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Review of Workers' Compensation Bills from the 78th Texas Legislature

by Jon Schnautz

With a major reform bill passed only last session and a comprehensive review of the state's workers' compensation administrative agency scheduled for the next two years, the 2003 Legislative session was expected to be characterized by relatively minor changes to the Texas workers' compensation system. For the most part, the 78th session held true to this expectation. With a multi-billion dollar state budget shortfall, tort reform and medical malpractice issues, and homeowners and auto insurance reform at the forefront, the workers' compensation system changes that won final passage tended to be focused, narrow statutory "clean up" changes, many related to the major reform bill from the 77th session, House Bill (HB) 2600. However, more than a dozen significant bills were passed, and major initiatives related to issues such as direction of medical care in the system, while not adopted, were discussed in some detail.

This special edition of the *Texas Monitor* examines the workers' compensation-related legislative proposals offered during the 78th regular session, which adjourned June 2, 2003. Workers' compensation legislation that won final approval and became law is highlighted in the first section. Workers' compensation bills that were proposed but did not pass are covered in the second section. For both sections, summaries of the bills are divided into eight subject matter areas:

1) Medical issues (including bills related to Texas Workers' Compensation Commission (TWCC) medical policy and resolution of medical disputes);
2) Income benefit issues (including bills related to recent prominent workers' compensation-related court decisions in the *Downs* and *Fulton* cases);
3) TWCC authority and enforcement issues;
4) Workers' compensation insurance coverage issues;
5) Legal issues;
6) Employment issues;
7) Budget and state agency related issues; and
8) State employee workers' compensation issues.[1]

In addition to the discussion of bills in this article, a more concise analysis can be found in Table 1 (pages 4-5), which provides a summary of all workers' compensation legislation that won final passage, organized by house and bill number.

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Section 1:
Workers' Compensation Legislation That Won Approval

1) Medical Issues

Several studies over recent years, including research published by the ROC in early 2001, demonstrated that Texas' workers' compensation medical costs were higher than those in comparable states and in other health care systems.[2] In addition, outcomes for injured employees (such as the ability to return to work) were poorer in Texas than in the comparison states, and injured employees in Texas were no more satisfied with the care they received. With this backdrop, the basic goal of HB 2600 from the 2001 Legislative session was to address high medical costs in the system and at the same time improve the quality of care provided to injured employees. This goal was addressed through several provisions of HB 2600, including a requirement that TWCC increase monitoring and enforcement efforts on doctors and insurance carriers participating in the system, an overhaul of the workers' compensation medical dispute resolution system, and the alignment of the Texas workers' compensation fee guidelines with the methodology and policies of the Medicare system, among other changes.[3]

Several legislative proposals passed this session related to general workers' compensation medical issues, most with some connection to previous (77th Legislature) HB 2600 mandates. These included:

HB 833
(Rep. Hochberg/Sen. Janek)

To achieve cost savings in the area of pharmaceuticals, HB 2600 had required TWCC to adopt a pharmaceutical drug formulary that gave preference to generic drugs, unless the brand name drug is specified by the prescribing doctor. This was the first statutory attempt in the Texas workers' compensation system to encourage use of generic drugs, as is done in almost all health care delivery systems. Since the implementation of HB 2600, a conflict came to light between the provisions of the *Labor Code* relating to the drug formulary and provisions of the *Occupations Code* (Texas Pharmacy Act) relating to the ability of a patient to request a brand-name drug when a generic substitute may be used.[4] In other health care delivery systems in Texas, a patient is entitled to refuse a generic equivalent and may "buy up" to the brand name drug if they so choose. Since Texas law generally does not allow a pharmacist to bill an injured worker for any portion of the medical care associated with a compensable work-related injury, these laws were somewhat in conflict.

HB 833 states that in a case where a generic pharmaceutical is prescribed or substituted under the formulary, an injured employee may choose to "buy up" to a brand name drug and pay the difference. HB 833 further clarifies that this payment by the injured employee does not violate other sections of the statute prohibiting a health care provider from billing an injured employee for medical care.[5] Since the injured employee is choosing to pay the additional amount, the employee is not allowed to seek reimbursement from an insurance carrier for the additional amount paid or dispute a denial of reimbursement. TWCC is required to adopt rules to implement this change in law by March 1, 2004.

Also added to HB 833 by Senate amendment is a requirement that TWCC consider a petition to amend Texas workers' compensation system rules relating to reimbursement for pharmaceuticals. This portion of HB 833, which is identical to **Senate Concurrent Resolution (SCR) 48 (Sen. Van de Putte/Rep. Giddings)**, which also passed, would allow a study funded by both workers' compensation insurance carriers and pharmacy providers to serve as a roadmap for the creation of a new pharmacy fee guideline at TWCC.

SB 1804
(Sen. Harris/Rep. Zedler)

In its final form, this bill made two statutory changes related to HB 2600 provisions. HB 2600 had allowed a process for voluntary precertification of medical services by a health care provider prior to the delivery of a service (i.e., allowed the provider to inquire with the insurance carrier as to whether or not the carrier would pay for the service). SB 1804 clarifies this process by explicitly indicating that pharmaceutical services may also be precertified voluntarily in this manner, and states that if an insurance carrier agrees to pay for medical services, it may not later dispute a payment for these services.[6]

HB 2600 also had completely overhauled the medical dispute resolution process in the Texas workers' compensation system, replacing the previous TWCC-based determination of the medical necessity of services in dispute with an Independent Review Organization (IRO) review process similar to that used for denials by Health Maintenance Organizations (HMOs). At that same time, HB 2600 also required TWCC to adopt fee guidelines based on the reimbursement structure used in the Medicare system.[7] However, the bill was not specific as to whether an IRO was required to base its medical dispute determinations on the TWCC fee guideline and payment policies, or even to consider the fee guideline and payment policies in its decision making. A House amendment to SB 1804 added to the bill the provisions of **SB 1573 (Sen. Carona/Rep. Giddings)**, which states that if a party to a dispute over the medical necessity of a service raises a TWCC payment policy in the dispute, the IRO reviewer must consider this policy and, if ruling contrary to it, state the basis for doing so.[8]

SB 1572
(Sen. Carona/Rep. Giddings)

In 2001, HB 2600 had removed the requirement that TWCC adopt treatment guidelines (i.e., policies that indicate the appropriate types and frequency of treatment for particular medical conditions), and abolished the previous TWCC treatment guidelines, which were not regarded as evidence-based. Removal of the requirement for specific treatment guidelines was also in part because the newly-required TWCC fee guideline, based on the Medicare system, included payment policies that speak to allowed and reimbursable care, much as a treatment guideline would. HB 2600 had required that any treatment guideline adopted by TWCC also be "nationally recognized, scientifically valid, and outcome-based," to ensure the quality of future guidelines.

During the interim period leading up the 78th Legislative Session, problems involving the payment for, and dispute of, pharmacy services for injured employees continued to be discussed and debated. One possible option to address this issue involved TWCC adopting pharmacy treatment guidelines or specific treatment protocols in an attempt to avoid disputes, at least for drugs and conditions particularly prone to conflict. However, since no "nationally recognized" treatment guideline existed, TWCC was effectively precluded from acting. Accordingly, SB 1572 changes the statutory requirement for a treatment guideline by stipulating that *if* no nationally recognized guideline is available, TWCC may adopt a treatment guideline, as long as it meets the other two statutory criteria. The bill also makes it clear that TWCC may not only adopt comprehensive treatment guidelines, but also specific treatment protocols (i.e., guidelines related only to specific conditions or treatments).

HB 3168
(Rep. Giddings/Sen. Carona)

The medical dispute resolution process utilizing Independent Review Organizations (IROs) created by HB 2600 in 2001 is more costly than the previous TWCC-based process (but provides that a doctor makes the decision). An IRO review costs either $460 or $650, depending on the specialty of the reviewing doctor. Some medical services in dispute, though, may cost significantly less than this review cost, especially in cases involving disputes over pharmaceuticals and other relatively low-cost items.

