment due to amputation, loss of eighty percent or more of vision, or serious facial or head disfigurement.⁵¹ The following cumulative schedule would determine the amount of an employee's benefit: (1) \$50 for each percent of permanent impairment of the body as a whole from one percent through fifty percent; and (2) \$100 for each percent of permanent impairment of the body as a whole for that portion in excess of fifty percent.⁵² The impairment guidelines published by the American Med-

45. *Id.*

46. *Id.* § 440.15(3)(u).

47. MONROE BERKOWITZ & JOHN F. BURTON, JR., *PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION* 269 (1987).

48. See Staff Analysis for CS for SB 188, *supra* note 42, at 2-3.

49. FLA. STAT. § 440.15(1)(a), (2)(a) (1979).

50. *Id.* § 440.15(4).

51. *Id.* § 440.15(3)(a).

52. *Id.*

ical Association would be used until the Division of Workers' Compensation developed a standard for Florida.⁵³

2. Attorneys' Fees

Attorneys' fees remained a source of contention in the workers' compensation system in 1979. In fact, during the 1978 session, the Legislature amended the law to require the claimant to pay twenty-five percent of attorneys' fees on claims for benefits, other than medical benefits, with the remaining seventy-five percent still paid by the carrier or employer.⁵⁴ Prior to 1978, the employer or insurance carrier paid 100% of a successful claimant's attorneys' fees.⁵⁵ In an effort to reduce litigation and its associated costs, the 1979 law required claimants to pay 100% of their attorneys' fees.⁵⁶ Nevertheless, three exceptions existed to this rule: (1) medical only claims; (2) bad faith actions by the carrier to the economic detriment of the employee; and (3) prevailing challenges on the issue of a compensable injury by the claimant.⁵⁷

3. The Industrial Relations Commission

Prior to 1979, judges of industrial claims first heard disputed claims, with appeals going to the Industrial Relations Commission and then, by petition for writ of certiorari, to the Florida Supreme Court.⁵⁸ The 1979 law eliminated the Industrial Relations Commission and its appellate review function, and provided that appeals go directly to the First District Court of Appeal and then to the Florida Supreme Court by petition for writ of certiorari.⁵⁹

C. 1983 Reform

Workers' compensation insurance rates plummeted in the years immediately following the introduction of the wage loss system.⁶⁰ After four successive cuts between August 1979 and January 1982, insurance rates had declined 36.3% from their 1978 levels.⁶¹ In September

53. *Id.* § 440.15(3)(a)3.

54. *Id.* § 440.34 (1978).

55. *Id.* § 440.34(1) (1977).

56. Staff of Fla. S. Comm. on Ins., CS for SB 188 (1979) Staff Analysis 2 (conference committee amendment May 1, 1979) (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 476, Tallahassee, Fla.).

57. FLA. STAT. § 440.34(2) (1979).

58. *Id.* § 440.25 (1977).

59. Ch. 79-40, § 46, 1979 Fla. Laws 215, 271.

60. See WORKERS' COMPENSATION ANN. REP., *supra* note 39, at 49.

61. *Id.* at 48.

1982, however, rates increased by 10%, followed by a further increase of 10.7% four months later.⁶² In addition, a court ruling during this time challenged the traditional rule requiring claimants to prove that their lack of employment was not due to the unavailability of jobs.⁶³ In response to these sudden rate hikes and the reaction among the business community to the adverse court ruling,⁶⁴ the Legislature passed a bill in 1983 amending the wage loss, medical care, and attorneys' fees provisions.⁶⁵

1. Wage Loss

The 1979 act provided that wage loss benefits were determined by the difference between an employee's pre-injury earnings and what the employee was "able to earn" after reaching maximum medical improvement (MMI).⁶⁶ Furthermore, the employee had the burden to prove that wage loss was the result of a compensable injury.⁶⁷ Because of court rulings that weakened this standard, the 1983 Legislature amended the law to clarify that the employee had the burden to demonstrate that a lack of employment or diminution of earnings was due to a physical limitation related to an injury, and not because of economic conditions or the unavailability of employment.⁶⁸

2. Health Care

The 1983 Legislature also made several changes related to medical services and health care costs. The existing law provided for a three-member panel to determine schedules of maximum medical fees based on local medical services costs.⁶⁹ This was changed to require one statewide schedule.⁷⁰ Minimum standards were also established for rehabilitation service providers, and a state-produced directory of approved providers was required.⁷¹ Only those providers meeting these

62. *Id.*

63. *Regency Inn v. Johnson*, 422 So. 2d 870 (Fla. 1st DCA 1982), *petition for review denied*, 431 So. 2d 989 (Fla. 1983).

64. See *Burton*, *supra* note 41, at I-107.

65. Staff of Fla. H.R. Comm. on Com., HB 1277 (1983) Staff Analysis 1-7 (final June 30, 1983) (available at Fla Dep't of State, Div. of Archives, ser. 19, carton 1128, Tallahassee, Fla.) [hereinafter Staff Analysis for HB 1277].

66. FLA. STAT. § 440.15(3)(b)(1) (1979).

67. *Id.* § 440.15(3)(b)(2).

68. *Id.* § 440.15(3)(b)(2) (1983).

69. *Id.* § 440.13(3)(a) (1981).

70. *Id.* § 440.13(4)(a) (1983).

