

WORKERS COMPENSATION

By
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June, 2003

Mary Ann Stiles, Esquire, General Counsel of Associated Industries of Florida and President & CEO of Stiles, Taylor & Grace, P.A., was once again the leader of the business community's workers' compensation reform effort, as she has been since the 1970's. Stiles was the major drafter of the business community's proposed legislation, most of which passed. She also put together a major coalition from within the business and insurance communities, and led the coalition to the successful passage of the most significant workers' compensation reform bill anyone can remember. For Stiles, it was an effort of four long years.

In December of 1993, the late Governor Lawton Chiles walked into a legislative committee room filled with representatives of both the House and the Senate late one evening and told them that if they did not pass workers' compensation reform, he would call them back into another special session. Everyone knew this meant they would be meeting the week before Christmas. Chiles outlined a series of key points he expected to be in the workers' compensation bill. The Legislature reacted within the next day in a positive fashion. At the last minute, however, the trial lawyers traded off worker's benefits in order to retain their level of fees into the law. It has been almost ten years since the Legislature has address workers' compensation.

Fast forward to 2003 and the Legislature, again in special session, hears from Governor Jeb Bush that he is very serious about passing a workers' compensation law revision. Everyone knows that if the Legislature does not react, the Governor will call them back into special session. Bush goes even a step further and has the House and Senate leaders sign an agreement that they will pass a bill encompassing key points which the Governor demands be in the bill. The result - the best workers' compensation reform ever!

For the past six years, the business community has been urging the Legislature to change the law to stop the attorney driven system from being out of control. Businesses aimed at the outrageous attorneys' fees, whereby plaintiff workers' compensation lawyers are paid on an "hourly basis," which is unheard of in any type of plaintiff law in the nation.

Thanks to Governor Bush, Senate President Jim King, and House Speaker Johnnie Byrd, there is now a new workers' compensation law in Florida which should finally bring equity in this vital system. If all three of these gentlemen had not played the significant and tremendous role that they did over the past year, there simply would have been no workers' compensation reform. Florida employers would have continued to pay among the highest premiums in the nation. Now rates will come down!

The business community owes a debt of gratitude to Governor Bush, President King, and Speaker Byrd for their tremendous leadership in passing workers' compensation legislation this year which will definitely lower rates.

The various parties involved, including the Governor, Speaker, President, Coalition of Business & Insurance Industry, NCCI, unions and The Trial Bar, all played very interesting roles in this reform.

The Governor

Governor Jeb Bush appointed a Governor's Commission on Workers' Compensation during 2002 to review the law and make recommendations to the Governor and Legislature prior to the 2003 Session of the Legislature. The Governor's Commission traveled extensively throughout the state, took testimony from all parties, and concluded their work with a wide ranging report. Much of the report encompassed issues identified by the business community for the past six years but there were also new issues.

The Governor highlighted his intent that the workers' compensation law be amended in the right way for over a year at every opportunity. When the Legislature failed to agree on a bill during the Regular Session, the Governor forced the issue during Special Session A and took the unique approach of asking the President, the Speaker, and all of the key legislators working on workers' compensation to sign a pledge ensuring that they would pass a bill during the special session that encompassed all of the key points outlined by the Governor. All of his points were ones that the business community had been seeking to pass for over six years. They were based on data that had been developed to show that these were key areas where problems existed that skewed the law. Never before had anyone ever heard of a governor asking legislators to sign such a document, but it certainly worked.

Without the Governor's leadership in the workers' compensation area over the past year, it definitely would not have received the high profile that it did and probably would not have passed through the Senate, although it did have strong support in the House.

Governor Jeb Bush

The Speaker

Speaker of the House Johnnie Byrd (R-Plant City) let everyone know that he fully intended to pass a workers' compensation bill that would lower rates and at the same time be fair to injured workers. The Speaker was relentless in his pursuit of this goal throughout the session, and the House, on almost a strictly partisan basis, complied with the Speaker's desires and sent a bill to the Senate that would correct the system. The bill followed closely those issues advocated by the business community, and the Speaker held firm throughout the Regular and Special Sessions on the bill that the House had developed.

