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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/17
LAST UPDATED _____

SPONSOR Ely **HB** 359

SHORT TITLE Workers' Comp Awards **SB** _____

ANALYST Klundt/Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Unknown	Unknown	Unknown	Recurring	Workers' Compensation Administration Fund
	\$6,500.0	\$7,000.0	\$8,000.0	\$21,500.0	Recurring	General Fund, GSD

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workers' Compensation Administration (WCA)
 General Services Department (WSD)
 Administrative Office of the Courts (AOC)

SUMMARY

House Bill 359 (HB 359) changes various sections of the Workers' Compensation Act, as follows:

Section 52-1-6 NMSA 1978, is an amendment to Subsection E allowing a party to go outside of the workers' compensation system to seek additional damages for bad faith, unfair claims processing, or other common law or statutory claims against an employer, insurer, or other party.

Section 52-1-26.3 NMSA 1978, increases modifier points for education under Subsection B and across-the-board modifier point increases for specific vocational preparation level under Subsection C.

Section 52-1-26.4 NMSA 1978, is a new Subsection D, allowing a worker to receive undefined modifier points for a reduction in physical capacity based upon primary mental impairment.

Section 52-1-28.1 NMSA 1978, is a change to Subsection C increasing the civil penalty for repeated unfair claims practice from \$1,000 to \$5,000. This is in addition to a new Subsection G that provides this section shall not limit the right to bring bad faith type claims outside the workers' compensation system.

Section 52-1-51 NMSA 1978, changes the way independent medical examinations (IMEs) are ordered, including limiting discretion of workers' compensation judges. The bill also allows a worker whose benefits are reduced or suspended because of an unsanitary or injurious practice to recover benefits once the unsanitary or injurious practice has ended.

Section 52-1-54 NMSA 1978 is a new Subsection B that requires all attorney fees, not just those by a worker's attorney, to be approved by a workers' compensation judge. Additional changes are made throughout Section 52-1-54 to implement this change. The bill also includes a provision in this Section increasing the limit for discovery advances from employer to worker from \$3,000 to \$6,000. Subsection H is amended to allow future medical benefits to be considered in determining attorney fees for a worker. Subsection I is amended to raise the amount that a workers' compensation judge can add to a finding of bad faith from \$5,000 to \$15,000. A new Subsection L is added, allowing for additional attorney fee payments to either party above the \$22,500 cap for cases involving permanent total disability. An amendment to Subsection N is made, raising the fine for violating the attorney fees provisions of this statute from \$50 to \$500 dollars to \$500 to \$5000.

Finally, the bill amends a provision of the Insurance Act. Section 59A-16-30 is amended to remove the provision that states that the Workers' Compensation Act and New Mexico Occupational Disease Disablement Law provide exclusive remedies in a workers' compensation case.

FISCAL IMPLICATIONS

The Worker's Compensation Administration (WCA) reported this bill will likely result in increased workers' compensation indemnity payments and costs by state, county, and local government employers.

The General Services Department (GSD) reported:

“This bill represents a Major fiscal impact to the State's Workers Compensation Retention Fund. It is estimated that the bill would have an FY'18 fiscal impact of at least \$7,000,000.

The modifier points are percentages of wage substitution provided to injured workers based on their age, education and work history. Each point increase is a percentage increase provided to worker. There is little rationale for stating that a worker five years ago should receive 5% of their wage replacement whereas a worker today should receive 10%. There is already a mechanism in the WCA for increases to the maximum compensation rate. Moreover, workers receive increases in pay through raises and promotions. A worker typically will get benefits for 500 to 700 weeks depending in part on the amount of the modifier benefits. An increase in the modifier points will lead to an increase in the time for which a worker can obtain benefits.

The suggested revisions will result in 33 to 100% increase in modifier payments. Thus, there will be an increase in premiums to Agencies across the State who will then require increased appropriations to cover increased workers compensation premiums. Additionally, It is difficult to measure the fiscal impact of the following changes:

1. The Judge approving fees awards for Employer;
 - a. Will the Judge have the authority to increase the hourly rate for contract attorneys
 - i. Would this violate the procurement code
 - b. What are the administrative costs in preparing for and appearing at fee approval hearings;
2. Elimination of the fee cap for Permanent Total Disability cases.
3. Reimbursement of wages suspended during an unsanitary or injurious practice.”

