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FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

MARVIN CASTELLANOS,

Petitioner,

vs.

NEXT DOOR COMPANY and
AMERISURE INSURANCE COMPANY,

Respondents.

CASE NO.: SC13-2082

FIRST DCA NO: 1D12-3639

OJCC NO: 09-027890GCC

D/A: 10/12/2009

APPENDIX

APPENDIX

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FL Staff An., H.B. 903, 3/13/2009

House of Representatives Staff Analysis, House Bill 903

March 13, 2009

Florida House of Representatives
2009 Regular Session

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

BILL #: HB 903 **Workers' Compensation Attorney's Fees**

SPONSOR(S): Flores and others

TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	19 Y, 2 N	Reilly	Cooper
2)	General Government Policy Council		Reilly	Hamby
3)				
4)				
5)				

SUMMARY ANALYSIS

In 2003, Florida enacted workers' compensation reform legislation (ch. 2003-412, L.O.F.). At that time, Florida's workers' compensation insurance rates consistently ranked as the most expensive or second most expensive in the country. The legislation made various changes to the workers' compensation statute, including revising compensability standards, indemnity benefit levels, medical reimbursement levels, and amending the provision governing attorney's fees in workers' compensation, s. 440.34, F.S.

The 2003 legislation retained a contingency fee schedule for attorney's fees, but removed a listing of factors a judge of compensation claims (JCC) was required to consider and upon which the JCC could increase or decrease the amount of the award. The factors included the time and labor required, the difficulty of the case, customary charges, and the lawyer's experience, reputation, and ability.

Since enactment of this comprehensive reform legislation, the Office of Insurance Regulation (the OIR) has approved six consecutive decreases in workers' compensation rates, resulting in a cumulative decrease of the overall statewide average rate by more than 60 percent.

In October 2008, the Florida Supreme Court in *Murray v. Mariner Health and ACE USA* determined that the attorney's fee schedule as amended, when read together with a provision that entitles certain prevailing claimants to "a reasonable attorney's fee," creates an ambiguity as to whether the fee schedule is the sole basis for determining a reasonable attorney's fee. The Court concluded that it is not, and held that the factors set forth in a Florida Bar rule for determining attorney's fees (which includes the

discretionary factors removed from the workers' compensation statute in 2003) were to be applied to determine a "reasonable attorney's fee" when the term is not otherwise defined.

Based on this decision, the OIR has approved a 6.4% increase in workers' compensation rates effective April 1, 2009.

House Bill 903 amends the attorney's fee schedule to permit fees on the first \$5,000 of benefits secured to be "less than or equal to" 20 percent of the first \$5,000 of benefits secured. Under current law, the fee must equal 20 percent of the first \$5,000 in benefits secured. The bill also addresses the *Murray* decision by clarifying that awards of attorney's fees, except in certain medical only cases, are to be calculated based solely on the fee schedule.

This bill should have no more than a minimal fiscal impact on state and local governments.

The bill takes effect upon becoming a law.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida's Workers' Compensation System

In the early part of the decade, Florida consistently had the most expensive or the second most expensive workers' compensation rates in the country. [FN1]

In 2003, workers' compensation reform legislation (ch. 2003-412, L.O.F.) was enacted in an attempt to significantly reduce system costs. The legislation made changes to various aspects of the workers' compensation law (ch. 440, F.S.) including:

- Revising eligibility for permanent total disability benefits and eliminating the social security eligibility standard;
- Requiring the workplace accident to be the "major contributing cause" of the resulting injury;
- Strengthening anti-fraud provisions;
- Increasing medical reimbursements for physicians and for surgical procedures and revising other reimbursement provisions;
- Increasing permanent impairment benefits from 50 to 75 percent of the temporary total disability benefit;
- Increasing the maximum death benefit;
- Retaining an attorney's fee schedule, but deleting from the statute the following list of factors [FN2] a judge of compensation claims could consider to increase or decrease the amount of the fee:
 - The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - The fee customarily charged in the locality for similar legal services.
 - The amount involved in the controversy and the benefits resulting to the claimant.
 - The time limitation imposed by the claimant or the circumstances.
 - The experience, reputation, and ability of the lawyer or lawyers performing services.

- The contingency or certainty of a fee.

