

TEXAS DEPARTMENT OF INSURANCE
DIVISION OF WORKERS' COMPENSATION



BIENNIAL REPORT
TO THE 85TH LEGISLATURE
DECEMBER 2016

Texas Department of Insurance, Division of Workers' Compensation

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TEXAS DEPARTMENT OF INSURANCE

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December 1, 2016

The Honorable Greg Abbott, Governor
The Honorable Dan Patrick, Lieutenant Governor
The Honorable Joe Straus, Speaker of the House

Dear Governor Abbott, Lieutenant Governor Patrick, and Speaker Straus:

In accordance with Labor Code, §402.066, I am pleased to submit the Texas Department of Insurance, Division of Workers' Compensation's biennial report to the 85th Texas Legislature. This report provides an update on the Texas workers' compensation system and a brief description of several legislative recommendations that I believe will improve my ability to effectively and efficiently regulate the workers' compensation system.

I am available to discuss any of the issues contained in the report and to provide you with technical assistance. The legislative recommendations in this report will be incorporated into TDI's forthcoming biennial report to the 85th Texas Legislature, which will also cover other lines and financial aspects of insurance in Texas.

Please contact me or Jeff Nelson, Director of External Relations at 512-804-4405 if you have any questions or need any additional information.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Ryan Brannan".

W. Ryan Brannan
Commissioner of Workers' Compensation

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INTRODUCTION

The Texas workers' compensation system was originally adopted in 1913 to meet the needs of both employers and employees—ensuring that the system provided adequate benefits to injured employees at a reasonable cost to Texas employers. It has been more than a century since the Texas workers' compensation system was formed, and while the system has undergone legislative reform efforts over the years, the current Texas workers' compensation system remains strong, stable, and an enviable model for other states.

Since the adoption of the 2005 landmark House Bill (HB) 7 legislative reforms, Texas has seen significant system improvements: lower claims costs and insurance premiums, higher employer participation rates, better access to care and return-to-work outcomes, and fewer disputes. In fact, many state workers' compensation systems have approached the Division of Workers' Compensation (DWC) to learn from and adopt many of the components of the 2005 reforms into their own workers' compensation systems. States have expressed interest specifically in including pharmacy closed formularies, evidence-based treatment guidelines, administrative dispute resolution processes, Medicare-based fee guidelines, and network certification processes.

Although Texas has cut workers' compensation costs and improved injured employee outcomes in recent years, other states have not had similar results. As such, there remains a national debate about whether state workers' compensation programs still constitute the “grand bargain” struck between employers and employees more than a century ago.¹ In response, the U.S. Department of Labor, fueled by growing concerns about the depletion of the Social Security Disability Insurance Trust Fund and the Medicare Trust Funds, issued a report entitled “*Does the Workers' Compensation System Fulfill its Obligations to Injured Workers?*” The report generally concludes that state workers' compensation systems have shrunk financial obligations to employers, and that the cost of work-related injuries is transferred to other federally administered social benefit programs. The report also suggests that,

¹ Some states have experienced recent challenges to the constitutionality of their workers' compensation statutes amid concerns that benefits and eligibility standards are insufficient in those states. In Oklahoma, these challenges also involved recently adopted statutes that permit certain employers to “opt out” of the state's workers' compensation system.

unless inadequacies are addressed in state workers' compensation programs, increased federal oversight may be necessary. DWC will continue to monitor any federal initiatives resulting from this report; however, given recent changes at the federal level, it is possible that many of these recommendations may not be pursued.

Regardless, Texas policymakers have ensured that the Texas workers' compensation system remains resilient and adaptable to changes in technology, medical innovation, and economic pressure by relying on research data to fuel policy decisions; by leveraging relationships with stakeholders to build consensus; and by adopting best practices found in general healthcare. As a result, Texas provides higher compensation rates and extended medical benefits for injured employees, compared with most states. At the same time, Texas employs innovative approaches like evidence-based medicine, a pharmacy formulary, electronic billing, and Medicare-based fee schedules to control costs. The Texas workers' compensation system also benefits from a strong Texas economy, which creates jobs and encourages injured employees to return to work as quickly and safely as possible.

As the primary administrator of the Texas workers' compensation system, DWC looks for innovative ways to improve its services to system participants by focusing its efforts to regulate workers' compensation efficiently, educate system participants, and achieve a balanced system that treats everyone with dignity and respect. Examples of this focus include on-site and single point-of-contact claim services in 20 DWC field offices across the state, free injured employee and employer training on workers' compensation and workplace safety issues, plain language forms and letters, and certain forms and correspondence made more secure with the removal of Social Security Numbers. DWC is also making administration of the system more efficient by enhancing internal automation efforts, digitizing millions of older paper claim records, and eliminating unnecessary storage space."

While Texas is a model for other state workers' compensation systems, the 85th Texas Legislature will have an opportunity to promote additional accountability for system participants, and assist DWC in achieving a more balanced workers' compensation system.

System trends presented in this report allow DWC, policymakers, and system participants to gauge the health of the system and consider fine-tuning previous reform efforts, eliminating potential confusion,

and addressing lingering statutory uncertainty.

INJURY RATES AND CLAIM FREQUENCY CONTINUES TO DECREASE

The Texas workers' compensation system continues to experience marked reductions in both the non-fatal occupational injury and illness rate and the overall number of reportable claims filed with DWC.

Since the 2005 legislative reforms, the non-fatal occupational injury and illness rate in Texas decreased 36 percent, from 3.6 to 2.3 injuries per 100 full-time employees.

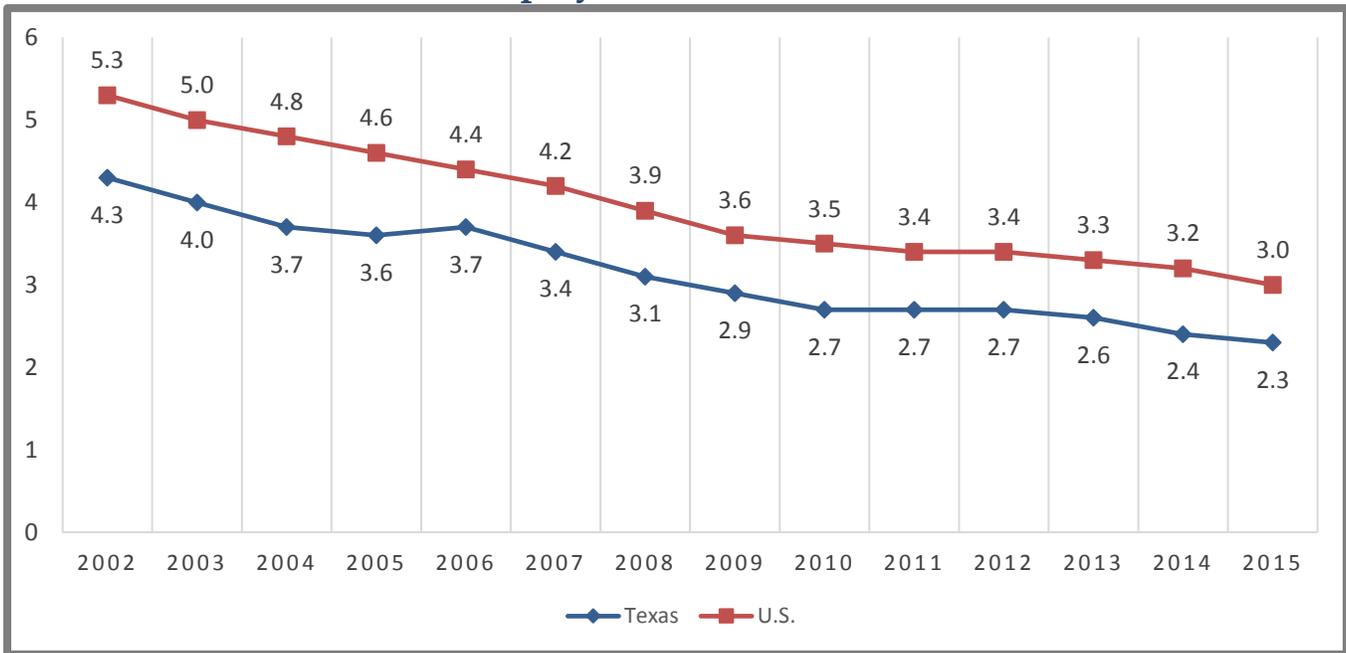
The non-fatal occupational injury and illness rate in Texas has decreased 36 percent since 2005. Overall, Texas' rate is lower than the national rate.

Workplace injury and illness rates

vary widely by industry. Incidence rates for industries such as construction, transportation and warehousing, and manufacturing, however, have experienced significant declines since 2005, while industries such as information and wholesale trade have had increased injury rates in recent years.

Overall, Texas's non-fatal occupational injury and illness rate is lower than the national rate (see Figure 1).

Figure 1: Texas and U.S. Non-fatal Occupational Injury and Illness Rates per 100 Full-time Employees, Private Sector (2002-2015)



Source: Texas Department of Insurance, Division of Workers' Compensation and U.S. Department of Labor, Bureau of Labor Statistics, Annual Survey of Occupational Injuries and Illnesses, 2015.

Despite the consistent reduction in the non-fatal occupational injury and illness rate in Texas over the past nine years, the number of fatal occupational injuries in Texas continues to fluctuate. After seeing decreases in 2010 and 2011, Texas recorded a significant increase in workplace fatalities in 2012 (536 fatal occupational injuries) due to increases in both the construction and mining industry sectors, including oil and gas extraction activities. Workplace fatalities declined in 2013 to 508 fatal occupational injuries and then increased again in 2014 to 531 fatal occupational injuries. Transportation incidents continue to be the leading cause of work-related fatalities in Texas. In 2014, the industry subsectors in Texas that experienced the highest number of fatal occupational injuries included specialty trade contractors, truck transportation, support activities for mining, heavy and civil engineering construction, and administrative and support services.

RECENT EFFORTS BY DWC TO IMPROVE WORKPLACE SAFETY

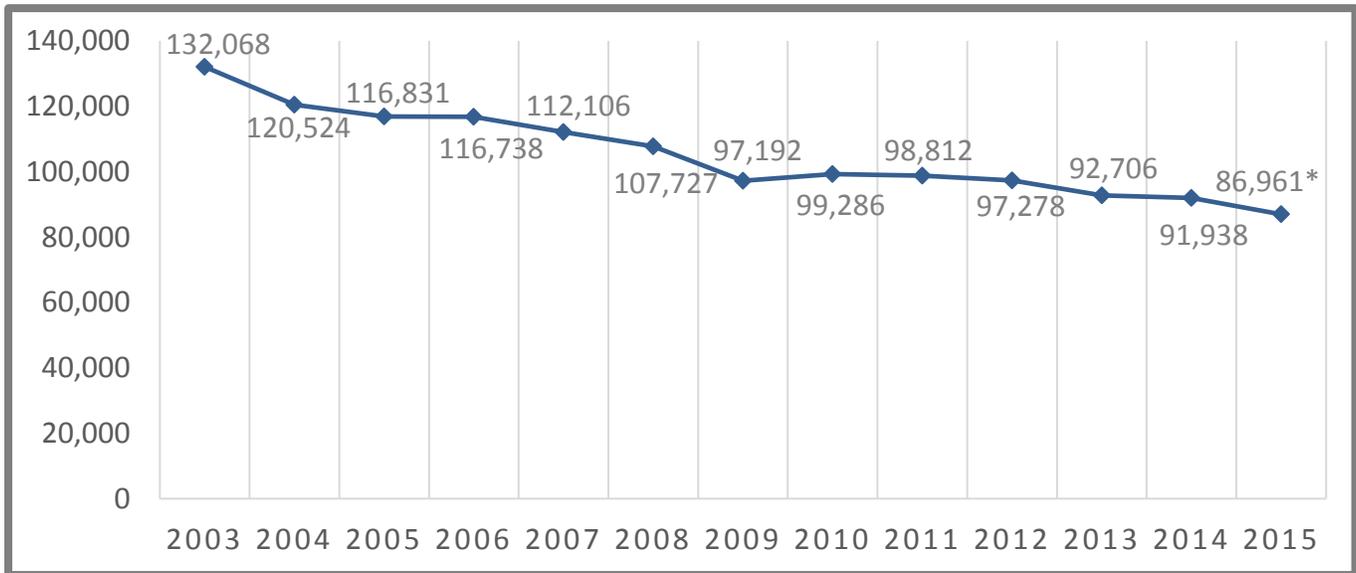
In an effort to increase awareness of the importance of workplace safety and to reduce the number of workplace injuries and fatalities in Texas, DWC conducts several safety outreach initiatives. These are aimed at:

- ★ offering free safety publications, face-to-face training, DVDs, and other safety products and services to encourage employers to create effective safety programs;
- ★ improving construction workplace safety by providing free Occupational Safety and Health Administration (OSHA) training to Texas employees;
- ★ providing safety consultations to employers that request help identifying potential safety hazards;
- ★ highlighting best practices for employers that consistently maintain a safe workplace for their employees;
- ★ awarding Lone Star Safety Awards to six Texas employers with exemplary safety programs that can serve as models for other employers; and
- ★ partnering with the Texas Department of Transportation and National Safety Council to reduce transportation fatalities by introducing online occupational driving safety guidance, and offering free traffic safety workshops for Texas employers.²

The continuing trend of declining non-fatal occupational injury and illness rates seen in Figure 1 is similar to the decline in the number of workers' compensation claims reported to DWC since 2003 (a 34 percent reduction). This decline, however, has begun to slow in recent years (see Figure 2). A variety of factors have led to the decline in reported claims nationally and in Texas, including increased employer and employee safety awareness, enhanced health and safety outreach and monitoring at the federal and state level, technology improvements, globalization, increased independent contractors use, and possible under-reporting of workplace injuries and illnesses.

² While DWC has statutory mandates to promote safety awareness and outreach, as well as regulate state-level insurance carrier loss-prevention activities, OSHA is primarily responsible for the regulation of workplace safety issues in Texas.

Figure 2: Number of Workers' Compensation Claims Reported to DWC, Injury Years 2003-2015



Note: Data updated through August 2016. These numbers include the claims that are required to be reported to DWC, including fatalities, occupational diseases, and injuries with at least one day of lost time. Medical-only claims are not required to be reported to DWC. *Data for 2015 should be viewed with caution since the number of claims per calendar year will continue to grow as injuries for that calendar year are reported or as “medical only” injuries begin to lose time away from work. Source: Texas Department of Insurance, Division of Workers' Compensation, 2016.

INSURANCE RATES AND PREMIUMS CONTINUE TO DECLINE FOR TEXAS EMPLOYERS

A key goal of the 2005 legislative reforms was to improve the affordability and availability of workers' compensation insurance for Texas employers. The Property and Casualty Actuarial Office of the Texas Department of Insurance (TDI) monitors insurance rate filings and reports workers' compensation insurance metrics as part of a biennial report to the Texas Legislature on the impact of the 2005 legislative reforms on insurance rates and premiums.³ In 2015, 290 insurance companies wrote workers' compensation insurance in Texas, and the total direct written premium (the growth of an insurance company's business during a given period) for the Texas workers' compensation insurance market was about \$2.74 billion.

Since 2003, workers' compensation insurance rates have dropped nearly 56 percent.

In terms of market share, 10 insurance company groups write about 79 percent of the market, and the top writer, Texas Mutual Insurance Company, has nearly 40 percent of the market, based on its 2015 direct written premium in Texas. The Legislature created Texas Mutual (formerly Texas Workers' Compensation Insurance Fund) in 1991 to serve as a competitive force in the marketplace, to guarantee the availability of workers' compensation insurance in Texas, and to serve as the insurer of last resort. While Texas Mutual is the insurer of last resort, it predominately writes voluntary business, competing with the rest of the insurers in the workers' compensation market. The involuntary (residual) market makes up less than a quarter of one percent of the workers' compensation insurance market.

In terms of profitability, two important measures of the financial health of the Texas workers' compensation insurance market are the loss ratio and the combined ratio. The loss ratio is the relationship between premium collected and the losses incurred (amounts already paid out plus amounts set aside to cover future payments) by insurance companies. The combined ratio is similar, except it compares premiums collected with the losses and expenses incurred by the insurance company. A combined ratio of less than 100 percent indicates that an insurance company earned a

³ For additional information on the effect of the reforms on the workers' compensation insurance market, see Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, *Setting the Standard: An Analysis of the Impact of the 2005 Legislative Reforms on the Texas Workers' Compensation System, 2016 Results*.

profit on its insurance operations (also known as an underwriting profit). A ratio of more than 100 percent indicates a loss on insurance operations, although this loss may be more than offset by investment earnings. For example, if the projected ultimate combined ratio is 110.0 percent, then for every \$1 in premium collected by the insurance company, it is projected that \$1.10 will be used to pay losses and expenses incurred. The insurance company will need to find other sources to pay the 10 cents not covered by the premium. This revenue may come from investments or a direct charge against the insurance company's surplus.

In 2015, the projected accident year combined ratio for workers' compensation in Texas was 80.5 percent. This means that for every dollar an insurance company collects, it will pay an estimated 80.5 cents to cover losses and expenses, and keep the remainder as profit. Table 1 shows the loss ratio and the combined ratio; both show that the last nine years have been very profitable for workers' compensation insurance companies. The combined ratio averaged 74.5 percent from 2003 to 2007. In 2008, this ratio deteriorated as the national economy went into recession, and it continued to do so until it started to rebound in 2012. It has continued to improve (decrease) each year since then.

**Table 1: Projected Ultimate Calendar Year/Accident Year
Loss and Combined Ratios**

Accident Year	Direct Written Premium	Loss Ratio	Combined Ratio
2007	\$2.73	39.1%	74.3%
2008	\$2.58	43.8%	84.5%
2009	\$2.18	41.7%	83.2%
2010	\$1.92	50.2%	93.6%
2011	\$2.16	52.3%	96.5%
2012	\$2.45	48.9%	91.1%
2013	\$2.66	45.7%	87.8%
2014	\$2.84	43.2%	84.6%
2015	\$2.74	39.1%	80.5%

Source: Direct Written Premium: TDI's compilation of the Texas Statutory Page 14 of the NAIC Annual Statement for Calendar Years Ending December 31, 2006 – 2015. Loss Ratio and Combined Ratio: NCCI Workers' Compensation Financial Data Call (Valuation Year 2015); The TDI's compilation of the Insurance Expense Exhibit for Calendar Years Ending December 31, 2007 - 2015. Loss development factors used in determining the ultimate losses are from the NCCI Annual Statistical Bulletin, 2015 edition.