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Table 1:
Significant Workers' Compensation Legislation Passed by the 78th Legislature

Bill # (Author/Senate Sponsor)	Brief Description	Effective date
HB 4 (Nixon/Ratliff)	Omnibus tort reform bill; Section 4 of bill reduces workers' compensation subrogation recovery potential by percentage of employer's responsibility for on-the-job injury.	Applies to a civil action filed on or after July 1, 2003.
HB 145 (Solomons/Fraser)	Gives TWCC authority to file suit to enforce its orders. Also requires notice to TWCC of District Court filings; if no notice is given, case cannot proceed.	Applies to a workers' compensation proceeding initiated on or after Sept. 1, 2003.
HB 833 (Hochberg/Janek)	Allows injured employees to pay to "upgrade" to brand-name drugs when generics are prescribed, resolving conflict with Pharmacy Act. Also requires TWCC to consider petition to set pharmacy fees (see SCR 48).	Effective Sept. 1, 2003; TWCC required to adopt rules to implement brand-name drug provision by March 1, 2004.
HB 1230 (Elkins/Carona)	Allows employees of County Community Service and Corrections Depts. to receive risk management services provided by the State Office of Risk Management (SORM).	September 1, 2003.
HB 1865 (Bonnen/Williams)	Allows purchase of group workers' comp. coverage by members of trade associations, making it easier for them to buy coverage (current requirement is for entities in a group to be in same line of business).	Immediately upon Governor's signature.
HB 2095 (Cook/Staples)	Allows group self-insurance by private employers and allows the purchase of group workers' compensation coverage by trade associations (language similar to HB 1865).	September 1, 2003; employers approved as a self-insured group may offer coverage on or after January 1, 2004.
HB 2116 (Fred Brown/Ogden)	Defines employees of Texas Task Force 1 (emergency responders) as state employees for workers' compensation purposes.	Immediately upon Governor's signature.
HB 2198 (Solomons/Fraser)	Sets a 90-day timeframe to dispute an assignment of Maximum Medical Improvement/impairment rating (response to *Fulton* court case); allows exceptions to timeframe (but only for first assignment or rating).	Immediately upon Governor's signature; applies to MMI assignments and impairment ratings after this date.
HB 2199 (Solomons/Fraser)	Changes seven day requirement for carrier to pay or deny benefits to 15 days; violation of 15-day requirement is not a waiver of compensability timeframe, but an administrative violation (response to *Downs* issue); adds language that notices are not required to be filed with TWCC if injury is accepted as compensable and no income or death benefits are due (medical only claims).	Injuries on or after September 1, 2003.
HB 2323 (McReynolds/Carona)	Clarifies that a suit filed in District Court after the exhaustion of the TWCC administrative dispute process may be transferred if filed in the wrong court, and that the 40-day filing timeframe is satisfied if filed timely in the first court.	Cause of action that accrues on or after September 1, 2003.
HB 2359 (Ritter/Armbrister)	Exempts the Employee Retirement System (ERS) from the state workers' compensation program administered by SORM. *(Note: Section 52 of HB 2425 includes the same language)*	September 1, 2003.

HB 3168 (Giddings/Carona)	Allows TWCC to create by rule a lower-cost medical dispute resolution process for medical services costing less than an IRO review. Also includes same language as SB 820, related to timely dispute of MMI/impairment rating issues.	Immediately upon Governor's signature; applies to MMI assignments and impairment ratings after this date.
HB 3318 (Luna/Bivins)	Designates the Subsequent Injury Fund (SIF) as a state general revenue fund.	Immediately upon Governor's signature.
HB 3378 (Hope/Shapleigh)	Designates the SIF as a dedicated general revenue fund.	Immediately upon Governor's signature.
SB 104 (Nelson/several co-sponsors)	Contains provisions requiring the State Board of Medical Examiners (BME) to notify TWCC if BME discovers a potential violation of workers' compensation laws.	Immediately upon Governor's signature.
SB 211 (Carona/ Laubenberg and Zedler)	Provides confidentiality for Board of Chiropractic Examiners (BCE) investigation files, but requires BCE to share information with TWCC at TWCC's request.	September 1, 2003.
SB 287 (Rodney Ellis/Chisum)	Changes membership on TWCC and SORM boards to address constitutional issues; TWCC remains at six board members, but with two-year terms; SORM goes to five board members.	Current terms expire Feb. 1, 2005; Governor required to appoint members to staggered terms after this date.
SB 478 (Duncan/Campbell)	Clarifies that a person who performs services that may benefit a political subdivision in connection with the operation of certain entertainment events, but who does not receive payment, is not eligible for workers' compensation benefits from the political subdivision.	September 1, 2003.
SB 820 (Fraser/Solomons)	Sets a 90-day timeframe to dispute an assignment of Maximum Medical Improvement/impairment rating (response to Fulton court case); allows exceptions to timeframe (for both first and subsequent assignments or ratings).	Immediately upon Governor's signature; applies to MMI assignments and impairment ratings after this date.
SB 1192 (Carona/Seaman)	Makes numerous changes to statute for Texas Property and Casualty Insurance Guaranty Association to conform Texas law more closely with model workers' compensation acts and facilitate cooperation with other states in liquidation issues.	Immediately upon Governor's signature.
SB 1282 (Fraser/Elkins)	Addresses notice of injury issue for self-insured employers and political subdivisions by changing written notice definition; notice to carrier would occur when entity that administers claims receives notice, not employer.	September 1, 2003.
SB 1572 (Carona/Giddings)	Allows TWCC to adopt non-nationally recognized treatment guideline, if no nationally recognized guideline exists; guideline must still be scientifically valid and outcome-based. Also allows TWCC to adopt individual treatment protocols.	Immediately upon Governor's signature.
SB 1574 (Carona/Giddings)	Allows TWCC and BME/BCE to share information without compromising confidentiality; provides stronger immunity protection for members of TWCC's Medical Quality Review Panel (MQRP); also sets State Average Weekly Wage at dollar-certain amount for fiscal years 2004 ($537) and 2005 ($539).	Immediately upon Governor's signature.
SB 1804 (Harris/Zedler)	Clarifies that pharmacy services can be voluntarily pre-certified prior to delivery, and that carrier must pay for services that it voluntarily pre-certifies; requires IROs to consider payment policies of TWCC in deciding medical disputes, if payment policy is raised.	September 1, 2003.

Source: Research and Oversight Council on Workers' Compensation, 2003.

Some health care providers contended in the interim that the cost of IRO review provides an unfair barrier to dispute resolution when lower-cost services are denied.

HB 3168 provides TWCC with clear authority to adopt a lower-cost alternative medical dispute process for services costing less than the cost of IRO review. The cost of this alternative process would be borne by the non-prevailing party to the dispute.

Another item added to HB 3168 in the House and included in the final version relates to the finality of an impairment rating given to an injured employee. The language is identical to that in **SB 820 (Sen. Fraser/Rep. Solomons)**.

2) Income Benefit Issues

Most of the bills approved by the 78th Legislature relating to income benefits involved two court decisions that were finally adjudicated during the interim. Bills related to these two court decisions – known as the *Downs* and *Fulton* decisions – are discussed first in this section, followed by other income benefit issues.