71. *Id.* § 440.49(1)(b).

standards would be authorized to provide workers' compensation services.⁷²

3. Attorneys' Fees

Lastly, the 1983 law made changes to attorneys' fees in cases involving third-party tortfeasors.⁷³ Under the old law, claimants who prevailed in third-party claims had to reimburse the carrier or employer for workers' compensation benefits paid to the claimant.⁷⁴ Further, the old law did not recognize the claimant's legal costs. Under the new law, however, the employer and insurance carrier's pro rata share of court costs and attorneys' fees were deducted from any reimbursement amount.⁷⁵

D. 1989 Reform

By 1989, spending by Florida employers for workers' compensation insurance had increased to an average of \$3.46 per \$100 of payroll.⁷⁶ This rate, 55.5% above the national average, made Florida the fourth highest state in the nation in workers' compensation costs.⁷⁷ Furthermore, in January 1989, premium rates increased another 26.2%, making them 66.3% higher than the 1978 rates.⁷⁸ In response, the 1989 Legislature passed Chapter 89-289, *Laws of Florida*, which became effective October 1, 1989.⁷⁹

This new law revisited many of the previous reform measures, including attorneys' fees, workers' compensation judges, medical and health care costs, wage loss criteria, and rehabilitation providers. It also created a safety data base, changed the way compensation was calculated in cases of substance abuse, and added mediation as an option for resolving disputes.

1. Attorneys' Fees

Under the existing law, attorneys' fees could be based on "reasonably predictable" future medical benefits. The 1989 changes limited attorneys' fees only to those benefits delivered within five years of the

72. *Id.*

73. See Staff Analysis for HB 1277, *supra* note 65, at 6.

74. *Id.*

75. FLA. STAT. § 440.39(3)(a) (1983).

76. WORKERS' COMPENSATION ANN. REP., *supra* note 39, at 49.

77. *Id.*

78. *Id.* at 48.

79. Ch. 89-360, 1989 Fla. Laws 2345.

final hearing.⁸⁰ Further, the new law readdressed one of the exceptions to the requirement that claimants pay 100% of attorneys' fees. The 1979 law had required the employer or carrier to pay attorneys' fees when it was demonstrated that the employer or carrier had acted in bad faith to the economic detriment of the employee.⁸¹ The 1989 law substituted a "twenty-one day rule" for the "bad faith" provision.⁸² This rule provided that attorneys' fees would be paid by the employer or carrier if it failed to pay a claim within twenty-one days after receiving notice.⁸³ Two additional changes expanded the ability of claimants' attorneys to recover fees from employers or carriers: (1) a successful defense to a petition for modification filed by the employer or carrier; and (2) the filing by a claimant for enforcement proceedings.⁸⁴

2. Health Care

The 1989 legislation also readdressed the issue of medical and health care cost containment. Utilization review was required in three situations: (1) if medical costs exceeded \$20,000; (2) if requests were made for sequential medical care by different health care providers; and (3) if disputes arose regarding the interpretation of fee schedules.⁸⁵ The law also barred physicians from payment for treatment of injured employees upon three findings of overutilization.⁸⁶

3. Employee Rehabilitation

The 1989 legislation contained extensive changes to the provisions relating to employee rehabilitation.⁸⁷ The existing statute required the employer to provide up to fifty-two weeks of training, education, and other rehabilitative services to injured workers. The new law allowed the worker or employer, if the employee could not earn an amount equal to the pre-injury wage, to request a rehabilitation evaluation to determine whether the employee would benefit from training.⁸⁸ If an evaluator determined that rehabilitation was needed, the Division of Workers' Compensation was required to contract for such services.⁸⁹

80. FLA. STAT. § 440.34(2) (1989).

81. *Id.* § 440.34(2)(b) (1979).

82. *Id.* § 440.34(3)(b) (1989).

83. *Id.*

84. *Id.* § 440.34(3)(c) (1989).

85. *Id.* § 440.13(1)(g).

86. *Id.* § 440.13(2)(a).

87. *Id.* § 440.49(1)(a).

88. *Id.*

89. *Id.*

The costs of these services were shifted from the employer to the state.⁹⁰ The division was required to set standards for such programs and provide information to a three-member panel in developing a fee schedule for such services.⁹¹

4. *Wage Loss*

The 1989 changes terminated workers' compensation benefits if an employee was discharged from employment due to misconduct, and redefined misconduct consistent with the provisions of the unemployment compensation law in Chapter 443.⁹² The new law also clarified "deemed earnings" for the purpose of determining wage loss benefits.⁹³ This amended definition included income that could have been earned, and required that such income be offset against any wage loss entitlement.⁹⁴

5. *Substance Abuse*

Under the old law, injuries attributed primarily to employee intoxication or to the use of non-prescription drugs were not compensable.⁹⁵ The 1989 changes provided that if the employer suspected alcohol or drug abuse was the primary cause of the workplace injury, the employee had to submit to a drug test.⁹⁶ If the test results were positive, twenty-five percent of the claimant's weekly benefits, up to a maximum of \$5,000, would help pay for a rehabilitation program.

6. *Dispute Resolution*

The 1989 law provided mediation as an option for resolving disputes.⁹⁷ The employee, employer, or carrier could request a mediation hearing before a special master.⁹⁸ Neither party could be represented by an attorney, and the final decision was not binding unless both parties agreed. If no agreement resulted, either party could request a hearing before a judge of compensation claims, and no evidence, testi-

90. *Id.*

91. Staff of Fla. H.R. Comm. on Com., CS for SB 896 (1989) Staff Analysis 12 (June 20, 1989) (on file with comm.).

92. FLA. STAT. § 440.15(3)(b)2 (1989).

93. *Id.*

94. *Id.*

95. *Id.* § 440.09(3) (1987).

96. *Id.* § 440.09(6)(a) (1989).

97. *Id.* § 440.185(4).

