



The Florida Senate

Interim Project Summary 98-04

November 1998

Committee on Banking and Insurance

Senator Mario Diaz-Balart, Chairman

PRIVATIZATION OF FUNCTIONS WITHIN THE DIVISION OF WORKERS' COMPENSATION

SUMMARY

In recent years, the efficiency, effectiveness, and necessity of programs and functions provided by governmental entities have been under intense scrutiny. As a result, many programs and functions are being eliminated or downsized, transferred to other agencies, or assumed by the private sector in order to reduce costs or to provide services in a more effective and efficient manner.

The Division of Workers' Compensation, within the Department of Labor and Employment Security, has initiated efforts in the last few years to evaluate the feasibility of privatizing or outsourcing, and streamlining certain functions. As a result, certain responsibilities have been contracted to the private sector.

This report identifies other functions within the Division of Workers Compensation that may be more effectively and efficiently administered by the private sector. Organizational structure, funding, and efficiency issues were also analyzed by staff.

It is recommended that the Legislature consider the following options:

Privatization

1. Authorize the Division of Workers' Compensation to contract out the audit function within the Bureau of Monitoring and Audit.
2. Revise the audit requirements to allow the division to target audit entities, on an as needed basis, instead of mandatory auditing once every 3 years.
3. Consider contracting out the annual report, required under the provisions of s. 440.59, F.S., or possibly revising the reporting requirements to ensure that the Legislature receives concise and relevant information

regarding trends and issues in workers' compensation in a more cost-effective manner.

4. Consider contracting out the administration of the permanent total supplemental payments to a third-party administrator to reduce administrative costs.
5. Consider transferring many of the administrative responsibilities of those presently conducted by the individual, self-insurers section of the Bureau of Operations Support to the Florida Self-Insurers Guaranty Association, Inc., to eliminate duplication of effort.
6. Consider transferring the funding of the Department of Insurance positions responsible for auditing individual, self-insurers to the Florida Self-Insurers Guaranty Fund, Inc., for the purpose of contracting out the audits to the private sector.

Organizational Structure, Funding, and Efficiency Issues

1. Consider transferring the enforcement responsibilities of the Bureau of Compliance to the Department of Insurance to enhance the coordination of investigations with the Division of Fraud.
2. Consider clarifying the responsibilities of the Division of Workers' Compensation and the Agency for Health Care Administration regarding the jurisdiction of managed care workers' compensation or possibly transferring the responsibility for the medical component (i.e., collection and reporting of data, dispute resolution, certification of providers) to the Agency for Health Care Administration.
3. Establishing an advisory council, within the Agency for Health Care Administration to evaluate the costs/benefits of the current medical, data collection and reporting requirements and to make

recommendations regarding the reporting requirements to ensure that meaningful data is collected in a cost-effective manner, if the entire medical component of workers' compensation is transferred to the agency.

4. Consider revising the dispute resolution process to:
 - a) require a claimant to submit proof of a denial of benefits from the carrier/employer (or no response within 21 days of a request by certified mail), prior to being eligible to invoke the request for assistance process; b) eliminate the mandatory use of the request for assistance prior to filing a petition for benefits; and c) contingent upon the results of the Early Intervention Program and the possible reduction in workload associated with the implementation of the two preceding recommendations, reallocate current positions within the Employee Assistance and Ombudsman Office to Early Intervention.
5. Revise the current organizational structure of the division to create a separate organizational entity and require the appointment of the director by the Governor for a specified term, subject to confirmation by the Senate.
6. Establish an advisory council, within the division to evaluate the costs/benefits of the current data collection and reporting requirements and to make recommendations regarding the reporting requirements to ensure that meaningful data is collected in a cost-effective manner.
7. Clarify the current statutory requirements relating to the application of audit penalties assessed for the disposition of medical bills.

BACKGROUND

Pursuant to s. 440.015, F.S., the Division of Workers' Compensation, within the Department of Labor and Employment Security, is charged with administering the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments. Moreover, the legislation states that ". . . an efficient and self-executing system must be created which is not an economic or administrative burden."