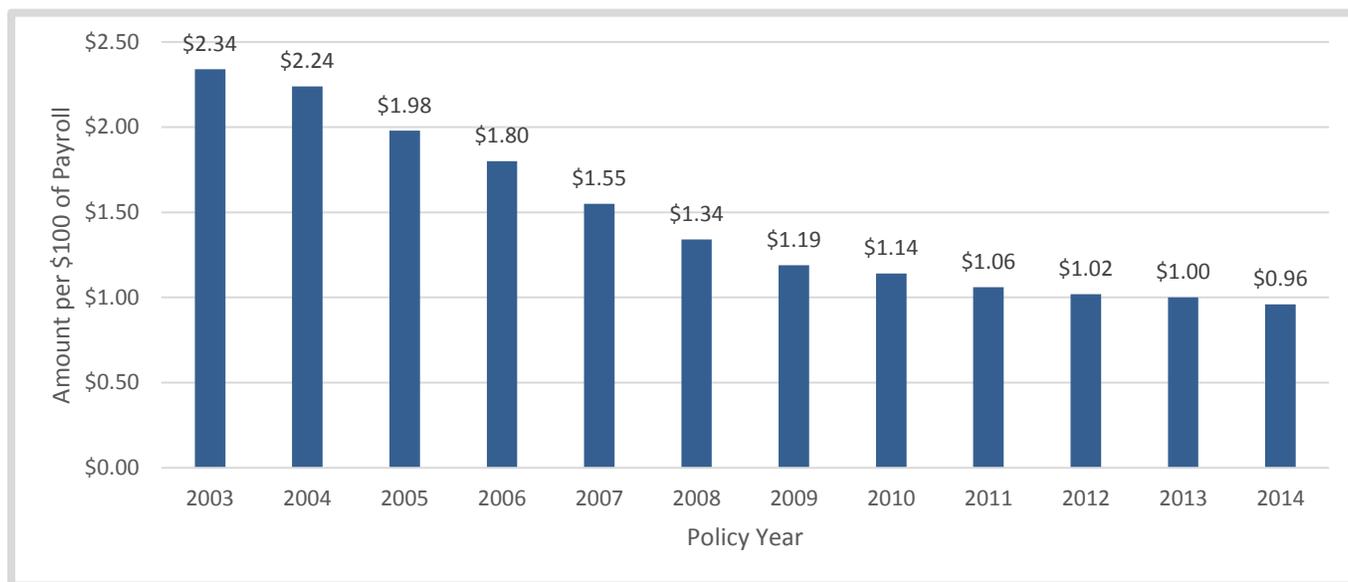
Note: The loss ratio and the combined ratio exclude experience for large deductible policies, which represent about 13 percent of 2015 direct written premium.

Since 2003, workers' compensation insurance rates have dropped nearly 56 percent. While the rate changes filed by insurance companies in the last few years show how much rates have decreased, these rates are just the start of the workers' compensation insurance pricing process. What employers actually pay—the premium—reflects not only rates but also mandated rating programs, such as experience ratings and premium discounts, as well as optional rating tools, such as schedule rating plans and negotiated experience modifiers. Insurance companies use these tools to achieve desired premium levels.

Figure 3 shows the average premium per \$100 of payroll for policy years 2003-2014, reflecting year-to-year changes in premiums charged. Beginning with policy year 2004, the average premium per \$100 of payroll began to decrease steadily as insurance companies lowered rates and increased the use of rating

tools, such as schedule rating. As of policy year 2014, the average premium per \$100 of payroll was down to 96 cents. This steady overall decrease coincided with average rate reductions, and as a result, employers benefitted from insurance companies' filed rate decreases.

Figure 3: Average Premium per \$100 of Payroll by Policy Year



Source: The Texas Workers' Compensation Financial Data Call and data compiled by the National Council on Compensation Insurance.

EMPLOYER PARTICIPATION AND EMPLOYEE COVERAGE RATES IMPROVED SIGNIFICANTLY IN 2016

Texas is the only state where private-sector employers (regardless of employer size or industry) are allowed the option of obtaining workers' compensation coverage or becoming "non-subscribers" that do not participate in the workers' compensation system.⁴ Employers who choose to not obtain workers' compensation coverage lose the protection of statutory limits on liability under the Labor Code and may be sued for negligence by injured employees. Several states with mandatory workers' compensation

⁴ In New Jersey, all employers must have coverage or be self-insured. Non-compliant employers are fined and their injured employees receive income and medical benefits through the Uninsured Employers' Fund (UEF). Recently, Oklahoma passed legislative reforms that allowed certain employers to opt-out of the workers' compensation system if they met certain financial requirements and offer benefits that are similar to those found in the workers' compensation system. However, the Oklahoma Supreme Court declared the statute authorizing employers to opt-out of the workers' compensation system unconstitutional in September 2016 because it was a special law that created unequal disparate treatment of injured employees.

laws provide statutory exemptions to allow small employers or employers from select industries to opt out of their workers' compensation systems.⁵

Non-subscription rates remain an important performance measure in the workers' compensation system because they generally show if employers believe the benefits of participating in the workers' compensation system outweigh the costs of obtaining the coverage. In 2016, the percentage of Texas private, year-round employers that were non-subscribers to the workers' compensation system decreased significantly, from 33 percent in 2014 to 22 percent. That is the lowest percentage since 1993 (an estimated 82,260 employers in 2016 were non-subscribers). This decrease followed two

consecutive years of significant declines in workers' compensation insurance rates, making workers' compensation coverage more affordable for Texas employers.⁶

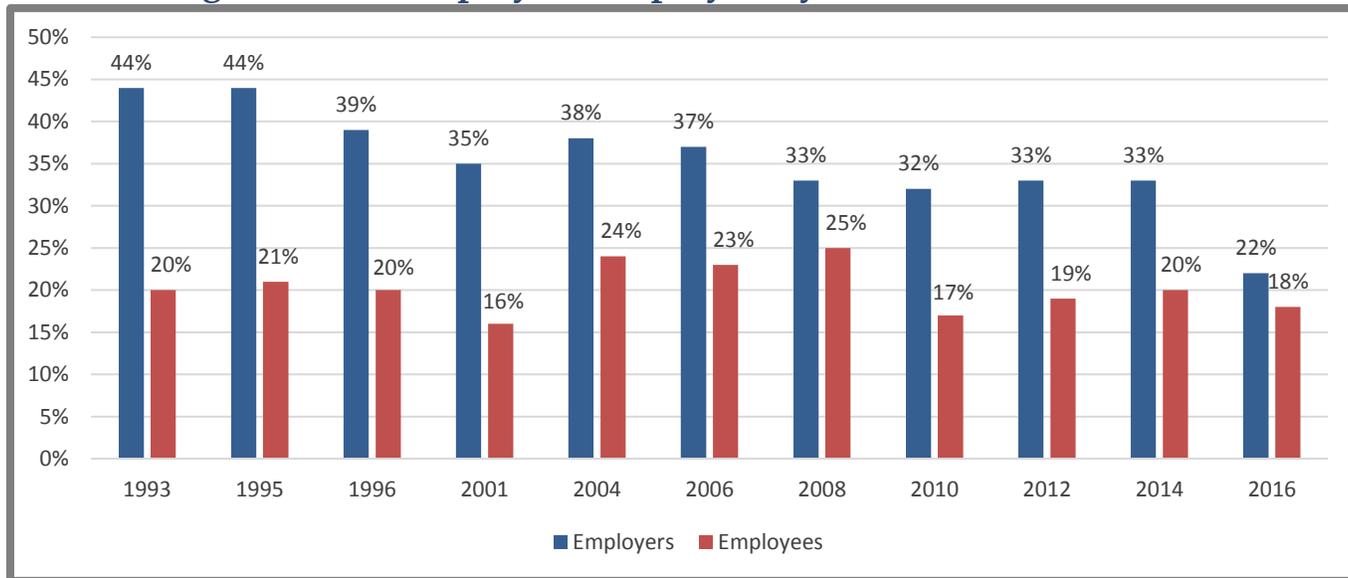
About 22 percent of private, year-round employers do not have workers' compensation—a dramatic reduction from 2014—and they employ about 18 percent of the private workforce in Texas.

Although the percentage of private, year-round employers who were non-subscribers declined significantly in 2016, the percentage of Texas employees who work for non-subscribers did not change proportionately. In 2016, an estimated 18 percent of Texas employees (representing about 1.8 million employees in 2016) worked for non-subscribing employers (a decline from 20 percent in 2014). This is primarily the result of smaller employers making the decision to enter or re-enter the workers' compensation system in 2016. Conversely, 82 percent of Texas private-sector employees (an estimated 8 million employees) were employed by the 78 percent of employers (an estimated 285,000 employers) that have workers' compensation coverage in Texas (see Figure 4).

⁵ Florida, for example, exempts non-construction employers with less than four employees and requires workers' compensation coverage for construction employers with one or more employees.

⁶ In the last two years, the National Council on Compensation Insurance or NCCI (an industry ratemaking advisory organization) filed double-digit reductions in workers' compensation loss costs. Loss costs are used by workers' compensation insurance companies as a baseline for calculating workers' compensation insurance rates in Texas. For policies written on or after July 1, 2015, the TDI approved a 10.9 percent reduction in Texas loss costs by NCCI and for policies written on or after July 1, 2016, TDI approved a 9.9 percent reduction in Texas loss costs by NCCI. TDI also approved a 5 percent reduction in workers' compensation relativities for insurance companies that choose not to use loss costs in their rate calculations in 2015 and a 10 percent reduction in 2016.

Figure 4: Percentage of Texas Employers That Are Non-subscribers and the Percentage of Texas Employees Employed by Non-subscribers, 1993-2016



Source: *Survey of Employer Participation in the Texas Workers' Compensation System*, 1993 and 1995 estimates from the Texas Workers' Compensation Research Center and the Public Policy Research Institute (PPRI) at Texas A&M University; 1996 and 2001 estimates from the Research and Oversight Council on Workers' Compensation and PPRI; and 2004-2016 estimates from the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group and PPRI.

The percentage of Texas employers that have workers' compensation coverage has increased since the passage of the 2005 legislative reforms (from 62 percent of Texas employers in 2004 to 78 percent in 2016), due primarily to lower insurance premiums and the increased availability of workers' compensation health care networks. Although the majority of non-subscribing employers are small employers, about one out of every five large employers in Texas (employers with 500+ employees) does not participate in the workers' compensation system primarily because they believe they can more effectively manage costs and ensure that their employees receive appropriate benefits as non-subscribers.

From 2014-2016, there were significant reductions in non-subscriber rates in virtually all employer size categories (see Table 2). The industries with the highest non-subscription rates include health care/educational services, arts/entertainment/accommodation/food services, and finance/real estate/professional services. Almost all industry sectors, however, with the exception of mining/utilities/construction, have experienced significant reductions in employer non-subscription rates since 2014.

Table 2: Percentage of Texas Employers That Are Non-subscribers, by Employment Size

Employment Size	1995	1996	2001	2004	2006	2008	2010	2012	2014	2016
1-4 Employees	55%	44%	47%	46%	43%	40%	41%	41%	43%	31%
5-9 Employees	37%	39%	29%	37%	36%	31%	30%	29%	27%	19%
10-49 Employees	28%	28%	19%	25%	26%	23%	20%	19%	21%	10%
50-99 Employees	24%	23%	16%	20%	19%	18%	16%	19%	18%	10%
100-499 Employees	20%	17%	13%	16%	17%	16%	13%	12%	14%	11%
500 + Employees	18%	14%	14%	20%	21%	26%	15%	17%	19%	19%

Source: *Survey of Employer Participation in the Texas Workers' Compensation System*, 1993 and 1995 estimates from the Texas Workers' Compensation Research Center and the Public Policy Research Institute (PPRI) at Texas A&M University; 1996 and 2001 estimates from the Research and Oversight Council on Workers' Compensation and PPRI; and 2004 -2016 estimates from the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group and PPRI.

Although non-subscribing employers have opted not to provide workers' compensation coverage to their employees, some of these employers (about 23 percent in 2016) provide an alternative occupational benefit plan for their employees in case of a work-related injury. It is important to note that these non-subscriber benefit plans are not regulated by DWC and the benefits offered in these plans vary by employer. Despite the relatively low percentage of non-subscribing employers with benefit plans, about 72 percent of the non-subscriber employee population is covered by some form of an alternate occupational benefit plan.⁷ As a result, an estimated 96 percent of private-sector employees in Texas have some form of coverage in the case of a work-related injury in Texas (either workers' compensation coverage or coverage from a non-subscriber occupational benefit plan). This means that, as of 2016, about 4 percent of Texas private-sector employees (about 414,000 employees) do not have coverage in the case of a work-related injury in Texas. In 2014, an estimated 5 percent of private-sector employees (about 470,000 employees) did not have any coverage in the case of work-related injury. It should be noted that even in states with mandatory workers' compensation coverage requirements,

⁷ Historically, larger, non-subscribing employers tend to provide alternative occupational benefit plans to their employees, and these larger employers employ a majority of the non-subscriber employee population in Texas.

there are employees who do not have coverage, either because their employer was too small to be required to have the coverage, or because the employer chose to be noncompliant with that state's coverage requirements. In fact, many state workers' compensation systems operate special funds to pay claims for uncovered employees who are injured on the job.

COMPLIANCE EFFORTS REGARDING REPORTING REQUIREMENTS FOR NON-SUBSCRIBING EMPLOYERS

The types and amounts of benefits provided to injured employees who work for non-subscribing employers, as well as the administration of those benefit programs, fall outside the jurisdiction of TDI and DWC. Non-subscribers, however, are still subject to certain reporting requirements under the Workers' Compensation Act and DWC rules. Non-subscribers must report annually to DWC that they have elected not to obtain workers' compensation coverage. They do so by filing DWC Form-005, *Employer Notice of No Coverage or Termination of Coverage* with DWC.⁸ Non-subscribers that employ at least five employees are also required to file a notice with DWC (using the DWC Form-007, *Employer's Report of Non-covered Employee's Occupational Injury or Disease*) for each occupational disease and on-the-job injury that results in more than one day of lost time.⁹ Failure to comply with these reporting requirements may result in enforcement action and administrative penalties of up to \$25,000 per day per occurrence.

Five sessions ago, the 80th Texas Legislature added an appropriation rider to TDI's budget that requires DWC to submit, as part of its biennial report to the legislature, a report on the compliance of non-subscribing employers that includes any administrative penalties levied against employers that don't comply. Prior to the 80th Texas Legislature, non-subscriber compliance reporting was primarily complaint-driven. Historically, however, DWC (and its predecessor the Texas Workers' Compensation Commission) had only received very few complaints about non-subscriber compliance. Since 2009, internal TDI monitoring efforts have generated most of the 2,700 complaints reported. These internal complaints resulted in more than 450 warning letters and nearly \$93,000 in penalties for non-subscribers that failed to respond to requests or file required forms. DWC has increased employer

⁸ See §406.004, Labor Code.

⁹ See §411.032, Labor Code.

education and compliance efforts for these reporting requirements, with increasing success—nearly half of the penalties levied against non-subscribers were assessed in the last four years.

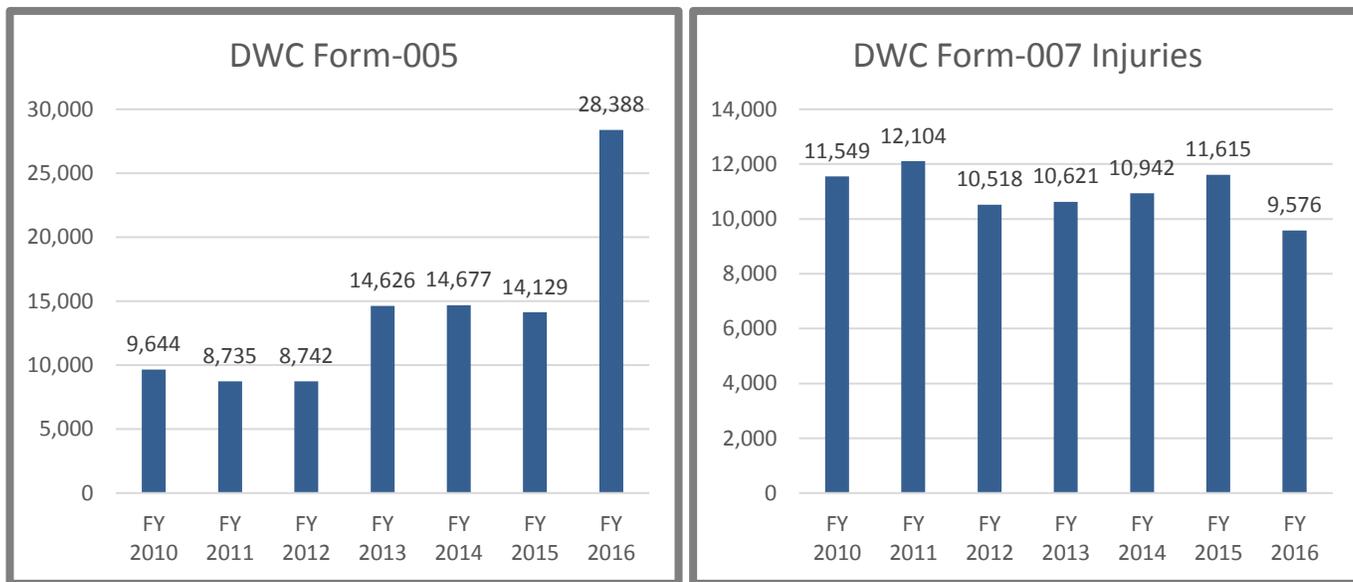
It is difficult for DWC to identify non-complying employers without complaints from system participants, because the policy and employer data submitted to DWC and other state agencies is often incomplete, inaccurate, and late. For example, an employer might file with the Texas Workforce Commission for unemployment insurance purposes using a parent organization's Federal Employment Identification Number (FEIN), but have different workers' compensation insurance policies under various FEINs and subsidiaries. As a result, it is difficult for DWC to identify individual employers that may be non-subscribers and to verify reporting compliance for these employers.

