



**Joint Select Committee  
on  
Workers' Compensation Insurance**

**A Report to the 71st Texas Legislature**

*Approved in Austin, Texas  
December 9, 1988*

---

**Joint Select Committee**  
**on**  
**Workers' Compensation Insurance**

---

**Senator Bob Glasgow**  
*Co-Chair*  
*Stephenville*

**Representative Richard Smith**  
*Co-Chair*  
*Bryan*

**Senator Kent Caperton**  
*Bryan*

**Representative David Cain**  
*Dallas*

**Senator Cyndi Krier**  
*San Antonio*

**Representative Robert Earley**  
*Portland*

**Senator John Montford**  
*Lubbock*

**Representative Alex Moreno**  
*Edinburg*

**Senator Frank Tejada**  
*Austin*

**Representative Rick Perry**  
*Haskell*

---

**Advisory Panel**

---

**Willie Chapman**  
*Legislative & Political Director*  
*AFL-CIO*  
*Austin*

**Robert S. Reeder**  
*Manager, Loss Control, Safety & Health*  
*Trees, Inc.*  
*Houston*

**E. K. "Red" Hayse**  
*President*  
*Transport Worker's Union Local 513*  
*Grapevine*

**Jim Sutton**  
*Regional Personnel Manager*  
*Levi Strauss & Co.*  
*San Antonio*

**Gale E. Van Hoy**  
*President*  
*Houston Gulf Coast Building and*  
*Construction Trades Council*  
*Houston*

**Rodgers Ellis**  
*President*  
*R.E.E., Inc.*  
*DBA/McDonald's Restaurant*  
*Beaumont*

---

**Committee Staff**

---

**Pamela R. Beachley**  
*General Counsel*

**Bobby Gierisch**  
*Executive Director*

*Interns:*

**Lisa Berlinger**

**Patricia Hall**  
*Administrative Assistant*

**John Hawkins**

**Tommy Weigel**  
*Research Analyst*

**Marlene Miller**

**Paul Roberts**

---



The Joint Select Committee  
on  
Workers' Compensation Insurance

SENATOR BOB GLASGOW  
REPRESENTATIVE RICHARD SMITH  
Co-Chairs

January 10, 1989

The Honorable William P. Hobby, Jr.  
The Honorable Gibson D. Lewis  
Members of the 71st Legislature

Ladies and Gentlemen:

In accordance with House Concurrent Resolution 27, adopted by the 70th Legislature in its second called session, we are pleased to submit this final report of the Joint Select Committee on Workers' Compensation Insurance.

1988 was the 75th anniversary of the Texas workers' compensation law. During that year the Committee, its advisory panel, and staff worked tirelessly to fulfill your mandate to collect, synthesize, comprehend, and analyze information about this complex and ill-understood system. This effort and the body of research it produced are unparalleled in the history of our act. The studies form an objective basis for understanding the workers' compensation system and, more importantly, for the legislative corrections it urgently requires.

This report contains a synopsis of the Committee's work and highlights the findings and recommendations of our consultant and staff studies. The report was approved by a unanimous vote on December 9, 1988, and we commend it to you for your earnest consideration.

Respectfully,

  
Senator Bob Glasgow  
Co-Chair

  
Representative Richard Smith  
Co-Chair

---

## Acknowledgements

---

*A project of the scope and detail of the work of the Joint Select Committee on Workers' Compensation Insurance does not succeed without the active assistance of groups and individuals too numerous to name. Any attempt to acknowledge the contributions of individuals risks important omissions. However, the failure to recognize the efforts of others and to extend a word of thanks would be an even greater omission.*

*The members and staffs of the Industrial Accident Board and the State Board of Insurance have readily provided every form of assistance and cooperation requested. More than that, they have supported the Committee by and through a desire to understand the workers' compensation system and to assist in correcting its flaws. Special recognition is due Scott McAnally, John Edmondson, Jeanette Montizouris, Susan Butterick, and the data processing staff of the Industrial Accident Board. Special thanks are due to Dixie Evatt, David Eley, Nancy Moore, and Gaylon Daniel of the State Board of Insurance.*

*The Texas Research League deserves a particular word of thanks for assisting the Committee with its research of selected insurance issues. The product of the League's efforts, An Examination of Selected Insurance Issues in the Texas Workers' Compensation System, is a critical contribution to the overall research effort.*

*The members of the Committee's advisory panel gave unselfishly of their time, talents, and expertise to help us understand the particular perspectives of workers and employers. Willie Chapman, E. K. (Red) Hayse, and Gale E. Van Hoy represented the labor community; Robert S. Reeder, Rodgers Ellis, and Jim Sutton represented employers.*

*The advice, support, and cooperation of the offices of the Lt. Governor and the Speaker of the House of Representatives have been critical components of moving the project forward. June Karp and Robin Mick, as representatives of those offices, have been accessible and responsive to every request.*

*Robert I. Kelly, Dorothy Wells, and the entire staff of the Legislative Council supported the Committee's work in innumerable ways both large and small. The Council provided complete administrative support, computer assistance, printing, proofreading, and the primary research for the legislative history contained in Chapter 1 of the Research Papers. Many contributed, but Dixie King, Richard Sanders, Marla Grimes, and Susan Moffitt merit special recognition.*

