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Missouri State Auditor

LABOR AND INDUSTRIAL RELATIONS

Workers' Compensation System

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Improvements Could Be Made To Missouri's Workers' Compensation System

The Department of Labor and Industrial Relations, through its Division of Workers' Compensation (the division), has responsibility for overseeing the state's workers' compensation system. Because of the importance of the workers' compensation system, we focused review efforts on determining (1) the impact of 2005 legislative changes to the workers' compensation system, (2) the adequacy of the medical rating process and the timeliness of benefit payments, and (3) whether other administrative improvements are needed in the system.

Full impact of 2005 legislation not yet known	Legislative changes enacted in 2005 have impacted Missouri's workers' compensation system. The number of workers' compensation cases filed by injured workers and premiums paid by employers decreased in 2006 and 2007. Benefit costs per covered employee declined significantly in 2006 and increased slightly in 2007. However, due to prior downward trends in the frequency of injuries and other factors, the full impact of the 2005 legislative changes is not yet known. (See page 11)
Guidance to injured workers eliminated	As a result of the 2005 legislation, injured workers are no longer provided limited legal guidance by division personnel to help ensure they are getting fair settlements. As a result of the law change, unrepresented claimants have been placed at a disadvantage. Since the new legislation has been in effect, settlements paid to unrepresented claimants have decreased by 14.3 percent. In addition, this legislative change may contribute to an increase in attorney involvement. (See pages 13 and 14)
Medical rating process not providing consistent and predictable results	Missouri's medical rating process has not provided consistent and predictable results for injured workers. Missouri, unlike most states, uses an unstructured approach to the medical rating process. In addition, benefits have not been provided to injured workers in a timely fashion. As a result, injured workers incur delays in getting benefits and may increase attorney involvement. (See pages 17 through 20)
Administration of system could be improved	The number of non-compliance investigations and referrals to the Attorney General have decreased. The amount of fines collected has also decreased. In addition, injury reporting violations have not been monitored or referred for prosecution. Changes are needed in state law to allow the division to base administrative fund tax and surcharge rates on future costs. Without a change to state law, the division cannot adequately plan for future expenditures. Improvements are needed to ensure the accuracy and completeness of the division's database system. (See page 23)

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Abbreviations

ALJ	Administrative Law Judge
CSR	Code of State Regulations
DOLIR	Department of Labor and Industrial Relations
PPD	Permanent Partial Disability
PTD	Permanent Total Disability
RSMo	Missouri Revised Statutes
SAO	State Auditor's Office
TPD	Temporary Partial Disability
TTD	Temporary Total Disability
WCRI	Workers' Compensation Research Institute



SUSAN MONTEE, CPA

Missouri State Auditor

Honorable Matt Blunt, Governor
and
Members of the General Assembly
and
Omar Davis, Director
Department of Labor and Industrial Relations
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The Department of Labor and Industrial Relations (DOLIR), through its Division of Workers' Compensation (division), has responsibility for overseeing the state's workers' compensation system. During 2007 injured workers received \$980 million in benefits through employers or employers' insurers. Because of the importance of the workers' compensation system, we focused review efforts on determining (1) the impact of 2005 legislative changes to the workers' compensation system, (2) the adequacy of the medical rating process and the timeliness of benefit payments, and (3) whether other administrative improvements are needed in the system.

We found 2005 changes to the workers' compensation system have impacted the system; however, the full impact of the changes is not yet known. We found the number of claims decreased during 2006 and 2007 and is expected to decrease in future years, in part, due to the law's requirement that work be "the prevailing factor" for injuries to be considered compensable. In addition, benefit costs to employers and insurers, as well as employer insurance premiums, decreased during 2006. However, the full impact on employer insurance premiums will not be known for several years. The 2005 changes also eliminated limited legal guidance provided by the division's legal advisors and administrative law judges no longer can provide any legal guidance. As a result, injured employees without legal representation have been placed at a disadvantage when dealing with insurers. The lack of department assistance may result in increased attorney involvement, slower resolution of cases, and increased system costs.

Improvements are needed in Missouri's medical rating process. Unlike the majority of other states, Missouri's process has not provided consistent and predictable results for injured workers because the state uses an unstructured approach to the medical rating process. Modeling the workers' compensation system after other states could provide more consistent and predictable results. We also found benefits have not been provided to injured workers in a timely manner because state law has not (1) contained clear language as to when the first temporary total disability payment is to be made, (2) required permanent partial disability benefits to be paid in a timely manner once a final rating has been issued, and (3) required timely medical treatment.

Improvements are also needed in the administration of the workers' compensation system. We found noncompliance investigations and referrals to prosecutors and/or the Attorney General, and fines collected as a result, decreased in 2006 and 2007 because of reductions in staffing levels. However, in 2008 the division took

action to increase noncompliance referrals. In addition, violations of the 5-day injury reporting requirement have not been monitored or referred for prosecution. Changes are also needed in state law to allow the division to base the administrative fund tax and surcharge rate formula on future needs. Improvements are also needed to ensure the accuracy and completeness of the division's database system.

We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides such a basis. This report was prepared under the direction of John Blattel and key contributors to this report included Robert D. Spence, Robert E. Showers, Ryan F. Redel, and Travis Owens.

A handwritten signature in black ink, appearing to read "Susan Montee". The signature is fluid and cursive, with the first name "Susan" and last name "Montee" clearly distinguishable.

Susan Montee, CPA
State Auditor

Introduction

Workers' compensation laws in Missouri are administered by the Department of Labor and Industrial Relations (DOLIR), Division of Workers' Compensation (division). According to state regulations,¹ the division administers the law "to insure injured employees receive prompt and adequate medical treatment, payment of benefits of wage loss, compensation for permanent disability and physical rehabilitation for the severely injured by providing assistance to injured workers, to include filing of claims and conducting hearings to resolve disputes between employers and employees relating to Workers' Compensation benefits."

According to DOLIR documentation, the General Assembly initially enacted Missouri's workers' compensation law in 1925, with the law taking effect in 1926, following voter approval. Before workers' compensation laws were enacted, an injured employee's only recourse for a work-related injury was to sue an employer in civil court. To win a settlement an employee had to prove employer negligence. For employers to prevail, they had to prove employee negligence and fault for the injury. These civil cases were often long and expensive.

The workers' compensation law required concessions by management and labor. Management's concession allowed a no-fault system in exchange for labor's concession of exclusive remedy. The no-fault system allows faster recovery for employees who had job-related injuries. It also allows employees with minor injuries to receive benefits without lengthy legal proceedings, previously an obstacle. The intent of the no-fault system was to make payment of benefits for work-related injuries a simple administrative procedure without requiring the courts to determine fault.

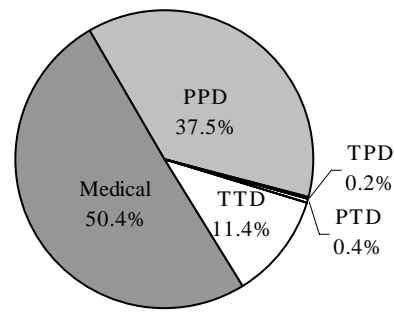
System Costs

The cost of Missouri's workers' compensation system is paid for by employers. Each eligible employer must either carry adequate workers' compensation insurance or become self-insured. Employers pay insurers a "premium," or fee, for coverage. The premium depends on the payroll of the company, the type of work employers engage in, the employer's past experience with workers' compensation and other factors. Self-insured employers are required to post a security bond adequate to cover any potential workers' compensation obligations. All benefit costs, including medical expenses, temporary total disability (TTD), permanent partial disability (PPD), permanent total disability (PTD) and temporary partial disability (TPD) benefits are paid by the insurer or the self-insured employer. Insurers and self-insured employers paid approximately \$980

¹ 8 CSR 50-1.010.

million in benefits in 2007.² Figure 1.1 depicts the breakdown of those benefits by benefit type for 2003 through 2007.

Figure 1.1: Benefits By Type as a Percentage of Total Benefits – 2003 through 2007



Source: Division of Workers' Compensation data.

While medical expenses made up approximately 50 percent of benefit payments from 2003 to 2007, this percentage increased every year during the 5-year timeframe, totaling 53 and 54 percent for 2006 and 2007, respectively. Likewise, the percentage of PPD benefits to total benefits declined every year from 2003 to 2007, totaling approximately 34 percent for 2007. Detailed benefit information for 1997 through 2007 is presented in Appendix II on page 30.