Section 440.34, F.S., governs attorney's fees in workers' compensation. Pursuant to subsection (1), a fee may not be paid for a claimant unless approved as reasonable by a judge of compensation claims or a court having jurisdiction over the proceeding. Further, an attorney's fee approved for benefits secured on behalf of a claimant must equal 20 percent of the first \$5,000 of the amount of benefits secured, 15 percent of the next \$5,000 of the amount of benefits secured, 10 percent of the remaining amount of the benefits secured and to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years. The judge is prohibited from approving fees in excess of "the amount permitted by this section."

Generally, a workers' compensation claimant is responsible for paying his or her own attorney's fees. However, under s. 440.34(3), F.S., a claimant is entitled to recover a "reasonable attorney's fee" from the carrier or employer in the following circumstances: 1) claimant successfully asserts a claim for medical benefits only; 2) claimant's attorney successfully prosecutes a claim previously denied by the employer/carrier; 3) claimant prevails on the issue of compensability, which was previously denied by the employer/carrier; and 4) claimant successfully prevails in proceedings related to the enforcement of an order or modification of an order.

Since the 2003 legislation, the Office of Insurance Regulation has approved six consecutive decreases in workers' compensation insurance rates, resulting in a cumulative decrease of the overall statewide average rate by more than 60 percent. [FN3] From 2002 to 2008, Florida's workers' compensation premium rate index decreased from \$4.47 per \$100 of payroll to \$2.20 per \$100 of payroll. [FN4] In 2008, 26 states had higher workers' compensation premiums than Florida. [FN5]

The Florida Supreme Court's Decision in *Emma Murray v. Mariner Health and ACE, USA* [FN6]

In *Murray*, a nursing assistant injured while lifting a patient suffered a uterine prolapse and underwent a hysterectomy. In response to claimant's petition for workers' compensation benefits, the employer and its insurance carrier asserted that no benefits were owed, as the injury did not arise out of or in the course of employment. After a hearing, the judge of compensation claims (JCC) found for the claimant and awarded \$3,244.21 in benefits.

Pursuant to s. 440.34(3), F.S., the claimant was entitled to recover "a reasonable attorney's fee," as she had successfully prosecuted a claim that had been denied. In determining "a reasonable attorney's fee," the claimant's attorney asserted that the JCC should consider the *Lee Engineering* factors that had been removed from the statute in 2003 by ch. 2003-412, L.O.F. The employer and insurance carrier, however, asserted that s. 440.34(1), F.S. controlled the fee calculation. This subsection requires that any fee "paid for a claimant" must be approved as reasonable by the JCC, "must equal" the contingency fee schedule, [FN7] and prohibits approval of an attorney's fee in excess of the "amount permitted by this section."

The JCC calculated the attorney's fee under both subsections, finding that the fee award would be \$684.84 (a rate of \$8.11 per hour) if calculated under the fee schedule of subsection (1), but \$16,000 (135 hours at \$125 an hour) if calculated under subsection (3). Finding that the fee award under subsection (3) was governed by the fee schedule of subsection (1), the JCC awarded an attorney's fee of \$684.84, which was subsequently affirmed by the First District Court of Appeal.

The Florida Supreme Court (the Court) reversed, finding that when subsections (1) and (3) of s. 440.34, F.S., are read together an ambiguity exists as to whether subsection (1) is the sole basis upon which to calculate a reasonable attorney's fee. As a review of the Legislative history of the attorney's fee provision, including the 2003 amendments, did not provide reasons for the changes made, the Court relied on two rules of statutory construction to clarify the ambiguity and determine legislative intent: (1) The specific provision controls the general and (2) a statute will not be construed in such a way that it renders meaningless or absurd any other statutory provision.

The Court determined that subsection (3), which specifically pertains to situations in which attorney's fees can be awarded, controls over subsection (1), which addresses the calculation of attorney's fees in general. Additionally, the Court stated that the "reasonable attorney's fee" language of subsection (3) would be rendered meaningless if it were construed as being controlled by the fee schedule of subsection (1), as application of the fee schedule would result in excessive fees in some cases and inadequate fees in others.

Thus, the Court concluded that reasonable attorney's fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined using rule 4-1.5(b) of the Rules Regulating the Florida Bar. This rule sets forth factors to be considered as guides in determining a reasonable fee, including the *Lee Engineering* factors that had been removed from the workers' compensation statute in 2003. Accordingly, the prevailing claimant was entitled to recover a reasonable attorney's fee of \$16,000.