*House Committee Chairmen Pete Laney, John Gavin, Clint Hackney, and Bill Haley are appreciated for the office space and furnishings provided for Committee staff and student interns. Tricia Stringer deserves special thanks for volunteering her time and expertise in the design and layout of the final document.*

*Workers' compensation experts and agency personnel across the nation gave freely of their time and expertise to give advice and consultation at many phases of the project. These include: Professor John Burton of Cornell University; Professor Arthur Larson of the Duke University School of Law; Jack Urling, consultant and former director of the Pennsylvania Bureau of Workers' Compensation; Howard Bunn, consultant and former director of the North Carolina*

---

*Industrial Commission; Roy Evans of the Employment Standards Administration, United States Department of Labor; Dr. Richard Victor and the staff of the Workers' Compensation Research Institute; Alan Tebb and the staff of the California Workers' Compensation Institute; and Casey Young of the California Senate Committee on Industrial Relations.*

*Others include Sue Robertson of the Minnesota Workers' Compensation Division; Simon Tai and Helen Schott of the Wisconsin Workers' Compensation Division and Hugh Russell, formerly of the Wisconsin agency; Todd Brown of the Florida Division of Workers' Compensation; John Harbison of the Massachusetts Department of Industrial Accidents; Tom Gleason and Barbara Bouillo of the New York Workers' Compensation Board. In Texas, Tony Koriath and Ron Ogden freely donated their time and expertise.*

*The Committee's principal consultants, John Lewis and Professor Peter Barth, have not only brought expertise and experience that are unexcelled, but have brought a personal commitment to improvement and excellence. Similarly, the personnel of the Public Policy Resources Lab at Texas A & M have rendered service above and beyond what the Committee could anticipate or adequately compensate. Special thanks are due Dr. Craig Blakely, Dr. James Dyer, and Karon Altom for their long hours and untiring efforts.*

*Many state agencies contributed to the Committee's work in various ways. These include the Texas Employment Commission, the Texas Rehabilitation Commission, the Texas Department of Health, the Department of Human Services, and the Department of Public Safety. Southwestern Bell Telephone Company provided special assistance in the Committee's survey of claimants.*

*Numerous anonymous people answered questionnaires for the Committee. These include employees of major insurance companies and public self-insureds, injured workers, and attorneys. The Committee appreciates their cooperation.*

*The National Council on Compensation Insurance provided data and information from other states that permitted certain interstate comparisons that otherwise would have been impossible. Nancy Schroeder of the Alliance of American Insurers provided a useful summary of recent workers' compensation legislation in other states.*

*Finally, the Committee expresses sincere gratitude to all those who gave the benefit of their views and suggestions through public testimony, correspondence, phone calls, and other personal communications. Their comments provided a vivid picture of the system from many perspectives and constantly kept before the Committee the personal dimensions of the workers' compensation system.*

**JOINT SELECT COMMITTEE  
ON  
WORKERS' COMPENSATION INSURANCE**

---

*Committee Report*

---

The Joint Select Committee on Workers' Compensation Insurance was created by the 70th Legislature in July, 1987, because the state's workers' compensation system was poorly understood and perceived to be out of control. Workers' compensation insurance rates had increased over 67% in 30 months. Additional increases of 25% and 19% were approved by the State Board of Insurance in 1987 and 1988. Large employers asserted that high workers' compensation costs impeded business growth and were a factor in management's decisions to expand operations in other states. Small employers said profit margins were reduced or eliminated, forcing many to choose between lay-offs, cessation of business operations, or cancellation of insurance policies and assumption of the attendant risks. At the same time, labor interests argued that Texas benefits were among the lowest in the nation. Thus, runaway insurance rates and a perception of high costs and low benefits were the puzzling premises underlying the creation of the Joint Select Committee.

The problems with and perceptions of the system were not new. In 1985, the House Select Interim Committee on Workers' Compensation Insurance had documented broad and deep dissatisfaction with the system and catalogued almost 200 recommendations for change. That committee's recommendations called for better information and more research on the system, more attention to job safety, better funding of the Industrial Accident Board, and continued study and attention to the more difficult issues. The committee's recommendations and those brought before it by other parties echoed concerns voiced for at least 50 years. In 1938 a report to Governor Allred declared that the workers' compensation system "cannot but be a genuine source of embarrassment to the informed citizenship of the State." The 1938 detailed report made numerous recommendations, including mandatory coverage, better benefits, limitations on compromise settlement agreements, better statistics, elimination of trial de novo, reduced attorney's fees, self-insurance, improved safety laws, and adequate funding for the Industrial Accident Board. These themes have recurred in virtually all commentaries on the system for the last 50 years.

What has been emphasized repeatedly, and was echoed again by the House Select Committee, is a lack of statistics and information about the system. Indeed, when the Joint Select Committee on Workers' Compensation Insurance was created it had been 24 years since the last statistical study of the system. A report of the Senate Jurisprudence Committee reached the unequivocal opinion in 1982 that,

*"Texas literally has no substantiated idea how good or bad its workers' compensation system is. Competing interest groups provide information to support their own positions, but what has emerged has not been a synthesis of available data, but rather a fragmented, parochial, seriously qualified collection of numbers that is so amorphous as to be almost meaningless. Regardless of what the interested parties may say and even believe, Texas is ignorant of where its workers' compensation system is going and only slightly more aware of where it has been."* (emphasis in original)

---

---

The present committee was therefore charged to conduct studies and develop objective information to define problems and formulate solutions.