The Division of Workers' Compensation is primarily funded through assessments on insurance companies,

self-insurance funds, assessable mutual companies, the Workers' Compensation Joint Underwriting Association, and self-insurers. The Workers' Compensation Administrative Trust Fund (WCATF) assessment may not exceed 4 percent, under the provisions of s. 440.51, F.S. For fiscal year 1997-98, the assessment base was approximately \$2.8 billion and the WCATF assessment was 2.4 percent. The assessment for fiscal year 1997-98 was slightly lower due to a \$39.9 million surplus in the trust fund. For fiscal year 1998-99, the projected assessment base is \$2.7 billion and the projected WCATF assessment rate is 2.75 percent.

In recent years due to the declining assessment base (because of the increasing use of high deductible policies), used to finance the Workers' Compensation Administrative Trust Fund and the Special Disability Trust Fund, an analysis of the efficacy of the division providing statutorily-required activities is timely. Prior to initiating efforts to recommend the privatization of functions or programs, an analysis of the existing programs was conducted by committee staff to determine whether recommendations should be made to retain, modify, continue, or eliminate a particular program administered by the division to meet the intent of ch. 440, F.S.

The Division of Workers' Compensation is organized into eight program or functional areas. As of November 1, 1998, the division has 643 full-time positions.

The Bureau of Monitoring and Audit is primarily responsible for monitoring the accuracy and timeliness of benefit payments, assessing penalties for late payments or reporting, and auditing carriers and individual, self-insurers (or their servicing company, if applicable).

The Bureau of Employee Assistance and Ombudsman Office (EAO) is charged with the responsibility of informing and assisting employers/carriers and injured workers in fulfilling their respective responsibilities under ch. 440, F.S., the Workers' Compensation Law. To effect the self-executing features of the law, s. 440.191, F.S., provides that chapter 440, F.S., is construed to permit injured workers and employers/carriers to resolve disputes ". . . without undue expense, costly litigation, or delay in the provisions of benefits." As a result, EAO investigates disputes and attempts to resolve disputes between injured workers and the carrier/employer in an informal manner through the Request for Assistance process. An employee may not file a petition for benefits unless the employee has exhausted this informal dispute resolution process. If resolution is not made in 30 days,

EAO may assist the employee in drafting a petition for benefits. The division refers the petition to the Office of the Judges of Compensation Claims for ultimate disposition.

The Bureau of Rehabilitation and Medical Services certifies and decertifies health care providers, promulgates reimbursement manuals, resolves reimbursement disputes, monitors carriers' compliance with reimbursement policies, evaluates carrier-provided re-employment services and training, and provides screening, re-employment, and training for injured workers.

The Bureau of Compliance is charged with the responsibility of ensuring that employers, subject to the Workers' Compensation Law, maintain workers' compensation coverage for their employees and maintains records relating to proof of coverage and exemption from coverage.

The Bureau of Operations Support administers the Special Disability Trust Fund, calculates and collects the assessments for the Workers' Compensation Administrative Trust Fund and the Special Disability Trust Fund, regulates individual self-insurers, and provides administrative support to the division.

The Bureau of Research and Education provides training and educational materials on the Workers' Compensation Law, responds to internal and external data requests, and administers electronic data interchange for the bureau. The Bureau of Information Management provides and maintains information systems technology for the division. The Director's Office staff includes: the director, assistant director, budget personnel, policy coordinator, and administrative support for the office.

METHODOLOGY

Stakeholders of the Division of Workers' Compensation (including representatives of insurance carriers, self-insured employers, injured workers, employee advocacy groups, employee union representatives, attorneys, research organizations, workers' compensation administrators in other states, and university faculty) were contacted to obtain comments and concerns regarding programs and functions provided by the division. In addition, staffs from the Department of Insurance, Agency for Health Care Administration, and Division of Workers' Compensation were interviewed.

Based on information obtained through the interview process, options and alternatives to improve the efficiency of the division's programs and services are offered, as well as options for privatization.

FINDINGS

Division's Efforts to Outsource and Streamline Operations

The Bureau of Compliance is evaluating a proposal made by the National Council on Compensation Insurance, Inc., (NCCI) to allow NCCI to assume the collection and maintenance of proof of coverage data for the division via computer access. Presently, the collection and processing of the proof of coverage documentation are very paper intensive and time-consuming procedures, since each proof of coverage form must be reviewed and entered into the computer system. The bureau estimates that the outsourcing of this process would eliminate the need for 12 full-time positions and would reduce salaries by approximately \$256,000.

