

# DIVISION OF WORKERS' COMPENSATION



## BIENNIAL REPORT

## TO THE 86TH LEGISLATURE

Texas Department of Insurance, Division of Workers' Compensation  
7551 Metro Center Drive, Suite 100 | Austin, Texas 78744  
512-804-4000  
[www.TDI.texas.gov](http://www.TDI.texas.gov)





## TEXAS DEPARTMENT OF INSURANCE

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### Division of Workers' Compensation

7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645

(512) 804-4000 | F: (512) 804-4001 | (800) 252-7031 | [TDI.texas.gov](http://TDI.texas.gov) | @TexasTDI

December 1, 2018

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 Texas Labor Code §402.066, I am pleased to submit the Texas Department of Insurance, Division of Workers' Compensation's biennial report to the 86th Texas Legislature. This report provides an update on the Texas workers' compensation system and a brief description of two legislative recommendations that I believe will improve the state's 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. Please contact 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,

Cassie Brown  
Commissioner of Workers' Compensation

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## INTRODUCTION

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The Texas workers' compensation system has undergone an evolution over the past 10-15 years – from an expensive system for employers that did not provide positive outcomes for injured employees, to a system that many other states now look to replicate. Claim and system costs are down, primarily driven by fewer injuries and claims, more efficient and effective medical care, fewer disputes, and better return-to-work rates for injured employees. As a result, workers' compensation insurance rates have significantly declined, encouraging more Texas employers to provide workers' compensation coverage for their employees.

In recent years, Texas has been an innovator in workers' compensation policy by implementing proven approaches found in other health care delivery systems, like evidence-based medicine, a pharmacy formulary, electronic billing, and Medicare-based fee schedules to control costs. As the administrator and regulator of the Texas workers' compensation system, the Texas Department of Insurance, Division of Workers' Compensation (DWC) continues these efforts by implementing new rules that eliminate barriers for telemedicine and increase scrutiny for compound drugs to ensure that these drugs are safe and medically necessary for injured employees.

Looking ahead, DWC's focus for the next two years will be to continue leveraging technology and its existing resources to improve administrative efficiencies for both DWC and system stakeholders. DWC will continue working on ways to increase electronic transmission of information, streamline internal business processes, open lines of communication with system stakeholders, and eliminate outdated and unnecessary regulatory requirements. Like other state agencies, DWC has also begun focusing on ways to improve succession planning within core agency functions to build institutional knowledge among staff and identify future staffing needs to support the agency's statutory mission and vision.

Going into the upcoming 86th Legislative Session, while additional improvements can be made to the Texas workers' compensation system, the system as a whole is stable. This report presents system trends that allow DWC, policymakers, and system stakeholders to gauge the relative health of the Texas workers' compensation system and consider whether additional legislative changes are necessary.

## DWC ESTABLISHES NEW FRAUD UNIT

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In May 2016, the commissioner of workers' compensation transferred workers' compensation fraud investigations back to DWC and established a dedicated workers' compensation fraud unit. This move permits DWC to pursue fraud actions criminally and allows DWC to use its existing resources to detect and prosecute fraud. Following this transfer, the 85th Legislature passed House Bill 2053, which clarified DWC's existing statutory authority to conduct fraud investigations, provided out-of-state subpoena authority, and authorized DWC's ability to provide litigation assistance to local prosecutors in workers' compensation fraud cases. Additionally, the 85th Legislature also authorized a budget rider

Since 2016, the DWC Fraud Unit and Prosecution teams have obtained 20 indictments, secured 17 convictions and obtained orders for restitution exceeding \$612,000 for workers' compensation system participants.

for DWC to establish a dedicated workers' compensation fraud prosecutor embedded in the Travis County District Attorney's Office.

Since 2016, the DWC Fraud Unit and Prosecution teams have been actively investigating fraud referrals, pursuing prosecutions, and to date, have obtained 20 indictments, secured 17 convictions, and obtained orders for restitution exceeding \$612,000 for workers' compensation

system participants. The DWC Fraud Unit also works collaboratively with federal agencies and insurance carrier special investigative units on more complex health care provider and premium fraud cases.

## DECLINING INSURANCE RATES AND PREMIUMS MAKE COVERAGE AFFORDABLE FOR TEXAS EMPLOYERS

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Ensuring that Texas employers have access to affordable workers' compensation insurance is an important goal for the system. The Texas Department of Insurance (TDI) Property and Casualty Actuarial Office 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.<sup>1</sup> In 2017, 293 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 \$2.31 billion.

The top 10 insurance company groups write about 77 percent of the market. The top writer, Texas Mutual Insurance Company, currently has 42 percent of the market and serves as the insurer of last resort.

Texas continues to have a healthy workers' compensation insurance market, which encourages competition from insurance companies and allows employers to purchase workers' compensation coverage at affordable rates.

Overall, the last decade has been very profitable for insurance companies writing workers' compensation insurance in Texas. In 2017, the projected accident year combined ratio for workers' compensation in Texas was 92.3 percent.<sup>2</sup> This

means that for every dollar an insurance company collects, it will pay an estimated 92.3 cents to cover losses and expenses and keep the remainder as profit.

Table 1 shows the projected workers' compensation loss ratio and the combined ratio for the last decade.

Since 2003, workers' compensation insurance rates have dropped nearly 64 percent.

Texas employers have also seen insurance rates decline significantly over time, making insurance coverage more affordable. Since 2003, workers' compensation insurance rates have dropped nearly 64 percent. While insurance rates have continued

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<sup>1</sup> 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, 2018 Results*.

<sup>2</sup> Two important measures of the market's financial health 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 those 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.

to decline in the last decade, these rates are just the start of the workers' compensation insurance pricing process. What employers pay—the insurance 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 calculate an employer's insurance premium.

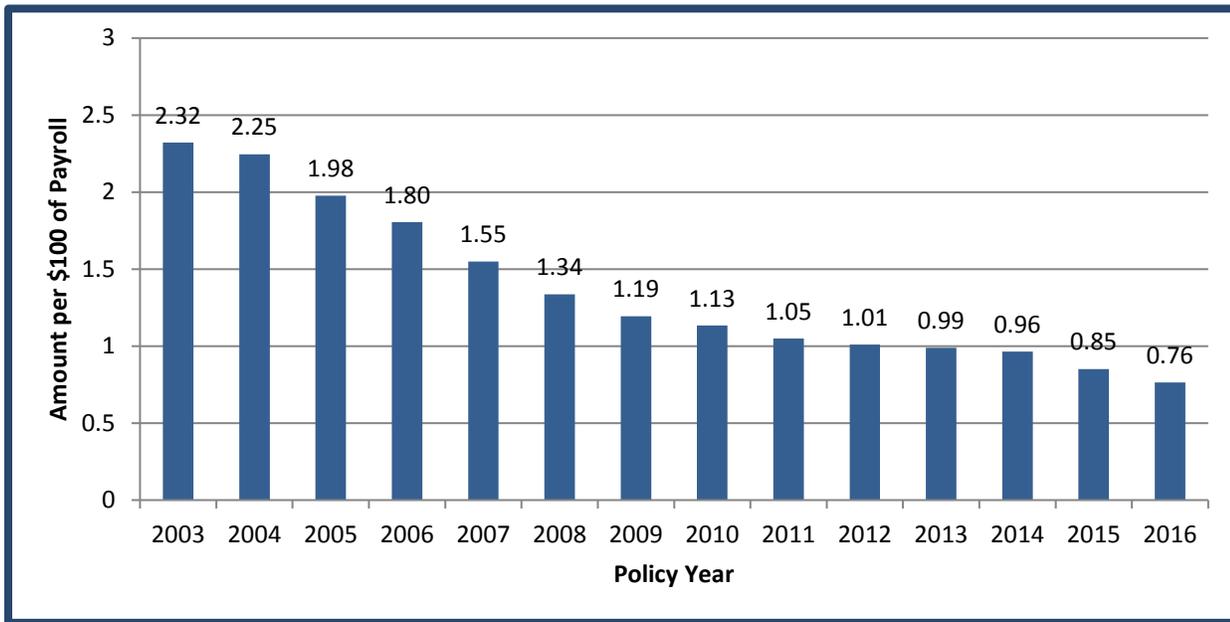
**Table 1: Projected Ultimate Calendar Year/Accident Year Loss and Combined Ratios**

Accident Year	Loss Ratio	Combined Ratio
<b>2008</b>	43.8%	84.5%
<b>2009</b>	41.7%	83.2%
<b>2010</b>	49.8%	93.2%
<b>2011</b>	50.3%	94.5%
<b>2012</b>	47.4%	89.6%
<b>2013</b>	44.2%	86.3%
<b>2014</b>	42.0%	83.4%
<b>2015</b>	38.2%	82.0%
<b>2016</b>	42.7%	91.8%
<b>2017</b>	<b>44.8%</b>	<b>92.3%</b>

Source: National Council on Compensation Insurance (NCCI) Workers' Compensation Financial Data Call (Valuation Year 2017) and TDI's compilation of the Insurance Expense Exhibit for Calendar Years Ending December 31, 2009-2017. Losses are developed to ultimate using the loss development factors from the NCCI Annual Statistical Bulletin, 2018 edition.

Figure 1 shows the average premium per \$100 of payroll for policy years 2003-2016, 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 2016, the average premium per \$100 of payroll decreased to 76 cents.

**Figure 1: 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, 2018.

## EMPLOYER PARTICIPATION RATES DECLINED WHILE EMPLOYEE COVERAGE RATES REMAINED STABLE IN 2018

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Texas is the only state where private-sector employers, regardless of employer size or industry, can make the choice to obtain workers' compensation coverage or become "non-subscribers" that do not participate in the workers' compensation system.<sup>3</sup> 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 laws provide statutory exemptions to allow small employers or employers from select industries to opt out of their workers' compensation systems.<sup>4</sup>

Non-subscription rates remain an important performance measure in the workers' compensation system because, in most cases, they show if employers believe the benefits of participating in the workers' compensation system outweigh the costs of obtaining the coverage. The percentage of Texas private-sector employers that were non-subscribers to the workers' compensation system decreased significantly from 2004 to 2016, from 38 percent to 22 percent. In 2018 employer non-subscription rates increased to 28 percent, which is still the second lowest percentage since 1993

About 28 percent of private, year-round employers do not have workers' compensation, and they employ about 18 percent of the private workforce in Texas.

(an estimated 105,608 private, year-round employers in 2018 were non-subscribers). This decrease since 2004 followed significant declines in workers' compensation insurance rates, including a rate

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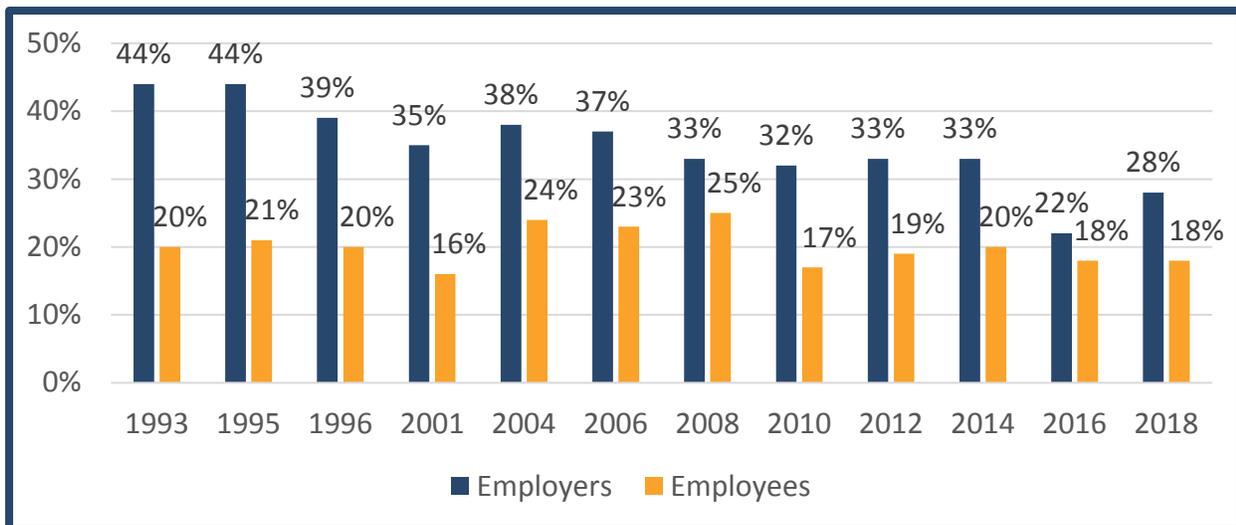
<sup>3</sup> In New Jersey, all employers must have coverage or be self-insured. Non-compliant employers are fined, and their injured employees receive income and medical benefits through the Uninsured Employers' Fund (UEF).