The Joint Select Committee conducted nine public meetings to receive testimony and information from state officials, invited experts, the principal workers' compensation interest group representatives, the public, and the committee staff and consultants. Four public hearings were held in Austin, Houston, Lubbock, and Arlington from January through June. At these meetings exhaustive expert and public testimony was received on the operations of the Industrial Accident Board and the State Board of Insurance, and on the subjects of safety, insurance, medical care, vocational rehabilitation, legal and litigation issues, benefits, and the economic effects on Texas businesses. At two meetings in July, additional expert testimony was taken from the State Board of Insurance, the Industrial Accident Board, the Texas Workers' Compensation Assigned Risk Pool, and representatives of labor, business, the insurance industry, health care providers, and attorneys.

In September, the main body of the committee's research was released in the **Research Papers of the Joint Select Committee on Workers' Compensation Insurance**. The **Research Papers** included staff and consultant studies on the history of workers' compensation legislation in Texas, an overview of the components of the system, benefits, costs, comparative litigation issues, medical care and cost, safety, and vocational rehabilitation. The **Research Papers** concluded with an extensive critique of the Texas system by Mr. John Lewis, a nationally recognized workers compensation expert. Additionally, the Texas Research League released "**An Examination of Selected Insurance Issues in the Texas Workers' Compensation System**," a report prepared at the committee's request on the subjects of competitive rating, self-insurance, a state insurance fund, and the assigned risk pool.

A **Summary of the Research Papers** was released in October, and the principal findings of the research were presented to the committee by staff and consultants in a public meeting on October 19, 1988. In November, the following reports were released:

- 1) **State Profiles**, detailing the workers' compensation systems of Florida, New York, and Wisconsin;
- 2) **Occupational Safety and Health in Texas Workplaces**, Volumes 1 and 2; and
- 3) **Results of the 1988 Workers' Compensation Claimant Survey**.

Altogether, over 1500 pages of original research material was prepared under the direction of the Joint Select Committee. In addition, the Workers' Compensation Research Institute (WCRI) of Cambridge, Massachusetts, published a comparative study of back injury claims in Texas, Wisconsin, and New Jersey, and is scheduled to publish a detailed descriptive study of the Texas administrative system early in 1989. Finally, the State Board of Insurance commissioned a detailed study of the Texas experience-rating and pool surcharge formulas to assist the committee.

---

## Committee Research Findings

---

The Joint Select Committee takes pride in the fact that in less than a year a body of research has been created which equals or exceeds that of the previous 75 years. Yet even a year's prodigious research is inadequate to answer all the questions about a system as large and multi-faceted as the Texas workers' compensation system. However, the studies of the committee have developed new and objective information on numerous issues where none had existed. The following findings of the committee's studies are highlighted.

- There is no sound statistical basis for comparing Texas' overall accident rates with those of other states. However, a study by the National Institute of Occupational Safety and Health shows that Texas ranks 12th among the states in traumatic occupational fatalities.
- Texas statutory provisions governing weekly benefit amounts and durations are generally less generous than those of other states; in some areas, including benefit provisions for the most seriously injured workers, they are among the least generous of all states.
- When benefits *actually paid* are considered, Texas ranks in the upper one-half to one-third of the states in benefit payments per claim.
- Beginning in or around 1983, several changes occurred in the system that resulted in higher payments to workers' compensation claimants. The changes included: (1) a higher proportion of claims with indemnity payments; (2) among indemnity claims, a higher proportion with payments for permanent disability; (3) higher settlements, awards, and judgments on claims; and (4) longer periods of temporary disability. Some of the changes correlated with increases in claims for unemployment benefits and total unemployment in the state.
- The system makes payments for permanent disability in a higher percentage of claims than almost any other state.
- Between 1983 and 1987 the system evidenced more controversy in the following ways. (1) The level of attorney involvement increased to almost 50% of compensated lost time claims. (2) The percentage of cases formally controverted by insurance companies increased. (3) The percentage of claims going to pre-hearing conferences increased.
- Workers' compensation medical costs are high in relation to those in other states; they have increased faster than medical costs outside the system and faster than indemnity costs.
- Comparisons of Texas law and court rulings with those of other states produced the following findings. (1) Texas law allows more cases to be adjudicated outside the scope of the workers' compensation law than laws of other states. Cases which escape the "exclusive remedy" doctrine of workers' compensation law include those for punitive damages against employers for gross negligence in death claims and actions against insurance companies for bad faith handling of claims. (2) Texas law and definitions on issues relating to disability, earning capacity, and liability for heart attacks and mental stress are generally comparable to those of a majority of the states. However,



---

Texas evidentiary guidelines on many of the issues are less explicit than those of other jurisdictions, allowing many claims to command payments that would not be made, or would be smaller, in other states.