Administration costs of the workers' compensation law, including administrative law judges (ALJs) and all division staff salaries, are paid through an administrative tax/surcharge on employers. Administrative costs totaled \$18.4 million in fiscal year 2008. Administrative costs decreased by 7.1 percent and 5.3 percent in fiscal years 2006 and 2007, respectively, before increasing 14.1 percent in fiscal year 2008. The increases in 2008 were primarily due to a significant increase in workers compensation tax refunds to employers who had overpaid taxes in prior periods. The Administrative Fund balance totaled \$30.4 million at the end of fiscal year 2008. See Appendix I for detailed administrative tax revenue and expenditure figures, as well as Administrative Fund balance information. State statutes contain a formula which the division uses to determine the administrative tax/surcharge rate as well as a formula for the Second Injury Fund surcharge rate. Statutorily, the administrative tax rate cannot exceed 2 percent, and the Second Injury Fund rate cannot exceed 3 percent. These rates are charged to insurers based on total premiums charged and are passed through to employers. The administrative tax/surcharge and Second

² Unless otherwise noted, statistical information presented in this report is on a calendar year basis.

Injury Fund surcharge go into separate funds. We addressed the Second Injury Fund in detail in an April 2007 audit report.³

How system costs compare to other states

According to 2005 data⁴ from the National Academy of Social Insurance, Missouri ranks 17th in the nation and 3rd among its 8 surrounding states in benefits paid per \$100 of wages paid, at \$1.18. Missouri is 14.6 percent higher than the national median of \$1.03 per \$100 of wages paid, and represents a 10.6 percent decline from the previous year.

According to a 2007 report⁵ by the Oregon Department of Consumer and Business Services, which performs a national analysis of workers' compensation premium rates, Missouri workers' compensation premiums rank 24th nationally, and 4th among the 8 states surrounding Missouri. Missouri ranked 26th in the nation in 2000 and 2002, and 22nd in 2004.

While division data shows total medical costs and medical costs per claim are increasing, National Council on Compensation Insurance (National Council) data indicates this is a national trend. In addition, Missouri's medical costs per claim have consistently been at least 25 percent below the national average, according to National Council data.

The Injury Reporting and Resolution Process

Injured workers begin the workers' compensation process by filing a report of injury with employers. The report of injury must be filed by the employee to the employer within 30 days of the work-related accident which caused the injury. The employer is required to report the injury to the insurance carrier, or third party administrator, within 5 days of being notified of the injury, and the insurance carrier is then required to report the injury to the division within 30 days of being notified of the injury. State law allows the employer to select the treating physician. If the insurer or third party administrator determines the injury is legitimate and decides not to contest liability for the injury, all medical costs associated with the injury are paid by the employer or the employer's insurance carrier. In the event the injury causes the employee to take time off work, the employee is awarded TTD benefits to partially replace any lost wages. TTD benefits are to be paid on the same schedule as the employee's regular wages, but at least every 2 weeks.

³ "Second Injury Fund," SAO, April 2007, Report Number 2007-19.

⁴ 2005 was the most recent data available for this statistic.

⁵ "Oregon Workers' Compensation Premium Rate Ranking - Calendar Year 2006," Oregon Department of Consumer and Business Services, Information Management Division, January 2007.

If the injury results in a permanent disability, PPD or PTD benefits are due. The amount of compensation depends on the severity of the disability, the body part injured, and the injured worker's average weekly wage. State law defines the weekly benefits for total loss of each part of the body and for the body as a whole. Partial disability benefits are paid based on the percentage of disability, multiplied by the maximum number of weeks for the body part that has been disabled. For example, the loss of the leg at the knee is statutorily valued at 160 weeks. If an injury to the knee has been determined to have caused a 20 percent disability of the knee, the injury would be paid at 32 weeks (160 weeks times 20 percent). The 32 weeks would be multiplied by the person's compensation rate, not to exceed 55 percent of the state average weekly wage, to determine the individual's compensation. PTD benefits are capped at 105 percent of the state average weekly wage.

An injured worker is not required to file an official claim form to receive benefits. However, a claim form must be filed within 2 years of the date of injury to preserve all of the worker's rights under statute. The period of limitations is extended to 3 years if the employer/insurer does not timely file the report of injury with the Division. An official claim form is typically filed when a case is in dispute. The majority of cases include no permanent disability issues and were not in dispute, and therefore, no claim form. The majority of cases involving permanent disabilities are resolved through lump sum settlement.

2005 Law Changes

Missouri's workers' compensation laws⁶ underwent significant changes, effective August 2005 as part of Senate Bill 1. Changes included (1) more narrowly defining the definition of an "accident," (2) tightening the definition of what constituted a work-related injury by adding language that stated work must be "the prevailing factor⁷ in causing both the resulting medical condition and disability," and (3) strengthening penalties for workers' compensation fraud committed by employers and employees. In addition, the changes eliminated the division's 23 legal advisor positions and created 14 new ALJ positions to add to the existing 26 ALJ positions already in place. These changes were made in an attempt to reduce workers' compensation costs to employers. The impact of Senate Bill 1 is discussed in Chapter 2 of this report.

⁶ Workers' compensation laws are found in Chapter 287, RSMo.

⁷ Prior to Senate Bill 1, state law required work be "a substantial factor in causing the injury."

Scope and Methodology

To determine the impact of the 2005 legislation and to discuss the current workers' compensation system, we interviewed officials at the Department of Labor and Industrial Relations (DOLIR), the Division of Workers' Compensation (division), the Missouri Department of Insurance, Financial Institutions and Professional Registration (Department of Insurance), and the Attorney General's Office. We also conducted interviews with 10 ALJs, Missouri Employer's Mutual⁸ officials, representatives of the Missouri Bar Association, the Missouri Association of Trial Attorneys, the American Federation of Labor and Congress of Industrial Organizations, Associated Industries of Missouri, the National Federation of Independent Businesses, as well as representatives from the Workers' Compensation Research Institute (WCRI),⁹ and other workers' compensation authorities. We also requested various data reports from the division's workers' compensation data system and the Fraud and Noncompliance Unit.

To review the adequacy of the medical rating process, we performed a review of 75 workers' compensation cases and related documentation. We limited our review to cases involving only one body part, the knee, to identify how consistent the system treats injuries of a similar nature. Of the 75 total cases reviewed, 50 were randomly selected from a list of 180 knee injuries compensated at a 20 percent level with injury dates during 2005 and 2006. In order to ensure a diverse sample, we stratified the population into cases with and without attorney involvement and sorted by medical costs. We selected 25 cases with attorney involvement and 25 cases without attorney involvement. We selected 3 other cases for review from the 20 percent population which contained significant medical costs.

In addition, we randomly selected 22 cases from a list of 299 knee injuries compensated at the 10 percent level with injury dates during 2005 and 2006. We selected 11 with attorney involvement and 11 without. Due to the limited scope of the items tested, the results of our test cannot be projected to the entire workers' compensation population. However, we believe the sample is representative of the universe of PPD cases. We did not perform test work on PTD cases. Workers' compensation insurance carriers and third party administrators determine if cases are compensable based on an investigation of the injury. We did not have access to insurance company investigation documentation, and therefore, could not review the validity of the claims involved.

⁸ Missouri Employer's Mutual is an insurance company that specializes in workers' compensation insurance and is the market leader in the state.

⁹ The WCRI is a not-for-profit research organization which provides information about public policy issues involving workers' compensation systems.

To test the validity of the data system, we compared information in the data system to information observed in the hardcopy image system for each case test item. We found errors in 7 of 75 items reviewed. Six of the errors did not materially affect the reliability of results of our audit work. We found one data input error which caused a significant overstatement of medical costs. See page 25 for a discussion of this issue.

We requested comments on a draft of our report from the Director of the Department of Labor and Industrial Relations.

