

**LEGISLATIVE BUDGET BOARD**  
Austin, Texas

**FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION**

**April 28, 2011**

**TO:** Honorable Byron Cook, Chair, House Committee on State Affairs

**FROM:** John S O'Brien, Director, Legislative Budget Board

**IN RE: HB3362** by Smithee (Relating to the appointment of an attorney for a workers' compensation claimant in certain proceedings.), **Committee Report 1st House, Substituted**

**Estimated Two-year Net Impact to General Revenue Related Funds** for HB3362, Committee Report 1st House, Substituted: a negative impact of (\$1,030,942) through the biennium ending August 31, 2013.

The bill would make no appropriation but could provide the legal basis for an appropriation of funds to implement the provisions of the bill.

**General Revenue-Related Funds, Five-Year Impact:**

Fiscal Year	Probable Net Positive/(Negative) Impact to General Revenue Related Funds
2012	(\$371,714)
2013	(\$659,228)
2014	(\$804,659)
2015	(\$790,146)
2016	(\$790,146)

**All Funds, Five-Year Impact:**

Fiscal Year	Probable (Cost) from <i>General Revenue Fund</i> 1	Probable Savings from <i>Subsequent Injury</i> <i>Fund</i> 5101	Probable (Cost) from <i>Subsequent Injury</i> <i>Fund</i> 5101	Probable (Cost) from <i>Interagency Contracts</i> 777
2012	(\$371,714)	\$135,000	(\$456,000)	(\$365,304)
2013	(\$659,228)	\$135,000	(\$456,000)	(\$365,304)
2014	(\$804,659)	\$135,000	(\$456,000)	(\$365,304)
2015	(\$790,146)	\$135,000	(\$456,000)	(\$365,304)
2016	(\$790,146)	\$135,000	(\$456,000)	(\$365,304)

Fiscal Year	Change in Number of State Employees from FY 2011
2012	4.0
2013	7.0
2014	9.0
2015	9.0
2016	9.0

## **Fiscal Analysis**

The bill would amend the Labor Code to allow the appointment of an attorney for a workers' compensation claimant in certain proceedings. The bill would require the court, at the request of a claimant, to provide an attorney to represent the claimant in a trial initiated by an insurance carrier. Under the provisions of the bill, the court could hold a pretrial hearing to determine whether the claimant had made a good faith effort to retain counsel before appointing an attorney.

When an attorney is provided under those provisions, that attorney's fees, as determined by the jury in the case, or by the trial judge when a jury is not requested, would be paid by the insurance carrier for any issue on which the claimant prevailed under the provisions of the bill. Otherwise the bill would require that the Subsequent Injury Fund General Revenue – Dedicated 5101 (GR-D 5101) would be liable for the attorney's fees. If the insurance carrier appealed, GR-D 5101 would be liable for the claimant's attorney fees should the insurance carrier prevail. If the insurance carrier appealed multiple issues and the insurance carrier prevailed on some, but not all of the issues, the court would apportion and award fees to the claimant's attorney from GR-D 5101 only for issues on which the insurance carrier prevailed.

A claimant who did not prevail in an administrative proceeding would not be entitled to a court-appointed attorney under the provisions of the bill, but could recover attorney's fees and expenses incurred in a trial initiated by the claimant in which the claimant prevailed. The bill would also require insurance carriers to pay reasonable and necessary attorneys' fees and expenses on claimant initiated judicial review cases.

The bill would take effect September 1, 2011.

## **Methodology**

Based on the analysis provided by the Texas Department of Insurance (TDI), it is estimated that carriers will initiate approximately 64 judicial appeals involving claimants annually and carriers prevail in an estimated 50 percent of these cases. It is estimated that the average attorney fees are \$19,000 per case. The analysis is based on a court appointed attorney representing the claimant in 75 percent of the cases, resulting in an estimated annual cost to the GR-D 5101 for attorney fees of \$456,000 annually.

