Associated Industries of Florida

EMPLOYER ADVOCATE

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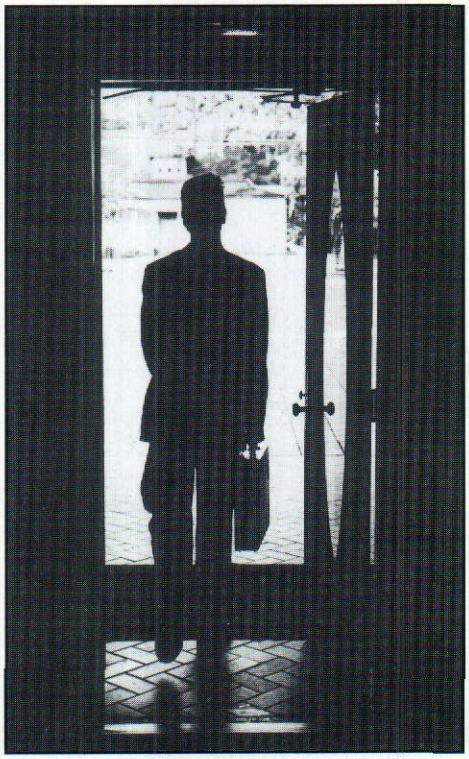
Don't Let the Door Hit You On the Way Out

Get out your yellow pages and let your fingers do the walking through page after page of advertisements by attorneys and you'll notice a common theme. Most of the ads promise "free initial consultation" if "you've been hurt on the job."



Now I think we can all agree that attorneys, especially those that specialize in workers' compensation and personal injury litigation, are motivated by sincere benevolence for their fellow man and passionate devotion to the cause of justice. They don't spend all these advertising dollars because they want to make money any which way they can. No, they tout their services because they want to help the poor and downtrodden.

Which makes it hard to understand why the American Bar Association thinks it needs to spend $700,000 this year on a campaign to improve the image of the legal profession.

In reality, the legal profession has earned the reputation it has. Sure, there are highly professional and ethical lawyers — maybe even the majority. But many are dirty players and many more view our legal system as a wrestling arena, some kind of sophisticated Darwinian structure where only the strongest (i.e. the most cantankerous) survive. A large percentage of those in the latter category have found a warm, cozy home in our state's workers' compensation system.

That system is beset with problems created by unsavory members of every component involved in the equation. Employers commit fraud on their premiums. Insurance companies ignore their obligations. Employees dabble in workers' comp as if it were a lottery where everyone who buys a ticket wins big. Service providers wriggle through it collecting payments for questionable and unnecessary procedures.

Members of every group admit that some of the individuals they represent do indeed cause trouble — every group, that is, except the trial lawyers. The president of the Academy of Florida Trial Lawyers, Wayne Hogan, and his cohorts would have you believe that the attorneys are the only element in the system that bears no guilt for the mess it's in. Don't believe them. Attorneys create the conditions that foster most methods of abuse practiced in workers' comp. And that's why employers are

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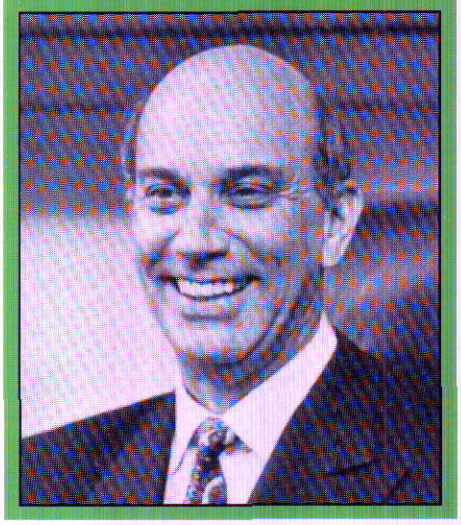
WORKERS' COMPENSATION SPECIAL EDITION

President's Message



It's Going To Be a Bumpy Ride

by Jon L. Shebel, President and Chief Executive Officer, Associated Industries of Florida

If a legislator tells you he's going to fix your workers' comp problems by mandating a rate freeze, you'd better hold onto your seat.

In this upcoming special session, chances are some lawmakers will latch onto the idea of rate freezes as an easy way out of this mess we call Florida's workers' comp system; but rate freezes won't work. And cutting the benefits to injured workers won't help either. The only choice legislators have is to tackle the tough issue of cutting out the players on the fringes of the equation — especially the lawyers.

That won't be easy for many of our senators and representatives who depend on the legal community for campaign subsidies. It won't be easy for our many lawyer/lawmakers who don't like to side against their distinguished colleagues. And it won't be easy because, as Jacobo Barrocas, one of the owner/managers of Injection Footwear Corporation, says, "We are dealing with a profession of individuals trained to use words to manipulate, not create."

Fortunately the people of Florida can rely on the strong and steady guidance of leaders like Gov. Chiles and Sen. Robert Wexler (D-Boca Raton), both of whom, coincidentally, are lawyers. After a rocky start in office, Gov. Chiles has proven one of the best friends employers could have. He understands how important a strong economy is to the welfare of the people.

Sen. Wexler is a pleasant surprise. He is a man of strong character and intellect who performs his duties with integrity. Whether he agrees with you or not, he keeps an open mind and makes fair decisions based on what he truly believes is best for the state. Both Gov. Chiles and Sen. Wexler bring honor to the the trust placed in them by the voters.

Our governor must hold steady in his quest for meaningful workers' comp reform. He has pledged to veto every bill passed by the Legislature that doesn't fulfill that promise, and says he will keep calling it back into special session until legislators get the job done. He will need the support of each member of the business community because he will be roundly criticized along the way. The media will gripe about the costs to taxpayers of these assemblies. Lawmakers will attack him for vetoing their initial feeble efforts.

And the trial attorneys will lead the general outcry. After all, they stand to lose a lot of money that they've gained at the expense of Florida employers, employees and consumers. At some point they will go into a full-scale panic if they see the governor holding firm to his resolve.

If legislators cannot muster the political courage to make these changes, they will have perpetrated a fraud on the people of this state.

There are three requirements that employer and employee representatives alike are demanding: creation of an office to help employees resolve disputes over benefits; establishment of assistant attorney generals to provide free legal assistance to injured workers; and reform of the workers' comp judicial system.

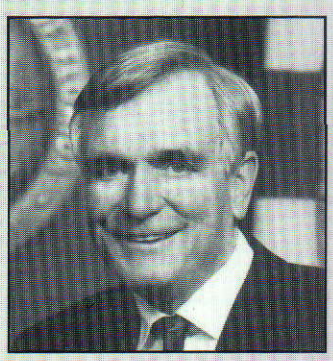
I'm going to tell you up front: the only groups supporting those three recommendations are the employers, the employees and the governor — oddly enough, the three groups that have the most at stake in the issue. Fourteen years ago, when Florida last overhauled its workers' comp system, attorneys were applying to medical schools in droves. They thought the new law had made them obsolete. Well, being opportunists they quickly learned to circumvent the spirit of that system, with the willing assistance of the judges who supposedly administer justice under that law. Today, they have created a scheme that allows them to manipulate the system like molding clay while receiving huge fees for their efforts.

Workers need someone to take their side and defend their rights. High-priced legal operators don't fill that role now and they never will. Until injured employees and their employers have a disinterested party who will help employees get the help they need, workers' comp will never work.

If legislators cannot muster the political courage to make these changes, they will have perpetrated a fraud on the people of this state. If they allow this deformed system to continue, they will be totally negligent.

Employers, your opinions will be heard and your demands met — but only if you speak out. I urge you to contact your representatives' and senators' offices every week, every day, until they fulfill their responsibility to you. Even if you don't talk to them directly you can have an impact. Just tell their staffs you support the governor's package on workers' compensation. They'll get your message loud and clear.

Sorry legislators. There's no easy way out this time.



A Message From Gov. Lawton Chiles

The workers' compensation crisis in Florida is breaking the back of our economy. With the second highest rates in the nation, legitimate businesses that are paying their fair rate are getting killed. At the same time, a few special interests are getting rich at *your* expense.

Here are some more facts about this broken system:

- Florida's workers' compensation rates are 95 percent higher now than they were in 1978.
- Between 1988 and 1992, claimant attorneys' fees in this state increased from $69 million to more than $137 million.
- Every year, benefits to injured workers and medical benefits top $1 billion.
- In 1989, the average premium an employer paid was $3.46 per every $100 payroll, 55.5 percent above the national average. In 1992, the average premium was $6.71 per every $100 of payroll. Florida is fourth in the nation in total premiums paid.
- According to the Florida Home Builders Association, up to 10 percent of the cost of a new home is tied up in workers' compensation costs.

The people of Florida are in dire need of serious workers' compensation reform. When we worked together to pass reforms in 1992 and 1993, some special interests thwarted our efforts. Soon I will call a special session to focus on the workers' compensation crisis, and we can't afford to settle for anything less than meaningful reform.

To achieve this goal, I am taking the cause to the people. Our best hope for reform is to educate the Legislature about problems with the system — and the need for change.

I will expect at a minimum that the Legislature accomplish the following:

- lower premium costs by 20 percent;
- reduce fraud in the workers' compensation system;
- significantly reduce litigation and restructure the way workers' compensation judges are appointed, reviewed and retained;
- promote return-to-work initiatives;
- cut down on paperwork and administrative costs;
- reduce medical costs by treating injured workers through managed care networks;
- create an employee assistance office to provide assistance and information to injured workers;
- improve safety in the workplace;
- improve regulation and reporting requirements for group self-insurance funds;
- create a joint underwriting association that would equitably spread the assigned risk burden; and
- provide a forum where labor and management can regularly recommend to the Legislature and the governor positive changes to the workers' compensation system.

Significant steps can be taken in each of these areas, and they will lead to great improvements in the workers' compensation system. I appreciate your help in making these reforms a reality for Florida.

Attorneys, from pg 1.

asking the Legislature to rid the system of the influence of trial lawyers.

During this year's session, the Division of Workers' Compensation announced that the fees paid by carriers to claimant attorneys (the attorneys hired by injured workers) during 1992 totaled $137 million. Claimant attorneys and the elected officials who support their position made much of the fact that those fees represented only 4 percent of the total spent on workers' compensation during 1992. They used that low percentage to defeat the creation of an office to provide free legal assistance to workers, a proposal supported by Gov. Chiles, business associations and employee representatives.

What they, and those who listened to them, chose to ignore was the complete picture of the drain created by those attorneys. The much-cited figure of $137 million does not include the fees carriers paid their attorneys for representation in vast numbers of cases with dubious merit. It does not incorporate the money injured workers pay their attorneys out of their own pockets. It does not encompass

Reform — Attorney Style

Claimant attorneys would have you believe they are the devout advocates of injured workers; a lone voice for justice embodying a modern David standing before the awesome and terrible power of today's Goliath — insurance companies and employers. In all truth, they have made every effort to silence other voices that would speak for employees in a stealthy bid to get rid of their competition.

Trial attorneys are the force behind the weakening of the Division of Workers' Compensation, the body empowered by the Legislature to offer assistance and support to injured workers in the recovery of the benefits owed to them. With the division performing that task, there was no role, and therefore no profit, for attorneys in the workers' comp system. Once the attorneys diluted the authority and the ability of the division to help employees, the door opened wide for the attorneys to commence the cycle of litigation that threatens to destroy our state program.

If you look under the trial attorneys' cloak of self-righteousness, you'll find that the emperor has no clothes — and it's not a pretty sight. Their efforts on behalf of employees prove they are false friends. And the games they play have contributed mightily to the mushrooming growth in the rates charged to employers for workers' comp insurance. The costs have stifled business growth, which equates to job creation.

The burdensome effect of the cost of insurance extends beyond the stifling of employment opportunities. Workers' comp is essentially a payroll tax. The rates employers pay are based on the kind of work employees perform and the wages they earn; the higher the wages, the higher the premiums. As the price tag for insurance becomes a significant factor in business expenses, employers seek to control their costs by controlling the payroll factor. Therefore, fewer employees are hired, and those already on the job find their wage increases are insignificant or nonexistent.

This is the kind of justice gained by attorneys for the employees of Florida. Still, the illustrious members of the legal profession would have you believe they take a sincere interest in creating a workers' comp system that works for workers.

During the 1993 Regular Session, Gov. Chiles presented a consensus reform proposal designed by representatives of the governor's office, the division, Associated Industries of Florida and the AFL-CIO. Once it hit the House of Representatives, though, the consensus proposal went through extensive reshuffling, guided by the hands of the trial attorneys and their legislative cronies. If you take a look at some of the "reforms" proposed by this group you'll discover the true effect they would have on the system; a true effect the trial attorneys wanted to mask.

The trial attorneys repeat their refrain long and often: "we're not the problem, _____ (fill in the blank) is."

Please see Reform, pg 18.

the costs of all the frivolous lawsuits the claimant attorneys file and then lose. It does not take into consideration the influence the absurdly high fees paid to attorneys have on the system (more on that later). And it does not expose the costs engendered by the deceptive and exploitive practices claimant attorneys use to drive their stake in the workers' comp money machine.

These are strong accusations. Some might claim they are exaggerations, but ample evidence exists of the impact of attorneys on the destruction of the workers' compensation system. The rest of this article gives a review — one that is by no means exhaustive — of the part attorneys have played.

Is it an injury — or isn't it?