Without Speaker Byrd's firm stand on workers' compensation, there probably would have not been workers' compensation reform this year.

**House Speaker
Johnnie Byrd
(R- Plant City)**

The President

President Jim King (R-Jacksonville) advised the Senate that they were going to pass a workers' compensation reform bill. The Senate, which calls itself the more deliberative of the two houses of the Legislature, had not received any instructions from President King during the entire session in the form that he put his direction to them on workers' compensation. The President of the Senate cannot simply dictate to the Senate what they are going to do because it is simply not the nature of this body of the Legislature. In this instance, Senator King did just that - he told the Senators that they were going to pass workers' compensation reform, and the Senate started heading in that direction.

Time and again some Senators, even from the President's own party (Republican), tried to go astray and head off real workers' compensation reform. Each time, President King put them back on course and was strong enough to carry this all the way through to the passage of a real reform bill during the special session. Senator King was the only member of the Senate who was dedicated to passing workers' compensation reform. In the final analysis, the Senators from his own party followed him while all of the Democrats voted in opposition. The Senate, as a body, obviously did not want to pass workers' compensation reform in the manner that it was passed. It was only through Senator King's persistent efforts that reform was enacted.

**Senate President
Jim King
(R- Jacksonville)**

House Members

In the House of Representatives, the business community owes a great debt to those key House members who backed up and implemented Speaker Byrd's desire for workers' compensation reform. Representative J. Dudley Goodlette (R-Naples) was the "go-to man" and the coordinator of "getting the job done." Representative Allan Bense (R-Panama City), a businessman who understands what it means to pay high workers' compensation rates, was there all the way, backing up the Speaker and Representative Goodlette. Representative Dennis Ross (R-Lakeland) was the leadership technician prior to and during the early days of the session. Representative Don Brown (R-DeFuniak Springs) became the real technician in the later days of the session. Everyone was very impressed with his deep knowledge of insurance, in general, and of the

workers' compensation law in particular, as he put all the technical pieces together to create a bill that followed the dictates of the data and the desires of the House leadership. Representatives Connie Mack (R-Ft. Lauderdale) and Donna Clarke (R-Sarasota) worked hard on their Republican colleagues to keep the majority party headed in the right direction with regard to reform. Representative Ross, a workers' compensation defense lawyer, was viewed as the most knowledgeable person on workers' compensation in the House. Unfortunately, when the House leadership was ready to move their bill forward, Representative Ross was continuing to negotiate with the Senate and some of the interest groups. The House leadership was ready to move and did so. This is where Representative Brown moved in to take over the formation of the technical aspects of the bill.

The opposition in the House came from the Democrats. The leaders of the opposition were Representatives Stacey Ritter (D-Coral Springs), Dan Gelber (D-Miami Beach), Bill Galvano (R-Bradenton), Kevin Ambler (R-Tampa), and Susan Bucher (D-West Palm Beach). The opponents spouted the script of the trial lawyers throughout the session. In the final analysis, the House voted along party lines with the exception of three Democrats who voted for the bill (Representatives Ed Jennings (D-Gainesville), Sheri McInvale (D-Orlando), and Roger Wishner (D-Plantation)) and, thanks to the leadership of the House Republicans, a bill was passed which followed along the lines of what had been advocated by the business community and documented by data. The House rejected the trial lawyers arguments and accepted those of the business and insurance communities based on data.

The Senators

The Senators who assisted President King the most in getting a real reform bill through the Senate were Senators JD Alexander (R-Winter Haven), Tom Lee (R-Bradenton), Paula Dockery (R-Lakeland), and Jeff Atwater (R-Palm Beach Gardens). These Senators, always ardent supporters of the President, came into play later in the session after the initial Senators in charge failed to come forth with a bill which King would accept as one that would enact real reform. Their leadership and expertise in the law and its ramifications were key to passage of a real reform bill. Early in the session, Senators Bill Posey (R-Rockledge), Charlie Clary (R-Destin), and Jeff