Full Impact of 2005 Legislation Not Yet Known

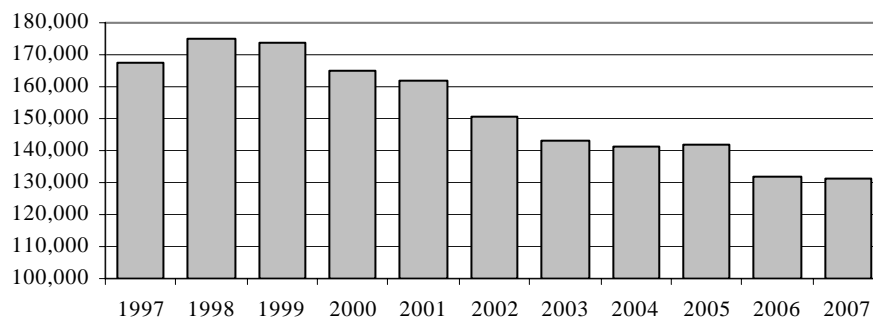
Legislative changes enacted in 2005 have impacted Missouri's workers' compensation system, however, the full impact of the 2005 legislative changes is not yet known. The number of workers' compensation cases filed by injured workers, losses paid by insurance companies, and premiums paid by employers have decreased. In addition, DOLIR no longer provides guidance to claimants. As a result, claimants without attorney representation have been placed at a significant disadvantage over those with representation which is expected to result in increased attorney involvement in the future. Attorney involvement has been shown to increase the duration of cases as well as increase litigation costs to both the injured worker and the employer/insurer.

Number of Cases, Benefit Costs, and Premiums Reduced

The number of cases and premiums charged to employers, decreased in both 2006 and 2007. The number of cases completed declined 4.8 percent from 2005 to 2006, and declined an additional 1.6 percent from 2006 to 2007, according to division data. The number of injuries reported decreased by 7.2 percent from 2005 to 2006, but declined by less than a percent from 2006 to 2007. Benefit costs per covered employee declined by 3.8 percent in 2006, the first decline since 1999, and increased by .10 percent in 2007.

The extent to which the change in injury activity is attributable to Senate Bill 1 is not readily apparent because historical information shows the number of injuries reported has declined 8 of the last 9 years, decreasing an average of 3 percent per year.

Figure 2.1: Reported Injuries – 1997 through 2007



Source: Division of Workers' Compensation data.

In addition, the National Council and Missouri Employer's Mutual data disclosed the frequency¹⁰ of claims has been declining in Missouri, and nationally, for approximately 10 years. According to the National Council, the following factors have impacted the decline:

¹⁰ Frequency is defined as the number of injuries reported per covered worker.

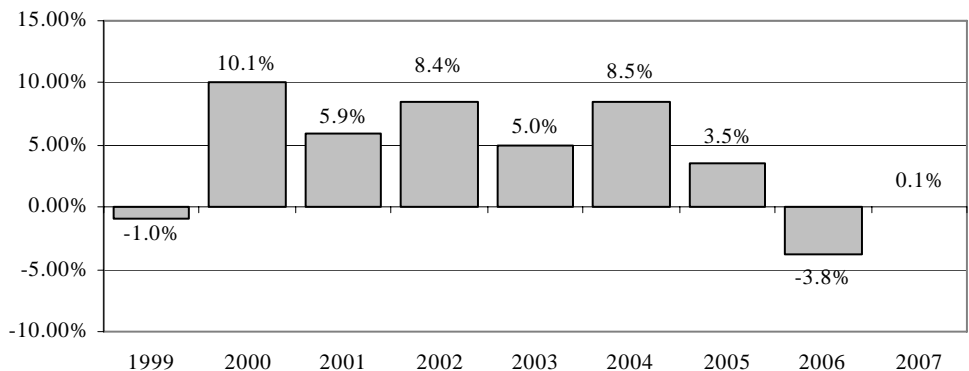
- Continued emphasis on workplace safety in all employment classes.
- Increased use of robotics.
- Increased use of modular design and construction techniques.
- Increased use of power-assisted processes.
- Advances in ergonomic design.

ALJs, attorneys, and insurance company representatives contacted believe the change in the law that requires work be "the prevailing factor" for the injury to be considered compensable, will decrease the number of injuries considered compensable in the future. The extent of the decrease may depend on how the ALJs, DOLIR's Labor and Industrial Relations Commission,¹¹ and appellate courts rule on cases involving the new law, according to ALJs contacted.

Benefit costs and premiums reduced

Based on division data, benefits paid per covered employee decreased by 3.8 percent from 2005 to 2006, the first decrease since 1999, and then increased slightly in 2007. Total benefits decreased by \$23.6 million from 2005 to 2006, but increased by \$9 million from 2006 to 2007. How much of the net decrease is attributable to the 2005 legislative changes is unclear because many of the injuries reported involving permanent disability benefits since the new law went into effect have yet to be finalized, according to division personnel.

Figure 2.2: Percent Change in Benefits Paid Per Covered Employee – 1999 through 2007



Source: Division of Workers' Compensation data and DOLIR covered employee data.

According to representatives of the Missouri Association of Trial Attorneys and an organized labor representative, it is unlikely benefit costs saved in 2006 were eliminated completely. For example, it is more likely private medical insurance or Medicaid absorbed a portion of the medical costs,

¹¹ The Labor and Industrial Relations Commission hears any appeals of workers' compensation cases which have been decided on by the division's ALJs.

Effect on future employer
insurance rates not
certain

according to the representatives. In addition, an increased number of medical-only claims are being paid directly by the employer, as opposed to being paid by the employer's insurance company, according to data provided by Missouri Employers Mutual. State law allows employers to pay up to \$1,000 of medical costs directly, without affecting the employers' insurance rate. While the injury is reported to the division in these situations, the costs associated with the claim are not.

Most employers experienced
decreased premium costs

In August 2007, the National Council issued a report estimating a 10.1 percent loss cost reduction for 2008. This estimate represents the first significant decline in anticipated costs since Senate Bill 1 was implemented. According to Department of Insurance personnel, the National Council cost estimates are advisory in nature and are not a guarantee that workers' compensation rates will decline. Based on discussions with the Department of Insurance and Missouri Employers' Mutual representatives, workers' compensation insurance rates are not directly driven by loss costs or cost estimates, but are more effected by overall market conditions, such as competition in the market place. In addition, according to the Department of Insurance and employer group representatives, uncertainty in the workers' compensation market regarding several lawsuits has possibly kept insurance rates from dropping more significantly.

The majority of Missouri employers have experienced reduced insurance premiums since the 2005 legislative changes. According to DIFP data, workers compensation insurance rates declined by 2.2 percent and 3.6 percent in 2006 and 2007, respectively. Based on premium rate filings with the Department of Insurance, 74 percent of Missouri employers experienced a reduction in premium costs on policies written in 2007, while 8 percent experienced increases. The remaining 18 percent experienced no change. In total, Missouri employers paid approximately \$980 million in workers' compensation premiums in 2007, a 1.3 percent reduction from 2006 levels, according to Department of Insurance estimates.

Guidance to Injured Workers Eliminated

Injured workers are no longer provided guidance by ALJs or division staff to help ensure they obtain fair settlements. ALJs and division staff are only allowed to notify claimants of the types of benefits available, the right to an attorney, and ensure the settlement is voluntary and not unduly influenced, according to ALJs contacted. Prior to Senate Bill 1, state law allowed the department's Legal Advisors¹² and ALJs to provide limited guidance to injured workers to help ensure unrepresented claimants received a fair settlement. A 2003 WCRI report on Missouri's workers' compensation

¹² The Legal Advisor position was eliminated as part of Senate Bill 1.

system¹³ cited the division's practice of providing this guidance as a safeguard for workers, particularly in a system, such as Missouri's, which allows the employer/insurer to select the treating physician.

ALJs no longer provide such guidance because of the Missouri Supreme Court Legal Ethics Counsel's interpretation of the 2005 legislation. The Legal Ethics Counsel concluded it was unethical for ALJs to provide any legal advice to claimants, and violation of such policy would impact the ALJs' law license. If state law gave ALJs authority to provide limited legal advice, or if someone other than the ALJ provided the guidance, no ethical concerns would exist, according to the Legal Ethics Counsel.

Unrepresented injured workers placed at disadvantage

Without the division providing a minimal level of guidance to ensure fair settlements, the Missouri Association of Trial Attorneys and labor representatives contacted believe claimants have been placed at a disadvantage. Discussions with ALJs disclosed injured workers without ALJ advice and/or legal representation have been offered lower settlements as a result of the law change. This is consistent with division data that shows the average PPD settlement paid to unrepresented claimants decreased an average of 14.3 percent since the new law's effective date in August 2005.¹⁴ The same data shows settlements for represented claimants have increased by an average of 9.6 percent since the effective date of the new law.

