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FISCAL IMPACT REPORT

| | | | | | |
|--------------------|--|----------------------|-----------------|-----------|------------------------|
| SPONSOR | <u>SCORC</u> | ORIGINAL DATE | <u>02/21/17</u> | HB | |
| | | LAST UPDATED | <u>03/16/17</u> | | <u>155/SCORCS/aSJC</u> |
| SHORT TITLE | <u>Workers' Comp Benefit Clarification</u> | SB | | | <u>/aHBIC/aHJC</u> |
| | | ANALYST | | | <u>Klundt</u> |

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY17 | FY18 | FY19 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---------|------|----------------------|------------------------------|---------------------------|
| Total | | Minimal | | | | Other Transfers, GF |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workers' Compensation Administration (WCA)

Administrative Office the Courts (AOC)

SUMMARY

House Judiciary Committee

The House Judiciary Committee (HJC) amendment makes several technical changes and inserts a substantive change to the temporary total disability and permanent partial disability benefits sections. Specifically, the amendment adds a new section to provide that termination, suspension or reduction of benefits “shall be limited to three months unless a workers’ compensation judge orders a longer period of termination, suspension or reduction.”

House Business and Industry Committee

The House Business and Industry Committee amendment to SCORC substitute for Senate Bill 155 addresses some technical issues and replaces “court” with “workers’ compensation judge”. Additionally, the amendment clarifies that the \$10 thousand fine is to be paid by the employer to the injured worker.

Senate Judiciary Committee

The Senate Judiciary Committee amendment to SCORC substitute for Senate Bill 155 strikes “is disabled and” from page 2 lines 10 and 17.

Senate Corporations and Transportation Committee Substitute

SCORC's substitute to SB 155 is very similar to HB 250 from the 2015 session. Similar to the original bill, the substitute addresses court rulings that adversely impact the return to work provisions and formulaic design of the Workers' Compensation Act. The proposed bill attempts to restore balance to the workers' compensation system and clarify a worker's entitlement to disability benefits when an injured worker (1) returns to work earning his or her preinjury wage, (2) unreasonably refuses to accept a reasonable return to work offer from an employer, or (3) is terminated for misconduct unrelated to the work injury after returning to work following an injury. The bill provides that disputes over the work offer or rejection of the work offer should be evaluated from a standard of "reasonableness". The bill also provides for penalties for bad faith, unfair claims practices, and retaliation against an employer who terminates a worker for pretextual reasons to avoid payment of benefits or as retaliation against the injured worker. The substitute imposes an additional "fine" of up to \$10,000 if a workers' compensation judge finds that the employer terminated the worker for pretextual reasons.

The effective date is July 1, 2017.

FISCAL IMPLICATIONS

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 increased disputed claims for worker's compensation benefits for temporary total disability or for the rating level of a permanent partial disability, including litigation of the new issues of whether the worker is responsible for the separation from employment and whether the separation is unrelated to the on-the-job injury. 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. AOC is currently working on possible parameters to measure resulting case increase.

SIGNIFICANT ISSUES

The Worker's Compensation Administration reported the following analysis to the HJC amendment:

To address the various significant issues identified in this section, the WCA offers a proposed amendment. See page 5 of this FIR.

The amendment seems to require litigation even when there is no dispute between the parties. Paragraph G provides guidance, "**in the event of a dispute**", to a workers' compensation judge on how to resolve litigation over the reasonableness of an offer or a rejection of an offer. This language takes into account the reality that parties may, but are not required to, file a complaint with the WCA when there is a dispute in a claim. Conversely, the new paragraph H will require litigation over termination of benefits (for misconduct or rejection of a reasonable return to work offer) to obtain approval of a workers' compensation judge in order to terminate benefits for a longer period than three months. Increased litigation will not only increase the workload of the WCA, but also will increase system costs (additional attorney fees for both parties) that will be passed onto employers through increased insurance premium costs.

In addition to requiring unnecessary litigation and increasing system costs, the amendment is confusing. The amendment inserts terms (“suspension” and “reduction”) that are not currently used in the sections of law covering temporary total disability (TTD) or permanent partial disability (PPD). Under current law, a worker either receives or does not receive TTD or PPD modifiers. Language referencing a “suspension” or “reduction” of such benefits fundamentally alters the structure and formulaic design of the benefits’ system. Are the HJC amendments intended to apply to other sections of the Act where benefits are changed (i.e., drug and alcohol reductions, safety device decreases, injurious practices, etc.)?