Atwater (R-Palm Beach Gardens), took the lead in trying to put together a workers' compensation reform bill. Quite frankly, Senators Posey and Clary were led astray by the trial lawyers and concentrated on areas such as a state run insurance company, open rating, and other items advocated by The Trial Bar to mislead the Legislature. Senator Atwater disagreed with the approach advocated by the trial lawyers and supported the approach of business based on data. Senators Posey and Clary got off course from where the data showed everyone they should be heading. This ultimately put the three senators in the posture of not having a bill that would enact real reform. Interestingly, many of the directions in which Senators Posey and Clary wanted to go, were those that have been pursued by the State of California over the last 20 years with disastrous results. As the session drew on, it was Senators Alexander, Lee, Dockery, and Atwater who stepped to the forefront as the leaders in workers' compensation. To his credit, Senator

Clary joined in to head it in the right direction. Senator Posey never got there and is still advocating reforms which would not, in reality, create reforms.

Opposing real workers' compensation reform were Senators Skip Campbell (D-Tamarac), a trial lawyer and one of the Senate's most articulate members, Debbie Wasserman-Schultz (D-Pembroke Pines), probably the Senate's most liberal member and a great friend of the unions and trial bar, Tony Hill (D-Jacksonville), a union organizer, and Rod Smith (D-Gainesville), a very distinguished lawyer who, at many times is called upon to be the legal advisor to both parties in the Senate. Basically, the workers' compensation lawyers (both plaintiff and defense) were providing these Senators and others with very misleading information - in other words, they lied constantly to the Senators and the House members. This created great confusion among some very knowledgeable Senators who ended up opposing the bill.

In the Senate, the vote was straight down party lines with the Republicans of President King's party prevailing.

Business and Insurance

The business community has been trying to amend the workers' compensation law for the last six years unsuccessfully. Associated Industries of Florida has always taken the lead on workers' compensation. It became obvious that if reform was going to succeed, it was going to take an effort by the entire business and insurance communities. After the 2001 Session of the Legislature, when a bill failed in the final hours, which was very much like the bill that ultimately passed this year, we decided to form a "coalition" of business and insurance leaders to pursue reform.

Mary Ann Stiles, General Counsel of Associated Industries of Florida, was given the responsibility to form and lead this coalition. What evolved was the "Coalition of Business & Insurance Industry," which started working diligently with a cross-section of all the major business organizations in Florida and all the major carriers writing workers' compensation in our state. (See list of "Coalition" active participants on last page.)

The Coalition started its work in 2001 and worked diligently through the 2002 Session and was unsuccessful in passing a bill in that session. The Coalition, immediately after the 2002 Session, started once again and has worked around the clock through the passage of the bill this year. The members of the Coalition were led by Mary Ann Stiles and an executive committee composed of Tom Koval, General Counsel of FCCI, and Gary Guzzo of Foley & Lardner. The activities of these three in plotting the course of action, drafting bills and amendments, and preparing and directing the distribution of talk sheets and other data to assist Legislators, was invaluable. The "around the clock" e-mails at all hours of the day and night from Stiles will long be remembered by members of the Coalition.

In fact, the work of the Coalition may well be the “finest days” of cooperation among all of the business associations, businesses and insurance companies that anyone can remember. The bottom line is - it worked! It also showed the various business organizations that they can, in fact, work together and succeed.

Through the Coalition, there was instant action and reaction over the last two years, and particularly during the times the Legislature has been in session. The diversity of the Coalition and the different access to data and key business and insurance leaders was invaluable in being able to pull data and key contact people together at a moment’s notice, while directing attention towards Legislators to lobby them and provide them with the data that they were requesting.

The business and insurance leaders knew from the outset that the key thing in reforming the law was to get rid of the hourly attorneys’ fees because this was driving the cost to the detriment of employers and injured workers. It took a massive amount of data collection and analysis to prove this point, and the Coalition was instrumental in providing this. The main cost driver, attorneys’ fees, was the main thrust of the Coalition to correct by putting plaintiff lawyers on a system whereby they receive a percentage of the recovery of the injured worker. This was accomplished and this more than anything will lead to cost reductions in the system and enable workers’ to receive more timely benefits, as the lawyers will not simply drag the cases on for years so they can bill hourly rates.

