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FISCAL IMPACT REPORT

	ORIGINAL DATE	02/01/11	
SPONSOR <u>Lopez</u>	LAST UPDATED	03/16/11	HB _____
			274/aSCORC/aSJC/
SHORT TITLE <u>Qualification of Workers' Comp Judges</u>			SB <u>aHLC</u>
			ANALYST <u>Peery-Galon</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$50.0 to \$100.0	\$50.0 to \$100.0	\$100.0 to \$200.0	Recurring	Workers' Compensation Administration

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workers' Compensation Administration (WCA)
 State Personnel Office (SPO)
 Attorney General's Office (AGO)
 University of New Mexico (UNM)

SUMMARY

Synopsis of HLC Amendment

The House Labor and Human Resources Committee amendment to Senate Bill 274 clarifies the nominating committee is to include four non-attorney public members recommended by the Business and Labor Coalition of New Mexico. Two members are to be appointed by the President Pro Tempore of the Senate and two members are to be appointed by the Speaker of the House of Representatives. No more than two members can be of the same party. Also, two members are to be from the labor community and two members are to be from the business community.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment for Senate Bill 274 changes the proposed legislation so that salaries of workers' compensation judges are to be 90 percent of those received by district court judges. The amendment strikes Subsection F and G and inserts the following: "F. No later than six months prior to the end of each term, the director shall establish a committee pursuant to Subsection C of this section to receive information regarding

appointments. All the information received shall be confidential. The information and recommendations of the committee shall be considered by the director in determining whether to make the reappointments.” Also, the amendment adds language that complaints against a workers’ compensation judge are to be filed with the personnel board and, that prior to the expiration of the judge’s term, a judge can only be removed for a violation of the Code of Judicial Conduct as determined by the personnel board.

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment for Senate Bill 274 removes the Dean of the University of New Mexico’s School of Law from the recruitment and selection process of a Workers’ Compensation Administration judge and places more involvement on the agency director. The amendment changes the proposed requirement to publish a notice of vacancy from the Bar Bulletin to an appropriate publication. The amendment reduces the proposed number of nominating committee members from eight to seven by removing the proposed requirement that one member be appointed at large by the State Bar of New Mexico. Also, the amendment defines that any complaint against a workers’ compensation judge be filed with the agency director and that prior to the expiration of a judge’s term the judge may only be removed for cause as determined by the New Mexico Judicial Performance Evaluation Committee.

Synopsis of Original Bill

Senate Bill 274 amends Section 52-5-2 NMSA 1978 to change the method of appointment of workers’ compensation judges and to establish qualifications and a nominating committee, which interviews qualified potential candidates and submits a list of recommended candidates to the director of the workers’ compensation administration, who appoints the judges. The proposed legislation requires the director to evaluate the performance of workers’ compensation judges by using a prescribed form of confidential questionnaire and point scoring. The completed evaluations may not be disclosed to the public, the judge or other members of the administration. The proposed legislation provides that, not later than six months before the end of the workers’ compensation judges’ term, the New Mexico Judicial Performance Evaluation Commission must evaluate the performance of each workers’ compensation judge to determine whether the judge should be recommended for reappointment. The commission must make a recommendation whether to reappoint. The director must act in accordance with that recommendation. The proposed legislation requires complaints against a workers’ compensation judge must be filed with the New Mexico Judicial Standards Commission. Also, it provides that workers’ compensation judges are subject to the superintending control of the Supreme Court.

FISCAL IMPLICATIONS

WCA reported there will be a slight fiscal impact relating to the conducting of an interim evaluation by written questionnaire that can be absorbed by the agency’s current budget.

SPO noted the proposed legislation does not contain any language prohibiting these appointed committee members from charging the Workers’ Compensation Administration, University of New Mexico School of Law, or other state entities for billable hours they spend serving the committee. There could potentially be an additional fiscal impact to the state if this is not defined and restricted. It is estimated that billable hours could range from \$50 thousand to \$100 thousand annually.

SIGNIFICANT ISSUES

WCA reported the Senate Corporations and Transportation Committee amendment for Senate Bill 274 deletes language that gave superintending control to the New Mexico Supreme Court in contravention with the separation of powers provisions of the New Mexico Constitution.

SPO stated the Senate Corporations and Transportation Committee amendment for Senate Bill 274 removes the Dean of the University of New Mexico's School of Law and an at-large member of the New Mexico Bar from the recruitment and selection process and provides more authority to the agency director. This amendment also specifies that a workers' compensation judge can only be removed for cause during their term.