<sup>4</sup> 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.

reduction of almost 20 percent in the last two years, making workers' compensation coverage more affordable for Texas employers.<sup>5</sup>

Although the percentage of private, year-round employers who were non-subscribers increased in 2018, the percentage of Texas employees who work for non-subscribers did not change from 2016. In 2018, an estimated 18 percent of private year-round Texas employees (representing about 1.8 million employees in 2018) worked for non-subscribing employers. Conversely, 82 percent of Texas private-sector employees (an estimated 8.4 million employees) were employed by the 72 percent of employers (an estimated 267,000 employers) that have workers' compensation coverage in Texas (see Figure 2).

**Figure 2: Percentage of Texas Employers That Are Non-subscribers and the Percentage of Texas Employees Employed by Non-subscribers, 1993-2018**



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 2004-2018 estimates from the Texas Department of Insurance, Workers' Compensation Research and Evaluation Group and PPRI.

<sup>5</sup> For policies written on or after July 1, 2018, TDI approved a 13.7 percent reduction in Texas' loss costs by the National Council on Compensation Insurance, an industry ratemaking advisory organization. TDI also approved a 15 percent reduction in workers' compensation relativities for insurance companies that choose not to use loss costs in their rate calculations in 2018.

The percentage of Texas employers that have workers' compensation coverage has increased since the passage of the 2005 legislative reforms due primarily to lower insurance premiums and the increased availability of workers' compensation health care networks. Although most 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 because they believe they can more effectively manage costs and ensure that their employees receive appropriate benefits as non-subscribers.

In recent years, non-subscriber rates have fluctuated, mainly for smaller employers. Overall, non-subscriber rates in 2018 declined from 2014 levels in all employer size categories, except employers with five to nine employees and large employers with 500+ employees (see Table 2). The industries with the highest non-subscription rates include health care, educational services, wholesale and retail trade, transportation, arts, entertainment, accommodation, and food services. Almost all industry sectors, except for manufacturing, have experienced reductions in employer non-subscription rates since 2014.

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

# of Employees	1995	1996	2001	2004	2006	2008	2010	2012	2014	2016	2018
1-4	55%	44%	47%	46%	43%	40%	41%	41%	43%	31%	36%
5-9	37%	39%	29%	37%	36%	31%	30%	29%	27%	19%	27%
10-49	28%	28%	19%	25%	26%	23%	20%	19%	21%	10%	16%
50-99	24%	23%	16%	20%	19%	18%	16%	19%	18%	10%	10%
100-499	20%	17%	13%	16%	17%	16%	13%	12%	14%	11%	10%
500 +	18%	14%	14%	20%	21%	26%	15%	17%	19%	19%	20%

Source: *Survey of Employer Participation in the Texas Workers' Compensation System*, 1995 estimates from the Texas Workers' Compensation Research Center and PPRI at Texas A&M University; 1996 and 2001 estimates from the Research and Oversight Council on Workers' Compensation and PPRI; and 2004-2018 estimates from 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 30 percent in 2018) 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.

About 64 percent of the non-subscriber employee population are covered by some form of an alternate occupational benefit plan in 2018, which is a decline from 72 percent in 2016. This change is primarily due to more small and mid-size employers making the choice to become non-subscribers.<sup>6</sup> As a result, an estimated 94 percent of private-sector employees in Texas have some form of coverage in

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<sup>6</sup> 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.

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 2018, about 6 percent of Texas private-sector employees (about 638,340 employees) do not have coverage in the case of a work-related injury in Texas (an increase from 4 percent and 414,000 employees in 2016). It should be noted that even in states with mandatory workers' compensation coverage requirements, 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.

## COMPLIANCE EFFORTS REGARDING REPORTING REQUIREMENTS FOR NON-SUBSCRIBING EMPLOYERS

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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 DWC. Non-subscribers, however, are still subject to certain reporting requirements under the Labor Code and DWC rules. Non-subscribers must file a notice annually with DWC that they have elected not to obtain workers' compensation coverage (DWC Form-005, *Employer Notice of No Coverage or Termination of Coverage with DWC*<sup>7</sup>). Non-subscribers that employ at least five employees are also required to file a notice with DWC (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.<sup>8</sup> Failure to follow these reporting requirements may result in enforcement action and administrative penalties.

Six 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

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<sup>8</sup> See Texas Labor Code §411.032.

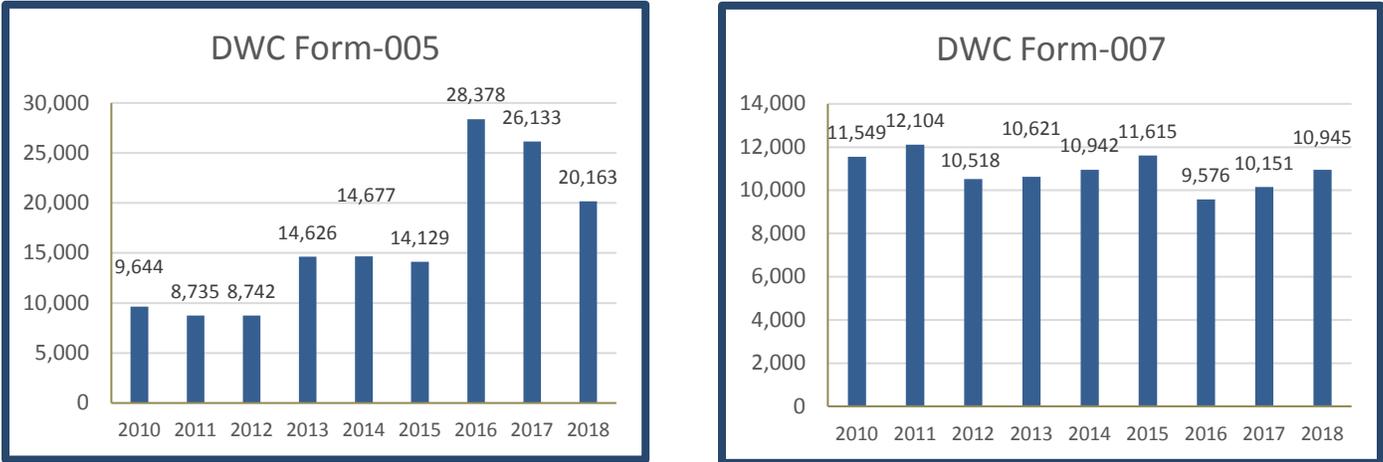
comply. Prior to the 80th Texas Legislature, non-subscriber compliance reporting was mostly complaint-driven. Historically, however, DWC receives very few complaints about non-subscriber compliance. Since 2009, internal DWC monitoring efforts have generated most of the 2,853 complaints reported. These internal complaints resulted in more than 464 warning letters and nearly \$93,000 in penalties for non-subscribers that failed to respond to requests or file required forms.

In the absence of complaints from system participants, it is difficult to identify non-complying employers 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.

To improve employer education regarding non-subscriber reporting requirements, DWC reorganized its employer resources website to help employers better locate pertinent workers' compensation and non-subscription information. The employer resources website ([www.tdi.texas.gov/wc/employer/index.html](http://www.tdi.texas.gov/wc/employer/index.html)) now features a direct link to the automated DWC Form-005, as well as video tutorials to help employers fill out the required forms and answer frequently asked questions.

DWC also provided a grace period for non-subscribers in 2016 and 2017 to increase employer compliance with the DWC Form-005 and DWC Form-007 filing requirements. This effort increased the number of DWC Form-005 filings with DWC; however, when DWC did not provide a grace period to employers in 2018, DWC Form-005 filings dropped (see Figure 3). Despite these efforts to increase employer education and compliance, overall non-subscriber reporting compliance remains low. DWC estimates that about 19 percent of non-subscribers complied with the DWC Form-005 filing requirement in 2018, compared to an estimated 35 percent compliance rate in 2016. While the compliance rate has dropped since 2016, the 19 percent compliance rate in 2018 is still higher than the estimated 12 percent compliance rate in 2014.

**Figure 3: Total Number of DWC Form-005 and DWC Form-007 Received by DWC, Fiscal Years 2010-2018**



Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.

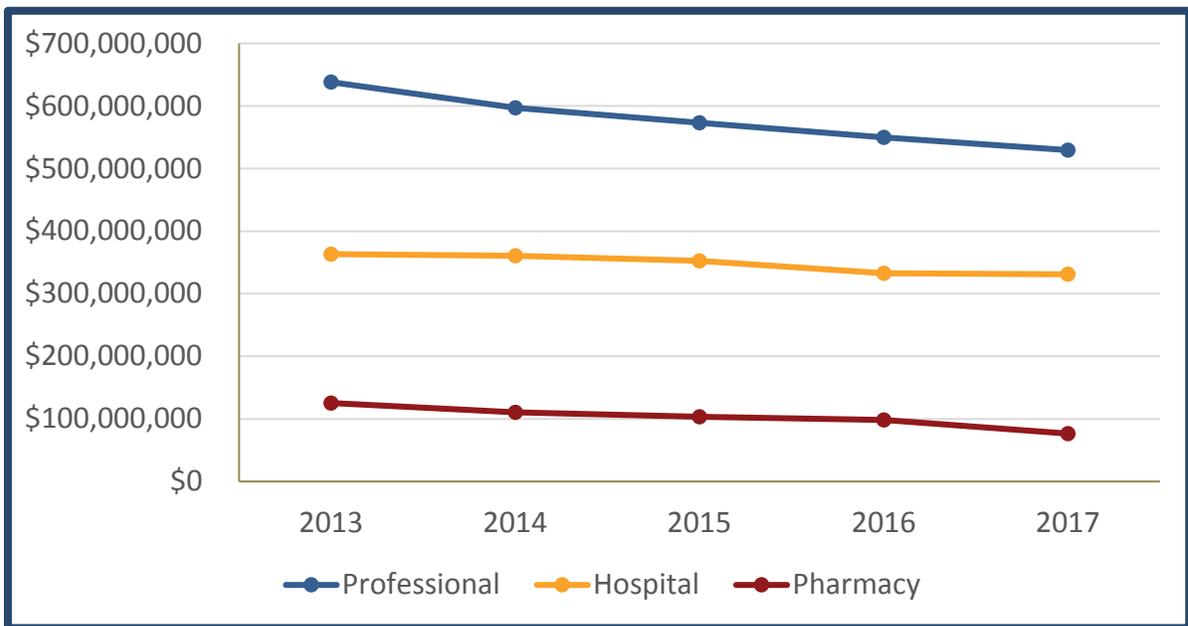
While filings of DWC Form-005 increased in 2016, filings of the non-subscriber injury report, DWC Form-007, did not increase proportionately. In fact, filings of these injury reports decreased after FY 2011 and have fluctuated in recent years. Some large non-subscribers have reported that they believe 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.

## MEDICAL COSTS CONTINUE TO DECLINE AND ARE LOWER THAN IN OTHER STATES

In 2005, the Texas Legislature made several statutory changes to address Texas' high medical costs and poor injured employee outcomes, including adopting evidence-based treatment guidelines, creating a pharmacy closed formulary, and certifying workers' compensation health care networks. Since then, total medical payments have declined in the system, primarily due to fewer claims needing treatment and a reduced amount of medical care received by injured employees per claim. From 2013 to 2017, total medical payments (for professional, hospital, and pharmacy services combined) decreased by about 17 percent, while pharmacy payments decreased almost 39 percent (see Figure 4).

From 2013 to 2017, total medical payments decreased by about 17 percent, while pharmacy payments decreased almost 39 percent.