98. *Id.* § 440.25(3)(b).

mony, or witnesses presented at the mediation conference would be admissible in the hearing.⁹⁹

7. *Safety*

The 1989 law emphasized safety as a means to control workers' compensation costs. For instance, the new law gave the Division of Workers' Compensation the authority to design a safety data base to identify individual employers who had a high frequency of claims or accidents.¹⁰⁰ Employers identified as having safety problems had to develop state-approved safety programs.¹⁰¹ Failure to comply with these requirements constituted grounds for cancellation of workers' compensation coverage by a carrier or self-insurance fund.¹⁰²

E. *1990 Reform*

In less than a year, the cost of workers' compensation coverage had increased to an average of \$4.58 per \$100 of payroll.¹⁰³ In January 1990, workers' compensation premiums increased an alarming twenty-nine percent.¹⁰⁴ In response, the Legislature passed House Bill 3809, a controversial law that contained extensive workers' compensation reform and created a Florida International Affairs Commission.¹⁰⁵ Its primary aim, however, was to reduce the spiraling costs of workers' compensation coverage, which it accomplished through substantial reductions in benefits.¹⁰⁶

1. *Wage Loss*

The most significant change in the 1990 legislation occurred to wage loss benefits. The Legislature reduced both the percentages applied to wage loss benefits and the maximum time employees were eligible to earn such benefits. For example, benefits payable for permanent partial disabilities were reduced to a rate equal to eighty percent of the difference between eighty percent of the employee's average weekly

99. *Id.*

100. *Id.* § 440.56(4).

101. *Id.*

102. *Id.* § 440.56(9).

103. WORKERS' COMPENSATION ANN. REP., *supra* note 39, at 53.

104. Letter from Tod Stupski, Nat'l Council on Compensation Ins. (NCCI), to Michael Valen, Legislative Intern, Fla. H.R. Comm. on Com. (June 22, 1993) (miscellaneous information regarding workers' compensation) (on file with comm.).

105. Ch. 90-201, 1990 Fla. Laws 894.

106. Staff of Fla. H.R. Comm. on Com., CS for HB 3809 (1990) Staff Analysis 2 (July 18, 1990) (on file with comm.).

wage and the wages earned after reaching MMI.¹⁰⁷ The legislation reduced the maximum time employees were eligible to collect such benefits from ten years to less than seven years.¹⁰⁸ The indemnity benefit threshold increased from fourteen days to twenty-one days, so that the first seven days of disability benefits were not payable unless an injury resulted in more than twenty-one days of disability.¹⁰⁹

More notably, however, the Legislature departed from the strict wage loss principle and instead adopted an impairment schedule. This schedule tied benefits to the impairment rating so that, for example, a worker with a three percent permanent impairment qualified for up to twenty-six weeks of benefits.¹¹⁰ The Legislature also called upon a three-member panel and the Division of Workers' Compensation to establish a new Florida impairment rating guide using objective criteria.¹¹¹

The new law further provided that an injured employee could not be declared permanently and totally disabled if the employee could engage in light work within a 100-mile radius of the employee's residence.¹¹² The legislation also shifted the burden of proof to the employer to prove that the employee's post-injury earning capacity equalled or exceeded the pre-injury wage.¹¹³

2. *The Industrial Relations Commission*

The 1990 law recreated the Industrial Relations Commission (IRC) to review orders issued by judges of compensation claims.¹¹⁴ A party could appeal IRC decisions directly to the First District Court of Appeal. The new law also changed the way judges of compensation claims were nominated, and provided for the anonymous evaluation of the judges by practicing workers' compensation attorneys within forty-five days of hearings in which the attorneys participated.¹¹⁵

107. Ch. 90-201, § 20, 1990 Fla. Laws 894, 937; *see also supra* note 30 (discussion of *Martinez*).

108. *See* Ch. 90-201, § 20, 1990 Fla. Laws 894, 939-40.

109. Ch. 90-201, § 17, 1990 Fla. Laws 894, 922; *see also supra* note 30 (discussion of *Martinez*).

110. Ch. 90-201, § 20, 1990 Fla. Laws 894, 939.

111. *Id.* § 20, 1990 Fla. Laws at 936-37.

112. *Id.* § 20, 1990 Fla. Laws at 934.

113. *Id.* § 20, 1990 Fla. Laws at 937-38.

114. *Id.* §§ 27-29, 1990 Fla. Laws at 954-56; *see also supra* note 30 (discussion of *Martinez*).

115. Ch. 90-201, § 39, 1990 Fla. Laws 894, 980; *see also supra* note 30 (discussion of *Martinez*).

3. Attorneys' Fees

The new law limited attorneys' fees for future medical or rehabilitation benefits to five years from the date the claim was filed,¹¹⁶ as opposed to five years from the date of the hearing. The law also amended the mediation process to allow both parties to be represented by attorneys.¹¹⁷

4. Substance Abuse: A Drug-Free Workplace

The 1990 law replaced the substance abuse provisions with comprehensive guidelines for implementing drug-free workplace programs.¹¹⁸ The new law also gave employers incentives, such as reductions in premiums, for implementing a drug-free workplace.¹¹⁹ An employee found to be under the influence of alcohol or drugs while working in a drug-free workplace would automatically forfeit any right to benefits if injured.¹²⁰ Employees who refused drug tests would also forfeit benefit rights.¹²¹

Further, if an injured employee had a blood alcohol level of .10% or greater, a presumption arose that the employee's alcohol consumption caused the injury.¹²² With a drug-free workplace program in place, such injuries were noncompensable unless the employee rebutted the presumption by clear and convincing evidence.¹²³ In cases where drugs or alcohol were found in the employee's system, but were determined not to be the cause of the injury, twenty-five percent of the employee's indemnity benefits, not to exceed \$5,000, went toward paying for the employee's drug or alcohol rehabilitation.