Effect of the Bill

House Bill 903 amends the attorney's fee schedule to permit fees on the first \$5,000 of benefits secured to be less than or equal to 20 percent. Current law provides for attorney's fees of 20 percent of the first \$5,000 of benefits secured. Further, the bill removes statutory language providing for a "reasonable" attorney's fee and specifies that fee awards cannot exceed the amount authorized by the attorney's fee schedule. Thus, attorney's fees in workers' compensation will be calculated in the manner they had been from the effective date of the 2003 reform up to the decision in *Murray*.

B. SECTION DIRECTORY:

Section 1. Amends s. 434, F.S., relating to attorney's fees in workers' compensation.

Section 2. Provides for the bill to take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Office of Insurance Regulation approved a 6.4% increase in workers' compensation rates based upon the Florida Supreme Court's decision in *Murray*. House Bill 903 will likely result in a workers' compensation rate filing seeking to unwind this increase. [FN8]

D. FISCAL COMMENTS:

To the extent that government employees injured at work are entitled to recover an attorney's fee award in workers' compensation proceedings, it appears that this bill will likely decrease the attorney's fees awards paid by state and local governments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends the attorney's fee schedule to permit the fee on the first \$5,000 of benefits secured to be "less than or equal to" 20 percent. Currently, s. 440.34(1), F.S., provides that the fee must be 20 percent of the first \$5,000 of benefits secured. As the bill does not provide guidance as to how a judge of compensation claims is to determine the percentage to be applied in calculating the fee payable on the first \$5,000 of benefits secured, it appears to introduce subjectivity into the calculation of

attorney's fees and require consideration of external factors, such as those set forth in *Lee Engineering* and which were used to determine a "reasonable attorney's fee" in *Murray*.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[FN1]. In 2000, Florida had the highest workers' compensation premiums in the country, and the second highest in 2002. See *Oregon Workers' Compensation Premium Rate Rankings for 2000, 2002*.

[FN2]. These factors were set forth in *Lee Eng'g. & Constr. Co. v. Fellows*, 209 So. 2d 454 (Fla. 1968) and subsequently incorporated into s. 440.34, F.S. *Lee Eng'g.* applied Canon 12 of the Canons of Professional Responsibility [the predecessor to rule 4-1.5(b) of the Rules Regulating the Florida Bar].

[FN3]. Office of Insurance Regulation Press Release dated October 29, 2008. Found at: <http://www.florir.com> (last accessed March 4, 2009).

[FN4]. Oregon Department of Consumer and Business Services, "Workers' Compensation Premium Rate Ranking Report" for 2002 and 2008 (biennial report). Found at: <http://egov.oregon.gov/DCBS/> (last accessed March 3, 2009).

[FN5]. *Id.* Subsequent to publication of the 2008 Oregon report, there have been two further rate decreases in Florida.

[FN6]. 994 So.2d 1051 (Fla. 2008).

[FN7]. Subsection (1) provides that any attorney's fee approved by a judge of compensation claims must equal 20 percent of the first \$5,000 of the amount of benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits to be secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years.

[FN8]. Correspondence from the National Council on Compensation Insurance (NCCI) on file with staff of the Insurance, Banking & Financial Affairs Policy Committee.

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exception of a slight increase in 2008-09. Despite these decreases, PFB filing volume in 2012-13 remains in excess of the volume in 1994 when that particular reform was passed.