The amendment is also problematic because it can be interpreted in many, inconsistent ways. For example, is the three month period viewed as a limitation on the time period for termination, suspension, or reduction of benefits, or is it a deadline within which to get a decision from a workers’ compensation judge? Also, is a hearing required before the workers’ compensation judge can decide the length of time a worker’s benefits may be terminated? If a hearing is required, what are the parties’ burdens of proof – is it the worker’s burden to present evidence justifying a reinstatement of the benefits or is it the employer’s burden to present evidence to justify continuing the termination, suspension, or reduction of benefits? It is also unclear how the provision will apply to temporary partial disability benefits when a worker returns to work but is earning less than the preinjury wage and receiving workers’ compensation benefits at a rate based on the difference between pre-injury and return to work wages. It is also unclear how the provision will apply when a worker accepts employment with another employer.

The amendment raises additional procedural questions. First, whose duty will it be to bring the matter before the workers’ compensation judge – the worker whose benefits were terminated or the employer who wishes to terminate benefits beyond the three month period? It is unlikely the dispute can be assigned to a workers’ compensation judge for resolution within a three month time line under the current dispute resolution process. Under current law, complaints must proceed to a mandatory informal mediation conference. Section 52-5-5 provides the WCA has up to 60 days for a mediator to issue a recommendation for resolution. The parties then have 30 days to accept or reject the mediator’s recommendation. A judge is not assigned to resolve the parties’ dispute until after a party rejects the recommendation. Once a judge is assigned, the judge cannot act for a period of time (possibly up to 20 days) to allow both parties their statutory right to excuse the judge. This total time frame is longer than three months (90 days), thus setting up a procedural impossibility for a judge to be assigned within three months, or to even issue a decision.

The amendment also raises practical challenges and questions. Will insurers of employers be expected to self-police and not terminate benefits for more than three months without obtaining a judge’s approval? If the insurer does in fact terminate benefits for more than three months without a judge’s approval, that could lead to a bad faith claim against the employer who will ultimately pay for the costs of the insurer’s decision through increased benefits and premiums.

Lastly, the amendment may not solve the issue of getting timely resolution when an injured worker’s benefits are terminated following a termination for misconduct or the

worker rejects a reasonable return to work offer. This is so because the amendment is confusing (see above), which may lead to additional litigation before the district court and Court of Appeals.

The Worker's Compensation Administration reported the following analysis to the HBIC amendment:

Replacing "court" with "workers' compensation judge" is consistent with other sections of the Workers' Compensation Act which refer to "workers' compensation judge" as the decision maker in disputed claims before the WCA's court. Although the amendment clarified the \$10,000 fine is to be paid to the worker, the amendment does not address other substantive and technical issues identified in prior FIRs.

First, the amendment does not address an ambiguity in Paragraph E. Under that provision, an additional "fine" of up to \$10,000 can be levied against an employer who terminates the worker for pretextual reasons. Does the reference to "pretextual reasons" in paragraph E (pages 3 and 5-6) refer to *any* pretextual reasons or only those pretextual reasons listed in paragraph D (pages 3 and 5)? To avoid ambiguity, paragraph E should be cross-referenced to Paragraph D to clarify that the pretextual reasons triggering the \$10,000 "fine" are limited to terminations motivated by a desire to avoid payment of benefits or as retaliation against the worker. Additionally, Paragraph D could be further clarified by inserting "the" before the described pretextual reasons that trigger the penalties under Section 52-1-28.1 and 52-1-28.2.

This paragraph also refers to a "fine", which is inconsistent with other provisions of the Workers' Compensation Act that refer to similar bad faith penalties as a "civil penalty" to be deposited into the WCA Administration Fund. See NMSA 1978, § 52-1-28.2. Use of the word "fine" may also be in conflict with Article 12, Section 4 of the New Mexico Constitution which provides that "fines" be deposited into the "school fund of the state." To avoid this ambiguity and possible conflict, "fine" may need to be replaced with "benefit penalty" or "penalty".

The amendment also fails to provide guidance on the "reasonableness" standard to be applied to offers of return to work and a worker's rejection of an offer to return to work.

The substitute expressly requires reasonable behavior by both worker and employer, as well as providing an explicit objective standard of court review of the same.