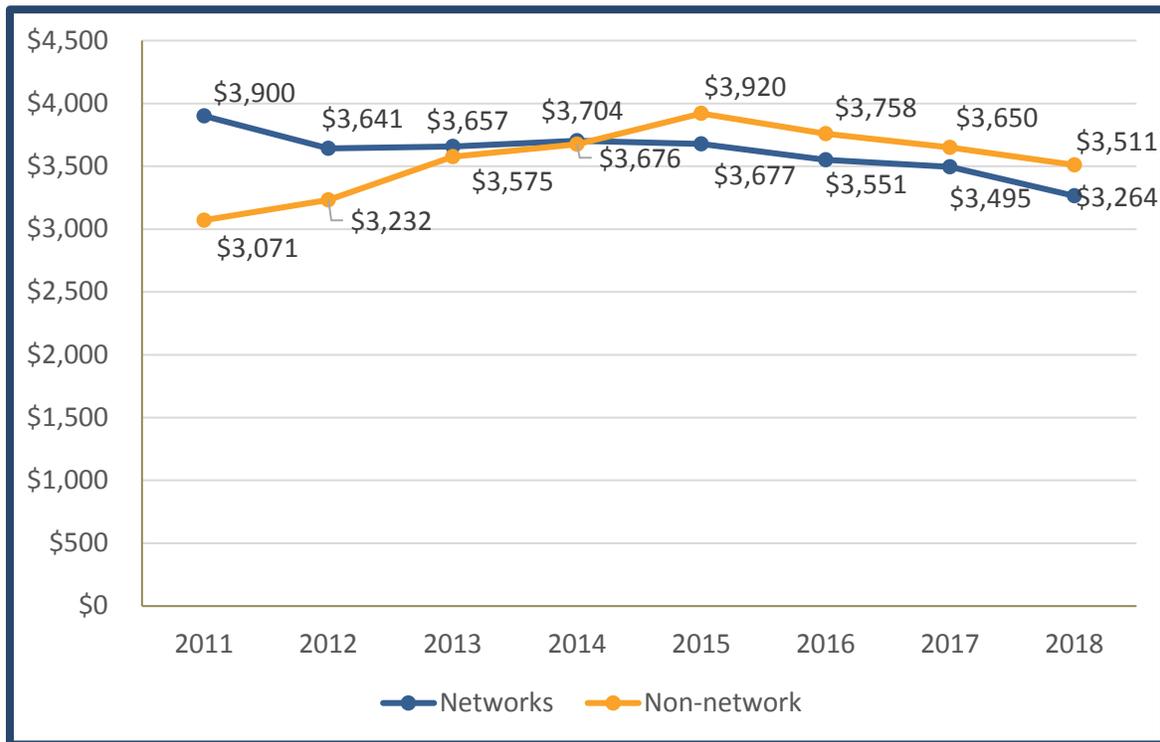
**Figure 4: Total Professional, Hospital, and Pharmacy Medical Payments, Service Years 2013-2017**



Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, 2018.  
 Note: Data updated through June 2018.

One area that has changed significantly since the 2005 reforms is the use of certified health care networks. There are currently 29 networks covering all 254 Texas counties, which are certified by TDI. The percentage of new workers' compensation claims treated in networks has grown from about 20 percent of new claims in 2010 to about 50 percent in 2018 (a 150 percent increase). Initially, medical costs per claim were higher in certified networks because networks tended to use more health care services per claim in the first six months post-injury. In 2014, the trend changed and now networks on average have lower medical costs than non-network claims (see Figure 5). 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.

**Figure 5: Average Medical Cost per Claim at 18 Months Maturity, Report Card Years 2011-2018**

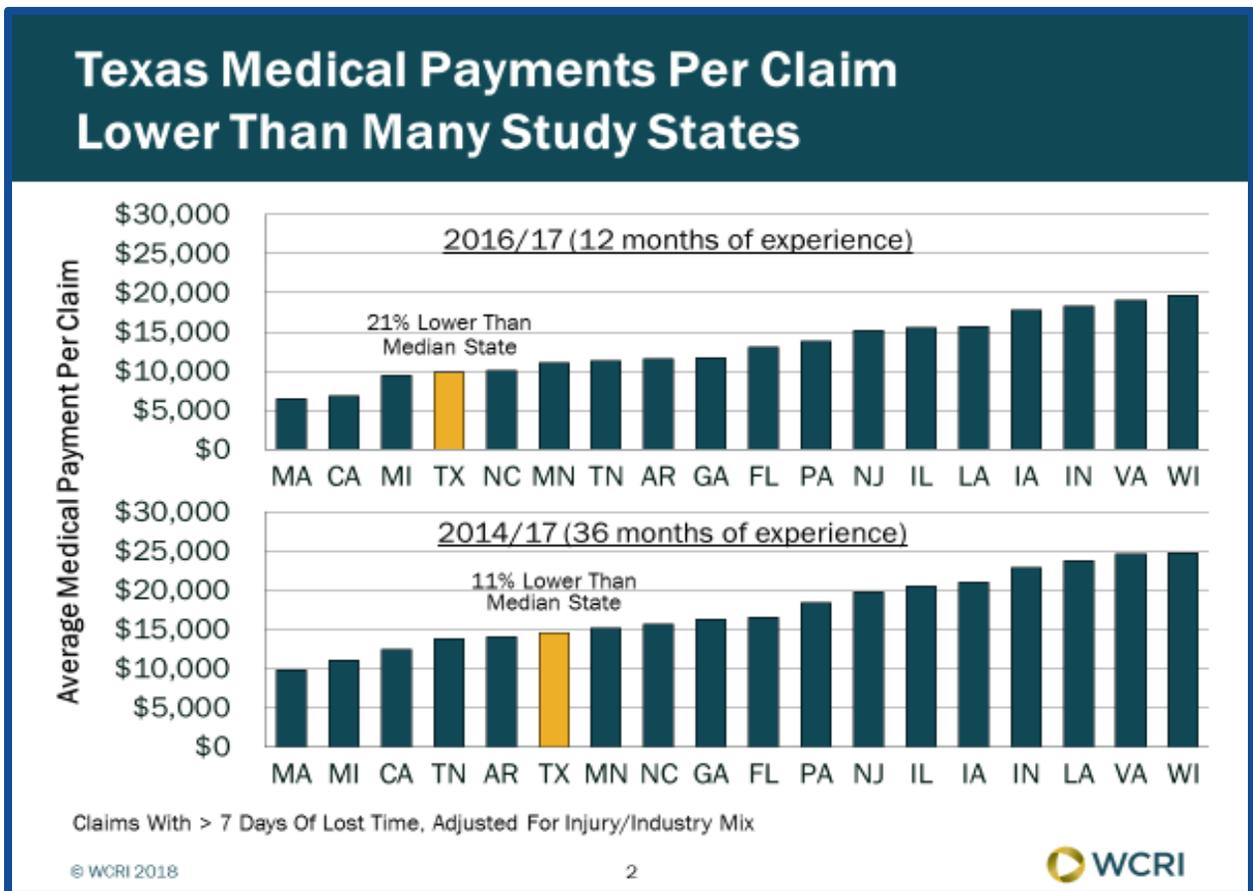


Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.  
 Note: For example, report card year 2018 included injuries that occurred to June 1, 2015, and May 31, 2016.

Compared with other states, Texas experienced significant reductions in medical costs per claim because 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 21 percent less than the median cost of the 18 states analyzed, which included Florida, Pennsylvania, Louisiana, and Illinois (see Figure 6).

Texas' medical cost per claim is about 21 percent less than the median cost of an 18-state comparison.

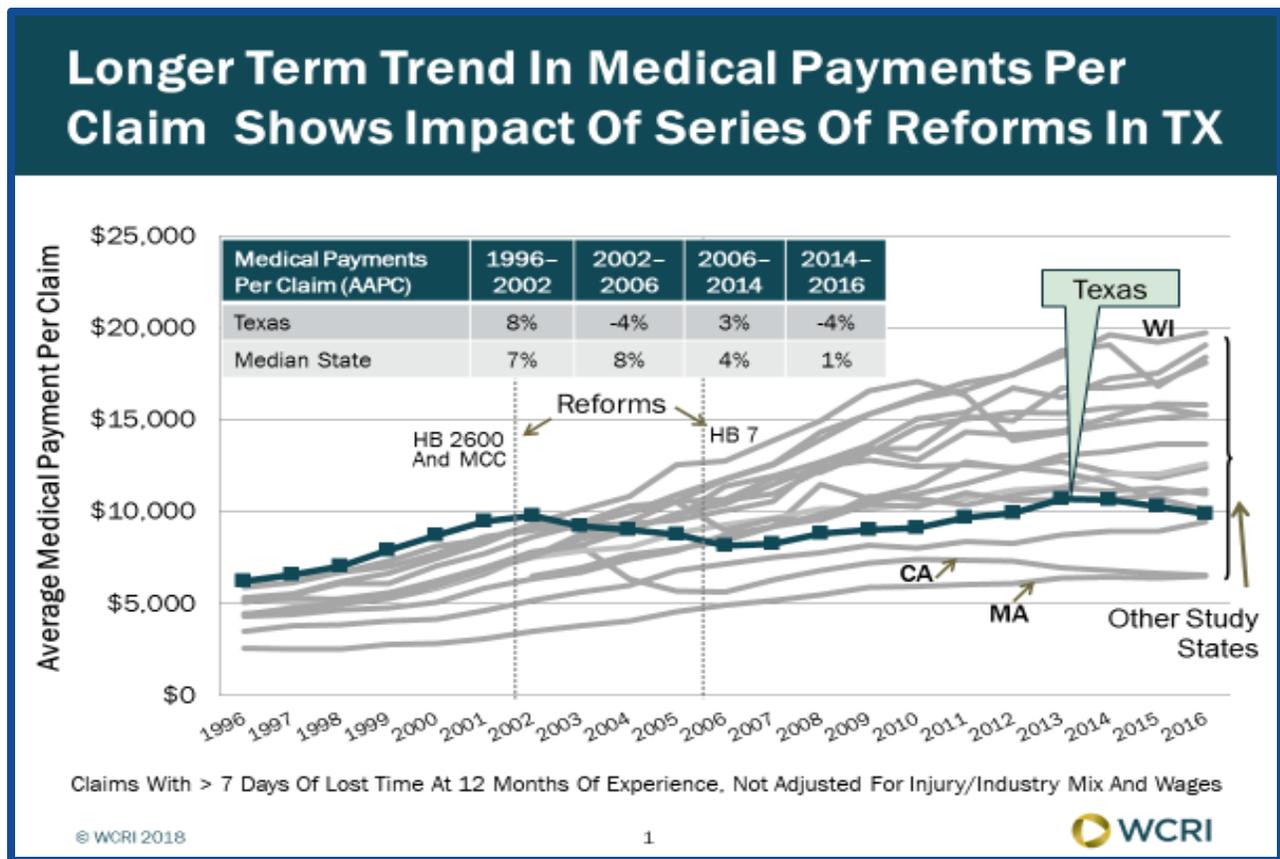
**Figure 6: Average Medical Cost for Claims with More Than Seven Days of Lost Time (All Services), 12 Months and 36 Months Average Maturity**



Source: Workers' Compensation Research Institute, CompScope™ Medical Benchmarks for Texas, 19th Edition, 2018.

As Figure 7 indicates, while other states have seen dramatic medical cost increases in their workers' compensation systems, Texas' costs have stabilized. This stabilization, coupled with reduced injury rates, enabled insurance carriers to lower workers' compensation insurance rates and encouraged more employers to provide workers' compensation coverage to their employees.

**Figure 7: Average Medical Cost for Claims with More Than 7 Days of Lost Time (All Services), 12 Months Average Maturity, 1996-2016**



Source: Workers' Compensation Research Institute, CompScope™ Medical Benchmarks, for Texas, 19th Edition, 2018. Note: "MCC" means medical cost containment. In 2001, the legislature passed HB 2600, which added new medical cost containment tools for workers' compensation claims, such as preauthorization requirements for spinal surgery.

## PHARMACY CLOSED FORMULARY CONTINUES TO PRODUCE RESULTS; DWC ADDRESSES COMPOUND DRUGS

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In 2011, DWC adopted one of the first workers' compensation pharmacy closed formularies in the nation. 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.<sup>9</sup> 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. Prescription drugs that are excluded from the formulary require preauthorization by the insurance carrier before they can be dispensed.

DWC and the Workers' Compensation Research and Evaluation Group (REG) have tracked the positive results of the pharmacy closed formulary since 2011, including fewer claims receiving "N" drugs, fewer opioids prescribed to injured employees, and lower pharmacy costs system wide.<sup>10</sup> Medical disputes did not increase in Texas after the implementation of the pharmacy closed formulary, and DWC has seen relatively few complaints from system participants.