As discussed above, division personnel have been limited in the help they can give to injured workers. However, state regulations¹⁵ state the purpose of the division is to insure timely and adequate benefits, and to provide assistance to injured workers.

2005 changes expected to increase attorney involvement, case costs, and duration

Historically, Missouri has been a high attorney involvement state, according to a WCRI report issued in 2003, because Missouri's system has created a situation where an attorney can provide significant value, according to a WCRI representative. According to ALJs and attorney groups contacted, the elimination of guidance to claimants has increased attorney involvement, or will create additional attorney involvement in the future. However, division data is inconclusive regarding the increase in attorney involvement as a result of the 2005 legislative changes.

¹³ "Revisiting Workers' Compensation in Missouri: Administrative Inventory", WCRI, December 2003.

¹⁴ Based on data through June 12, 2008.

¹⁵ 8 CSR 50-1.010.

A high level of attorney involvement results in increased litigation costs for both the employer as well as the injured worker, according to a WCRI representative. Litigation costs include attorney fees and costs for additional doctor ratings. Based on our case review, attorney involvement also lengthens the duration of the claim. Our test case results disclosed cases with attorney involvement took an average of 13 percent longer from injury date to resolution. For example, claimant cases without legal representation took an average of 358 days from injury to resolution, while claimant cases with legal representation took an average of 405 days. As described on page 9, our case review focused on injuries to the same body part and injuries rated at the same severity.

Conclusions

Legislative changes in 2005 have been a factor in the reduction of compensation cases in 2006 and 2007. However, the full impact of the legislation is not yet known. The change in the law requiring work to be "the prevailing factor" before an injury is considered compensable is expected to decrease the number of compensable injuries in the future. With decreasing claims, workers' compensation losses to employers and/or insurers will likely continue to decrease. Employer insurance rates have declined since the implementation of the 2005 legislation. Future decreases in the premiums charged may not be determined solely by loss cost reductions, but may depend on competitive market conditions.

The 2005 changes to the law eliminated the Legal Advisor positions, which eliminated a claimant's ability to obtain guidance from DOLIR. In addition, the Legal Ethics Counsel's interpretation of the 2005 law deemed it unethical for ALJs to provide limited legal guidance to claimants. As a result, unrepresented injured workers have been placed at a disadvantage, and have experienced a significant decline in the average PPD settlement awarded. By creating a situation where an attorney significantly increases benefit payments, attorney involvement is expected to increase, resulting in slower resolution of cases, and increased system costs for both the employer and employee. By providing limited legal guidance to injured workers, the department can help ensure timely and equitable settlements are attainable without claimants hiring legal representation.

Recommendation

We recommend the Director of the Department of Labor and Industrial Relations:

- 2.1 Expand the role of attorneys within the division, other than the ALJs, to provide limited legal guidance to help ensure timely and fair settlements to injured workers.

Agency Comments

See Appendix III for agency responses to the recommendations and SAO comments.

Opportunities Exist To Improve Missouri's Workers' Compensation System

Missouri's medical rating process has not provided consistent and predictable results for injured workers. This situation has occurred because Missouri, unlike most states, uses an unstructured approach to the medical rating process. In addition, benefits have not been provided to injured workers in a timely fashion because state law has not (1) contained clear language as to when the first TTD payment is to be made, (2) required PPD benefits to be paid in a timely manner once a final rating has been issued, and (3) required timely medical treatment be provided. As a result, injured workers incur delays in getting benefits and may have to increase reliance on attorneys to resolve claims.

Medical Rating Process Not Providing Consistent and Predictable Results

Missouri has a medical rating process that is unstructured and has not provided consistent and predictable results for injured workers. This situation has occurred because Missouri law does not contain specific information regarding how injured workers' disabilities are to be rated. Missouri is one of seven states that has not instituted some form of structured impairment or disability rating guidelines.

Consistency and predictability are important to create an efficient workers' compensation system because not having those attributes leads to increased attorney involvement, cost, and inefficiency, according to WCRI officials.

Medical rating process causes inconsistent ratings

Our review of 75 permanent partial knee injury cases disclosed a medical rating process which produced a mixture of disability and impairment ratings as much as a 30 percent difference in doctor ratings, and cases where no medical rating had been performed. In addition, conflicts of interest exist for medical doctors used by employers and medical doctors hired by attorneys representing claimants.

Ratings vary between employer and employee physicians

The treating physician, and in some cases another physician paid by the employer and/or insurer, typically provided a final disability rating for the injured worker. However, many claimants paid to have separate medical examinations and ratings performed. Our review of test cases disclosed the difference between the employer or insurer physician rating, and employee physician ratings varied significantly. For example, for the cases reviewed with attorney representation, in which employer and employee ratings were known, the variance between the 2 ratings averaged 20 percent. The following two injuries illustrate the inconsistent ratings observed during our case review:

- In one case, the claimant sustained a torn anterior cruciate ligament, a significant knee injury, which required reconstructive knee surgery, and required the claimant to miss over a month of work. Upon achieving maximum medical improvement, this claimant

received a permanent disability rating of 5 percent from the physician hired by the employer.

- In a separate case, a claimant sustained a minor injury to the patellar tendon, which required no surgery, and required no time off work. This claimant received a permanent disability rating of 25 percent from a physician hired by the claimant's attorney.

Conflicts of interest possible for rating physicians

In some cases, physicians are paid by either employers or insurers, or by the employee to provide the disability rating on an injured worker. Many physicians specialize in providing ratings to either employers or insurers, or employees, and receive future referrals based on the ratings they give, according to attorney groups contacted. Therefore, rating physicians, particularly those paid specifically for ratings, have a conflict of interest when providing ratings which favor parties that hired them, according to these groups.

Injuries of similar severity receive different final ratings

Our case reviews also disclosed instances in which claimants with similar injuries had been compensated at significantly different permanent disability ratings. For example, of the 22 cases reviewed and compensated at the 10 percent disability level, 5 involved claimants with a confirmed medial meniscus tear. However, we observed the same injury compensated at the 20 percent disability level in 11 of the 50 cases reviewed. Based on the information available, all 16 required surgery.

State law does not specifically require ratings to be in terms of impairment or disability

During our review of test cases, we also observed instances in which the ratings provided by physicians represented impairment ratings. State law does not specifically state the rating is to be a disability rating. However, the law does mention such factors as the individual's loss of earning power, which implies disability. An impairment rating considers only the individual's physical limitations associated with the injury, such as loss of range of motion or strength.

Guidelines are a possible solution

According to data from an impairment rating consultant,¹⁶ Missouri is one of seven states which does not use the American Medical Association impairment guidelines, state created guidelines, or some combination thereof. The purpose of a structured rating system is to provide medical information in a structured manner in order to assign benefits with minimal

¹⁶ Brigham & Associates, Inc.

dispute, according to a 2003 RAND Inc. study¹⁷ of California's permanent disability rating schedule. A structured rating process would require all physicians use the same methodology to determine disability levels, leading to consistency and predictability in the rating process, according to a WCRI representative. The structured rating process also allows physicians to compare notes in the event of significant dispute.

According to WCRI representatives, a possible solution would be using American Medical Association guides as a baseline when calculating disability. The guides would at least allow workers to receive a more consistent base of compensation and could result in fewer disputed claims. However, the strict use of American Medical Association guidelines would significantly reduce the amount of benefits paid to injured workers, according to the WCRI representative and attorney groups contacted. Reductions in benefits would occur because American Medical Association ratings only deal with the physical impairment of the injured worker and do not consider the impact on the individual's ability to perform a job. Some states require the American Medical Association rating to be adjusted upward to account for non-impairment related factors.

WCRI representatives also stated that another possible solution would be the establishment of a schedule of disability for common injuries. According to the representatives, such an approach might actually be preferable because it adds a level of predictability without adding costs by requiring mandatory ratings.

Attorney involvement resulted in higher final ratings

Our review of 50 cases that had final ratings at the 20 percent disability level disclosed the 25 claimants without legal representation initially obtained an average disability rating of 14.5 percent from employer doctors, while the 25 claimants that obtained legal representation averaged initial disability ratings of 7.5 percent from employer doctors. Therefore, claimants with legal representation negotiated greater increases from the initial rating.¹⁸ Based on these figures, claimants with legal representation received settlements totaling \$3,163¹⁹ more than they otherwise would have, after

¹⁷ "Evaluation of California's Permanent Disability Rating Schedule, Interim Report," RAND Institute of Civil Justice, December 2003. The RAND Institute is a non-profit research organization.