During the last 2 fiscal years, the number of disputes resolved by the Bureau of Employee Assistance and Ombudsman Office, through the Request for Assistance Process has been declining. In response, the bureau is presently engaged in an "Early Intervention" pilot program in two counties which is aimed at notifying injured workers regarding their rights and responsibilities soon after the notice of injury (NOI) has been received by the division. The bureau hopes that the early intervention will result in disputes being resolved in a more timely and informal manner. The pilot was initiated on July 1, 1998, and will end on December 31, 1998. Committee staff contacted many stakeholders and solicited comments regarding the Early Intervention program, as compared with the current resolution process. Many stakeholders were very interested in the outcome of the Early Intervention program and emphasized the need for educating workers and employers and possibly revising the dispute resolution process.

The Bureau of Operations Support is evaluating the feasibility of outsourcing many of the responsibilities relating to the individual, self-insurers, including the calculation of experience modifications and evaluation of payroll information and the day-to-day oversight of the individual, self-insurers. Presently, these functions are very labor intensive and time-consuming process. Privatization could possibly eliminate seven positions.

The Bureau of Rehabilitation and Medical Services contracts with training facilities, including schools, on-the-job training and certificate programs to provide training and education to assist injured workers in returning to suitable, gainful employment. For fiscal years 1996-97 and 1997-98, the bureau paid \$1.3 and \$1.5 million to such facilities to provide these services. The seven district offices also engage qualified rehabilitation providers to review injured workers' physical and intellectual capabilities, aptitudes, achievements, and work-related behaviors to identify the most cost-effective means to facilitate return to work. For fiscal years 1996-97 and 1997-98, these contracts averaged approximately \$700,000.

Privatization Options

Special Disability Trust Fund

The Special Disability Trust Fund (SDTF), or "second-injury fund," was established in ch. 440, F.S., the Workers' Compensation Law. The SDTF was created to facilitate the reemployment of a worker with a disability or reemployment of a worker following an injury by reducing an employer's insurance premium for reemploying an injured worker and decreasing litigation between carriers concerning apportionment issues.

In 1997, the Legislature terminated the fund, effective with accidents occurring on or after January 1, 1998, and the assessment rate was capped at 4.52 percent. However, the fund retained the liability for claims filed prior to 1997.

The feasibility of privatizing the Second Injury Fund was evaluated in Connecticut in recent years; however, the Treasurer, as the administrator of the Fund, ultimately decided to retain the administration of the fund internally. According to the Treasurer's Office staff, it was determined that it would be more cost-effective to restructure the management of the fund and implement many cost containment strategies, than to privatize the fund.

During the 1998 Legislative Session, the Florida Legislature (ch. 98-399, L.O.F.) established the Special Disability Trust Fund Privatization Commission to evaluate the feasibility of privatizing the administration of the fund and transferring the liabilities of the fund to the private sector. If the commission determines that the state could realize substantial savings if the administration of the claims and the liabilities of the fund

are privatized, the legislation provides a mechanism to create a financing corporation for the purpose of transferring and privatizing the liabilities of the fund. The commission is authorized to contract with consultants deemed necessary to determine the liabilities of the fund, as of December 31, 1998, and the feasibility of privatizing the fund. The commission is also authorized to develop and issue a request for proposals on or before July 1, 1999, to contract out the administration of the fund and the assumption of the liabilities.

Audit

This section of the Bureau of Monitoring and Audit presently has the responsibility of auditing carriers, and individual, self-insurers (or their servicing company, if applicable) at least once every 3 years, under the provisions of s. 440.525, F.S. This section has 16 Workers' Compensation Specialists that are responsible for conducting audits and re-audits. Salaries and benefits associated with these positions are approximately \$900,000. During the last 2 fiscal years, the bureau has completed, on average, 65 audits and 32 re-audits, per year. The estimated costs for conducting audits and re-audits, on an annual basis, are \$401,000 (\$316,000 audits and \$85,000, re-audits). Presently, the on-site examination process and the preparation of the audit report are not automated.