5. Health Care

The 1990 law required the Department of Insurance to establish a pilot program in managed care techniques to monitor health care costs.¹²⁴ It also provided that no health care provider could refer an

116. Ch. 90-201, § 29, 1990 Fla. Laws 894, 955; *see also supra* note 30 (discussion of *Martinez*).

117. Ch. 90-201, § 25, 1990 Fla. Laws 894, 951-52; *see also supra* note 30 (discussion of *Martinez*).

118. Ch. 90-201, §§ 11-13, 1990 Fla. Laws 894, 910-20; *see also supra* note 30 (discussion of *Martinez*).

119. Ch. 90-201, § 51, 1990 Fla. Laws 894, 994.

120. *Id.* § 11, 1990 Fla. Laws at 911-12.

121. *Id.*

122. *Id.* § 11, 1990 Fla. Laws at 910.

123. *Id.*

124. *Id.* § 19, 1990 Fla. Laws at 933-34; *see also supra* note 30 (discussion of *Martinez*).

employee to any other health care facility or provider without carrier or employer approval, except in emergencies.¹²⁵

6. Exclusions

The new law modified definitions to eliminate compensation for the following types of injuries: those sustained while participating in social or recreational activities;¹²⁶ those sustained while traveling to and from work;¹²⁷ those sustained while deviating from the course of work; and those caused by any subsequent intervening accident.¹²⁸ The 1990 law also eliminated exemptions from obtaining workers' compensation coverage for sole proprietors, officers, and partners in the construction industry.¹²⁹

7. Rate Rollback

Finally, the 1990 legislation enacted a one-year mandatory twenty-five percent reduction in premium rates charged by all insurers.¹³⁰

F. *Martinez v. Scanlan and the 1991 Special Session*

The controversy over the 1990 legislation began soon after its passage. The new legislation encountered political challenges from those in the construction industry who lost their exemptions. In addition, after becoming law on June 26, 1990, the bill was immediately challenged on constitutional grounds in *Martinez v. Scanlan*.¹³¹

Although nearly every provision was challenged on some basis, the primary issues in *Martinez* consisted of questions of violations of due process, the separation of powers doctrine, and the single subject rule.¹³² The Florida Supreme Court found the entire act unconstitutional because it violated the single subject rule.¹³³ The court also found the provisions creating the Florida International Affairs Commission unrelated to the workers' compensation statute.¹³⁴

In January 1991, the Legislature convened in a special session to correct these flaws. The Legislature eliminated the portion of the 1990

125. Ch. 90-201, § 19, 1990 Fla. Laws 894, 933-34.

126. *Id.* § 15, 1990 Fla. Laws at 920; *see also supra* note 30 (discussion of *Martinez*).

127. Ch. 90-201, § 15, 1990 Fla. Laws 894, 920.

128. *Id.*

129. *Id.* § 9, 1990 Fla. Laws at 905-06; *see also supra* note 30 (discussion of *Martinez*).

130. Ch. 90-201, § 57, 1990 Fla. Laws 894, 995-96; *see also supra* note 30 (discussion of *Martinez*).

131. 582 So. 2d 1167 (Fla. 1991).

132. *Id.* at 1169-70.

133. *Id.* at 1172.

134. *Id.* at 1173-74.

law establishing the Florida International Affairs Commission.¹³⁵ It also eliminated other politically controversial provisions, such as those creating the Industrial Relations Commission and those removing exemptions from coverage for sole proprietors, officers, and partners in the construction industry.¹³⁶ Beyond some other technical changes, the Legislature readopted the substance of the 1990 legislation.¹³⁷

IV. THE 1993 REGULAR LEGISLATIVE SESSION

Notwithstanding these major reforms, workers' compensation insurance premiums continued to rise. In January 1992, rate increases of 31.2% went into effect.¹³⁸ Although the rate of increase slowed to 7.2% in January 1993,¹³⁹ the fear of continued high premiums kept workers' compensation on the legislative agenda. Indeed, at the beginning of the 1993 session, Governor Lawton Chiles highlighted workers' compensation as an anticipated issue for that session.¹⁴⁰

Nevertheless, the 1993 Regular Session came to a close before legislators could reach agreement on a workers' compensation bill. As in past sessions, the significant issues included attorneys' fees, rising medical costs, wage loss changes, re-creation of an appellate body similar to the Industrial Relations Commission, and regulatory issues related to self-insurance funds and a joint underwriting association.¹⁴¹ Legislators debated two proposals in the 1993 session. A coalition of labor and industry developed one proposal, which the Governor supported.¹⁴² The House of Representatives generated an alternative proposal.¹⁴³

135. Ch. 91-1, 1991 Fla. Laws 21; Ch. 91-2, 1991 Fla. Laws 120; Ch. 91-5, 1991 Fla. Laws 133.

136. Ch. 91-1, 1991 Fla. Laws 21; Ch. 91-2, 1991 Fla. Laws 120.

137. Staff of Fla. H.R. Comm. on Com., HB 11-B (1991) Staff Analysis (final Jan. 30, 1991) (on file with comm.).

138. See Stupski, *supra* note 104.

139. *Id.*

140. FLA. H.R. JOUR. 4, 6 (Reg. Sess. Feb. 2, 1993) (address by Gov. Lawton Chiles).

We know that soaring workers' compensation rates are putting our small businesses out of business every day. . . . We have to return the system to its original purpose. . . . [I]t wasn't designed for lawyers, it wasn't designed for doctors, it wasn't designed for insurance companies. It was designed to help employers and their workers. Let's take it back to that.

Id.