A workers' comp case begins with an injury. Under Florida's workers' compensation law, an employee is eligible for benefits if his injury is caused by an accident at work. According to the *Florida Statutes*, "'accident' means only an unexpected or unusual event or result, happening suddenly" [F.S. 440.02(1)]. The law defines a compensable injury as a "personal injury or death by accident arising out of and in the course of employment, and such diseases or infection as naturally or unavoidably result from such injury" [F.S. 440.02(17)].

These definitions may seem easy to understand, but they aren't — primarily due to claimants' attorneys, who have spent the last 14 years undermining the legislative intent behind those definitions. For instance, attorneys have filed lawsuits on behalf of claimants who suffered injuries when they left the office on break, while they were at company picnics, as they were crossing the parking lot to get into their cars and drive home. Tying up the court system with cases such as these fosters a general sense of frustration and irritation. The fact that judges, and more importantly, the First DCA, actually award benefits in these cases enrages employers and insurance companies.

These are the circumstances employers and insurance carriers have to consider. The carrier's claims adjuster investigates the facts surrounding the "injury" and makes a seemingly logical decision to deny compensation. But logic apparently has no place in workers' compensation.

Let's take a look at one 1981 case involving the question of whether an injury was compensable under workers' compensation. In this case, two employees were both dating a third employee, only the first employee didn't know she was involved in a romantic triangle. One day, in the company cafeteria, she found out about her lover's infidelity from the other woman. The next day she overheard employees gossiping about the situation, became enraged, and attacked her competitor, who stabbed her with a knife provided by the employer for peeling shrimp.

Doesn't exactly sound like a case where the employer should have been held responsible for the injury, does it? Well, the claimant managed to find an attorney who thought otherwise, and he took the case before a judge who agreed that the claimant deserved workers' compensation benefits. The employer turned to the First District Court of Appeal, hoping to receive a logical resolution to the case. That's not what happened.

According to the Florida Statutes, "'accident' means only an unexpected or unusual event or result, happening suddenly" [F.S. 440.02(1)].

The First District Court upheld the claimant's right to receive benefits. Why? Well, first of all, if the three employees hadn't worked together, none of this nasty business would have occurred. Second, if the employer hadn't made that knife available, the claimant would not have been stabbed. Finally, the claimant got mad when she overheard all that gossip. Now, we all know that since gossip is just part of our working conditions, it's our employers' fault if we react inappropriately to innuendo.

In 1979, Associated Industries of Florida published a book to explain the new law to employers. That edition required 52 pages of text to explain the entire law. The latest edition takes 57 pages merely to explain the definition of an injury. Has the Legislature actually changed the law that much over the last 14 years? No — the lawyers and the courts have, with case after case of absurd and conflicting interpretations of what injuries are covered by workers' compensation. This conflict increases the adversarial nature of the system and swells costs by expanding the number of people who receive benefits. It also encourages abuse and breeds the confusion that lawyers need to stay in business.

How to make a fortune without even trying

It's time to play let's pretend. Suppose that we get everyone to agree on just what constitutes a compensable injury — one that qualifies a worker to receive workers' comp benefits. Would that solve all our problems? Unfortunately, the answer is no.

When an employee gets hurt on the job, workers' compensation will pay for all of the medical treatment necessary to take care of the injury. If the injury causes the employee to miss more than seven days of work, he is eligible for benefits to compensate him for lost wages. Until the employee returns to work, he is eligible for temporary total disability benefits (TTD), up to 260 weeks. If he is able to return to work but has some restrictions caused by the injury, he receives temporary partial disability (TPD) benefits, up to 260 weeks. Once the doctors have done everything they can to heal the employee, he has reached a point called maximum medical improvement (MMI). If there are lingering

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Attorneys, from pg 5.

effects of the injury, the doctor assigns an impairment rating to the employee, which determines how long the employee will receive wage loss (1 percent impairment means he gets wage loss for 26 weeks, 5 percent means he gets it for 52 weeks, and so on — up to 364 weeks). If the employee's injury has caused him to be permanently and totally disabled (PTD) — if the doctor says he will never be able to work again — he gets benefits for the rest of his life. And these are usually technical, not actual PTDs. If his condition improves at a later date, the carrier may reopen his file for another determination of his eligibility for benefits.

It's a confusing system, isn't it? Imagine it from the perspective of an employee. If he has a question about his benefits or if he thinks he is being treated unfairly, who can he turn to? The insurance company? That's hardly a disinterested party, and unfortunately some carriers do not give employees equitable treatment. Who else is available? Not the employer, since most of them don't really understand the ever-changing and complex world of workers' comp law. Not the Division of Workers' Compensation, which is woefully under-staffed and under-trained. As a matter of fact, the most common piece of advice a worker receives from the division is, "Call a lawyer." So he does.

Now you might say, "Well, it serves the insurance company right. It's trying to cheat the employee." But usually it isn't. Insurance companies are simply attempting to pay benefits in accordance with the law. They may have analyzed the case and legitimately determined that the employee does not deserve the benefits he is claiming. Or, there may be a misunderstanding or human error involved. Whatever the situation, the means do not exist to resolve a dispute fairly, agreeably, quickly and inexpensively. And the results of that lack reverberate throughout the system.

All right, now we have the lawyer involved. What happens? The only way a lawyer is going to get paid a fee for his efforts is if he hassles the insurance company so much that they'll throw a lump sum of money at the claimant just to get rid of him. Otherwise the lawyer has to worm his way into a courtroom and win additional benefits for his client. No incentive exists for the attorney to resolve the matter without tying it up in knots.

Please see Attorneys, next pg.

The Long Arm

Why does Associated Industries insist on cleansing workers' compensation of the presence of lawyers? After all, the medical component of the system accounts for more than 50 percent of the costs while lawyers only account for 4 percent.

First of all, that figure of 4 percent is a devious smoke screen that does not reflect the true expense connected to attorney involvement. The rise in workers' comp medical costs is directly related to the dizzying rate of inflation in health care. In fact, the rate of medical inflation in workers' comp is higher than that of the wider market place.

There is another ingredient, however, lurking behind skyrocketing medical costs, and is directly tied to the actions of claimants' attorneys. The accompanying article, *Don't Let the Door Hit You On the Way Out*, portrays many of the devices and stratagems employed by these attorneys to drive their collection of fees. Every tactic they use depends on one central notion: keep the employee out of work as long as possible, and attorneys use medical services to delay the claimant's return to work. They manipulate the medical system in a search for stronger and more powerful ammunition in the fight for higher fees.

Doctor-Shopping: If a claimant gets good news from the doctor, that's bad news for the attorney. The attorney doesn't want the claimant to be healed or even appear healed. His livelihood depends on dodging the purpose for workers' comp, which is to heal injured employees and get them back to work. The lawyer is not going to make any money if that happens. So, if the doctor says the employee is all better, the first thing the lawyer is going to do is find another doctor. And if that doctor doesn't give him the diagnosis he wants, the lawyer will look for another one and another one until he finds a provider who's willing to play along.

Inventing a Need: In 1987, the impact of chiropractic care did not even appear as a blip on the workers' comp radar screen. Six years later, chiropractors represented 8 percent of ***all*** medical costs — or 4 percent of overall system costs. What did that industry do to create that kind of growth? Simple. They told the lawyers what the lawyers wanted to hear. Trial attorneys regularly hold seminars to teach their colleagues how to boost income. One popular piece of advice they freely share: "If you can't get a good impairment rating, send your client to a chiropractor. If you send your client enough times and you let the chiro make some money, he's going to reward you with the impairment rating you want."

So, basically, the lawyers manipulate chiropractors, the chiropractors manipulate spines, and everyone manipulates workers' comp.

Lawyers also regularly invent new professional designations for members of the medical community. One favorite tactic is requesting the carrier provide a neuro-psychological consultation. A neuro-psychologist is a neurologist who also has a degree in psychology. What does that mean? The lawyer can get a physical impairment rating ***and*** a psychological impairment rating from the same doctor. One-stop impairment rating stacking.

A few years ago, nobody had even heard of neuro-psychologists. Today, if you ask a claims adjuster about them, be prepared to duck.

Of the Lawyers

The claimants' attorneys have played sugar daddy for them and a legion of other medical specialties. They have invented a niche for pain management clinics, work hardening programs, physiatrists. Most people don't know these services exist and they can hardly contemplate throwing good money after them. But the claimant attorneys need them, and these guys have responded with great loyalty.

Preserving the Silence: A claimant attorney's biggest fear is what his client might do or say, so he will take extraordinary measures to keep the injured worker incommunicado. He never knows if his client might say during a conversation with his employer: "Oh, I'm feeling a lot better;" or "When I get the jacuzzi my lawyer's going to ask for, you'll have to come over." The claimant might also say something to the carrier, like: "Well, of course I couldn't do a job search last week. I was on a camping trip in the middle of nowhere."

That communication barrier blocks every attempt by the employer and the carrier to monitor the progress of the employee's recovery and get him back to work. The point cannot be stressed enough: the entire purpose of the comp system is to help the employee recover so that he can return to work; and the entire objective of the attorney's scheming is to keep the employee away from gainful employment.

If an employer contacts an employee to tell him there's a job available for him, the claimant's attorney will fire off an indignant letter to the employer's attorney demanding an end to the harassment.

Attorneys block every attempt on the part of the employer or carrier to get information on the status of the worker's health, and providers aren't much help either. Doctors routinely neglect to give the carrier timely notice that the employee has reached maximum medical improvement and is released to return to work. This means the carrier pays additional disability benefits to which the employee is not entitled, since he should have been working. Of course, chances are slim that the carrier will recoup the loss of money. Furthermore, the carrier has no course of action to take against the provider, except to take him off its referral list.

"There's gold in them thar hills!": That is the actual headline on a flyer distributed by a national rehabilitation association. It asks its members: "Are you getting your share?" If not, the association will enroll you in a seminar to teach you how to hit the mother lode in workers' comp.

Service providers, such as rehabilitation specialists and the others mentioned above, have learned a lesson from their buddies, the trial lawyers: workers' comp is a rich vein; if you don't protect your stake, you're going to lose it. Step right up and learn the easy way to manipulate the system.

Uninvited Guests: Is it any wonder that employers feel like they're running a workers' compensation motel, filled with unwanted visitors who raid the refrigerator, borrow their clothes, mess up the house, and just won't leave? Actually, workers' comp is more like a host organism that supports a number of parasitic bacteria.

Or perhaps the trial attorneys are right: there's nothing wrong with workers' comp; all these problems are in your head. Maybe what you really need is a neuro-psychologist. I know a lawyer who can refer you to a good one.

Attorneys, from previous pg.

Legal Michelangelos

To get into the courtroom a lawyer has to create an issue. He has to demand some benefit for his client that the insurance company will refuse. Create is the operative word here. And some of these guys work the system with the virtuosity of a master artist. Some even file "shot gun" claims that some judges refuse to dismiss — and guess what? Award attorneys' fees!

Lawyers use a number of different strategies, bringing us back to all of this TPD, TTD and MMI business. He can claim the employee is TTD instead of TPD. He can claim the employee has not reached MMI and therefore should still receive TTD benefits that are higher than wage loss. The attorney can also file a claim for TTD, TPD and wage loss from date of accident and continuing, and most judges do not dismiss these claims either. He can orchestrate a higher impairment rating for his client, thereby expanding the length of eligibility for wage loss. Or he can figure out a way to get his client declared permanently and totally disabled. But no matter what, he's got to do everything he can to keep his client off the job until he can finagle a settlement out of the carrier. A settlement is the lawyer's first priority since he'll get a fee no matter what. If he can't maneuver his way into a settlement, he'll try to get the case into a courtroom. If he loses the case, he doesn't get a fee; but the chances of his coming out a winner are virtually guaranteed. Claimant's attorneys win approximately 70 percent of the cases they argue.

Under Florida's law, the employer/carrier allegedly gets to pick which doctor will treat the employee. If that seems unfair because, after all, the worker is the one who's being treated and therefore should pick his own doctor, consider this: workers' comp carriers use doctors all the time. They have a good grasp on the levels of competence among different practitioners. Furthermore, the carrier and the employer are the ones paying the bills; the employee pays nothing for his care. Finally, if the employee does not like his attending physician, he can request a change. The change must be made by the employer/carrier unless it asks for a hearing with a JCC.

This is one of the major areas of contention where a disinterested party could intervene to resolve disputes before they are blown out of proportion. As stated earlier, however, there is no

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disinterested party involved in the system. The lawyers take full advantage of that, and here's a simple explanation how they do it.

Let's say an employee is hurt and the injury is serious enough to keep him out of work. The employer notifies the carrier, who refers the employee to a doctor. After two weeks of treatment, the doctor tells the employee he's ready to return to work, but he can't lift anything heavier than 50 pounds and he needs further medical treatment. The employee doesn't want to return to work; he wants to keep drawing TTD benefits. If he went back to work, he would receive TPD benefits — in other words, less money.

For whatever reason, the employee has hired a lawyer who then requests a change in physician. The carrier complies and the employee goes to the second medical provider. This doctor tells the employee that, not only is he ready to return to work, he is 100 percent better. The employee needs no further treatment and he has no impairment. That's the last thing the lawyer wants to hear because that means all benefits are cut off, so he requests a third physician (or a chiropractor).

Again the carrier complies. This third physician tells the employee he is nowhere near ready to return to work — he's still TTD. In the meantime, the first physician has decided the patient has reached MMI with a 2-percent impairment. The lawyer is perfectly satisfied with doctor number three because that physician is supporting higher benefits for his client. The employee, however, doesn't want to go to doctor number three because three wants to operate and the employee says he has an overwhelming fear of anesthesia. The third doctor says that if he doesn't have the operation, the worker has reached MMI with a 20-percent impairment.