Legislation Related to the *Downs* Decision

Under Texas workers' compensation law, an insurance carrier has 60 days from the date it is notified of an injury to contest that the injury was compensable (i.e., that the injury was "work-related"). The same section of the *Labor Code* that sets this timeframe (Section 409.021) also requires an insurance carrier to initiate compensation under the statute "promptly," and further states that no later than the seventh day after the date on which the carrier receives written notice of an injury, the carrier shall either begin payment of benefits or notify TWCC and the injured employee of its refusal to pay. The statute does not explicitly state what, if any, relationship exists between the seven-day "pay or deny" requirement and the 60-day timeframe to contest compensability. In the court case *Downs vs. Continental Casualty*, the survivor of a deceased employee contended that the law meant that because the carrier did not pay or deny within seven days in this particular case, the carrier also waived its right to contest compensability within 60 days.[9] After several iterations of court decisions, the Texas Supreme Court held in June 2002 for the deceased employee's survivor. Thus, based on the *Downs* decision, insurance carriers are required to pay or deny benefits within seven days of notice or risk losing their ability to deny compensability at a later date. This timeframe is not sufficient, carriers contend, to allow proper investigation of a claim, and for cases in which no income benefits are due (i.e., "medical only" claims) it is not clear exactly what a carrier must do to retain its ability to dispute. In an attempt to assist carriers in complying with *Downs*, TWCC has accepted thousands of notifications from carriers to pay benefits "as and when they are due" for medical-only claims, in an attempt to meet the seven-day deadline for action on such claims.

Several bills were introduced to eliminate the connection between the requirement that a carrier pay or deny on a timely basis and the 60-day timeframe to dispute compensability, while still attempting to ensure that carriers began payment of benefits quickly, as the statute clearly intends. **HB 2199 (Rep. Solomons/Sen. Fraser)** was the most comprehensive bill related to the *Downs* issue to pass. The bill made it clear that a carrier's failure to act to pay or deny benefits within a certain timeframe was *not* a waiver of the ability to dispute compensability, but rather an administrative violation. The amount of the violation would range from $500 (for a payment less than six working days late) to $5,000 (for a payment more than 30 days late), and penalties are not cumulative. Additionally, the bill replaced the seven-day requirement to pay or deny with a 15-day requirement, in an attempt to more closely match when benefits are actually due to the injured employee by the insurance carrier.[10] The bill also clarified that "written notice" to an employer who self-insures occurs when the entity that services claims for that employer is notified, not when the injured employee reports the injury to the employer (see SB 1282, de-

scribed immediately below, for more discussion on this topic). Finally, HB 2199 includes language that attempts to address what an insurance carrier must do to avoid an administrative violation for failure to pay or deny benefits on medical-only claims. Under this provision, a carrier is not required to pay or deny benefits if income or death benefits have not yet accrued and if the carrier accepts the claim as a compensable injury. The implications of this provision are somewhat unclear, since it could be interpreted to require carriers to continue filing notices with TWCC to pay "as and when due" for medical-only claims or risk waiving the right to dispute compensability. **SB 1282 (Sen. Fraser/Rep. Elkins)** also passed, and involved the definition of "written notice" to a self-insured employer, or a political subdivision that self-insures. For purposes of complying with the provisions of Section 409.021, SB 1282 states that self-insured employers receive written notice on the date the employer's certified claims servicing contractor receives notice.[11] Written notice is similarly redefined for self-insured political subdivisions, but applies more broadly to any reference to "written notice" in the *Labor Code*.

Legislation Related to the *Fulton* Decision

When an injured employee is found to have reached the point in recovery at which no further improvement of the employee's medical condition is anticipated, the employee is said to have reached maximum medical improvement, or MMI.[12] When an employee reaches MMI, the employee is assigned an impairment rating, (i.e., a measurement of the whole-body impairment resulting from the employee's injury). This rating is critical to the employee's future eligibility for income benefits, and MMI and impairment rating determinations are areas of frequent dispute in the workers' compensation system.[13] Previous to court action in a case styled *Fulton vs. Associated Indemnity*, TWCC rules allowed a 90-day timeframe in which the first MMI determination or impairment rating could be disputed, with certain exceptions to allow disputes after 90 days.[14] The *Fulton* case challenged the statutory basis of this rule, and the plaintiffs eventually prevailed, leading to the repeal of the rule by TWCC in March 2002. As a result, there was no timeframe in statute or TWCC rule that limited the ability of an injured employee or insurance carrier to dispute an MMI determination or impairment rating – save for the fact that an injured employee's MMI determination could not by statute be extended beyond 104 weeks from the date income benefits begin to accrue.[15]

Like the *Downs* decision, the *Fulton* decision also created concern for insurance carriers, who argued that an open-ended timeframe to dispute MMI determinations and impairment ratings would lead to more disputes and result in the re-opening of previous impairment ratings. Eventually, three bills passed that addressed the lack of impairment rating finality by essentially placing the provisions of the former TWCC "90-day rule" in statute. All three bills stipulated that an initial determination of MMI or an impairment rating could only be disputed after 90 days if certain exceptions are met. However, all three bills also applied this finality to any subsequent MMI determinations or impairment ratings, while the original TWCC rule had applied only to the *first* MMI determination or impairment rating. Two of the bills – **SB 820 (Sen. Fraser/Rep. Solomons)** and a portion of **HB 3168 (Rep. Giddings/Sen. Carona)** – also allowed the exceptions to finality after 90 days to be considered for subsequent impairment ratings; the other bill, however, **HB 2198 (Rep. Solomons/Sen. Fraser)** did not.

Other Legislation that Passed Related to Income Benefit Issues

SB 1574 (Sen. Carona/Rep. Giddings)

This bill contained a provision to set the State Average Weekly Wage (SAWW) for the next two fiscal years at $537 and $539, respectively. The SAWW is used to calculate the weekly cap on workers' compensation income and death benefits. Since the major system reform of 1989, the SAWW has been based on a wage rate calculated by the Texas Workforce Commission (TWC), equal to the "annual average of

the average weekly wage of manufacturing production workers" in Texas. Early in the 78th session it was discovered that this rate would soon change significantly because of a change in the industry codes that TWC uses to calculate it. As a result, the cap on workers' compensation income benefits would have increased by an estimated $40 in FY 2004, creating an estimated additional cost to the system of about $5.6 million a year. Further expected changes in the methodology for calculating this wage by TWC in the future could result in an even larger increase in the cap. In response to the need for a statutory change to avoid an unintended increase in the cap on benefits and the short time available for consideration of a new benchmark, SB 1574 sets the SAWW for fiscal year 2004 at $537 (the same as in FY 2003) and for FY 2005 at $539. These amounts reflect the general trend of the SAWW in recent years (i.e., very slight annual increases). This is a short-term fix, and in the 2005 Legislative session a long-term benchmark for the SAWW and workers' compensation benefits cap will have to be identified.

3) TWCC Authority and Enforcement Issues

Another major focus of HB 2600 was enhanced authority for TWCC to monitor and discipline doctors and insurance carriers who contribute to high medical costs and poor outcomes in the system. Two of the most important tools provided to TWCC to accomplish this included the statutory establishment of a Medical Advisor position and the creation of the Medical Quality Review Panel (MQRP). In the 78th session, several bills passed designed to enhance TWCC's ability to use these resources to their fullest.

SB 1574 (Sen. Carona/Rep. Giddings)

In addition to the SAWW provision mentioned previously, SB 1574 included two provisions related to medical monitoring and enforcement efforts required of TWCC by HB 2600. First, it established a clear process for TWCC to share confidential information regarding health care providers with the Texas State Board of Medical Examiners and Texas Board of Chiropractic Examiners. SB 1574 essentially establishes that confidential information may be shared between TWCC and each agency, and that the confidentiality of this information is not affected by it being shared in this manner. The bill also included a provision that provides stronger immunity protection for members of the TWCC Medical Quality Review Panel (MQRP) to prevent them from being sued for performing their duties in good faith. The MQRP is a group of doctors created by HB 2600 to assist the TWCC Medical Advisor in performing reviews of the practices of doctors and insurance carriers in the workers' compensation system. General immunity for MQRP members was provided in HB 2600, but stronger statutory protection was considered necessary by the Medical Advisor and MQRP members to ensure minimal risk of personal or civil suit, and SB 1574 reflects such language.