141. Staff of Fla. H.R. Comm. on Com., HB 2063 (1993) Staff Analysis (Mar. 9, 1993) (on file with comm.) [hereinafter "Staff Analysis for HB 2063"].

142. Working within the theory that the original workers' compensation system was designed to serve primarily the employee and the employer, the Governor sponsored a coalition of labor and industry to develop a workers' compensation reform package. A major concern was that other parties in the workers' compensation industry had dominated the solutions in the past,

A. Attorneys' Fees

The 1979 law required employees to pay 100% of their attorneys' fees. Nonetheless, the statute allowed certain exemptions that became the rule rather than the exception. The proposal by the labor and industry coalition eliminated all claimant's attorneys' fees and created a section of public lawyers within the Department of Labor and Employment Security.¹⁴⁴ Claimants then would have the option of using these state lawyers or hiring private counsel. Fees could not be assessed against the employer or carrier, however.

In contrast, the House plan proposed a straight five percent reduction to each level of the 1977 attorneys' fees schedule.¹⁴⁵ In addition, the House plan placed a five-year cap on attorneys' fees, calculated on future indemnity payments.¹⁴⁶

B. Health Care

In 1990, health care costs in the Florida workers' compensation system exceeded the amount paid in indemnity benefits.¹⁴⁷ The use of limitations on provider services in the coalition proposal, and the emphasis on managed care in the House proposal constituted the primary difference between the two proposals. The coalition proposal limited chiropractic services to the first of twelve visits or a thirty-day treatment period, unless prescribed by a physician, and eliminated payments to work hardening, pain management, and weight loss programs.¹⁴⁸ The House proposal, on the other hand, encouraged managed care without the limits on chiropractors or work hardening, pain management and weight loss programs.¹⁴⁹ It also required carriers and self-insurance funds to review all treatment plans before authorizing providers to begin treatment.¹⁵⁰ Both proposals increased utilization review in an effort to restrict overutilization by providers.

particularly in the medical and legal fields. Accordingly, this coalition attempted initially to draft a bill addressing only the concerns of labor and management. Videotape of Town Meeting with Gov. Chiles in Orlando (Mar. 16, 1993) (on file with Fla. H.R. Comm. on Com.) (comments by Gov. Chiles concerning workers' compensation).

143. The Senate did not formally prepare a work product, but informally attempted to draft a bill.

144. Fla. HB 953 (1993).

145. Staff Analysis for HB 2063, *supra* note 141, at 9.

146. *Id.*

147. See Stupski, *supra* note 104.

148. Fla. HB 953 (1993).

149. Staff Analysis for HB 2063, *supra* note 141, at 7.

150. *Id.* at 5.

C. *Wage Loss*

Compared to other states, Florida has a significantly greater frequency of permanent total disability awards.¹⁵¹ By the end of the 1993 session, both the coalition proposal and the House proposal included four significant changes to the permanent total disability determination process.¹⁵² First, before a claim could be filed, a six-month waiting period after MMI was required. Second, reemployment assessments were mandated before a permanent total disability claim could be awarded.¹⁵³ Third, periodic vocational reevaluations were required, even after the permanent total disability was established.¹⁵⁴ Finally, employees engaged in sheltered employment were not eligible for a permanent total disability judgment.¹⁵⁵

D. *The Industrial Relations Commission*

Both proposals authorized an updated version of the Industrial Relations Commission, called the Workers' Compensation Appeals Commission.¹⁵⁶ Parties could appeal decisions from the judges of compensation claims directly to this Commission. In addition, appeals from the Commission would be to the First District Court of Appeal only by writ of certiorari.¹⁵⁷

E. *Regulatory Issues*

The regulation of self-insurance funds and changes to the Workers' Compensation Joint Underwriting Association (JUA) were the most controversial workers' compensation issues of the 1993 session.¹⁵⁸ The House proposal amended the existing Joint Underwriting Association to include both commercial carriers and group self insurance funds.¹⁵⁹ This proposal also transferred the regulation of all workers' compensation insurers to the Department of Insurance.¹⁶⁰ In addition, self-

151. NATIONAL COUNCIL ON COMPENSATION INSURANCE, REVISED GOVERNOR'S WORKERS' COMPENSATION PROPOSAL (Mar. 16, 1993) (on file with Fla. H.R. Comm. on Com.).

152. Fla. HB 953 (1993).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Interviews with Rep. Joseph R. "Randy" Mackey, Jr., Dem., Lake City, and staff members of the Fla. H.R. Comm. on Com. (Apr. 1993).

159. Fla. HB 2063 (1993) (second engrossed).

160. *Id.* Currently, the Department of Labor and Employment Security regulates self-insurance funds that write workers' compensation coverage, and the Department of Insurance regulates commercial carriers and other insurance entities that may underwrite forms of insurance other than workers' compensation. See FLA. STAT. §§ 440.57, .5705, .572 (1993) (Dep't of Labor & Employ. Sec.); *Id.* §§ 624.02, .06, .075, .11 (1993) (Dep't of Ins.).

insurance funds had to report experience data to be used in the development of workers' compensation rates.¹⁶¹ Although the House initially passed these proposals, the controversy surrounding them proved so overwhelming that the entire workers' compensation package died in the Senate. A Special Session was scheduled for November 1, 1993, to complete the task of addressing workers' compensation reform.¹⁶²

V. 1993 SPECIAL SESSION¹⁶³

The 1993 Special Session effort to address workers' compensation reform highlighted the traditional topics of workers' compensation legislation: health care costs, wage loss and indemnity benefits, the dispute resolution process, and regulatory issues such as the Joint Underwriting Association.¹⁶⁴