And now it's going to pay the worker to sit in his new jacuzzi and play football with his sons, and its going to put his wife on the comp payroll too.

The lawyer latches onto this fear of anesthesia and requests a psychological evaluation for his client, claiming post-traumatic stress syndrome, depression caused by pain, whatever. The psychiatrist gives the claimant a 10-percent psychiatric impairment rating and recommends further treatment. Now the lawyer has a claimant with a stacked impairment rating of 30 percent. So he moves to have his client declared permanently and totally disabled.

While this is going on, the carrier has kept the claimant under surveillance. Videotapes show the claimant building a new deck on his home and playing touch football with his sons. Furthermore, now that the worker has reached MMI, he's supposed to return to work. Unfortunately, his job is no longer available. The employer has only seven employees, and when this one got hurt he had to be replaced to keep the business going. So, the worker has the responsibility to conduct a job search. The carrier's investigation reveals that the worker's job search has not met the requirements outlined in the law.

In view of these circumstances, the carrier decides to cut off benefits, and off they go to court. Now, the carrier has videotape footage of this severely injured claimant playing touch football. It has evidence that the employee is not fulfilling his responsibility to look for work. It has the testimony of two doctors who say the employee is capable of working. One says he has no impairment; the other rates him at 2 percent.

First, the judge of compensation claims (JCC) refuses to look at the surveillance tapes. Then he ignores the inadequacy of the worker's job search — that requirement is not important to him. He listens to the three physicians and the psychiatrist and accepts the testimony relating to the 30-percent impairment rating based on his own observation of the claimant (never mind the fact that the JCC has never even spent 10 minutes in medical school and, therefore, is hardly in the position to make a diagnosis).

He decides the worker is 30 percent impaired and therefore should be considered permanently and totally disabled. He also instructs the carrier to install a jacuzzi in the claimant's backyard on the basis that the claimant needs it to ease the pain of the injury he suffered. He also awards attendant benefits to the claimant's wife, who has taken on the responsibility of taking care of her husband, who allegedly cannot take care of himself anymore because of the injury.

What's the result of this? The carrier has wasted staff time on this dubious claim. It's paid its own attorney and the worker's attorney outsized fees (we promise: we'll get to the fees shortly). It's paid four doctors to do basically nothing. It's paid detectives, rehabilitation specialists and employment counselors. And now it's going to pay the worker to sit in his new jacuzzi and play football with his sons, and its going to put his wife on the comp payroll too.

Sounds ridiculous, doesn't it? These cases are common. The November/December, 1992 edition of *Employer Advocate* included a summary of one such actual case from the records of the AIF Property and Casualty Trust. Any carrier could recite cases in their files that are similar or worse. Cases where the existence of any disability is subject to serious question. Cases where evidence exists that the claimant is faking an injury. Cases where the injury probably did not occur on the job at all. Cases where the blatant tinkering of an attorney and the partiality of a JCC and an appeals court that bends over backward to award benefits have combined to send the costs of workers' comp into a spiral.

There's not enough space in this newsletter to outline all of the manipulative schemes and strategies of the legal profes-

sion. Ask any employer or carrier about his own "parade of horribles" and you'll wish you'd kept your mouth shut.

If a carrier deals unfairly with a claimant, by all means it deserves to be dragged into court; but how a carrier treats a claimant does not abide at the root of most of the legal activity in workers' comp. The ease with which the system can be manipulated is the root cause.

Maybe we can't argue with the way these attorneys operate. Maybe we can't expect them to adopt ethical behavior or curb their combative hunger. Maybe that's just the nature of the beast. But if they won't control themselves, who will? Not the judges — that's for sure.

Little courtroom of horrors

This summer John Lewis, a preeminent authority on workers' compensation, testified before the Senate Select Committee about the problems in our system. He expressed his opinion of the judicial reaction to the 1979 workers' compensation reforms: "But something happened that I don't think anybody anticipated. It was clear that many of the judges and certainly the appellant courts were totally hostile to what this state had done legislatively . . . [T]hat hostility — at least to me, some others, and to a lot of people out of state — was apparent. As a result, we had a workers' compensation system that was torn apart from the start."

Mr. Lewis is expressing an opinion backed by nothing more than anecdotal evidence, but what he says deserves reflection. Hostility, personal bias, ignorance — there are any number of motivations that can be attributed to the actions of the judges of compensation claims and the appeals court, but the result is the same. The cases mentioned earlier in this article, such as the case of the lovers' triangle, are just a few examples, but there are plenty more.

Let's consider a 1988 case where an employee hurt his knee while playing softball on a team sponsored by his employer. The worker's participation was strictly voluntary. None of the games or practices were held during company time or on company property. So what qualified the injury as compensable? The court figured that the employer got some benefit from the games since the players all wore t-shirts with the company's name on the back, and therefore the injury was covered by workers' comp. That was it. That was the only reason.

One 1981 case is a real stunner. This time the claimant refused to give a co-worker in his car pool a ride to work since the co-worker refused to pay his weekly gas fee. They got into a fight and the co-worker hit the claimant with a weapon, which caused a shoulder injury. The deputy commissioner (title now is judge of compensation claims) decided this was a job-related injury even though the only connection to the job was that the combatants worked together and they were on their way to work. The decision was appealed to the First District Court of Appeal, which decided against the compensability of the injury.

How could the deputy commissioner have missed out on this one? Well, there's this arcane little principle in workers' comp called the "coming and going rule." Remember when the Supreme Court tried to come up with a definition of pornography? One of the justices said he couldn't specifically describe what constitutes pornography but "he'd know it when he saw it." The same thing applies to the coming and going rule. The deputy commissioner decided employees "deserved" the most liberal interpretation of the rule.

An even fuzzier line of thinking concerns stress, trauma and psychiatric conditions. One such case involved a

Please see Attorneys, pg 16.

The Economics of Workers' Comp

If you've ever stretched a rubber band too far you know that when it breaks, the snapping ends are going to sting your fingers.

Like a rubber band, if Florida's workers' compensation system snaps, everybody who lives and works in Florida will feel the sting. But how close are we to the breaking point? With few exceptions, Florida employers are required to carry workers' compensation, which leaves them trapped in a risky situation. They have to pay the premiums or discontinue their operations, but many can't afford the payments they must make to stay in business.

Between 1982 and 1991, the average indemnity claim (payment for lost income) rose 230 percent. During that same period, the cost of the average medical claim quadrupled. Today Florida's premiums, having undergone a 300-percent increase between 1980 and 1992, rank second highest among 32 other states. A 1989 comparison between workers' compensation costs among the states revealed our state's premiums are six times the national average.

At the end of July, the Senate Select Committee on Workers' Compensation heard testimony from a Jacksonville contractor who told his listeners that, despite a good safety record, the workers' compensation system was one minor injury away from shutting him down. If that happens, his employees, like the employees of so many other companies that fell to exorbitant workers' comp premiums, will be out of a job, dependent on family or the state to support them. This wage-payer from Jacksonville summed up the problem for anyone who missed the point: "The system hurts the employees who don't get hurt."

by Jacquelyn Horkan, AIF Information Specialist

And At Last Count

Each Florida legislator is listed in these charts with his or her historical percentage on workers' compensation issues.

Legislators marked with an asterisk (*) do not have an historical percentage.

Senator	Percent
Bankhead	80
Beard	100
Boczar	*
Brown-Waite	*
Burt	*
Casas	100
Childers	79
Crenshaw	100
Crist	*
Dantzler	86
Diaz-Balart	50
Dudley	100
Dyer	50
Foley	100
Forman	100
Grant	89
Grogan	*
Gutman	90
Harden	100
Hargrett	63
Holzendorf	38
Jenne	80
Jennings	85
Johnson	*
Jones	0
Kirkpatrick	100
Kiser	100
Kurth	*
McKay	*
Meadows	*
Myers	90
Scott	75
Siegel	*
Silver	38
Sullivan	*
Thomas	85
Turner	*
Weinstein	100
Wexler	*
Williams	*

Representative	Percent
Abrams	36
Albright	89
Armesto-Garcia	100
Arnall	70
Arnold	55
Ascherl	54
Bainter	100
Barreiro	100
Benson	0
Bitner	33
Bloom	38
Boyd	50
Brennan	0
Bronson	80
Brown	0
Bullard	100
Burke	0
Bush	0
Casey	100
Charles	0
Chestnut	0
Clemons	0
Constantine	100
Cosgrove	45
Couch	100
Crady	69
Crist	100
Davis	27
Dawson	0
De Grandy	67
Dennis	0
Edwards	0

Representative	Percent
Eggelletion	0
Feeney	100
Feren	0
Fuller	100
Futch	100
Garcia	86
Gay	100
Geller	25
Glickman	38
Goode	78
Gordon	53
Graber	43
Greene	0
Hafner	33
Hanson	100
Harris	70
Hawkes	50
Hawkins	94
Healey	47
Hill	0
Ireland	100
Jacobs	0
Jamerson	42
Johnson, Bo	54
Johnson, Buddy	100
Jones	67
Kelly	54
Kerrigan	100
King	83
Klein	0
Laurent	100
Lawson	67

Representative	Percent
Lippman	47
Littlefield	100
Logan	40
Long	40
Mackenzie	45
Mackey	50
Manrique	50
Martinez	33
McAndrews	0
McClure	0
McMahan	0
Merchant	100
Miller	0
Minton	33
Mishkin	0
Mitchell	57
Morroni	100
Morse	58
Mortham	100
Ogles	100
Peeples	44
Posey	100
Pruitt	50
Rayson	0
Reddick	45
Ritchie	45
Roberts	40
Rojas	83
Rudd	55
Rush	30
Safley	100
Sanderson	77

Representative	Percent
Saunders, Dean	50
Saunders, Ron	36
Schultz	0
Sembler	100
Shepard	0
Simon	45
Sindler	50
Smith	83
Stabins	100
Stafford	0
Starks	100
Sublette	0
Tedder	100
Thomas	64
Thrasher	100
Tobin	40
Trammell	42
Upchurch	0
Valdes	100
Villalobos	0
Wallace	50
Warner	100
Webster	90
Wise	89

Democrats in Roman;
Republicans in italic.

Source: The Florida Business Network — a division of Associated Industries of Florida Service Corporation.

REMODELING Workers' Comp

by Mary Ann Stiles, Esquire, Stiles, Taylor & Metzler, P.A., Special counsel to AIF on workers' compensation

Florida's business community can no longer afford the workers' compensation rates it is paying. Rates now are already too high and any increase would be devastating. Employers are finding it necessary to cut employees, eliminate bonuses, drop employees' health insurance coverage or close their doors simply because they cannot afford the mandated workers' compensation coverage.

The position of the business community is that the workers' compensation crisis must be resolved, and not, anymore, by cutting employees' benefits. The entire system and all those who live off it must be confronted. Before this crisis can be resolved, the Legislature will have to stand tall and say to those who are extraneous to the system, "We will resolve this crisis without damage to the injured worker; and we will bring rates down."

The Legislature must act, and act swiftly, to resolve the crisis. The workers' compensation system is on the verge of collapse. Failure to pass real reform would be tantamount to a dereliction of legislative responsibility to the citizens of this state.

One of the problems that occurs in trying to resolve the crisis is that workers' compensation has become very political. In 1983 Associated Industries recommended several changes to the Workers' Compensation Act, and those amendments passed through the legislative process without a committee hearing. Today, one cannot even say the words "workers' compensation" without hundreds of people showing up to express their views. Most of this concern results from the threat of reducing the money some parties make off of the $4.3 billion system. But, naturally, when you start tinkering with people's pocketbooks they come out in droves.

There is something intrinsically wrong with a system in which employers pay more and more in premiums and employees get fewer and fewer benefits. There is something grossly wrong with a system in which medical costs have increased from 33 percent to 55 percent of claim dollars in just a few years. There is something seriously wrong with a system in which chiropractic charges a few years ago were so minute that their fees did not show up in the premium base while, today, chiropractic treatment makes up 8 percent of medical costs. There is something horribly wrong with a system in which attorney involvement jumped from 6 percent to 23 percent in lost time cases in a few short years.

In looking at the entire system, it is important to keep in mind that approximately 80 percent of all cases are medical only, meaning the employee loses no time and returns to work. Approximately another 15 percent of the system is made up of employees who do lose time from work but return to work or collect wage loss benefits for a short period, then find jobs and return to work. A mere 5 percent of the system is made up of a combination of these types of cases. It is this 5 percent that we litigate; and it is to this 5 percent that 70 percent of benefit dollars are paid.

Associated Industries is looking to the Legislature to resolve this crisis and believes that this crisis cannot be resolved until the following issues are addressed:

Fraud

The Associated Industries of Florida Property & Casualty Trust was recently involved in a case in which an individual was awarded temporary total disability benefits and six months of attendant care benefits. AIFPCT appealed the order on attendant care for household duties. While the case was on appeal, the PCT adjuster received a call from a hotel chain that advised her it needed information regarding the claimant's PCT knee injury because the claimant was making a new claim against the hotel chain for a knee injury. It turned out that the individual was working in the hotel the entire time she was testifying before a judge of compensation

claims that she was unemployed. She had a job the entire time her doctor was stating she needed attendant care for household duties. The claimant had a job the entire time another doctor was testifying she was incapable of working. During the time she claimed disability the claimant earned approximately $18,000 one year and $20,000 the second year, more money than she had made prior to her workers' compensation injury.