HB 145 (Rep. Solomons/Sen. Fraser)

In the course of adjudicating disputes, TWCC makes many decisions and issues many orders. Often, these orders will require an insurance carrier to pay benefits to an injured employee, sometimes while the outcome of a dispute is still pending. Prior to the passage of HB 145, the law allowed that, in a case where an insurance carrier does not comply with a TWCC decision or order, the injured employee could file suit to enforce the order.[16] However, the statute did not speak to *TWCC's* ability to sue to enforce its decision or order on behalf of the employee. HB 145 allows TWCC to do so, and to recover attorney's fees and costs. The bill also addresses another issue related to parties seeking judicial review outside of TWCC's jurisdiction. Judicial review is allowed after a party exhausts TWCC's administrative process, and while the previous law indicated that TWCC was to be notified of a party's appeal to judicial review, a court had held that this requirement did not prevent the party from proceeding to judicial review.[17] HB 145 amends the *Labor Code* to make it clear that a party may not seek judicial review unless the party has provided notice to TWCC.

SB 104
(Sen. Nelson/several House co-sponsors)
SB 211
(Sen. Carona/Reps. Laubenberg and Zedler)

Both bills contained provisions relating to TWCC's interaction with medical licensing boards. Section 35 of SB 104 requires the Texas State Board of Medical Examiners to notify TWCC if it discovers a potential violation of Texas workers' compensation laws. SB 211 provides confidentiality protection for the investigative files of the Texas Board of Chiropractic Examiners (a protection not previously granted under law), but also stipulates that the board shall share confidential information with another regulatory agency (such as TWCC) on request of that agency, regardless of whether an investigation is open or closed.

4) Workers' Compensation Coverage Issues

Texas is the only state in the country in which the purchase of workers' compensation insurance is elective for all private sector employers. The most recent research by the ROC on this issue indicates that, based on a survey of approximately 2,800 Texas employers in late 2001, an estimated 65 percent of Texas employers employing 84 percent of the Texas workforce purchase workers' compensation coverage, with the remaining 35 percent of employers opting to be "nonsubscribers" to the system.[18]

For those employers who do purchase coverage, several workers' compensation insurance options are available. Employers may purchase coverage from an insurance carrier, may self-insure (assuming they meet certain statutory and TWCC rule criteria) or may collectively purchase a policy through an insurance carrier (i.e., group insurance), also if they meet certain criteria.

Several bills were approved during the 78th Legislative Session related to workers' compensation coverage issues, and two significant statutory changes were made that should expand employers' ability to obtain workers' compensation coverage in ways not previously allowed by law.

HB 2095
(Rep. Robby Cook/Sen. Staples)

While employers may self-insure individually or form groups to purchase workers' compensation insurance, Texas law did not allow employers to form groups to self-insure. HB 2095 allows employers who meet certain criteria to do just that. Subject to the approval of the Commissioner of Insurance, groups of five or more employers with a combined net worth of at least $2 million engaged in similar types of business and are members of a trade or professional association may form groups to self-insure.[19]

Much of the discussion about allowing group self-insurance centered on how to ensure that groups would remain able to pay workers' compensation claims should some or all of their members become insolvent. Several provisions of the bill attempt to address this concern by requiring that groups provide surety bonds, by making the other members of a group responsible for the insolvency of any one member, and allowing the Commissioner of Insurance to assess other groups to pay claims should an entire group become insolvent. In addition, the bill created an advisory committee to offer a recommendation as to whether employers who self-insure via groups should be required to participate in a guaranty association that would assume the payment of claims for insolvent members. Guaranty associations are already mandated for workers' compensation insurance carriers and self-insured employers in Texas.

HB 2095 also included language amending the *Insurance Code* to make it easier for employers to form groups to purchase workers' compensation coverage. Prior law required that business entities wishing to participate in a group must be engaged in a "same or similar" business pursuit as the other members of the group. The new language included in HB 2095 allows business entities not engaged in similar lines of business to also come together to form groups, if those members are in the same trade association.

HB 1865
(Rep. Bonnen/Sen. Williams)

HB 1865 made a statutory change very similar to that found in HB 2095 relating to the ability of business entities in a trade association to purchase workers' compensation coverage as a group. However, the wording in this bill is slightly different, and makes it clear in redefining the term "group" as it relates to the ability to purchase coverage that the Commissioner of Insurance must approve the formation of such a group.

SB 478
(Sen. Duncan/Rep. Campbell)

This bill clarified that individuals who perform in certain entertainment events that may benefit a political subdivision, but are not paid by the political subdivision for these services, are not employees of the political subdivision for workers' compensation purposes.[20]

SB 1192
(Sen. Carona/Rep. Seaman)

Although not a coverage issue per se, this bill relates to an important aspect of the workers' compensation system involving defunct insurance carriers. The bill modified the way claims are handled by the Texas Property and Casualty Insurance Guaranty Association (TPCIGA), which assumes payment of claims for insurance carriers that become insolvent. Significant changes were included in this bill relating to the qualification for a net worth provision that allows TPCIGA not to assume the claims of some large employers, and in other areas; generally, these changes will have minimal impact on how injured employees whose carriers become insolvent have their claims handled, and in most cases actually emphasized the responsibility of TPCIGA to pay workers' compensation claims as the former carrier would have been obliged to do.

5) Legal Issues

Tort reform was a major issue in the 78th session, and the provisions of **HB 4 (Rep. Nixon/Sen. Ratliff)**, the omnibus tort reform bill, also made some changes to workers' compensation law. Article 4 of HB 4 (relating to proportionate responsibility of parties in a civil lawsuit) amended Section 417.001 of the *Labor Code*, which describes the ability of an insurance carrier to subrogate a recovery made by an injured employee against a third party found to be responsible for an on-the-job injury. As noted in the previous section on coverage issues, employers who purchase workers' compensation insurance cannot be sued for simple negligence for an on-the-job injury. However, an employee injured on the job is allowed by law to bring suit against another party for such an injury (for example, the manufacturer of a product that contributed to the employee's injury). If the employee receives a recovery from such a third party, the workers' compensation insurance carrier is allowed to subrogate (i.e., recover) the cost of any benefits paid to that employee against the employee's court award. HB 4 alters the carrier's ability to subrogate in these cases by limiting the carrier's subrogation rights to the amount of benefits paid minus an amount the court determines based on a percentage of responsibility assigned to the employer. In other words, the fault of the employer is considered in the calculation of the carrier's subrogation award, thereby limiting a carrier's ability to fully recover all benefits paid on behalf of the worker. This limitation may be indirect (in the case of an employer/carrier relationship) or direct (in the case of a self-insured employer). Although subrogation claims are relatively rare, this provision could have a long term impact of increasing costs that remain internal to the workers' compensation system rather than being borne by third parties. It should also be noted that a provision was added to HB 4 to clearly state that the changes made by this section were not intended to alter the immunity of employers covered by workers' compensation to suits for simple negligence.

HB 2323
(Rep. McReynolds/Sen. Carona)

This bill addressed an uncertainty in the *Labor Code* regarding the filing of suits in District Court. Section 410.252 speaks to where a party wishing to appeal a final TWCC administrative decision may do so, requiring that such a suit be filed within 40 days of the final TWCC decision in the Dis-

trict Court of the county where the employee was living at the time of injury.[21] The law was not specific as to what occurs if an employee or insurance carrier files suit in another county. HB 2323 clarifies that if this occurs, the court in which the suit was incorrectly filed shall transfer the case to the correct court, and that the 40-day timeframe requirement is satisfied if the suit was filed timely in the first court.

6) Employment Related Issues

Four bills were proposed related to employment issues, but none passed. (See Section 2 on proposed legislation that did not win passage for a discussion of these bills.)

7) State Agency/State Budget and Funding Issues

No single issue received as much attention during the 78th session as the state's biennial budget for FY 2004-2005, expected to be some $10 billion short of revenue to fund projected state expenses. Several bills related to the budget or state agencies involved in workers' compensation were proposed during the 78th session, and a few of these won passage.