¹⁸ Represented claimants achieved a rating increase of 12.5 percent (20%-7.5%) compared to a rating increase of 5.5 percent (20%-14.5%) for unrepresented claimants.

¹⁹ $(14.5\% - 7.5\%) \times 160 \text{ weeks} = 11.2 \text{ weeks}$. $\$376.55 \times 11.2 \text{ weeks} = \$4,217$. $\$4,217$ minus 25% attorney fee = \$3,163. 100% of the knee is statutorily valued at 160 weeks, and the maximum permanent partial compensation rate for fiscal year 2007 is \$376.55. This figure is based on a small sample size and cannot be projected to the workers' compensation system as a whole.

attorney fees, than unrepresented claimants. Overall, PPD benefits awarded to the 50 knee injuries averaged \$11,904 per case.

Our review of 50 knee injuries, compensated at the 20 percent permanent disability level, also disclosed claimants represented by attorneys had less severe injuries than individuals that did not have representation. For example, of the 25 unrepresented cases compensated at the 20 percent level, 8 involved anterior cruciate ligament tears, while the same injury occurred in 2 of the 25 cases with legal representation. An anterior cruciate ligament tear is considered a significant knee injury by medical sources reviewed.

According to a WCRI representative, Missouri's unstructured rating process allows attorneys to add value to a claim. The representative also reiterated WCRI's 2003 assessment of Missouri's system that stated the unstructured medical rating process is one of the significant factors leading to the high level of attorney involvement and a significant driver of costs in the system.

Benefits Not Always Provided Timely

The workers' compensation system has not ensured TTD, PPD, and medical benefits have been provided in a timely manner. State law²⁰ requires TTD benefits be made at least every two weeks. However, according to division personnel familiar with the process, the statute does not contain clear language as to when the first TTD payment is to be made and does not require the employer or insurance carrier to make the first payment in a timely fashion. We identified 12 of 42 TTD cases (29 percent) in our test population where the first TTD payment occurred more than 2 weeks after payment was first due. For these 12 cases, the first TTD payment was made an average of 52 days after the payment was due. According to division personnel, insurance companies will typically wait until investigations are complete before initiating benefit payments.

State law has not required PPD benefits be paid in a timely manner once a physician's final rating has been issued, and contains no penalties for slow payment. Our case review disclosed the average interval from final doctor's rating to case resolution averaged 154 days. The interval averaged 185 days for cases involving an attorney, compared to 137 days for cases with no attorney involvement. Based on our case review, the longer interval for cases involving attorneys occurred because of additional ratings and negotiations that occurred once employers' doctors have issued ratings.

Although no data was available for analysis, a WCRI representative believes the interval between the final doctor's rating and case resolution in Missouri

²⁰ Section 287.160, RSMo.

is longer than other state systems. The WCRI representative, as well as attorney groups contacted, told us requiring injured workers to wait long periods for final permanent benefit checks provides employers/insurers significant leverage to negotiate smaller settlements. ALJs are unable to ensure a timely payment because state law contains no timeliness requirement for permanent benefit payouts, according to division personnel.

State law does not require timely medical treatment be provided and, therefore, no information is tracked by the division to monitor the timeliness of medical treatment. Based on information provided by claimants and attorney groups contacted, medical treatment can be withheld while the employer/insurer obtains different opinions for treatment, causing delay in treatment. For example, one injured worker contacted stated the insurer sent him to three doctors and waited almost 6 months before his employer's insurance paid for required surgery. The delays occurred even though the employer's initial doctor recommended surgery immediately. In this case, the compensability of the work injury had not been questioned.

Conclusions

Missouri's medical disability rating process has not ensured predictable and consistent results for injured workers and creates a system in which an attorney is considered necessary to obtain a fair settlement. As a result, Missouri has become a high attorney involvement state compared to other states. Attorney involvement has proven to increase case duration and increase case costs to both employers and employees.

Following the lead of other states and instituting a structured approach to the medical rating system would add predictability and consistency to the medical rating process. Once instituted, it could lead to increased efficiency in the system, more timely resolution of cases, increase worker confidence in the system and possibly reduce the need for attorney involvement. However, simply requiring the use of American Medical Association impairment guidelines, as many states have done, would significantly reduce the benefits currently being provided to injured workers. The General Assembly should consider options to add structure to the medical rating system without reducing the benefit level being provided.

State law does not adequately ensure benefits are provided in a timely manner. When medical treatments and benefit payments are not provided in a timely manner, injured workers cannot get the treatment and compensation they are entitled to in a timely fashion. Untimely benefits can create a significant hardship on workers who are unable to work as a result of a work-related injury. As a result, injured workers may retain attorneys to help obtain workers' compensation benefits they are seeking. Again, attorney involvement has proven to increase case duration and increase case

costs to both employers and employees. Improving the timeliness of benefits would help reduce the potential for unnecessary legal representation. In addition, state law has not been clear on how quickly benefit payments should begin and has not provided incentives for employers to make timely first payments and/or provide timely medical treatment. Therefore, the division should work with the General Assembly to clarify state law.

State law does not contain any penalties to encourage timely payment of PPD benefits. By allowing employers and insurers to delay payment of permanent partial benefits once maximum medical improvement has been achieved may provide employers/insurers unfair leverage to negotiate a lower settlement than the injured worker might otherwise have accepted. Improvements to the medical rating structure may reduce this leverage and help ensure permanent partial benefits are paid in a timely and fair manner.

Recommendations

We recommend the Director of the Department of Labor and Industrial Relations:

- 3.1 Work with the General Assembly to help develop a more structured disability rating process.
- 3.2 Work with the General Assembly to clarify state law on how quickly TTD benefit payments should begin and what requirements are necessary to ensure timely payments and/or medical treatments are provided.
- 3.3 Work with the General Assembly to change state law to ensure timely payment of PPD benefits once the claimant has reached maximum medical improvement.

We recommend the General Assembly:

- 3.4 Change state law to implement a more structured disability rating process.
- 3.5 Clarify state law on how quickly TTD benefit payments should begin and what requirements are necessary to ensure timely payments and/or medical treatments are provided.
- 3.6 Change state law to ensure timely payment of PPD benefits once the claimant has reached maximum medical improvement.

Agency Comments

See Appendix III for agency responses to the recommendations and SAO comments.

Administration of the Workers' Compensation System Could Be Improved

Improvements are needed in the administration of the workers' compensation system. Improvements are needed because the number of noncompliance investigations and referrals to the Attorney General have decreased, as well as fines collected. This situation has occurred because of inadequate staffing. Also, injury reporting violations have not been monitored or referred for prosecution. In addition, changes are needed in state law to allow the division to base administrative fund tax and surcharge rates on future costs. Without a change to state law, the division cannot adequately plan for future expenditures. The division has also not ensured data tracked on each case is complete and accurate, and has not used data to adequately track system performance.

Noncompliance Investigations and Referrals Decreased

The division's Fraud and Noncompliance Unit (unit) is responsible for investigating all allegations of fraud and noncompliance involving workers' compensation committed in the state. However, the number of noncompliance cases investigated by the unit dropped from 1,231 to 676 (45 percent) from 2005 to 2006, and dropped to 598 (an additional 11.5 percent) in 2007. Noncompliance investigations primarily involve employers that have not obtained workers' compensation coverage, or have inadequate coverage, according to a unit representative. In addition, the unit has not adequately monitored the timeliness of injury reports, which represents another type of noncompliance.

Staff reduction causes drop in activity

The number of investigations dropped primarily because of a reduction in staffing levels, according to a unit representative. While no positions were eliminated, DOLIR notified the division in 2006 that open investigator positions would not be filled because of budgetary considerations, according to the representative. In the fall of 2007 the unit had 9 investigators, but had as many as 13 during 2005. According to a unit representative, the shortage of staff did not allow the division to utilize a program which compares DOLIR employment data to National Council data to identify potential uninsured employers. The division had the program in place during 2005, and resulted in a significant increase in noncompliance investigations. However, division did not have the system in use during 2006 or 2007. As a result, the number of noncompliance referrals to the Attorney General and local prosecutors dropped approximately 76 percent, from 508 in 2005 to 122 in 2006, according to Attorney General's office data. The Attorney General's office also reports that 2007 referrals increased by 24 percent, to 151 referrals, but fell well below 2005 levels.