- Texas is one of only three states in which coverage is not mandatory.
- Texas is one of only three states in which self-insurance by private employers is not allowed, and one of only three states in which employers are afforded but a single means of indemnification.
- The cost of the workers' compensation system to employers is among the highest in the nation.

The following are major deficiencies in the system as identified by the staff and consultants.

- The resources and incentives available to promote safety are not used effectively. Texas agencies collect substantial information for assessing injury and accident rates, characteristics, and trends, but the information is neither analyzed nor used to direct efforts to improve safety.
- While the coverage of persons and infirmities provided in the statute is near-universal, the effect of the coverage provisions is diluted by the fact that coverage is voluntary. To the extent that employers opt against coverage, the purposes of the act are frustrated and in some business activities uncovered employers enjoy a significant competitive advantage over those who are covered.
- Benefits are inadequate for some classes of employees. Texas workers with serious, long-term disabilities receive benefits which are among the very lowest in the nation. High wage earners also receive benefits which are low by national standards. Low wage earners, part-time or seasonal workers, and many with minor injuries receive benefits that are high by national standards.
- Numerous features of the system conspire to create great inequities among claimants. The features which contribute to inequities are: (1) the low weekly benefit maximum; (2) the statutory 300-day formula; (3) short benefit durations for permanent disabilities; (4) the benefit schedule for specific injuries; (5) the occurrence of settlements prior to stabilization of the claimant's medical condition; (6) the subjectivity of the benefit criterion (loss of wage earning capacity); (7) the differing proclivities of juries in different counties; (8) the use of inexpert juries as factfinders in contested claims; and (9) elective coverage.
- The process of delivering benefits suffers from several deficiencies which impede its efficiency and effectiveness.
  1. The system has no means to render fast decisions in disputes which require them. These include disputes about medical care and eligibility for temporary disability benefits.
  2. Information is lacking that would enable policymakers to effectively control the routine operations of the system or to evaluate its performance.

- 
3. **The agency lacks either the ability or the resources to effectively control the behavior of participants and to compel appropriate actions when they are required.**
  4. **The system, intended to be a no-fault, uncontroversial system, manifests a very high level of attorney involvement and increasing levels of controversy and litigation.**
- **Legislators and administrators are unable to develop and implement policies on a consistent basis, hindered by inadequate information and research. A vague statute and the de novo trial system with inexpert juries as factfinders undermine the ability of the board to provide substantive interpretation of the law or to implement such interpretations.**
  - **Due to the delay and cost of the system's first factfinding (the court trial), disputes are resolved by compromises rather than application of the law to facts established through formal procedures. Compromises are driven by factors not contemplated in the law, such as temporary hardship and administrative costs, causing claimants to compromise benefits (most obviously medical benefits) and insurers to pay more than the entitlements due. Compromises are often reached before the medical condition of the claimant is stable, increasing the probability that the assessment of disability (and hence, the benefits) will be inaccurate. Permanent benefits are almost always paid in a lump sum, increasing the probability that money will not be available when the future effects of the disability are realized.**
  - **The system contains no effective incentives for employers to rehabilitate injured workers or to return them to suitable jobs, and it contains disincentives for some classes of workers to return as quickly as possible.**

---

## Committee Policy Objectives

---

At its meeting on October 19, 1988, the committee adopted 14 policy objectives to guide the development of recommendations for reform. The policy objectives follow.

**1. SAFETY**

The system should promote safety and health in the workplace through an appropriate employer incentive system.

**2. COVERAGE**

The system should provide broad coverage of employees and work-related injuries and diseases regardless of fault.

**3. MEDICAL CARE AND REHABILITATION**

The system should provide appropriate and quality medical care directed toward prompt restoration of the workers' physical condition and earning capacity.

**4. BENEFIT ADEQUACY**

The system should provide:

- (a) temporary benefits that replace a high proportion of after-tax lost earnings, and
- (b) benefits for permanent disability that substantially alleviate the economic duress that occurs or may be expected to occur because of the disability.

**5. BENEFIT EQUITY**

The system should provide similar benefits to claimants in similar circumstances and it should provide benefits that are reasonably proportionate to the severity of the injury.

**6. EFFECTIVE DELIVERY OF BENEFITS**

The system should provide both income and medical benefits which are adequate, equitable, and appropriate in a manner which is timely, humane, and cost-effective.

- (a) Temporary, permanent, and medical benefits should be provided promptly.
- (b) The likelihood of disputes should be minimized, but when they occur they should be identified and resolved promptly and fairly.
- (c) All participants should know their rights and responsibilities.
- (d) There should be objective criteria regarding the entitlement to benefits and the amount of the entitlement.

**7. AGENCY CONTROL**

The Industrial Accident Board (IAB) should have the authority and resources to administer and enforce the law and its rules, including the ability to promptly detect and appropriately address acts or practices of non-compliance on the part of any participant.

---

**8. *POLICY CONTROL***

Policymakers in the legislature and the IAB should be able to insure that the system operates in accordance with the law and policies properly established.

**9. *RETURN TO WORK***

The system should encourage the speedy return to employment which is safe, meaningful, and commensurate with the abilities of the accident victim.

**10. *INSURANCE***

The system should provide a system of insurance which is secure and efficient in the delivery of benefits.