HB 3318
(Rep. Luna/Sen. Bivins)

The Subsequent Injury Fund (SIF) is responsible for the payment of Lifetime Income Benefits (LIBs) to a small group of injured employees, and for certain reimbursements to insurance carriers. Historically, for state budget and accounting purposes, the SIF has been classified as a "special fund in the state treasury," and been administered by TWCC. HB 3318 redefines the SIF as a general revenue fund, which means that the SIF will be required to receive a legislative appropriation like state agencies and other general funds. Previous to this change, TWCC simply paid obligations and collected revenues for the SIF without the need for a specific appropriation. Another bill, **HB 3378 (Rep. Hope/Sen. Shapleigh)** which designates the SIF a "dedicated general revenue account," also won passage, and these bills have not been reconciled as of this writing.

SB 287
(Sen. Ellis/Rep. Chisum)

Several bills were offered (and one passed) changing the terms of office of TWCC's six-member board. A recent Constitutional change requires all state agency and entity boards to be composed of an odd number of members, unless a specific statutory exemption is granted. Article 47 of SB 287**,** related to this issue, maintains TWCC's six-member board (with three members representing employers and three representing employees), and calls for staggered two-year terms (currently, TWCC board members serve six-year terms), with the terms of three members expiring on February 1 of each year. SB 287 also revised the six-member board of the State Office of Risk Management (SORM) to transform it to a five-member board.

8) State Workers' Compensation Program Issues

Most employees of the State of Texas are insured for workers' compensation purposes through the State Office of Risk Management (SORM). However, a few large agencies and entities – the University of Texas System, the Texas A&M University System, and the Texas Department of Transportation – manage their own programs, and are not covered through SORM.

HB 2600 and HB 2976 also made major changes to the SORM-administered state program. That legislation required SORM to establish a program that made each covered state agency share more fully in the costs and risks involved in the state workers' compensation program by allocating to that agency an annual assessment, somewhat like an employer's workers' compensation premium. This initiative was dubbed a "risk-reward" program because in concept, agencies that suffered higher losses than their assessment would be forced to make up the difference from other funds, while agencies that suffered lower losses could be allowed by the Legislature to keep some of the savings. Transition to an agency-paid system rather than the former approach, in which

the state budget in general paid the majority of workers' compensation costs, required SORM to calculate an appropriate assessment amount for each agency based on several statutory factors. Although most agencies have paid their assessments, a few have raised concern that their assessment amount was unreasonably high and/or did not reflect their actual loss history. As a result of these concerns, several pieces of legislation were introduced to allow specific agencies or entities to leave the SORM program.

The bills passed in the 2003 regular session related to workers' compensation issues for state employees were:

HB 2359
(Rep. Ritter/Sen. Armbrister)
Section 23 of this omnibus bill related to the state employee retirement system allows the agency that administers this system, ERS, to be exempt from any statutory provisions relevant to SORM's workers' compensation program. In addition, the ERS Board of Directors is allowed broad authority to "acquire services described in that chapter" (presumably, workers' compensation coverage) "in any manner or amount the board considers reasonable." It is not known at present how ERS will exercise this authority. The same language is included in **HB 2425 (Rep. McCall/Sen. Duncan)**.

HB 1230
(Rep. Elkins/Sen. Carona)
SORM's enabling statute requires the agency to act as a risk manager and insurance manager for state agencies it covers.[22] HB 1230 allows SORM to extend risk management services to employees of Community Supervision and Corrections Departments (CSCDs) in the same manner as for state employees.

HB 2116
(Rep. Fred Brown/Sen. Ogden)
This bill is also related to disasters, in that it provides state workers' compensation coverage for employees of Texas Task Force 1, a volunteer force that may be activated by the Governor to respond to a natural or man-made disaster by performing rescue and recovery operations. Coverage is provided through SORM as it would be for other state employees, with the Governor's Office of Emergency Management to reimburse SORM for the actual cost of any medical or indemnity payments made to these volunteers. In addition, the bill lays out a framework for calculating the Average Weekly Wage (AWW) of Task Force 1 members, based on their wages from their regular employment, since service on the task force is unpaid.

SB 1652
(Sen. Shapiro/Rep. Morrison)
This omnibus higher education bill also included in Article 4 provisions relating to the workers' compensation coverage of employees of the University of Texas or Texas A&M University systems. Specifically, the bill clarifies that employees of these system are entitled to benefits under the state workers' compensation program regardless of whether they were hired in, work in, or were injured in Texas. However, the bill also clarifies that an employee who "elects to pursue remedies" in the state where the injury occurred (presumably, in the case of another state) is not also entitled to state workers' compensation program benefits.

Two New Members Appointed to ROC Board

The Research and Oversight Council on Workers' Compensation is pleased to announce two new appointments to its board of directors. Commissioner Richard A. Smith, Chair of the Texas Workers' Compensation Commission (TWCC), has been appointed as the employer representative and Commissioner Eddie Wilkerson has been appointed as the employee representative. They replace Lonnie Watson and Rebecca Olivares. The ROC appreciates the leadership provided by Mr. Watson and Ms. Olivares during their time on the ROC board.

Section 2:
Workers' Compensation Legislation That Did Not Pass

1) Medical Issues

HB 1896 (Rep. King) and **SB 1134 (Sen. Carona)** were bills related to the creation of insurance carrier networks for workers' compensation medical care, and addressed a fundamental issue in the system – namely, how doctors are selected to provide care to injured employees. Although insurance carriers are allowed to create their own networks to provide workers' compensation medical care under current law, injured employees covered by those carriers are not required to use these networks. HB 1896 and SB 1134 would have changed the general choice of doctor process from one in which an injured employee may choose a treating doctor from any on TWCC's Approved Doctor List (ADL) to one in which an injured employee must choose a doctor from within the carrier network, if the carrier offers a network. Other provisions of this bill described the information to be provided to injured employees in the networks, the standards that would have applied to the networks, and the arrangements between carriers and doctors involved in the networks. While both bills were introduced and significant discussions occurred between insurance carrier, employer and health care provider representatives regarding these provisions, negotiations could not produce a final consensus between the groups, and neither bill was ever heard in committee.

HB 3285 (Rep. Martinez Fischer) related to the fee guideline adopted by TWCC in response to the mandate of HB 2600, also did not pass. The fee guideline proposal adopted by TWCC in April 2002 resulted in an overall decrease in the levels of reimbursement provided to health care providers (from an aggregate of approximately 140 percent of the amount reimbursed under the Medicare system to 125 percent), and this prompted a lawsuit by the Texas Medical Association (TMA) and Texas AFL-CIO, which contended that the decrease in reimbursement would cause certain doctors to leave the system. These same concerns were voiced by proponents of HB 3285, which would have placed in statute the approximate reimbursement amounts under TWCC's current fee guideline. HB 3285 won approval of the House Committee on Business and Industry but was never heard in the full House. In May 2003, Judge Dietz of the 126th District Court in Austin lifted a previous injunction on the April 2002 TWCC fee guideline, removing any apparent obstacles to its implementation. In mid-June, it was announced that the 2002 TWCC Medical Fee Guideline would become effective on August 1, 2003.