In particular, the pharmacy closed formulary has had a tremendous impact on the use of opioids in the Texas workers' compensation system. Overall, the total number of opioid prescriptions declined by 11 percent and the number of "N" drug opioid prescriptions declined by 81 percent between 2011 and 2012. The pharmacy closed formulary also impacted opioid dosage levels for injured employees, which reduces the potential for overdoses and possible deaths. The number of claims receiving "N" drug opioids that exceed 90 morphine milligram equivalents (MMEs) per day decreased from

Other states, including Oklahoma, Tennessee, and California, have followed Texas' lead and implemented closed pharmacy formularies in their states.

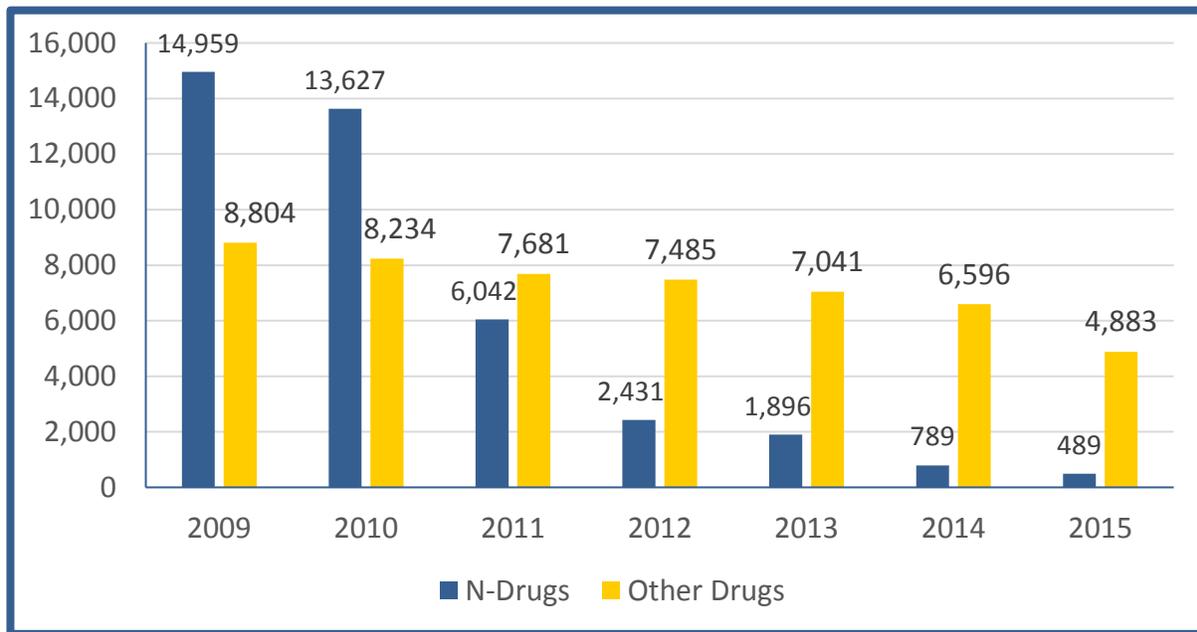
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<sup>9</sup> Legacy claims include those workers' compensation claims with dates of injury prior to September 1, 2011.

<sup>10</sup> For more information, see Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, *Baseline Evaluation of the Utilization and Cost Patterns of Compounded Drugs*, 2017.

almost 15,000 in 2009 to less than 500 in 2015, while the number of claims receiving other opioids also declined (see Figure 8).<sup>11</sup> Other states, including Oklahoma, Tennessee, and California have responded to these positive results by following Texas' lead and implementing closed pharmacy formularies in their states.

**Figure 8: Number of Claims Receiving Opioid Prescriptions with 90+ MMES Per Day, by Service Year**



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

<sup>11</sup> According to the U.S. Centers for Disease Control and Prevention, patients receiving more than 90+ MMEs per day have the highest risk of potential overdose.

Shortly after implementing the pharmacy closed formulary, Texas, like many other state workers' compensation systems and other health care delivery systems at that time, experienced an increase in the number of compounded drugs prescribed to injured employees.<sup>12</sup> Compounding is a process where

From 2010 to 2014, the number of compound drugs prescribed to injured employees increased by about 16 percent; however, the costs associated with these drugs more than doubled during the same time.

a pharmacist combines or alters ingredients to create a customized form of a prescription drug as an alternative to commercially available manufactured drugs. From 2010 to 2014, the number of compound drugs prescribed to injured employees increased by about 16 percent; however, the costs associated with these drugs more than doubled during the same time (from \$5.9 million in 2010 to more than \$14 million in 2014) (see Table 3). In 2015, these prescriptions and costs began to slowly decline and then sharply decreased in 2017 in conjunction with a DWC

medical quality review audit of compound drug prescribers, as well as a State Office of Administrative Hearings medical fee dispute resolution decision. That decision concluded that compound drugs were "experimental and investigational" and, therefore, required preauthorization.

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<sup>12</sup> Many state workers' compensation systems and group health plans also saw an increase in the use of compound drugs in the last five years. The issue of making improvements to the licensing and regulation of compounding pharmacies was an interim charge for the Texas House of Representatives, 83rd Legislature, Public Health Committee.

**Table 3: Number and Cost of Compounded Drugs, Service Years 2010-2017**

Service Year	Number of Prescriptions	Number of Ingredients	Total Cost	Average Cost per Prescription
2010	18,491	51,037	\$5,915,571	\$320
2011	18,347	55,993	\$6,125,896	\$334
2012	20,563	69,269	\$9,287,207	\$452
2013	19,675	60,383	\$13,043,228	\$663
2014	21,486	68,721	\$14,048,517	\$654
2015	16,488	57,690	\$12,210,341	\$741
2016	15,084	47,968	\$11,766,394	\$780
2017	5,246	16,031	\$2,496,507	\$476

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

Compounded drugs are not recommended as a first-line therapy by the current edition of DWC's adopted treatment guidelines (*Official Disability Guidelines*). DWC found in its medical quality review audit that prescribing doctors generally did not demonstrate or document the efficacy or medical necessity of prescribed compound drugs dispensed to injured employees. In response to these concerns and with direction from the House Business and Industry Committee, DWC adopted amendments to its pharmacy closed formulary rules in April 2018. The adopted rules require preauthorization for compound drugs from the closed formulary before being dispensed to injured employees. These rules took effect in July 2018. DWC will continue to monitor the impact of these rules to ensure that these new preauthorization requirements do not prohibit the use of compound drugs for injured employees when medically necessary but will ensure that medical necessity is determined prior to dispensing these drugs.

## **ACCESS TO CARE IMPROVES FOR INJURED EMPLOYEES**

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Ensuring that injured employees have adequate access to medical care is an important function of the workers' compensation system. Without sufficient access, necessary medical care is delayed. This increases medical and income benefit costs, and unnecessarily adds to time off work for injured employees.

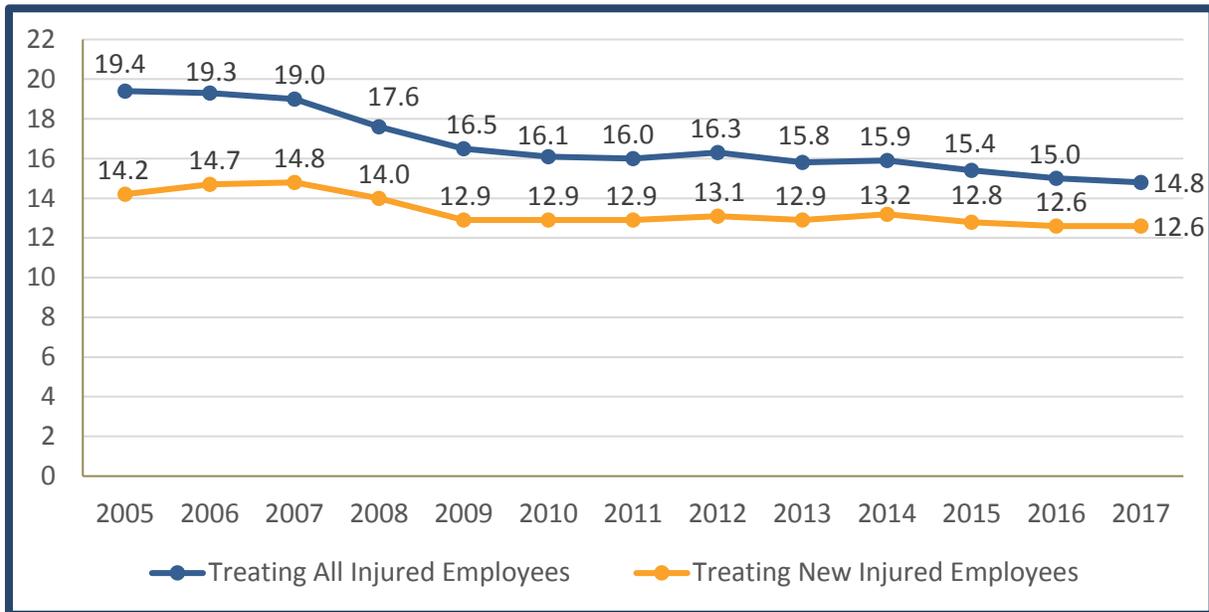
An analysis of the workers' compensation medical billing and payment data collected by DWC, combined with physician licensing information from the Texas Medical Board, shows a significant

increase in the number of physicians actively participating in Texas workers' compensation over the last decade. This is due to changes in tort reform liability for physicians and a robust Texas economy. The number of physicians in Texas willing to treat injured employees has also improved over time. Texas saw a net increase in the number of physicians treating injured employees since 2005 (from 17,656 physicians in 2005, to 18,419 in 2017).

Texas saw a net increase in the number of physicians treating injured employees since 2005.

Additionally, 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 physician participating in the Texas workers' compensation system. This means fewer injured employees competing for the same physicians (see Figure 9). In 2005, each physician treated about 19 workers' compensation claims, compared to less than 15 claims per physician in 2017 – a 24 percent decrease.

**Figure 9: Average Number of Claims Per Workers' Compensation Participating Physician, Service Years 2000-2017**

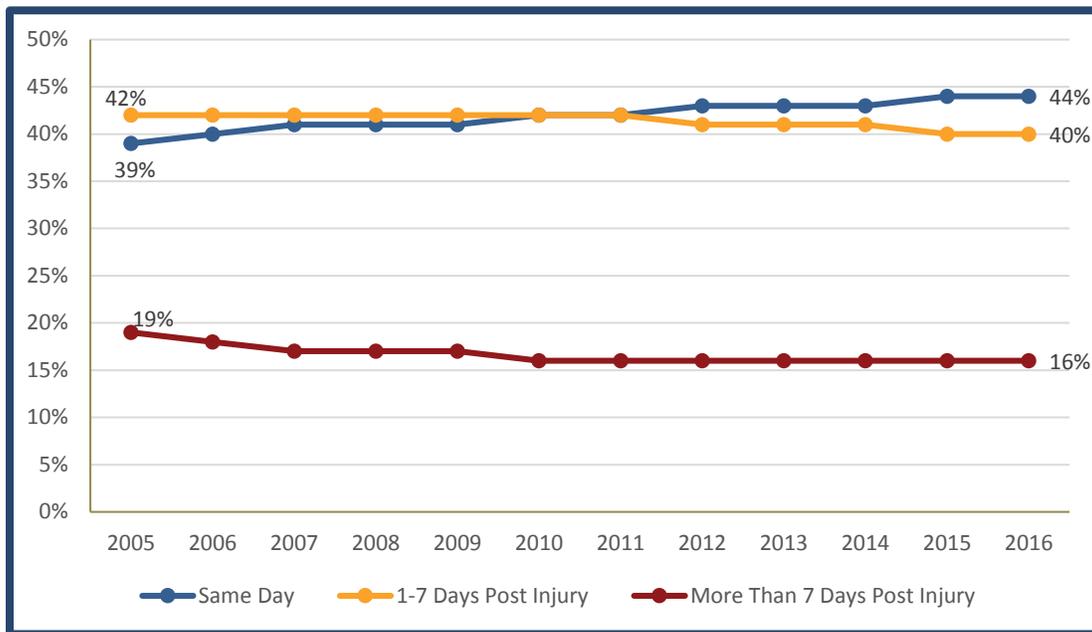


Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

Injured employees' access to timely medical care in the Texas workers' compensation system has also improved. In 2016, about 84 percent of injured employees received initial medical care either on the same day of injury or within seven days, up from 81 percent in 2005 (see Figure 10). Several REG studies have shown that delayed access to initial medical care increases overall claim costs and reduces the likelihood of injured employees returning to productive employment.<sup>13</sup>

<sup>13</sup> See Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, *Access to Medical Care in the Texas Workers' Compensation System*, 2012, 2015, and 2018.