**11. *COST INTERNALIZATION***

The system should protect and relieve public and private programs of the financial burdens of work-related injuries by appropriately allocating such costs to employers.

**12. *ECONOMIC VIABILITY***

Workers' compensation insurance should be available to all employers at rates that are not burdensome so that the provision of coverage does not hinder the creation of jobs and economic development.

**13. *SYSTEM MONITORING***

The system should provide a mechanism for continued monitoring by and input from business and labor interests.

**14. *PROTECTION AGAINST COST TRANSFER***

Costs that are not caused by work-related injuries or illnesses should not be transferred into the system.

---

In light of the deficiencies identified and the policy objectives adopted by the committee, the consultants and staff formulated a set of recommendations to address the major deficiencies in the Texas system. The recommendations are based on the research conducted for the committee, the research and experience in other states, and the professional judgment of the staff and consultants.

The recommendations are not exclusive. There are other modifications that would result in improvements that could be added to or, in some instances, substituted for those offered for consideration. In some cases, alternatives to the recommended action are provided.

The recommendations are also not exhaustive. Recommendations have been made only where the available information and expert opinion are felt to justify a recommendation. Additional changes may be warranted on pure policy grounds or on the need to go beyond actions which can be demonstrated or justified with the information currently available. The issue of self-insurance is a good example. The staff and consultants believe that self-insurance programs can be a safe and responsible way to deliver benefits and that these are the principal considerations in whether self-insurance or any other means of indemnification should be available to employers. However, there is some evidence that allowing self-insurance in Texas could raise rates for those purchasing insurance, but the precise impact is not known. Under these circumstances the legislature must weigh the potential benefits and risks and make a judgment. In instances such as these, the recommended action is denoted as optional.

Finally, there are numerous minor issues and problems that are not addressed in the recommendations presented here but on which legislative or agency action is appropriate and needed.

In short, the recommendations address major issues and are based on current information and disinterested expert opinion. The staff and consultants believe that these recommendations, if properly implemented and adequately funded, offer the best hope of improving the workers' compensation system for employers and employees. However, they are offered to promote discussion, not to cut it off.

Some recommendations are more critical than others, either because they address particularly critical deficiencies or because they are a part of the system of interrelated processes and incentives that govern the delivery of benefits. These are designated with an asterisk, and they are considered critical recommendations. (It should be made clear that such a division is not made to suggest that some changes be considered immediately and others delayed. On the contrary, all possible improvements should be made at one time.)

The recommendations are divided into topical areas for clarity of presentation. Three of these areas are highly interrelated and central to any effort to improve the operations of the system. These are Benefits, Adjudication of Disputes, and The Agency. A few words of explanation of the goals of the changes in these areas are helpful.

---

The changes to the agency and its administrative capabilities are intended to remedy several shortcomings. The agency should be in a better position to establish, interpret, and implement policies for the system. In order to do these things its decisions must carry more weight, it should have effective input from employer and employee interests, and it must have accurate and timely information for (1) the day-to-day control of the system and (2) the longer term evaluation of the system's performance. The agency must have the ability to identify those employers, employees, carriers, attorneys, and health care providers whose behavior impedes the efficient and effective operation of the system, and it must have the authority to sanction that behavior in a meaningful way.

The agency must improve its oversight of the cost and quality of medical care. It must operate a safety system that identifies employers with the greatest needs and effectively directs available assistance to them and their employees. Finally, the agency must take the lead in improving the understanding of the system among all interested parties.

The changes in the benefit structure are designed to reduce the bias against highly paid and seriously injured workers; to provide a clearer, more objective standard for permanent benefits in order to reduce friction costs and enhance efficiency; to safeguard against premature settlements; and to provide an incentive for speedy return to work.

The changes in the methods of dispute resolution are intended to provide for the timely resolution of issues involving matters of urgency (e.g., medical care and temporary benefit entitlements); to improve the system's ability to reach consistent decisions and to implement policy on a consistent basis; and to reduce the cost and time of the formal factfinding and thereby reduce the need for either party to compromise its interests.

---

## Staff and Consultant Recommendations

---

**In the recommendations that follow . . .**

**An asterisk (\*) denotes a critical recommendation.**

**The qualifier “(Recommendation)” denotes the preferred alternative on issues where more than one alternative is presented.**

**The qualifier “(Alternative)” denotes an alternative to a recommendation, or it denotes one of several alternatives where none is preferred.**

**The qualifier “(Option)” is used with those issues for which a remedy is suggested but on which no affirmative recommendation is made.**

### I.

#### **The Agency, Advisory Council, and Research Institute**

1. Change the name of the agency to be more descriptive. Use the words “Workers’ Compensation” in the name.
  
- 2.\* (Alternative) Enlarge the workers’ compensation board to six or nine members appointed by the governor and confirmed by the senate for staggered six-year terms. One-third of the members shall be selected from the employer community, one-third from the employee community, and one-third from the general public. The commission shall serve on a part-time basis and shall employ an executive director to administer the agency under the policy direction of the commission.