HB 3000 (Rep. Capelo) also sought to make a statutory change related to the TWCC fee guideline. This bill would have allowed certified surgical assistants and surgical first assistants to bill and be reimbursed under the new Medicare-based fee guideline. Medicare does not allow these (and some other) types of health care providers to bill and be reimbursed. Although the *Labor Code* was not changed to allow billing of these providers, TWCC retains authority under the statute to make necessary modifications to the Medicare-based fee guideline by rule.[23]

SB 1576 (Sen. Carona) and HB 3589 (Rep. Giddings) also involved modifications to a portion of workers' compensation law created by HB 2600 in 2001. Another aspect of HB 2600 designed to improve the quality and reduce the cost of medical care had called for a feasibility study on regional workers' compensation health care delivery networks. This study was to be overseen by a Governor-appointed Health Care Network Advisory Committee (HNAC), containing voting members from both employer and employee groups, which would also approve network standards and report card (i.e., quality measurement) measures on which these networks could be assessed. A unique aspect of these HNAC networks, if created, is that they would be voluntary for insurance

carriers, employers, and employees (although once "opting in" to the network, injured employees would be required to receive care in the network, with certain exceptions). A feasibility study between the 77th and 78th sessions revealed that such networks could be feasible, given certain assumptions about employee participation levels, and should be attempted on a pilot basis for state employees in the Austin/San Antonio and Houston areas. SB 1576 would have incorporated certain statutory changes requested by the HNAC into the *Labor Code*, as well as placed some structure on a state employee pilot project, while also allowing the pilot to grow to include other insurance carriers after one year with the HNAC's approval, if successful. While the HNAC project can continue under current law, the HNAC-requested statutory changes did not win passage.

SB 1573 (Sen. Carona/ Rep. Giddings) would have required IROs to consider the payment policies of TWCC in deciding medical disputes, if these policies are raised by a party; this bill was identical to a portion of SB 1804, which did pass.

SB 1767 (Sen. Carona) would have made a number of changes to the TWCC medical dispute resolution process. The bill would have required the medical dispute process to consider *and apply* the payment policies of TWCC (i.e., the dispute process would not allow a ruling counter to the payment policies, an approach more strict than that in SB 1804 and SB 1573); made all medical disputes between a health care provider and an insurance carrier "loser-pay" (currently, the cost of IRO reviews involving preauthorization denials are paid for by the insurance carrier, regardless of outcome, while IRO reviews on retrospective disputes are "loser pay"); clarified the authority of an insurance carrier to audit the bills of a health care provider, and required TWCC to order a refund to a carrier from a health care provider that receives payments not in compliance with the fee guideline; created an alternate process for resolution of medical disputes brought by workers' compensation claimants; allowed TWCC to contract with the Texas Medicare intermediary to resolve medical fee disputes; and required TWCC to provide a copy of a certified record of a medical dispute to parties to the dispute, among other changes.

Several other bills would have made specific statutory changes related to billing and payment for medical services. **SB 603 (Sen. Ellis)** would have set out specific criminal penalties for health care providers who bill workers' compensation insurance carriers in excess of the amount they normally charge outside the workers' compensation system. These penalties would have applied only to treatments and services not priced at a specific amount under the TWCC fee guideline, and would have been scaled to the amount by which the provider overcharges, varying from a Class C misdemeanor to a first degree felony.

SB 1311 (Sen. Van de Putte) would have changed several statutory provisions related to pharmaceutical services in the workers' compensation system. The bill would have required TWCC to adopt a pharmacy fee guideline to set specific pricing for drugs; in addition, SB 1311 would have required an insurance carrier to notify a pharmacist prior to denying payment for a pharmaceutical drug, and if no notification is given, require payment for the drug. Another provision was also related to the conflict with the *Occupations Code* involving an injured employee's ability to receive a brand name drug when a generic equivalent is available (see HB 833). Unlike the approach in HB 833, SB 1311 would have required an injured employee to pay the full price for a brand name pharmaceutical to the pharmacist, then allowed the employee to seek reimbursement from the insurance carrier for the amount payable for the generic equivalent.

HB 566 (Rep. Berman) would have expanded the circumstances in which a health care provider could bill an injured employee for health care services. Specifically, if an injured employee's workers' compensation claim is denied by an

insurance carrier as non-compensable (i.e., as having not arisen in the course and scope of employment), and medical bills submitted by a health care provider are denied on this basis, the health care provider would have been allowed to bill the injured employee for these services if the employee does not contest the denial of compensability within 45 days. Under current law, a provider can only bill an injured employee in cases where an injury is "finally adjudicated" as non-compensable.[24]

HB 1266 (Rep. Goolsby), while not specifically related to the workers' compensation system, would have altered the requirements for a health care provider to perform spinal manipulation and adjustment, relatively common procedures in the system. Only health care providers who receive at least 300 hours of classroom instruction in spinal manipulation or adjustment and at least 600 hours of supervised training at an institution or facility in which manipulation or adjustment are the primary means of treatment would have been allowed to perform such treatment.

2) Income Benefit Issues

The *Downs* Decision

Several bills were proposed related to the *Downs* issue, as well, but did not win final passage. **SB 819 (Sen. Fraser)** would simply have stated that a carrier's failure to pay or deny benefits within seven days does not affect the carrier's ability to dispute compensability, but rather is an administrative violation. **HB 2098 (Rep. Oliveira)** would have removed the connection between a carrier's failure to pay or deny within seven days and the ability to dispute compensability, as well, but only for political subdivisions that self-insure. The definition of written notice would also have been modified for these entities. Another unique aspect of HB 2098 would have made the penalty for failure to pay or deny within seven days payable to the injured employee an amount equal to "double the amount due for the days delinquent."[25] **HB 2177 (Rep. Elkins)**, a companion bill substantively identical to SB 1282, also did not pass.

Other Bills Related to Income Benefits That Did Not Pass

HB 2057 (Rep. Christian) would have repealed a statutory change made by HB 2600 in 2001 that allows injured employees to claim income benefits based on all their pre-injury, IRS-reportable income, rather than just the salary from the job where the injury occurred, effective for injuries on or after July 1, 2002. This provision of HB 2600 is commonly referred to as a "multiple employment" benefit, since it allows employees who have more than one job to receive benefits based on all their jobs. Insurance carriers are allowed to claim reimbursement from the TWCC Subsequent Injury Fund (SIF) for additional benefits paid based on multiple employment.

HB 2307 (Rep. Jesse Jones) would have established that an injured employee's eligibility and receipt of federal Social Security disability benefits should be considered "determinative" of the employee's continued impairment for purposes of workers' compensation benefits (i.e., that if the employee is receiving Social Security benefits, this fact should suggest that they remain eligible for workers' compensation benefits).

HB 3220 (Rep. Bohac) would have allowed an insurance carrier to pay Impairment Income Benefits (IIBs) based on a "reasonable assessment" of an employee's impairment rating in a case where the impairment rating given by a TWCC designated doctor is disputed by the carrier. Although this issue is not explicitly covered by current statute, TWCC rule requires an insurance carrier to pay based on the impairment rating given by the designated doctor, regardless of dispute.[26] The bill would also have allowed an injured employee or an insurance carrier to request a clarification report from a designated doctor for up to one year after the designated doctor's initial report.

3) TWCC Authority and Enforcement Issues

HB 3533 (Rep. Laubenberg) contained several provisions related to TWCC authority and other changes to the *Labor Code*. Use of the TWCC name and logo by private entities would have been specifically prohibited under this bill, with specific

civil and administrative penalties for doing so; a requirement that employers who do not purchase workers' compensation coverage file a notice attesting to their coverage status with TWCC would have been removed, as would a requirement that TWCC schedule a formal dispute resolution proceeding (known as a Contested Case Hearing) at the same time as an informal mediation is set;[27] and TWCC would have been granted specific statutory authority to access the records of any participant in the workers' compensation system.

SB 1575 (Sen. Carona/ Rep. Giddings) would have provided greater immunity from lawsuits for members of the Medical Quality Review Panel (MQRP). This bill did not pass in its own right but was later incorporated into SB 1574.

4) Workers' Compensation Coverage Issues

HB 3266 (Rep. Gallego) contained a provision similar to that found in HB 1865 and HB 2095 relating to the ability of a member of a trade association to purchase coverage as a group. Several other bills proposed relating to subscription and nonsubscription issues did not win passage. One of the primary incentives given to employers to purchase workers' compensation insurance is that those who do so cannot be sued by their employees injured on the job for simple negligence. Nonsubscribers, on the other hand, traditionally assume greater risk of litigation.