DWC has also reorganized its employer resources website to help employers better locate pertinent workers' compensation information. The employer resources website (www.tdi.state.tx.us/wc/employer/index.html) now features a direct link to the automated DWC Form-005, as well as Online Reporting Help and Frequently Asked Questions. DWC also distributed information about these reporting requirements and the adoption of new rules to state business and non-subscriber associations, and DWC coordinates with other state agencies to ensure they add these reporting requirements on their websites to increase employer awareness and compliance.

GRACE PERIOD COMPLIANCE EFFORTS

To further increase compliance with filing the DWC Form-005 and DWC Form-007, DWC allowed a grace period for non-subscriber filings for 2016. This effort increased the number of forms filed with DWC, especially with DWC Form 005 (see Figure 5). DWC also provided an option that let employers file the DWC Form 005 online and through electronic bulk submissions. Despite these efforts, however, overall non-subscriber reporting compliance remains low. An increase in the percentage of private employers with workers' compensation coverage, coupled with an increase in the number of DWC Form-005 filings by non-subscribers, has significantly increased non-subscriber reporting compliance in 2016 over previous years. Overall, DWC estimates that about 35 percent of non-subscribers (an estimated 82,260 year-round private employers were non-subscribers in 2016) are in compliance with the DWC Form-005 form filing requirement, compared to a compliance rate only 12 percent in 2014.

Figure 5: Total Number of DWC-005 Forms and DWC-007 Injuries Received by Fiscal Year



Source: Texas Department of Insurance, Division of Workers' Compensation, 2016.

While filings of the DWC Form-005 increased in 2016, filings of the non-subscriber injury report (the DWC Form-007) did not increase proportionately. In fact, filings of these injury reports actually decreased after FY 2011 and have fluctuated in recent years. Some large non-subscribers have reported that they believe only those injuries that they have accepted liability for as a work-related injury must be reported to DWC. This may help explain why injury reports from non-subscribers tend to be lower compared to the number of workers' compensation claims reported by subscribing employers.

In order for DWC to accurately evaluate and report on workplace safety, employers must comply with coverage and injury reporting requirements. DWC urges all employers, regardless of workers' compensation coverage status, to comply with statutory and regulatory injury reporting requirements. Employers must report all potentially work-related fatalities, occupational diseases, and injuries that result in at least one-day of lost time from work, regardless of compensability or liability. In order to promote better reporting from employers, DWC is considering an additional grace period to allow employers that have not reported non-coverage and injuries to do so without enforcement action or penalties. DWC encourages employers that have not reported either DWC Form-005 or DWC Form-007 to notify DWC immediately.

MEDICAL COSTS HAVE STABILIZED OVER TIME AND ARE LOWER THAN IN OTHER STATES

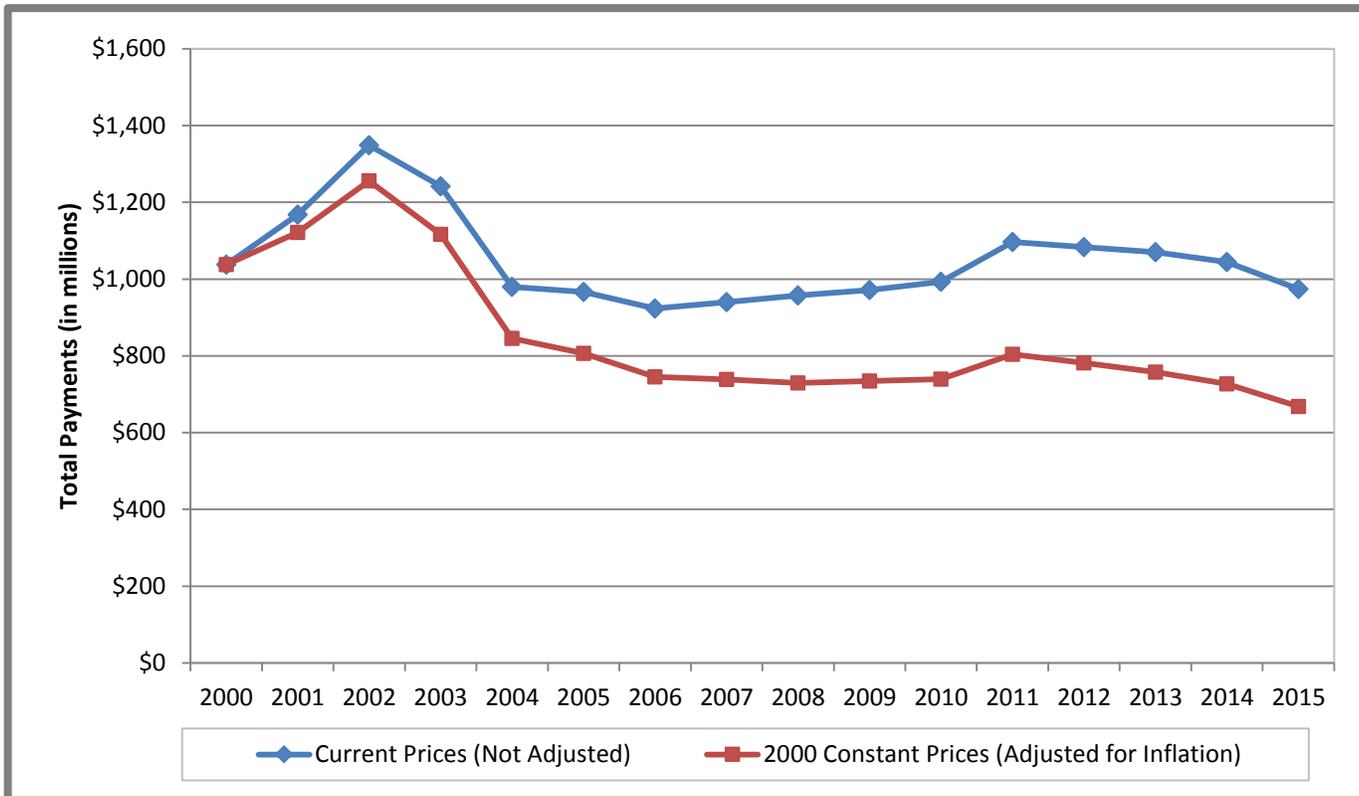
Prior to the 2005 legislative reforms, Texas had some of the highest medical costs per claim compared with other states, driven primarily by overutilization of medical treatment for injured employees. Despite high medical costs, injured employees also had poor return-to-work outcomes, less access to medical care, and lower satisfaction with care when compared to similarly injured employees in other states. In response, the 79th Texas Legislature adopted several statutory changes to address these issues, including the adoption of evidence-based treatment guidelines, a pharmacy closed formulary, and the creation of workers' compensation health care networks.

According to an 18-state comparison by the Workers' Compensation Research Institute, in 2001, Texas was the highest nationally in terms of medical costs per claim. Now, Texas' cost per claim is 15 percent less than the median cost of those same states.

Figures 6 and 7 illustrate the medical cost trends that the system experienced before and after implementation of the 2005 reforms. As Figure 6 illustrates, when total medical payments are analyzed without taking into account inflationary changes, total professional and hospital payments appear to

have stabilized in the Texas workers' compensation system (from \$967 million in 2005 to about \$973 million in 2015). Adjusted for inflation, however, total professional and hospital medical payments are about 17 percent lower than they were in 2005, and 31 percent lower than in 2000.

Figure 6: Total Professional and Hospital Medical Payments, Adjusted for Inflation, Service Years 2000-2015 (in millions)

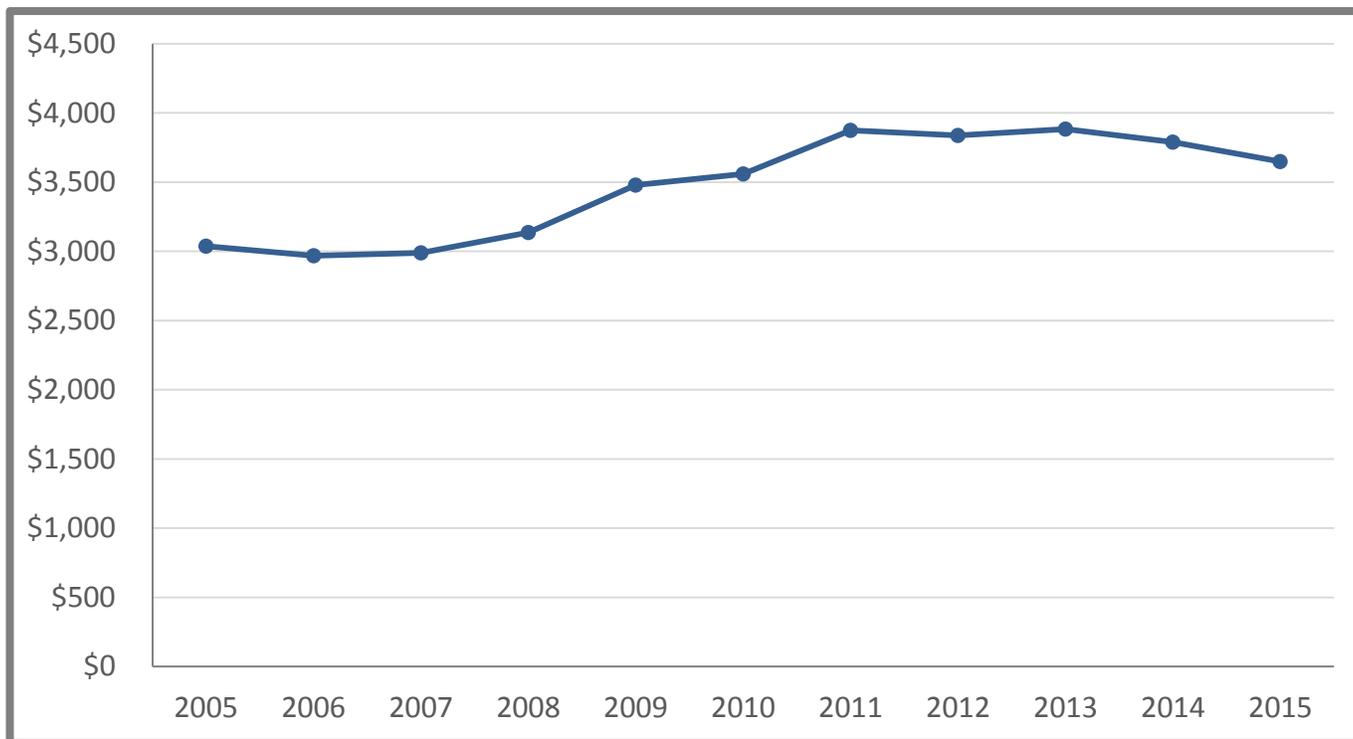


Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

Looking at Figure 7, it appears that the average medical cost per claim is still relatively stable compared to the double-digit increases in medical costs that the system experienced in the late 1990's and early 2000's before passage of HB 7 in 2005.¹⁰ Recent cost increases are mainly due to the 2008 DWC Medical Fee Guideline, which contains an annual inflation factor—the Medicare Economic Index.

¹⁰ On August 1, 2003, the system's first Medicare-based professional service fee guideline took effect. While this fee guideline increased reimbursement for some categories of services, including primary care, reimbursements for specialty surgery services were significantly reduced. On the whole, the reimbursement rates for professional medical services in the Texas workers' compensation system went from approximately 140 percent of Medicare to approximately 125 percent of Medicare.

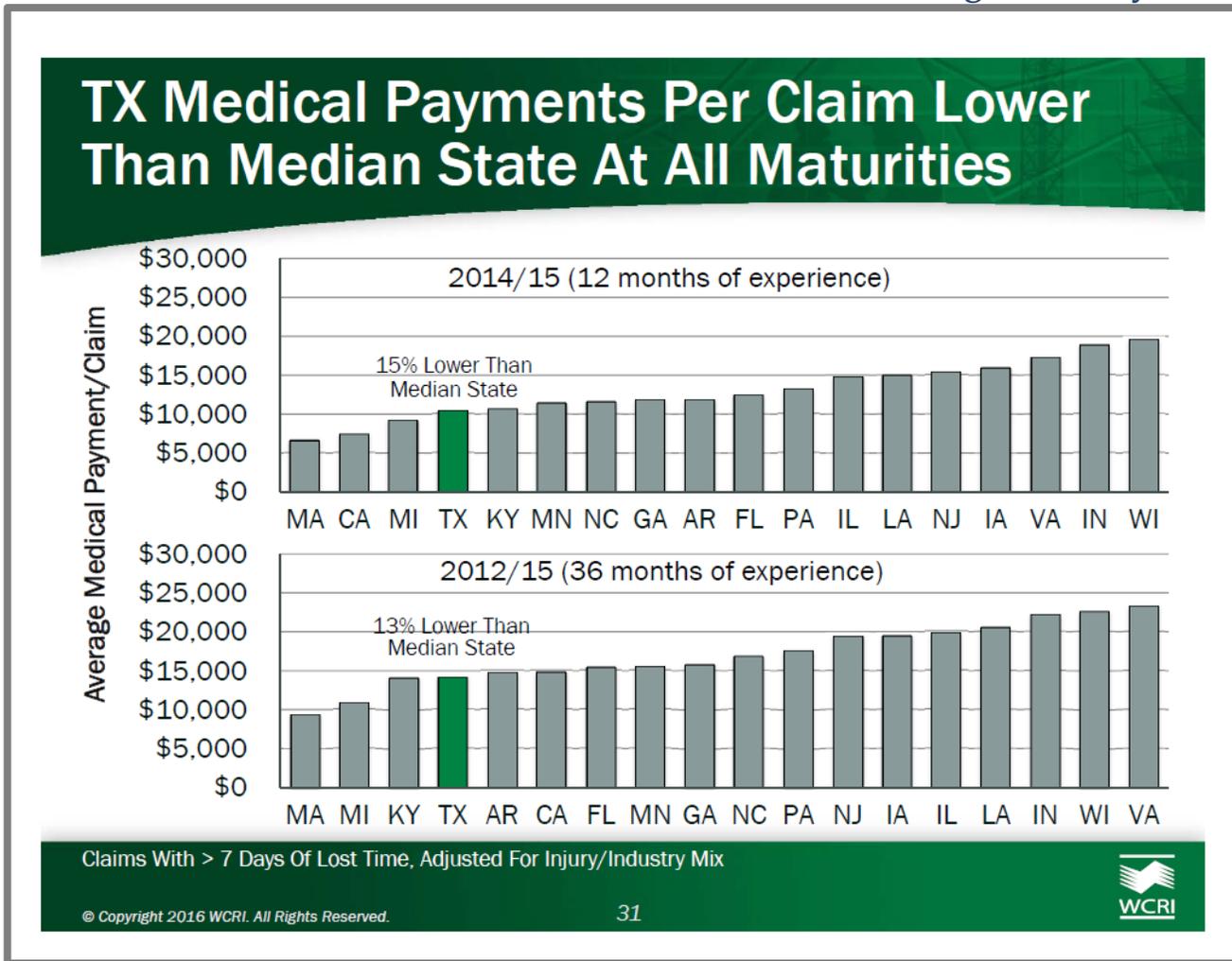
Figure 7: Average Professional and Hospital Medical Cost per Claim, Unadjusted, Service Years 2005-2015



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

Compared with other states, Texas experienced significant reductions in medical costs per claim as a result of legislative reforms to the workers' compensation system. In 2001, Texas was among the highest nationally in terms of medical costs per claim, according to a multi-state comparison by the Workers' Compensation Research Institute. Now, Texas' cost per claim with 12 months maturity is about 15 percent less than the median cost of the 18 states included in the analysis, which included Florida, Pennsylvania, Louisiana, and Illinois (see Figure 8).