The problem with this case was that the claimant truly had a compensable knee injury. This case was resolved for the $16,000 she was overpaid, and the claim dropped for any past temporary total or attendant care and attorneys' fees. However, future medical treatment had to stay open because the law states that you cannot settle medical in this particular kind of case. So, even though the woman committed fraud, there is nothing in the statute or any proposed legislation that could remove her from the workers' compensation system.

If an individual commits fraud in the workers' compensation system, that individual should be ousted from the system. The present system does not allow for that.

Medical

In the medical area, the Legislature must create practice patterns and require that physicians follow them.

The Legislature must take away the ability to doctor shop. The present law provides that employers have the choice of physician; however, employees can ask for another physician and employers must acquiesce. This encourages doctor shopping. If a doctor tells an individual there is nothing wrong with him, he can ask for doctor after doctor after doctor until he finds one who says, "Yes, there is something wrong with you." The ability to doctor shop through the system must be stopped. Establishment of an expert medical adviser would put a stop to this provision if it is implemented properly.

The ability of an attorney to file a claim for a neurologist and orthopedic surgeon, a psychiatrist, a physiatrist and a chiropractor concurrently, without any physician stating that such care is medically necessary, must be stopped. The only alternative the carrier currently has is to offer alternative physicians in each of the categories or face potential attorney fees and costs.

Chiropractors must no longer be able to give impairment ratings. In case after case, if an employee has a 3-percent impairment and is entitled to 26 weeks of benefits, his attorney will threaten to get a chiropractor to give a higher impairment, because if the chiropractor gives another .5-percent impairment, the claimant is then entitled to an additional 26 weeks of benefits.

The employer/carrier must also have the opportunity to get medical information on a claimant. The claimant's bar has been successful in limiting this access; however, access by the claimant's attorney has not been limited. It is not unusual to appear at a deposition and face medical records that show one thing and a doctor that testifies differently, especially on restrictions and impairment ratings and whether an individual is able to return to work.

The unrestricted right to an independent medical evaluation must be guaranteed to the employer/carrier. Currently, a claimant's attorney can refuse to send an injured worker to an IME and faces no sanction or penalty. Of course, the claimant's attorney expects to get attorney fees when he has to respond to a Motion to Compel an Independent Medical Exam, after he has advised his client not to show up for the IME.

The bill must require that all physicians who treat workers' compensation patients be experienced and understand the workers' compensation statute, the rules of procedure and the fact that they must timely forward all medical records to the carrier. The longer a doctor waits to provide necessary and complete medical information, the longer benefits are paid when they shouldn't be, or delayed when they should be paid. For instance, it is not unusual to receive a report from a physician that states that a person has reached maximum medical improvement with certain restrictions, yet the report lists no impairment. Case law requires that if there are restrictions, there must be an impairment. It is necessary in many instances to take the doctor's deposition to discover the impairment so that a determination of benefits can be made. That process can take four to six months and increases attorneys' fees on both the defense and claimant sides.

The longer a doctor waits to provide necessary and complete medical information, the longer benefits are paid when they shouldn't be, or delayed when they should be paid.

Permanent Total Disability

The Legislature must do something to end "technical" permanent total disability cases. PTD means that a person has an inability to work. In Florida a person can be declared a "technical" permanent total, settle his case and go find another job because

Please see Remodel, pg 14.

Remodel, from pg 13.

he truly is capable of working. A "technical" permanent is only based on the particular facts of a particular case — the claimant is not *actually* permanently and totally disabled. NCCI figures show that Florida has a higher rate of permanent total cases than most other states. The Legislature must tighten the definition of permanent total and stop the abuse in our system. And it is imperative that the Legislature stop the abuse of using psychiatric ratings to make a claimant permanently and totally disabled when physical restrictions are minute.

Wage Loss

The entire system of wage loss benefits must be addressed. At present, the system compensates for negative behavior. The requirement that an employee find a job, knowing that if he finds a job he will get no settlement because then his case will have no value, is nothing more than a joke. The First DCA, in its 1992 *Regency Inn* decision, basically made workers' compensation an unemployment compensation system, and nothing has changed since that decision was issued. It was the beginning of the end of wage loss. This system must either be drastically changed or eliminated.

Office of Employee Assistance

An Office of Employee Assistance must be created and given substantial powers, one of which is the power to try to resolve problems before benefit claims are filed. At present too many lawyers are saying they are the only allies employees have in the system; yet when this provision is recommended, the attorneys fight it. The reason they fight it is because, if problems are resolved by another entity, attorneys will be out of the system and out of a gold mine. Some allies.

Attorneys need to focus on what is best for the injured worker; and what is best for the injured worker is a swift resolution of his case, regardless of attorney involvement. If that can be accomplished without an attorney and can be accomplished in a short period, then the Legislature should use it as a way to reduce litigation in the system.

Office of Public Counsel

Attorneys' fees should be limited to those benefits actually received, not benefits that may be received in the future. Claimants should also pay their own attorneys' fees. Twenty-six states require that claimants pay their own attorneys' fees. Very few states allow recovery on all benefits, which can reasonably be determined to be paid as a result of the representation.

However, every time the above provisions are drafted, attorneys argue that claimants will not be able to hire attorneys to represent them because there would not be enough money in the case to cover representation.

AIF's answer to that argument is, "Then, let's provide free attorneys to injured workers, and if an injured worker wants to opt out of the system and hire an attorney, then let the injured employee opt out, but be required to pay for his own attorney." The Office of Public Counsel should be created within the Division of Workers' Compensation.

The claimant's bar has often countered this argument by stating that injured workers' only recourse would then be attorneys who are poorly trained and inexperienced. Simply because an attorney is employed by the state does not make that attorney incompetent. There are many dedicated state attorneys who are extremely competent, and such an argument by the claimant's bar is specious.

Industrial Relations Commission

Appeals should be heard by a commission that specializes in workers' compensation; that hears no other issues; that gets to cases faster than the First DCA, and that decides cases on a consistent basis. Claimant attorneys have testified that within the current system there are no inconsistent decisions, but those who practice law on a daily basis can point to numerous cases of judicial inconsistency.

Judges of Compensation Claims

The system of appointment and reappointment of Judges of Compensation Claims must also be amended. The present system of a commission made up of attorneys and three lay people is inappropriate. The very people who practice before these JCCs should not also be the ones who make the recommendations for appointment and reappointment, which is the present situation. While it may be appropriate for attorneys to serve on the panel, it is not appropriate that the panel be controlled by attorneys who practice workers' compensation.

The chief judge should be given the authority to promulgate local rules and the authority to recommend termination of or terminate any judge who does not perform responsibly. JCCs must be held accountable for their job performance.

There are many other provisions the Legislature should look at, but these are the highlights of the business community's demands. Business owners need to let the Legislature know it cannot slap a Band-Aid on this problem. The Legislature must make the necessary changes, recognizing that this system was designed for employees and employers. All the other parties must step back and relinquish their foothold in this system.

What is so wrong with drafting legislation that would create a system that employers could afford; one in which employees could get benefits promptly; one in which benefits don't diminish as premium costs rise?

Let's See If We Can Manage It

Ask ten people to define managed care and you'll get ten different answers, ranging from long-winded technical explanations to quizzical stares to, "managed *what*?"

Simply put, managed care or managed care organizations (MCO) cover the idea embodied in all of those trendy concoctions called health maintenance organizations, preferred providers organizations, and exclusive provider organizations. Basically, an MCO is an arrangement with a network of health care providers — doctors, hospitals, clinics, physical therapists, etc. By guaranteeing a certain volume of business, the MCO negotiates reduced fees for treatment of MCO patients.

Fans of MCOs will tell you the networks reduce costs of care while improving quality. There are many studies that confirm their claims and the success of these organizations has led to their increased popularity in the general health care market. The concept of managed care is an integral part of the health care reform package adopted during the 1993 Legislative Session. But can the MCO model be applied to workers' comp?

The answer is yes, if the goal of workers' comp is to combine competent and appropriate treatment with cost containment. A successful MCO program for workers' comp must include the following elements:

Provider Mix — Treatment of work place injuries requires the services of certain providers and specialists. The MCO network must include a suitable quantity of these providers in order to save money. There must also be sufficient numbers in each provider category to allow for second opinions and employee requests for change of physicians. There must also be a geographical spread of providers so that they are accessible to the injured employees.

Credentialing Procedures — The MCO must make provisions for ensuring the competence and professionalism of its providers, including initial credentialing and on-going quality review.

Communication — Currently, efforts by employers and carriers to receive up-to-date information on the employee's status and progress are frustrated by lawyers who block their communication with providers. Even without the legal obstructions, many doctors do not file timely, complete and accurate reports. The MCO should help make sure the employers and carriers get the information they need to monitor the claim.

Provider Reimbursement — Many MCOs use a schedule to reimburse their providers. The fees are capitated, which means the provider receives a set fee to treat an injury. That gives the provider an incentive to heal the patient thoroughly and quickly. Under the traditional fee-for-service approach, every time a patient walks through the door the doctor gets a fee. For some providers that means there is no motivation to limit visits to those that are medically necessary. These providers prolong treatment and augment their incomes with unnecessary visits. Obviously, this does not serve the best interest of employers or employees.

Cost Control — Unnecessary or ineffective treatments don't benefit the worker, the employer, or the carrier. The MCO should have a mechanism for approving treatment before it is given. It should match pre-certification to payment processes so that the carrier only pays for treatments it has authorized.

Quality and Appropriateness of Care — The MCO should have utilization review and peer review procedures to evaluate the job done by the provider. Did the employee receive the proper care? Did the provider pursue the most efficient and effective plan of treatment? Was the outcome acceptable?

Three years ago, Florida Insurance Commissioner Tom Gallagher received permission from the Legislature to implement two pilot projects in managed care for workers' comp. The first undertaking involved 17,000 state employees in Dade and Broward counties. Half of the employees received treatment from an HMO for on-the job injuries; the other half stayed in the traditional system.

The HMO chosen for this first project was CAC Ramsay, which is owned by Ramsay-HMO Inc. of Coral Gables. If a recent report issued by Milliman & Robertson, a Seattle-based actuarial consulting firm, is any indication, managed care in workers' compensation is the answer we've been waiting for. According to the report, the HMO charges for treatment of work place injuries were 38.5 percent *lower* than the charges from traditional fee-for-service physicians.

Today, medical costs devour 55 percent of the money spent on workers under our comp program. Unfortunately, far too much of that money is wasted. Over-utilization, doctor-shopping, countless evaluations — all of this manipulation leads to higher costs without contributing anything to the welfare and recovery of the injured worker. These abuses drive up medical costs and, at the same time, lead to a decline in the standards of care delivered to injured workers. Reform of the medical component of the system must focus on reducing costs while increasing quality — an objective that has been met in the MCO model.

by Jacquelyn Horkan, AIF
Information Specialist

Attorneys, from pg 9.

claimant whose attorney argued that on-the-job stress aggravated his multiple sclerosis. No proof existed that the claimant suffered a higher degree of stress than found anywhere in normal, daily life, but the First DCA, in its finite wisdom, declared, "Workers' compensation should be awarded when a claimant's pre-existing physical defect is exacerbated by job-related stress."

This case dragged itself through legal circuits for eight years before the Florida Supreme Court finally raised its voice of reason. Last year, in overturning the First DCA's argument, the Supreme Court wrote:

"Whether or not we agree with that view, we find that it is contrary to the existing workers' compensation statute and it would be improper for the courts to so amend that statute. Recently in *Leon County School Board v. Grimes*, 548 So.2d 205 (Fla. 1989), we reviewed another attempt by the First District Court of Appeal to broaden the purpose of workers' compensation and concluded that by adopting the district court's view, 'we would be amending the purpose of Chapter 440 to allow compensation to injured employees without regard to whether industry brought about the injury.' *Id.* at 208. We refused to engage in such judicial legislation then, and we refuse to do so now. As we stated in *Grimes*: 'We find that the legislature which established this means of compensation is the proper branch to broaden the purpose of Chapter 440.'"

Read those words carefully again. That's the exact argument the business community is making for reform of the workers' compensation judicial structure. Time and again the First District has engaged in judicial legislation. When the judges didn't like the way the Legislature wrote the law, they simply rewrote it from the bench. Time and time again, the Legislature, in response to court decisions, has tried to clarify the law in terms that even the judges could understand. And what we've ended up with is a poorly written statute and a bewildering body of case law.

This is just one harmful side effect of judicial tinkering with the law; but there are others. In a lawsuit filed in 1991, an employee got drunk at a Christmas party. The employer asked him to give his car keys to a fellow employee. Later on in the evening another employee offered to drive him home. The drunk employee got angry, started a fight, fell over backwards, hitting his head and suffering severe injuries. A lawyer filed a lawsuit to get workers' comp benefits for the employee and a judge of compensation claims ***actually awarded them***.

Florida is one of the few states in the nation that allows an attorney to earn a fee higher than the total award he won for his client.

The First District eventually overturned the decision, but not until the staff of the carrier wasted hours of time managing the case. While the claimant's attorney did not earn a fee, the carrier still had to pay an attorney to defend itself against the lawsuit.

The lawyer suffers no penalty for filing a ridiculous claim like this one. In fact, the very kindness and liberality of the judges encourages him to do so. He's got nothing to lose — and he might get lucky. This situation also adds to the cost of workers' comp as carriers accept claims for questionable benefits. Why go to the trouble of opposing them? Some carriers, such as the AIF Property & Casualty Trust, adopt very aggressive methods for managing these suspicious claims, but many others don't want the aggravation of a trial, so they keep paying and paying and paying. And every business person can tell you the truth: those big, rich insurance companies don't have some enormous pool of money sitting in a bank vault to cover those costs.