HB 570 (Rep. Fred Brown) would have extended protections from lawsuits to nonsubscribers who provide their injured employees with certain levels of on-the-job injury benefits by limiting their liability in a lawsuit to $250,000, minus any benefits paid.[28]

HB 851 (Rep. Fred Brown) relates to another incentive provided to employers to purchase coverage – the requirement that workers' compensation insurance be offered in order to bid on a government construction contract. This bill would have allowed nonsubscribers to bid on these government contracts as well, provided they offer on-the-job injury benefits in the same amounts noted in HB 570.

HB 1375 (Rep. Farabee) also would have provided greater ability for nonsubscribers to bid on government construction contracts by only requiring workers' compensation coverage for contracts that exceed $9,000 in a fiscal year.

SB 477 (Sen. Duncan) related to the eligibility for workers' compensation benefits of professional athletes in the Central Hockey League, which includes several franchises in Texas. Under workers' compensation law, professional athletes are generally required to choose between receiving workers' compensation benefits or compensation under their contracts. SB 477 would have applied this provision to Central Hockey League athletes.

5) Legal Issues

HB 2982 (Rep. Nixon) would have changed current law regarding what entities an employee may sue in the event of an on-the-job injury. An injured employee may not sue his or her employer for simple negligence if that employer provides workers' compensation coverage, but nothing in the law prohibits an employee of a subcontractor on a construction project, for example, from suing the general contractor on the job, or the owner of the construction site. HB 2982 would have established that if workers' compensation coverage is provided, it is the exclusive remedy for an employee of a subcontractor or independent contractor hurt on the job against not only his or her employer, but also the general contractor and owner of the premises where construction occurs. This prohibition against suit would not have applied to a death claim involving an intentional act, omission, or gross negligence.

HB 2788 (Rep. Eiland) would have allowed an injured employee to sue his or her employer for an on-the-job injury *and* collect workers' compensation benefits, and also stipulated that the workers' compensation insurance carrier in the case would not have to pay benefits to the employee for any amount determined to be the fault of the employer, but rather, the employer would pay this amount directly to the employee.

HB 704 (Rep. Solomons) would have exempted the State

Office of Risk Management (SORM), a state agency that acts as the insurance carrier for most state agency workers' compensation claims, from a section of the *Labor Code* that set a maximum percentage for a carrier to pay a claimant's attorney fee in a subrogation case. Since a carrier and injured employee may have a similar interest in pursuing a third party (the employee to try and recover damages, and the carrier to recover benefits already paid), the law requires a carrier to pay some portion (a maximum of one-third of the carrier's recovery) of the attorney fees in such a case, unless the carrier has its own counsel.[29] HB 704 would have exempted SORM from this maximum percentage. **SB 675 (Sen. Estes)** would have clarified that not only is an employer who carries workers' compensation insurance protected from lawsuits by its employees, but also a parent or subsidiary corporation of the employer, or any other named insured on the workers' compensation policy.

SB 496 (Sen. Janek) and **HB 1240 (Rep. Nixon)**, while not related to workers' compensation benefits *per se*, would have affected lawsuits brought by plaintiffs claiming harm from exposure to asbestos, which may occur in the course of work. Among other provisions, the bills would have established an "inactive docket" for asbestos lawsuits, allowing these suits to move forward when the plaintiff begins to exhibit symptoms of asbestos-related illness.

HB 2406 (Rep. Stick) would have raised the maximum hourly cap on attorney's and legal assistant's fees under the *Labor Code* from the current levels set by TWCC rule ($150 an hour for attorneys and $50 an hour for legal assistants) to 35 percent and 12 percent of the SAWW, respectively. This was an attempt to tie the hourly maximum to a rate that would change with time, rather than remain static. Finally, although not purely a legal issue,

HB 1356 (Rep. Thompson) dealt with access to workers' compensation claim records in the workers' compensation system. The bill attempted to address difficulties with the implementation of legislation from the 77th session designed to allow group health insurance carriers access to TWCC workers' compensation claims data, in order to determine if potential subclaims (i.e., claims in which the group health care paid for costs that should have been borne by a workers' compensation insurance carrier) exist.[30] The language in HB 1356 would have allowed group health carriers broad access to certain elements of TWCC claims data on a regular basis to check for subclaims and other activity that may be fraudulent.

6) Employment Related Issues

While none passed, four bills of note were proposed related to general employment issues that may have had some impact on workers' compensation or, more broadly, on workplace injury benefit plans of nonsubscribers.

HB 328 (Rep. Chisum) would have allowed an employer to inquire with a prospective employee about the existence of any prior workers' compensation claims, injuries or disabilities, and established that if the employee did not answer truthfully, he or she could forfeit rights to future benefits for the injury or disability in question from that employer. In addition, the employer could not be sued solely because he or she relied on information from the employee in determining not to hire the employee.

HB 359 (Rep. Dutton) would have prohibited an employer from requiring as a condition of employment that an employee submit to mandatory arbitration of an employment dispute that could be the basis for a complaint with the state or federal government. This provision could have had some effect on the use of mandatory arbitration for on-the-job injury claims by nonsubscribers.

HB 371 (Rep. Dutton) would have prohibited the use of mandatory arbitration by an employer during the first 90 days in which an employee is on the job.

HB 3430 (Rep. Martinez Fischer), also related to arbitration, would have prohibited enforcement of arbitration in a personal injury claim unless each party to the claim agrees to the arbitration and is represented by an attorney.

7) State Agency/State Budget and Funding Issues

HB 2774 (Rep. Solomons) would have made two statutory changes related to the SIF. The SIF currently pays Lifetime Income Benefits (LIBs) to a small group of injured employees who qualify for those benefits based on a second injury (e.g., an employee who is blind in one eye and subsequently loses sight in the other as a result of an on-the-job injury, therefore qualifying for LIBs); reimburses insurance carriers ordered to pay benefits in disputes in which they later prevail; and reimburses insurance carriers for income benefits based on multiple employment. HB 2774 would have required TWCC to enter into a Memorandum of Understanding with the Texas Department of Health to determine, on an annual basis, if any recipients of LIBs paid from the SIF have died. In addition, the bill would have increased funding for the SIF by requiring insurance carriers to pay in larger sums of money to the SIF in death claims in which no beneficiary survives the deceased employee. Current law requires an amount equal to 364 weeks of death benefits be paid into the SIF; the bill would have increased this to an amount equal to 401 weeks of benefits (the current statutory cap on income benefits payable to injued employees).

SB 1529 (Sen. Brimer) also would have made changes to the operation and management of the SIF. The administrator of the SIF, currently a TWCC employee who answers to the TWCC Executive Director, would have become a Governor-appointed post. In addition, the SIF would have been allowed to fund other workers' compensation health care network costs (the SIF is already required by HB 2600 to pay certain costs related to the HNAC network project, up to $1.5 million), and the reserving requirements for the SIF to trigger an increase in the workers' compensation insurance carrier maintenance tax (in the event that current reserves are not adequate to fund expected liabilities) would have been decreased.

HB 2808 (Rep. Giddings) would have transferred certain authority over the Texas Mutual Insurance Company (TMIC) from the Texas Department of Insurance (TDI) to TWCC, as well as strengthened membership and audit report requirements relevant to the TMIC Board. In addition, the bill proposed to statutorily lengthen the timeframe in which TWCC may request or receive a grant from TMIC from September 1, 2003 to September 1, 2005.[31]

SB 101 (Sen. Van de Putte) would have barred former TWCC Commissioners and TWCC or State Office of Administrative Hearings (SOAH) personnel from going to work for insurance carriers for certain timeframes after they leave service with the state. For commissioners, this period would have been two years; for TWCC and SOAH personnel, one year.