The Administrative Office of the Courts (AOC) reported there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, additional appeals based on increased fines and additional actions for claims of bad faith, unfair claims-processing practices or other similar common law or statutory claims against an employer, insurer or other party. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

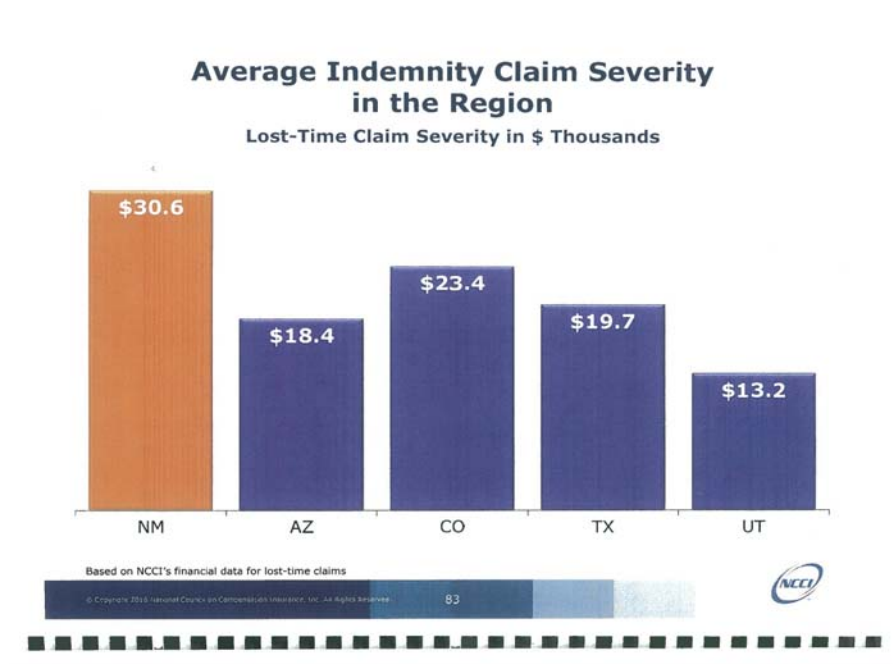
SIGNIFICANT ISSUES

WCA reported the following:

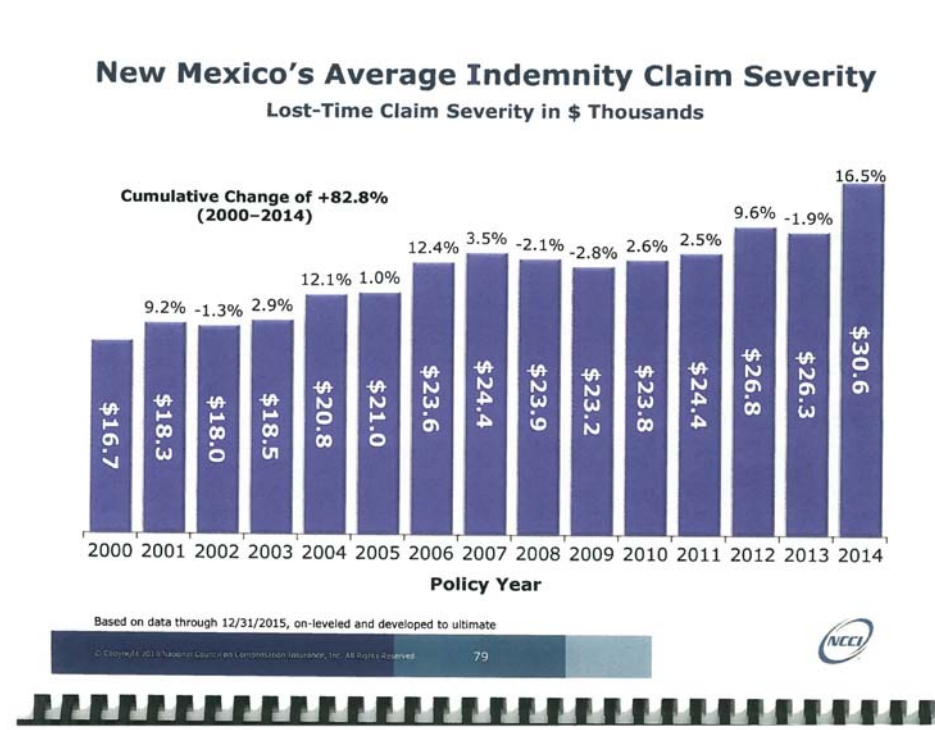
“This is an omnibus bill that makes sweeping changes to the Workers’ Compensation Act. The Workers’ Compensation Administration (WCA) has not had sufficient time to review the bill and comment on the extensive changes it proposes. Additionally, stakeholders have not been invited to review or comment on the changes, including the employers and insurers, the attorneys who practice workers’ compensation law, and the workers’ compensation judges who apply the law. The systemic and administrative costs of enacting the bill have also not been vetted or evaluated.

