

WORKERS'

Assessment of NMSA 52-1-54 Values Using Inflation Indices

2023 HM 83 Attorney Fee Cap Task Force

COMPENSATION

Submitted December 2023

DISCLAIMER

The following Assessment of NMSA 52-1-54 Values Using Inflation Indices was produced solely at the direct request of the New Mexico House Memorial 83 Task Force (Task Force). More specifically, the Task Force asked the Economic Research and Policy Bureau to provide updated inflation-adjusted values for the attorney fee cap and discovery cost advance sections of NMSA 52-1-54 (sections I and D, respectively). This assessment is not intended to influence or advocate for a particular course of action with regards to NMSA 52-1-54. While the analysis provides inflation adjustments to the requested values, there may be alternative approaches to updating the statute, assuming that it is updated at all.



Introduction & Scope of Analysis

The New Mexico House of Representatives passed House Memorial 83 (HM83) in March of 2023. HM83 directed the New Mexico Workers' Compensation Administration (NMWCA) to form a task force (the Task Force) with the purpose of examining the implications of attorney fees and their caps on New Mexico's workers' compensation system. The work of the Task Force is ongoing as of the date of this report (December 2023). As part of its analysis, the Task Force has requested that the NMWCA Economic Research and Policy Bureau (ERPB) provide an inflation analysis of the attorney fee cap and discovery cost advance provisions of NMSA 52-1-54.

Key Findings

- All inflation-adjusted values have been rounded to the nearest \$250 for the sake of practicality and simplicity.
- The current value for the attorney fee limit (NMSA 52-1-54 Subsection I) is \$22,500. The analysis suggests an **inflation-adjusted attorney fee limit of \$32,750**, or an increase of \$10,250.
- The current value for the discovery cost advance provision (NMSA 52-1-54 Subsection D) is \$3,000. The analysis suggests an **inflation-adjusted discovery cost advance of \$6,250**, or an increase of \$3,250.



Subsection I: Attorney Fee Limit

NMSA 52-1-54 (I) sets a limit for attorney fees including paralegal services, legal clerk services, and any other related legal services costs on behalf of a claimant or an employer for a single accidental injury claim to \$22,500. The attorney fee limit was most recently increased from \$16,500 to \$22,500 in June of 2013. In order to assess the effect of inflation on the attorney fee limit since the 2013 update, the non-seasonally adjusted Producer Price Index (PPI) for legal services was used as a measure of inflation (Appendix B). Because the attorney fee limit applies to both injured worker attorneys and employer/insurance company attorneys, the affected legal transactions represent a mix of business-to-consumer and business-to-business transactions. The Producer Price Index (PPI) for legal services, which measures prices received by producers from both consumers and businesses, was deemed by the ERPB to be the most appropriate measure of inflation.

Since June of 2013, the Producer Price Index (PPI) for legal services has increased from 188.0 to 273.6 in October of 2023 (preliminary data), an increase of 45.5%. Applying this rate of inflation to the current attorney fee limit of \$22,500 yielded an inflation adjustment of \$10,245. Adding the inflation adjustment resulted in a total inflation-adjusted attorney fee limit of \$32,745. Finally, in order to promote practical legislation and for the sake of simplicity, inflation-adjusted values were rounded to the nearest \$250. This produced a potential attorney fee limit of \$32,750.

Subsection D: Discovery Cost Advance

NMSA 52-1-54 (D) allows claimants to receive a discovery cost advance of up to \$3,000 from an employer when they request discovery. The employer/insurance company is responsible for paying for an injured worker's discovery costs up to the discovery advance limit, with a provision for reimbursement to the employer if the claimant does not substantially prevail on their claim. The last time that the discovery limit was updated was in June of 2003, when it was increased from \$1,000 to \$3,000. To assess the impact of inflation on the \$3,000 cap since 2003, the non-seasonally adjusted Consumer Price Index (CPI) for legal services was used by the ERPB as a measure of inflation (Appendix C). The CPI represents a basket of goods that reflect



the spending of an average consumer. Because the discovery advance is intended for use by injured workers, the business-to-consumer aspect of the CPI for legal services was selected by the ERPB as the most representative measure of inflation.