HB 3233 (Rep. Todd Smith) would have transferred the administrative hearing functions of certain state agencies, including TWCC, to the State Office of Administrative Hearings (SOAH). Under current law, TWCC resolves all disputes regarding indemnity benefit matters, while SOAH handles appeals of workers' compensation medical disputes and disputes involving administrative penalties and sanctions.

Several bills, including **HB 3345 (Rep. Wohlgemuth)**, **HB 3071 (also Rep. Wohlgemuth)**, **HB 2769 (Rep. Chisum, a companion bill to SB 287), and SB 1952 (Sen. Ellis/Rep. Swinford)** proposed various two-year term structures for TWCC's Board, but these bills did not pass.

8) State Workers' Compensation Program Issues

HB 2427 (Rep. Fred Brown) would have allowed universities covered by SORM to self-insure in the same manner as the UT and Texas A&M systems. Similarly, **SB 1243 (Sen. Armbrister/Rep. Ritter)** would have allowed the Teachers Retirement System (TRS) to pursue workers' compensation coverage options outside of SORM. Another bill, **HB 322 (Rep. Noriega)** would have allowed state employees to concurrently use all or part of their sick leave and receive workers' compensation income benefits. Under current law, employees must choose whether to use sick leave or receive workers' com-

pensation income benefits, but cannot do both at the same time.

SB 147 (Sen. Barrientos/ Sen. Elkins) would have required state agencies to develop risk management plans that meet certain requirements and to submit these plans to SORM by July 15 of each odd-numbered year. SORM would have, in turn, been required to provide assistance to agencies in creating these plans. The bill specifically required that risk management plans include business continuity strategies designed to keep agencies operational if faced with either man-made or natural disasters or disruptions.

Notes

[1] All bills discussed in this article are referred to as either HB (House Bill) or SB (Senate Bill) to indicate the chamber of the Legislature where the bill originated, with the last name of the bill's author and, if applicable, the bill's sponsor in the second house also noted afterward.

[2] See *Striking the Balance: An Analysis of the Cost and Quality of Medical Care in the Texas Workers' Compensation System*, Research and Oversight Council on Workers' Compensation and Med-FX, LLC, January 2001.

[3] For a more thorough description of all the provisions of HB 2600 and other legislation considered and passed by the 77th Legislative session, see *Texas Monitor* 6:2 Special Legislative Edition (Summer 2001), available online at www.roc.state.tx.us/monform.htm.

[4] See Texas *Labor Code,* Section 408.028 and Texas *Occupations Code* Section 562.009.

[5] See Texas *Labor Code,* Section 413.042.

[6] It should be noted that neither the bill nor current law requires an insurance carrier to respond to a request for precertification.

[7] As discussed later in this section, the Medicare payment policies have not yet been implemented in the Texas workers' compensation system because of litigation over the adopted 2002 TWCC fee guideline. This litigation appears to have ended, but as of this writing, no effective date has been set for the new guideline.

[8] Some of the original provisions of SB 1804 were not included in the final bill. One of these provisions would have revised the application process for Supplemental Income Benefits (SIBs) for certain injured employees. SIBs are available to injured employees who sustain impairment ratings of 15 percent or more (a relatively small group of seriously injured employees), who remain unable to earn wages at their pre-injury rate due to their injury, and who meet certain other requirements. These injured employees are required to apply for SIBs on a quarterly basis; SB 1804 would have modified this to a twice-a-year basis for injured employees who have received SIBs continuously for at least one year. SB 1804 also originally contained a provision calling on TWCC to study an alternative lower-cost medical dispute resolution process (see HB 3168, which did pass, for more information on this subject), and a provision requiring designated doctors in disputes involving a SIBs recipient's ability to return to work to more specifically address tasks that the injured employee could perform. However, these provisions were not included in the final version of SB 1804 approved by both houses.

[9] See *Continental Casualty v. Downs*, Texas Supreme Court, 81 S.W.3d 803 (Texas 2002).

[10] Under Texas *Labor Code,* Section 408.082, income benefits begin to accrue on the eigth day of disability, and first payment of benefits is made about a week later – generally, about 15 days after the date of injury.

[11] Texas *Labor Code,* Sections 407.061 and 407.001(5) require a self-insured employer to utilize a separate business entity as a "qualified claims servicing contractor."

[12] Notwithstanding the employee's actual state of medical improvement, all injured employees are considered to have reached MMI at 104 weeks after the date income benefits begin to accrue. This concept is known as "statutory MMI" (see Texas *Labor Code,* Section 401.011 (30)(B)). An exception may be made to the statutory MMI requirement for employees who undergo spinal surgery; see Texas *Labor Code,* Section 408.104.

[13] Impairment ratings determine both the duration of any Impairment Income Benefits (IIBs) an injured employee may receive (three weeks of benefits are given for each percentage of impairment), and the employee's eligibility for Supplemental Income Benefits (SIBs) after IIBs have expired (an employee must have a rating of at least 15 percent to be eligible for SIBs. See Texas *Labor Code,* Sections 408.121 and 408.142.

[14] See *Fulton v. Associated Indemnity Corporation*, Cause #03-00-00449-CV.

[15] See Texas *Labor Code,* Sections 401.011 (30)(B) and 408.104.

[16] See Texas *Labor Code,* Section 410.208.

[17] See *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958 (Texas, 1999).

[18] See Shields, Joseph, and D.C. Campbell, *A Study of Nonsubscription to the Texas Workers' Compensation System: 2001 Estimates,* Research and Oversight Council on Workers' Compensation, February 2002. It should also be noted that the fact that an employer does not carry workers' compensation coverage does not mean that employer provides no benefits for on-the-job injuries; according to the 2001 estimates, over half of nonsubscribers surveyed (56 percent) employing the vast majority of the nonsubscriber workforce (80 percent) indicated they pay some on-the-job injury benefits.

[19] HB 2095 exempts groups in existence as of Sept. 1, 2003 from the $2 million net worth requirement.

[20] Specific events mentioned in SB 478 are: a stock show; rodeo; carnival; circus; musical, vocal or theatrical performance; professional baseball league or game; professional hockey league or game; wrestling event or match; vehicle or motorcycle event; or "another entertainment event."

[21] In the case of an occupational disease claim, the case may be filed in the county the employee resided when disability

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began or an agreed county. See Texas *Labor Code,* Section 410.252.

[22] See Texas *Labor Code,* Section 412.011 (b).

[23] See Texas *Labor Code* Section 413.011 (a).

[24] See Texas *Labor Code,* Section 413.042. Generally, "finally adjudicated" is interpreted to mean that the claim has been finally decided within TWCC's administrative system; however, this process can be lengthy, and in some cases (such as those where no further income benefits are at stake), the injured employee may have little incentive to contest a denial and therefore receive "final adjudication."

[25] The provision of HB 2098 requiring a penalty be paid to an injured employee was included in an earlier version of HB 2199, but not in the version that won final approval.

[26] See TWCC Rule 130.6.

[27] See Texas *Labor Code,* Sections 406.004 and 410.025.

[28] To receive these protections, nonsubscribers would have been required to offer medical benefits of at least $300,000 for at least the 104 weeks following the injury; at least $100,000 in accidental death benefits for a fatality; and weekly income benefits of at least 75 percent of the employee's preinjury income for at least 104 weeks after the date of injury, not to exceed $600 a week.

[29] See Texas *Labor Code,* Section 417.003 (a) and (b).

[30] HB 1562 (77th session, 2001) dealt with a similar issue. See *Texas Monitor* 6:2 (Summer 2001), available online at www.roc.state.tx.us/monform.htm.

[31] Previous legislation from the 76th session in 1999 (HB 2510) authorized TWCC to accept a grant from the Texas Workers' Compensation Insurance Fund (now Texas Mutual Insurance Company) for up to $2.2 million in order to implement steps to lower medical costs and improve medical quality. TWCC submitted a grant request to TMIC in early 2003 and was awarded a $2.2 million grant in February 2003.

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