TDI indicates that currently approximately 10 carrier-initiated appeals annually do not have a claimant attorney involved, and therefore resolve in favor of the carrier. Assuming an average reimbursement amount of approximately \$24,000, these cases result in GR-D 5101 reimbursing carriers approximately \$240,000 annually for overpayment of benefits. TDI assumes that the bill would result in an attorney being appointed to represent the claimant in 75 percent of the cases and that attorney representation would reduce the number of no evidence summary judgments, which would consequently reduce GR-D 5101 reimbursements made for overpayment of benefits. It is anticipated that the claimant with attorney representation will prevail in about half of these cases, resulting in \$90,000 not being reimbursed to the carriers. Among the cases that would be resolved in favor of the carrier, TDI estimates that 75 percent would settle. Because GR-D 5101 does not reimburse carriers for overpayment of benefits in judicial appeals that resolve in favor of the claimant or that settle, an additional \$45,000 annually would not be reimbursed by the fund. Based on the analysis provided by TDI, the bill will result in an annual savings to GR-D 5101 of \$135,000.

Based on the analysis provided by the State Office of Risk Management (SORM), implementation of the bill is anticipated to increase costs by \$90,488 in each fiscal year SORM for the payment of attorney fees for court-appointed counsel. SORM initiated an average of 6 judicial review proceedings per year over the last four fiscal years. Based on the assumptions provided by TDI and SORM, 75 percent of these cases would result in the appointment of a court-appointed attorney and of those 4.5 cases, TDI's analysis assumes that the carrier would prevail 50 percent of the time. Based on the analysis provided by SORM, the average cost of attorney fees is \$40,217. The additional cost to SORM would be \$90,488 each fiscal year.

Additionally, an average of 4 judicial proceedings are initiated by claimants each year. Based on the assumptions provided by TDI and SORM, it is assumed that the claimant would prevail in half of those cases resulting in an additional cost to SORM of \$80,434 each year of the biennium. Based on the analysis provided by SORM, it is assumed that claimant initiated judicial review proceedings will increase. Over the past three years, fifty-eight claimants did not prevail at the administrative level, averaging 19.3 cases per year. Assuming half of those would result in an additional judicial review proceeding and the claimant would prevail in half of those cases, additional cost to the SORM program of \$194,382 is anticipated each year of the biennium (4.83 cases annually at \$40,217 average attorney fee award per case).

The Office of the Attorney General (OAG) handles all of the workers' compensation cases in district court for SORM, the University of Texas System, and the Texas A&M University System. Cases against claimants who do not have an attorney do not require as much attorney/paralegal/secretary time to litigate. As a result of this bill, it is anticipated that there will be few, if any, cases litigated with claimants who do not have an attorney.

Based on the analysis of the OAG, implementation of the bill will require an additional 4.0 full-time-equivalent positions (FTEs) in fiscal year 2012, 7.0 FTEs in fiscal year 2013, and 9.0 FTEs in fiscal years 2014 through 2016 to handle the additional workload. In fiscal year 2012, the 4 FTEs would cost \$246,288 in salaries and wages, \$68,616 in benefit costs, \$9,200 in travel, and \$18,584 in other operating expenses. One-time capital equipment costs are anticipated to be \$29,026 fiscal year 2012, for a total General Revenue cost of \$371,714 in fiscal year 2012. In fiscal year 2013, the 7 FTEs would cost \$458,610 in salaries and wages, \$127,769 in benefit costs, \$18,400 in travel, and \$32,522 in other operating expenses. One-time capital equipment costs are anticipated to be \$21,927 in fiscal year 2013, for a total General Revenue cost of \$659,228 in fiscal year 2013.

Based on the analysis provided by the Texas A&M University System, the bill would have no significant fiscal impact on the system. Based on the analysis provided by the University of Texas System Administration, implementation of the bill would have a cost, but the cost is anticipated to be absorbed within existing agency resources.

### **Local Government Impact**

No significant fiscal implication to units of local government is anticipated.

**Source Agencies:** 302 Office of the Attorney General, 304 Comptroller of Public Accounts, 454 Department of Insurance, 479 State Office of Risk Management, 710 Texas A&M University System Administrative and General Offices, 720 The University of Texas System Administration

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