

## EXECUTIVE SUMMARY

**Proposed**

**"WORKERS' COMPENSATION REFORM ACT OF 2001**

**Recommended by**

**Associated Industries Of Florida**

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There is a major crisis looming on the horizon on the Florida's Workers' Compensation Act. Costs are rising, medical is soaring out of control, yet injured workers are caught in the middle, many with inadequate benefits.

It is imperative that the 2001 Legislature address this issue before the system is totally out of control. The attached is an Executive Summary of proposed changes that the business community feels must be made now. Included are:

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- Moving the Judges of Compensation to the Department of Administrative Hearings;
  - creating a Commission on Insurance with all of the functions of the Department of Insurance transferred to the Commission;
  - eliminate managed care;
  - eliminate all of the exemptions for workers' compensation coverage in the construction industry;
  - increase benefits to uninjured workers;
  - limit the numbers of independent medical exams;
  - recreate a quasi-judicial body to hear workers' compensation appeals;
  - eliminate the Requests for Assistance; eliminate docketing order, set more realistic time frames to hold mediation, pretrial conference and final hearings;
  - eliminate the Workers' Compensation Oversight Board;
  - and most importantly limit attorney's fees to contingency based on the amount recovered rather than an hourly rate and/or a contingency fee.
  - Provide for medical issues under \$5,000 and any issue on the average weekly wage be determined by a Judge of Compensation Claims without attorney involvement.

AIF respectfully requests the Governor and the Legislature take up and pass these issues in the 2001 Legislative Session.

# LITIGATION

## **ATTORNEYS' FEES**

### **Current Situation**

The law now allows a claimant's attorney to charge hourly rates, which results in inequitable outcomes for the injured worker because the attorney has no incentive to pursue quick resolution of a claim through settlement. By keeping the claim open as long as possible, the attorney can build up his hours, bringing him a larger fee.

### **Recommendation**

This legislative proposal eliminates the ability of claimants' attorneys to charge hourly rates. It also returns the law to its original intent, which was to have claimants pay 100 percent of their attorneys' fees. The First District Court of Appeal effectively eliminated this provision through case law. The legislation also limits appellate hourly rates to \$125 an hour up to a maximum of \$5,000, with appeals to be heard before a newly created Workers' Compensation Appeals Commission.

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## **REDUCING LITIGATION**

### **Current Situation**

The calculation of an injured employee's average weekly wage, which is used to calculate his compensation rate, has become a matter of substantial litigation because the parties can never agree on the meaning of the term "average weekly wage." Another source for substantial litigation involves medical issues of under \$5,000.

### **Recommendation**

The legislation would help eliminate the costs of this unnecessary litigation. Judges of compensation claims would be required to review pay records submitted by the employee and the employer/carrier and then determine the correct average weekly wage without the involvement of attorneys.

Judges would hear disputes over medical issues that involve payment of \$5,000 or less without attorney involvement.

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## **COMBINING THE REQUEST FOR ASSISTANCE AND THE PETITION FOR BENEFITS**

### **Current Situation**

When an injured employee believes he is eligible for benefits he is not receiving, he must file a request for assistance with the state Employee Assistance Office. The insurance carrier has 30 days to resolve the issue in question, after which time it incurs responsibility for the claimant's attorney's fees. After the 30 days, if the matter is not settled to the employee's satisfaction, he may file a petition for benefits. The law, however, does not require that the insurance carrier receive a copy of the request for assistance. Often, the 30 days will pass before the carrier finds out that there is an issue in question, thus the carrier does not have the ability to work toward resolution of the problem until the situation reaches the point where the carrier may become liable for payment of attorney's fees.

### **Recommendation**

This legislation combines the petition for benefits and the request for assistance into one document and requires that the carrier receive a copy of it when it is filed, giving the carrier 30 days to resolve any problems before the litigation process begins. This should help reduce attorney involvement and costs. The legislation also changes the name of the "Notice of Denial" form, the document by which the carrier responds to the petition for benefits, to "Response to Petition."

