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Texas Workers' Compensation: A Ten-Year Survey - Strengths, Weaknesses, and Recommendations.

Phil Hardberger

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Hardberger: Texas Workers' Compensation: A Ten-Year Survey - Strengths, Weakn

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ARTICLES

TEXAS WORKERS' COMPENSATION: A TEN-YEAR SURVEY— STRENGTHS, WEAKNESSES, AND RECOMMENDATIONS

CHIEF JUSTICE PHIL HARDBERGER*

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I. Introduction

The present Texas Workers' Compensation system has been in effect for ten years. It had a difficult birth. Governor Bill Clements made the development of a new compensation scheme for injured workers his chief priority for the 71st legislative session, which began in January of 1989. The struggle between adherents and opponents dominated the Legislature's regular session, but nothing passed.[1] In July of that same year, Governor Clements issued a press release blaming trial lawyers for the impasse, stating that such attorneys "owe[d] the entire state an apology."[2] The Governor called a special legislative session to continue the fight.[3] The special session failed to produce any results either. Governor Clements then called a second special session.[4] The Senate, by an 18-13 vote, finally adopted the Conference Committee Report on December 12, 1989,[5] thus ending a year of legislative struggle and rancor. The new system became effective January 1, 1991.[6]

The fight for workers' compensation reform in Texas was undoubtedly important. Over 221,000 Texas employers subscribed to workers' compensation insurance in 1989.[7] The costs of workers'

1. *See* Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 St. Mary's L.J. 1111, 1125 (1991).

2. Press Release, Office of the Governor, Trial Attorneys to Blame for Worker's Comp Impasse 30 (July 20, 1989) (on file with the author).

3. *See* Tex. Gov. Proclamation No. 41-2240, 71st Leg., 1st C.S., 1989 Tex. Gen. Laws IX.

4. *See* Tex. Gov. Proclamation No. 41-2361, 71st Leg., 2d C.S., 1989 Tex. Gen. Laws XXXIII.

5. *See* Tex. S.B. 1, 71st Leg., 2d C.S., ch. 1, § 17.16, 1989 Tex. Gen. Laws 122.

6. *See id.*

7. Tex. Indus. Accident Bd., Annual Fin. Rep. 41 (1989).

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compensation coverage hurt business growth, cut into profits, and forced some Texas employers to expand into other states.[8] Many businesses were unwilling or unable to participate in the system, leaving some 750,000 to one million workers without coverage.[9] The costs to businesses were among the highest in the nation[10]—fifth among the states.[11]

In 1988 and 1989, the Industrial Accident Board received 498,252 and 521,443 injury reports, respectively.[12] The true number of injuries, however, was much higher, as many employers did not carry workers' compensation insurance[13] and injuries to their employees went unreported. Most civilized societies recognize a moral obligation to take care of injured workers, or their families if death has occurred from on-the-job injuries. Apart from this moral imperative, there are practical implications as well. If a worker cannot return to work, then he or she no longer contributes to society and becomes a financial burden on the state. Such a burden comes in the form of welfare, higher taxes and reduced consumer activity.

In 1897, England adopted a no-fault compensation system.[14] The British based their system on the premise that employers would pay compensation expenses as part of production costs that could, in turn, pass to consumers in the form of higher prices.[15] This philosophy has not changed. Today, in the United States, every state has a workers' compensation system.[16] Texas first en-

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8. *See* JOINT SELECT COMM. ON WORKERS' COMP. INS., A REPORT TO THE 71ST TEXAS LEGISLATURE 1 (Dec. 9, 1988).

9. *See* William O. Ashcraft & Anita M. Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 610 (1990).

10. *See* JOINT SELECT COMM. ON WORKERS' COMP. INS., A REPORT TO THE 71ST TEXAS LEGISLATURE 4 (Dec. 9, 1988).