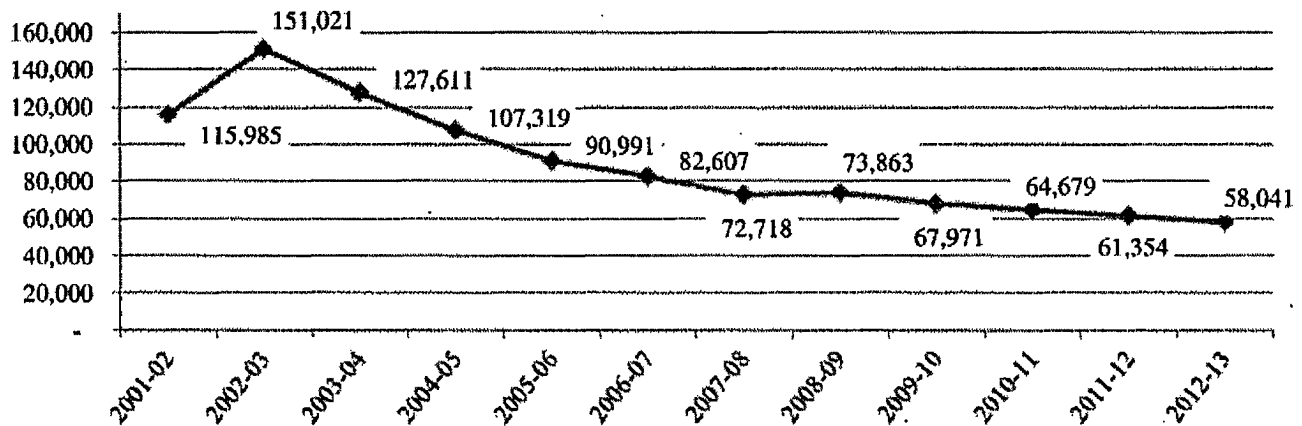
One component of the 2003 reforms was an amendment to Fla. Stat. §440.34, which addresses the payment of attorneys' fees in workers' compensation cases. The interpretation of that statutory change was litigated extensively, and multiple decisions of the First District Court of Appeal ("DCA") interpreted Fla. Stat. §440.34(2003) as limiting fees to a "percentage of recovery" fee in most cases.¹⁰ Under those DCA interpretations, hourly attorney's fees were forbidden in most cases. In October 2008, the Florida Supreme Court rendered their decision in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008). The Supreme Court's interpretation of Fla. Stat. §440.34 differed from the DCA decisions, and effectively restored entitlement to hourly attorney fees for cases with a date of accident after 2003.

The overall decrease in PFB filing volume between fiscal 2003 and fiscal 2008 was approximately fifty-two percent (51.85%). Until rendition of the Supreme Court Murray decision, the PFB filings (for the first quarter of fiscal 2008-09) had continued to demonstrate a similar downward trend. In the spring of 2009, the Florida Legislature amended Fla. Stat. §440.34 to again forbid hourly fees. Therefore, the Court's Murray decision affects cases between October 1, 2003 and July 1, 2009.¹¹ Although PFB filings trended down before the Court's analysis, at year end, the 2008-09 PFB filings overall increased minimally (1.6%) from fiscal 2007-08.

In 2009-10 the PFB volume returned to its downward trend (8%). Although that trend moderated somewhat in the last two fiscal years, it has continued to decline. On March 23, 2011 the Florida First DCA rejected various constitutional challenges to Fla. Stat. §440.34 (2009) in Kauffman v. Community Inclusions, Inc., 57 So.3d 919 (Fla. 1st DCA 2011). Early in fiscal 2011-12, the Florida Supreme Court denied a petition for review of that decision based on a lack of jurisdiction.

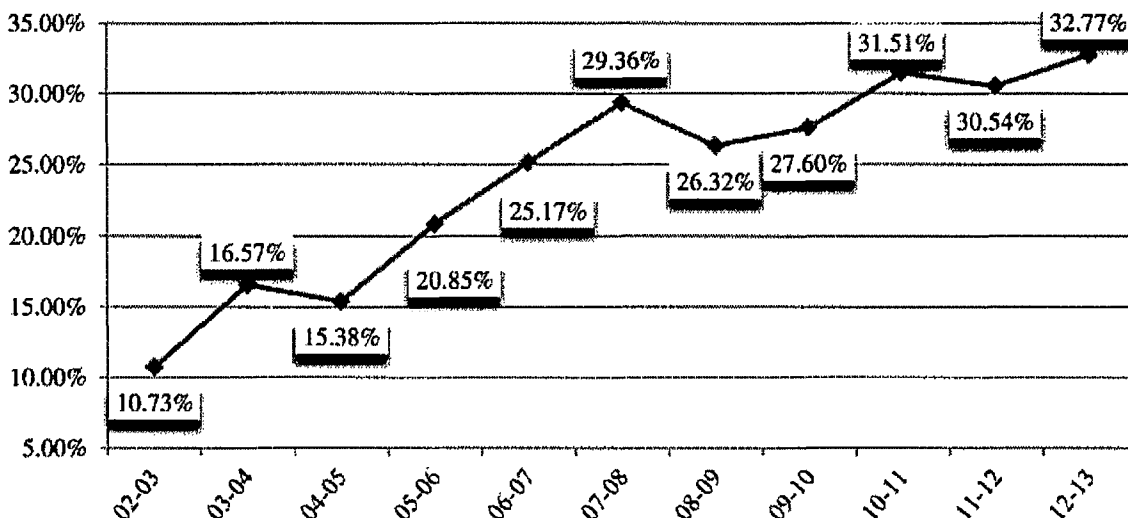
Fiscal Year	Petitions Filed	% Change
2002-03	151,021	
2003-04	127,611	-15.5%
2004-05	107,319	-15.9%
2005-06	90,991	-15.2%
2006-07	82,607	-9.2%
2007-08	72,718	-12.0%
2008-09	73,863	1.6%
2009-10	67,971	-8.0%
2010-11	64,679	-4.8%
2011-12	61,354	-5.1%
2012-13	58,041	-5.4%