Since the bureau staff identified 1,200 entities subject to an audit and identified less than 100 as actually audited, the bureau staff was asked to provide supporting documentation and methodology for the workload statistics. In recent years, the bureau has relied heavily on auditing claim files of servicing companies as means of determining the compliance of the particular carrier or individual self-insurer that contracts with the servicing company. However, the sampling methodology used by the bureau in selecting files to review does not ensure that files for each particular carrier or individual self-insurer are included and reviewed within the scope of the audit to determine compliance with the requirements of ch. 440, F.S.

The bureau could only document approximately 350 entities as specifically audited by the bureau. The bureau identified 161 entities as definitely not being audited by the bureau. However, the bureau could not ascertain whether 718 entities were actually audited as part of an audit of a servicing company.

Efforts to privatize similar compliance examination functions in other governmental entities appear to have resulted in considerable cost savings, without reducing

the quality or quantity of the work product. The Department of Insurance recently initiated efforts to privatize the field property and casualty and life and health market conduct examinations of carriers and estimated eliminating a total of 24 positions and reducing the budget by an estimated \$1.4 million by the end of fiscal year 2000.

Research and Education

Section 440.59, F.S., requires the division to submit an annual report to the Legislature by September 15 of each year. This report was intended to provide an annual update to the Legislature on the status of workers' compensation trends and issues in Florida. The legislation specifically requires the reporting on the administration of ch. 440, F.S., by the division; a statement of the causes of the accidents leading to the injuries for which the awards were made; and a closed claims report for lost-time cases, including a status report on all cases involving work-related injuries in the previous 10 years.

Presently this report, which includes the items required above and many additional data elements, costs the division approximately \$125,000 per year or approximately \$105 per report (excluding billable hours of staff external to the Bureau of Research and Education). Many individuals interviewed for this interim project indicated that they found the current format of the report to be voluminous and questioned the cost/benefit of the current, work product and expressed concerns regarding the quality and credibility of the data. Other individuals interviewed found the information to be useful. Some individuals, including legislative staff, have suggested revamping the report to produce a more concise report focusing on the impact of reforms, responsibilities of the division, key contacts for program areas, and placing most of the charts, graphs, and data on the INTERNET, or available as a hard copy, upon request. In response, the division created another report to address the 1993 reforms.

Audits of Individual, Self-Insurers by the Department of Insurance

The Department of Insurance presently has two full-time positions assigned to the responsibility of auditing the payroll and classification codes of individual, self-insurers to determine whether the amount reported to the Division of Workers' Compensation was accurate for purposes of calculating and collecting the Workers'

Compensation Administrative Trust Fund assessment. For the period of fiscal years 1994-95 through 1997-98, the auditors conducted, on average, eight governmental audits and 11.5 private sector audits per year. As a result, only 4 percent of the total number of individual, self-insured employers (462) are audited per year. The costs of conducting and issuing an audit report is approximately \$2,300 per audit or \$37,000 per year. The salaries and benefits for the two positions total approximately \$85,000.

The major stakeholders concerned about the accuracy and completeness of the payroll and classification codes of individual self-insurers are the Division of Worker's Compensation and the Florida Self-Insurers Guaranty Association, Incorporated. The association has indicated that they also engage examiners periodically to evaluate the financial condition, payroll, and classification codes of members.

Payment of Supplemental Benefits

Under the provisions of s. 440.15, F.S., the division is responsible for paying supplemental benefits to permanently disabled persons injured during the period of July 1, 1955, through June 30, 1984. For fiscal year 1997-98, the division paid approximately \$24 million in supplemental benefits to injured workers. Salaries and benefits associated with the five positions within the Bureau of Monitoring and Audit that are responsible for administering this program (four Senior Workers' Compensation Examiners and one Senior Clerk) total approximately \$200,000, per year.

In a recent Auditor General's report issued June 23, 1998, entitled, *Operational Audit of the Florida Department of Labor and Employment Security*, concerns were raised regarding the administration of this program. The report noted that,

“...20 of the 28 available claimant files reviewed (approximately 71 percent) did not contain one or more required documents used by the division to determine eligibility. In the absence of the necessary records, we were unable to determine whether the subject claimants were eligible to receive the supplemental benefits or whether such benefits were properly calculated.”

An analysis of the records also disclosed “. . . 45 claimants with dates of death ranging from February 11, 1995, to July 27, 1997, for which warrants totaling over

\$152,400 had been negotiated (deposited or cashed) after the later of July 1, 1996, or the respective dates of death.”

