

2018 Annual Report:

Advisory Council on Workers' Compensation and Occupational Disease Disablement

Presented to:

The Honorable Michelle Lujan
Grisham, Governor

The Honorable John. G. Franchini,
Superintendent of Insurance

and

Senate President Pro - Tempore

Speaker of the House

Senate Majority Floor Leader

House Majority Floor Leader

Senate Minority Floor Leader

House Minority Floor Leader

Chair, Senate Finance Committee

Chair, Senate Judiciary

Chair, Senate Corporations and

Transportation Committee

Chair, House Appropriations and

Finance Committee

Chair, House Business & Industry

Committee

Chair, House Judiciary



Submitted by:

James Magoffe, Chair

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Annual Report of the Advisory Council on Workers' Compensation and Occupational Disease Disablement - 2018

The Advisory Council on Workers' Compensation and Occupational Disease Disablement is a statutory body created by the Workers' Compensation Law of New Mexico. Members are appointed by the Governor to represent both employers and workers. Our duty is to report annually to the Governor and Legislature concerning the state of the workers' compensation system and to make recommendations regarding rules and legislation.

Mission

The mission of the Advisory Council on Workers' Compensation and Occupational Disease Disablement is:

- to monitor the performance of the workers' compensation and occupational disease and disablement system;
- to make recommendations to the Governor, Legislature, regulatory agencies and participating industries, related to the adoption of rules and legislation and the method and form of statistical data collections;
- to ensure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers.

Council Members

The Council currently has six appointed members. The Director of the Workers' Compensation Administration serves as an ex officio, non-voting member. The Council is made up of three representatives from labor and three representatives from the business community.

Status of the Workers' Compensation Administration

The New Mexico Workers' Compensation Administration (WCA) has been fully engaged to meet its primary goal of making a better workplace for New Mexico through responsive and effective services. The WCA's mission is: *To assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers.*

2018 Legislative Efforts

House Bill 82 – REDUCE QUARTERLY WORKERS' COMPENSATION FEE

Sponsored by Rep. Randal S. Crowder (R-Curry) HB 82 attempted to reduce the workers' compensation assessment fee by covered employees from \$2.00 per quarter to \$1.50 per quarter. HB 82 would not change the assessment fees paid by covered employers (currently \$2.30 per quarter per employee). The bill attempted to further restrict the use of money in the workers' compensation administration fund by adding the words "and only" in the following sentence of NMSA 52-5-19: "Expenditures shall be made from this fund on vouchers signed by the Director *and only* for the necessary expenses of the workers' compensation administration."

House Joint Memorial 5 –STUDY NATIONAL TRENDS IN NEW MEXICO WORKERS' COMPENSATION ISSUES

Also sponsored by Rep. Crowder, the memorial asked the Workers' Compensation Administration to commission an independent study on national trends in workers' compensation issues. The memorial would have also required the WCA to commission follow-up studies on national trends every five years and report the findings to the Legislative Finance Committee.

Neither proposal advanced during the Session, dying in committee.

Reallocation of Funds

Over the last 10-plus years, nearly \$30 million has been transferred out of the WCA to other agency funds (according to WCA audited financial statements, 2005-2016). The Council continues to oppose the issue of reallocating funds taken from the workers' compensation assessment, which is supposed to be for purposes of funding the workers' compensation system. In Fiscal Year 2018, \$1.5 million was transferred to the New Mexico Department of Workforce Solutions (DWS), with an additional \$1.25 to be transferred to DWS in FY 2019, as indicated in the budget passed by the New Mexico Legislature. (*Source: NM WCA 2018 Annual Report*). In FY 2017, legislative transfers included \$1.5 million to DWS, and \$8.75 million to the State General Fund. In FY 2016, the WCA was directed to transfer \$2,048,200 dollars from its operational budget to the Department of Workforce Solutions (DWFS), representing an increase of \$1,148,200 over the transfer in FY 2015. (*Source: NM WCA 2017 Annual Report*).