A. Health Care

Aggressive managed care and case management were proposed as a solution to rising health care costs in the workers' compensation system. Underwriters of workers' compensation coverage were authorized to establish—using either health maintenance organizations or provider networks—contractual arrangements with health care providers to provide workers' compensation health care services.¹⁶⁵ Each arrangement is characterized by use of a medical care coordinator or case manager, an internal grievance procedure, and a comprehensive network of medical services.¹⁶⁶

The medical care coordinator is a "gatekeeper," serving as a case manager for the employee, and must be a licensed physician or osteopath. All referrals and utilization review are done by the medical care coordinator. The internal grievance procedure within the managed care arrangement would allow the employee an additional mechanism to seek redress of dissatisfaction with medical care without the neces-

161. Fla. HB 2063 (1993) (second engrossed).

162. Proclamation of Gov. Lawton Chiles (Oct. 11, 1993) (on file with Fla H.R. Com. on Comm.).

163. The Legislature convened in Special Session from November 1-10, 1993, and passed a significant rewrite of certain portions of chapter 440, *Florida Statutes*. The bill was signed into law on November 24, 1993, and was assigned chapter number 93-415, *Laws of Florida*. The analysis of this legislation was still incomplete at the time of the printing of this Article; however, this section reviews some of the major provisions.

164. Summary of Conference Committee Action Report for SB 12C (Nov. 9, 1993) (on file with Fla H. R. Com. on Comm.).

165. *Id.* § 18 (FLA. STAT. § 440.134).

166. *Id.*

sity to seek legal counsel and pursue a claim before a judge of compensation claims.

Until January 1, 1997, implementation of managed care arrangements are encouraged through a ten percent credit to the employer's workers' compensation premium.¹⁶⁷ Subsequent to that date these arrangements would be mandatory.

B. *Indemnity*

There were significant changes to indemnity benefits in this act. A combination of definitional changes, as well as benefit reductions, were adopted. The definition of permanent disability was revised to include only catastrophic injuries such as severe paralysis from spinal cord injury, amputation or loss of appendage, brain or head injury accompanied by severe motor, cerebral, or neurological disturbances, substantial second- or third-degree burns, blindness, or any injury severe enough to qualify for federal disability benefits.¹⁶⁸

The maximum number of weeks an injured employee could collect temporary partial and temporary total benefits was reduced from 260 weeks to 104 weeks.¹⁶⁹ In addition, an impairment schedule was adopted which provided for three weeks of benefits for every one percent of impairment.¹⁷⁰ The impairment benefits were limited to fifty percent of the average weekly temporary total benefits.¹⁷¹

The concept of wage loss was eliminated and a schedule of supplemental benefits was established for severely injured employees with an impairment rating of twenty percent or greater and who had not returned to work at eighty percent of their preinjury wage.¹⁷² Supplemental benefits are payable at the rate of eighty percent of the difference between eighty percent of the employee's preinjury wage and after injury earnings.¹⁷³

C. *Dispute Resolution Process*

The dispute resolution process was redesigned to allow for informal dispute resolution facilitated by the Division of Workers' Compensation. An Employee Assistance and Ombudsman Office was created

167. *Id.* § 95.

168. *Id.* § 2 (FLA. STAT. § 440.02(34)).

169. *Id.* § 20 (FLA. STAT. § 440.15(2), (4)).

170. *Id.* § 20 (FLA. STAT. § 440.15(3)(a)3.).

171. *Id.*

172. *Id.* § 20 (FLA. STAT. § 440.15(3)b.).

173. *Id.*

within the Division of Workers' Compensation.¹⁷⁴ The goal of this office is to assist the employees, employers, carriers, and health care providers in informally resolving disputes. The office has thirty days to attempt to resolve the dispute before an employee can file a claim with a judge of compensation claims.

In addition, a pay without prejudice mechanism was established for carriers to pay claims. Rather than the current requirement to pay or deny a claim within twenty-one days, a carrier has fourteen days to begin paying claims to employees. This is without prejudice, however, to deny claims within 120 days.¹⁷⁵

Mandatory mediation was required of all claims prior to a hearing before a judge of compensation claims. Within twenty-one days of a filing of a petition of benefits, a mediation conference is to be held.¹⁷⁶ Mediation is attempted for ten days, after which a judge holds a pre-trial hearing and the formal dispute resolution process is initiated.¹⁷⁷ The time frame for the formal dispute resolution process was changed to require that the final hearing be concluded within forty-five days rather than 120 days from the date of the pretrial hearing.¹⁷⁸

D. Attorneys' Fees

The schedule of attorneys' fees was reduced five percent from its present structure.¹⁷⁹ The schedule as amended provides for twenty percent of the first \$5,000, fifteen percent of the second \$5,000, and ten percent of the remaining amounts. Indemnity awards are reduced to five percent after ten years.

E. Safety

A two percent premium credit for implementing a state approved safety program was established as an incentive to encourage attention to safety by small employers.¹⁸⁰ In addition, significant resources were provided to the Division of Safety to enhance both its technical assistance to small employers as well as its enforcement efforts.¹⁸¹ The bill also required the creation of safety committees by employers with ten or more employees.¹⁸²

174. *Id.* § 24 (FLA. STAT. § 440.191).

175. *Id.* § 25 (FLA. STAT. § 440.192(8)).

176. *Id.* § 30 (FLA. STAT. § 440.25](1)).

177. *Id.* § 30 (FLA. STAT. § 440.25(4)(a)).

178. *Id.* § 30 (FLA. STAT. § 440.25(4)(b)).

179. *Id.* § 34.

180. *Id.* § 94 (FLA. STAT. § 627.0915).