- 
2. (Alternative) As above, except that no board positions are reserved for employer and employee interests. In addition to the board, create a permanent **labor-business advisory council** consisting of three to six representatives of each group appointed by the board for staggered terms of four years to:
    - a. Monitor system performance in light of legislative and board policy and in coordination with the independent research institute.
    - b. Initiate or provide comments on proposed changes in rules and policies of the board.
    - c. Provide independent input in the research agenda of the research institute.
    - d. Provide the board a list of nominees for the positions of executive director and director of the hearings division, such lists having the approval of a qualified majority of the members of the council. The board shall fill the positions from the names submitted.
    - e. Provide information to the labor and business communities concerning the purposes and operations of the workers' compensation system.
  - 3.\* Establish a **hearings division** to hear and rule on contested issues in accordance with the Administrative Procedure and Texas Register Act (APTRA).
  - 4.\* Establish a **board of appeals** within the agency to hear appeals of decisions of hearing examiners. The review shall be on both law and facts, and on the record of the administrative hearing.
  - 5.\* Maintain the system of review and pre-hearing conferences (PHC's).
  - 6.\* Establish a division of **medical review and compliance** to:
    - a. Create and maintain a statewide data base of charges and treatment protocols.
    - b. Monitor charges for and utilization of medical services to identify providers outside of established guidelines.
    - c. Refer health care providers (HCP's) that are outside of guidelines to peer review organizations, the hearing division, or other bodies for review and sanctions as appropriate. Penalties and compliance monitoring shall be on the basis of non-complying practices (patterns of conduct) as well as non-complying acts (specific events).
    - d. Conduct reviews of medical treatment in claims exceeding specified lost-time thresholds.
    - e. Perform all necessary coordination functions with HCP's, including educational seminars on agency rules and practices, relations with peer review organizations, and contracts for independent medical examinations (IME's) and consultant services.



- 
- f. Sanctions should be provided for non-compliance with fee or utilization guidelines, and other practices such as improper billing formats, improper medical report formats and contents, and untimely filing of reports.

**7.\* Create a compliance and practices division to:**

- a. Audit insurance carriers for compliance with laws and rules governing such matters as:
  - (i) Timely payment of medical charges
  - (ii) Reasonableness of controversions
  - (iii) Reasonableness of appeals
  - (iv) Reasonableness of voluntary payments
  - (v) Investigation of claims
  - (vi) Notification of employers of hearings and settlement proposals
  - (vii) Timeliness of temporary total disability payments/controversions
  - (viii) Timeliness of permanency payments
  - (ix) Failure to appear at PHC's and hearings
  - (x) Reasonableness of final offers at PHC's
  - (xi) Adjuster training requirements.
- b. Collect and compile information necessary to monitor the acts and practices of insurance carriers, attorneys, and health care providers to detect non-compliance with laws, rules, and ethics codes.
- c. Assess penalties and refer parties to hearings or other appropriate authorities for sanctions for non-compliance with laws, rules, and ethics codes. Penalties and monitoring shall be based on both acts and practices of non-compliance.
- d. Conduct preliminary investigations of fraud by any party, employer discrimination, case-running, and other complaints of illegal or unethical acts, and refer to hearings or other authorities when appropriate.
- e. Monitor compliance with applicable commission requirements of employers, employees, and any other persons.

**8.\* Create a division of occupational health and safety to:**

- a. Establish and maintain a job safety information system.
- b. Monitor loss control services provided by carriers.
- c. Provide health and safety education services.
- d. Provide health and safety consultations under the federal OSHA 7(c) program, as currently provided by the Texas Department of Health.

- 
- e. Provide safety and loss control services to agencies of the State of Texas.
  - f. Coordinate or supervise state or federal data collection, including the Supplementary Data System (SDS) and the Bureau of Labor Statistics (BLS) annual survey.
  - g. Coordinate employer consultations and other requirements made of employers exceeding accident or loss thresholds established by the agency. (See IV. 2.)
9. Create a division of education and training to:
- a. Conduct seminars and other training required of adjusters, attorneys, and other practitioners.
  - b. Provide information and education to employers, employees, and the interested public generally.
10. Up-grade computer hardware, software, and personnel as required to support other functions including:
- a. The job safety information system.
  - b. The statewide data base of medical charges and utilization (or coordinate with a third party contractor).
  - c. Improved carrier reporting requirements.
  - d. An automated tickler system to monitor filings and other actions by the parties and to generate notices to assure timely actions on claims.
  - e. Filing of carrier reports in machine-readable form.
  - f. Reports detailing trends in system cost components and performance.
  - g. Providing required data to independent researchers and research facilities.
  - h. Screening of claims for medical treatment reviews and for referral to the Texas Rehabilitation Commission for vocational rehabilitation.
- 11.\* Create a semi-autonomous workers' compensation research institute to conduct professional studies relating to the delivery of benefits, litigation and controversy, insurance costs, rehabilitation and reemployment, workplace safety, medical quality and cost, and other matters pertinent to the effectiveness of the system. The research agenda should be established in coordination with the board and the labor-business advisory council.
12. Provide the agency with the capability and the affirmative duty to provide information and assistance to unrepresented claimants.