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## **PARTIAL DISMISSAL OF A PETITION**

### **Current Situation**

In many cases, claimants' attorneys currently file numerous petitions for benefits for the same injury before any of the petitions are resolved. They argue that they must do so because filing all of the petitions in one document may result in the dismissal of all claims if just one issue is not ripe. They must then start the process all over again, which delays the delivery of benefits to the injured workers. The practical result of this is that the number of hours billed by attorneys for the claimant and the carrier are unnecessarily boosted, as much of the work done is duplicative.

### **Recommendation**

This legislation would allow for partial dismissal of a petition, so that all the issues that are ripe can be addressed at that time.

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## **ELIMINATE ALLEN V. TYRONE SQUARE 6 AMC THEATERS**

### **Current Situation**

The statutes provide that attorneys' fees do not attach until 30 days after the filing of a request for assistance and 14 days a petition for benefits has been filed. The First District, however, created an exception to this provision in its ruling in *Allen v. Tyrone Square 6 AMC Theaters*. In this case, the appeals court held that the request for assistance and a petition for benefits need not be filed for attorney's fees to attach if the issue in question involves medical benefits only. In this case, what constitutes notice to the carrier is subjective. Case law also has not clarified what constitutes a reasonable time to respond to one of these subjective "requests" prior to incurring attorneys' fees.

### **Recommendation**

This legislation would eliminate this exception imposed by the appeals court.

## **BENEFITS**

### **INCREASING BENEFITS TO INJURED WORKERS**

#### **Current Situation**

An employee who reaches maximum medical improvement, and has an impairment of up to 20 percent, is entitled to impairment benefits. The employee is paid at 50 percent of his compensation rate. These benefits are paid at three weeks for each percentage of impairment (an employee with a seven-percent impairment would receive 21 weeks of benefits).

If an employee has an impairment of 20 percent or more, he is also entitled three weeks of impairment benefits for every percent of impairment. Once this employee with a 20-percent-or-more impairment exhausts his impairment benefits he may be eligible for supplemental benefits if he has not returned to work; he is also eligible if he has returned to work but is receiving less than 80 percent of his pre-injury wage. Supplemental benefits are payable at a rate of 80 percent of the difference between 80 percent of the employee's average weekly wage and any wages he earned during the reporting period; the benefits cannot exceed the employee's maximum compensation rate. If the employee has not returned to work, he must conduct a job search during the reporting period and submit the results of that search to the carrier to retain eligibility for supplemental benefits.

In some cases, this benefits schedule does not give employees the benefits they need. With the litigiousness of the system, many employees are turning to lawyers to increase their benefits beyond what was intended by having themselves declared permanently and totally disabled. As a result, the number of permanent-total cases has increased from four percent of the benefit system in 1994 to 17 percent. Claimants' lawyers are abusing a loophole in the law that allows use of the Social Security disability test to claim permanent-total disability, even if the claimant has not been declared eligible for Social Security disability.

### **Recommendation**

This legislation would close the Social-Security loophole by stipulating that eligibility for permanent-total disability must be based on objective findings of disability caused by the work injury.

This proposal would also increase the compensation amount for impairment benefits from 50 percent of the injured employee's compensation rate, to 66 2/3 percent. If an injured worker had a seven-percent impairment rating and a compensation rate of \$200, his total impairment benefits would increase from \$2,000 (21 weeks at \$100 per week) to \$2,814 (21 weeks at \$133.34 per week).

## MEDICAL

### **MANAGED CARE**

#### **Current Situation**

In 1993, the Florida Legislature mandated the conversion of health-care delivery under the workers' compensation system to a managed-care model. Managed care was supposed to reduce the cost of medical services rendered to injured workers while upholding the quality of care. The cost-savings have not appeared; in fact, managed care seems to be causing an increase in costs, mostly due to increased administrative expenses. The function of managed-care coordinators does not operate as intended. The fabric of managed care has also been tattered by case law also allows claimants to leave the managed-care network if they don't get treated quickly enough.