The Advisory Council stands firm in its belief the fund should be exclusively reserved and not be diverted from its intended purpose to support the workers and employers of New Mexico through the Workers' Compensation Administration. These funds are raised through assessments on workers and employers and the Council feel strongly the money should stay with WCA for the betterment of both workers and employers. While we understand that at the start of the recession it may have been necessary, this should have been a temporary necessity. We respectfully request that these transfers stop this next budget year.

2019 Legislative Initiatives

The Advisory Council hosted a public forum to discuss workers comp issues in September that was very well attended by practitioners from all aspects of work comp. The panel included a workers'

comp practitioner, William Ritchie, M.D.; a workers comp judge, Hon. Shanon Riley; New Mexico Sen. Jacob Candelaria (D-Albuquerque); a worker's representative, attorney Bob Scott; and New Mexico Mutual Claims Manager Dan Giralmo, representing business interests.

Major topic issues discussed were:

- a. Lack of health care providers (HCP) that accept work comp cases in the state;
- b. Excessive litigation regarding selection of HCP (NMSA §52-1-49);
- c. Constraints on communication regarding medical information on injured worker between HCP and adjusters;
- d. Timely resolution of minor medical disputes;
- e. Impact of opioid use/overuse on workers comp system;
- f. Carriers' right of reimbursement from at-fault third parties (subrogation); and
- g. Bad faith penalties

Some of these issues and/or concerns may be addressed and corrected through rules and/or legislation. A report from a forum participant is attached as an addendum to our full annual report.

Independent Study of Disability Benefits in the New Mexico Workers' Compensation System

The New Mexico Workers' Compensation Administration, with the full endorsement of the Advisory Council, is in the early stages of an independent study which hopes to address the following question: How can we improve the way we calculate and compensate permanent disability for workers' compensation in New Mexico to result in easier-to-understand, more consistent benefit amounts without significantly raising system-wide costs? The complete study should:

- Evaluate permanent disability compensation statutes and rules, benefit methodology and costs of permanent disability benefits in New Mexico, and compare the New Mexico benefit structure, including the impact of loss of use percentages and modifier points, as well as claimant demographics and wage loss, with a cross section of at least four other US jurisdictions;
- Evaluate permanent disability (PD) benefit levels based on wage loss and in relation to permanent disability benefits provided by other comparable US jurisdictions;
- Determine how the American Medical Association (AMA) Guides affect the permanent disability benefit structure in New Mexico, particularly how it affects disability payments over time between similar workers with similar work-injury conditions; and
- Compare the current benefit structure for scheduled injury benefits (including loss of use component as assigned by workers' compensation judges) to whole body benefits, and address the likely effect of eliminating scheduled injury provisions on system costs overall.

The Council plans to await completion of the independent third-party system study prior to putting forth any related legislative proposals.

New Mexico Workers' Comp Rating

New Mexico workers' compensation premium rate ranking improved over the past two years, according to a study published by the Oregon Department of Consumer and Business Services. The study is published in even numbered years. The study analyzes the premium rate rankings of all 50 states and

the District of Columbia. The study released this fall ranked the state 34th highest, meaning that New Mexico employers in the voluntary market on average pay the 34th highest workers' compensation premium rates in the nation. According to the 2018 study, only 16 states and the District of Columbia have lower premium rates than our state. New Mexico's workers' compensation system ranked 20th in both the 2016 and 2014 studies. Less expensive states rank higher, and costlier states rank lower, hence a higher number is a better ranking. The drop from 20th to 34th is a good thing. It means that New Mexico employers are paying less expensive workers' compensation premiums now than just two years ago.

In Oregon's 2000 report, New Mexico's rating was far better at 42, and we've slipped over time. We understand that there are a variety of circumstances that contribute to these ratings such as lost cost, etc. But we also acknowledge that with your help we have passed several important laws over the last several years, which we hope have improved the state's workers' compensation system, and may have therefore had a significant impact on this rating.