Organizational, Funding, and Efficiency Issues

Collection of Penalties - Late Filing of the First Notice of Injury

Section 440.185(9), F.S., requires the division to fine an employer or insurer who fails or refuses to timely send any form, report, or notice a penalty not to exceed \$500. For example, if an employer fails to file a first notice of injury with a carrier within 7 days of actual knowledge of injury or death, the employer would be subject to this penalty. Rule 38F-24.0231, F.A.C., requires the division to assess a penalty in the range of \$100-500, contingent on the number of days the form was untimely filed. The timely filing of the notice of injury is critical to provide prompt notification to the carrier and to ensure that an injured worker receives the appropriate benefits in a timely manner.

The division, at the direction of the department, initiated a waiver for the first instance of noncompliance of this statutory penalty by employers during fiscal year 1996-97. As a result, the Bureau of Monitoring and Audit failed to collect penalties in the amounts of \$1,195,600 and \$206,800 for fiscal years 1997-98 and 1996-97, respectively. If the division continues to waive this statutorily-required penalty for the late filing of the first notice of injury, it should seek legislative authority to codify this practice. The division does not authorize such a waiver for a carrier, individual, self-insured employer, or servicing agent failing to submit statutorily-required reports in a timely manner.

Collection of Penalties - Waiver of Audit Assessments

The Bureau of Monitoring and Audit is also responsible for examining each carrier or individual, self-insurer, under the provisions of s. 440.525, F.S. Section 440.13(11)(b), F.S., provides that any self-insured or carrier that is not in compliance, regarding the payment of medical bills, will be assessed a fine not to exceed 1 percent of the prior year's assessment for every quarter in which the entity fails to attain 90-percent compliance. In addition, the statute directs the division to fine a carrier, as provided in s. 440.13(11)(b), F.S., up to \$50 for each late payment of compensation that is below the 90 percent threshold.

Rule 38F-24.0221, F.A.C., requires any carrier, self-insurer or servicing agent who fails to attain the 90 percent performance standard to submit a corrective action plan to the division within 30 days after receipt of the audit report. Upon the receipt of the plan, the division will withhold the collection of all penalties and fines assessed against the entity for untimely filing of forms or late payments of compensation, as identified in the audit report. If the entity has not corrected all these deficiencies by the time the entity is re-audited, all penalties and fines for failure to achieve the 90 percent standard are to be collected from the entity.

The percentage of entities achieving the 90 percent performance standard during the initial audit for fiscal year 1996-97 and 1997-98 were 43 percent and 50 percent, respectively. Since an entity has an opportunity to receive a subsequent re-audit (within the next year) and possibly have all or some of the penalties waived, there does not appear to be a strong incentive for entities to aggressively monitor their performance or claims practices on an ongoing basis prior to an audit.

During the fiscal year 1996-97, one penalty, in the amount of \$200,000 for the untimely disposition (payment) of medical bills, was waived for a particular auditee. This waiver practice appears to be an exception to the standard operating practice of the bureau. The division should seek statutory clarification to provide a waiver of any or all penalties, since the statutes do not appear to authorize such a waiver. Also, the actual administration or application of the waiver appears to conflict with the rule. Any such waiver should be consistently applied to all audited entities.

Division's Organizational Structure

Currently, the Secretary of the Department of Labor and Employment and Security appoints the Director of the Division of Workers' Compensation. During the period of 1979 through 1998, eight individuals have served as the director (or acting director) of the division and the average appointment period was less than 3 years. The lack of continuity in this key position and instability in the appointment period has made it very difficult for the division to develop and implement short and long-term strategies and to be responsive to the changes and trends in the workers' compensation market.

Enforcement Responsibilities

The Division of Workers' Compensation is granted civil enforcement authority with respect to compliance. If the Division of Workers' Compensation concludes that a criminal intent to defraud exists, it must refer the case to the Department of Insurance, Division of Insurance Fraud. However, as noted in the First Interim Report of the Fourteenth Statewide Grand Jury entitled, *Report on Workers' Compensation Fraud*, regulators and insurers indicate that the protocols for the transition of compliance investigations into fraud investigations are unclear. Thus, it is unclear what circumstances would generally prompt a referral from Division of Workers' Compensation to the Division of Insurance Fraud. Many stakeholders within the workers' compensation system that were interviewed expressed concerns regarding the resources and expertise of the Bureau of Compliance and suggested that the transfer of the bureau's enforcement role to the Department of Insurance may result in greater coordination and effective utilization of resources and expertise for the enforcement responsibilities.