The CPI for legal services has increased from 221.8 in June of 2003 to 456.1 in September of 2023 (most recent data), an increase of 83.2%. Applying this rate of inflation to the existing discovery limit of \$3,000 yielded an inflation adjustment of \$3,170. Adding the inflation adjustment to the current discovery advance limit produced a total inflation-adjusted discovery advance limit of \$6,170. Following the same methodology from Subsection I, the revised discovery cost advance limit was rounded by the EPRB to the nearest \$250, resulting in an **adjusted discovery advance limit of \$6,250.**



Appendix A

52-1-54. Fee restrictions; appointment of attorneys by the director or workers' compensation judge; discovery costs; offer of judgment; penalty for violations.

A. It is unlawful for any person to receive or agree to receive any fees or payment directly or indirectly in connection with any claim for compensation under the Workers' Compensation Act except as provided in this section.

B. In all cases where the jurisdiction of the workers' compensation administration is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act, the director or workers' compensation judge, unless the claimant is represented by an attorney, may in the director's or judge's discretion appoint an attorney to aid the workers' compensation judge in determining whether the settlement should be approved and, in the event of an appointment, a reasonable fee for the services of the attorney shall be fixed by the workers' compensation judge, subject to the limitation of Subsection I of this section.

C. In all cases where the jurisdiction of the workers' compensation administration is invoked to approve a settlement of a compensation claim under the Workers' Compensation Act and the claimant is represented by an attorney, the total amount paid or to be paid by the employer in settlement of the claim shall be stated in the settlement papers. The workers' compensation judge shall determine and fix a reasonable fee for the claimant's attorney, taking into account any sum previously paid, and the fee fixed by the workers' compensation judge shall be the limit of the fee received or to be received by the attorney in connection with the claim, subject to the limitation of Subsection I of this section.

D. The cost of discovery shall be borne by the party who requests it. If, however, the claimant requests any discovery, the employer shall advance the cost of paying for discovery up to a limit of three thousand dollars (\$3,000). If the claimant substantially prevails on the claim, as determined by a workers' compensation judge, any discovery cost advanced by the employer shall be paid by that employer. If the claimant does not substantially prevail on the claim, as determined by a workers' compensation judge, the employer shall be reimbursed for discovery



costs advanced according to a schedule for reimbursement approved by a workers' compensation judge.

E. In all cases where compensation to which any person is entitled under the provisions of the Workers' Compensation Act is refused and the claimant thereafter collects compensation through proceedings before the workers' compensation administration or courts in an amount in excess of the amount offered in writing by an employer five business days or more prior to the informal hearing before the administration, the compensation to be paid the attorney for the claimant shall be fixed by the workers' compensation judge hearing the claim or the courts upon appeal in the amount the workers' compensation judge or courts deem reasonable and proper, subject to the limitation of Subsection I of this section. In determining and fixing a reasonable fee, the workers' compensation judge or courts shall take into consideration:

(1) the sum, if any, offered by the employer:

(a) before the worker's attorney was employed;

(b) after the attorney's employment but before proceedings were commenced; and

(c) in writing five business days or more prior to the informal hearing;

(2) the present value of the award made in the worker's favor; and

(3) any failure of a party to participate in a good-faith manner in informal claim resolution methods adopted by the director.

F. After a recommended resolution has been issued and rejected, but more than ten days before a trial begins, the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against the employer or claimant for the money or property or to the effect specified in the offer, with costs then accrued, subject to the following:

(1) if, within ten days after the service of the offer, the opposing party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof, and thereupon that compensation order may be entered as the



workers' compensation judge may direct. An offer not accepted shall be deemed withdrawn, and evidence thereof is not admissible except in a proceeding to determine costs. If the compensation order finally obtained by the party is not more favorable than the offer, that party shall pay the costs incurred by the opposing party after the making of the offer. The fact that an offer has been made but not accepted does not preclude a subsequent offer;

(2) when the liability of one party to another has been determined by a compensation order, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability;

(3) if the employer's offer was greater than the amount awarded by the compensation order, the employer shall not be liable for the employer's fifty percent share of the attorney fees to be paid the worker's attorney and the worker shall pay one hundred percent of the attorney fees due to the worker's attorney; and

(4) if the worker's offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker's attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker's attorney fees.

G. In all actions arising under the provisions of Section 52-1-56 NMSA 1978 where the jurisdiction of the workers' compensation administration is invoked to determine the question whether the claimant's disability has increased or diminished and the claimant is represented by an attorney, the workers' compensation judge or courts upon appeal shall determine and fix a reasonable fee for the services of the claimant's attorney only if the claimant is successful in establishing that the claimant's disability has increased or if the employer is unsuccessful in establishing that the claimant's disability has diminished. The fee when fixed by the workers' compensation judge or courts upon appeal shall be the limit of the fee received or to be received by the attorney for services in the action, subject to the limitation of Subsection I of this section.