Workers Compensation Advisory Council and Director Appointments

The Workers' Compensation Act requires that the Advisory Council on Workers' Compensation and Occupational Disease Disablement consist of three employer representatives and three worker representatives to: (1) make recommendations relating to the adoption of rules and regulation; (2) make recommendations regarding the method and form of statistical data collections; and (3) monitor the performance of the workers' compensation and occupational disease disablement system in the implementation of legislative directives. It is important that appointments to the Workers' Compensation Advisory Council comply with the Workers' Compensation Act in identifying qualified leadership and in maintaining the essential balance between employer and worker interests to ensure the long-term integrity of the Workers' Compensation System for New Mexico.

The Workers' Compensation Act requires the appointment of a Director of the Workers' Compensation Administration to a term of five years with the consent of the Senate, on the basis of administrative ability, education, training and experience relevant to the prescribed duties of the office. It is important that the appointment of the Director of the Workers' Compensation Administration be a qualified leader to carry out the public policy purpose of the Workers' Compensation Act to administer and enforce the Workers' Compensation Act and "...to provide a workers' benefit system ...to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers."

Thank you and Congratulations

Lastly, we would like to extend our appreciation to outgoing WCA Director Darin A. Childers. The Council members have worked closely with Childers during the past five years and have found him to be personable, professional and knowledgeable regarding the state's workers' comp system.

Additionally, we would like to congratulate Governor-elect Michelle Lujan Grisham. We understate that these transitions entail a lot of work, and we are ready to assist when it comes to continuing a great workers compensation environment in New Mexico.

Conclusion

The New Mexico Workers' Compensation Administration is stable at this time. We, the members of the Advisory Council on Workers' Compensation and Occupational Disease Disablement are dedicated to remaining responsive to the dynamic challenges of the overall system.

This report was approved by via email communication on December, 20, 2018.

Respectfully submitted:

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ADDENDUM

New Mexico Workers Compensation System Issues

The following issue areas were identified at the Workers' Compensation Advisory Council Forum on September 18, 2018. The discussion panel consisted of the following individuals:

- William Ritchie, MD, Board Certified Orthopedic Surgeon;
- Shannon Riley, Workers' Compensation Administration Judge;
- Jacob Candelaria, State Senator and Defense Attorney;
- Robert Scott, Plaintiff Attorney;
- Dan Giralmo, Claims Director, New Mexico Mutual; and

1. Healthcare Provider Access.

- a. **Issues.** Panelists discussed the lack of health care providers willing to treat injured or disable workers under the Workers' Compensation System in New Mexico for the following identified reasons:
 - i. Relative lower reimbursement rates, as compared to private insurance health insurance;
 - ii. Longer appointment times;
 - iii. Additional overhead to administer workers' compensation claims; and
 - iv. New Mexico does not permit health care providers to pass-on Gross Receipts Tax (GRT) under the Workers' Compensation System, resulting in an estimated 7% cut to health care provider billings.
- b. **Comments.** Any legislative or regulatory proposals related to healthcare provider access under the Workers' Compensation System should be substantiated by supporting data or trends and legal research (New Mexico and other states). Specifically, cost and efficiency impacts on the Workers' Compensation System should be clearly understood. The Workers' Compensation Administration might complete and leverage its study of the statutory benefits of the Workers' Compensation System in New Mexico to identify legislative or regulatory solutions.

2. Initial HCP Selection Time Frames

- a. **Current Law.** The New Mexico Workers' Compensation Act provides that an employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection, which shall be in effect during

- the first 60-days from the date the worker receives treatment from the initially selected health care provider.¹
- b. **Issues.** It has been proposed that the initial selection period should be increased from 60 to 90 days.
 - c. **Comments.** Any legislative proposals related to initial selection period of a health care provider under the Workers' Compensation Act must be substantiated by supporting data or trends and legal research (New Mexico and other states). It must also be clear whether such legislation would impose unwarranted costs, inefficiencies, or litigation to the Workers' Compensation System in contravention of the public policy purpose of the Workers' Compensation Act.