---

## II.

### Benefits

- 1.\* (Recommendation) Change the basis for permanency benefits to impairment with a formula adjustment for age, education, and type of work.
1. (Alternative) Change the basis for permanency benefits to impairment with subsequent adjustment for actual loss of wages or lost earning capacity available for claimants whose wages remain significantly below the pre-injury level for an extended time.
- 2.\* Require immediate commencement of permanent benefits at maximum medical improvement, paid weekly.
- 3.\* Provide for resolution of medical rating disputes by referral to a rating physician selected by mutual agreement of the parties or, alternatively, by referral to a rating physician designated by the agency. In either case, the rating of the physician shall be relied upon.
- 4.\* After six months' return to bonafide employment and at least three months without medical treatment, the agency may approve a lump sum payment of indemnity benefits.
- 5.\* Medical benefits may not be settled or compromised. After two years without medical treatment, the burden to prove that additional medical care relates to the injury is the claimant's.
- 6.\* Base the average weekly wage (AWW) on actual wages for the 13 weeks prior to the injury (use "same or similar" employee for claimants without a 13-week history). For part-time or seasonal workers, AWW may be adjusted to more accurately reflect expected earnings based on the pattern of employment established by the custom and practice of the claimant.
- 7.\* Increase the maximum weekly compensation rate to levels nearer national norms. The goal should be 100% of state average weekly wage (SAWW) for temporary disability benefits and at least 75% of SAWW for permanent disability benefits, subject to assessment of the rate effects of such changes. Both rates should be indexed to the SAWW.
- 8.\* Eliminate the benefit schedule and incorporate specific injuries and hernias into the overall impairment rating system (no change in statutory permanent total provisions).
- 9.\* Extend the duration of permanent total disability benefits; require periodic payment of benefits with adjustment to partial benefits if the claimant returns to substantial employment; alter definitions to restrict permanent total disability benefits to those workers unlikely to ever return to substantial employment.

- 
10. Provide that workers' compensation benefits may be reduced upon commencement of social security retirement benefits so that combined workers' compensation and social security benefits (net of any taxes) do not exceed pre-injury after-tax earnings.
  11. Require that all beneficiaries in death cases, except spouses and minor children, be truly dependent on the decedent.
  12. Provide for inflation adjustments to statutory permanent total claimants and beneficiaries in fatal claims, capped at 5% per year.
  13. (Option) Reduce the retroactive period to 14 days.
  14. (Option) Reduce the waiting period to 3 days.

### **III.**

#### **Adjudication of Disputes**

- 1.\* Provide for evidentiary hearings in the agency with appeals to an appeals board within the agency. Appellate review within the agency shall be on law and facts and on the record of the administrative hearing. (No change in the pre-hearing system.)
- 2.\* (Recommendation) Provide for review of agency decisions on liability and compensation issues by the courts on the record of the agency under the substantial evidence standard.
2. (Alternative A) Provide for review of liability and compensation decisions on both law and fact; make the agency records admissible; the burden of the appealing party is to show the agency erred, based on the information before it at the time of the decision.
2. (Alternative B) Provide for review of liability and compensation decisions on both law and fact by a court of special jurisdiction and no jury.
2. (Alternative C) Provide for review of liability and compensation decisions on both law and fact, but limit facts to the administrative record.
2. (Alternative D) Provide for review of liability and compensation decisions on both law and fact, but restrict issues subject to de novo appeal to those of major importance, such as liability in death claims or declarations of permanent total disability.
- 3.\* Provide that court review of agency decisions on penalties, sanctions, and other issues arising from its administrative functions be on the agency record under the substantial evidence standard.

- 
- 4.\* Allow a claim to remain under the jurisdiction of the agency during the pendency of an appeal of a ruling on a disputed issue or issues in the claim.
  - 5.\* Authorize the agency to issue temporary orders relating to payment of medical or temporary disability benefits pending a final order on the dispute; provide for expedited proceedings on these issues and for the expanded use of independent medical examinations.
  6. (Option) Establish venue in the county of residence with explicit grounds for a change of venue to the county of injury.
  7. Permit employers to contest liability for a claim, even if the insurer has initiated payments. Within 30 days after the employer has notice of the claim, he may petition the agency for a hearing that shall be separate from the processing of the claim by the carrier. If the employer prevails, the claim shall be expunged from his loss records, and the carrier shall reimburse the employer's costs of the proceedings. No costs incurred on such claims may be included in information on which rates are based.
  8. Provide that bad faith handling of claims is not grounds for a suit outside the workers' compensation act; provide the agency with authority to issue penalties for bad faith.
  9. Define gross negligence in the same manner as it is defined in the Texas Civil Practices and Remedies Code, Section 41.001(5).

## IV

### Safety

- 1.\* Mandate the agency to establish and maintain a complete job safety information system with a data base similar to the one recommended to the Committee by the Martin Urling Company, issue periodic reports, and generate specialized reports and studies for public and private entities working to improve safety.
- 2.\* Authorize the agency to establish guidelines under which employers who exceed a certain threshold of claims and/or losses in a 12-, 24-, or 36-month period are identified. The guidelines should take into account the hazard of the industry and the size of the business establishment.