WCA reported the 1990 Workers' Compensation Act struck a deliberate balance between the interests of injured workers and the interests of employers. In addition to lifetime medical benefits, the Act provides for two types of "wage replacement" benefits when a worker is not able to return to work following an on-the-job injury. Temporary total disability (TTD) benefits are due when the employer does not offer a return to work position within medical restrictions at preinjury wage, and continue until the point the worker reaches maximum medical improvement. Permanent partial disability modifier (PPD Modifiers) benefits are added onto the worker's permanent physical impairment rating when a worker does not return to work after maximum medical improvement; these add-on benefits are calculated based on the worker's age, education, skill level, training, and change in physical capacity after injury.

The 1990 reforms sought to encourage return to work at all levels and discourage reliance on compensation benefits. See NMSA 1978, § 52-1-26 (“To assure that every person who suffers a compensable injury with resulting disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards.”). The Act accomplishes return to work policy objectives by (1) requiring an employer to pay wage replacement benefits to an injured worker when an employer fails to return the injured worker to work within doctor restrictions at preinjury wage and (2) encouraging an injured worker to return to work by reducing wage replacement benefits when a worker fails to accept a return to work offer within his or her doctor’s restrictions.

SB 155 address the NM Supreme Court decision in *Hawkins v. McDonalds*, 2014-NMSC-048, and the New Mexico Court of Appeals decision in *Cordova v. KSL Union*, 2012-NMCA-083. *Hawkins* involved a workers’ entitlement to benefits in a situation where worker was terminated for misconduct. *Cordova* involved a situation where the worker voluntarily removed himself from employment in order to retire.

After *Hawkins*, termination from post-injury employment, whether for misconduct or not, does not affect a workers’ entitlement to temporary disability benefits or permanent partial disability modifier benefits. In *Hawkins*, the worker was terminated for violating the employer’s zero-tolerance sexual harassment policy after employer learned worker failed to report an incident of sexual harassment. The court ruled that, despite the worker’s misconduct which led to termination, the employer was still obligated to pay worker temporary disability and modifier benefits because the Legislature had not articulated an exception to benefit entitlement. The Court stated:

“While we recognize that [an] injured employee could intentionally violate company policy in order to get fired and yet be entitled to full [temporary total disability] benefits, we are bound to construe Section 52-1-25.1(B) in favor of providing compensation to an injured worker absent clear statutory language to the contrary. It is not our place to insert language into the WCA that does not exist. That task falls to the Legislature alone.”

The Court’s decision was a complete shift on the issue of voluntary abandonment - before *Hawkins*, an employer was permitted to argue that the worker’s misconduct constituted voluntary removal from the workforce, thereby terminating benefits. After *Hawkins*, employers must continue to pay wage replacement benefits to the worker even in situations where the worker engaged in misconduct that left the employer no choice but to terminate the employment relationship.

In *Jaramillo v. State of New Mexico Dept. of Corrections*, Ct. App. 10-66173 (unpublished), the Court of Appeals extended the *Hawkins* decision to impact the State of New Mexico. In that case, the NM Department of Corrections terminated an employee based on allegations of sexual harassment. Because of the *Hawkins* decision as applied by *Jaramillo*, the State was required to pay wage replacement workers’ compensation benefits to terminated state employee.

Similarly, in *Cordova v. KSL Union*, 2012-NMCA-083, The New Mexico Court of Appeals ruled that a worker was entitled to workers’ compensation wage replacement benefits despite the worker’s decision to voluntarily retire. In *Cordova*, the injured worker began the retirement process prior to the work place injury. After the work place injury, the worker returned to work

with the at-injury employer but then decided to proceed with voluntary retirement. In reaching its decision, the Court of Appeals said the worker was not required to consider the employer's interest in deciding whether to return to work with the employer.

Decisions like *Hawkins*, *Jaramillo*, and *Cordova* decrease the likelihood an injured worker will return to work quickly and stay at work. The cases discourage employers from bringing the injured employee back to work. The decisions further discourage injured workers

Paragraph E's provision for an additional "fine" of up to \$10,000 against an employer who terminates the worker for pretextual reasons is vague and should be clarified. Does the reference to "pretextual reasons" in paragraph E (pages 3 and 5-6) refer to *any* pretextual reasons or only those pretextual reasons listed in paragraph D (pages 3 and 5)? To avoid ambiguity, paragraph E should be cross-referenced to Paragraph D to clarify that the pretextual reasons triggering the \$10,000 "fine" are limited to terminations motivated by a desire to avoid payment of benefits or as retaliation against the worker. Additionally, Paragraph D could be further clarified by inserting "the" before the described pretextual reasons that trigger the penalties under Section 52-1-28.1 and 52-1-28.2.