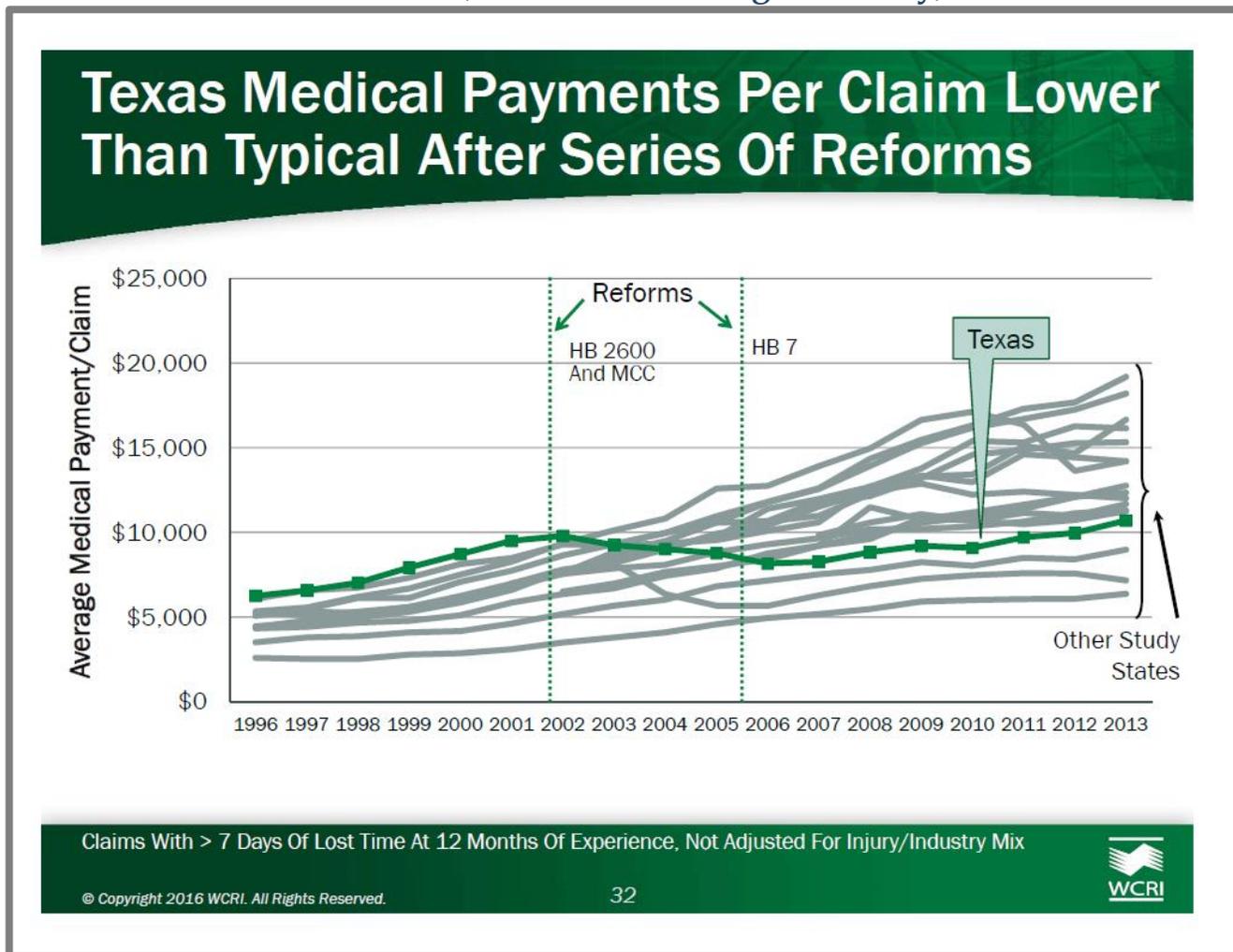
Figure 8: Average Medical Cost for Claims with More Than 7 Days of Lost Time (All Services), 12 Months and 36 Months Average Maturity



Source: Workers' Compensation Research Institute, CompScope™ Medical Benchmarks for Texas, 17th Edition, 2016.

As Figure 9 indicates, while other states have seen dramatic medical cost increases in their workers' compensation systems, Texas' costs have stabilized. This stabilization, coupled with a reduction in injury rates, enabled insurance carriers to reduce workers' compensation insurance rates and encouraged more employers to provide workers' compensation coverage to their employees.

Figure 9: Average Medical Cost for Claims with More Than 7 Days of Lost Time (All Services), 12 Months Average Maturity, 1996-2013



Source: Workers' Compensation Research Institute, CompScope™ Medical Benchmarks, for Texas, 17th Edition, 2016.

Information from the annual workers' compensation network report card produced by the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group (REG) in September 2016 provides insight into the ongoing implementation of certified health care networks, a key component of the 2005 legislative reforms.¹¹ As Figure 10 shows, for the first time since networks were implemented, the average medical cost per network claim was lower than non-network claims, at six

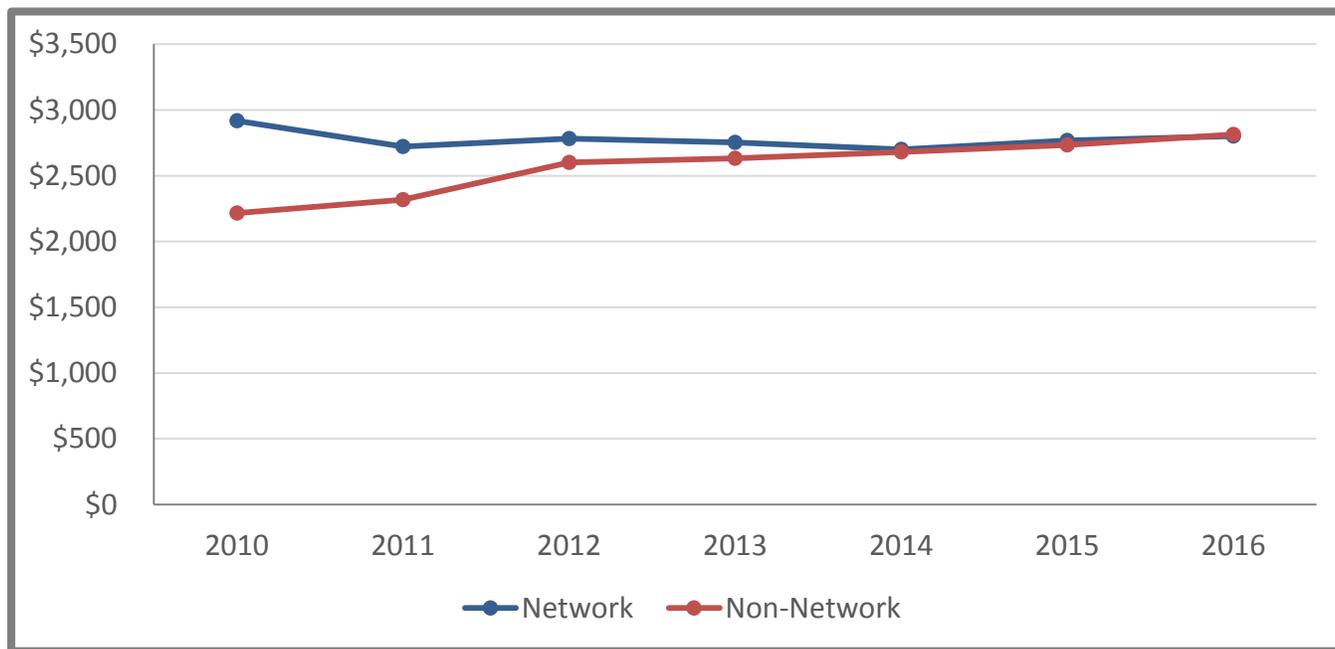
¹¹ For more information about how individual networks compare with each other and with non-network claims on a variety of cost and outcomes measurements, see "2016 Workers' Compensation Network Report Card Results" by Texas Department of Insurance, Workers' Compensation Research and Evaluation Group.

months after an injury. Overall, network medical costs have remained stable over the past five years, while non-network medical costs per claim have risen steadily after the prohibition of informal network discounts in 2011 and increases in medical fees resulting from the adoption of the 2008 Medical Fee Guideline.¹² In 2016, about 47 percent of new workers' compensation claims were treated in certified health care networks or political subdivision health plans.¹³ As employers and insurance carriers continue to use health care networks to deliver medical treatment to injured employees, the cost and outcomes of these networks will play a larger role in determining the overall efficiency of the Texas workers' compensation system.

¹² In 2007, the Legislature adopted HB 473, which prohibited insurance carriers from taking informal network discounts off of medical bills for non-network claims starting January 1, 2011.

¹³ Under Labor Code, §504.053 (b) (2), political subdivisions may elect to provide medical benefits to their employees by establishing or contracting with certified health care networks or contracting directly with health care providers to form their own health plans. These political subdivision health plans are often referred to as "504 networks."

Figure 10. Average Medical Cost per Claim, Network and Non-Network Claims, Six Months Post-Injury



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

Two areas in particular, need close monitoring by DWC in the future—hospital outpatient payments per claim, driven mostly by treatment/operating room fees and the average number of neurological/neuromuscular testing visits per claim.

PHARMACY CLOSED FORMULARY PRODUCES SIGNIFICANT RESULTS; OTHER STATES AIM TO REPLICATE TEXAS FORMULARY MODEL

The last component of the 2005 legislative reforms implemented by DWC was the adoption of a pharmacy closed formulary for Texas workers' compensation claims. The closed formulary took effect for new workers' compensation claims with dates of injury on or after September 1, 2011 and for older (legacy) claims on September 1, 2013.¹⁴ The closed pharmacy formulary includes all FDA-approved drugs, except investigational and experimental drugs and excludes drugs listed as "N" drugs (or "not recommended" drugs). "N" drugs are listed in Appendix A of DWC's adopted treatment guidelines the *Official Disability Guidelines: Treatment in Workers' Comp*, published by the Work Loss Data Institute.

¹⁴ Legacy claims include those workers' compensation claims with dates of injury prior to September 1, 2011.

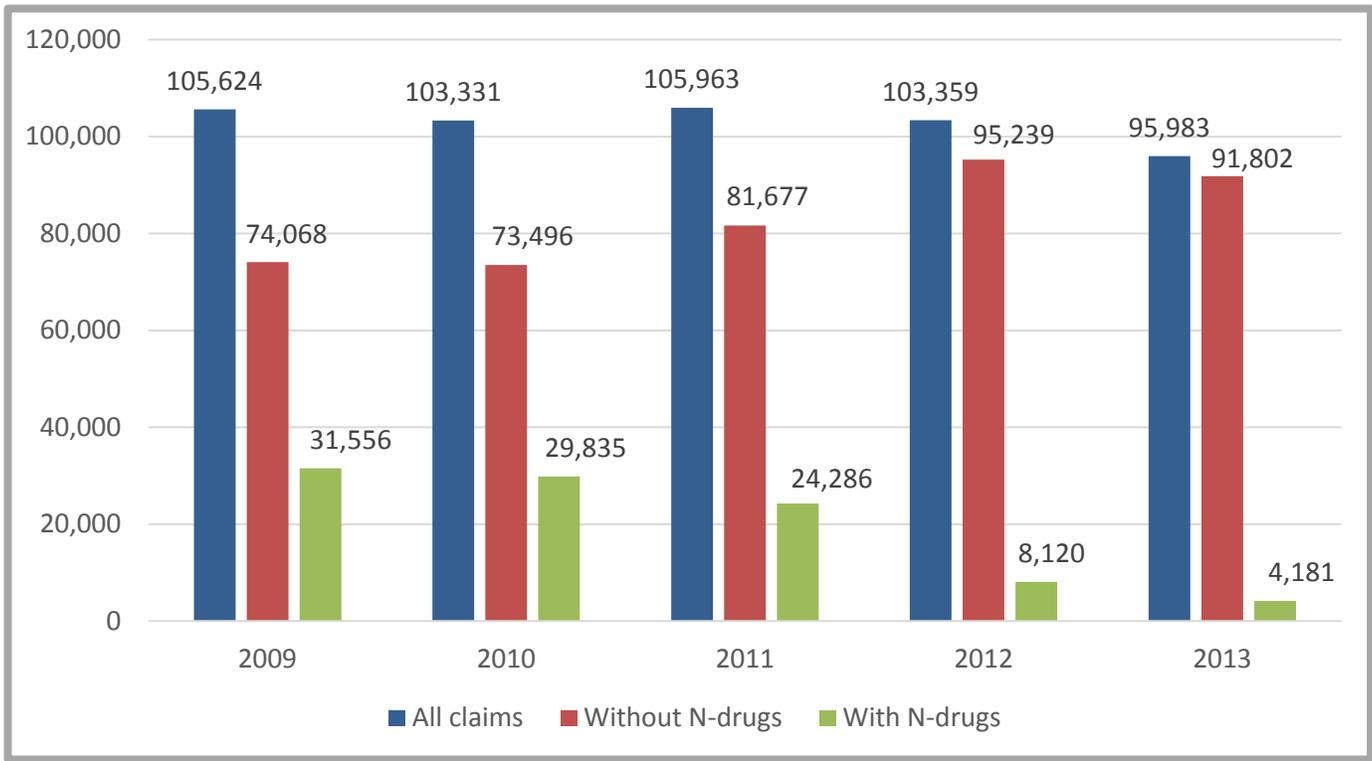
Under this formulary, prescriptions that are excluded from the formulary require pre-approval by the insurance carrier before they can be dispensed.

Overall, total pharmacy costs were reduced 15 percent as a result of the pharmacy closed formulary.

In 2016, the REG published its seventh analysis of the impact of the DWC pharmacy closed formulary. The most recent analysis shows that the pharmacy closed formulary has had a significant impact on new injuries and legacy claims.¹⁵ The study compared injuries that occurred in (September-August) 2012 and 2013 with injuries that occurred during the same timeframe in 2009, 2010 and 2011. Both sets of claims were analyzed at 24 months post-injury to account for differences in claim maturity. The study found that the closed formulary reduced the total number of claims receiving "N" drugs by 67 percent from 2011 to 2012 (see Figure 11).

¹⁵ For more information, see Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, *Impact of the Texas Pharmacy Closed Formulary*, 2016.

Figure 11: Frequency of Claims Receiving “N” Drugs, Injury Years 2009-2013



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

The closed pharmacy formulary had a significant impact on prescription drug costs in the Texas workers' compensation system. Overall, total pharmacy costs for 2012 were reduced 15 percent (about \$6 million), compared to 2011. Cost reductions were even more significant for “N” drugs. Prescription drug costs attributed to “N” drugs for 2012 claims were reduced by 78 percent compared to 2011, and the average “N” drug cost per claim was reduced by more than a third (see Table 3).

Table 3: Impact of Closed Formulary on Pharmacy Costs, Injury Years 2009-2011

Injury Year	2009	2010	2011	2012	2013	2011-2012 Percentage Change
Total pharmacy costs (in thousands)	\$49,617	\$46,263	\$44,545	\$38,020	\$36,671	-15%
Total cost of "N" drug prescriptions (in thousands)	\$11,852	\$11,294	\$8,913	\$1,950	\$1,007	-78%
Average "N" drug cost per claim	\$376	\$379	\$367	\$240	\$241	-35%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

The pharmacy closed formulary also had a significant impact on prescribing patterns for Texas physicians treating workers' compensation claims (see Table 4). The frequency of "N" drug prescriptions dispensed to injured employees was reduced by 77 percent from 2011 to 2012, while the number of "N" drug prescriptions per claim was reduced by 32 percent. The reduction in "N" drug prescriptions did not result in an overall increase in other types of prescriptions. In fact, there was a slight decrease in the total number of "other drug" prescriptions to injured employees during that time.

Table 4: Impact of Closed Formulary on Prescription Patterns, Injury Years 2009-2013

Injury Year	2009	2010	2011	2012	2013	2011-2012 Percentage Change
"N" drugs						
Number of "N" drug prescriptions	113,333	98,251	74,081	16,974	8,979	-77%
Number of "N" drug prescriptions per claim	3.6	3.3	3.1	2.1	2.1	-32%
Other drugs						
Number of Other drug prescriptions	575,131	559,253	591,017	576,221	536,889	-3%
Number of Other drug prescriptions per claim	5.6	5.6	5.7	5.6	5.6	-2%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

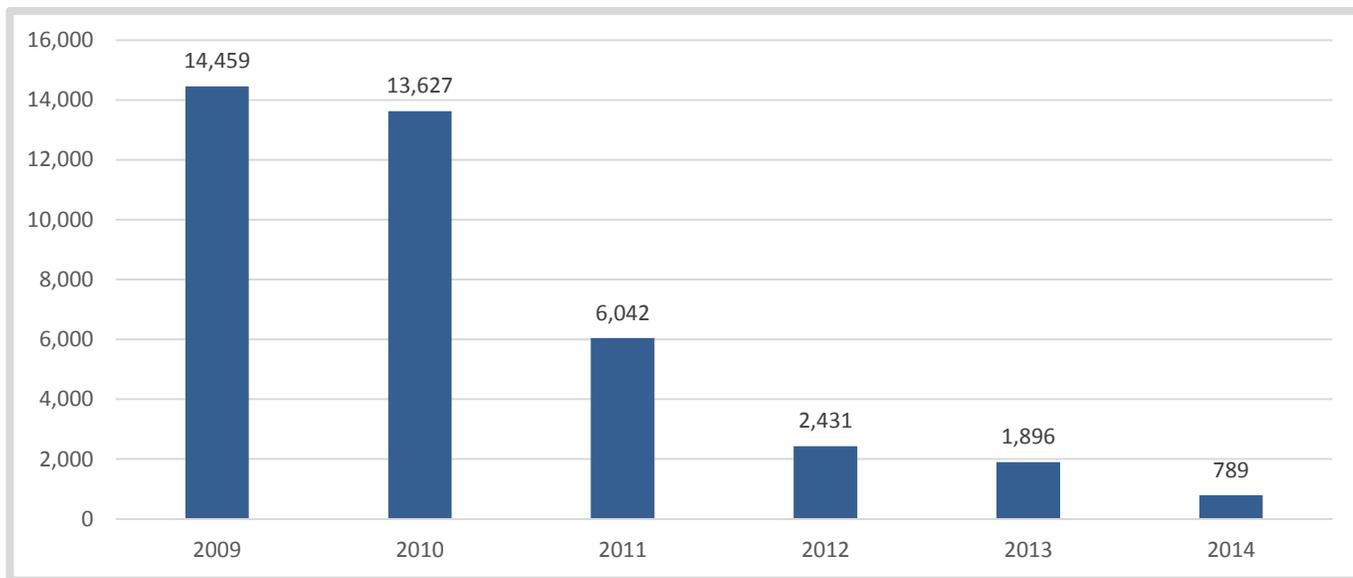
When DWC first implemented the closed formulary, some stakeholders were concerned that physicians would simply substitute an "N" drug for another drug, which would essentially negate the savings to the formulary. REG recently completed a separate analysis using a controlled group of legacy claims that previously received "N" drugs and found that about 85 percent of these claims stopped receiving "N" drugs after the formulary took effect. Use of "other drugs" also decreased 38 percent for the claims in the control group. These findings indicate that the closed formulary may have caused some physicians to review the medical necessity of all prescriptions dispensed to injured employees and not just prescriptions for "N" drugs.

Use of opioid painkillers among the American public has been deemed an epidemic by the U.S. Surgeon General, who has initiated a new nationwide campaign in 2016 that focuses attention on overuse of prescription opioids to treat pain.¹⁶ The Texas workers' compensation system has helped pave the way to addressing opioid overuse among injured employees through implementation of the closed formulary. As a result, the frequency of all opioid prescriptions was reduced by 11 percent and the frequency of "N" drug opioids was reduced by 81 percent between 2011 and 2012. The closed formulary has also significantly reduced the number of injured employees receiving extremely high dosages of "N" drug opioids from almost 15,000 in service year 2009 to less than 800 by service year 2014 (see Figure 12).¹⁷ The U.S. Centers for Disease Control (CDC) defines an extremely high dose as more than 90 Morphine Milligram Equivalents (MMEs) per day.