An identified employer is required (1) to obtain a professional safety consultation from the agency, its carrier, or another qualified source; and (2) to provide the agency with a copy of the consultant's report detailing hazardous conditions and a statement of corrective actions contemplated by the employer. An employer who continues to exceed the threshold after six months shall receive a follow-up consultation from the agency, and for each new claim the employer shall file a special accident report detailing the nature and causes of the

---

accident and measures taken to prevent similar future accidents. After another six months above the threshold, the employer shall file a complete safety plan that must be approved by the agency.

Employers who fail to obtain consultations or file required reports are subject to penalties on all future claims until compliance is forthcoming. The penalties shall be used to defray the costs of the agency's safety activities.

3. Remove the "commensurate with the risk" language from the Insurance Code requirement that carriers provide safety consultation services, and reverse or partially reverse the obligation; that is, require that a portion of loss control services be provided to small and medium-size risks. These would not have to be provided in the traditional form of on-site consultations, but could be provided as training or other services in conjunction with a trade association, union, public safety agency or other organizations. Provide the agency the authority to review and approve the carrier safety programs in advance.
4. Provide the agency with resources to conduct safety education through public service announcements, fliers, training courses, etc. Funds could be appropriated for grants to public and private groups for safety training and education, with the agency acting as grant administrator and using its information base to direct the funds to industries and problems most needing attention, or the agency could provide direct training. Funds should be provided through a levy on premiums.
5. Transfer all of the state's current occupational safety programs to the agency. These include the Texas Department of Health (TDH) consultation program, TDH participation in national surveys, State Board of Insurance (SBI) monitoring of carrier-provided loss control services, and safety programs for state agencies administered by the attorney general.

## V.

### Insurance

1. (Option) Provide self-insurance for individual employers, with stringent requirements for eligibility and financial integrity. Require security mechanisms (bonds, excess coverage, guaranty fund, etc.) at least as good as those required of insurance companies. Allow for future expansion of self-insurance to additional classes of individual employers and to groups of employers.
2. Require insurance companies to provide each insured employer with a list of claims charged against his policy, including payments made and reserves established on each claim, at least 60 days prior to expiration of a policy and at other times as requested.
3. (Option) Require insurance policies to offer employers a deductible or a range of deductibles.

- 
4. **Require carriers to notify employers when a claim is filed, of proposals to settle the claim, and of any pre-hearings, hearings, or court proceedings on the claim. Employers shall be entitled to present information relevant to the issues at board proceedings.**
  5. **Require the chairman and the executive director of the workers' compensation board to present testimony at rate hearings on trends in claim resolutions and cost components. The purpose of the testimony is to provide more immediate information on trends which might affect insurance costs in the rate period. Such testimony should be subject to cross-examination.**
  6. **Limit the assigned risk pool to policies with a premium of \$10,000 or more. Other rejected risks shall be assigned to individual carriers under a fair and non-discriminatory assignment plan developed by the SBI.**
  7. **Reform the assigned risk pool in the following ways:**
    - a. **Make the pool subject to provisions of the Open Meetings Act and the Open Records Act.**
    - b. **Require selection of servicing companies by competitive bids.**
    - c. **Provide for *ex officio* representation of business and labor interests and the SBI on the governing committee of the pool.**
    - d. **Create an office in the SBI to review policy renewals and employer applications to the pool and to attempt to place those employers' policies in the voluntary market. Carriers must state specific reasons for rejecting each risk.**

## **VI.**

### **Coverage**

1. **(Recommendation) Make coverage mandatory.**
1. **(Alternative) Require an affirmative action by employers not wanting coverage. This would allow better monitoring of coverage and better assessment of the difficulties and opportunities of requiring it.**
1. **(Alternative) Require employers to give positive notice that coverage is not provided (1) to new employees at the time of employment, and (2) at least annually, to all employees.**

## VII.

### Miscellaneous Provisions

1. Provide a definition of fraud with applicability to all parties and appropriate administrative remedies.
2. (Option) Amend the Penal Code to create an offense for misrepresentation by an employer or employee with intent to defraud another in order to obtain or deny benefits.
3. Establish a complete hierarchy of penalties and sanctions applicable to health care providers, carriers, and law firms/attorneys, including fines, probation periods, and temporary and permanent suspensions of the right to workers' compensation practice.
4. (Alternative) Reduce attorney's fees to a maximum of 20% of the recovery.
4. (Alternative) Base attorney's fees on the attorney's time and charges, limited to 25% of the recovery.
4. (Alternative) Allow attorney's fees of up to 25% on the first \$10,000 of recovery, 20% on the next \$10,000, and 15% on all remaining recovery.
4. (Alternative) Allow attorney's fees of 25% based on recovery above the carrier's offer.
5. Permit the payment of attorney's fees in a lump sum regardless of the method (periodic or lump sum) of payment of indemnity benefits.
6. Require a periodic cross check of agency records with the Texas Employment Commission unemployment compensation records to eliminate payments contrary to law.
7. (Option) Establish a two to four year pilot program for vocational rehabilitation of workers' compensation claimants to be operated by the Texas Rehabilitation Commission (TRC); improve the agency's ability to screen claimants for referral to TRC; operate the program with funds generated by a premium assessment and appropriated to TRC.
8. Limit a claimant's choice of physicians to two treating physicians and their referrals. Permit additional changes with approval of the carrier or the agency.