Employers know they're the ones who pay the penalty, with soaring premiums and diminishing insurance options. And employers also know that, ultimately, they're not the ones who are footing the bills. That burden gets passed on to every consumer in Florida.

The lawyers say they're not the problem in workers' comp? Guess again. Not only are they the problem, they're the big winners.

Sold to the highest bidder

How much do you think one hour of an attorney's time is worth? Seventy-five dollars? One hundred and fifty dollars? Two hundred dollars? Try $1,500. At least that's what one judge thought one claimant attorney's time was worth — $1,500 an hour. Is it any wonder that attorney involvement in workers' comp claims jumped from 6 percent in 1983 to 23.7 percent in 1992? Whatever you want to say about these guys, they're not stupid.

Florida is one of the few states in the nation that allows an attorney to earn a fee higher than the total award he won for his client. One attorney went to court and, as a result of his efforts, won $50,000 in benefits for his client. Sounds like the claimant did pretty well — after all $50,000 is no small amount. The attorney, however, is the one who really hit the jackpot. The judge awarded him a $450,000 fee. Yes, he got ***nine times*** the amount of money he won for his client.

Until a few years ago, an attorney's fee was based on a formula of percentages tied to the benefits won for the claimant. Now, however, the judge awards a fee based on the hours an attorney spends working a claim. Which is one reason why attorneys spend so much time filing routine paperwork and an endless trail of silly requests for benefits. Considering the potential for a lavish hourly fee, which averages $200 per hour statewide, there

are not many tasks that fall below the dignity of a workers' comp claimant attorney. And actually, it is not uncommon for a claimant to object to the fee awarded to his own lawyer.

Are you wondering how these judges of compensation claims get away with bestowing these astronomical fees on attorneys? Good question. They get away with it because they can. And because the First DCA has established the standard that $1,500 an hour is not an unreasonable fee.

JCCs are appointed by a nominating council, the majority of whom are attorneys — often the same attorneys who appear before them to represent clients. When there's a vacancy, the attorneys present the governor with a list of at least three candidates and the governor gets to select one. Obviously, if the attorneys desire the presence of one particular individual on the bench, they're going to present a loaded list of two unlikely candidates and one relatively unobjectionable nominee.

If the JCC is up for reappointment, the council may choose to recommend him for continuation on the bench and the governor's only option is rubber-stamping the choice of the council. If the governor refuses to reappoint a JCC, nothing happens. If the nominating council chooses to ignore our chief executive, that judge keeps doing whatever it is he's been doing all along and the governor's hands are tied.

Of course, nobody wants to accuse these attorneys and JCCs of skullduggery, but the potential for wrongdoing obviously exists. The governor, the business community and employee representatives want to change the system of appointments to give more power to the governor — an elected official chosen by the voters of this state. Not surprisingly, the attorneys are unwilling to give up their control over the nominating procedure. That would mean a loss of control over the process.

Of course, nobody wants to accuse these attorneys and JCCs of skullduggery, but the potential for wrongdoing obviously exists.

Turning the tide

John Lewis delivered a direct and compelling summary of our state's workers' comp dilemma when he told the members of the Senate Select Committee: "If the litigation process encourages extending the healing period — if it, in effect, says to people, 'don't go back to work, even if you can, because you've got to maximize your wage loss settlement and the way to do that is by not going back to work' — when that occurs you are affecting every component of the system."

How do we remove the destructive influence of the legal profession from our model of workers' comp? Actually it was a claimant attorney, Robert Denson, who said it best at the governor's town meeting in Jacksonville. "I think it's clear from the testimony today that by the time a worker gets to a lawyer, the system has already failed (him). I think if you want to decrease lawyer involvement, you make the system work through the many, many steps that have to occur before a lawyer even opens his door or signs a fee contract."

Thank you Mr. Denson, that's our thought exactly. The system needs to work for two groups and two groups only: employers and employees. Right now, it's failing both, but if we fix the problems employees face, we'll fix most of the problems employers face. The first step is simplifying the law. The lawyers won't like that though, because the more complicated it is, the more money they make.

Next, the Legislature must authorize creation of an Office of Employee Assistance in the Department of Labor and Employment Security. It must authorize use of money from the Workers' Compensation Trust Fund to adequately staff and train personnel. When that happens, employees will have somewhere to turn when they have questions or concerns about their rights. And employers and employees alike will have a disinterested party to resolve disputes and misunderstandings without dragging in ravenous hordes of trial attorneys.

At the same time, the Legislature must authorize creation of an Office of Employee Counsel, allocating enough money to hire experienced and capable lawyers. Doing so will give employees access to free legal counsel, cutting out the high-priced lawyers that business can't afford. If an employee wants to hire independent counsel, he retains that option but he will have to pay the legal fees.

None of these reforms will work unless control over the workers' comp judges is taken from the lawyers and given to the governor's office. If that doesn't happen, the judiciary will be waiting to revoke every positive action we take. They've done so since 1979 and there's no evidence that they've had a change of heart.

Finally, the Legislature must remove the control lawyers and judges have over matters of medical treatment and diagnosis. They can do this in two steps. The first is to establish practice parameters that define standards of care. The second is to authorize the appointment of independent medical examiners who will make autonomous, impartial and binding judgments concerning medical disputes.

All of these changes will cause indignation among attorneys, but it's time for them to realize the truth: workers' comp doesn't exist for their benefit. Besides, they're an opportunistic bunch who will find some other program or situation to sabotage.

Of course, the people who print telephone books will lose a whole awful lot of advertising revenue, but they probably won't mind. After all, they too have to pay workers' comp premiums.

by Jacquelyn Horkan, AIF Information Specialist

Reform, from pg 4.

Always eager to blame someone else, the trial attorneys consistently point an accusatory finger at the medical profession, the insurance carriers, the employers, the state.

Earlier this year, representatives of the governor conferred with emissaries from the AFL-CIO and Associated Industries to craft a comprehensive reform proposal. The governor's proposal offered specific and necessary cost-cutting proposals, so it should come as no surprise that the trial lawyers fought it with all their might and money. And what recommendations did they offer in place of the governor's proposal?

Controlling medical

The governor's reform proposal recommended prior approval by the carrier before the claimant could utilize the services of work hardening, pain management and weight loss programs. Pain management clinics help injured workers "deal" with the aches caused by their injuries while work hardening programs ease the worker's transition back into the rigors of working on a daily basis, presumably by hardening something. The problem with these services is the difficulty of making an objective assessment of their necessity and success. Basically, as long as the personnel of these organizations say the claimant has a continued need for their services, there's not much a carrier can do except play right into an attorney's hands by refusing treatment.

On the issue of weight loss clinics, the First District Court of Appeals ruled in 1991 that the carrier cannot deny payment for enrollment in one of these programs, if dieting will help alleviate the claimant's pain. In this particular case, the fact that the employee was obese before the accident even occurred did not carry any weight with the court. This follows a long line of decisions from the First District that allows treatment for pre-existing conditions that don't have the remotest connection to the injury.

. . . work hardening programs ease the worker's transition back into the rigors of working on a daily basis, presumably by hardening something.

The trial attorneys responded to this situation by suggesting that referrals for these services be made by physicians — those same physicians that have turned attorneys into shopaholics.

The governor's proposal sought to establish practice parameters, which are standardized courses of treatment for comparable injuries or conditions, thereby taking much of the guesswork out of questions of over-utilization. The trial attorneys recommended a requirement that a physician develop a treatment plan for approval by physicians "employed by, or under contract with, the insurer." Taking into consideration that no controversy over medical treatment ever arises in 95 percent of workers' compensation claims, the treatment plan requirement for every injury would create bundles of unnecessary paperwork, which of course would increase costs and possibly the potential for litigation.

Adding bad to worse, Rep. Charlie Roberts (D-Titusville), who spends his off-season in the practice of law, proposed an amendment that would have required approval of the treatment plans within ***three business days***. Apparently Rep. Roberts' naivete convinces him that medical diagnosis and treatment is a simple and routine matter. Since doctors are notorious for their tardiness in supplying medical records to carriers, Rep. Roberts suggested that matters could be handled over the telephone. Considering attorneys' success at robbing carriers and employers of the right to contact their clients' medical providers, one can only assume that, having tied the hands of employers and carriers, the attorneys planned this "reform" measure as a means to shackle their feet.

The collaboration between the attorneys and their friends in the Legislature also removed any restriction on employees' choice of pharmacies. Now, this one is tricky. The lawyers said, "We realize many of you employers have negotiated deals with pharmaceutical companies to get reduced prices on prescriptions. Since we don't want to make things harder for you, we won't hold you responsible for the difference in price if the employee gets his medication at a pharmacy that charges more." Awfully nice of them, wasn't it? Not really. Employers use the guarantee of volume to negotiate these lower prices. If employees can shop at any pharmacy they choose, employers lose their negotiating advantage. This provision won the particular sanction of Rep. Fred Lippman (D-Hollywood), an independent pharmacist and chairman of the House Commerce Committee, which has oversight for all workers' comp legislation.

Claims management

Before getting into this next point, we have to backtrack. An employee's right to indemnity benefits (every form of disability and wage loss) is determined to a large degree by his medical condition. If he is TTD, his benefits are higher than if he is TPD or has reached MMI. Furthermore, if the employee has reached MMI, he should be able to work light duty, or, if his job is no longer available, he's supposed to conduct a job search.

As mentioned above, some physicians forget to notify the employer of the employee's release to work, which is the trigger point for the employee's transition into the lower benefit level. If the carrier is not advised that the employee has reached MMI or has been designated temporary partial, the carrier wastes money paying the employee more benefits than he deserves.

These delays also play into the hands of the lawyers who like to withhold as much information as possible from the carriers. That lack of knowledge may cause the carrier to make a mistake — the hope and dream of every claimant attorney. Over and over again, the Legislature has reaffirmed the right of employers and carriers to contact the workers' physicians. However, the First District Court of Appeal constantly puts up roadblocks to disallow such contacts.

In a deceptive change of heart, the attorneys' bill promised unencumbered access to medical records. ***However***, before contacting the injured worker, the carrier or employer had to give reasonable advance notice to the claimant and/or his attorney of the time and nature of the discussion. This provision represented little more than an attempt to codify present case law of *Perez* and *Adelman Steel*.

The attorneys also wanted to allow the submission of all medical records into evidence, including those from unauthorized physicians. Obviously this would allow the trial attorneys to load their side with testimony from every quack and charlatan they could find.

Ann Clayton, the director of the Division of Workers' Compensation, whose experience with this area of the law spans seven states and 21 years, calls Florida's statute one of the most poorly written of any she's ever seen. That fact makes trial lawyers chortle with glee, because the more confusing the law, the more they're needed. Therefore it should come as no surprise that the trial lawyers tried to muddy the waters even more with their legislative package.

While it doesn't happen often enough, sometimes claimant attorneys do lose cases.

The trial lawyers used unclear wording to address the issues of independent medical examinations and employee change of physicians. They claimed the provisions would eliminate doctor shopping. All it did was give the claimant attorney greater control over medical treatment while leaving carriers to interpret the new procedures drafted by the attorneys. The first time a carrier gave the provisions an interpretation that strayed from the one preferred by the attorneys, guess who'd end up in court?

Fraud

The attorneys then addressed the issue of fraud by erasing the requirement that the claimant sign the claim form. Now, if the claim form is fraudulent or contains false or misleading information and the claimant has not signed it, the carrier can hardly allege misconduct on the part of the claimant. After all, without the claimant's signature, what proof does the carrier have that the claimant ever saw the form? You have to admit — it's an interesting way to resolve that pesky little fraud problem.

Attorneys' fees

The trial attorney bill attempted to address the rising costs of legal representation in workers' comp by stipulating that the fee paid to carriers' lawyers could not exceed the fee paid to claimants' attorneys. That provision ignores the fact that the hourly fee charged to carriers by their own attorneys generally averages between $75 and $80, while the hourly fees awarded to claimant attorneys hovers in the range of $200 to $250. Since the carrier pays both fees, that means it's already paying to its adversary about three times the hourly fee it pays to its advocate.

There's another part to this artful pretense. While it doesn't happen often enough, sometimes claimant attorneys do lose cases. In those situations they usually don't collect fees. So does this provision mean a defense attorney does not get paid anything for winning a case? Consider the delightful consequences that would bring to the claimant attorneys.

In addressing the issue of attorney fees, the true reforming spirit of the legal profession was displayed at its best. Currently, if a claimant attorney wins benefits for his client, the judge of compensation claims determines the size of the attorney's award that is paid by the carrier. This scheme works so well for the claimant attorneys that they generously wanted to extend it to the defense attorneys who represent the carriers. This means the carrier would have no control over the amount they would pay their counselors.

The money paid on claims affects the rates employers pay since losses are part of the formula for calculating premiums. And because defense of these claims is a natural part of the work performed by the carrier on behalf of the employer, the fees paid to defense and claimant attorneys are included in the total cost of the claim. The trial attorneys sought to nullify the application of defense fees to the cost of the claims, while retaining the cost of fees paid to claimant attorneys. So who would pay for the expense of defending a claim? The carrier, that's who. This provision would have pretty much shut down any use of lawyers by carriers to defend an employer against an unreasonable claim since carriers are not going to put up with losing any more money on workers' comp than they're already losing. And that means claimant attorneys would have an even freer rein in workers' comp.