**Figure 10: Percentage of Claims That Received First Non-Emergency Medical Service Within 7 Days of the Injury, Injury Years 2005-2016**



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

Note: Services analyzed at six months post-injury. Injury year 2016 figures includes services through June 30, 2017.

The introduction of certified networks as part of the 2005 legislative reforms also appears to have improved the timeliness of medical care for injured employees. Non-network claims averaged about five days from the date of injury to first non-emergency medical treatment in 2017, compared to two to five days for most certified networks.

In addition to physicians, other types of health care providers, such as chiropractors, physician assistants, nurse practitioners, and physical and occupational therapists also provide medical care to injured employees. Like other health care delivery systems, the use of physician extenders (i.e., physician assistants and nurse practitioners) has increased in the Texas workers' compensation system, especially for initial medical visits. For example, in 2005, only about 1 percent of injured employees saw a physician assistant on their initial medical visit, compared to roughly 12 percent of injured employees in 2016. The increasing use of physician extenders and their changing role in treating injured employees is a topic that DWC will continue to monitor in the future.

## RETURN-TO-WORK RATES IMPROVE FOR INJURED EMPLOYEES

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Returning injured employees to safe and productive employment is a key goal of the Texas workers' compensation system. 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. Since 2005, a higher percentage of injured employees receiving Temporary Income Benefits (TIBs) returned to work after their

Since 2005, a higher percentage of injured employees receiving Temporary Income Benefits (TIBs) returned to work after their injuries.

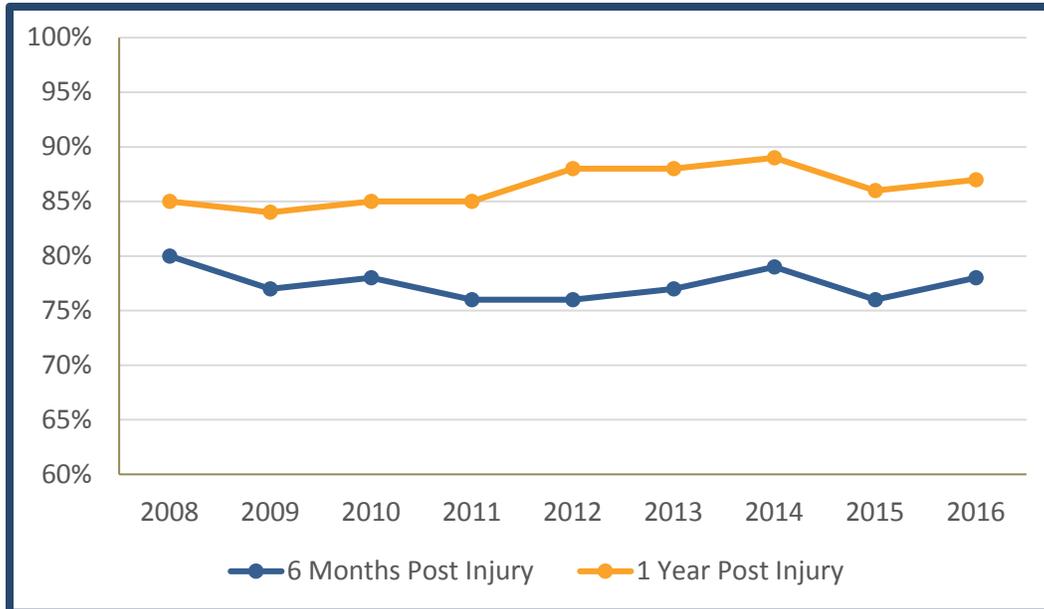
injuries.<sup>14</sup> In 2005, about 75 percent of injured employees receiving TIBs went back to work within six months, compared to about 78 percent of injured employees in 2016. At one-year post-injury, almost 90 percent of Texas injured employees have returned to work, which means that more injured employees are able to return to their pre-injury wage-earning capacity sooner than before the

reforms. However, it is important to note that these return-to-work rates fluctuate along with changes in the Texas economy (see Figure 11). In periods of economic pressure, return-to-work rates generally decline. For example, return-to-work rates declined in Texas during the 2010-2012 economic recession, and then began to rebound only to drop again because of the reduction in oil and gas production in Texas during 2015 and early 2016. According to the Texas Railroad Commission, oil production in Texas is once again on the rise and unemployment rates in Texas are at record lows, which may encourage more employers to bring employees back to work after a work-related injury.

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<sup>14</sup> Temporary Income Benefits are paid to injured employees who have been off work for at least one week because of a work-related injury.

**Figure 11: Percentage of Injured Employees Receiving TIBs Who Initially Returned to Work at Six Months and One Year Post-Injury**



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

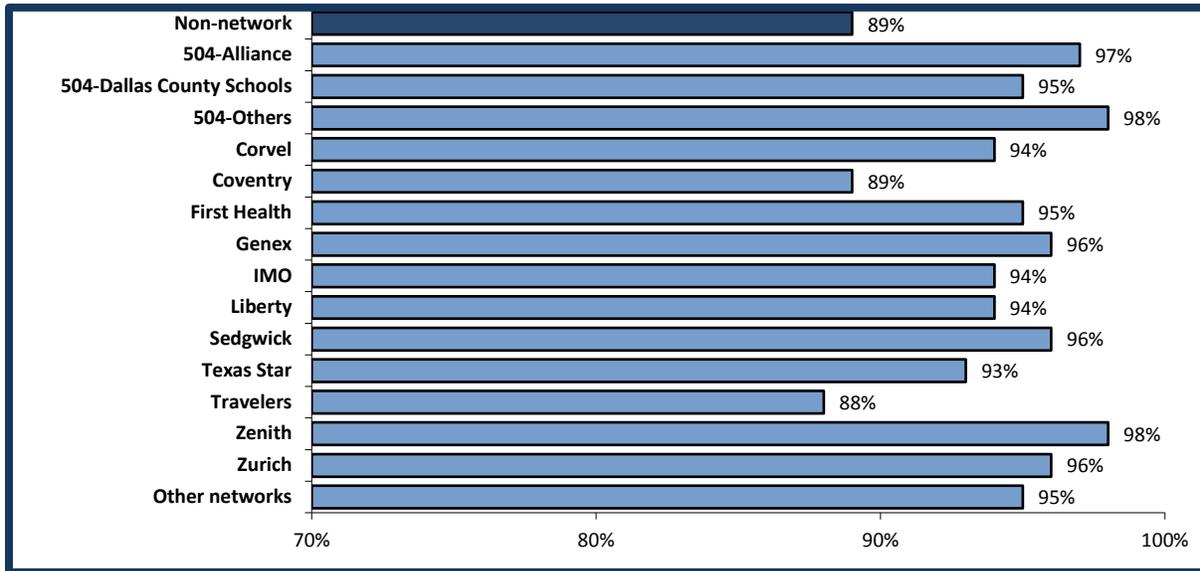
Results from the REG's 2018 Workers' Compensation Network Report Card also indicate that

Injured employees who receive medical care from networks reported higher return-to-work rates than employees with non-network claims.

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 injured employees with non-network claims (see Figure 12), and they also had less time away from work (see Figure 13). The improved performance of most network over non-network claims may be the result of improved

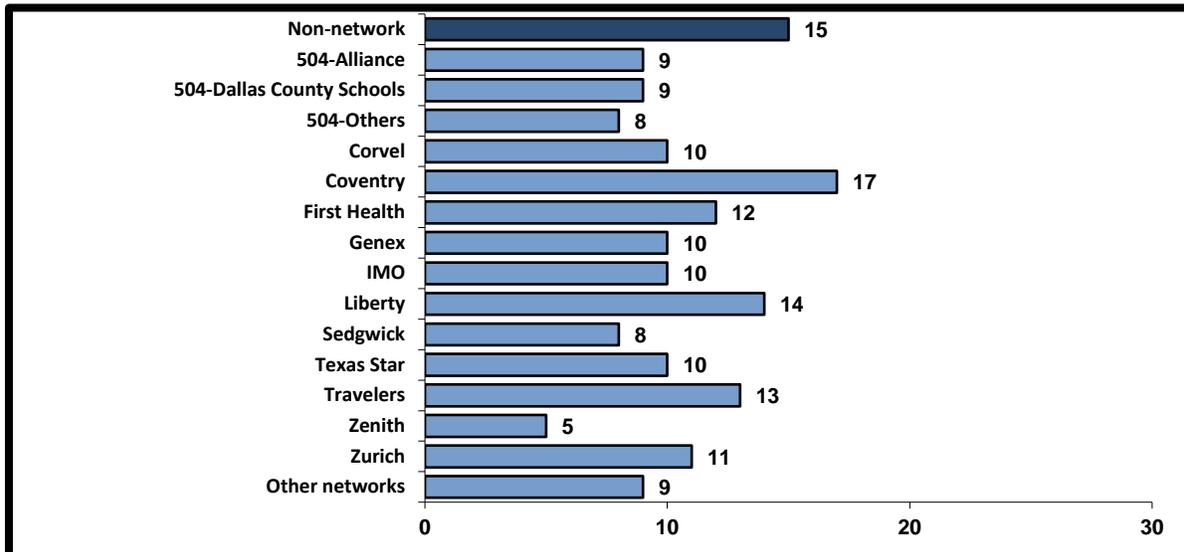
coordination between system participants, particularly employers that help injured employees to return to work and network health care providers that are focused on releasing employees back to work quickly after a work-related injury.

**Figure 12: Percentage of Injured Employees Who Indicated That They Went Back to Work at Some Point After Their Injury**



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

**Figure 13: Average Number of Weeks Injured Employees Reported Being Off Work Because of Their Work-Related Injury**



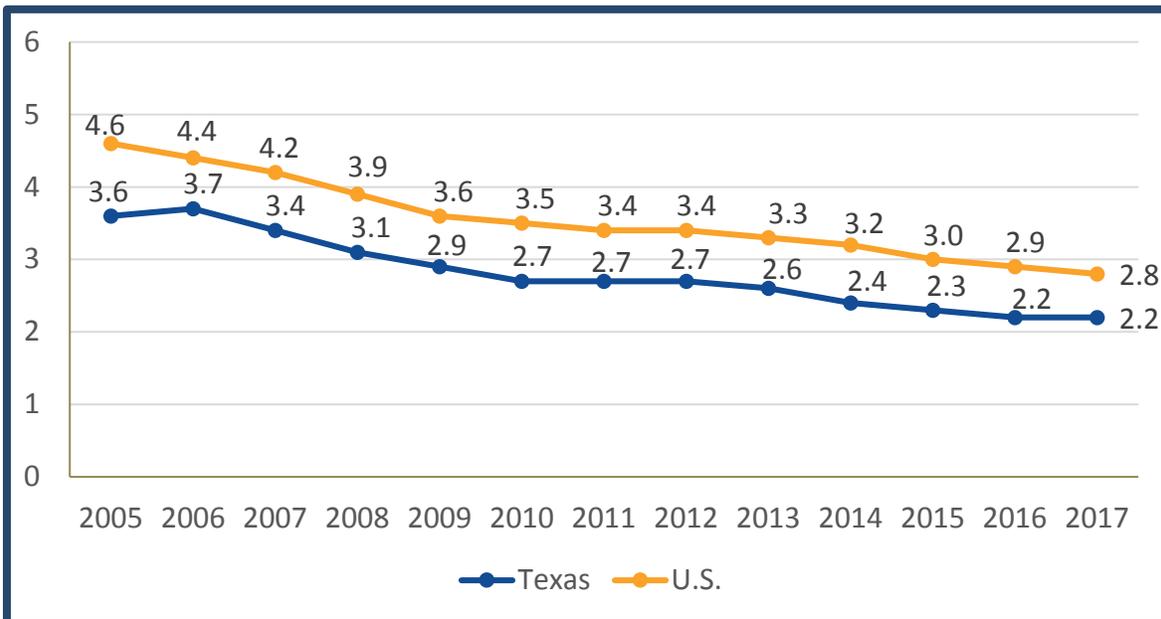
Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2018.

