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State: Fla.

Backlog of Fee Petitions Drives Up Payments to Workers' Attorneys by 26%: Top [2017-04-13]

Florida claimants' attorney fees jumped 26% in the 11 months since the state Supreme Court ruled the statutory fee schedule was unconstitutional, but that spike may represent pent-up demand as attorneys held off on filing fee petitions while awaiting the high court's decision rather than the beginning of a long-term trend.

WorkCompCentral analyzed nearly two years of fees awarded to injured workers' attorneys following a request for electronic records from the Office of Judges of Compensation Claims.

Some observers say that that the numbers reflect thousands of settlements hoarded by attorneys — some for many years — in anticipation of a favorable decision in [Marvin Castellanos v. Next Door Co.](#) or simply through lax bookkeeping, officials said.

The data clearly show a backlog of fees that took years to process.



The high court delivered the Castellanos decision on April 28, 2016. The following day, judges awarded claimants' attorneys \$577,107 for cases dating as far back as 2002. On April 29, 2015, the attorney fees were \$394,284, or 31.7% lower than the day following the Castellanos ruling.

“This is clearly a contaminated petri dish,” said West Palm Beach defense attorney H. George Kagan. “We couldn't drag a claimants' attorney kicking and screaming to file a fee petition. Things came to a substantial halt in the 12 months before Castellanos.

“The claimants' attorneys gambled and won — the case went their way. Now the inventory is being depleted for cases held on to for that purpose,” Kagan said.

From May 1, 2015, through March 31, 2016, workers' attorneys were awarded fees of \$121,394,968. For May 1, 2016, through March 31 of this year, the fees were \$164,015,777, or 26% higher.

The jump was gradual: In May 2016, attorney fees climbed only 2.56% over the previous May. In January of this year, the fees jumped 42.6% over the same month the year before.

David Langham, deputy chief judge of the OJCC, said there are many possible explanations for the increase in attorney fees post-Castellanos:

- Some attorneys lack business acumen and got behind on record-keeping as they focused on a high caseload.
- Fee petitions can be arduous to craft and often take a back seat to case preparation. “Some lawyers tell me they have really old fees sitting around because putting together a fee petition can take a lot of work when you're in a busy practice and have a neurosurgeon's deposition today at 6,” Langham said.
- It can take years to determine attorney fees because it takes years to determine total benefits awarded to injured workers. The fees generally are based on how much the attorney wins for his or her client.

- Some attorneys held their fees in abeyance as the Castellanos case loomed.

“Some attorneys are just not focused on the business side of their practice,” Langham said. “In some cases, fees were awarded last year when the benefit entitlement was decided in the 1990s. Some are more dedicated to their clients than to their fees.

“It may take seven, eight, nine years to work through the process to determine total benefits,” he said. “The lawyer that’s diligent about the fee still has to be able to determine the reasonable value of the benefits that came from his successful claim, and that can take years. And I’ve had lawyers who’ve told me they were waiting on the Castellanos decision.”

The National Council on Compensation Insurance, which recommends full rates for Florida’s workers’ compensation insurers, initially determined the Castellanos decision alone would raise premiums by 15%, or approximately \$552 million in the first year. As a result, the ratings agency submitted a 19.6% rate hike recommendation to the Florida Office of Insurance Regulation.

At OIR’s behest, NCCI ultimately lowered its rate increase recommendation to 14.5% — a \$528 million first-year impact with \$368 million attributable to Castellanos.

Increases in provider reimbursements and decisions in two other court cases, Westphal v. City of St. Petersburg and Jones v. Food Lion Inc., accounted for another 4% rate increase after those rulings replaced a 104-week cap on temporary benefits with the previous statutory limit of 260 weeks over issues of constitutionality.

Winter Park claimants’ attorney Geoff Bichler said the 26% increase in fees after Castellanos was expected because carriers now have to pay up for wrongfully denying claims.

“A lot of people were looking at the fees that they had won at trial and were not pursuing those fees until the constitutional issues were resolved,” Bichler said. “There were fees waiting in the wings.

“I really don’t think that’s all that troubling of a statistic (26%), especially when you look at the role attorney fees play in the larger system as an enforcement mechanism,” he said. “It’s probably just getting us back to parity or close to parity with the defense side. We only get paid when we win. They get paid regardless.”

Data kept by the OJCC show that defense fees in fiscal 2016 outpaced claimants’ attorney fees by nearly 2-1, or \$242 million versus \$136 million.

In fiscal 2003, claimants’ attorney and defense fees were almost 50-50: \$211 million for workers’ lawyers and \$217 million for the defense.

Before 2003, the OJCC was allowed to depart from the statutory fee formula of 20% of the first \$5,000 secured for workers, 15% of the next \$5,000, 10% of the remainder secured during the first 10 years after the claim was filed, and 5% of the benefits secured after 10 years.

In 2003, the Legislature removed a provision that allowed a reasonable hourly fee when the formula resulted in an unfairly low fee. The state Supreme Court in 2008 ruled that the law required a reasonable fee anyway because the word “reasonable” remained in the statute, so legislators the following year removed that word and capped fees based on the formula.

Castellanos held that the exclusive statutory percentage-based fee schedule created an irrebuttable presumption that the schedule always resulted in a correct fee and ruled it unconstitutional as a violation of the claimant’s due process rights.

“We believe the current attorney fee payments represent a temporary spike based on the backlog of cases in the system which were wrongfully denied prior to Castellanos,” said Miami claimants’ attorney Richard Chait. “If

anything, what this demonstrates is the excessive number of denials which were confronted when the insurance carriers did not have the linchpin of reasonable fees to govern their claims-handling practice.”

The Florida Justice Reform Institute said its experts have estimated attorney fees would increase from 19% to 31% after the Castellanos ruling, so 26% is “right in line with what we expected,” said William Large, president of the tort reform organization.

“The guideline fee that was in place was a system that helped all employees and employers, and protected the workers’ compensation system,” Large said. “Now we’re going to have endless litigation on small ticky-tacky issues like the average weekly wage.”

The Castellanos decision mobilized Florida’s business community against the potential for skyrocketing claimants’ attorney fees. They enlisted sponsors in both legislative chambers to introduce workers’ compensation reform bills.

One of those bills, [Senate Bill 1582](#), goes before the Appropriations Committee at 9:30 a.m. today. It would codify the court decisions in Castellanos and Westphal, and allow judges of compensation claims to award claimants’ attorneys hourly fees capped at \$250.

A House companion bill, [HB 7085](#), would cap the hourly fee at \$150. It passed out of the Commerce Committee on a 20-9 vote a week ago and on Wednesday was placed on the House calendar for a full floor vote.

“It’s not surprising that attorney fees have increased as a result of the Castellanos decision, and what’s unfortunate is that there are no additional benefits to the injured worker as a result of those increased costs,” said Carolyn Johnson, director of business, economic development and innovation policy for the Florida Chamber of Commerce.

“It’s up to the Legislature to fix attorney fees, and the Florida Chamber believes that the House bill passed last week does just that,” she said.