¹⁶ See www.turnthetidex.org. This initiative includes guidance for physicians to better assess pain and function and look for alternatives before prescribing opioids. It is designed to work hand-in-hand with the new CDC Opioid Prescribing Guide.

¹⁷ MMEs are designed to compare the dosage amounts for various types of opioid drugs, packages and strengths using the drug morphine as the reference point. Patients that receive high MMEs/day are at significantly higher risk of overdose and death according to the CDC.

Figure 12: Number of Claims Receiving “N” drug Opioid Prescriptions with 90+ MMEs/Day, Service Years 2009-2014



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

DWC needs additional data to determine the long-term effects of the closed pharmacy formulary on the utilization and costs of “N” drugs and the effect this reduction has had on injured employee outcomes.

Overall, the results of several analyses conducted over the last several years indicate that the formulary has had a significant impact on the utilization and costs associated with these “N” drugs, as well as an effect on the overall utilization of opioids by injured employees.

About 84 percent of injured employees receive non-emergency medical care either the same day or within seven days of the injury.

ACCESS TO CARE HAS IMPROVED FOR INJURED EMPLOYEES

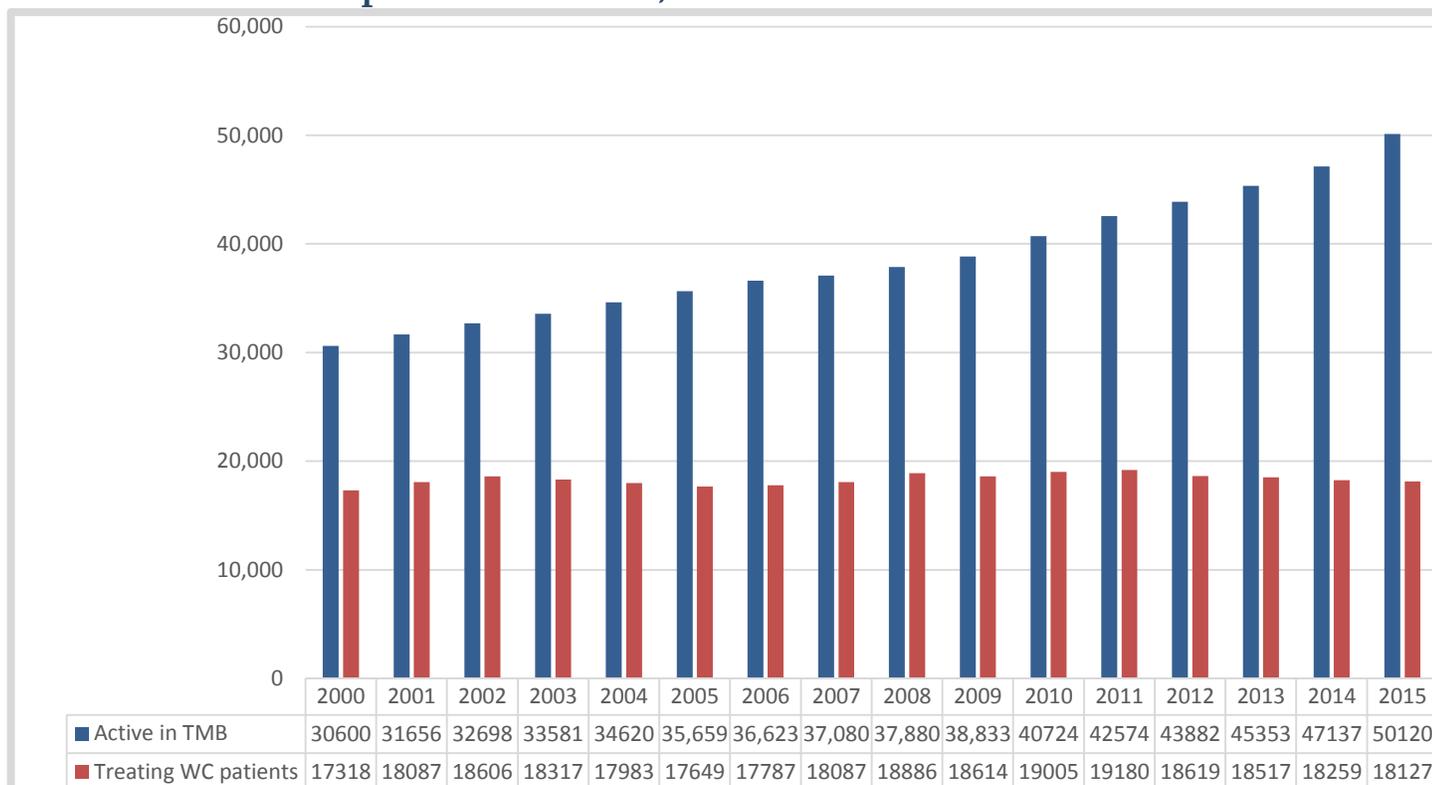
Ensuring that injured employees have adequate access to medical care is an important function of the workers' compensation system. Without sufficient access to care, necessary medical care is delayed, increasing medical and income benefit costs and unnecessarily adding to time off of work. System participants have raised concerns in the past that the workers' compensation system had an “access to care problem” and that many health care providers, particularly physicians, were concerned with the

“hassle factor” and compensation rates associated with treating injured employees.¹⁸

An analysis of the medical billing and payment data collected by DWC, combined with licensing information from the Texas Medical Board, shows a significant increase in the number of active physicians in Texas over the last decade. This increase is primarily the result of tort reform legislation in 2003. The overall increase in active physicians in Texas flows through to the workers' compensation system, which has also seen an increase in the number of physicians treating workers' compensation claims over time (from 17,649 physicians treating workers' compensation claims in 2005 to 18,127 in 2015) (see Figure 13).

¹⁸ The passage of the first Medicare-based professional services fee guideline in 2002 (the guideline became effective in August 2003 after a court battle) spurred controversy when the compensation rate for workers' compensation professional services was set at 125 percent of Medicare. For some specialty providers, such as surgeons, this was a significant cut in compensation and many providers said they would no longer accept injured employees as patients.

Figure 13: Total Number of Active Physicians Who Treated Workers' Compensation Claims, Service Years 2000-2015

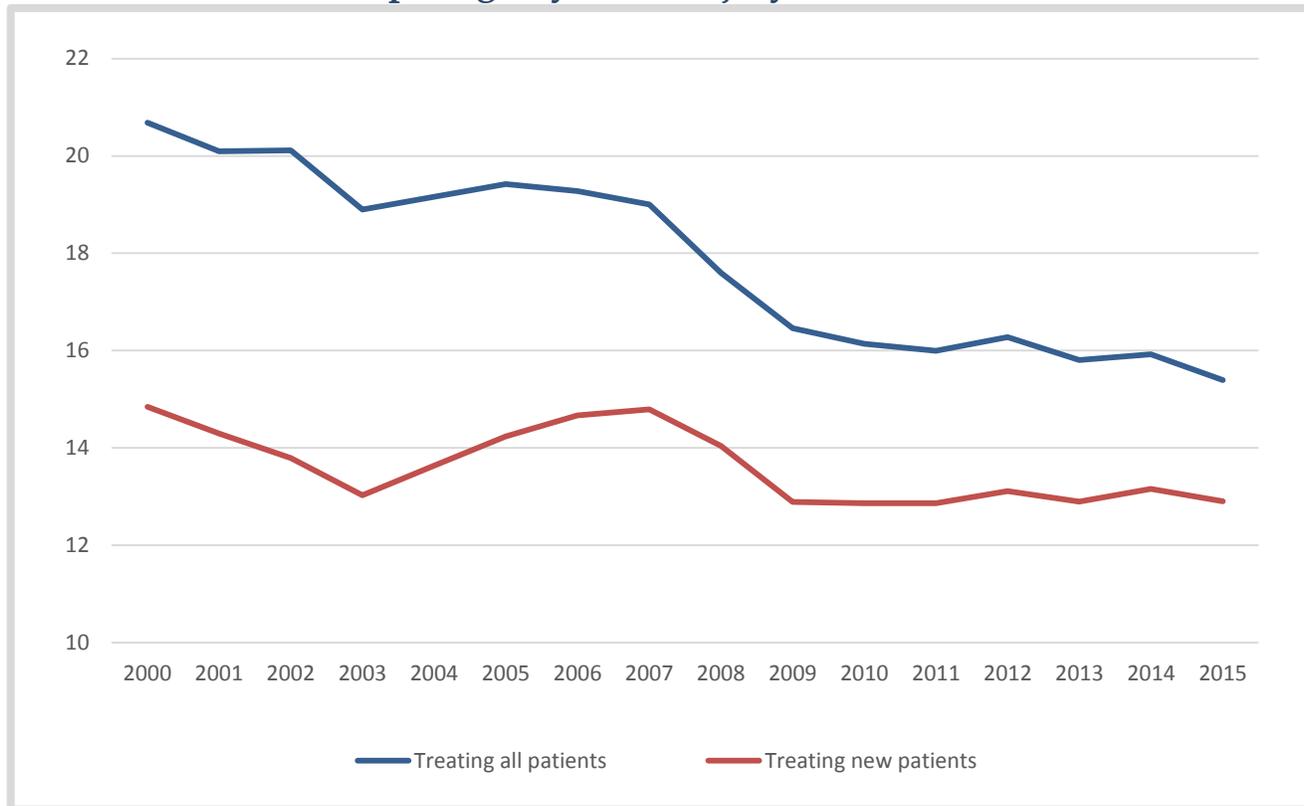


Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

Notes: 'Active in TMB' refers to the total number of active physicians licensed by the Texas Medical Board. 'Treating WC patients' refers to the number of participating physicians who billed at least one service in a given service/calendar year according to the medical billing data. *2004 shows an average of 2003 and 2005 due to incomplete data.

Since the 2005 legislative reforms, a consistent decline in injury rates and workers' compensation claims, along with a stabilizing pool of physicians participating in the Texas workers' compensation system has lowered the average workers' compensation caseload for each participating physician, meaning fewer injured employees are competing for the same physicians (see Figure 15). In 2005, each treating physician filed about 19 workers' compensation claims, compared to 15 per physician in 2015—a 21 percent decrease.

Figure 15: Average Number of Claims per Workers' Compensation Participating Physician, Injury Year 2000-2015

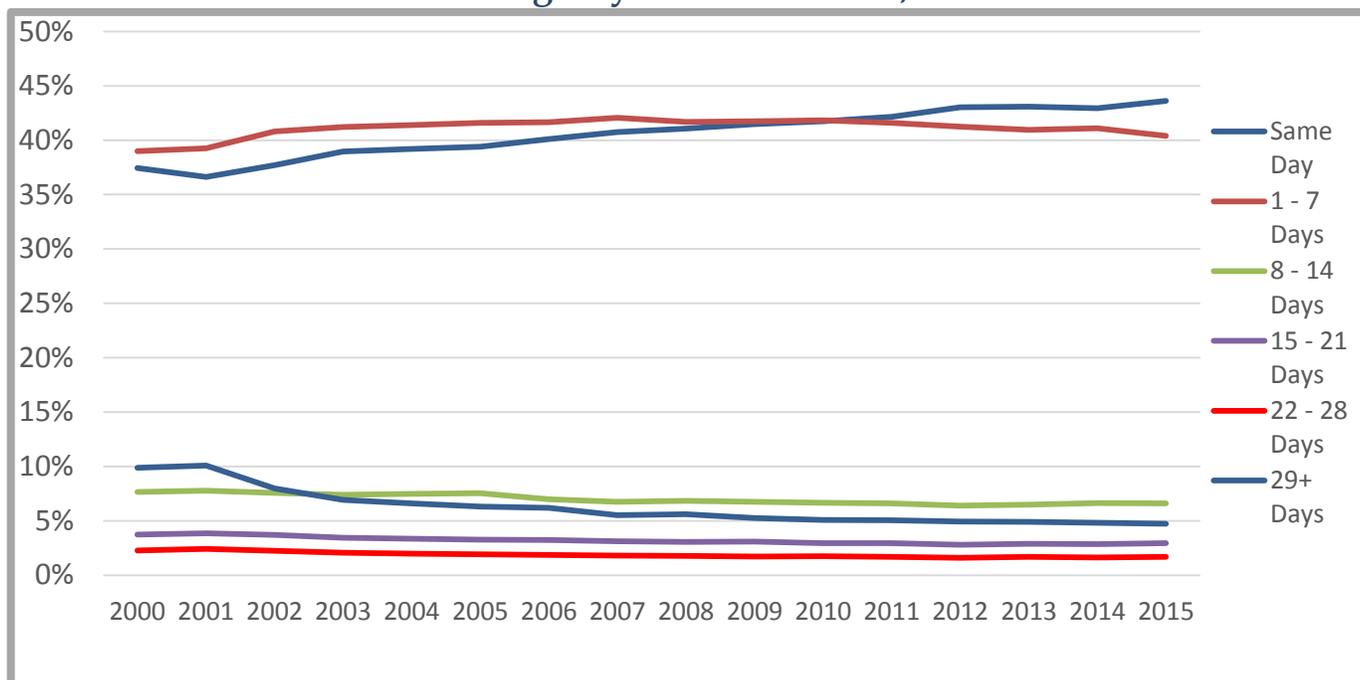


Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.
 *2004 shows an average of 2003 and 2005 due to incomplete data.

Injured employees' access to timely medical care in the Texas workers' compensation system has improved since the 2005 legislative reforms. About 84 percent of injured employees received initial medical care either on the same day of injury or within seven days in 2013, up from 76 percent in 2000 (see Figure 16). Several REG studies have shown that delayed access to initial medical treatments increases overall claim costs and reduces the likelihood of injured employees returning to productive employment.¹⁹

¹⁹ See Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, *Access to Medical Care in the Texas Workers' Compensation System*, 2012 and 2015.

Figure 16: Percentage of Claims by Number of Days between Injury and the First Non-Emergency Medical Service, 2000-2015



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

Note: 2004 shows an average of 2003 and 2005 due to incomplete data.

The introduction of certified networks also appears to have improved the timeliness of medical care for injured employees. Non-network claims averaged about 5 days from the date of injury to first non-emergency medical treatment in 2015, compared to 3-5 days for most certified networks.

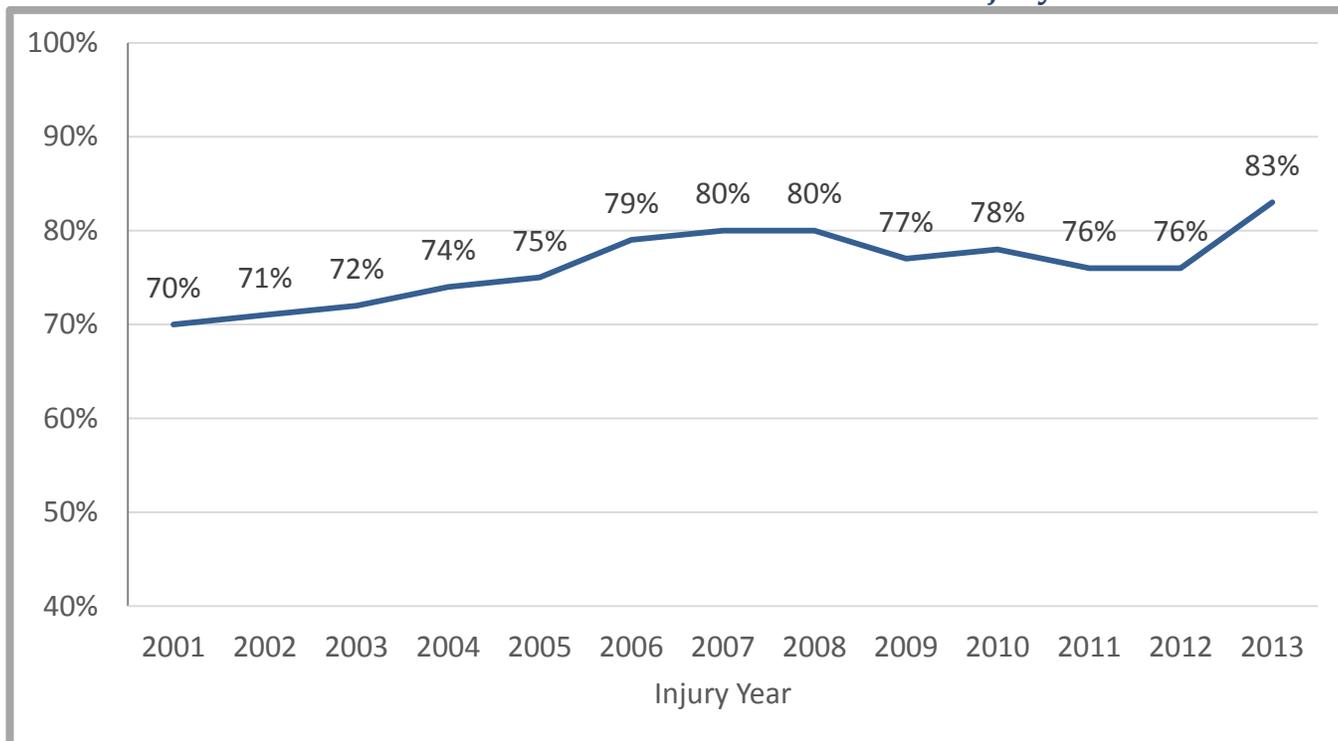
RETURN-TO-WORK RATES IMPROVE FOR INJURED EMPLOYEES

One of the most basic objectives of the Texas workers' compensation system is to return injured employees to safe and productive employment. Effective return-to-work programs help reduce the economic and psychological impact of a work-related injury on an injured employee, reduce income benefit costs, and curb productivity losses for Texas employers. Before the 2005 legislative reforms, Texas injured employees were generally off work for longer periods of time and were more likely to report that their take-home pay after a work-related injury was less than pre-injury pay. Armed with these findings, policymakers and system participants placed considerable attention on improving return-to-work outcomes.