H. In determining reasonable attorney fees for a claimant, the workers' compensation judge shall consider only those benefits to the worker that the attorney is responsible for securing. The value of future medical benefits shall not be considered in determining attorney fees.

I. Attorney fees, including, but not limited to, the costs of paralegal services, legal clerk services and any other related legal services costs on behalf of a claimant or an employer for a single accidental injury claim, including representation before the workers' compensation administration and the courts on appeal, shall not exceed twenty-two thousand five hundred dollars (\$22,500). This limitation applies whether the claimant or employer has one or more attorneys representing the claimant or employer and applies as a cumulative limitation on compensation for all legal services rendered in all proceedings and other matters directly related to a single accidental injury to a claimant. The workers' compensation judge may exceed the maximum amount stated in this subsection in awarding a reasonable attorney fee if the judge finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed five thousand dollars (\$5,000). As used in this subsection, "bad faith" means conduct by the claimant, insurer or employer in the handling of a claim that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker or employer. Any determination of bad faith shall be made by the workers' compensation judge through a separate fact-finding proceeding. Notwithstanding the provisions of Subsection J of this section, the party found to have acted in bad faith shall pay one hundred percent of the additional fees awarded for representation of the prevailing party in a bad faith action.

J. Except as provided in Paragraphs (3) and (4) of Subsection F of this section, the payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer.

K. It is unlawful for any person except a licensed attorney to receive or agree to receive any fee or payment for legal services in connection with any claim for compensation under the Workers' Compensation Act.



L. Nothing in this section applies to agents, excluding attorneys, representing employers, insurance carriers or the subsequent injury fund in any matter arising from a claim under the Workers' Compensation Act.

M. No attorney fees shall be paid until the claim has been settled or adjudged.

N. Every person violating the provisions of this section is guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500), to which may be added imprisonment in the county jail for a term not exceeding ninety days.

O. Nothing in this section shall restrict a claimant from being represented before the workers' compensation administration by a nonattorney as long as that nonattorney receives no compensation for that representation from the claimant.

History: 1978 Comp., § 52-1-54, enacted by Laws 1987, ch. 235, § 24; 1989, ch. 263, § 32; 1990 (2nd S.S.), ch. 2, § 23; 1993, ch. 193, § 5; 2003, ch. 265, § 3; 2013, ch. 168, § 1.



Appendix B

Producer Price Index - Legal Services - Not Seasonally Adjusted												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2013	185.8	186.5	186.9	188.1	188.0	188.0	188.0	188.0	188.7	188.6	188.6	189.0
2014	192.7	193.1	193.2	193.4	194.3	194.4	194.5	194.4	194.4	194.4	194.4	194.4
2015	196.8	198.3	199.0	200.1	199.8	200.3	199.9	199.9	200.0	200.5	199.6	199.4
2016	201.8	202.8	202.2	202.9	203.5	203.5	203.4	204.6	204.5	204.5	204.1	203.8
2017	207.7	210.8	210.0	210.7	211.0	211.0	212.0	212.0	211.4	211.7	212.3	210.9
2018	214.6	216.7	217.3	217.8	216.6	216.7	216.2	216.0	215.8	215.8	215.9	215.6
2019	220.4	222.9	223.1	223.2	223.5	223.9	224.2	225.2	225.0	225.8	225.5	225.7
2020	229.8	232.2	231.8	233.0	235.4	235.3	236.5	236.5	236.6	234.9	234.9	235.3
2021	238.0	240.1	240.9	243.5	243.9	244.2	244.4	244.0	244.1	245.3	245.1	245.3
2022	251.2	253.9	253.8	253.8	255.2	255.1	255.6	256.0	257.2	257.8	257.6	257.3
2023	265.5	270.3	270.2	270.8	270.4	270.4	271.917(P)	271.576(P)	271.549(P)	273.602(P)		