3. Communication & Exchange of Medical Information with Health Care Providers

- a. **Current Law.** The Workers' Compensation Act currently requires:

“A health care provider to immediately release to a worker, that worker’s employer, that employer’s insurer, the appropriate peer review organization or the health care selection board all medical records, medical bills, and other information concerning any health care or health care service provided to the worker upon either party’s written request to the health care provider for that information. Except for the those records directly related to any injuries or disabilities claimed by a worker for which that worker is receiving benefits from his employer, the request shall be accompanied by a signed authorization for that request by the worker.”²
- b. **Issues.** Since 1986, New Mexico case law has deviated from other states in imposing significant restrictions on the exchange of claim-related medical information between health care providers and employer-insurers including claims adjusters and medical case managers.³ These case decisions have introduced significant costs and inefficiency into the Workers' Compensation System, in addition to increased litigation, legal costs, and allegations of unfair claims-processing and bad faith.
- c. **Comments.** New Mexico should consider legislation to assure the necessary and appropriate exchange of claims-related medical information between health

¹ Workers' Compensation Act, NMSA 1978, §52-1-49(B).

² Workers' Compensation Act, NMSA 1978, §52-10-1.

³ *Church's Fried Chicken No. 1040 v Hanson*, 114 N.M. 730; 845 P.2d 824; 1992 N.M. App. LEXIS 134 (N.M. Ct. App. 1992), cert denied 114 N.M. 577; 844 P.2d 827; 1993 LEXIS 1 (N.M. 1993); *Yocum v. BJ Services Co.*, 2011 N.M. App. Unpub. Lexis 237 (*Church's* applies to both written and oral communications); *Gomez v. Nielson Corp*, 119 N.M. 670 (N.M. 1995)(*Church's* applies to medical case management and third party administrator situations).

care providers and employer-insurers to enhance the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers, consistent with other State systems. Such legislation would also support return-to-work solutions, while minimizing litigation, legal costs, and liability under the Workers' Compensation System. It may also minimize costs associated with over-reliance and utilization of Independent Medical Examinations or the deposition of treating healthcare providers. At the regulatory level, the Workers' Compensation Administration might reach out to UNMH, Presbyterian, and Lovelace to amend the standard medical release/authorization to permit the efficient exchange of claim-related medical information between health care providers and workers' compensation benefits payers. The Workers' Compensation Administration should also review and update, as necessary, the WCA Form Letter to Health Care Provider to permit the efficient exchange of claim-related medical information between health care providers and workers' compensation benefits payers.

4. Health Care Service and Billing Disputes

- a. **Current Law.** The New Mexico Workers' Compensation Act requires the WCA to establish a system of peer group utilization review of selected outpatient and inpatient health care provider services to workers claiming benefits under the Act, the decisions of which shall be binding on affected health care providers, workers, employers, insurers, and their representatives.⁴
- b. **Issues.** To date, the Workers' Compensation Administration has not promulgated regulations to administer and implement a Utilization Review system to appropriately resolve disputes over the necessity, appropriateness, efficiency, and quality of health care services provided to injured or disabled workers based upon medically accepted standards and an objective evaluation of the health care services provided.⁵
- c. **Comments.** New Mexico has not been as successful as other states in assuring the affordability, access, and quality of health care services to injured or disabled workers pursuant to medically accepted standards such as evidence-based guidelines or formularies, or adoption of uniform medical billing standards (e.g., CMS-Based Methodologies). In addition, there is no process for resolving minor issues involving health care services (e.g., the need for an MRI) without the need for excessive due process or a formal administrative trial. The current law in New

⁴ Workers' Compensation Act, NMSA 1978, §52-4-2(A).

⁵ Workers' Compensation Act, NMSA 1978, §52-4-2(B).

Mexico prohibits any contact between the E/I and the health care provider, leading to unnecessary delays in obtaining medical care and obtaining information to move claims forward. In summary, there may be opportunities to modernize and improve the Workers' Compensation System to not only safeguard financial integrity, but also maximize medical rehabilitation outcomes and return-to-work solutions.