Several components of the 2005 legislative reforms placed significant focus on returning employees to work, including a requirement that DWC adopt return-to-work guidelines; institute a return-to-work reimbursement program for employers; improve coordination of vocational rehabilitation referrals between DWC, the Office of Injured Employee Counsel and the Department of Assistive and Rehabilitation Services (DARS); improve return-to-work outreach efforts; and implement changes in the work-search requirements for injured employees who qualify for Supplemental Income Benefits (SIBs).

Since the passage of HB 2600 in 2001 and the passage of HB 7 in 2005, there has been a steady increase in the percentage of injured employees receiving Temporary Income Benefits (TIBs). That is, injured employees with more than seven days of lost time who have initially returned to work after their injuries. In fact, the 2005 legislative reforms appeared to have helped temper the effects of the economic downturn in Texas. Despite the economic decline from late 2009 to 2012, a higher percentage of injured employees receiving income benefits went back to work within six months in 2013 (83 percent), compared to 2004 (74 percent) (see Figure 17). Texas' economic recovery, powered by a significant increase in statewide oil and gas jobs, led to a significant rebound in the initial return-to-work rate in 2013. Further monitoring is necessary, however, to determine what impact, if any, the subsequent drop in oil and gas production in 2015 and 2016 will have on future return-to-work rates.

Figure 17: Percentage of Injured Employees Receiving TIBs Who Initially Returned to Work within 6 Months Post-Injury



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

While the percentage of injured employees who initially return to work is an important benchmark of system performance, a more accurate measure of the system's ability to promote "successful" return-to-work initiatives is whether these injured employees remain employed once they go back to work. As Table 5 indicates, the percentage of injured employees receiving TIBs who initially returned to work and remained employed for at least three successive quarters (or nine months) also continues to improve. Roughly 75 percent of employees injured in 2013 who initially returned to work within the first six months of their injuries remained employed for three consecutive quarters, compared to only 66 percent in 2004. Like the initial return-to-work rates in Figure 17, the percentage of TIBs recipients who returned to work and remained employed declined from 2009 to 2011 due to the impact of the U.S. recession and high unemployment rates. Return-to-work rates in Texas, however, began to rebound in 2012 and 2013, along with the state's economy.

Table 5: Percentage of Injured Employees Receiving TIBs Who Initially Returned to Work and Remained Employed for Three Successive Quarters (6 Months to 3 Years Post-injury)

Injury Year	Within 6 Months Post Injury	Within 1 Year Post Injury	Within 1.5 Years Post Injury	Within 2 Years Post Injury	Within 3 years Post Injury
2009	68%	75%	78%	81%	84%
2010	69%	76%	79%	82%	85%
2011	68%	76%	79%	81%	85%
2012	74%	81%	82%	82%	
2013	75%				

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

Note 1: The study population consists of 277,246 employees injured in 2009-2013 who also received TIBs. Note 2: The third year of 2012, and the one, one and one-half, second, and third years of 2013 are excluded due to insufficient data. Note 3: Sustained return-to-work rates for 2013 injuries are subject to change, as more wage data is made available for injuries occurring in the later quarters of 2013.

Not only has the percentage of injured employees who returned to work and remained employed improved since the 2005 legislative reforms, but the amount of time the average injured employee who received TIBs is off work after an injury also decreased from a median of 28-29 days in 2004-2005 to 19 days in 2013. The reduction in the number of days off work per claim not only allows employers to quickly restore productivity levels after a work-related injury, it also allows injured employees to regain their wage-earning capacity quicker, helping them avoid severe economic losses as a result of a work-related injury. Results from the 2016 Workers' Compensation Network Report Card produced by the REG also indicate that injured employees who receive medical care from networks (either certified health care networks or political subdivision health plans) reported higher return-to-work rates than workers with non-network claims, and they also had less time away from work. The improved performance of most networks over non-network claims may be the result of coordination between system participants, particularly employers that help injured employees to return to work.

MEDICAL DISPUTES HAVE SIGNIFICANTLY DECLINED

The 2001 and 2005 legislative reforms also focused on reducing friction among health care providers, injured employees, and insurance carriers by requiring them to resolve medical necessity disputes through use of Independent Review Organizations (that is, panels of doctors certified by TDI). The use of standardized medical billing forms, documentation requirements, coding requirements, certified health care networks, and evidence-based treatment guidelines have also helped avoid disputes. Generally, there are three types of medical disputes raised in the workers' compensation system:

Medical disputes have declined 70 percent from 2003-2015.

- ★ **fee disputes** (which may include a dispute over the application of DWC's fee guidelines or billing requirements);
- ★ **preauthorization/concurrent review disputes**²⁰ (that is, disputes regarding the medical necessity of certain medical treatments that were denied prospectively or concurrently by the insurance carrier); and
- ★ **retrospective medical necessity disputes** (that is, disputes regarding the medical necessity of medical treatments and services that have already been rendered and billed by the health care provider).

As Table 6 indicates, the 2005 legislative reforms to the Texas workers' compensation system led to a significant reduction in the number of medical disputes filed with DWC. In 2003, DWC's predecessor, the Texas Workers' Compensation Commission, received about 17,433 medical disputes, but by 2015 that number had fallen by about 70 percent, to 5,283. The decline in disputes was related to several factors, including fewer claims filed, creation of health care networks in 2006, adoption of DWC's medical treatment guidelines in 2007, and DWC's adoption of new professional, inpatient and outpatient hospital and ambulatory surgical center fee guidelines in 2008. DWC did not experience an increase in medical disputes after the implementation of the closed formulary for new claims in 2011 and for legacy claims in 2013. In fact, the volume of medical disputes in the Texas workers' compensation system has

²⁰ Labor Code, §413.014 and 28 Texas Administrative Code (TAC) §134.600 include a list of medical treatments and services that require preauthorization or concurrent review by the insurance carrier before they can be provided to an injured employee. Networks are not subject to these requirements and may establish their own lists of medical treatments and services that require preauthorization or concurrent review. See Texas Insurance Code, §1305.351.

remained relatively stable over the past five years.

While stable overall, there has been a shift over time in the distribution of medical disputes. Before the 2005 legislative reforms, a greater share of medical disputes involved medical treatments that were denied retrospectively as not medically necessary by insurance carriers. With the legislative reforms' increased emphasis on pre-authorization, most retrospective medical necessity disputes disappeared from the system and the percentage of all medical disputes involving pre-authorization denials increased from 13 to 23 percent.

AIR AMBULANCE FEE DISPUTES

One additional area that has seen a significant increase in medical fee disputes in recent years involves the amount of reimbursement for air ambulance services (as of November 10, 2016, there were 665 active air ambulance disputes pending at DWC). Air ambulance providers have asserted that the federal Airline Deregulation Act of 1978 preempts any state regulation regarding the price of air ambulance services, while workers' compensation insurance carriers counter that DWC has the authority to determine payment, as the federal McCarran-Ferguson Act generally prevents a federal preemption of state laws regulating the business of insurance.

Currently, there are lawsuits pending in state (*Texas Mutual Insurance Company, et al., v. Phi Air Medical, LLC*) and federal court (*Air Evac EMS, Inc., v. State of Texas, Dept. of Insurance, Div. of Workers' Compensation*) to address these issues. The federal lawsuit raising the preemption issues was dismissed by federal court on jurisdictional grounds, and this dismissal is currently on appeal to the U.S. Fifth Circuit. The state lawsuit is set for hearing in a Travis County District Court in December, and DWC has intervened in support of the requested declaration that the federal Airline Deregulation Act of 1978 does not preempt the Texas Workers' Compensation Act and rules that regulate the billing and reimbursement for air ambulance services provided to injured employees.

The resolution of this federal preemption question is crucial to the general premise that workers' compensation benefits, including medical benefits, are regulated by state laws, and that the state is responsible for ensuring that medical reimbursement rates for services provided within the workers' compensation system safeguard quality medical care and promote effective cost control.

Table 6: Number and Distribution of Medical Disputes Submitted to TDI or DWC, by Type of Medical Dispute (as of April 2016)²¹

Year Dispute Received	Pre-authorization	Fee Disputes	Retrospective Medical Necessity Disputes	Total
2003	11%	70%	19%	17,433
2004	13%	60%	27%	14,291
2005	13%	68%	19%	13,257
2006	16%	70%	14%	9,706
2007	27%	72%	1%	8,810
2008	22%	75%	3%	12,244
2009	24%	74%	2%	12,293
2010	41%	58%	1%	7,596
2011	35%	63%	2%	7,795
2012	37%	62%	1%	5,643
2013	26%	73%	1%	5,187
2014	26%	74%	Less than 1%	5,241
2015	23%	77%	Less than 1%	5,283

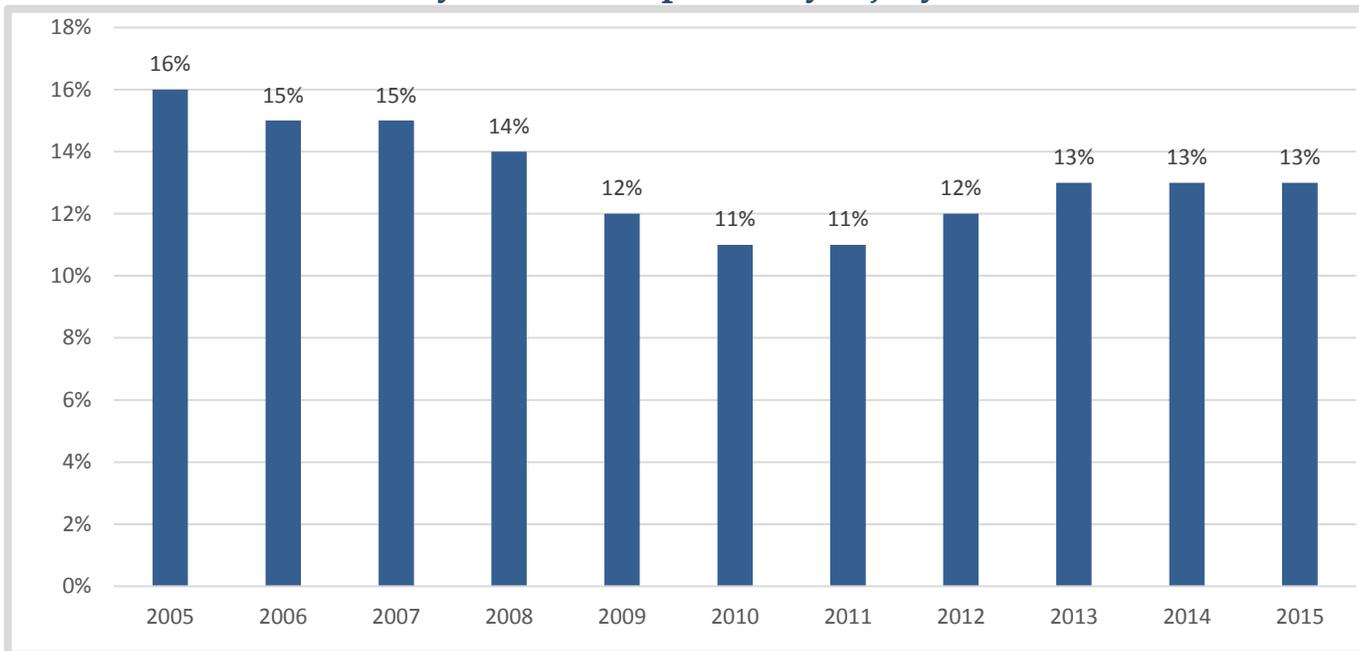
Source: Texas Department of Insurance: Division of Workers' Compensation and Workers' Compensation Research and Evaluation Group, 2016.

CLAIM DENIAL RATES AND REQUESTS FOR INDEMNITY DISPUTE RESOLUTION DECLINE; DESIGNATED DOCTOR DISPUTES REMAIN HIGH

The number of workers' compensation claims initially denied or disputed by the insurance carrier as not work-related decreased from 16 percent in 2005 to 13 percent in 2015 (see Figure 18). This change reflects liability denials and initial compensability (that is, whether an injury is work-related or not), and do not account for denied claims that were eventually approved as work-related during DWC dispute proceedings.

²¹ From August 2008 to August 2009, one health care provider filed about 6,000 pharmacy fee disputes against one insurance carrier. DWC upheld a great majority of these disputes in favor of the insurance carrier (about 60 percent of all fee disputes decisions made during those years), and the requestor eventually withdrew all of the disputes during the appeal process.

Figure 18: Percentage of Reportable Claims That Are Initially Denied/Disputed, by Injury Year



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

The vast majority of claims, 92-95 percent, are handled without the need for dispute resolution by DWC.

Although much of the system's resources are spent on claim disputes between insurance carriers and the injured employees, it is important to note that only a small percentage (from 5 to 8 percent) of workers' compensation claims ever end up in a dispute at DWC (see Table 7).

Table 7: Percentage of Reportable Claims with a Workers' Compensation Dispute Proceeding at DWC by Calendar Year of Injury

Calendar Year of Injury	Percentage of Claims
2008	7%
2009	7%
2010	7%
2011	8%
2012	8%
2013	8%
2014	7%
2015	5%*

Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, 2016, data through June 2016.

Note: *The percentage of claims with a dispute proceeding may continue to increase as issues arise on more recent injury claims.

Along with reductions in the number of workers' compensation claims filed with DWC over time, the number of benefit review conference (BRC) requests has also decreased steadily over the past 10 years.

A BRC is an informal meeting with the injured employee, an insurance carrier representative, and a DWC benefit review officer to discuss and attempt to resolve disputed issues.

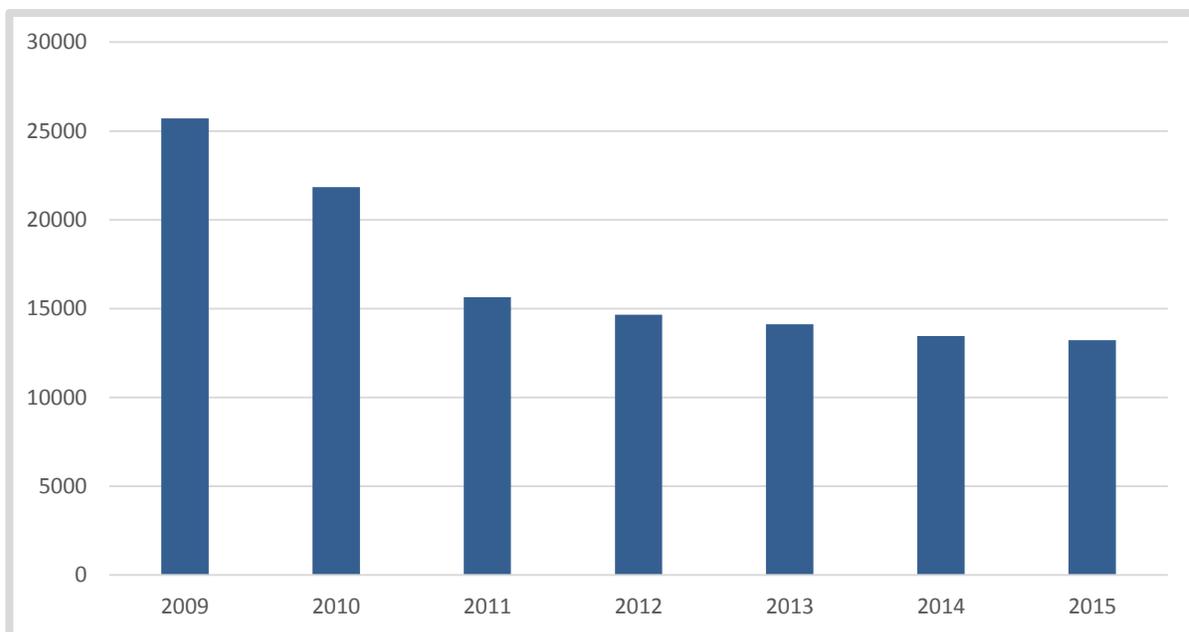
An injured employee or an insurance carrier may request a BRC. In 2009, system participants requested nearly 26,000 BRCs. By 2015, that number had fallen to 13,228 requests, a 49 percent decrease (see Figure 19).

The number of benefit review conferences concluded on workers' compensation disputes has declined 45 percent since 2003, but designated doctor disputes account for about 61 percent of disputed issues.

In addition to fewer BRC requests, the number of concluded BRCs also significantly declined from 2005 to 2015, dropping 45 percent (from about 17,000

BRCs concluded in 2005 to about 9,500 in 2015). Some of this decline can be attributed to a consistent reduction in the number of claims reported to DWC; however, the number of BRC requests and the number of BRCs concluded fell by a greater proportion, indicating that fewer claim denials and stricter rescheduling and cancellation standards for BRCs may also have helped reduce disputes.²²

Figure 19: Number of BRC Requests Received, 2009 - 2015



Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, and Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

In addition to the declines in disputes, there has been a shift in the types of disputes typically handled by DWC. Starting in 2011, a higher proportion of the disputes requested included issues involving the extent of an employee's injury, the designated doctor's²³ determination regarding the date of the injured employee's maximum medical improvement (MMI)²⁴ or the impairment rating assigned to an

²² In 2011, the legislature passed HB 2605, which required DWC to establish stricter standards for rescheduling and cancelling BRCs by rule.

²³ DWC appoints designated doctors to examine injured employees and issue opinions to resolve certain types of questions, including the date an injured employee reached MMI, the extent of the employee's injury, the employee's impairment rating, whether the employee can return to work, and other similar issues. By statute, designated doctor opinions have presumptive weight in DWC dispute proceedings.