11. JOINT SELECT COMM. ON WORKERS' COMP. INS., RESEARCH PAPERS, ch. 4 at 15 (Sept. 1988).

12. TEX. INDUS. ACCIDENT BD., ANNUAL FIN. REP. 41 (1989).

13. *See* William O. Ashcraft & Anita M. Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 610 (1990).

14. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797-800 (1982).

15. *Cf.* Ellyn Moscowitz, *Outside the "Compensation Bargain:" Protecting the Rights of Workers Disabled on the Job to File Suits for Disability Discrimination*, 37 SANTA CLARA L. REV. 587, 593-94 (1997) (explaining that the costs of the workers' compensation "bargain" were to be absorbed by the employer).

16. Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1118 (1991).

acted a workers' compensation system in 1913 and has had one ever since.[17] Though the system has operated under several different versions[18] and withstood many unsuccessful legal challenges,[19] few responsible citizens would argue that a workers' compensation system should not exist. The argument has now shifted to how to make the system work better.

This Article will examine the current Texas Workers' Compensation system based on its ten-year track record. No attempt is made to compare it with previous systems. The Article emphasizes how to improve the current system, while identifying those parts working well enough not to need improvement.

The following premise can be accurately asserted: for the majority of injuries, those where recovery can be achieved within 104 weeks, the present system works well.[20] This area needs few improvements. The more seriously injured worker, one with lasting disability, suffers under the present system. Specifically, after the first 104 weeks of recovery, the benefits decrease dramatically regardless of the severity of the injury.[21] For many injured workers, the benefits simply disappear. Although the worker has not recovered from the injury, and in some cases never will, the system un-

17. *See id.* at 1118, 1120.

18. *See id.* at 1118-19.

19. *See, e.g.*, Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 510 (Tex. 1995) (challenging the system on constitutional grounds); Middleton v. Tex. Power & Light Co., 178 S.W. 956, 958 (Tex. Civ. App.—Austin 1915), *aff'd*, 108 Tex. 96, 185 S.W. 556 (1916), *aff'd*, 249 U.S. 152, 153 (1919) (affirming the Texas Supreme Court's determination that the statute was constitutional); Memphis Cotton Oil Co. v. Tolbert, 171 S.W. 309, 311-13 (Tex. Civ. App.—Amarillo 1914, writ ref'd).

20. *See* ANNETTE GULA & ZHONGMIN LI, TEX. WORKERS' COMP. RESEARCH CTR., THE DELIVERY OF TEMPORARY INCOME BENEFITS UNDER THE TEXAS WORKERS' COMPENSATION SYSTEM-RECEIPT OF THE FIRST PAYMENT 26 (July 1993) (indicating that the "average number of days for receipt of the first TIBs payment decreased from 31.4 days to 24.2 days under the new law"). *Compare* JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 2 at 7 (Oct. 1988) (reporting that prior to reform, temporary benefits were paid at 66-2/3% of average weekly wage), *with* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 32 (Aug. 1998) (noting that the maximum weekly temporary disability payment increased to 70-75% of average weekly wage after reforms).

21. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 5-6 (Apr. 1999) (indicating that less than 1% of claims receive SIBs).

ceremoniously throws out the worker.[22] When a genuine dispute arises involving a serious injury, a worker faces numerous impediments in attempting to obtain legal representation, which generally guarantees the worker an inferior bargaining position and unjust results. Moving from the general to the specific requires an understanding of our present system and the thought process behind it.

II. Opting Out of the Texas System

A. *Problems with Employers Opting Out of the System*

Texas is the only state in which workers' compensation coverage is optional.[23] A 1996 survey revealed that 39% of Texas employers, who employ 20% of the workforce, opted out of workers' compen-

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22. *See id.* at 6 (revealing that less that 1% of claims receive SIBs; only 12.2% of claimants who received SIBs received SIBs through the entire 401 week period); *see also id.* at 11 (stating that approximately 69% of SIBs claimants who no longer received SIBs had not returned to work).