This bill would also allow, for the first time since the Workers’ Compensation Act was passed, a worker to seek a remedy in another court for common law or statutory damages outside of the Workers’ Compensation Act. This would erode the exclusive remedy provision of the Workers’ Compensation Act and ultimately result in increased costs for employers, and delay delivery of benefits to injured workers. It will across increase the number of claims filed in district courts.

Increasing indemnity benefits to injured workers may be unnecessary. As set forth in the following chart prepared by the National Council on Compensation Insurance (NCCI), in 2016, New Mexico insurers already pay more in indemnity benefits on average than surrounding states.



Further, as demonstrated in claims data prepared by NCCI, the average amount of indemnity benefits paid to injured workers has increased 8.28% from 2000 to 2014.



The 1990 Workers' Compensation Act struck a deliberate balance between the interests of injured workers and the interests of employers. The workers' compensation system is designed to be formulaic (i.e., if this, then that) so that claims can be paid predictably and consistently and so that parties know what is expected of them. Under current law, workers who suffer a whole body injury (e.g. shoulders, backs, hips) and receive a

physical impairment rating are entitled to permanent partial disability (PPD) benefits. These benefits are made up of a physical impairment rating and, if the worker does not return to work at preinjury wage, modification of the physical impairment rating based on a formula assigning points for the worker's age, education, skill level, training, and change in physical capacity.

The bill proposes to increase the modifiers for education and skill level. Because the bill increases every modifier for education and skill level by at least 1 point (there are several modifiers that may apply in each case for a current maximum of 13 base modifier points), the resulting increase in base modifiers is at least an additional 3-4% per claim. This increase is before the base modifiers are multiplied by change in physical capacity; the physical capacity multiplier is as high as a multiplier of 8 (see Section 52-1-26.4 NMSA 1978). An increase in the base modifier numbers that make up the PPD benefits, as set forth in the bill, will result in higher permanent partial disability rating in every whole body injury case.

Increasing modifiers as proposed may increase the number of claims that result in a permanent partial disability rating of 80% or higher. This is critical because workers with PPD ratings below 80% receive 500 weeks of benefits, whereas workers with PPD ratings of 80% or above receive 700 weeks. The proposed bill will likely increase the number of whole body impairment ratings that result in an impairment rating of 80% or higher, thus increasing the number of claims subject to 700 weeks of benefits. Preliminary input from at least one workers' compensation judge indicates that about 40% of that judge's trials in 2016 involved a claim where the issue centered on whether the worker's PPD rating was at or greater than 80% (700 weeks) or less than 80% (500 weeks).

Even for those workers entitled to receive 500 weeks of benefits, the bill will increase the permanent partial disability impairment rating because it increases the modifier points for education and skill level awarded to every worker entitled to receive PPD benefits. The impact of this bill may lead to significant increases in the cost of indemnity claims and, ultimately, increased insurance premiums to employers.

The amendment to Section 52-1-54 increasing the advance for worker discovery from \$3,000 to \$6,000 may increase the ultimate cost of litigation by encouraging discovery, as well as delaying the trial and the ultimate conclusion of the case. This is contrary to the purpose of the Act, which is to ensure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers. *See* Section 52-5-1."

PERFORMANCE IMPLICATIONS

WCA reported this bill may increase the number of cases that proceed to formal hearing and may ultimately cause delays in delivering timely compensation orders in other disputed claims. In addition, the agency also believes the bill allows bad faith and other claims outside of the Worker's Compensation Act but also allows the worker to assert those claims before the WCA's Court. Allowing similar claims to proceed to two different court settings, possibly at the same time, will increase costs for employers and could cause jurisdictional confusion for the WCA's Court and the judiciary.

TECHNICAL ISSUES

The bill does not remove the farm and ranch exclusion that was ruled unconstitutional by the New Mexico Supreme Court in *Noe Rodriguez v. Brand West Dairy*, 2016-NMSC-029.

Section 5(B): the original statutory section made it clear that the only health care provider authorized to conduct an examination would be chosen by the judge from an approved list. The HB 359 amendment, however, permits the judge to designate the health care provider originally chosen by the petitioner. Additionally, under the HB 359 amendment, the judge “*may also* designate a health care provider” from the approved list, creating confusion about whether a judge may designate two providers to perform the independent examination.

OTHER SUBSTANTIVE ISSUES

Without agreeing with the procedure set forth in the bill, the WCA agrees that the procedure for ordering IMEs might have a more appropriate route and that IMEs may be too frequently ordered. The WCA also agrees that calculation of modifiers for primary mental impairment claims (those without physical injury) may require clarification.

The AOC reported HB 359 does not require notice to the judge that benefits have been restored, despite the reduction or suspension having been ordered by the judge, nor does it require a hearing to determine that the behavior has ceased or been undertaken.

KK/sb