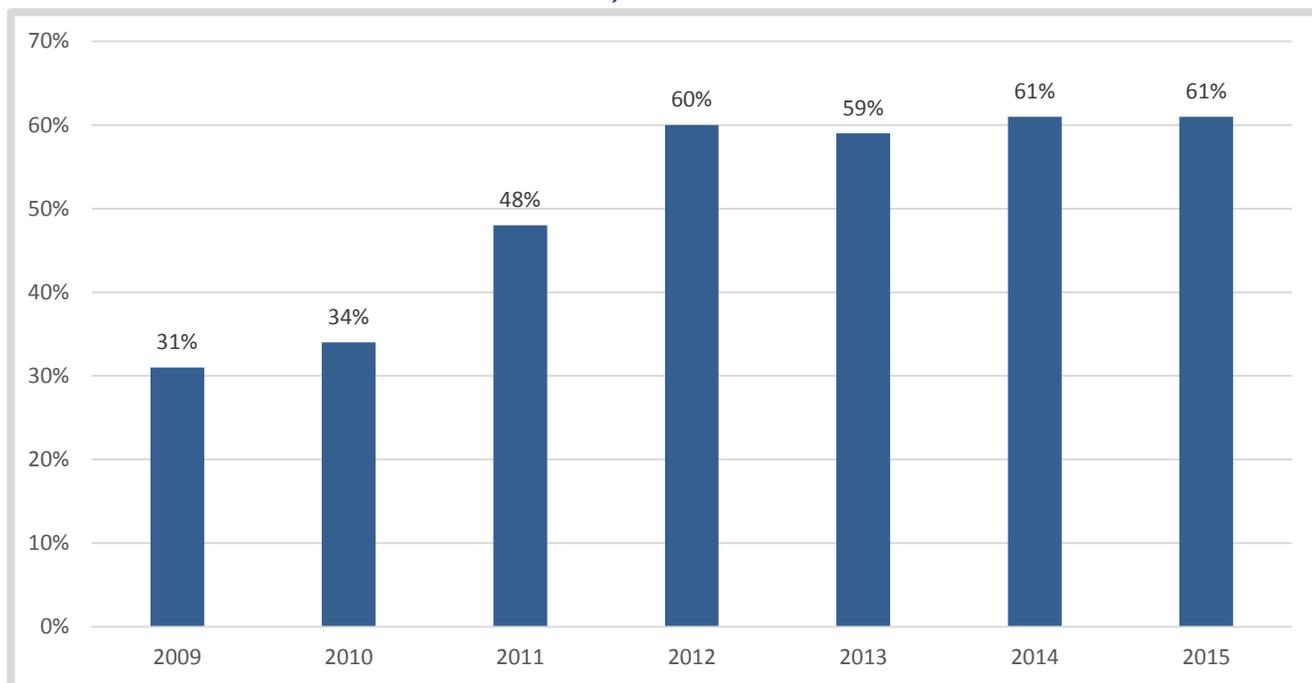
²⁴ The date of MMI is the earliest of: 1) the date a doctor determines an injured employee has recovered from the work-related injury as much as can be anticipated or 2) 104 weeks after income benefits began to accrue, with exceptions for spinal surgery.

injured employee's claim by the designated doctor.²⁵ Increases in these disputed issues coincide with DWC's passage of BRC rules in 2011 clarifying that a BRC must be requested and scheduled in order to stop the statutory 90-day finality of the first impairment rating/date of MMI assigned to an injured employee.²⁶ There are also many instances where the DWC-assigned designated doctor is the first doctor to determine whether an injured employee has reached MMI or has an impairment rating. Therefore, it is often the designated doctor's first MMI date or impairment rating that may become final if it is not disputed within 90 days by either the insurance carrier or the injured employee, which accounts for the increase in these types of disputes after 2011. The percentage of disputed issues involving extent of injury or designated doctor opinions, however, seems to have leveled off over the past few years (see Figure 20).

²⁵ The impairment rating is the percentage of permanent impairment to an injured employee's body resulting from a compensable injury.

²⁶ Prior to the 2011 rule, injured employees and insurance carriers would try to stop the statutory 90-day finality of the first impairment rating or date of MMI by submitting a BRC request to DWC and then writing on that request that the party did not want a BRC, which was inconsistent with the statutory intent to dispute the first impairment rating or date of MMI by the 90th day or it would become final.

Figure 20: Percentage Share of Total BRC Issues Involving Disputes over Extent-of-Injury, Designated Doctor Impairment Rating, and Designated Doctor MMI Date, Calendar Year 2009-2015



Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, and Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

DWC will continue to monitor dispute trends to determine if future statutory or regulatory changes are needed to reduce the number of disputes or address issues with designated doctor determinations.

CONCLUDING REMARKS

The Texas workers' compensation system continues to evolve, but it has experienced marked improvement as a result of significant legislative reforms in 2001 and 2005. These reforms have helped stabilize claims costs, improve return-to-work rates, and improve injured employees' access to medical care. The number of medical fee and income benefit disputes filed with DWC is down overall, and injury rates and workers' compensation claim frequencies continue to decline. These improvements in system outcomes have helped reduce workers' compensation insurance costs for Texas employers, which has encouraged more employers to provide workers' compensation coverage for employees. Certified health care networks, an important component of the 2005 legislative reforms, have begun to reduce medical costs, improve return-to-work outcomes, and improve timeliness of care for injured

employees.

Although the Texas workers' compensation system serves as a model for other state workers' compensation systems, it has been more than a decade since the last legislative reforms. Certain legislative tweaks and clean up could further reduce confusion, enhance efficiencies, promote fairness, and preserve DWC's ability to effectively regulate the Texas workers' compensation system. With those goals in mind, DWC has assembled several legislative recommendations for consideration by the 85th Texas Legislature designed to build on the successes of previous reforms and reinforce DWC's mission to efficiently regulate workers' compensation, educate system participants, and achieve a balanced system that treats everyone with dignity and respect.

WORKERS' COMPENSATION LEGISLATIVE RECOMMENDATIONS

ALIGN EXISTING AUTHORITY FOR WORKERS' COMPENSATION FRAUD INVESTIGATIONS WITH THE TEXAS WORKERS' COMPENSATION ACT

RECOMMENDATION: Amend Labor Code, Chapter 418 to align the DWC Fraud Unit's authority to conduct workers' compensation fraud investigations with similar existing authority for the TDI Fraud Unit under Insurance Code, Chapter 701. This would include:

- ★ authority to investigate suspected workers' compensation fraud, including subpoena authority and the ability to share information with other authorized governmental agencies, TDI or local law enforcement; and
- ★ the authority to ensure that information acquired by DWC or shared with other authorized governmental agencies as part of a fraud investigation is confidential by law and not subject to open records.

Under this recommendation, Labor Code, Chapter 418 would be dedicated to the identification and investigation of workers' compensation fraud and would codify the creation of the DWC Fraud Unit. This recommendation would also include a proposal to move Labor Code, §415.008, which currently addresses administrative violations for fraudulently obtaining or denying workers' compensation benefits to the new Chapter 418 and amend existing Labor Code, Chapter 418 provisions for criminal penalties.

This recommendation would provide the new DWC Fraud Unit with the same investigative authority the TDI Fraud Unit now has for other types of insurance fraud. Under this proposal, workers' compensation insurance companies would still have to adopt and file an anti-fraud plan with the Texas Department of Insurance under Insurance Code, Chapter 704; however, the DWC Fraud Unit would have access to those anti-fraud plans.

ISSUE: In an effort to focus more attention on identifying, investigating and prosecuting premium and provider workers' compensation fraud, the Commissioner of Workers' Compensation established a

dedicated DWC Fraud Unit in 2016. This realignment also permits DWC to pursue workers' compensation fraud actions administratively as well as criminally, and allows DWC to leverage existing resources to support workers' compensation fraud efforts. The DWC Fraud Unit consists of investigators who were part of the TDI Fraud Unit, along with additional internal DWC employees who are familiar with workers' compensation issues.

Because the newly formed DWC Fraud Unit does not meet the definition of an "authorized governmental entity" under Insurance Code, §701.001, DWC recommends aligning various statutory authority associated with fraud investigations in Insurance Code, Chapter 701 with existing authority under the Labor Code. This statutory alignment will ensure that the DWC Fraud Unit has access to the information it needs to effectively and efficiently identify, investigate and prosecute workers' compensation fraud in Texas.

BACKGROUND: Workers' compensation fraud occurs when a person knowingly or intentionally conspires to commit, misrepresents, or makes a false statement to either deny or obtain workers' compensation benefits, or profits from the deceit.²⁷ There are various types of fraud in the Texas workers' compensation system: injured employee benefit fraud, employer premium fraud, health care provider fraud, insurance carrier fraud, and attorney fraud.

Workers' compensation fraud increases system costs, which results in higher insurance premiums for Texas employers and drains resources that could provide benefits for injured employees.

Currently, Insurance Code, Chapters 701, 703, and 704 govern the identification and investigation of all insurance fraud in Texas, including workers' compensation fraud, while Labor Code, Chapter 418 spells out the various criminal penalties available. Prior to the adoption of House Bill (HB) 7 in 2005, the Texas Workers' Compensation Commission (DWC's predecessor) had the statutory responsibility to investigate workers' compensation fraud. However, when the Texas Workers' Compensation Commission was merged into TDI in 2005, those responsibilities were taken over by the TDI Fraud Unit, which is tasked with investigating fraudulent insurance acts and the offense of insurance fraud under §35.02 of the Penal Code.

²⁷ See Labor Code §415.008.

CLARIFY NOTIFICATION REQUIREMENTS FOR JUDICIAL REVIEW PETITIONS AND PROPOSED JUDGMENTS AND SETTLEMENTS

RECOMMENDATION: Amend Labor Code, §410.253 to clarify that a party seeking judicial review of a DWC appeals panel decision shall provide DWC with a copy of the party's petition that has been filed with district court. This clarification will ensure that DWC does not receive a generic notice of appeal. Also, amend Labor Code §410.258 to clarify:

- ★ that a party's duty to file any proposed judgment or settlement with DWC includes all proposed judgments and settlements, including all agreed judgments, voluntary dismissals, judgments to be entered after summary proceedings, hearing or trial, and any other judgments on the merits; and
- ★ that a description reflecting the precise terms of the settlement or agreement be filed with DWC along with any proposed judgments or settlements, including a description of any anticipated payments to a party or counsel; specifying exactly how the DWC's final administrative decision is reversed, affirmed, or modified.

These clarifications will help DWC monitor the quality of its appeals panel decisions by tracking the types of decisions that are appealed to district court, as well as the outcome of those appeals.

ISSUE: Although these statutes have been in place for some time, compliance varies among system participants. DWC does not always receive the judicial review notices required by the statute when a party seeks judicial review of a DWC appeals panel decision. In some cases, when DWC does receive a written notice, it does not include a copy of the actual petition filed with the court, making it difficult for DWC to track the types of appeals panel decisions that are being appealed to district court.

Some proposed settlements or judgments filed with DWC contain generic language that describes what is being resolved at a high level, but the terms and conditions of the agreement or settlement appear to be intentionally ambiguous or remain undisclosed. This makes it extremely difficult for DWC to review proposed judgments and settlements for compliance with the law and to monitor the quality of appeals panel decisions appealed to district court by tracking the outcome of those appeals.

There is also conflicting case law among the state's appellate courts as to which proposed judgments or

settlements must be filed with DWC. As a result, system participants should be required to file any proposed judgment and settlement with DWC.

BACKGROUND: Workers' compensation claim disputes are first addressed through the DWC's dispute resolution process, which consists of a benefit review conference, a contested case hearing, and a review by the appeals panel. If a party disagrees with the agency's decision, it may seek judicial review in district court. Labor Code, §410.253 requires a party to provide "written notice of the suit or notice of appeal" to DWC and authorizes DWC to intervene in any judicial review proceeding (Labor Code, §410.254). The form and substance of the required "written notice" is not defined, nor is it viewed as jurisdictional by the courts. DWC often has no opportunity, or only a limited opportunity, to discern which administrative decision is being appealed and why the petitioner believes DWC's final administrative decision may be invalid. DWC has a separate statutory duty to administer the Subsequent Injury Fund, which may become obligated for reimbursement if the judicial review process overturns or modifies an interlocutory order or dispute resolution decision made by DWC.

Once a petition for judicial review has been filed in district court there are several possible outcomes, including settlement, a default judgment, a summary judgment, an agreed judgment, or judgment after trial on the merits. Current statute (Labor Code, §410.258) requires that any proposed judgment or settlement made by the parties, including a proposed default judgment, be filed with DWC 30 days prior to the date the court is scheduled to enter the judgment or approve the settlement. This provision also allows DWC to review proposed judgments to ensure that: they do not order reimbursement from the Subsequent Injury Fund; do not provide payment of lump sum benefits; do not resolve an impairment rating issue before the date the injured employee reaches maximum medical improvement; and do not limit or terminate an injured employee's right to medical benefits in accordance with Labor Code, §410.257.

ELIMINATE OBSOLETE REPORTING REQUIREMENTS

RECOMMENDATION: Eliminate the following reporting requirements from the Texas Workers' Compensation Act:

- ★ Labor Code, §402.074 requires the Commissioner of Workers' Compensation to analyze DWC's effectiveness of implementing legislative goals established by House Bill 7 (79th Legislature, 2005). DWC issued this report in 2006 and is already required to issue a biennial report to the Legislature under Labor Code, §402.066.
- ★ Labor Code, §409.012(d) allows private providers of vocational rehabilitation services to register with DWC. DWC has adopted rules and maintained a registry of private vocational rehabilitation providers since the 1990's, though stakeholders may not be using it. DWC can continue to ensure that private vocational rehabilitation providers maintain certain credentials and qualifications by rule, similar to the way DWC establishes qualifications for case managers under 28 Texas Administrative Code (TAC), §137.5.
- ★ In part, Labor Code, §408.150(a) requires DWC notify insurance carriers when DWC refers injured employees to the Department of Assistive and Rehabilitative Services (DARS) for vocational rehabilitation services. The notice is unnecessary because a referral to DARS (now the Texas Workforce Commission) does not guarantee that the injured employee will apply or be accepted for these services. Insurance carriers already have detailed information related to the injured employee's work-related injury or illness, work status, physical abilities, medical treatment, and need for vocational rehabilitation.
- ★ Labor Code, §408.032 requires DWC to study required accreditation of interdisciplinary pain rehabilitation programs or treatment facilities and report statutory changes necessary to recommend the accreditation to the legislature. DWC issued this report to the 80th Texas Legislature in 2007.
- ★ Labor Code, §408.086 requires the Commissioner of Workers' Compensation to determine if an injured employee's extended unemployment or underemployment is a direct result of the employee's impairment while the injured employee is receiving impairment income benefits or supplemental income benefits. This statute also allows the Commissioner of Workers' Compensation to require

periodic reports from the employee and insurance carrier, as well as examinations, vocational assessments, or tests or diagnoses necessary to make this determination. This DWC determination for individual claims is unnecessary because the insurance carriers must adjust claims and pay appropriate benefits based on the injured employee's impairment and eligibility for those benefits. If there is a dispute over work status, impairment, or income benefits involving an individual claim, DWC resolves them through the administrative dispute resolution process.

- ★ Labor Code, §§406.144 and 406.145 require a hiring contractor who has an agreement with an independent contractor/subcontractor that states the hiring contractor is or is not providing workers' compensation insurance coverage to file that agreement with DWC. Filing these agreements with DWC is unnecessary because if there is a dispute over workers' compensation insurance coverage, DWC can request a copy of the written coverage agreement and resolve these disputes through the administrative dispute resolution process.

ISSUE: Eliminating obsolete reporting requirements will help clarify DWC's statutory responsibilities and allow system stakeholders to reallocate resources to more meaningful obligations.

BACKGROUND: The Texas Workers' Compensation Act currently requires that DWC produce certain one-time legislative reports or perform certain reporting functions that are no longer necessary. Some of these reports have been completed. Other reporting functions are obsolete and create inefficiencies for system stakeholders.

PERMIT ELECTRONIC TRANSMISSION OF INFORMATION

RECOMMENDATION: Revise the following statutes to allow electronic transmission of information:

- ★ Labor Code, §406.007(a) requires an employer file a written notice with DWC by certified mail when the employer terminates workers' compensation insurance coverage.
- ★ Labor Code, §406.008(a) requires an insurance company that cancels or does not renew a workers' compensation insurance policy to deliver the cancellation or non-renewal notice to DWC by certified mail or personal delivery.
- ★ Labor Code, §406.144(c) requires an agreement between a hiring contractor and an independent contractor to provide workers' compensation insurance coverage be filed with DWC either by personal delivery or registered/certified mail. *This requirement is also identified in DWC's recommendation to eliminate obsolete reporting requirements.*
- ★ Labor Code, §406.145(b) requires an agreement between a hiring contractor and an independent contractor not to provide workers' compensation insurance coverage be filed with DWC either by personal delivery or registered/certified mail. *This requirement is also identified in DWC's recommendation to eliminate obsolete reporting requirements.*
- ★ Labor Code, §409.010 requires DWC to mail information to an injured employee or a legal beneficiary immediately upon receiving notice of an injury or a death. The information provided by DWC must include the services provided by DWC and the Office of Injured Employee Counsel, DWC's procedures, and the person's rights and responsibilities.
- ★ Labor Code, §409.011 requires DWC mail information to an employer immediately upon receiving notice of an injury or a death. The information provided by DWC must include the services provided by DWC and the Office of Injured Employee Counsel, DWC's procedures, and the employer's rights and responsibilities.
- ★ Labor Code, §409.013(b) requires DWC contact employees by mail or telephone to provide information about the workers' compensation benefit process and compensation procedures in plain language.

ISSUE: Labor Code, §401.024 gives the Commissioner of Workers' Compensation general authority to permit electronic transmission of information by rule instead of the specified form, manner, or procedure. However, this language sometimes conflicts with statutes that specifically require certain notices be physically mailed or personally delivered. This creates confusion when statutes contain specific, conflicting requirements about the legally required method of transmission.

DWC may decide that certain notices still need to be mailed to injured employees; however, the statutory clarification would allow DWC the flexibility to determine the best method of delivering these notices and information by rule.

BACKGROUND: Although the Texas workers' compensation system has significantly reduced the amount of paper used by DWC,²⁸ the Texas Workers' Compensation Act requires certain notices sent to and provided by DWC be physically mailed or personally delivered.