Regulation of Workers' Compensation Managed Care

As a result of the 1993 reforms, workers' compensation managed care was mandated, effective January 1, 1997. Section 440.13(11), F.S., authorizes the division to determine "...whether providers are complying with ch. 440, F.S., and with rules adopted by the division, whether the providers are engaging in over utilization, and whether providers are engaging in improper billing practices." The Agency for Health Care Administration is responsible for authorizing carriers to offer or utilize a workers' compensation managed care arrangement, if the carrier meets the conditions of s. 440.134, F.S. As of November 1, 1998, the division and the agency had not formally signed a memorandum of understanding clarifying the jurisdictions and duties of the two entities. Many stakeholders in the workers' compensation system expressed concerns regarding the current administration and possible duplication in the regulatory requirements for managed care workers' compensation arrangements in Florida.

RECOMMENDATIONS

It is recommended that the Legislature consider the following options:

Privatization

1. Authorize the Division of Workers' Compensation to contract out the audit function within the Bureau of Monitoring and Audit.
2. Revise the audit requirements to allow the division to target audit entities, on an as needed basis, instead of mandatory auditing once every 3 years.
3. Consider contracting out the annual report, required under the provisions of s. 440.59, F.S., or possibly revising the reporting requirements to ensure that the Legislature receives concise and relevant information regarding trends and issues in workers' compensation in a more cost-effective manner.
4. Consider contracting out the administration of the permanent total supplemental payments to a third-party administrator to reduce administrative costs.
5. Consider transferring many of the administrative responsibilities of those presently conducted by the individual, self-insurers section of the Bureau of Operations Support to the Florida Self-Insurers Guaranty Association, Inc., to eliminate duplication of effort.
6. Consider transferring the funding of the Department of Insurance positions responsible for auditing individual, self-insurers to the Florida Self-Insurers Guaranty Fund, Inc., for the purpose of contracting out the audits to the private sector.

Organizational Structure, Funding, and Efficiency Issues

1. Consider transferring the enforcement responsibilities of the Bureau of Compliance to the Department of Insurance to enhance the coordination of investigations with the Division of Fraud.
2. Consider clarifying the responsibilities of the division and the Agency for Health Care Administration regarding the jurisdiction of managed care workers' compensation or possibly transferring the responsibility for the medical component (i.e., collection and reporting of data, dispute resolution, certification of providers) to the Agency for Health Care Administration.
3. Establishing an advisory council, within the Agency for Health Care Administration to evaluate the costs/benefits of the current medical, data collection

and reporting requirements and to make recommendations regarding the reporting requirements to ensure that meaningful data is collected in a cost-effective manner, if the entire medical component of workers' compensation is transferred to the agency.

- 4. Consider revising the dispute resolution process to:
 - a) require a claimant to submit proof of a denial of benefits from the carrier/employer (or no response within 21 days of a request by certified mail), prior to being eligible to invoke the request for assistance process;
 - b) eliminate the mandatory use of the request for assistance prior to filing a petition for benefits;
 - and c) contingent upon the results of the Early Intervention Program and the possible reduction in workload associated with the implementation of the two preceding recommendations, reallocate current positions within the Employee Assistance and Ombudsman Office to Early Intervention.

- 5. Revise the current organizational structure of the division to create a separate organizational entity and require the appointment of the director by the Governor for a specified term, subject to confirmation by the Senate.
- 6. Establish an advisory council, within the division to evaluate the costs/benefits of the current data collection and reporting requirements and to make recommendations regarding the reporting requirements to ensure that meaningful data is collected in a cost-effective manner.
- 7. Clarify the current statutory requirements relating to the application of audit penalties assessed for the disposition of medical bills.

COMMITTEE(S) INVOLVED IN REPORT (*Contact first committee for more information.*)

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MEMBER OVERSIGHT

Senators Charlie Clary and Alberto Gutman