WCA reported the proposed legislation grants superintending control over the workers' compensation judges to the New Mexico Supreme Court and removes it from the executive branch, in this case the Workers' Compensation Administration director. WCA stated this is prohibited by the separation of powers provisions contained in the New Mexico Constitution.

WCA noted shortening the length of the workers' compensation judge's term could mitigate a situation where the system has to accommodate a judge who has a low caseload due to a high recusal rate or has otherwise poor performance. WCA stated that adding layers of review in the complaint situation could decrease accountability. The Court of Appeals in *Carrillo v. Compusys* confirmed the WCA director's sole authority to appoint and terminate workers' compensation judges. The proposed legislation requires a committee to nominate, a committee to evaluate, and a committee to establish a violation of the Code of Judicial Conduct. WCA reported the WCA director is the final decision maker in all these instances, and adding layers of bureaucracy is contrary to this administration's initiatives to downsize and streamline government.

The proposed legislation creates the requirement that an evaluation be established by the dean of the University of New Mexico's School of Law to screen candidates and conduct interviews then forward a list of recommended candidates to the Workers' Compensation Administration director. SPO noted that although screening and interviewing appear to be conducted by a qualified group of attorneys in the legal field, the proposed legislation appears to hinder the director's ability to evaluate, interview and hire staff in their own agency. However, SPO reported this may ultimately be administratively favorable since the director will now make a selection from a vetted "short list" of the most qualified applicants.

The proposed legislation defines very specific evaluation criteria and establishes a method of ranking candidates responses. SPO noted that if another job related criteria is identified as important by the evaluation committee, the committee would be unable to consider this criteria since the language in the proposed legislation is very specific.

The proposed legislation states that workers' compensation judges' salaries and retirement benefits shall be 90 percent of a district judges' salary. SPO reported it is likely a new retirement plan would need to be developed, which would require legislative action and involvement from Public Employee Retirement Association.

The proposed legislation provides that applications reviewed by both trial and defense attorneys who practice workers' compensation law at least half time. SPO noted it is unclear if a conflict of interest would exist since these are the same judges that would hear these attorney's cases adding potential bias into the judicial process.

SPO reported currently complaints against workers' compensation judges are filed with the State Personnel Board, which reports its finding to the director of WCA. The proposed legislation changes from the State Personnel Board to the Judicial Standard's Commission and makes the workers' compensation judges subject to the superintending control of the Supreme Court. This change treats workers' compensation judges in the same manner as judges in the judicial branch.

AGO reported it is an issue whether workers' compensation judges may be made subject to the Supreme Court's power of superintending control under Article VI, Section 3 (see *Carrillo v. Compusys, Inc.* – 1997 NMCA-3, 122 N.M.720, 930 P. 2d 1172). Workers' Compensation Act is not part of the judiciary, and Supreme Court's power of superintending control in Article VI, Section 3 is limited to control over inferior courts with the judicial branch of government.

Under Article VI, Section 32, the judicial standards commission is created to provide for the discipline of "any justice, judge or magistrate of any court." AGO stated not being part of the judiciary, it is an issue whether the authority of the Judicial Standards Commission could be made legislatively to extend to workers' compensation judges.

The Judicial Performance Evaluation Commission is provided for by Supreme Court rules. Those rules define "judge" to mean appellate court judges and justices and district and metropolitan court judges. AGO noted it is an issue whether the legislature can engage the Supreme Court's judicial performance evaluation commission to conduct evaluations and make reappointment recommendations of workers' compensation judges. AGO reported *Maples v. State*, 110 N.M. 34, 42, 796 P.2d 788, 790 states "administrative cases like workers' compensation proceedings are by definition special statutory proceedings to which judicial rulemaking authority does not extend." In addition, the power to regulate practice and procedure in the courts is vested exclusively in the Supreme Court (see *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 311, 551 P.2d 1354 (1975)).

ADMINISTRATIVE IMPLICATIONS

WCA stated there will be a slight increase in caseload in organizing, mailing and compiling questionnaire results for the interim review. Having committees screen candidates initially on mid-term evaluations and for violations lengthens all these processes significantly.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 274 a relationship with Senate Bill 67 which seeks to consolidate all hearing officers/administrative law judges in state agencies into an Administrative Hearing Office.

OTHER SUBSTANTIVE ISSUES

WCA reported a bill similar to the proposed legislation was presented to the Advisory Council on Workers' Compensation and Occupational Disease and Disablement and was approved. The proposed legislation differs from the bill the advisory council approved as it relates to the term of the appointment.