Judicial reform

Under the current law, trial attorneys are in virtual control over the judicial process of workers' comp. They nominate the judges of compensation claims and make sure the friendly JCCs never leave the bench. The governor's proposal contained far-reaching provisions for reform of this judiciary, including the creation of a Workers' Compensation Appeals Commission to replace the First District as the body that would consider appeals of decisions made by judges of compensation claims.

Please see Reform, pg 21.

Just the FACTS

Is Florida's workers' compensation system really in need of major repair? What will happen if nothing is done? One only needs to examine a few facts to arrive at the resounding answers to those questions.

According to the latest National Council on Compensation Insurance (NCCI) figures, medical costs associated with lost time claims in this state are the highest in the nation. As a matter of fact, Florida's average medical cost for lost time claims is nearly twice the national average.

FACT

Is Florida such an unsafe state to work in; is medical care here just that much more expensive; or is this fact merely indicative of underlying systemic problems?

In reviewing statistics compiled by the Department of Labor, the average number of days lost from work due to injury in Florida is not significantly different from other states across the country. Therefore, we have to rule out Florida's work environment as being so unsafe as to cause soaring medical costs. This is not to say that greater emphasis on work place safety to prevent accidents wouldn't help, but injury severity does not seem to account for the exceedingly high medical costs.

Is medical care just that more expensive in Florida? Examination of another interesting statistic doesn't seem to indicate so. The average medical cost in Florida associated with claims where no time is lost from work is at the national average, indicating treatment costs are not all that different.

One can only conclude that Florida's high medical costs are the result of systemic problems related to the expansion of workers' compensation beyond its original intent — for example, doctor shopping for higher ratings to obtain higher benefits.

Attorney involvement in workers' compensation claims has exploded in this state. The percentage of claims with attorney involvement has risen from a reasonable 6 percent in the early 1980s to nearly 27 percent today.

FACT

The original purpose of workers' compensation was to rapidly deliver benefits and treatment without the need to prove anything in a court of law — in other words, a true self-executing, no-fault system. Workers' compensation is far from that today.

The manner in which attorney fees are determined and obtained in this state actually work to defeat the intent and the very basis of the system's objective of returning injured workers to gainful employment. Other articles in this issue of the *Employer Advocate* expand upon the issue of excessive attorney involvement as one of the major cost drivers of the system today, and there is no need to repeat them here. One can only wonder, though, whether this fact is perhaps one of the major contributing reasons for excessive medical costs. As such, how much of those medical costs are going to effective treatment of injuries and how much is going to "building the case" and/or stretching the patience of insurance companies for settlement purposes. It is amazing the miraculous recoveries that occur after attorneys succeed in securing settlements.

Florida has the highest incidence of permanent and total *awards* in the country.

FACT

Permanent and total disability is defined in the statutes as the inability to perform any gainful employment due to a severe injury. The judiciary has interpreted the definition much more loosely in this state, resulting in the highest frequency of permanent and total disability in the country.

Is this consistent with the return-to-work foundation of the system and the federal view under the ADA law?

Prior to the reform effort of 1990, Florida had one of the highest average costs for permanent partial disability in the country. Again, this is not due to the seriousness of the injuries, but rather the liberalness of the awards. While the 1990 reform efforts attempted to arrest these costs, other elements of the system have offset any gains made in that area, leaving cost savings nowhere near what was hoped for three years ago.

FACT

Florida has the highest cost for lost time injuries in the country. Yet, if you look solely at the statutory benefit levels, you might find that hard to understand. Any analysis of Florida's workers' compensation dilemma must encompass all of the above-mentioned facts, because it is their combined effect that has produced the egregious situation we've found ourselves in in 1993.

Florida employers, in turn, must pay some of the highest premiums in the country to cover their employees under workers' compensation. If significant reform of the system is not adopted, these costs and the resulting premiums will only continue their upward spiral.

Meaningful reform must be undertaken on all fronts, and aimed at the very precepts of workers' compensation. The system must be returned to as close a system of self-execution as possible. Barriers to returning injured employees to work — or, perhaps it is better said, incentives for injured employees *not* to return to work — must be removed. A tighter definition of what truly constitutes permanent and total disability must be implemented. Simple and expedient dispute resolution processes must be set up. Administrative changes to the judicial process need to be adopted. Rapid delivery of quality medical care through managed care must be an integral part of meaningful system reform.

These are just some of the features necessary to succeed in a true reform of the workers' compensation system in Florida. If passed legislatively and adopted administratively, substantial savings are possible. This savings will not come about overnight, but then again, the system wasn't stretched to its breaking point overnight. Reform efforts in Oregon, Colorado and Texas, among other states, have been successful and rates charged to employers there are on the decline.

Florida was once looked upon as the innovator in workers' compensation; now it is held up as one of the most costly and convoluted systems. True reform is necessary before the entire system collapses under its own weight.

by Frank T. White, Executive Vice President & Chief Executive Officer, AIF Property & Casualty Trust

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Reform, from pg 19.

Rates

The most cunning of all the attorney recommendations was their proposal for a rate freeze that would put an artificial lid on rate increases through 1997. Rate freezes without accompanying limitations on the cost drivers in the system would result in nothing less than a complete collapse of the system. That would leave employers without the means to purchase this mandatory line of insurance, and it would rob employees of the protection offered by workers' comp.

Conclusion

Why do the trial lawyers resist workers' comp reform with such fervor? The likeliest argument is that reform might cut them out of a lucrative market. The cynics among us might suggest that this argument underestimates the ambitions of the legal community. The collapse of workers' comp might well make up the fantasies that lawyers dream as they slumber. The possibility of luxurious settlements under personal injury lawsuits exceed those of comp law. If only they could get rid of workers' comp, the opulent world of personal injury would open before them. If only . . .

No matter the reason, when considering the influence of lawyers in workers' comp, it may be best to reflect on the words of the late Supreme Court Justice Felix Frankfurter, "In the last analysis, laws are what the lawyers make them." For the last decade or so, trial attorneys have tried to create the workers' compensation law in their own image. If the events of the last legislative session are any indication, the trial attorneys are not yet satisfied with the picture they have drawn.

by Jacquelyn Horkan, AIF Information Specialist

Who Gets The BLAME In a No-Fault System?

The 1979 Legislature rewrote Florida's compensation law to cure a variety of ills. Fourteen years later, we're trying to find some way to heal the cure. What are we doing wrong?

Workers' compensation is the oldest social insurance program in our country. Before workers' comp laws were enacted, workers had no protection against the awful incidence of an on-the-job injury. If a worker was injured, he had to hire an attorney to defend his rights in a civil lawsuit. The worker had to prove that the employer was at fault for the injury. The employer, on the other hand, could argue that the accident was caused by the negligence of the injured worker or that of another employee. The lawsuit could drag on for years before the employee received any form of compensation for the harm he suffered or the wages he lost.

Recognizing the horrible injustice of this cumbersome and expensive process, the Florida Legislature enacted its first workers' comp law in 1935. The idea was to replace lawyers and courts with a simple, automatic method to get help to employees injured on the job. Employers agreed to accept responsibility for the care and support of any worker who suffered an on-the-job injury (today there are a few exceptions to this, such as drug or alcohol use). Workers' comp was an exclusive remedy for employees; in other words, they could not sue their employers under any other laws. They exchanged their right to an uncertain but potentially lucrative settlement for the promise of quick delivery of medical treatment and disability payments. It was a covenant between employers and employees that replaced lawsuits with a guarantee. Each gave up a little for the sake of security.

Florida's first law was voluntary — employers were not required to participate. Those who stayed out of the system could be sued by their employees. Those who entered the system bought an insurance policy to cover the potential for an accident. By 1978 coverage was mandatory for all but a few companies. Today, 81 percent of Florida's employees are protected by workers' comp.

Beginning at the birth of workers' comp theory in England and Germany and carrying over to its adoption in the U.S., the system was guided by one overriding principle: employers provided workers' compensation so that injured employees could be healed and returned to productivity. Since no one wanted to make accidental occupational injuries a lucrative proposition, the injured employee only received a percentage of his pre-injury wage while he was recovering. This stipulation was also designed to encourage the return to work.

From its inception through the year 1974, Florida's program underwent little change beyond increases in benefits and refinements of the administrative process. Between 1936, the first full year of the program, and 1973, the number of injuries reported

increased from 32,000 to 330,000 and the weekly compensation rate for disability went from $18 to $80.

Today, while the maximum disability benefit amount has risen to keep up with the changing times, the number of injuries has actually decreased while costs have soared. Much has happened in the 20-year interval between 1973 and 1993, but one fact remains: after 58 years of practice at administering a workers' compensation program, we still can't seem to get it right.

The answers to the failure in workers' comp go back to 1973 and that $80 maximum benefit amount. The law originally enacted in 1935 authorized disability benefits not to exceed two-thirds of the statewide average weekly wage. By 1973, the maximum had dropped to just over half of the state's average weekly wage because the law lacked a mechanism that allowed the maximum benefit amount to keep pace with yearly growth in the statewide weekly wage. If someone thought the maximum weekly benefit amount needed escalation, he went to the Legislature and if it agreed with him, it passed a law. If the Legislature didn't want injured workers to get more money, it didn't pass a law. Benefit levels were a political football.

Much has happened in the 20-year interval between 1973 and 1993, but one fact remains: after 58 years of practice at administering a workers' compensation program, we still can't seem to get it right.

The year of 1974 was pivotal in workers' comp. Responding to criticism of workers' comp programs across the country, President Richard Nixon formed the National Commission on State Workmen's Compensation Laws in 1972, the same year Congress considered a law to transfer administrative control of those programs from the states to the federal government. Between 1972 and 1974, under pressure from Congress and the National Commission, almost every state Legislature moved to forestall federal intervention by expanding benefit levels. Florida was no exception.

While the 1974 benefit reforms were supposed to ordain fairness, observers of the program quickly noticed the commencement of certain tactics that would drive the system toward disaster by 1978. By that year, Florida comp rates were the fifth highest in the nation while its statutory benefits (the benefit levels outlined in the state law) ranked 37th. Employers paid $779.8 million in premiums — up from the 1974 total of $349.3 million. Many of the costly and manipulative strategies that exist in the system now also flowered in those days — over-utilization, doctor-shopping, frivolous lawsuits, legal gamesmanship, immoderate legal fees, judicial prejudice, questionable claims handling, and inadequate regulation.

Think about this quote from a 1979 article in *The Miami Herald*: "'Nobody is the good guy in the system,' says one prominent Miami orthopedic surgeon. 'The lawyer stinks. The doctor stinks. The insurance company stinks. And the patient stinks, too. Nobody is trying to make it work. The system breeds dishonesty.'"

It also bred cynicism. Here's another quote from a 1979 *Miami Herald* article. This one comes from Jerome Wolfson, a claimant attorney who extracted $71,539 in legal fees during 1978. "You wanta know what to do?" he said. "You wanta solve all the problems? I got the answer. Let's legalize fraud."

The 1979 Legislature ignored the advice of a claimant attorney, choosing instead to adopt an expansive package of reforms. The new law sought to lower costs while raising the level of benefits. While that sounds like an impossible task, all it actually took was a little redistribution of the money already being spent. In 1978, a lowly 5 percent of all injured workers raked in 68.5 percent of the benefits paid. These were the workers who claimed a lasting and permanent disability — either total or partial — as a result of the injury.

In 1978, permanent total disability (PTD) cases accounted for 58.8 percent of all injuries. After reaching maximum medical improvement (MMI), a PTD could collect benefits in one of two ways. The insurance company could take his impairment rating and, by using a series of complex calculations, arrive at a set sum of money. For example, a 20-percent impairment would be worth 70 weeks of benefits, giving the employee a payment of $9,100. Or, the PTD could claim diminution of wage earning capacity. Basically this standard would take into consideration the worker's age, occupation and level of education to push his award higher.

The open-ended and perplexing nature of this scheme lent itself to the kind of exploitation eagerly practiced by the legal community. One lawyer developed a procedure for taking advantage of the situation and his colleagues readily followed his example. Known as the "you name it, we'll claim it," strategy, the attorney, on behalf of his injured claimant, would file a form letter with the carrier demanding every benefit on the book, without regard for his client's eligibility or his own expectation of receiving the award. Today these are called "shot gun" claims.

The system quickly dissolved into a combative, antagonistic wrestling match. With insurance companies reporting total losses of $205.1 million in the comp line, the quality of carrier claims service dwindled. Under the barrage of ridiculous requests from

Please see No-Fault, pg 24.

No-Fault, from pg 23.

attorneys, insurance companies developed the practice of get rid of the hassles by settling claims in lump sums, a process that was also called "washing out." Generally, the wash out cost more than following a claims file to its natural conclusion, but, right or wrong, panicky insurance companies embraced the policy when faced with the uncertain cost factors embedded in the system.

From 1975 to 1978, the Legislature addressed the growing issues of fraud, abuse and manipulation in futile efforts to terminate those practices. A 1975 bill reduced compensation to employees who deliberately ignored safety procedures. It also disallowed compensation to workers who were found to be under the influence of drugs at the time of the accident. The 1977 Legislature applied the same restriction to employees who were under the influence of alcohol at the time of injury. That same year, lawmakers stipulated an offset between workers' comp and unemployment comp benefits, so that the amount of workers' comp was reduced by the amount of unemployment comp the worker was receiving.

The 1977 Legislature also addressed the issue of attorneys' fees by establishing a schedule for workers' comp judges to follow when awarding the fees. According to this formula, an attorney would receive a fee totaling 25 percent of the first $5,000 of benefits he earned for his client; 20 percent of the next $5,000 of the claim; and 15 percent of the remaining balance. The legislators gave the judges considerable discretionary powers by allowing them to consider "additional factors" which gave them the leeway to increase or decrease the award. Needless to say, the judges interpreted this freedom to the fullest extent, rarely — if ever — using it to decrease an award to a claimant's attorney.