Petitions Filed 2001-2013



Florida workers' compensation premiums decreased significantly after the 2003 reforms. The cumulative premium decrease through fiscal 2008-09 was approximately 58%. Interestingly, in that same time period, PFB filings had decreased approximately fifty-two percent (51.85%); which might be interpreted as a close correlation. In fiscal 2009-10, despite the continued downward trend in PFB filings (-8%), the Florida Insurance Commissioner approved a 7.8% increase in workers' compensation rates. Likewise, despite the 4.8% decline in PFB filings in 2010-11, the Commissioner approved a rate increase of 8.9% for 2012¹² and an additional 6.1% increase for 2013.¹³ As this report was prepared, the Commissioner considered another increase for 2014, albeit a very small 1%

that process. Mediation is, at its very root, a process and not necessarily a destination. In other words, the journey itself is productive, even if no issues are resolved. Success may also be found in affording the parties the opportunity to express their concerns and positions, and in opening lines of communication. Thus, in measuring success, the subjective perspectives of participants are as important in some regard as the overall resolution of issues at the mediation itself.



AMOUNT OF ATTORNEY'S FEES PAID IN EACH CASE ACCORDING TO ORDER YEAR AND ACCIDENT YEAR:

The OJCC is required by law to approve all attorney fees paid by or on behalf of an injured worker. Fla. Stat. §440.34.³⁵ There is no such specific requirement for the approval of fees paid by employer/carriers for their defense counsel representation.³⁶ Despite the absence of such specific requirement for defense fee approval, the broad language of Fla. Stat. §440.105(3)(b)³⁷ arguably could require OJCC approval of defense attorney's fees. However, this statutory authority has historically not been interpreted to require approval of defense attorney fees, although some claimant's attorneys and groups have questioned this interpretation.

The OJCC has required insurance carriers to report their respective total annual expenditures for aggregate defense fees.³⁸ The reporting requirements in fiscal year 2011 require that reporting by September first of each year.

Because these defense fee figures are reported in the aggregate, it is impossible to discern whether cost reimbursement to E/C attorneys has been included in the figures reported by the various carriers. Furthermore, this information regarding defense fees expended during the fiscal year, does not provide any edification regarding the respective dates of accident involved in the cases in which those fees were paid during that fiscal year.

Fiscal Year	Claimant Attorney Fees
02-03	\$210,660,738
03-04	\$215,322,360
04-05	\$211,157,073
05-06	\$208,369,260
06-07	\$191,197,443
07-08	\$188,701,256
08-09	\$181,660,686
09-10	\$176,996,765
10-11	\$157,081,084
11-12	\$152,848,003
12-13	\$151,889,627

Order Year 2012-13 Attorney Fees:

Previous OJCC annual reports detailed payment of claimant attorney fees, based upon the best information available, when those reports were prepared. The OJCC gathers claimant attorney fee data through a computer program (part of the system that includes the JCC Application database, electronic filing, and internet publication of data) that simultaneously uploads fee approval orders to the Internet case docket and captures the data regarding claimant fee and cost amounts. The district staff is responsible for the input of the fee and cost amount data for each individual fee approval order entered. Because the database currently produces different total annual figures for claimant attorney's fees figures, approved in prior fiscal years, than was reported in OJCC Annual Reports in those years, it is believed that subsequent to the initial calculation of those figures, and issuance of those prior OJCC

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Annual Reports, additional information was entered by district staff (additional approved orders for a particular fiscal year were input and uploaded after the data query for that particular fiscal year was initially run).³⁹ Those figures have therefore been corrected in this, and other more recent, annual report, as noted in the chart here.