#### **Recommendation**

This bill eliminates the managed-care provisions of the workers' compensation law.

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### **OBJECTIVE FINDINGS FOR PSYCHIATRIC DISABILITY**

## **Current Situation**

Case law involving claims for psychiatric disability has been liberalized to the point that claimants' lawyers shop around among doctors until they can find one who will diagnose a psychiatric disability, which often is remote from the original injury. Employees with small physical impairment ratings are using pre-existing mental, psychological, and emotional conditions to boost their impairment ratings until they can qualify for permanent-total disability. This practice increases medical costs, attorney involvement, and indemnity benefits beyond reasonable amounts.

## **Recommendation**

This legislation would fix abuse of the system by clarifying that there will be no impairment ratings after maximum medical improvement for mental, psychological, and emotional conditions.

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## **INDEPENDENT MEDICAL EXAMS**

### **Current Situation**

Currently, an injured worker can receive independent medical exams in an unlimited number of specialties. A claimant's lawyer may request independent medical exams by a psychiatrist, a psychologist, a neurologist, a neurosurgeon, an orthopedic surgeon, a chiropractor, etc. All of these different exams drive up the medical costs and attorneys' fees, and serve as an abuse of the system that drives up benefit costs. Also, a carrier is not allowed to charge these expenses as medical costs, but rather as legal and administrative expenses.

### **Recommendation**

This legislation limits independent medical exams to one per injury, and clarifies that these exams are to be charged as medical benefits.

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## **ELIMINATE INTEREST ON MEDICAL BILLS**

### **Current Situation**

The First District has ruled that interest must be calculated on unpaid medical bills and paid to the claimant. Employees do not pay for their medical care under the workers' compensation system, however, and payment of this interest merely increases the system's costs.

### **Recommendation**

This legislation eliminates this judicially created payment of interest on unpaid medical bills.

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## **REHABILITATION PROVIDERS' RIGHT TO MEDICAL RECORDS**

### **Current Situation**

The law requires access to all medical records without encumbrance, but some judges of compensation claims are denying those records to rehabilitation providers.

### **Recommendation**

This legislation clarifies that access to an injured worker's medical records must be given to all persons who are responsible for returning the employee to work.

## **ADMINISTRATION**

### **JUDGES OF COMPENSATION CLAIMS**

#### **Current Situation**

Cases involving workers' compensation claims are currently heard by judges of compensation claims who are housed in the Division of Workers' Compensation in the Department of Labor and Employment Security (DLES). The 31 judges are not accountable to any entity and are subject to pressure in their local jurisdictions. Delays in hearings on claims occur because there is no one to fill the void left when positions are vacant, or when the judges take time off.

#### **Recommendation**

Since the DLES will be eliminated this year, this legislation eliminates the positions of chief judge and judge of compensation claims and moves those functions to the Division of Administration Hearings (DOAH), which can improve the existing capacity to control scheduling, case load, time off, and other administrative functions. The rules for the judges would be promulgated under the Administrative Procedure Act, but the hearing process would be exempt from that act.

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## **APPELLATE BODY**

### **Current Situation**

Appeals of decisions on claims by judges of compensation claims are now heard by the First District Court of Appeal. This body does not always recognize the difference between civil and common law and the statutory remedy imposed in the workers' compensation system. The appeals court also has issued too many conflicting opinions, which subtracts from the self-executive nature of the workers' compensation system.

### **Recommendation**

This legislation creates the Workers' Compensation Appeals Commission, similar to bodies that exist in many states, which would be the first avenue of appeal on claims decisions. The First District would hear appeals from the Workers' Compensation Appeals Commission. Attorneys' fees on cases appealed to the First District would be limited to a maximum of \$3,000.

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## **DEPARTMENT OF INSURANCE**

### **Current Situation**

The state governmental entities that regulate banking and insurance are currently headed by Cabinet officers whose positions will be combined into one, Chief Financial Officer, after the 2002 elections. If state government organization remains unchanged, when that constitutional amendment goes into effect, one Cabinet officer will be responsible for the duties and responsibilities now carried out by two.