By 1978, the situation in workers' comp had reached crisis proportions. That year, while lawmakers enacted some relatively minor reforms, they took a crucial step by setting up a study commission to review the issue and provide recommendations for major reform in 1979.

At the close of the 1978 Session, the Joint Committee on Workmen's Compensation went into action. Their deliberations set off a flurry of motion as every interest group — from attorneys' groups, insurance carriers, independent agents and medical providers to employers and employees — hurried forth with their own sets of recommendations.

As the 1979 Legislative Session drew near, the joint committee settled on a scheme called "wage loss" as the answer to Florida's prayers. Wage loss existed as little more than a theory in the minds of the experts; nowhere had it been put into action. The 1979 Workers' Compensation Reform Act used that theory to replace the old concept of diminution of wage-earning capacity, which compensated workers based on some fuzzy notion of the level of income the worker would lose in the future.

Under the old system, as soon as an injured worker reached MMI, insurance companies were supposed to turn into clairvoyants who could predict how much money the worker wouldn't be able to make in the future because of the injury he suffered. Accordingly, many workers got their bundles of money, then went back to work and made the same amount of money they had made before their injuries. Wage loss was supposed to replace fortune-telling with facts. After 1979, the worker would receive compensation based on the actual amount of income lost as a result of the accident.

The 1979 reforms also restructured the whole idea of permanent partial impairments. In 1978, permanent partial awards represented 3 percent of the total number of claims, yet they constituted more than 60 percent of the total benefits paid. The framework for deciding the degree of a partial impairment — which regulated the reimbursement for diminution of wage-earning capacity — was complex, subjective and imprecise. In other words, it was ripe for manipulation and abuse.

The Legislature also reorganized the administrative and judicial mechanisms of the workers' comp system. Employer and employee advocates alike argued that judicial proceedings were playing too large a part in a system that was supposed to be self-executing. The decision-making role of the body responsible for administering the law had been effectively abolished and replaced with a process of judicial fiat that demanded the presence of lawyers. By 1978, the Bureau of Workers' Compensation was swamped by floods of paperwork generated by the presence of the legal profession in the system.

From 1975 to 1978, the Legislature addressed the growing issues of fraud, abuse and manipulation in futile efforts to terminate those practices.

In 1979, the Legislature elevated the Bureau of Workers' Comp to division status and expanded its decision-making role in the process. This move was vital to protect the interests of the injured worker and his employer. The division was directed to investigate every claim for benefits and make an initial determination of whether benefits were due. State workers were made a resource to injured employees, guiding their progress through the system and representing the employees' interests in disputes with employers and insurance companies.

As a result of the reforms, the

Please see No-Fault, pg 31.

1993 Workers' Compensation Cost Comparison (as of Sept. 16, 1993)

prepared by Edward O. Roberts, Jr., Vice President, Governmental Services, Indiana Manufacturers Association

State	SAWW	Avg. W.C. Rate	Mock 100 Employee Avg. Premium
Maine	$400.77	$10.59	$212,207.71
Texas	462.12	10.03	231,753.18
California	537.96	8.74	235,088.52
Massachusetts	549.45	8.55	234,889.87
Rhode Island	445.68	8.30	184,957.20
Florida	**424.63**	**7.41**	**157,325.41**
New York	592.29	7.37	218,258.86
Colorado	463.13	7.12	164,874.28
Oklahoma	400.32	7.09	141,913.44
Michigan	509.93	7.03	179,240.39
Connecticut	603.59	6.82	205,824.19
Pennsylvania	475.33	6.72	159,710.88
New Hampshire	454.95	6.63	150,815.92
New Mexico	383.51	6.45	123,681.97
Montana	355.94	6.33	112,655.01
Louisiana	416.33	6.27	130,519.45
Hawaii	469.41	6.17	144,812.98
Kentucky	403.62	5.93	119,673.33
Illinois	515.53	5.57	143,575.10
Minnesota	467.33	5.47	127,814.75
Kansas	405.27	5.47	110,841.34
Alabama	407.12	5.45	110,940.20
Georgia	449.61	5.42	121,844.31
Missouri	435.82	5.40	117,671.40
Vermont	414.01	4.60	95,222.30
Mississippi	354.40	4.46	79,031.20

State	SAWW	Avg. W.C. Rate	Mock 100 Employee Avg. Premium
Wisconsin	$425.81	$4.42	$94,104.01
Nebraska	375.19	4.38	82,166.61
Alaska	594.88	4.38	130,278.72
New Jersey	586.22	4.25	124,571.75
Arizona	426.64	4.21	89,807.72
Iowa	385.08	4.20	80,866.80
Idaho	379.41	4.12	78,158.46
Arkansas	368.57	4.04	74,451.14
Tennessee	416.94	3.96	82,554.12
Utah	400.08	3.93	78,615.72
Delaware	481.24	3.77	90,713.74
South Dakota	328.42	3.67	60,265.07
North Carolina	409.76	3.63	74,371.44
Oregon	433.50	3.47	75,212.25
Maryland	493.47	3.39	83,643.17
South Carolina	394.97	3.23	63,787.55
Indiana	439.62	2.51	55,172.31
Virginia	451.12	2.39	53,908.84
Wyoming	394.84	*	—
Nevada	452.83	*	—
West Virginia	410.38	*	—
Washington	467.32	*	—
Ohio	461.28	*	—
North Dakota	348.72	*	—
National Average	**$475.53**	**$5.53**	**$131,484.04**

** No figures on average workers' compensation rate available — No figures on mock 100 employee premium available*

Method of computation

SAWW — State average weekly wage is determined by multiplying average hourly wage x 40 hours. SAWW is then multiplied by 50 weeks (resulting in a wage for 2,000 hours/year). That result is then multiplied by 100 employees. That result is then divided by 100 (the rate is per $100 wages) to determine the number of $100 units to which the rate is applied. The result is then multiplied by the average workers' comp insurance rate, yielding the average premium cost for an employer of 100 employees whose average wage equals SAWW in that state and whose mix of job classifications results in an average rate for the company equal to the average in the state.

Lessons To Be Learned

Some states in this nation are strapped with debilitating systems for delivering workers' compensation — Florida is one. Other states, such as Texas and Colorado, conquered the problems in their systems and watched premiums drop.

Since every situation is different, Florida cannot take the reform packages that work elsewhere and expect the same results. Some states are heavy manufacturing centers with strong union representation. In others, people congregate in urban areas surrounded by large, relatively unsettled, regions. Then there are the states where large numbers of people live in small geographic areas. And while many in Florida view workers' comp as an alternative welfare system, on average, our state lacks the entitlement-crazy politics of the Northeastern U.S.

All these variables aside, there are lessons to be learned from the successes of others.

Texas

Look at the past in Texas and you might see Florida's future. Four years ago, attorneys were involved in 40 percent of the claims filed there; attorney fees topped out at more than $150 million; and between 1983 and 1988 rates zoomed up about 200 percent.

Todd Brown is the executive director of the Texas Workers' Compensation Commission, the Lone Star State's version of our Division of Workers' Compensation. Brown worked for the Florida agency from 1988 to 1990, so he's familiar with our problems and the similarity they bear to the situation in Texas prior to passage of their 1989 reforms.

Today, the Texas commission follows an aggressive program to resolve disputes. When a conflict arises, an intermediary from the commission steps in to investigate the matter. If he cannot resolve the differences, the parties enter a five-tier dispute resolution process that ends in a state court of appeals. In 1991, only **nine** cases originating under the new process went to this court while more than 13,000 cases begun under the old law ended up in the appeals court.

Not only does the system operate with greater efficiency; it takes a lot less money to keep it running. Rates in 1993, on average, dropped to 15 percent of the 1990 levels. By 1994, Brown estimates that employers will spend 50 percent less on comp premiums than they did in 1990. Employer-paid deductibles contribute much of the savings. Since 1991, employers have had the opportunity to use the deductibles to pay early costs for injuries. Since they don't have to pay those funds to insurance companies in the form of premiums, they get to hold onto the money longer, which increases their investment return on it.

Brown gives recognition to another major ingredient for reduced premiums. "None of this came about because of a rate roll-back," he observes. "It all happened in the marketplace." The reforms opened up competition for premium dollars, with a resulting drop in price and increase in service.

The state provides the services of state officers, called ombudsmen, to assist employees, employers and beneficiaries who have not retained legal representation. The help rendered by the ombudsmen obviously satisfies the people they represent since only 6 percent of injured workers who filed for benefits in 1992 hired lawyers to represent them. More than 53 percent of all injured workers receive representation from commission personnel and 68 percent of all disputes over benefits reach resolution before entering the mediation process.

Brown credits the 1989 provision that ended lump sum settlements as the most important element of reform. "Before 1989, the insurance carrier would try to save money by cutting off the claimant's indemnity," he says. "Basically they'd try to starve the claimant out. The attorney would respond by sending the claimant on rounds to the doctors. The carrier would get nervous about the medical costs and he'd call the lawyer and say 'Let's settle.' It was like gambling in Vegas, but you notice those gambling houses never go broke. Well, the carriers might win a few, but most of the time they ended up paying out more than they should have."

The attorney's settlement award averaged out to a higher hourly fee than the $150 hourly fee he received from a court award. Once the lump sum settlements were disallowed, the attorneys didn't make as much money — $150 an hour wasn't

enough for them — and they backed out of the system. Brown says most of these attorneys got involved in workers' comp in the hope they would luck into a big third-party suit — such as contributory negligence by the manufacturer of a faulty piece of equipment or safety device. "The fees from settlements were a lucrative way to make a living until they found a big-ticket item," he explains.

Recently, the Fourth District Court of Appeal in San Antonio declared, in a 4-3 opinion, that key elements of the Texas law violate a worker's right to trial by jury, due process and equal protection of the law. Brown is not too concerned about this ruling. He knows the act's opponents shopped for the most liberal court they could find, and the Fourth District is notoriously pro-labor. Furthermore, when Texas enacted its original workers' comp system in 1917, the program was immediately challenged in court. The 1917 judiciary approved the legality of the system and affirmed the Legislature's power to limit access to the courts if lawmakers substituted the limitation with an equitable trade-off. Brown describes the trade-off in workers comp, "We tell the employee 'you can't sue,' and we tell the employer 'you have to provide this protection.'" That original test sets a precedent that Brown believes will be invoked by the state Supreme Court to uphold the 1989 reforms.

In Texas, workers' compensation insurance is voluntary; the employer chooses whether to purchase the insurance. If he doesn't and an employee is injured, that employee may sue for damages. One interesting note: 77 percent of all Texas employees are covered by workers' compensation as compared to the 81 percent protected by Florida's mandatory program.

In Brown's opinion, one big difference between Florida and Texas is the significance given to the administrative end of the system. "More attorney involvement means your agency is not effective at ensuring the delivery of benefits. I tell my people it's like routine maintenance. You can either pay a little money to change your oil filter regularly or you can wait a few years and buy a new engine. You can either put up some effort up-front or you can pay a lot more at the back end of the process."

Colorado

In 1991 the Colorado Legislature enacted a comprehensive package of reforms to the state's workers' comp system. Prior to the passage of that legislation, Colorado rates had jumped at an alarming clip of about 250 percent during the last decade, while the surrounding states experienced increases of approximately 80-90 percent. As premiums strangled growth in the state, the disparity between Colorado and its neighbors intensified the stunning impact of workers' comp on the economy.

According to Patrick Boyle, vice president of governmental affairs for the Colorado Association of Commerce and Industry (AIF's counterpart in that state), the reform effort began in 1988. The primary opposition to reform came from the workers' comp attorneys and the AFL-CIO. Building the groundswell of support that was necessary to overcome their resistance was a three-year effort, culminating in the 1991 victory.

As soon as Colorado's governor signed the bill into law, the AFL-CIO began an assault on the law, beginning with charges that the act violated the state's constitution. On July 6, 1993, after five days of arguments and two years of litigation, a Denver District Court dismissed the AFL-CIO's lawsuit. The decision calmed the apprehensions of the business community, which feared a return to the bad old days.

While the reform legislation covered a lot of ground, its overall objective centered on reducing unnecessary litigation and medical expenditures. One of the key features of the act put soft-tissue injuries on a schedule of benefits. Those injuries, such as sprains and strains, give carriers nightmares and claimant attorneys sweet dreams because they are difficult to diagnose and treat. Generally, a physician has to rely on the injured worker's complaints of the extent of his pain to make a diagnosis, recommend treatment and evaluate progress toward recovery. The schedule of benefits replaces subjectivity with a standard; instead of allowing open-ended and unlimited use of medical services, the schedule sets up a timetable for standard treatments, recovery periods and benefits.

The Colorado reforms also increased the effectiveness of the administrative arm of the system. The self-executing nature of workers' compensation requires strong administration of the provisions of the law in order to ensure fairness and to reduce the friction that leads to litigation.

Enactment of the Colorado law averted an anticipated 38-percent rate hike in 1991. Just recently, Colorado's rating agency, the National Council on Compensation Insurance (which also recommends Florida's workers' comp rates), proposed a 5-percent rate ***decrease***. This recommendation proves the extent of Colorado's achievement.

Opposition to the law has not been quelled, however. After losing its lawsuit, the AFL-CIO promised to appeal the decision to a higher court. The trial lawyers are mounting a campaign to overturn the law with two voter initiatives they hope to place on the 1994 ballot. The first would give workers the right to choose their physicians. Statistics show this measure would cause an increase in costs of 30-35 percent.