5. Opioid Impacts.

- a. **Issues.** The National Council on Compensation Insurance ("NCCI") has reported that injured workers who were prescribed at least one prescription in 2016 received three times as many opioid prescriptions as the US opioid prescribing rate.⁶ However, it is not clear what the specific impacts of opioid prescriptions are to the Workers' Compensation System in New Mexico.
- b. **Comments.** New Mexico needs to understand the impacts of opioid prescriptions to the Workers' Compensation System in terms of costs and the maximization of medical rehabilitation outcomes and long-term health of injured or disabled workers. Any legislative or regulatory proposals related to opioid prescriptions and the Workers' Compensation System should be substantiated by supporting data or trends and legal research (New Mexico and other states). The Workers' Compensation Administration might complete and leverage its study of the statutory benefits of the Workers' Compensation System in New Mexico to identify legislative or regulatory solutions.

6. Subrogation.

- a. **Current Law.** The Workers' Compensation Act grants an injured or deceased worker the right, who receives compensation benefits under the Workers' Compensation Act, to pursue a tort action for payment or damages caused by the negligence or wrong of a non-employer third party.⁷ The receipt of any statutory compensation paid by the employer or insurer under the Workers Compensation Act operates as an assignment to reimburse the employer-insurer to the extent of the statutory compensation benefits paid or to be paid to an injured or deceased worker under the Workers' Compensation Act.
- b. **Issues.** An employer-insurer's right to subrogation is limited as a derivative right of the injured or deceased worker. This means that an employer-insurer cannot independent pursue subrogation if the injured or deceased worker fails to pursue a tort action against a third-party tortfeasor. As a result, neither reimbursement for statutory compensation benefits paid or to be paid by an employer-insurer under

⁶ https://www.ncci.com/Articles/Pages/II_OnOpioids-Doctors.aspx

⁷ Workers' Compensation Act, NMSA 1978, §52-5-17; see also *Gutierrez v. City of Albuquerque*, 1998-NMSC-027.

the Workers' Compensation System nor other payment or damages to be paid to the injured or deceased worker often cannot be obtained.

- c. **Comments.** New Mexico should consider legislation, similar to states like Arizona or Minnesota that assigns any claims from the injured or deceased worker to the employer-insurer, if a tort action has not been brought within one year by the injured or deceased worker. This would permit employer-insurers to independently pursue potential recovery of workers' compensation coverage expenditures from third party tortfeasors. Injured or deceased workers would retain the ability to receive the excess payment and damages. Such legislation would support the financial integrity of the System, benefit injured workers, and minimize adverse impacts to premium rates incurred by employers in New Mexico.

7. Bad Faith Penalties

- a. **Current Law.** The New Mexico Workers' Compensation Act currently permits allegations of unfair claim-processing or bad faith to be filed with the WCA. If unfair claim-processing or bad faith is found to have occurred, the claimant is to be awarded, in addition to benefits due and owing, a benefit payment not to exceed 25% of the benefit amount ordered to be paid.⁸ If a history or pattern of unfair claim-processing or bad faith is found, then the WCA may impose a civil penalty of up to \$1,000 to be depositing in the Workers' Compensation Administration Fund.⁹
- b. **Issues.** During the 2017 Legislative Session, House Bill 359 was introduced that, in relevant part, had two proposals related to the statutory provision on unfair claims processing and bad faith penalties. The first proposal was to increase the civil penalty from \$1,000 to \$5,000. The second proposal was to add a new subsection that permitted legal remedies for unfair claims-processing or bad faith to be brought under common law or statute, beyond the Workers' Compensation Act.
- c. **Comments.** Any legislative proposal related to unfair claims-processing and bad faith penalties under the Workers' Compensation Act must be substantiated by supporting data or trends and legal research (New Mexico and other states). It must also be clear whether such legislation would erode the Exclusive Remedy or impose unwarranted costs or inefficiencies to the Workers' Compensation System in contravention of the public policy purpose of the Workers' Compensation Act.

⁸ Workers' Compensation Act, NMSA 1978, §52-1-28.1(A)-(B).

⁹ Workers' Compensation Act, NMSA 1978, §52-1-28.1(C).