181. *Id.* § 110.

182. *Id.* § 63.

F. Joint Underwriting Association

A Joint Underwriting Association (JUA) was established to provide coverage to employers who were unable to purchase workers' compensation coverage on the open market. The JUA was established with three plans: Plan A for small employers whose premiums do not exceed \$2500; Plan B for employers engaged in high risk industries; and Plan C for other employers who are placed there primarily because of high accident ratios.¹⁸³

G. Small Business Purchasing Alliance

A small business purchasing alliance was created to assist small employers in purchasing workers' compensation coverage. The alliance will function as a non-profit entity to serve as a broker between small employers and underwriters specializing in workers' compensation insurance.¹⁸⁴

VI. SUMMARY OF REFORM EFFORTS

The preceding survey reveals almost annual attempts to address many of the same issues. Solutions offered in one year become problems in a subsequent year. Indeed, since 1979, each legislative reform of the workers' compensation statute has addressed attorneys' fees, medical costs, dispute resolution mechanisms, wage loss changes and insurance regulatory issues.¹⁸⁵

Obviously, this troubles Florida policymakers: Why does a system based on such a simple concept continue to spin out of control, frustrating everyone involved? This section analyzes some of the issues that have been debated in the last fifteen years and that will most likely serve as the focus of future debates.

A. Attorneys' Fees

Attorney involvement and the cost of claimants' attorneys' fees are frequently cited as indicators of serious problems within Florida's workers' compensation system. Although attorney involvement in these cases has increased, approaching twenty-one percent in 1990, this is not inconsistent with other states.¹⁸⁶ It is doubtful attorney in-

183. *Id.* § 98.

184. *Id.* § 102.

185. *See supra* notes 27-30.

186. NATIONAL COUNCIL ON COMPENSATION INSURANCE, Florida Workers' Compensation Resource Book 6 (1993).

volvement can be significantly reduced without changes to the dispute resolution process, such as mandatory mediation or simplification of the benefit structure together with implementation of managed care and case management.

Many critics, however, blame the system's problems on the high cost of claimants' attorneys' fees. Consequently, very little discussion occurs concerning defendants' attorneys or their fees. Nonetheless, statistics from the National Council on Compensation Insurance (NCCI) indicate that attorneys' fees for both claimants and defendants account for only 1.6% of the entire workers' compensation system's multi-billion dollar costs.¹⁸⁷

As a result, some theorize that reform efforts in this area are intended to provide an advantage in an adversarial process rather than genuinely reduce either attorney involvement or attorneys' fees. Future legislative debates will most likely include proposals relating to mediation, the reduction of attorneys' fees, the removal of claimants' lawyers from the system by creating a bureau of public lawyers, as well as increased efforts to streamline and shorten the dispute resolution process.

B. Health Care

One of the nationally recognized efforts of the 1993 session was the Florida Legislature's passage of a landmark health care bill.¹⁸⁸ This was significant because the cost trends in workers' compensation have begun to emulate the trends in the economy as health care costs have consumed a greater share of overall spending. Indeed, health care costs accounted for fifty-two percent of the cost of claims paid in 1990.¹⁸⁹

Managed care will serve as the focal point of this debate. At issue will be the use of a mandatory or authorized managed care model and how this should be implemented. Much of the debate will center on the Oregon experience. Oregon is the only state using a managed care system with enough data from which to make cost calculations.¹⁹⁰ The state reduced costs by twelve to eighteen percent with a thirty percent market penetration.¹⁹¹

187. NATIONAL COUNCIL ON COMPENSATION INSURANCE REPORT, HB 2063 (second engrossed) (n.d.) (on file with Fla. H.R. Comm. on Com.) [hereinafter NCCI REPORT].

188. Ch. 93-129, 1993 Fla. Laws 657.

189. See Stupski, *supra* note 104.

190. NATIONAL COUNCIL ON COMPENSATION INSURANCE REPORT ON MANDATORY MANAGED CARE (Mar. 19, 1993) (on file with Fla. H.R. Comm. on Com.) [hereinafter MANDATORY MANAGED CARE]; see also NCCI REPORT, *supra* note 187.

191. MANDATORY MANAGED CARE, *supra* note 190.

Significant differences exist between Florida and Oregon, however. Oregon has a more rural population.¹⁹² Florida also has multiple underwriters of workers' compensation insurance, while Oregon has only two principal providers.¹⁹³ Nevertheless, enough similarities exist to attempt some comparisons. Should a more aggressive managed care model be implemented in Florida, perhaps the market penetration would be higher, resulting in increased savings.

C. *Dispute Resolution and the Industrial Relations Commission*

As noted previously, the 1979 Legislature abolished the Industrial Relations Commission as the appellate body for resolving workers' compensation claims. This action was recommended by the Commission on the Florida Appellate Court Structure, appointed by then-Chief Justice England of the Florida Supreme Court.¹⁹⁴ The initial recommendation provided that appeals should be distributed among all the district courts of appeal.¹⁹⁵ The 1979 Legislature did not follow this recommendation, however, because of concerns that it would result in conflicting decisions.¹⁹⁶ All appeals were thus referred to the First District Court of Appeal.¹⁹⁷

During the 1993 Regular Session, a proposal was offered to recreate the Industrial Relations Commission in the form of a Workers' Compensation Appeals Commission. Ironically, the rationale offered for reestablishing the appeals structure was the inconsistency of opinions provided by the First District. Thus, as is often the case with workers' compensation, previous reforms are dusted off and offered as new solutions to recurring problems.