Fines and penalties generated from referrals to the Attorney General declined by over 50 percent from 2005 through 2007, going from \$919,213 in 2005 to \$454,171 in 2007,²¹ according to Attorney General's office data.

In early 2008 the division increased the number of investigator positions authorized to 12 and restored the use of the cross-match system in place during 2005. As a result, the number of noncompliance cases referred to the unit from January through May 2008 is more than double the number of cases referred over the same timeframe during 2007, according to data provided by the unit.

**Injury reporting violations
not monitored or
referred for prosecution**

State law²² requires the employer to notify an insurer, or administrator, of each injury reported within 5 days of being made aware of the injury. However, our review of 75 cases showed an average interval from injury report date to administrator of 9.6 days. The sample included 15 cases which had been reported more than 10 days late, with 4 of those cases exceeding 50 days. Timely reporting is necessary to ensure a timely determination of compensability, as well as helping ensure timely medical treatment is arranged, according to Missouri Employer's Mutual personnel. Timely payment of TTD benefits and timely medical services also result in reduced attorney involvement, according to Missouri Employer's Mutual representatives as well as attorney group representatives.

State law²³ contains penalties for noncompliance with reporting requirements. However, a unit representative stated the division has not actively monitored compliance with the 5-day reporting requirement because the department has not had the authority to administratively impose fines. The representative also expressed concern that local prosecutors and/or the Attorney General's office may not have time to prosecute minor offenses such as compliance with the 5-day reporting requirement. However, a representative of the Attorney General's office stated adequate staffing is in place to prosecute any instances of noncompliance referred to them. The Attorney General's office receives funding from the workers' compensation administrative fund to provide these services.

²¹ Penalties went from \$919,213 in 2005 to \$652,265 in 2006, and to \$454,171 in 2007.

²² Section 287.380, RSMo.

²³ Section 287.380.4, RSMo.

Administrative Fund Rate Formula Not Ensuring Adequate Future Funding

The statutory formula for determining the administrative fund tax and surcharge rate has not allowed the division to ensure adequate funding will be available for future expenditures. State law requires the division to project the year end fund balance by October 31 of each year, and compare it to 110 percent of fund expenditures from the prior full year to determine whether an administrative tax and surcharge will be imposed on employers for the coming year. For example, at October 31, 2006, the division projected the December 31, 2006, fund balance to be \$10.2 million, and compared it to 110 percent of actual administrative expenditures from 2005, which came to \$18.2 million. Since the balance was below the threshold, the division then did another calculation to determine what rate to charge.

The division's plan to upgrade its data system illustrates the inadequacy of the current formula. The division's plan requires spending a significant amount of administrative funding over the next several years. However, these future year expenditures cannot be taken into account when deciding whether an administrative tax/surcharge rate can be charged in those periods. Instead, the division must look at the previous year expenditure level.

DOLIR officials stated that basing the administrative tax/surcharge on projected expenditures, similar to what is done in the Second Injury Fund surcharge rate calculation, would help them ensure adequate funds would be available for future periods. Administrative fund expenditure projections are much more predictable than those of the Second Injury Fund because expenditures are more fixed in nature, such as salaries and benefits, and under DOLIR's control.

Timing issues with administrative tax have been addressed

In prior periods, the administrative fund experienced timing issues as a result of state law, which required the prior year tax rate be charged in the current period. The law also resulted in June adjustments which made it difficult for DOLIR to project revenue amounts and ensure cash flow, according to department personnel. As a result, the administrative fund became insolvent during fiscal year 2003, and required a loan from the Tort Victims' Compensation Fund. According to DOLIR personnel, the old law also is responsible for the large fund balances that accumulated in fiscal years 2000 and 2005. Legislative changes in 2005 corrected these problems, allowing the current year tax rate to be charged immediately, creating a more logical cash flow of administrative tax/surcharge funds and reducing the amount of mid-year adjustment that will be required, according to DOLIR personnel.

Division Not Ensuring Data Accuracy and Completeness

Our review of cases disclosed the division's data system has not always contained complete information on each case. For example, of the 72 cases reviewed with completed doctor ratings, ratings for 60 cases (83 percent) had not been included in the division's data system. In addition, 22 (37 percent) of 60 cases reviewed, in which TTD payments had been made, did not have information on the timing of the first TTD payment. The division's injury processing manual states follow-up letters are to be sent to insurers in the event data reported to the division is inaccurate or incomplete. However, division personnel could not explain why data was incomplete.

We also found several significant data errors. For example, we identified one case where the data system showed medical expenses of \$157 million. Investigation by division personnel showed the actual medical costs of the case totaled \$15,000. We also identified a similar error involving a case with over \$25 million in medical costs. In another case, medical costs of \$6 million had been included in the data system and had been supported by a hardcopy document. However, review of the case documents showed the injury to be minor. Subsequent follow-up with the insurer determined the actual medical costs for the case were \$260. Division personnel corrected these three errors after our inquiries about the cases. Division personnel have procedures in place to randomly check the accuracy of input personnel at the division level. However, they have not instituted procedures to detect errors such as the large medical cost errors discussed above.

Data system not used to adequately track system performance

The division has not utilized information in its database to monitor system performance.²⁴ Specifically, the division has not tracked the timeliness of TTD benefit payments or injury reports. Tracking benefits by insurer/employer and reporting the information back to insurers has proven to be an effective method of improving system performance by the state of Wisconsin, according to a WCRI representative interviewed.

Conclusions

To better ensure compliance with workers' compensation laws, the unit must thoroughly investigate all potential instances of employer noncompliance. Since the department has adequate funds, officials should restore unit staffing to prior levels. Doing so should result in additional investigations and referrals to the Attorney General's Office, and in fines and penalties. In addition, it should result in increased compliance with workers' compensation laws, which benefits the workers of the state and protects the Second Injury Fund from uninsured employer claims. The monitoring and referral of untimely injury report violators would also help ensure medical care and TTD benefits are provided in a timely manner and may help reduce

²⁴ WCRI addressed this issue in its 2003 report.

attorney involvement. With the potential increase in penalties and fines being sufficient to cover any increases in personnel costs, the benefits of increasing staffing should outweigh the costs.

State law has not allowed the division to adequately plan for future administrative costs and ensure adequate revenues will be available for administrative needs. By requiring the current balance be compared to past expenditures, the department cannot adequately plan for future expenditures that may be required. Therefore, the division should work with the General Assembly to revise state law to allow it to base administrative fund tax and surcharge rates on projected future expenditures.

Ensuring the completeness and accuracy of case information put into the system will increase the reliability of information pulled from the system. In addition to being used internally to track the progress of each case, data included in the division's database can be used by management to monitor the overall timeliness of benefits and other system performance and trends, and can be provided to insurers as feedback to improve insurer performance.

Recommendations

We recommend the Director of the Department of Labor and Industrial Relations:

- 4.1 Restore staffing to previous levels to increase the number of fraud and noncompliance investigations and referrals for prosecution.
- 4.2 Work with the General Assembly to revise state statutes to allow the division to consider future administrative expenses when calculating the administrative tax and surcharge rates.
- 4.3 Require the division to develop procedures to ensure the accuracy and completeness of division data.
- 4.4 Require the division to track and monitor the timeliness of reporting injury information, processing claims, and benefit payments using existing database information to improve employers' and/or insurers' performance.

We recommend the General Assembly:

- 4.5 Revise state law to allow the division to consider future administrative expenses when calculating the administrative tax and surcharge rates.

Agency Comments

See Appendix III for agency responses to the recommendations and SAO comments.

Historical Administrative Fund Financial Information and Surcharge Rates

Table I.1 depicts revenue and expenditures by categories, and balances and surcharge rates for fiscal years 2002 through 2008.