## WORK-RELATED INJURIES CONTINUE TO DECLINE IN TEXAS

Texas continues to experience a steady decline in both the non-fatal occupational injury and illness rate and the overall number of reportable workers' compensation claims filed with DWC. Since the 2005 legislative reforms, the non-fatal occupational injury and illness rate in Texas decreased 39 percent, from 3.6 to 2.2 injuries per 100 full-time employees. The 2017 national rate was 2.8. Workplace injury and illness rates vary widely by industry. Industries such as manufacturing, wholesale and retail trade, and mining have seen injury rates decline in recent years. Overall, Texas's non-fatal occupational injury and illness rate has consistently been lower than the national rate (see Figure 14).

The non-fatal occupational injury and illness rate in Texas has decreased 39 percent since 2005. Overall, Texas' rate continues to be lower than the national rate.

**Figure 14: Texas and U.S. Non-fatal Occupational Injury and Illness Rates per 100 Full-time Employees, Private Sector (2005-2017)**

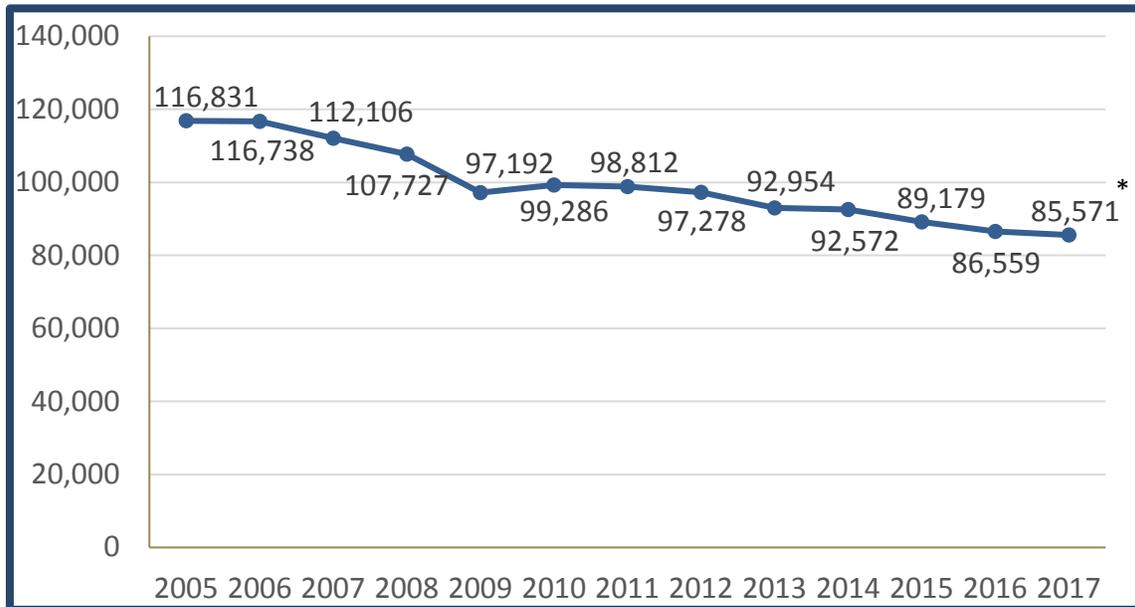


Source: Texas Department of Insurance, Division of Workers' Compensation and U.S. Department of Labor, Bureau of Labor Statistics, Annual Survey of Occupational Injuries and Illnesses, 2017.

Despite the consistent reduction in the non-fatal occupational injury and illness rate in Texas over the past twenty years, the number of fatal occupational injuries in Texas continues to fluctuate. After seeing decreases in 2010 and 2011, Texas recorded an 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. In 2016, there were 545 workplace fatalities in Texas. Transportation incidents continue to be the leading cause of work-related fatalities. In 2016, the industry subsectors in Texas that experienced the highest number of fatal occupational injuries included specialty trade contractors, truck transportation, administrative and support services, support activities for mining, and heavy and civil engineering construction.

The number of workers' compensation claims reported to DWC has also declined since 2005 (a 27 percent reduction). This decline, however, has begun to slow in recent years (see Figure 15). A variety of factors have led to the decline in reported claims nationally and in Texas, including increased safety awareness, enhanced health and safety outreach and monitoring at the federal and state level, technology improvements, globalization, increased use of independent contractors, and possible under-reporting of workplace injuries and illnesses.

**Figure 15: Number of Workers' Compensation Claims Reported to DWC, Injury Years 2005-2017**



Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.

Note: Data updated through June 2018. 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 2017 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.

## MEDICAL DISPUTES CONTINUE TO DECLINE

Previous legislative reforms focused on reducing medical fee and medical necessity disputes between health care providers, injured employees, and insurance carriers by using standardized medical billing forms, documentation requirements, coding requirements, evidence-based treatment guidelines, and the pharmacy closed formulary. In 2001, the Legislature also required medical necessity disputes to be resolved through use of Independent Review Organizations (panels of doctors certified by TDI) instead of having those disputes resolved by DWC staff. Additionally, new DWC rules adopted in 2018 that require compounded drugs to be preauthorized by the insurance carrier before these drugs may be dispensed to an injured employee are also expected to further eliminate disputes regarding the medical necessity of these drugs.

Generally, there are three types of medical disputes raised in the workers' compensation system:

- **fee disputes** (disputes over the application of DWC's fee guidelines or billing requirements);
- **preauthorization/concurrent review disputes**<sup>15</sup> (disputes regarding the medical necessity of certain medical treatments that were denied prospectively or concurrently by the insurance carrier); and
- **retrospective medical necessity disputes** (disputes regarding the medical necessity of medical treatments and services that have already been rendered and billed by the health care provider).

As Table 4 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 2005, DWC received about 13,257 medical disputes, but by 2017 that number

had fallen by 63 percent, to 4,849. 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

Medical disputes have declined  
63 percent from 2005-2017.

guidelines in 2007, and adoption of new professional, inpatient and outpatient hospital and ambulatory surgical center fee guidelines in 2008. Interestingly, DWC did not experience an increase in medical disputes after the implementation of the pharmacy 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 remained relatively stable in recent years.

Along with changes in the volume of medical disputes since the reforms, there have also been changes in the types of medical disputes in the system. Before 2005, 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 preauthorization, most retrospective medical necessity disputes disappeared from the system and the percentage of all medical disputes

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<sup>15</sup> Texas Labor Code §413.014 and 28 Texas Administrative Code §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).

involving preauthorization denials increased. Now, the vast majority of the remaining medical disputes in the system involve fee disputes for non-network or out-of-network medical care.

**Table 4: Number and Distribution of Medical Disputes Submitted, by Type of Medical Dispute (as of April 2018)<sup>16</sup>**

Year Dispute Received	Pre-authorization	Fee Disputes	Retrospective Medical Necessity Disputes	Total
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
2016	20%	80%	Less than 1%	4,960
2017	17%	82%	Less than 1%	4,849

Source: Texas Department of Insurance: Division of Workers' Compensation and Workers' Compensation Research and Evaluation Group, 2018.

<sup>16</sup> 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 the disputes during the appeal process.

The timeliness of resolving medical disputes in the system has also improved over time. In 2005, the system resolved a preauthorization dispute in an average of 59 days, a retrospective medical necessity dispute in an average of 123 days, and a medical fee dispute in an average of 335 days. In 2017, preauthorization disputes were resolved in an average of 18 days, retrospective medical necessity disputes in an average of 20 days, and fee disputes in an average of 67 days.

## **DESIGNATED DOCTOR OPINIONS CONTINUE TO BE A VALUABLE TOOL FOR DISPUTE RESOLUTION**

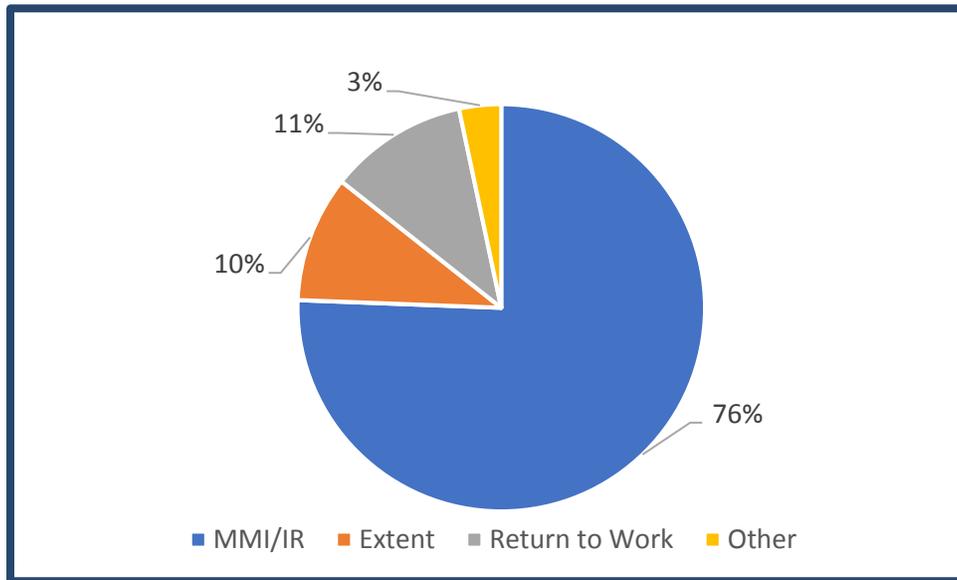
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Designated doctors (DDs) perform an important role in resolving many types of disputes about an injured employee's claim. Through the use of examinations, they can determine the date of an employee's maximum medical improvement (MMI), impairment rating (IR), extent of injury, ability to return to work, and other related issues. Without these expert opinions, the system would potentially have tens of thousands of additional disputes each year to resolve. DWC certifies DDs, who must complete required training and testing, and assigns them examinations based on the doctor's credentials, the injured employee's affected body parts, and the injured employee's diagnosis. Because of their enhanced training and testing, and their role as an independent evaluator, DD opinions have presumptive weight in DWC dispute resolution proceedings.

Because of their enhanced training and testing and their role as an independent evaluator, designated doctor opinions have presumptive weight in DWC dispute resolution proceedings.

Many DD appointments requested by system participants involve assessments of an injured employee's date of MMI and IR, followed by assessments of an injured employee's ability to return to work, and the extent of the employee's injury. Figure 16 provides information for fiscal year 2018; however, this distribution of DD examinations by issue type has remained essentially the same for the last five years.

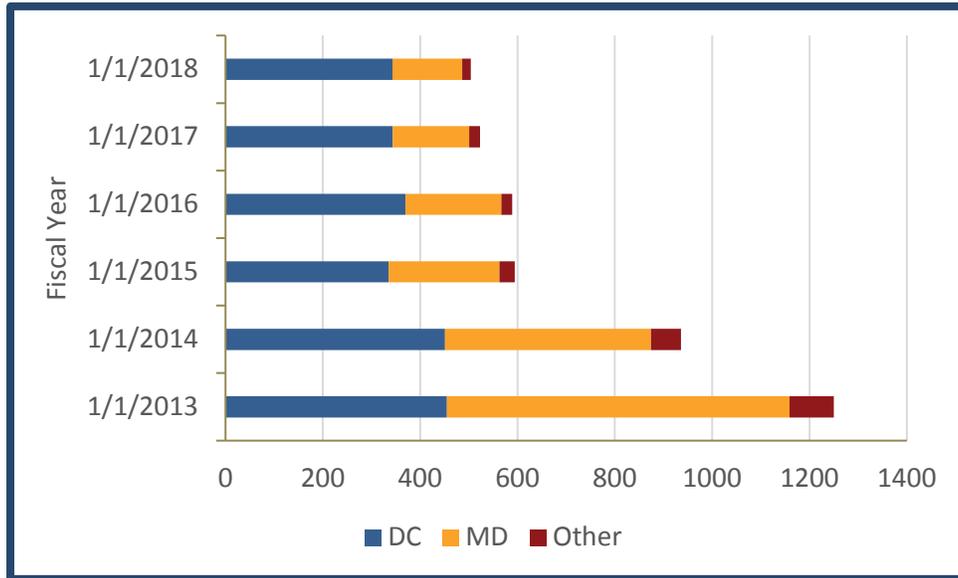
**Figure 16: Distribution of Designated Doctor Appointments by Issue, Fiscal Year 2018**



Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.  
 Note: "Other" includes disability, return-to-work/Supplemental Income Benefits eligibility, and other related issues.