23. Tex. Lab. Code Ann. § 406.002 (Vernon 1996). *See* Research and Oversight Council on Workers' Comp., Experiences of Injured Workers Employed by Non-subscribing Employers 1 (Mar. 1997). *See generally Potential Impact of Mandatory Workers' Compensation on Texas Employers and Employees*, Tex. Monitor (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1996, at 9, 9 (noting that the decision to make coverage optional during 1989 reforms was contrary to recommendations of both the Texas Joint Select Committee on Workers' Compensation Insurance and the National Commission on State Workmen's Compensation Laws); Mary Flood, *New Ruling May Threaten Workers' Comp*, Wall St. J., Feb. 16, 2000, at T1 (noting Texas is the only state in which coverage is optional). Only public employers and a limited number of other employers are required by Texas law to provide workers' compensation insurance coverage. Tex. Lab. Code Ann. § 406.002 (Vernon 1996). South Carolina, which was the last of the other states with non-mandatory coverage, amended its statutes in May of 1996 to make coverage mandatory. S.C. Code Ann. §§ 42-1-330 to 42-1-340 (Law. Co-op. 1985) (repealed 1996) (providing the employer means to exempt himself from the system). *See generally*, Alton L. Martin, Jr., *Understanding the New Workers' Compensation Legislation*, S.C. Law., Sept.-Oct. 1996, at 15, 16, WL 8-OCT SCLAW 15; Research and Oversight Council on Workers' Comp., Experiences of Injured Workers Employed by Non-subscribing Employers 1 n.1 (Mar. 1997). New Jersey's law technically provides employers with an optional form of liability based on traditional common law remedies; however, all New Jersey employers have chosen to adopt the typical workers' compensation system. *See id.* Although coverage is mandatory in other states, those states provide certain exemptions from coverage. For example, in seven states, employers with fewer than three employees are exempt from the workers' compensation law. *See Potential Impact of Mandatory Workers' Compensation on Texas Employers and Employees*, Tex. Monitor (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1996, at 9, 9. Two additional states exempt employers with fewer than four employees, and four other states exempt employers with fewer than five employees. *See id.*

sation coverage.[24] Litigation involving these nonsubscribing employers reveals the shortcomings in permitting employers to opt out of the system.

1. Alternative Benefit Plans

Nonsubscribing employers often develop alternative benefit plans for their employees. While some plans provide adequate coverage, others do not primarily because the State does not regulate the adequacy of the benefits received under the plans. A nonsubscribing employer has unfettered discretion in determining the amount of benefits it will provide employees under an alternative plan. In exchange for these benefits, regardless of how minimal, the worker is prevented from presenting his claims to a jury by being required either to waive his right to sue or to submit his claims to binding arbitration.[25] This is unacceptable.

Despite the inherent problems with alternative benefit plans, some surveys relating to these plans seem to reveal positive aspects. Such surveys, however, can be misleading. For example, one survey revealed that 92% of injured workers employed by large nonsubscribing employers received medical benefits from their employers for medical costs associated with on-the-job injuries.[26] In addition, 82% of injured workers employed by large non-

24. Research and Oversight Council on Workers' Comp., Experiences of Injured Workers Employed by Nonsubscribing Employers 1 (Mar. 1997). *See* Mary Flood, *New Ruling May Threaten Workers' Comp*, Wall St. J., Feb. 16, 2000, at T1, T4 (citing survey). In 1993, an estimated 44% of Texas employers were nonsubscribers. *See* Dr. James A. Dyer et al., Tex. Workers' Comp. Research Ctr., A Study of Nonsubscription to the Texas Workers' Compensation System 17 (Aug. 16, 1993).