Source: United States Bureau of Labor Statistics - Consumer Prices Index



Appendix C

Consumer Price Index - Legal Services - Not Seasonally Adjusted												
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1987	101	101.8	102.2	102.5	102.9	103.3	103.9	104.1	104.4	104.8	105.2	105.2
1988	105.6	106.1	106.7	106.8	106.9	107.1	107.9	108.3	108.5	108.8	109.3	109.9
1989	111.1	111.7	111.6	112.2	112.7	114.6	115	115.5	116.1	116.2	115.9	116.8
1990	117.7	118.2	120.4	120.9	123.4	123.7	123.8	123.8	124.4	124.8	124.8	124.8
1991	126.2	126.3	128.1	128.7	129	129.2	130.3	130.6	131.6	131.5	131.5	131.9
1992	134.7	135.8	136.4	135.9	135.6	135.8	136.1	136.1	136.7	137.1	137.2	137.2
1993	137.7	138.1	137.8	138.5	142.9	143.3	143.5	143.7	143.9	144	144.9	145.1
1994	145.5	145.7	146.1	146.3	146.3	146.7	146.8	146.8	146.9	147.9	148.2	147.9
1995	148.3	150.5	150	150.7	151.2	151.4	152.4	152.5	152.7	153.1	153.3	153.5
1996	153.5	153.7	155	156	157.3	157.4	158	158.3	158.6	158.6	159.3	159.3
1997	159.7	160.1	160.7	161	161.5	164	163.8	166.5	166.5	167.2	167.4	167.5
1998	168.6	169.9	170.2	170.5	171.1	171.2	171.3	171.9	172.9	173.8	174	174.6
1999	175.7	177.3	178.2	178.6	179.6	179.6	180	180.9	181.5	182.3	182.5	183.5
2000	184.9	185.6	186	187.8	188.7	189.1	190.2	191	191.5	192.2	192.5	192.6
2001	193.4	194.7	195.5	196.1	196.6	196.8	199.5	203	203.2	204.8	204.9	205.1
2002	207	208.6	209.7	209.7	210.9	211.1	211.2	211.8	212.3	212.7	213.7	213.9
2003	216.1	218.8	221.1	221.2	221.4	221.8	222	222.3	223.1	223.6	224.5	224.6
2004	226.5	228.4	230.3	231.1	231.5	231.9	232.5	233.6	234.3	234.8	235.6	236.6
2005	238.5	238.3	239.3	239.5	242.1	241.8	243	243.2	243.4	243.5	243.8	244.6
2006	246	246.6	247.4	247.1	247.8	248	249.4	252.1	252.1	253.6	254.5	255.5
2007	255.961	256.503	258.069	259.058	260.499	260.772	260.822	261.368	262.509	262.493	262.315	262.91
2008	266.221	266.634	267.35	268.828	270.892	271.236	271.852	272.776	272.583	272.583	272.946	274.81
2009	275.818	275.836	276.071	276.042	276.357	277.162	276.868	277.024	277.608	282.107	283.443	283.418
2010	284.964	285.617	286.287	286.638	286.189	286.509	287.176	289.018	290.862	290.796	290.889	292.614
2011	294.975	295.771	295.663	296.15	296.53	296.585	296.416	298.623	299.429	298.706	299.8	300.48
2012	301.013	300.865	301.696	301.859	302.998	304.234	303.017	303.978	304.011	305.88	305.976	306.049
2013	306.202	309.892	310.386	310.395	310.244	311.652	311.908	314.108	314.021	314.979	313.736	314.281
2014	315.758	317.364	318.334	318.769	317.82	318.963	318.925	319.115	319.095	319.485	319.485	318.795
2015	319.39	319.613	320.198	321.015	321.825	321.793	323.086	324.413	327.485	327.557	328.393	327.925
2016	326.621	326.68	326.714	327.114	331.779	333.681	339.14	339.054	340.76	340.873	339.966	341.357
2017	348.052	345.769	345.706	345.865	344.984	349.127	348.267	346.046	345.431	345.577	346.003	345.87
2018	349.586	358.637	360.741	360.832	361.374	361.374	360.971	360.971	361.248	363.273	368.049	367.877
2019	363.948	367.054	367.076	362.839	362.964	363.152	365.428	365.428	365.193	365.193	364.384	364.384
2020	367.022	369.233	369.233	367.647	367.911	368.924	368.854	369.22	369.317	369.071	369.112	369.112
2021	369.417	371.052	371.083	371.157	371.157	371.157	371.157	371.13	377.635	384.455	380.812	382.358
2022	381.584	389.25	390.992	395.288	399.211		406.267	405.729	405.729	405.325	404.33	405.211
2023	405.211	409.39	410.273		428.416		424.823		456.146			

Source: United States Bureau of Labor Statistics - Producer Price Index