The Trial Lawyers

It is important in workers’ compensation to identify the “trial lawyers” in terms of the law and from the business person’s point of view as to who is working for and against business in the legislative process. The “trial lawyers,” who we talk about, are both plaintiff and defense lawyers. One would normally think that your defense lawyer is working for you as a business person and as an insurance company. In terms of the legislative process, we have always found that this is definitely not the case.

Both plaintiff and defense lawyers have continuously opposed real legislative reform in workers’ compensation. While there may be the occasional defense lawyer who advocates real workers’ compensation reform, we have never met one and have never seen one in Tallahassee when workers’ compensation is being debated in the Legislature with the exception of our General Counsel, Mary Ann Stiles, of Stiles, Taylor & Grace, P.A. in Tampa. Mary Ann has led every legislative reform for the business community since the 1970’s. So the next time your defense lawyer tells you “I was with you,” have him call us, because we certainly do not remember anyone from the defense bar lobbying for real workers’ compensation reform.

The trial lawyers were their own worst enemies during 2003 in their opposition to workers’ compensation reform. First of all, the Governor, the Speaker, and the President had all decided they were going to enact legislative reform. So in reality, the trial lawyers were fighting an uphill battle. They were still their own worst enemy by using the worn out tactic and trying to use the same old arguments that everything was due to “bad investments of insurance companies.” This

is the same argument that they use in opposition to tort reform and medical malpractice reform. In fact they are using it at the present time to oppose the impending special session of the Legislature on medical malpractice. The trial bar advocated the creation of a state insurance company, open rating for workers' compensation, and other worn out arguments. What they advocated was going in the direction of states like California, which have a disaster on their hands in workers' compensation because they did create a state insurance mechanism which the present state Insurance Commissioner is trying to slow down because of his concern with regard to solvency. The pitch of the trial lawyers is based on lies and deceit, as usual. Either they do not really know the workers' compensation law, which to some extent is true, or they simply lie with regard to what the present law says and what proposed measures would do. To the credit of the business community, all of the arguments used by business and insurance were based on data. None of the trial lawyers' arguments were based on data. In the end, the Legislators wanted to know "what does the data say?" This is a compliment to the Legislature, and we believe that more and more in the years ahead, they will want to know the data on the various issues rather than the emotional and untruthful arguments which The Trial Bar puts forth.

As stated above, the real issue in the whole workers' compensation reform battle was attorneys' fees. For the past eight years, workers' compensation plaintiff lawyers have been paid on an hourly basis rather than on a percentage of the award basis, which is the case throughout the entire tort law nationwide. Getting paid on an hourly basis, as a plaintiff lawyer does, gives them incentive to keep cases going for years so they can "write down" hours spent on a particular file. There is no incentive to settle a case in the best interest of their client when they are receiving an hourly fee. Rather, the incentive is to keep the file open and to keep billing hours against the file rather than settling the case in best interests of their client. The hourly rate definitely set up a conflict of interest between the plaintiff lawyer and his client. But it was one that was very lucrative to the plaintiff lawyer, and therefore, they went all out during recent legislative sessions to defeat the move of business and the insurance industry to eliminate the hourly rate. The hourly rate was also very good for defense lawyers since it ensured that their hourly rates would be more because the cases stayed open longer. Ultimately, all of this works to the detriment of the employers, who pays the workers' compensation premium, and the injured worker who wants and needs the payment on a timely basis of benefits.

In effect, the hourly rate for plaintiff lawyers in workers' compensation pitted the plaintiff lawyer against his client and the defense lawyers against his client. They will all deny this, but we all know they don't tell the truth.

National Council on Compensation Insurance (NCCI)

The National Council on Compensation Insurance (NCCI) is the rating entity for the State of Florida. NCCI collects and analyzes all the relative data on workers' compensation and provides rating information to the Governor and the Legislature and annually files proposed rates with the Office of Insurance Regulation.

The work of NCCI is done by actuaries who are trained to analyze data and come up with answers. Most people don't even know what actuaries do. For those who do, they will tell you that if you place a set of numbers in a room before two actuaries, they will never reach the same conclusion. That is why NCCI and others who utilize actuaries have a number of them so that they can come to a consensus. Throughout the Legislative Session and Special Session, NCCI provided, as always, the value of various provisions being put before the Legislature. In other words, NCCI would advise the Legislature that particular language would cause an increase or decrease in rates and would give the appropriate amount. Any organization that does this is going to be criticized. Over the years, the business community, the insurance industry, and legislators have all criticized NCCI and other actuarial consultants as to the accuracy of their numbers. The bottom line is NCCI has the proper systems in place, the trained actuaries to do the work, and they have the responsibility to provide the numbers which everyone has to rely on as a "range" of what particular language will do in terms of increasing or lowering rates.