The other trial attorney initiative is even more devious. It would allow workers to invoke personal injury to sue their employers for workplace accidents. This proposal would violate the very essence of workers' comp law — protection offered by a no-fault, exclusive remedy system — and would effectively abolish workers' comp.

The Colorado experience defines the gist of the reform debate: do we allow workers' comp to function as it should or do we return to an expensive and cumbersome tort system that threatens the welfare and security of every worker, every employer and, ultimately, every taxpayer?

by Jacquelyn Horkan, AIF Information Specialist

The Prescription For Failure

As Maine's former insurance commissioner, Joe Edwards spent four years as his governor's point man for workers' comp reform. Since his 1991 resignation from that office, Edwards has been involved in comp reform efforts in a dozen other states.

He is also an attorney, a sin he readily confessed to Gov. Chiles on Sept. 8 at a workers' comp hearing in Miami. After receiving Chiles's reassurance that, "I'm handicapped by a law degree myself. Confession is good for the soul," Edwards expressed hope that, after his testimony, he might earn our forgiveness. Boy, did he ever.

Edwards began his testimony by admitting that there are many important areas that need to be addressed in reform, but that he wanted to concentrate on those relevant to costs. He ticked off a list of the pertinent factors — safety, carrier performance — before zeroing in on litigation as the key problem. While attorneys' fees were not the largest cost element in the system, Edwards acknowledged "a lot of other costs are driven by it. The frequency of litigation amplifies other costs."

He pointed to opportunity and incentive as the major catalysts behind litigation frequency. Opportunity is driven by the statute's complexity; incentive by its subjectivity. Florida has plenty of both. Using humor to clarify his point, Edwards gave the audience a lesson in Workers' Comp 101.

"In most states, the number one cost-driver is the number of people in the system. Even in Maine, which arguably has the worst system in the country, it is yet to happen that an attorney or a health provider is sending in a bill without a client. They haven't done that yet. If it happens first, it will happen in Maine.

Even in Maine, which arguably has the worst system in the country, it is yet to happen that an attorney or a health provider is sending in a bill without a client.

"So, the first thing that is necessary to have professional fees derivative from the system, are clients. And what you see is a broadening of the front end. The gatekeeper broadens so that more people are allowed in the system — stress, strain, back pain. Then you've got longer time in the system. It's inefficient. It's poorly administered. There's a lot of subjectivity and complexity, so people are in it for a longer period of time.

"And then the back-end gatekeepers — the return to work incentives, the ratio of benefits to wages and the other mechanisms that get people back on the job — break down or are, in the wage loss system in Florida for example, subject to dispute."

Next he discussed what he called, "medical-driven legal and legal-driven medical." Our state's litigious system creates the demand for expert medical testimony. In other words, more medical expenses are shifted into care that is centered on diagnosis rather than treatment. Instead of healing injured workers, physicians help both sides acquire evidence.

Edwards also reminded the audience of the significance of strong, efficient, well-organized administration of the system. Referring to some symptoms of Florida's poor regulation of workers' compensation — the system's enthusiasm for awarding attorney fees, case law that causes leap-frogging costs — he observed, "If you've got poor administration, not even good legislation will remedy that."

That statement hearkens back to a comment made by Todd Brown, executive director of the Texas Workers'

Compensation Commission. Brown credits his state's effective administrative control of the system to its structure for mediation and dispute resolution. In Florida disputes are settled against a quasi-judicial backdrop with a state officer, called a judge of compensation claims, presiding. JCCs owe their appointments to a council of lawyers, setting up an inherent conflict of interest when those same lawyers appear before the JCCs, who are supposed to listen as impartial arbitrators. Texas, on the other hand, gives the executive director of the workers' comp commission the power to hire and fire that state's equivalent of our JCCs, thereby removing the appearance, as well as the reality, of judicial preference.

Before efforts to reconstitute Florida administration of the law can begin, however, we have to pass a reform bill. Edwards cataloged the four parties he calls the ultimate repositories of money in this system: lawyers, providers, claimants and insurance carriers. And he offered some good advice, "Absolutely follow the dollars and you're in good shape. If you're going to cut costs, somebody is going to have to get less money than they're getting now. That's the bottom line."

At this point, Gov. Chiles interrupted Edwards with a question, targeted directly at members of the Legislature who, so far, have apparently missed out on the startlingly simple truth of this particular detail. The governor asked, "Are you saying there's no way we can make everybody happy — or the Legislature can — and reduce these rates?"

Edwards drew a rueful laugh with his response. "Absolutely," he agreed. "Unless they're happy getting less money and I've never known that to be the case. Someone has to lose."

"You've got to introduce that strong bill and then you've got to stand by it and insist that something effective be passed, because a bad bill is worse than no bill at all," Edwards said.

And therein lies the heart of matter. "The prescription for failure," Edwards warned, "is to draft a decent bill that accomplishes some of these objectives and then let it go into the legislative process and be eroded away through negotiation in an effort for consensus. Because one thing I can guarantee you: this bill, as in other states, will pass unanimously with complete consensus at exactly the point it has no financial savings and positive impact whatsoever. That's when you'll get consensus, and not before."

That fact disturbs the appetite and slumber of many of our lawmakers. Sen. Toni Jennings (R-Orlando), who chaired the Senate Select Committee, made some remarks at a conference in Orlando in which she blamed the failure of the governor's reform proposal during this year's session on its early publication. According to Jennings, if the governor had delayed release of his proposal until the last possible moment, all of those special interests would have lost the time they needed to convince legislators to kill it.

While it may reflect good, old-fashioned political strategy, her statement is an unsatisfactory rationalization for the Legislature's failure to act in the best interest of the people who put them in office. Edwards' final comments at the hearing gave our legislators clear and sensible guidelines for what the voters expect of them. With any luck, they'll pay attention.

"You need to draft strong reform," he said. "You need to understand what you're accomplishing. You've got to recognize you have to take money away from some people. That's a very difficult thing to do, but it has to be done if you're going to reduce costs.

"You've got to introduce that strong bill and then you've got to stand by it and insist that something effective be passed, because a bad bill is worse than no bill at all. And the issue really is jobs, wages and the economic health of the state of Florida."

Thank you Mr. Edwards. We couldn't have said it better ourselves.

by Jacquelyn Horkan, AIF
Information Specialist

You Don't Need the Luck O' the Irish . . .

When There's Joint and Several

For Florida trial lawyers, workers' compensation is a lucrative practice. Joint and several liability, however, was the leprechaun leading many of them to the pot of gold at the end of the rainbow.

Joint and several liability. The very words are anathema to the economic well-being of business in this state.

Joint and several liability. It is the core profit motive and chief means of collecting damages for most of Florida's overzealous trial lawyers.

Joint and several liability. It is no longer law in Florida, but the trial lawyers want it back. And they may do anything to get it.

This summer the Florida Supreme Court decided the case of *Fabre v. Martin*, which squarely faced the issue of liability for damages. The question was whether a negligent party who caused an injury but was only partially at fault should pay the entire damage award; or whether damages should be paid in accordance with fault.

Until the ruling in *Fabre* the entire damage award could end up being paid by the defendant with the deepest pocket because under Florida law joint and several liability applied. Each person involved in causing an injury could ultimately be held liable for the entire award of damages, regardless of the individual degree of fault.

Because of joint and several liability, a trial lawyer was able to sue every company in sight hoping that the jury would find a wealthy company even 1 percent at fault. That 1-percent at-fault made that "deep pocket" responsible for 100 percent of the jury award.

Business and the defense bar tried for decades to overturn joint and several liability by statute. Finally, in 1988, the Legislature enacted section 768.81(3), *Florida Statutes*, which abolished joint and several liability for non-economic damages (including punitive damages), which make up the bulk of most jury awards. Despite the new section, joint and several liability hung on.

With *Fabre* the Florida Supreme Court finally upheld the statute. "We are convinced that section 768.81(3) was enacted to replace joint and several liability with a system that requires each party to pay for non-economic damages only in proportion to the percentage of fault by which that defendant contributed to the accident." Thus, joint and several liability for non-economic damages is no longer Florida law either.

The trial bar is not happy with this decision because it makes collection of huge jury awards difficult. They will try to amend the statute. Millions of dollars are at stake. If the fight over fees in workers' compensation is any indication, then the fight to regain joint and several will be a legislative blood bath.

by Jodi L. Chase, AIF Vice President and General Counsel

No-Fault, from pg 24.

statutory benefits available to workers jumped from $130 per week to $195, literally overnight. While benefits increased, employers' premiums actually decreased. By Jan. 1, 1982, two and a half short years after the reforms went into effect, employers were paying, on average, 36.3-percent less for workers' comp insurance than they had paid in 1978. Attorney involvement in the system was insignificant. So, what happened?

Right away, trial attorneys went on the attack. They assaulted the division's role in representing the interest of the employee, determining compensability and resolving disputes. Once they won that battle, the war was over and every manipulator in Florida swarmed back into the system like fleas on a mangy old dog.

John Lewis was one of the issue experts who assisted the Legislature in developing the 1979 workers' comp reforms. This summer he told a story to the Senate Select Committee on Workers' Compensation. According to Lewis, he was invited to speak at a meeting of the Friends of 440. This was a group of workers' comp attorneys that drew its name from Chapter 440 of the *Florida Statutes*, the section of our state's law that regulates workers' comp. As Lewis relates, "The one comment that was made in the middle of [my presentation] was from a lawyer that I had known for years. He got up and looked around — there were judges, doctors, claims adjusters and lawyers from both sides there — and he said, 'Just remember, we are all in this together. If they don't need me, they don't need you and I am too old to learn a job that is going to pay me as much as the one I have now.'"

This statement illustrates the most significant problem in workers' comp: too many interest groups who are secondary to the purpose of the system have a disproportionate economic stake in it.

Lewis continued his story, "I ran into this gentleman — we sat next to each other on a plane a few years later on our way to a workers' compensation conference in Orlando — and he conceded that he was doing a lot better financially in post-wage loss than he had in pre-wage loss . . . With one or two exceptions, most of the people who are involved now, and who were involved 15 years ago, are making a whole lot more money in workers' compensation today than they were in 1978 and 1979."

In other words, the same people who drove our system to the brink of collapse 15 years ago are back in the driver's seat. Many of these interest groups are trying to dominate the current debate over workers' comp reform. The 1979 workers' comp effort, hailed as a landmark piece of legislation, failed because it did not rid the system of the fatal influence of these groups.

Unless the Legislature takes action to dilute the influence of these groups, any attempt to fix workers' comp is doomed to failure. Unless the Legislature takes action to implement a system for reaching objective medical decisions — unless the Legislature allows employees to receive assistance from experts who do not base their services on the hope of hitting a financial bonanza — our state's employers, employees and consumers will continue to pay the price.

by Jacquelyn Horkan, AIF Information Specialist

Associated Industries of Florida

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24 – 7

Twenty four hours a day, seven days a week — that's the new idea circulating among policy wonks and insurance junkies. The concept, called "24-hour coverage" would combine the medical benefits of health care, auto and workers' compensation insurance into one mega-policy.

This growing interest in the concept of 24-hour coverage should not surprise anyone, now that we have a Democratic president in the White House. After all, the easiest way to distinguish a liberal from a conservative is to mention that you have a new idea. The liberal is the one whose face lights up in a 1,000-watt flare. The conservative is the one who growls and walks away. Clinton, as a liberal, is fascinated with the idea of consolidating all medical benefits into one package.

In addition to the feds, 12 states (including Florida) are toying with idea. It's intriguing; it's innovative; it's controversial — but will it work?

Nobody can answer that question because nobody has the slightest idea ***how*** it will work. Proponents like the idea because they say it will cut costs by reducing double recoveries for the same injury. They also argue that 24-hour coverage will cut out all of the assorted paperwork and reporting requirements that come with different sources of coverage. Instead of trying to figure out which policy covers which medical benefits, one policy would cover every potential. No more haggling with insurance companies about whether the liability is theirs. And best of all, combining all medical coverage in one policy will increase efficiency and reduce litigation.

Those promises are impressive but largely ungrounded. Frank White, Executive Vice President and Chief Operating Officer of the AIF Property & Casualty Trust is one of the doubters. "The idea has a lot of merit, but health doesn't pay for as much as workers' comp. Are you going to restrict workers' compensation or expand health? Health can't possibly pay for what courts have interpreted as the range of workers' comp benefits." And does anyone really believe that lawyers won't find ample grounds to challenge these differences?

Workers' comp coverage offers virtually unlimited access to such services as rehabilitation, vocational training and physical therapy. As long as the injured worker needs the services (or his lawyer says he does), he gets them. Health insurance either excludes those services or limits the level of coverage. Cutting workers' comp benefits to the level of health benefits is an unlikely proposition. Raising health to the measure of workers' comp would bankrupt the state and the nation. And any decrease in administrative costs will not cover the cost of increased coverage. Besides, trying to regulate the differences between benefit levels could generate as much paperwork as consolidation seeks to eradicate.

The capacity of 24-hour coverage to lower the administrative costs of health care is unproven. If it can lower those costs, we're all for it, but 24-hour coverage is nothing more than an administrative remedy. It cannot attack the problems of over-utilization, fraud and manipulation that exist in every aspect of medical insurance. Florida's workers' comp system is afflicted with a highly contagious form of these problems. Until we can fix that disease, we need to keep it under 24-hour quarantine so that it doesn't infect other forms of health insurance.

by Jacquelyn Horkan, AIF
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