Inconsistency among the decisions rendered by the judges of compensation claims may be the real reason for the confusion in the opinions at the appellate level. Under the current system, judges of compensation claims are free to adopt their own rules of procedure. Hence, similar claimants injured under similar circumstances often receive different awards. Little case law precedent exists at the trial level to guide judges in making consistent decisions.

D. *Wage Loss*

During the 1993 Regular Session, wage loss discussions were limited to the frequency of permanent total disability awards in Florida. A

192. *Id.*

193. *See id.*

194. *See Sadowski, supra* note 1, at 660.

195. *Id.*

196. *See id.*

197. *Id.*

growing concern exists, however, that wage loss, offered as a solution in 1979, has become a costly problem.¹⁹⁸ While it may be premature to discard wage loss as a failed experiment, it is worth noting some nationwide trends.

Immediately following the 1979 adoption of wage loss, Florida's workers' compensation rates declined for four consecutive years.¹⁹⁹ Thus, on the surface, wage loss appeared to be a major success. Nevertheless, in reviewing the historical trend in workers' compensation rates nationwide, most states' rates declined during this same time frame.²⁰⁰ To lend further evidence that the change to wage loss was not singularly responsible for the immediate decline in workers' compensation rates, rate filings are based on a historical claims experience from the previous year. Further, most experts believe it takes approximately two years to notice, through rate filings, changes in experience resulting from legislative efforts. Therefore, more study is necessary to determine whether the successful results attributable to wage loss might simply have reflected a national trend.

E. Insurance Regulatory Issues

1. Joint Underwriting Association

As with any mandated insurance program the thorny question always exists concerning how to provide affordable insurance to those unable to purchase the required coverage. Current law, contained in the 1979 reform, created an optional Workers' Compensation Joint Underwriting Association (JUA) to offer workers' compensation coverage to small businesses and high risk employers. This statute was never implemented and, in its place, commercial carriers voluntarily created the "assigned risk pool," similar to a joint underwriting association, to underwrite these policies. Underwriters participated in the assigned risk pool based on their share of the workers' compensation market.

Group self-insurance funds have always forcefully opposed participating in the assigned risk pool or a JUA. Commercial carriers have argued that a competitive advantage is available to the funds because they can pursue increases in market share without corresponding in-

198. Bill Bergstrom, *State's Program is Called 'Stupid, Not Salvageable,'* TALLAHASSEE DEMOCRAT, June 16, 1993, at 5B.

199. See Stupski, *supra* note 104.

200. John F. Burton, Jr., & Timothy P. Schmidle, *Workers' Compensation Insurance Rates: National Averages Up, Interstate Differences Widen,* in WORKERS' COMPENSATION DESK BOOK I-6 (1992).

creases in poor risk policies. Groups argue that the popularity of self-insurance programs results from their attention to safety and streamlined claims management that keeps premiums low. In 1992, the group funds were successful in amending the statute to exclude them from the optional JUA.²⁰¹ Self-insurance funds are now the dominant writers of workers' compensation coverage, and considerable debate remains over their participation in a mandatory JUA. Because of the 1992 amendment, it is now necessary to alter the law to spread the underwriting risk to include both the carriers and funds.

2. *Regulatory Authority*

Currently, the Department of Labor and Employment Security regulates self-insurance funds writing workers' compensation coverage. The Department of Insurance regulates commercial carriers and other insurance entities that may underwrite other forms of insurance in addition to workers' compensation. Under most circumstances, this duplication would be an obvious target of criticism; however, it has been tolerated and viewed as beneficial to all concerned. Self-insurance funds have long been wary of regulation by insurance regulators, fearing they are prejudiced by the interests of the large commercial carriers. The insurance marketplace has become more complex, however, and the distinctions between commercial carriers and self-insurance funds have become less clear. Many self-insurance funds actually purchase insurance products, such as reinsurance, to protect against significant losses. Accordingly, it has become increasingly difficult for two separate regulatory authorities to regulate this complex field, as well as justify this governmental duplication of effort.

3. *Rate Setting*

Under current law, only commercial carriers report rating experience data to the rating services that calculate workers' compensation rates. This rate tends to be artificially high, as carriers reflect only thirty-five percent of the market, and this includes the assigned risk pool with a poorer rate history. To include self-insurers in this process would allow a more representative sample of claims' experience, as well as include underwriters with better claims management records. The NCCI estimated that this alone could reduce the overall workers' compensation rates by 1.8%.²⁰²

201. Ch. 92-318, § 25, 1992 Fla. Laws 3081, 3103.

202. NATIONAL COUNCIL ON COMPENSATION INSURANCE REPORT ON THE EFFECTS OF INCLUDING SELF-INSURED DATA IN THE RATE BASE (n.d.) (on file with Fla. H.R. Comm. on Com.).

VII. CONCLUSION

Workers' compensation has proven an almost annual source of controversy and debate in Florida. Legislators, who have passed significant workers' compensation reform legislation in six of the last sixteen years, find themselves facing continued high premium rates and overall dissatisfaction with the system. Similar to the legendary fate of the Greek King Sisyphus, condemned to roll a heavy rock up a mountain in Hades only to have it roll back down again just as he reached the top,²⁰³ today's policymakers continue to struggle with this seemingly perpetual problem. Already with the ink barely dry on the 1993 Special Session reform, there is an interest in developing a "glitch bill" to readdress issues not satisfactorily resolved in the 1993 Special Session act. Old solutions are often dressed up and presented as bold new initiatives; conversely, bold new initiatives are subsequently discarded as system-destroying problems. An examination of the history of workers' compensation reform reveals a system fraught with seemingly insoluble problems. If historical precedents are a reflection of the future, workers' compensation will most likely continue as a source of public policy debate for years to come.

203. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1102 (9th ed. 1987).

