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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Herndon</u>	<b>LAST UPDATED</b> <u>3/6/23</u>
	<b>ORIGINAL DATE</b> <u>2/28/2023</u>
<b>SHORT TITLE</b> <u>Workers' Compensation Changes</u>	<b>BILL NUMBER</b> <u>House Bill 455/aHLVMC</u>
	<b>ANALYST</b> <u>Chenier</u>

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		\$20.0	\$20.0	\$40.0	Recurring	Uninsured Employers Fund
		Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Recurring	GSD Increased Workers' Compensation Insurance Rates

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Workers' Compensation Administration (WCA)  
 General Services Department (GSD)  
 Office of the Superintendent of Insurance (OSI)

## SUMMARY

### Synopsis of HLVMC Amendment to House Bill 455

The House Labor, Veterans and Military Affairs Committee Amendment to House Bill 455 removes a strike through that would have permitted nonattorneys to receive compensation for representing a claimant for workers' compensation.

### Synopsis of Original House Bill 455

House Bill 455, for workers' compensation claims, increases the amount of discovery costs to be advanced by the employer from \$3,000 to \$10 thousand, increases the maximum on awardable attorney fees (for both worker and employer attorneys) from \$22.5 thousand to \$32.5 thousand, and gives Workers' Compensation Administration (WCA) judges discretion to increase the above-described attorney fee "cap" by \$3,000 for "good cause" for each violation of Section 52-1-28.1 NMSA 1978.

The bill lists a few examples of “good cause,” such as “permanent and total disability” and “serious injuries” and provides judicial discretion to award the higher fee amount in these “good cause” situations.

The current statute allows for an additional \$5,000 attorney fee to be assessed against a claimant, an insurer or an employer acting in bad faith during the litigation. The proposed bill includes new language that references Section 52-1-28.1 NMSA 1978, and this section only lists an employer, insurer, or claim-processing representative as parties against whom the fine may be imposed.

The bill also removes language that imposed misdemeanor criminal penalties for violations of Section 52-1-54 NMSA 1978. Additionally, nonattorneys will be permitted to represent injured workers but can receive compensation, while current law does not allow compensation for nonattorney representation.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## **FISCAL IMPLICATIONS**

GSD said the bill will increase the amount paid out for worker’s compensation claims in litigation at RMD. According to the RMD claims system, the Workers’ Compensation Bureau paid \$183.1 thousand in attorney’s fees and discovery costs in FY22. However, GSD did not provide an analysis of the expected increase in attorney’s fees related to this bill.

OSI said to the extent the costs of the advance for discovery and the attorney fees may be covered by workers’ compensation insurance, the increased limits would contribute to higher incurred losses for insurers, which would translate into higher workers’ compensation insurance rates.

WCA said constituents voiced the following concerns over an earlier version of this bill:

- (1) Higher discovery costs and attorney fees will lead to additional litigation, including the filing of appeals.
- (2) An increase in attorney’s fees of up to \$42.5 thousand in certain cases will increase workers’ compensation insurance premiums at a time when the New Mexico business community is recovering from the Covid-19 pandemic.
- (3) Litigation will increase over what cases qualify for the higher fee beyond \$32.5 thousand.
- (4) Raising the \$5,000 additional attorney fee for “bad faith” situations from a \$5,000 maximum cap to a \$3,000 “per violation” basis will increase litigation.
- (5) The current fee of \$22.5 thousand is causing access to justice issues in that worker attorneys are hesitant to take on complex litigated workers’ compensation cases as doing so means they are not compensated for the time spent during such representations.
- (6) An increase in attorney’s fees means workers will receive less money because one-half of the attorney fee that is awarded is paid by the worker.

WCA collects payment data for workers’ compensation claims from insurers and self-insurers. Based on a query of claims with dispute resolution activity that closed within the last three years, 242 (9 percent) reported fees for workers’ attorneys that reached the existing cap, while 190 (7 percent) of claims reported fees for employers’ attorneys that reached the existing cap.

WCA said the uninsured employers fund (UEF), administered by WCA, currently pays one-half of the \$22.5 thousand current maximum fee cap one time per year and 100 percent of the full \$22.5 thousand fee cap twice per year. The UEF usually recovers payouts from the uninsured employer and historically recoupsd 25 percent to 40 percent of what it paid out. Applying this ratio, UEF would recover 25 percent on average of what it pays out and the net annual increase in UEF expenditures is anticipated to be about \$20 thousand annually.

At the end of FY22, the UEF carried a balance of about \$6.5 million, while the department spent about \$850.8 thousand in the same year.

## SIGNIFICANT ISSUES

WCA provided the following:

The last time the attorney fee cap was updated was in 2013. Applying the producer price index (PPI) for legal services as a measure of inflation, the inflation adjusted value of \$8.3 thousand (with rounding) should be added to the prior cap amount of \$22.5 thousand raising the attorney fee cap to \$30.8 thousand.

Applying PPI to the existing discovery cost allowance of \$3 thousand would produce an adjusted increase of \$2.5 thousand, the new discovery advance amount would total \$5,500, well lower than the proposed \$10,000 figure.

WCA administers the uninsured employers fund (UEF), which pays benefits to injured workers whose employers lack required workers' compensation insurance. In addition to paying indemnity and medical benefits, the UEF can be required to pay the uninsured employer's one-half share of the attorney's fee owed to the worker's attorney. Sometimes, the UEF pays 100 percent of the worker's attorney's fees. The UEF paid \$230 thousand in attorney fees over the past 5 calendar years, an average of \$46 thousand per year.

If enacted the UEF will have to pay an increased amount of attorney's fees exceeding the current \$22.5 thousand threshold. The probability of UEF paying higher attorney's fees is not merely in cases that qualify as "cap" cases, but also cases that would generate an attorney fee award between \$22.5 thousand and the proposed \$32.5 thousand "cap." In addition, the UEF could become obligated to pay 100 percent of the worker's attorney fee up to the outside cap of \$42.5 thousand.

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