Paragraph E is also unclear what happens to the \$10,000 "fine." Under Section 52-1-28.1, already referenced in the bill, an employer, insurer, or claims-processing representative who has a history or pattern of unfair claims practices or bad faith is subject to a "civil penalty" of up to \$1,000 for each violation. This penalty is deposited into the WCA Fund. Similarly under Section 52-1-28.1, also referenced in the bill, an employer who retaliates against an injured worker for filing a claim is subject to a "civil penalty" of up to \$5,000. This penalty is deposited into the WCA Fund. Presumably, the fine referenced in paragraph E (pages 3 and 5) would be deposited into a state fund. If the intent is that the fine would be paid to the worker, the bill should clearly provide for that outcome. If the "fine" is really a "civil penalty," that correction should be made to avoid ambiguity.

The substitute provides that offers to return to work and a worker's rejection of a return to work offer are to be evaluated from a "reasonableness" standard. This appears to be a codification of the court's decision in *Cordova*, but requires a workers' compensation judge to consider more than the worker's subjective viewpoint of reasonableness. However, the substitute is vague in that it does not give guidance to workers' compensation judges on what factors should be considered in evaluating the reasonableness. The only restrictions on the return to work offer referenced in the bill are that it be at or above preinjury wage and within medical restrictions provided by a doctor. Are there other factors to consider in the totality of circumstances when measuring reasonableness? For example, does a reasonable return to work offer need to be in the same office, the same city, or simply geographically close to the pre-injury position? Similarly, does the return to work offer need to have similar duties to the pre-injury job? Also, what factors would make a worker's rejection of the offer "unreasonable"? For example, is it reasonable for a worker to reject a return to work offer if the worker does not like the schedule for the return to work position? Similarly, is it reasonable for the worker to reject an offer of employment if the worker does not like the individual who would supervise him or her in the return to work position? Without some guidance, "reasonableness" will be left to the subjective determinations of employers, workers, insurance adjusters, and workers' compensation judges, thus increasing the possibility of additional complaints filed with the WCA. In the absence of legislative guidance, the WCA will likely need to define "reasonableness" by regulation.

PERFORMANCE IMPLICATIONS:

The “reasonableness” standard may be difficult to apply and may lead to inconsistent interpretation of what constitutes a reasonable offer and a reasonable reject of an offer. Injecting a subjective standard such as “reasonableness” is a departure from the bright line, formulaic design of the 1990 reforms.

ADMINISTRATIVE IMPLICATIONS:

Before *Hawkins*, parties to a claim were able to litigate whether a worker’s conduct constituted voluntary abandonment of employment that warranted reducing or terminating benefits. This bill attempts to restore the pre-*Hawkins* intent and interpretation of the Act, and should not result in increased litigation beyond the level of disputed claims prior to the *Hawkins*’ decision.

The WCA may, however, see an increase in complaints filed where the parties dispute the basis for employer’s termination of worker or dispute the reasonableness of a return to work offer or the reasonableness of the worker’s rejection of an offer. At this time, the WCA cannot say whether additional staffing would be needed to handle the potential increase in complaints.

TECHNICAL ISSUES:

The WCA requested replacing paragraph H on the HJC amendment (items # 5 and 9) with the following language:

“H. If there is a dispute between the parties regarding the termination of benefits pursuant to this section, the dispute shall be presented by the aggrieved party through written application to a workers’ compensation judge, who shall rule on the matter within 60 days.”

The HBIC amendment addresses technical issues identified with use of the word “court” when referring to the decision maker. The amendment does not address issues – technical and substantive – with the use of the word “fine” versus “civil penalty.”

Paragraphs E and G refer to the decision maker as “the court.” Other sections of the Act use “workers’ compensation judge.” To be consistent with other provisions, “the court” should be replaced with the commonly used reference decision makers on claims before the WCA and its court.

Paragraph E references a “fine” (see discussion above). It is presumed this was a drafting error and that “fine” was intended to be “civil penalty,” which is the description used in other sections referencing penalties for bad behavior.

KK/al/jle