The total number of DDs certified by DWC declined from 1,250 in fiscal year 2013, to 504 in fiscal year 2018 (see Figure 17). This decline was primarily the result of increased designated doctor training and testing requirements authorized by House Bill 2605, 82nd Legislature and adopted by rule in 2012. These enhanced training and testing requirements were designed to improve the quality of DD examinations. However, fewer licensed medical doctors (MDs) and doctors of osteopathy (DOs) now participate in the DD program, which is a concern since these doctors are qualified to evaluate nearly all musculoskeletal and non-musculoskeletal injuries seen in the workers' compensation system. The number of chiropractors (DCs) serving as DDs has also declined, but at a lower rate than MDs and DOs. Despite these declines, in fiscal year 2018 more than 97 percent of injured employees saw a qualified DD in their county of residence, or an adjacent county.

**Figure 17: Number of DWC Certified Designated Doctors by License Type**



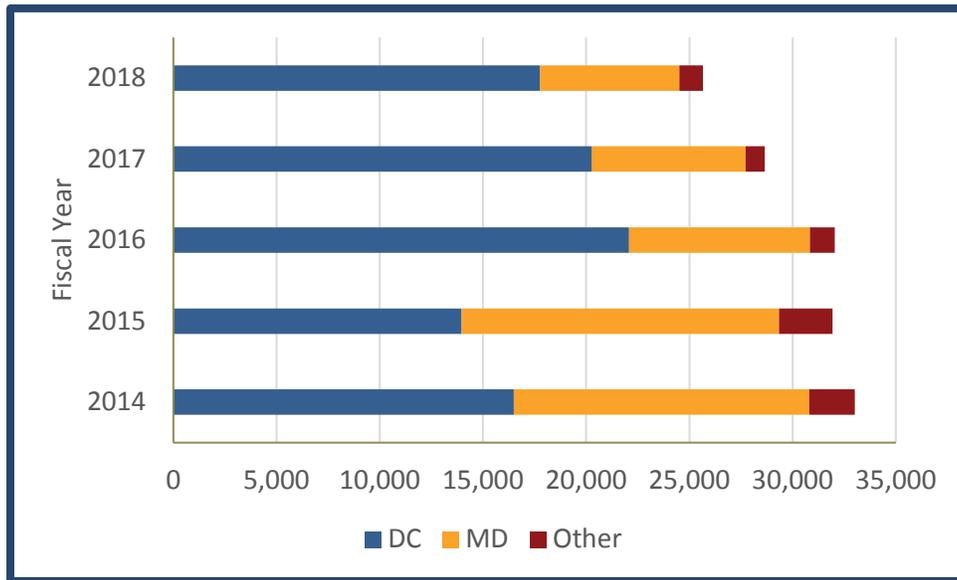
Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.  
 Note: "Other" includes osteopaths and podiatrists.

During the same time frame, however, the number of DD appointments also declined by about 22 percent (from 33,015 appointments in fiscal year 2014, to 25,655 appointments in fiscal year 2018) due

In fiscal year 2014, MDs performed approximately 43 percent of DD examinations, but by fiscal year 2018, MDs only performed about a quarter (26 percent) of these examinations.

to a decrease in the number of workers' compensation claims filed in the system. The distribution of DD examinations by license type has also changed over time, resulting in fewer examinations for MDs and more examinations for DCs. In fiscal year 2014, MDs performed approximately 43 percent of DD examinations, but by fiscal year 2018 MDs only performed about a quarter (26 percent) of these examinations (see Figure 18).

**Figure 18: Distribution of Designated Doctor Appointments by License Type**



Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.  
 Note: "Other" includes osteopaths and podiatrists.

Over time, DWC's methodology for assigning examinations to DDs based on the injured employee's affected body parts and diagnosis produced an unbalanced distribution of assignments among doctors qualified to perform these examinations. To address these concerns, DWC recently adopted new rule amendments that are intended to balance the assignment of examinations to all certified DDs who are qualified to evaluate musculoskeletal areas of the body and provide transparency in the DD assignment process. These rules take effect in December 2018. DWC will continue monitoring the impact of these rules to ensure that an adequate number of qualified doctors remain available to perform these examinations.

## REQUESTS FOR INDEMNITY DISPUTE RESOLUTION DECLINE; MAJORITY OF DISPUTES INVOLVE DESIGNATED DOCTOR OPINIONS

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 4 percent to 8 percent) of workers' compensation claims ever end up in a dispute at DWC (see Table 5).

About 92 percent of claims, are handled without the need for dispute resolution by DWC.

**Table 5: Percentage of Reportable Claims with a Workers' Compensation Dispute Proceeding at DWC by Calendar Year of Injury**

Calendar Year of Injury	Percentage of Claims
2013	8%
2014	8%
2015	8%
2016	7%
2017	4%*

Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, 2018. Data through June 2018.

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 few 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 2017, that number had fallen to 11,712 requests, a 55 percent decrease (see Figure 19).<sup>17</sup>

Along with fewer requests, the number of concluded BRCs also significantly declined since the 2005

The number of benefit review conferences concluded has declined 40 percent since 2005 but increased in recent years due to more designated doctor disputes.

legislative reforms (from about 17,000 BRCs concluded in 2005, to about 10,283 in 2017). Some of this decline can be attributed to a consistent reduction in the number of claims reported to DWC. However, the number of BRCs concluded has fluctuated in recent years (from 10,720 in 2013, to 9,510 in 2015, and then an increase to 10,283 in 2017) due to an increasing number of designated doctor and extent of injury disputes.

If a dispute between an injured employee and an insurance carrier cannot be resolved at the BRC level, then a contested case hearing (CCH) is held. A CCH is a formal administrative hearing where a DWC administrative law judge will hear the case and issue a written decision resolving the disputed issues. While the number of CCHs concluded declined significantly from 2005 to 2011 (from about 7,100 in 2005, to about 4,200 in 2011), the number of CCHs concluded have increased in recent years to about 6,600 in 2017 because of increasing extent of injury and DD disputes, since these types of disputes tend not to resolve at the BRC level.

Since 2011 a higher proportion of the disputes requested at the BRC and CCH levels include issues involving the extent of an employee's injury, the DD's<sup>18</sup> determination regarding the injured

<sup>17</sup> Information regarding the number of BRC requests received by DWC is not available prior to 2009.

<sup>18</sup> DWC appoints DDs to examine injured employees and issue opinions to resolve certain types of questions including, the extent of the employee's injury, the date an injured employee reached MMI, the employee's IR, whether the employee can return to work, and other similar issues. By statute, DD opinions have presumptive weight in DWC dispute proceedings.

employee's date of MMI<sup>19</sup> or the IR assigned to an injured employee's claim by the DD.<sup>20</sup> Increases in these disputed issues coincide with the August 2010 ruling by the Texas Supreme Court in *Transcontinental Insurance Company v. Crump*<sup>21</sup> that described the burden of proof needed to show that a work-related activity was the "producing cause" of the employee's injury, as well as DWC's passage of BRC rules in 2011 that clarified that a BRC must be requested and scheduled in order to stop the statutory 90-day finality of the first valid IR or date of MMI assigned to an injured employee.<sup>22</sup>

There are also many instances where the DD is the first doctor to determine whether an injured employee has reached MMI or has an impairment rating. Therefore, it is often the DD's first MMI date or IR that may become final if it is not disputed within 90 days by either the insurance carrier or the injured employee. Overall, the percentage of disputed issues involving extent of injury or DD opinions remained steady from 2012 to 2016 but increased again in 2017 (see Figure 20).

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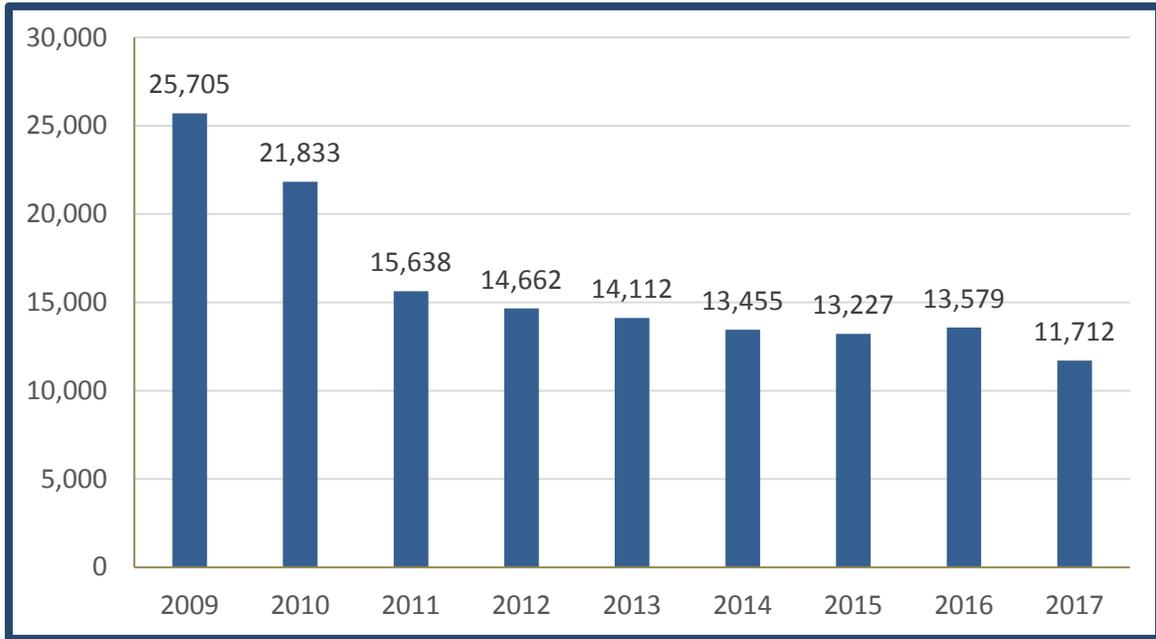
<sup>19</sup> The date of MMI is the earliest of: 1) the date a doctor determines an injured employee has recovered from the work-related injury as much as can be anticipated, or 2) 104 weeks after income benefits began to accrue, with exceptions for spinal surgery.

<sup>20</sup> The IR is the percentage of permanent impairment to an injured employee's body resulting from a compensable injury.

<sup>21</sup> See *Transcontinental Insurance Company, v. Crump*, 330 S.W 3d 211 (Tex.2010).

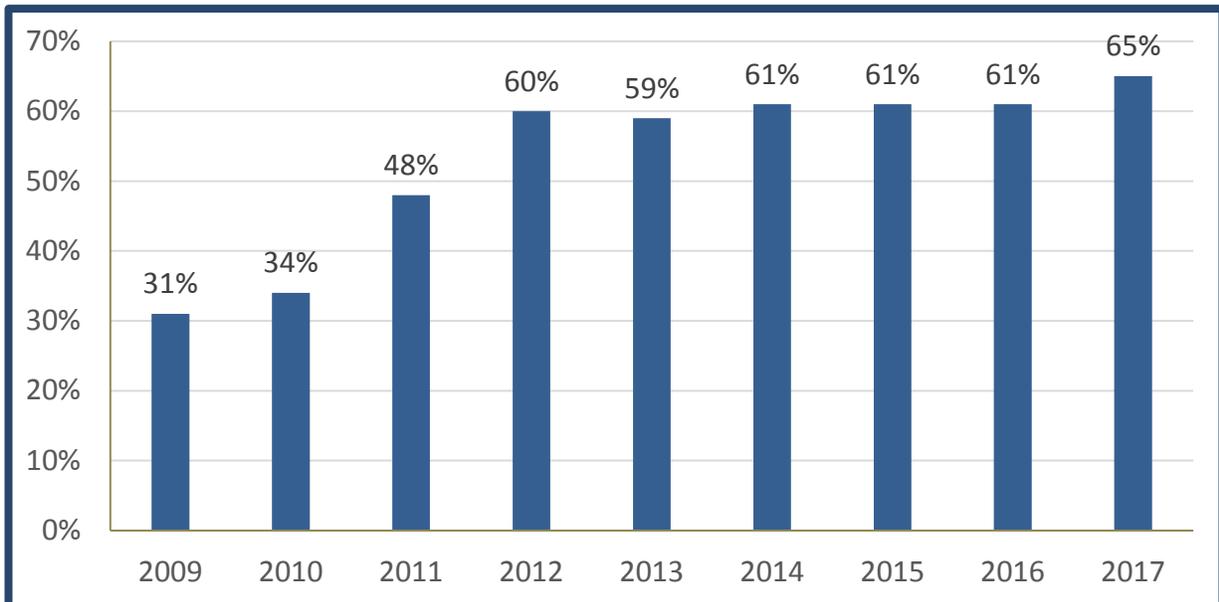
<sup>22</sup> Prior to the 2011 rule, injured employees and insurance carriers would try to stop the statutory 90-day finality of the first IR or date of MMI by submitting a BRC request to DWC and then writing on that request that the party did not want a BRC, which was inconsistent with the statutory intent to dispute the first IR or date of MMI by the 90th day or it would become final.