The Legislators who did not receive the answers they wanted were critical of NCCI, while those who felt the numbers favored their position were in support. This is the way it will always be, whether it is NCCI or some other entity that provides the numbers. There has been talk by some Legislators who did not like what the numbers said, that they want another entity to provide the numbers in the future. In fact, the Senate will be looking at NCCI in a study during the interim to determine what they do and how they do it. This is good!!! The Legislature needs to understand how NCCI operates and how they arrive at the numbers. Once there is a better understanding, there will be more comfort.

In the past, Associated Industries has, at times, been critical of the work of NCCI, and we may well be so in the future. The bottom line is, as long as the systems are correct and the data is properly collected, NCCI, the only rating entity of its type in the nation, has over the years done a commendable job. They did so during the last session, and once the Legislature understands that the numbers are the midpoint of ranges and not exact specific numbers in the methodology which NCCI uses, there will definitely be more comfort.

The creation of a state entity or another entity to provide workers' compensation data to the Governor and the Legislature is definitely not warranted.

Lori Lovgren, Esquire, State Relations Executive, was the key contact for NCCI with the legislators and the Office of the Governor. She took a daily beating from those who did not view the latest NCCI rating as furthering their cause, but she did a very competent and professional job throughout.

What's Next???

There are those in the Legislature (the ones who lost) who are trying to come back very rapidly to undo the workers' compensation reforms which have just been enacted. In the Senate, there are Republicans as well as Democrats who want to conduct their own studies that are intended to provide the basis to undo the reforms. We don't really see Senate President Jim King being interested in letting the Senate undo a significant and good reform bill.

In the House, it is obvious that the leadership is firm in its support of the bill that ultimately passed since most of the language is the original House bill. Since it takes two houses of the Legislature to pass a bill, we frankly don't see any eroding of the major provisions of the new workers' compensation law, but the business community must be present at all of the interim meetings to provide explanation and data as to why the bill that passed should be retained in its present form. In other words, before the Governor has even signed the workers' compensation bill into law, there are those in the Legislature - in the minority, but in both parties - who want to undo the reform and return to certain provisions of the old law. It was mainly attorneys' fees that caused the problems that we have just tried to resolve, and it is, once again, the attorneys who are pushing to undo the reform.

We really hope that "What's Next???" is that the Legislature continues on to take care of the other major problems of the state, and allows the reform bill to start working. As the years go on, there will certainly need for future amendments to the law, but it would be unthinkable to pass a major reform bill in 2003 and to start tinkering with it in 2004 in ways that everyone knows would be detrimental to the interests of employers and injured workers.

Oh, by the way... it goes without saying, but I will say it here just as a reminder, that the workers' compensation attorneys will certainly challenge the constitutionality of the law in the Circuit Court. AIF general counsel, Mary Ann Stile, is standing by to defend the law as she has each and every time they have challenged legislative enactments over the past twenty five years which were good for employers. So the saga continues.

"COALITION OF BUSINESS & INSURANCE INDUSTRY"

Key Participants

<p>Alliance of American Insurers</p> <p>David Anderson William H. Stander</p> <p>American Insurance Association</p> <p>Cecil Pearce</p> <p>Amerisure Companies</p> <p>Jim Gibson</p> <p>Associated Builders & Contractors of Florida, Inc.</p> <p>Richard Watson</p> <p>Associated Industries Insurance Services, Inc.</p>	<p>Florida League of Cities</p> <p>Kraig A. Conn John C. Thomas</p> <p>Florida Retail Federation</p> <p>Bill Herrle</p> <p>Florida Roofing, Sheet Metal & A/C Contractors Assn</p> <p>Anna Cam Fentriss</p> <p>Foley & Lardner</p> <p>Gary Guzzo</p>
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