Table I.1: Revenue and Expenditure Detail – Fiscal Years 2002 through 2008

	2002	2003 ¹	2004	2005	2006	2007	2008
Beginning Balance	20,643,132	5,946,117	9,585,810	39,635,984	48,125,610	37,437,759	31,220,609
Revenue							
Administrative							
Tax/Surcharge	2,221,514	18,558,537	45,780,130	23,532,434	2,070,359	6,289,512	13,980,076
Interest	618,767	100,581	154,312	940,081	1,650,069	1,571,180	1,549,789
Other	676,252	513,764	704,594	869,841	1,245,882	743,727	562,650
Total Revenue	3,516,533	19,172,882	46,639,036	25,342,356	4,966,310	8,604,419	16,092,515
Expenditures							
Personal Service	11,294,141	10,934,835	11,141,711	11,846,208	10,734,919	10,696,587	11,391,648
Operating Expenses	6,023,053	3,879,432	4,327,036	4,226,817	4,347,510	3,479,065	3,743,687
Tax Refunds	526,203	339,757	668,032	315,348	151,872	78,380	1,271,232
Attorney General							
Salaries	229,150	229,150	268,496	309,261	290,511	349,782	368,296
Attorney General							
Operating	141,001	150,016	183,589	155,095	129,349	217,755	135,512
Total Expenditures	18,213,548	15,533,189	16,588,862	16,852,729	15,654,161	14,821,569	16,910,375
Ending Balance	5,946,117	9,585,810	39,635,984	48,125,610	37,437,759	31,220,609	30,402,749
Administrative							
Tax/Surcharge Rate ²	1.0%	2.0%	1.0%	0.0%	0.0%	1.0%	1.0%

¹ For comparative purposes, we did not include a \$3.6 million loan from the Tort Victims' Compensation Fund and its subsequent repayment in 2003 revenue and expenditure amounts.

² Surcharge rate is charged and collected on a calendar year basis.

Source: Division of Workers' Compensation records.

Historical Injury and Benefit Data

The following tables include data obtained from the division's data system, and includes the number of injuries reported, and the number and cost of cases completed, by year and type.

Table II.1: Injuries Reported – 1998 through 2007

Year	Injuries Reported	Percent Change
1998	174,823	4.29
1999	173,670	-0.66
2000	165,245	-4.85
2001	161,778	-2.10
2002	150,350	-7.06
2003	143,015	-4.88
2004	141,212	-1.26
2005	141,794	0.41
2006	131,649	-7.15
2007	131,542	-0.08
Averages	151,508	-2.33

Source: Division of Workers' Compensation data.

Table II.2: Cases Completed By Year and Benefit Type – 1997 through 2007

Cases							
Year	Completed	TTD	TPD	PPD	PTD	Medical	Total Benefits
1997	96,179	\$95,900,639	233,907	273,913,747	561,173	287,149,420	\$657,758,885
1998	123,856	90,429,408	593,541	263,367,615	1,797,333	289,191,902	645,379,799
1999	125,231	87,264,646	1,254,823	265,922,280	1,893,436	293,529,988	649,865,173
2000	123,824	96,403,210	1,564,307	296,812,523	3,918,470	328,740,500	727,439,010
2001	117,746	102,840,501	1,287,999	322,776,716	2,748,316	348,062,955	777,716,486
2002	113,335	104,994,845	1,572,531	341,923,425	2,415,115	380,927,412	831,833,328
2003	105,918	105,219,415	1,746,983	357,048,830	2,322,303	403,167,436	869,504,967
2004	107,528	109,379,093	1,891,549	378,851,534	5,967,981	453,077,498	949,167,655
2005	102,249	112,701,035	2,135,710	376,268,769	3,452,742	499,959,846	994,518,103
2006	97,300	107,906,955	2,485,220	339,387,980	4,490,542	516,687,678	970,958,374
2007	95,767	108,388,845	2,443,243	335,151,855	4,403,816	529,571,073	979,958,832
Averages	109,903	\$101,948,054	1,564,528	322,856,843	3,088,293	393,642,337	\$823,100,056

Source: Division of Workers' Compensation data.

Agency Responses and SAO Comments

DOLIR management provided the following responses to our recommendations. SAO comments to the division response are included. The recommendations are restated for clarification.

Recommendation 2.1: Expand the role of attorneys within the division, other than the ALJs, to provide limited legal guidance to help ensure timely and fair settlements to injured workers.

The Department believes that publication of additional brochures explaining the rights of the injured employees and employers and providing an explanation of what to expect at the settlement conference would be beneficial to all stakeholders. The publication of brochures would accomplish the recommendation made by the State Auditor which is to ultimately ensure that an injured employee receives a settlement in accordance with the law.

The concept of the Department's attorneys providing some sort of "limited legal guidance" is novel and presents some difficulty in adoption for the reasons set forth below.

First, the General Assembly abolished the practice of Department staff providing legal advice to claimants and employers to eliminate any hint of bias toward either group. The concept of guidance is synonymous with advice. Unlike criminal defendants, neither claimants nor employers in workers' compensation proceedings have a right to court or state appointed counsel. At their heart, workers' compensation claims are civil actions. The fact that a venue other than circuit court has been chosen to resolve these disputes does not change their underlying nature. The Department needs to comply with the will of the General Assembly and not reinstitute the practice of providing limited legal advice.

Second, state statute requires the settlement agreement to be "valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement." An Administrative Law Judge (ALJ) has to approve the settlements and has every right to ask the parties questions before granting such approval. Further, statute requires a seven day waiting period between the injury and the offer to settle to allow both parties to assess the circumstances and attempt to avoid abusive settlement practices. Section 287.800.2 RSMo mandates that the ALJs "weigh the evidence impartially without giving the benefit of doubt to any party when weighing evidence and resolving factual conflicts." The Department's legal personnel are governed by the same dictates to remain impartial in responding to inquiries from either the employee or the

employer/insurer. Therefore, it would be difficult and certainly unethical, if not illegal, for the Department's attorneys to exhibit bias toward the unrepresented employee by offering "limited legal guidance" while ignoring the employer/insurer in the process.

Third, an attorney is subject to and governed by the Missouri Supreme Court rules governing the representation of clients. The Department's attorneys represent DOLIR and offer legal advice to the Director, Deputy Director and other Department units and personnel. The Department interprets the State Auditor's recommendation as an invitation to engage in activities that the legislature has squarely placed within the province of the ALJs as set forth in §287.390 RSMo.

The Department's attorneys routinely respond to questions from the ALJs on specific cases. Consequently, the attorneys would be precluded from fulfilling their role as counsel to the Department as they would be rendering "limited legal guidance" to unrepresented claimants while simultaneously rendering advice to Department personnel on many of the same matters. As such, implementation of the State Auditor's recommendation would create an untenable situation for Department attorneys.

Fourth, the General Assembly specifically repealed major portion of §287 RSMo (notably §§287.616 and 287.642) which authorized the Legal Advisors to act as ALJ's and public information personnel. In certain instances Legal Advisors could approve settlements authorized by §287.390 RSMo, preside over docket settings and make final determinations, as well as advise parties on the law and the merit of any settlement offers. The General Assembly made a well reasoned policy determination that legal advisors serving as judge, jury, and advocate was rife with conflicts. Further, there was substantial outcry from employers who complained that they were not only paying for the fund, but also paying for legal advisors to advise claimants on how to get more out of the fund.

Upon elimination of the Legal Advisors, the General Assembly more than doubled the number of ALJ's available to adjudicate worker's compensation claims and vested them with authority to approve settlements. The State Auditor's recommendation that the Department's attorneys offer "limited legal guidance" would invade the province of the ALJs, and reinstitute a practice that was abolished by the General Assembly because of its obvious conflicts.

Fifth, several factors are involved with respect to the timeliness of the settlements, most noteworthy being the nature and severity of the injury. The nature and severity of the injuries influences the ability to quickly receive a

disability rating. Further, the parties often effect when a final determination is reached due to the progress of settlement negotiations and their own availability. The ALJ's try to accommodate these various factors by changing docket schedules to best serve all interested parties. However, to avoid unreasonable delay, the Department has implemented automatic docketing procedures to move cases along and the ALJ's have been advised to adhere as close to these schedules as possible. As indicated above, the approval of a settlement is an adjudicative function solely within the province of the ALJ's. No one has encouraged the ALJ's to approve settlements solely for the sake of expediency, so some delays can be anticipated. While, timeliness is a goal to which the Department attaches significant importance, a fair, reasoned, and thorough decision making process should not be sacrificed to achieve better timeliness measures.