**Figure 19: Number of BRC Requests Received, 2009-2017**



Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, 2018.

**Figure 20: Percentage of Disputed Issues at the BRC Level Involving Extent-of-Injury, Designated Doctor IR, and Designated Doctor MMI Date, Calendar Year 2009-2017**



Source: Texas Department of Insurance, Division of Workers' Compensation, System Data Report, 2018.

Despite statutory presumptive weight for DD opinions in disputes, increased training and testing requirements, and enhanced monitoring of doctors by DWC, the majority of disputes in the system

involve DD opinions. 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 DD opinions.

## CONCLUDING REMARKS

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Overall, the state of the Texas workers' compensation system is strong. Injury rates, claims, medical costs, income disputes, and medical disputes are down from pre-2005 reform levels, which has resulted in lower insurance rates and more affordable insurance coverage for Texas employers. As a result, more employees have workers' compensation coverage than before the reforms. There are more Texas physicians willing to treat injured employees and timeliness of medical care has improved, which helps return employees back to work after an injury quickly and safely. New DWC rules open the door to improved access to quality medical care for injured employees by eliminating barriers to telemedicine and increasing scrutiny for compounded drugs to ensure that these drugs are safe and medically necessary. Over half of new workers' compensation claims are now treated in certified health care networks, which continue to produce lower medical costs, better return-to-work outcomes, more timely medical care, and better functional outcomes for injured employees.

Texas remains a model for other state workers' compensation systems because of its ability to identify and implement targeted reforms designed to not only reduce system costs, but also improve outcomes for injured employees. Because the system continues to produce favorable results for Texas employers and employees, significant legislative changes to the Texas workers' compensation system are not recommended at this time. DWC puts forth two legislative recommendations for consideration by the 86th Texas Legislature - one recommendation to address an important issue involving injured employees receiving medical care in federal military treatment facilities and another minor cleanup recommendation to eliminate the requirement to file a form with DWC. Additionally, this report highlights an emerging issue that will likely be discussed during the upcoming legislative session - statutory presumptions involving firefighter and EMT cancer claims.

## DWC LEGISLATIVE RECOMMENDATIONS

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### ELIMINATE OBSOLETE REPORTING REQUIREMENT

**RECOMMENDATION:** Amend Texas Labor Code §406.145 (f) to remove the requirement for hiring contractors to file the DWC Form-84, *Exception to Application of Joint Agreement for Certain Building and Construction Workers*, with DWC. This form will continue to be sent to the hiring contractor's insurance carrier and will be available to DWC, if requested.

**ISSUE:** The recommendation eliminates an unnecessary reporting requirement to DWC. DWC accepts and stores the DWC Form-84 but does not use it to make decisions or process claims. Eliminating this reporting requirement will help clarify DWC's statutory responsibilities and allow system stakeholders and DWC to reallocate resources to more meaningful obligations.

**BACKGROUND:** HB 2112 from the 85th Legislature made several changes to Labor Code, Chapter 406 to eliminate obsolete reporting requirements. The bill amended or repealed several sections across the Labor Code, including requirements for hiring contractors to submit copies of DWC Form-83, *Agreement for Certain Building and Construction Workers*, to DWC. As part of DWC's rulemaking efforts to implement HB 2112, DWC has also eliminated previous rule and form requirements for general contractors and motor carriers to file DWC Form-81, *Agreement Between General Contractor and Sub-Contractor to Provide Workers' Compensation Insurance*, DWC Form-82, *Agreement for Motor Carriers and Owner Operators*, and DWC Form-85, *Agreement Between General Contractor and Subcontractor to Establish Independent Relationship*.

## ADDRESS BILLING AND REIMBURSEMENT REQUIREMENTS FOR MEDICAL CARE PROVIDED TO INJURED EMPLOYEES IN FEDERAL MILITARY TREATMENT FACILITIES

**RECOMMENDATION:** Create a new section in Texas Labor Code, Chapter 413 that would provide a definition of “federal military treatment facility” and would clarify that medical care provided in these facilities is exempt from certain workers’ compensation-specific statutory requirements in Labor Code Chapters 408, 413, and 504 relating to medical billing and reimbursement, as well as network requirements in Texas Insurance Code, Chapter 1305. This recommendation would address the issue of injured employees being balance-billed when receiving medical care at military treatment facilities.

DWC currently has the statutory authority to adopt rules that would alleviate some of the medical bill denials and reductions by insurance carriers. However, there are certain statutory medical billing and utilization review defenses that insurance carriers could assert when processing medical bills from federal military treatment facilities that DWC cannot waive through rulemaking.

**ISSUE:** Federal military treatment facilities, such as Brooke Army Medical Center (BAMC) in San Antonio currently accept and treat civilians, generally on an emergency basis. BAMC is the only Level I trauma center in the Department of Defense Military Health System and is only one of two Level I trauma centers in Bexar County. As a result, BAMC provides medical care for trauma patients, including injured employees, and bills for that medical care in accordance with federal requirements. As a federal military treatment facility, BAMC requires full reimbursement of all its charges and does not recognize state workers’ compensation statutory or regulatory requirements that impose certain billing or utilization review requirements on health care providers, or limit reimbursement consistent with DWC’s adopted medical fee schedules. Consequently, when workers’ compensation insurance carriers have denied or reduced payment for medical care provided by BAMC in accordance with state law, BAMC has balance billed injured employees directly and pursued federal debt collection actions through the Department of the U.S. Treasury against some injured employees. This federal debt collection in some cases has included garnishment of injured employees’ tax refunds or Social Security benefits.

**BACKGROUND:** Workers' compensation is a state-regulated system that provides medical and income benefits to employees who are injured on the job. The basic premise underlying all state workers' compensation systems (often referred to as the "grand bargain") is that workers' compensation provides injured employees with benefits that are statutorily defined at no cost (i.e., no copayments or deductibles), and in return, employers receive protection from most lawsuits. Thus, workers' compensation benefits become the employee's "exclusive remedy" against their employer in the case of a work-related injury or illness. Additionally, Texas law (Labor Code §413.042) prohibits health care providers from billing (or balance-billing) injured employees directly for medical care they received because of a work-related injury or illness. In the Texas workers' compensation system, health care providers may request dispute resolution with DWC if they were denied payment or underpaid by an insurance carrier.

Federal military treatment facilities, such as BAMC, do not typically treat injured employees outside of a medical emergency, but when they do, federal law requires that they be paid their full billed charges, which are governed by the U.S. Department of Defense. These facilities also follow federal medical billing requirements, which conflict with state workers' compensation statutory and regulatory health care billing requirements. In return, workers' compensation insurance carriers have argued that these facilities should be paid reimbursement rates that are consistent with DWC's adopted medical fee schedules and that their bills should be subject to the same medical billing and utilization review requirements in the Texas workers' compensation system.

The balance billing of injured employees by BAMC has increased in recent years partially due to a Department of Defense, Inspector General audit report from August 13, 2014, which identified the BAMC Uniform Business Office as having a poor record for collecting on delinquent medical service accounts. The result of this audit led to more aggressive collection efforts from BAMC.

DWC data show that between January 1, 2015, through July 31, 2018, approximately 666 injured employees received health care services at BAMC, which resulted in an estimated 4,731 medical bills. These medical care services resulted in approximately \$25.3 million in charges to insurance carriers who paid about \$13.3 million for these services (or 53 percent of what was charged by BAMC). It's not clear whether BAMC intends to pursue all of these additional charges, but DWC has seen an uptick in

complaints from injured employees who have received balance bills from BAMC or had their debt turned over to the Federal Treasury. To resolve these complaints from injured employees, DWC has been contacting insurance carriers on individual claims to try and secure additional payments, but generally at this point injured employees have already received balanced bills from BAMC or had their debt turned over to the Federal Treasury.

DWC has met with BAMC officials several times over the past year to gather information from them. BAMC has made it clear to DWC that they will not participate in DWC's medical dispute resolution process to dispute reductions or denials in medical bills by insurance carriers because any decision rendered by DWC could be appealed to the State Office of Administrative Hearings (SOAH) and then subsequently to state district court. To resolve these complaints from injured employees, DWC has been contacting insurance carriers on individual claims to try and secure additional payments, but generally at this point injured employees have already received balance bills from BAMC or had their debt turned over to the Federal Treasury.

## **EMERGING ISSUE: FIREFIGHTER AND EMT CANCER PRESUMPTION**

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A current issue facing the Texas workers' compensation system is how to process certain firefighters' and emergency medical technicians' (EMTs) workers' compensation claims when these claims involve cancer. Under Texas Government Code, Chapter 607, Subchapter B, "[a] firefighter or emergency medical technician who suffers from cancer resulting in death or total or partial disability is presumed to have developed the cancer during the course and scope of employment" if the firefighter or EMT meets certain criteria. For the purposes of this statutory presumption, a cancer is known to be associated with firefighting or exposure to heat, smoke, radiation, or a known or suspected carcinogen if it is "a type of cancer that may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen as determined by the International Agency for Research on Cancer" (also known as IARC). IARC is an international organization that compiles research and statistics to identify the causes of cancer for prevention purposes. Texas Government Code, Chapter 607 also creates similar rebuttable presumptions for firefighters and EMTs with other occupational diseases, including heart attacks and strokes, tuberculosis and other respiratory diseases, and smallpox or other diseases for which immunization is possible.

Some system participants have expressed concern about the frequency at which these cancer claims are being initially denied, while others are concerned about the potential cost that these cancer claims pose to political subdivisions. As most firefighters and EMTs are employed by political subdivisions, the denials are mainly coming from individually self-insured cities or municipalities, or political subdivisions that are part of larger intergovernmental risk pools. At times, political subdivisions have interpreted the IARC information to argue that only three types of cancer: prostate, testicular, and non-Hodgkin's lymphoma, qualify for the statutory presumption under Texas Government Code, Chapter 607. Firefighters, EMTs, and their beneficiaries argue that any cancer that can be tied to on-the-job exposures documented by IARC are presumed to be work-related. As a result, the statutory presumption language in Texas Government Code, Chapter 607 is interpreted in different ways by different parties in the workers' compensation system.

Between January 1, 2012, and October 31, 2018, political subdivisions reported 168 cancer claims by firefighters and EMTs to DWC. Of these reported claims, 146 have been denied by the insurance carrier

(see Table 6). In most of these cases, the insurance carrier asserted that the statutory presumption did not apply either because of the type of claimed cancer or because of other issues like the injured employee's prior tobacco use, duration of employment as a firefighter, and whether or not the duties performed by the injured employee qualify for the statutory presumption. Once an insurance carrier has determined that the statutory presumption does not apply to a cancer claim, the insurance carrier will generally deny the claim entirely. Few of these claim denials (approximately 30) have been disputed. While each claim dispute is handled by DWC on a case-by-case basis, DWC has not interpreted the statutory presumption to only apply to three types of cancer. DWC also takes into consideration the IARC's analysis of a broader set of cancers which may be caused by exposure to heat, smoke, radiation, or a known or suspected carcinogen. Several of these DWC dispute decisions have been appealed to district court; however, to date, all cases remain pending.

Additionally, Texas Labor Code §409.022 requires the insurance carrier to include specific information on any claim denial that is subject to the Texas Government Code, Chapter 607 statutory presumption. DWC is currently in the process of reviewing all notices of claim denials to ensure they meet the statutory requirements.

**Table 6: First Responder Workers' Compensation Claims Reported to DWC, Injury Years 2012-October 2018**

Injury Year	Number of Claims	Number of Claims Denied by Insurance Carrier	Number of Claims Where Denial Was Disputed
2012	16	13	3
2013	13	10	7
2014	14	12	4
2015	23	19	5
2016	35	33	7
2017	24	24	2
2018	43	35	2
<b>Total</b>	<b>168</b>	<b>146</b>	<b>30</b>

Source: Texas Department of Insurance, Division of Workers' Compensation, 2018.

Notes:

- First responder claims include claims where incident North American Industrial Classification Code = 621910, 922120, 922130, 922140, 922150, 922160, 922190, and 921190.
- Includes claims where the first report of injury from the insurance carrier specified the nature of injury as cancer.