### **Recommendation**

This legislation would transfer all functions of the Department of Insurance and the Department of Banking to an entity under the governor and Cabinet. A commissioner of insurance and a commissioner of banking would serve at the pleasure of the governor and Cabinet, subject to

Senate confirmation. Both banking and insurance would have a separate division under the new entity, and each commissioner would have final agency action.

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## **ADJUSTERS AND MEDIATION**

### **Current Situation**

Some mediators require adjusters to physically appear at mediation sessions, even if the sessions are held outside of an adjuster's county. This is a costly, inefficient, and unnecessary use of adjusters' time.

### **Recommendation**

This bill would authorize adjusters to appear by phone for mediation session if they are represented by counsel. This would protect adjusters against abuse by claimants' attorneys while protecting the mediation system, which is working well.

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## **FUNDING THE DIVISION OF WORKERS' COMPENSATION**

### **Current Situation**

The operation of the Division of Workers' Compensation is now funded through an assessment on the premiums that employers pay for their workers' compensation insurance. Employers thus shoulder the entire burden (approximately \$42 million a year) of this function of state government that serves all citizens.

### **Recommendation**

This legislation transfers funding of the judges of compensation claims to general revenue, an appropriation of approximately \$16 million a year.

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## **ELIMINATE DOCKETING ORDERS**

### **Current Situation**

Judges of compensation claims are required to review each petition for benefits to ensure that it meets the specificity requirements of the statute. This slows down process of getting petitions set for mediation, pretrial hearings, and final hearings.

### **Recommendation**

This legislation eliminates the review process, which will reduce attorneys' fees and unnecessary paperwork.

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## **SETTING DEFINITE DATES FOR MEDIATION, PRETRIAL, OR FINAL HEARING**

### **Current Situation**

Currently, dates for mediation and pretrial or final hearings are tentatively scheduled and then canceled and rescheduled. These delays drive up the costs of the system and delay the delivery of benefits to claimants for months.

### **Recommendation**

This legislation would require judges of compensation claims to identify the dates for these sessions in the order. It also creates more reasonable time frames in the statute. Once the petition becomes final, mediation must be scheduled within 60 days; a pretrial conference must be scheduled within 90 days; and a final hearing must be scheduled within six months. If a session has to be rescheduled, a new date would be established within a reasonable frame of time and the date would be put in the order continuing the session.

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## **CONSTRUCTION EXCLUSIONS**

### **Current Situation**

In 1993 and 1998, the Florida legislature took steps to close loopholes in the exemption from workers' compensation coverage that were available to officers of construction companies. Despite these actions, fraudulent use of the exemptions continues to exist in the construction industry.

### **Recommendation**

The legislation eliminates all exemptions from coverage in the construction industry. This will help protect construction employees as well as the integrity of the system itself.

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## **CHILD SUPPORT ENFORCEMENT**

### **Current Situation**

A Miami trial court has ruled that judges of compensation claims be allowed to reduce settlements by the amount of any outstanding child support owed by the claimant.

### **Recommendation**

This legislation codifies that ruling.

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## **ENACT PROVISIONS OF HB 1149 (FILED DURING 2000 SESSION)**

### **Current Situation**

In the 2000 session, Rep. Jerry Melvin (R-Fort Walton Beach) filed a bill that was the product of two years of work. The non-controversial bill would have resolved a number of procedural and administrative problems faced by workers' compensation providers and carriers. It did not pass when it became caught up in another controversial issue.

### **Recommendation**

This legislation incorporates most of the provisions of HB 1149.

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## **WORKERS' COMPENSATION OVERSIGHT BOARD**

### **Current Situation**

The Workers' Compensation Oversight Board was created to act as a watchdog over the system, reporting to the governor and the legislature on issues and problems that arise. It has never filled that function, which makes it unnecessary.

### **Recommendation**

This bill eliminates the board.