During 2012-13, a total of four hundred eighteen million, seven hundred seventy-five thousand ninety-nine dollars (\$418,775,099) was expended on combined claimant fees and defense attorney's fees⁴⁰ (and perhaps defense "costs") in the Florida worker's compensation system. This represents less than one half percent (0.005%) increase from the 2010-11 aggregate fees of four hundred sixteen million, eight hundred seventy thousand, nine hundred sixty-two (\$416,870,962).

As represented above, the Claimant fees decreased in 2012-13, and there was a modest increase in defense fees of approximately one percent (1.08%). The 2012-13 Claimant total represents the most modest decrease in the eleven years since the 2003 legislative reforms. The aggregate attorneys' fees in Florida workers' compensation are detailed in the second chart on this page. This chart illustrates the total fees for both claimant and defense, and then provides the percentage that each make of the whole. This delineation was close to 50/50 in the early years of the comparison, but as aggregate claimant's fees have decreased and employer/carrier fees have increased, a disparity between claimant's and defense fees has developed. In 2012-13, the claimant's fees accounted for 36.27% of the total and employer/carrier fees accounted for almost 64%.

In the 2012 annual report, this Office first noted the inflation effect. Considering inflation over the last decade, this difference is more pronounced. According to the U.S. Inflation calculator,⁴¹ the 2002-03 aggregate (\$430,705,423), in 2012 dollars, adjusted for inflation, would have been \$539,268,938. Adjusted for inflation in 2013, that same figure would have been \$548,093,717. Thus, the aggregate inflation-adjusted fees are down over the last nine years by more than one hundred thirty million dollars.

The claimant attorney fee aggregate for 2012-13, is the ninth consecutive decrease since 2003-04. The last ten fiscal years of claimant and defense attorney's fees and the annual rates of change are set forth in the table above. It is unclear whether any portion of the increased defense fees in this chart are attributable solely to more effective data collection and carrier compliance following the implementation of the defense fee reporting process in 2003. It is also notable that some portion of overall defense fees reported, may relate to cases in which no claimant fees were paid, such as, charges for preparation and approval of pro se settlement documents or instances in which the E/C sought and paid for legal advice that ultimately did not result in the filing of any workers' compensation dispute.

Reported defense attorney fees progressively increased after the 2003 statutory amendments, at a significant rate, as illustrated in the previous table. Conversely, claimant attorney's fees decreased in each of the last nine years. These decreases demonstrated some consistency, marked by notable decreases in 2006-07 (8.24%) and 2010-11 (11.25%). In sum, over the ten year period since 2002-03, claimant fees have decreased about twenty-eight percent (27.9%) and defense fees have increased about twenty-one percent (21.3%). Neither portion of the

Fiscal Year	Claimant Attorney Fees	Percent Change	Defense Attorney Fees	Percent Change
02-03	\$210,660,738		\$220,044,685	
03-04	\$215,322,360	2.21%	\$231,150,559	5.05%
04-05	\$211,157,073	-1.93%	\$264,058,532	14.24%
05-06	\$208,369,260	-1.32%	\$299,412,570	13.39%
06-07	\$191,197,443	-8.24%	\$287,443,033	-4.00%
07-08	\$188,701,256	-1.31%	\$270,501,374	-5.89%
08-09	\$181,660,686	-3.73%	\$277,664,217	2.65%
09-10	\$176,996,765	-2.57%	\$279,570,117	0.69%
10-11	\$157,081,084	-11.25%	\$270,955,703	-3.08%
11-12	\$152,848,003	-2.69%	\$264,022,959	-2.56%
12-13	\$151,889,627	-0.63%	\$266,885,472	1.08%

Fiscal Year	Aggregate Fees	Claimant %	Defense %
02-03	\$430,705,423	48.91%	51.09%
03-04	\$446,472,919	48.23%	51.77%
04-05	\$475,215,605	44.43%	55.57%
05-06	\$507,781,830	41.04%	58.96%
06-07	\$478,640,476	39.95%	60.05%
07-08	\$459,202,630	41.09%	58.91%
08-09	\$459,324,903	39.55%	60.45%
09-10	\$456,566,882	38.77%	61.23%
10-11	\$428,036,787	36.70%	63.30%
11-12	\$416,870,962	36.67%	63.33%
12-13	\$418,775,099	36.27%	63.73%

Fiscal Year	Claimant Attorney Fees	Percent Change	Defense Attorney Fees	Percent Change
02-03	\$210,660,738		\$220,044,685	
12-13	\$151,889,627	-27.90%	\$266,885,472	21.29%