Sixth, claimants are not wholly without resources to allow them to gain a greater understanding of workers' compensation law. In an effort to educate stakeholders on the changes made to the workers' compensation law effective August 28, 2005, the Department: developed PowerPoint presentations; published a brochure called "How the changes in the workers' compensation law affect you"; and participated in numerous presentations throughout the state; and the Department's website has extensive information on Workers' Compensation.

It is important to note that the General Assembly retained the introductory language in §287.642 RSMo that requires the Department to "create in all area offices a public information program to assist all parties involved with an injury or claim under this chapter." As a consequence, the Department maintains dedicated employee and employer toll free number as a service to all stakeholders. Information Specialists respond to questions presented by the stakeholders and the Department's attorneys assist in explaining or clarifying the statutory provisions so that accurate information is disseminated. The Department also provides training to the Information Specialists and other Department personnel. In addition, the Department has a Dispute Management Unit tasked with providing assistance with issues such as basic compensability, temporary total disability benefits and payment of medical bill.

8 CSR 50-1.010 provides in pertinent part that the Division administers the workers' compensation law "to insure injured employees receive prompt and adequate medical treatment, payment of benefits of wage loss, compensation for permanent disability and physical rehabilitation for the severely injured by providing assistance to injured workers, to include filing of claims and conducting hearings to resolve disputes between employers and employees relating to Workers' Compensation benefits." A reading of

this regulation does not support the concept of Department attorneys' providing limited legal guidance. As indicated above, the Division has published brochures and provides assistance to stakeholders who contact the Division.

SAO Comments:

The audit report presents evidence which suggests injured workers have been placed at a disadvantage as a result of the changes to the law to eliminate the legal advisor positions. Prior to the law change, legal advisors were allowed to advise parties of the law and discuss the merits of any settlement offers. While we would agree that allowing legal advisors to approve settlements in addition to providing guidance to claimants created conflicts, the ability of the advisor to notify a claimant of an unfair offer was necessary to ensure unrepresented claimants were not taken advantage of.

Our recommendation is not to allow ALJs to provide legal advice, or for the division to reinstate the Legal Advisor position as it existed previously. However, we believe it would be beneficial to unrepresented injured workers and for the workers' compensation system as a whole for someone with legal experience within the department, who is independent of the case, to advise an unrepresented claimant if the settlement offer they have received is not reasonable. State law does not specifically state the division cannot designate staff for this purpose.

Recommendation 3.1: Work with the General Assembly to help develop a more structured disability rating process.

This recommendation requires legislative action. The Department is an administrative agency charged with applying legislation, not enacting legislation. The Department, in its effort to effectively apply statute, will focus its response on the limited operational recommendations contained in the report and as such will be unable to adequately reply to any recommendations requiring legislative action. Should the General Assembly choose to address recommendations contained in this report, the Department will readily supply information as needed. The Department interprets this recommendation as an acknowledgment by the State Auditor that this matter is currently beyond the control of the Department. The Department would welcome any operational recommendations the State Auditor should have on this issue.

Recommendation 3.2: Work with the General Assembly to clarify state law on how quickly TTD benefit payments should begin and what

requirements are necessary to ensure timely payments and/or medical treatments are provided.

This recommendation requires legislative action. The Department is an administrative agency charged with applying legislation, not enacting legislation. The Department, in its effort to effectively apply statute, will focus its response on the limited operational recommendations contained in the report and as such will be unable to adequately reply to any recommendations requiring legislative action. Should the General Assembly choose to address recommendations contained in this report, the Department will readily supply information as needed. The Department interprets this recommendation as an acknowledgment by the State Auditor that this matter is currently beyond the control of the Department. The Department would welcome any operational recommendations the State Auditor should have on this issue.

Recommendation 3.3: Work with the General Assembly to change state law to ensure timely payment of PPD benefits once the claimant has reached maximum medical improvement.

This recommendation requires legislative action. The Department is an administrative agency charged with applying legislation, not enacting legislation. The Department, in its effort to effectively apply statute, will focus its response on the limited operational recommendations contained in the report and as such will be unable to adequately reply to any recommendations requiring legislative action. Should the General Assembly choose to address recommendations contained in this report, the Department will readily supply information as needed. The Department interprets this recommendation as an acknowledgment by the State Auditor that this matter is currently beyond the control of the Department. The Department would welcome any operational recommendations the State Auditor should have on this issue.

Recommendation 4.1: Restore staffing to previous levels to increase the number of fraud and noncompliance investigations and referrals for prosecution.

Staffing levels in the Fraud and Noncompliance Unit were increased from eight investigators to twelve investigators prior to September 1, 2007. Currently, there are thirteen investigators. Factors other than staffing levels significantly impact the number of investigations from year to year. By using 2005 data as a base year for referrals in the audit report, the State Auditor provides an inaccurate benchmark. A five-year average for investigations conducted and cases referred provides a better standard than

a one-year snapshot. Since calendar year 2005 was an anomaly, the best comparison would be to compare 2002 through 2007 and remove 2005 from the equation. Utilizing statistics from those five years would provide a yearly average of 213 noncompliance referrals and 48 fraud referrals. Referrals in any given year can be dramatically different from previous years due to a number of factors, including several prosecutions from one investigation, or a dramatic increase in leads or tips.

The State Auditor asserts that the Attorney General's office has adequate staffing to prosecute any referral, yet there are in excess of 200 cases that were referred to the Attorney General over a year ago. More than 50 of those cases are in excess of three years old and as such may have exceeded the statute of limitations to prosecute. If staffing levels are, indeed, sufficient at the Attorney General's office, the Department has significant questions about the prioritization of cases by the Attorney General.

The State Auditor indicates fines and penalties generated from referrals to the Attorney General declined by over 50% from 2005 to 2007 according to the Attorney General's office data. Settlement amounts are agreed to by the Attorney General. The Department has no control over any settlement reached between the Attorney General and trial attorneys. The Department interprets this audit finding to indicate that the Attorney General's office could do more to improve these results.

Recommendation 4.2: Work with the General Assembly to revise state statutes to allow the division to consider future administrative expenses when calculating the administrative tax and surcharge rates.

This recommendation requires legislative action. The Department is an administrative agency charged with applying legislation, not enacting legislation. The Department, in its effort to effectively apply statute, will focus its response on the limited operational recommendations contained in the report and as such will be unable to adequately reply to any recommendations requiring legislative action. Should the General Assembly choose to address recommendations contained in this report, the Department will readily supply information as needed. The Department interprets this recommendation as an acknowledgment by the State Auditor that this matter is currently beyond the control of the Department. The Department would welcome any operational recommendations the State Auditor should have on this issue.

Recommendation 4.3: Require the division to develop procedures to ensure the accuracy and completeness of division data.

The Department agrees with this recommendation. Increased training and communication can mitigate data entry mistakes. The Department will conduct more training and make the training continuous. The Department will also conduct more cross-training. The Department has designated personnel as trainers to ensure training received by employees is consistent and standardized. Quality control issues have been identified and the Department is developing a plan to address quality control issues through training and a renewed focus on standard operating procedures. The Department is developing a monthly communication to be emailed to outer offices in an effort to share communication, updates, and ensure accuracy and consistency from office to office.

The Department will also initiate efforts to provide for consistency. The Department will identify a person in each section; docketing, injury processing, liens, entry and withdrawal of attorneys, etc. to answer questions about data entry. The Department will also send a standard procedure manual to the outer offices with those procedures that pertain to the outer offices. The Department is developing standard forms for entry, withdrawal, and substitution of attorneys. Other forms have been modified to enable auto-indexing in an effort to ensure the accuracy of Department data. Some Department forms have been modified to automatically make calculations to ensure data accuracy. Department data, in some cases, is received from attorneys representing employees. This information is received on legal documents and must be entered exactly as it appears on the document. This affects data accuracy. The Department has made a significant push to electronic submission of forms and data. The automation reduces chances for human error. In addition, the Department currently conducts random samples to check data accuracy. To ensure completeness of Department data, the Department is reviewing criteria for closing cases to ensure the completeness of Department data.

Recommendation 4.4: Require the division to track and monitor the timeliness of reporting injury information, processing claims, and benefit payments using existing database information to improve employers' and/or insurers' performance.

The Department will increase its work through education and investigation to monitor and improve reporting compliance by employers and insurers. The Department will continue to seek improvement in these areas. At the same time, the Department is in the planning stages to rebuild or replace the DWC computer system. This process will allow the Department to review reporting compliance issues and address those issues in the new system.