²⁸ Examples of efforts to reduce the amount of physical paper in the Texas workers' compensation system, include: requiring insurance carriers to submit claim, benefit and medical data to DWC via Electronic Data Interchange (EDI); requiring health care providers to submit medical bills electronically to insurance carriers under most circumstances and requiring insurance carriers to accept and process those medical bills; providing an electronic proof of coverage portal on the DWC to allow stakeholders to search an employer's workers' compensation coverage status; and providing a mechanism to allow claimant and insurance carrier attorneys to submit and have their bills processed by DWC electronically.

CLARIFY DWC'S AUTHORITY TO REQUEST CERTAIN INFORMATION FROM DESIGNATED DOCTORS

RECOMMENDATION: Amend Labor Code, §408.1225 to clarify that, upon request, a designated doctor shall provide copies of any contract involving the performance of designated doctor duties between the designated doctor and the authorized agent.

In order to allow DWC to obtain the information needed to monitor the designated doctor process without releasing proprietary information, this recommendation includes a proposal to make any contracts requested by DWC confidential by law and not subject to disclosure under Government Code, Chapter 552 (the Texas Open Records Act).

ISSUE: Most designated doctors delegate certain administrative functions to authorized agents the same way that a doctor who treats patients uses medical office staff to handle scheduling, billing, and referrals. These authorized agents provide needed support to designated doctors and help ensure timely examinations.

However, compliance issues sometimes arise when it is not clear to DWC which designated doctor administrative duties have been delegated to the authorized agent. While the Commissioner of Workers' Compensation can compel the production of documents upon request (see Labor Code, §402.00128), these contracts between designated doctors and their authorized agents contain proprietary information, such as reimbursement arrangements, that may or may not be shielded from open records. Having access to these contractual arrangements between designated doctors and authorized agents, would facilitate DWC's ability to ensure that only authorized agents have access to confidential medical records and that all protections are in place to secure confidential information regarding an injured employee's claim in accordance with 28 TAC Chapter 127. These contracts would also help inform DWC's efforts to establish fair and adequate reimbursement rates for designated doctor examinations.

BACKGROUND: Designated doctors are selected by DWC to resolve certain types of disputes about a work-related injury or illness (Labor Code, §408.0041), including:

- ★ whether the work-related injury or illness has resulted in permanent impairment (such as, the calculation of an injured employee's impairment rating);
- ★ whether the injured employee has reached the point in the work-related injury or illness that he or she is not reasonably anticipated to further recover in any significant way, and if so, when (also called, the date of maximum medical improvement);
- ★ the extent of the employee's work-related injury or illness (such as, whether the work-related injury or illness includes certain medical conditions, diagnoses, or body parts);
- ★ whether the injured employee's lost wages are a direct result of the work-related injury or illness;
- ★ whether the injured employee can physically return to work, and if so, when; and
- ★ other, similar issues.

To participate, doctors must apply to DWC for certification every two years and undergo required training and testing on workers' compensation and medical issues. Once a designated doctor has been assigned to resolve a dispute on a particular workers' compensation claim, that designated doctor is assigned to that claim for any further questions unless DWC authorizes a new designated doctor. As a result, designated doctors' opinions have presumptive weight in DWC dispute resolution proceedings (Labor Code, §408.1225).

Labor Code, §408.1225 and 28 TAC, Chapter 127 establish eligibility requirements for designated doctors, including the requirement to protect and maintain confidential medical records. Specifically, designated doctors must ensure the confidentiality of medical records, analyses, and forms provided to or generated by the designated doctor and must maintain these records for a specified period of time. The Workers' Compensation Act also directs DWC to monitor the decisions and reviews from these doctors, and set reimbursement rates for designated doctor and other related medical examinations that "ensure quality medical care" and "achieve effective cost control."²⁹

²⁹ See Labor Code §413.011(f).

REPLACE STATUTORY REFERENCES TO "HEARING OFFICER" WITH "ADMINISTRATIVE LAW JUDGE"

RECOMMENDATION: Replace statutory references to "hearing officer" with "administrative law judge" throughout the Texas Workers' Compensation Act (Labor Code, Title 5, Subtitle A).

ISSUE: The presiding officers in DWC contested case hearings are currently classified as "administrative law judges" based on state employee classification titles established by the Texas State Auditor's Office. The term "administrative law judge" more accurately connotes that these presiding officers are licensed attorneys. Most similar positions in other state workers' compensation systems, as well as at other Texas agencies, are referred to as "administrative law judges." Replacing the term "hearing officer" with "administrative law judge" will clarify these presiding officers' responsibilities with DWC contested case hearings; align DWC presiding officer titles with similar positions in other states; and assist DWC in its efforts to recruit and retain qualified candidates for these positions.

BACKGROUND: If a dispute arises on a workers' compensation claim, then DWC may resolve the dispute through its multi-tiered administrative dispute resolution process, which includes benefit review conferences, contested case hearings, and a review by the appeals panel. All presiding officers in a DWC contested case hearing must be licensed attorneys. However, the Texas Workers' Compensation Act refers to these presiding officers as "hearing officers" not "administrative law judges."

PROVIDE AN EXCEPTION TO SOVEREIGN IMMUNITY AGAINST ATTORNEY FEES IN THIRD-PARTY ACTIONS FOR WORKERS' COMPENSATION CLAIMS

RECOMMENDATION: Amend Labor Code, Chapter 504 and Civil Practice and Remedies Code, Chapter 101 to provide a specific sovereign immunity exception for the payment of attorney fees in third-party actions and to ensure that the liability caps for governmental entities that were in effect for these situations prior to 2005 remain in effect. This recommendation restores the statutory interpretation regarding the payment of attorney fees in third-party actions.

The recommendation also removes a disincentive for attorneys to assist political subdivision claimants with third-party actions and allows third-party actions for workers' compensation claims involving political subdivisions to be treated the same way as those for workers' compensation claims involving certified self-insured employers and commercial insurance companies.

ISSUE: In 2005, the 79th Texas Legislature added Labor Code, §504.053 to allow political subdivisions the option of either establishing/contracting with a certified workers' compensation health care network under Insurance Code, Chapter 1305 or directly contracting with health care providers for health care services. New Labor Code, §504.053(e) also included the following language, "Nothing in this chapter waives sovereign immunity or creates a new cause of action."

Prior to the addition of Labor Code, §504.053(e), political subdivisions that subrogate and recover workers' compensation benefit payments made to the injured employee/beneficiary could not assert sovereign immunity to shield themselves from attorney fees. However, in recent years, some governmental entities may have begun to claim sovereign immunity from the payment of injured employee/beneficiary attorney fees, including attorney fees as a result of third-party actions on a workers' compensation claim. This could create inequity between injured employees/beneficiaries who have a workers' compensation claim administered by a political subdivision, compared to a certified self-insured employer or commercial workers' compensation insurance carrier. It also could create a disincentive for plaintiff attorneys to pursue third-party actions involving workers' compensation claims administered by governmental entities, which reduces opportunities for these entities to benefit by recovering workers' compensation benefit

payments made on these claims through subrogation.

BACKGROUND: Under Labor Code, Chapter 417, an injured employee/beneficiary may pursue a third-party action and seek damages and may also pursue workers' compensation benefits under the Texas Workers' Compensation Act. These third-party actions may be initiated in situations where persons or companies other than the employer for the injured employee caused the work-related injury or fatality (for example, pursuing the manufacturer of a machine that was not properly designed and caused an injury or pursuing a third-party who caused an automobile accident that involved the injured employee).

In these situations, if the injured employee/beneficiary recovers any damages under the third-party action, then Labor Code, Chapter 417 clarifies that the workers' compensation insurance carrier may enforce another party's rights for the carrier's own benefit and is entitled to recover any payments made by the carrier as a result of the workers' compensation claim (such as medical and/or indemnity benefits) from the net recovery amount received by the injured employee/beneficiary. The workers' compensation insurance carrier is also entitled to any recovery that exceeds the insurance carrier's reimbursement as an advance against future medical and/or indemnity benefits.

In many situations, the workers' compensation insurance carrier and the injured employee/beneficiary share in the attorney fees because both parties benefit from the third-party recovery.

REVISE WORK-HARDENING AND WORK-CONDITIONING PRE-AUTHORIZATION AND CONCURRENT REVIEW REQUIREMENTS

RECOMMENDATION: Revise Labor Code, § 413.014(c)(2) to allow the Commissioner of Workers' Compensation the discretion to determine, by rule, whether to exempt accredited facilities that provide work-hardening and work-conditioning services from pre-authorization and concurrent review. This recommendation would not preclude the commissioner from exempting facilities that have certain accreditations from pre-authorization or concurrent review, but would allow DWC to determine whether an exemption is warranted.

ISSUE: While seeking and obtaining accreditation for work-hardening and work-conditioning services shows that a facility has demonstrated conformance to certain accepted standards of care and administrative procedures, accreditation does not guarantee quality medical care or prevent the overutilization of work-hardening and work-conditioning services. Although the Division has little data to demonstrate that accredited facilities are more cost-efficient and produce better return-to-work outcomes than non-accredited facilities, the current statute exempts accredited facilities from most pre-authorization and concurrent review requirements.

BACKGROUND: The Workers' Compensation Act requires certain health care treatments and services to be preauthorized by the insurance carrier for medical necessity before they can be performed by a health care provider.³⁰ These services include work-hardening or work-conditioning services provided by a health care facility that is not credentialed by an organization recognized by commissioner rules. Work-hardening is a multi-disciplinary and individualized rehabilitation program designed to restore functional and work capacities to the injured employee through work simulation activities.³¹ Work-conditioning is a rehabilitation program that uses strengthening and conditioning tasks to restore an injured employee's function.

This "mandatory list" of treatment and services that require pre-authorization was first established by the

³⁰ Labor Code §413.014 directs DWC to adopt rules to specify the list of health care treatment and services that are subject to both pre-authorization and concurrent review for medical necessity by the insurance carrier and provides that this list, by rule, include the health care treatments and services listed in statute.

³¹ These services also include spinal surgery, inpatient hospitalization, physical and occupational therapy, outpatient and ambulatory surgical services, experimental or investigational services or devices.

77th Legislature as part of a comprehensive reform package, House Bill (HB) 2600, which focused on reducing overutilization of unnecessary medical care in the Texas workers' compensation system. In response, the former Texas Workers' Compensation Commission (TWCC, the predecessor to DWC), adopted amendments to 28 TAC, § 134.600, which established the full list of health care treatment and services that required pre-authorization or concurrent review by the insurance carrier, including the "mandatory list" of treatments and services listed in Labor Code, § 413.014. As part of this rulemaking, the TWCC recognized work-hardening and work-conditioning services performed by facilities accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF) as exempt from these mandatory pre-authorization and concurrent review requirements. While DWC and the former Texas Workers' Compensation Commission (TWCC) have not required facilities that provide work-hardening and work-conditioning services to seek accreditation, facilities over the years have been encouraged to become accredited because accredited facilities receive increased reimbursements in DWC-adopted fee guidelines.

Since 2001, the Texas Legislature has required the adoption of other utilization controls, including evidence-based treatment guidelines, which provide guidance to health care providers and insurance carriers about appropriate treatment protocols for specific types of work-related injuries and illnesses. These treatment guidelines also address the appropriate use of work-hardening and work-conditioning services to injured employees. As a result, DWC amended 28 TAC, § 134.600 to clarify that work-hardening and work-conditioning services provided by CARF-accredited facilities that exceed or are not addressed in DWC's adopted treatment guidelines, require pre-authorization and concurrent review by the insurance carrier. Work-hardening and work conditioning services that are not subject to pre-authorization or concurrent review are still subject to retrospective review of medical necessity by the insurance carrier.

OTHER ITEMS FOR CONSIDERATION

SOVEREIGN IMMUNITY FOR WORKERS' COMPENSATION ENFORCEMENT ACTIONS

ISSUE: Although there is language in Chapters 501-505 of the Workers' Compensation Act that specifies that the monitoring, compliance, and enforcement provisions of the Workers' Compensation Act apply to these governmental entities, some claim sovereign immunity to avoid being sanctioned or paying administrative penalties for noncompliance. Recent appellate court decisions³² on other related workers' compensation sovereign immunity issues have also stated that governmental entities enjoy sovereign immunity unless there is an express waiver of this protection from lawsuits and liability in the Civil Practice and Remedies Code. The courts have also said the state's liability is limited to actions and damages authorized by the Civil Practice and Remedies Code, Chapter 101 (known as the Texas Tort Claims Act). Prior to these recent court decisions, governmental entities, including the state's workers' compensation programs, paid administrative penalties for noncompliance with the Workers' Compensation Act and Rules.

As a result, DWC's statutory authority to pursue enforcement actions against governmental entities acting as insurance carriers for noncompliance with the Workers' Compensation Act and Rules is unclear. This prevents DWC from carrying out its statutory mandate to regulate the workers' compensation system in accordance with Labor Code, §402.021.³³ This lack of clarity also removes incentives for governmental entities to ensure they handle workers' compensation claims in accordance with the Workers' Compensation Act and Rules.

BACKGROUND: Insurance carriers play a vital role in this system by adjusting, processing, and paying all required benefits due on individual workers' compensation claims. The Workers' Compensation Act and

³² See *State Office of Risk Management v. Davis*, 315 S.W.3d 152 (Tex. App. 2010) and *Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528 (Tex. 2012).

³³ Labor Code §402.021 lays out several goals for the workers' compensation system and establishes that the legislative intent in implementing these goals includes that DWC must "promptly detect and appropriately address acts or practices of noncompliance" and "promote compliance with this subtitle and rules adopted under this subtitle through performance-based oversight."

Rules provide specific guidance to insurance carriers about the investigation of claims and payment of benefits, including the types of benefits due, compensation rates, and payment timeframes. Insurance carriers are also expected to comply with other statutory requirements governing the processing and payment of medical bills, reporting claim and medical data to DWC, paying certain attorney fees, and complying with other commissioner orders and actions on individual claims.

Labor Code, §401.011(27) defines “insurance carrier” to include commercial insurance companies writing workers’ compensation coverage, as well as certified self-insured employers, group self-insured employers and governmental entities that self-insure individually or collectively. Governmental entities that are acting as “insurance carriers” for workers’ compensation purposes include the State of Texas and its political subdivisions, which may self-insure individually or through intergovernmental risk pools.³⁴

To ensure that injured employees have their claims processed fairly and promptly, and also receive all the statutory benefits they are entitled to under the law, the Workers’ Compensation Act and Rules charges DWC with the statutory responsibility to provide oversight and enforcement, including the authority to issue administrative violations and penalties against insurance carriers for non-compliance.

³⁴ Specifically, the State of Texas’ workers’ compensation program is administered through four separate self-insured entities: Texas A&M University System (Labor Code, Chapter 502); the University of Texas System (Labor Code, Chapter 503); the Texas Department of Transportation (Labor Code, Chapter 505); and the State Office of Risk Management (Labor Code, Chapter 501). The State Office of Risk Management handles all state employee workers’ compensation claims, except for those handled by the other programs listed above.

OUTDATED AND OFFENSIVE LANGUAGE REGARDING ELIGIBILITY FOR LIFETIME INCOME BENEFITS FOR CERTAIN TRAUMATIC BRAIN INJURIES

ISSUE: The terms “incurable insanity” and “imbecility” are currently used to describe the degree of a brain injury that qualifies an injured employee to be eligible for lifetime income benefits (LIBs); however, the terms are not defined in the Labor Code. As a recent appellate court decision noted, the terms are outdated, offensive, and lack guidance to stakeholders and DWC in determining eligibility for LIBs for brain injuries.³⁵ Currently, DWC and stakeholders are monitoring a case that is pending at the Texas Supreme Court, *Chamul v. Amerisure Mutual Ins. Co.*, to see if the Supreme Court will provide clarification for the terms “incurable insanity” and “imbecility.”

These terms have little medical significance and are not used by the medical profession. As a result, injured employees and insurance carriers often find it difficult to obtain medical opinions from doctors regarding whether an injured employee has “a physically traumatic injury to the brain resulting in incurable insanity or imbecility” and DWC’s presiding officers have difficulty interpreting the statute when there is a dispute over an injured employee’s eligibility to LIBs.

BACKGROUND: The Texas Workers’ Compensation Act (Labor Code, § 408.161) provides injured employees who sustain specific catastrophic injuries with LIBs.³⁶ These benefits equal 75 percent of an injured employee’s average weekly wage, with a three percent cost of living increase each year until the employee’s death. By statute, injured employees may be eligible for LIBs if they incur the following injuries:

- ★ total and permanent loss of sight in both eyes;
- ★ loss of both feet at or above the ankle;

³⁵ See *Chamul v. Amerisure Mutual Ins. Co.*, 486 S.W.3d 116 (Tex. App—Houston [1st Dist.] 2016, *pet. filed.*) In April 2016, Amerisure Mutual asked the Texas Supreme Court to define “imbecility” to help settle its dispute with a man seeking LIBs after contending that the appeals court had discarded a definition that has been used in similar cases.

³⁶ Virtually every state workers’ compensation system pays lifetime income benefits to injured employees with specific catastrophic injuries. These benefits are often referred to as “permanent total disability benefits” in other states.

- ★ loss of both hands at or above the wrist;
- ★ loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
- ★ an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
- ★ a physically traumatic injury to the brain resulting in incurable insanity or imbecility; or
- ★ third-degree burns that cover at least 40 percent of the body and require grafting, or third degree burns covering the majority of either both hands or one hand and the face.

The list of injuries triggering liability has remained largely unchanged since the first workers' compensation laws were enacted in Texas, and it includes a physically traumatic injury to the brain that results in "incurable insanity and imbecility."³⁷

³⁷ In 1997, the Texas Legislature passed House Bill (HB) 3522, which eliminated the eligibility requirement "an injury to the skull resulting in incurable insanity and imbecility" and replaced it with "a physically traumatic injury to the brain resulting in incurable insanity and imbecility" after an injured employee failed to qualify for LIBs because of an electrocution that resulted in a severe brain injury, but did not affect the employee's skull. In 2001, the Texas Legislature passed HB 2600, which added "third-degree burns that cover at least 40 percent of the body and require grafting, or third-degree burns covering the majority of either both hands or one hand and the face."