25. *See, e.g.*, Strawn v. AFC Enters., Inc., 70 F. Supp. 2d 717, 721-22 (S.D. Tex. 1999) (discussing arbitration provision); Lawrence v. CDB Servs., Inc., 16 S.W.3d 35, 45 (Tex. App.—Amarillo 2000, pet. granted) (discussing a waiver provision); *In re* Turner Bros. Trucking Co., 8 S.W.3d 370, 377 (Tex. App.—Texarkana 1999, orig. proceeding [leave denied]) (discussing arbitration provision); Lambert v. Affiliated Foods, Inc., 20 S.W.3d 1, 5-7 (Tex. App.—Amarillo 1999, pet. granted) (discussing a waiver provision); Reyes v. Storage & Processors, Inc., 995 S.W.2d 722, 726-28 (Tex. App.—San Antonio 1999, pet. denied) (discussing arbitration provision); *In re* H.E. Butt Grocery Corp., No. 09-99-451-CV, 2000 WL 85347 (Tex. App.—Beaumont Jan. 27, 2000, orig. proceeding) (not designated for publication) (discussing such an arbitration provision).

26. Research and Oversight Council on Workers' Comp., Experiences of Injured Workers Employed by Nonsubscribing Employers 13 (Mar. 1997) (describing medical expense coverage of injured workers employed by nonsubscribing employers). Out of the percentage of injured workers receiving medical benefits, 81% stated that all of their medical costs were covered, and 87% stated that medical expenses were paid for the duration of their treatment. *Id.* at 13-14.

subscribing employers stated that they received wages for lost time.[27] Although these results make it appear that nonsubscribing employers generally cover employees for workplace injuries, the survey only covered large nonsubscribing firms. Moreover, only those employees who reported their injuries were contacted for the survey.[28] The survey had a low response rate due to many injured workers' reluctance to participate.[29] Finally, the survey failed to compare the actual benefits employees received under these alternative benefit plans with the benefits provided by the workers' compensation statute. In many cases, the injured worker received less under the alternative benefit plan than the worker would have received under the workers' compensation statute. The survey also ignored what employees were required to give their employers in return for these alternative benefit plans. Employees under alternative plans generally must waive their right to sue or agree to arbitrate their claims.[30] Subsequent litigation concerning these waiver and arbitration provisions illustrate the problems associated with this common feature in nonsubscribers' alternative plans.

27. *Id.* at 17.

28. *See id.* at 2-3.

29. *See id.* at A1-A4.

30. *See, e.g., Lawrence*, 16 S.W.3d at 38-41; *Lambert*, 20 S.W.3d at 5-7 (upholding a waiver/arbitration provision); *Reyes*, 995 S.W.2d at 727 (asserting that employees of nonsubscribers are entitled to sue their employers, and the employer is not entitled to assert contributory negligence, assumption of the risk, or negligence of a fellow employee as a defense). *See* TEX. LAB. CODE ANN. § 406.033 (Vernon 1996) (abolishing these certain defenses in order to discourage employers from opting out of the system); *see also* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 511 (Tex. 1995) (discussing the Workers' Compensation Act); *Reyes*, 995 S.W.2d at 727 (explaining the provisions of the Workers' Compensation Act). *See generally* Mary Flood, *New Ruling May Threaten Workers' Comp*, WALL ST. J., Feb. 16, 2000, at T1 (noting that the risk of expensive litigation is a big incentive for employers to join the workers' compensation system). The Legislature has previously rejected efforts to pass legislation that would permit nonsubscribers to obtain liability waivers from employees. *See id.* at T4. Until recently, a question remained open as to whether a comparative negligence issue must be submitted to a jury upon an employer's request or whether the application of comparative negligence is barred by section 406.033. *See generally* Randall O. Sorrels & Jason B. Ostrom, *Should an Employee's Negligence Be Submitted in a Non-Subscriber Case?*, 63 TEX. B.J. 330 (2000) (providing a broad overview of this issue), WL 63 TXBJ 330. The Texas Supreme Court resolved the issue on May 11, 2000, holding that a comparative responsibility instruction should not be submitted. *See* Kroger Co. v. Keng, 23 S.W.3d 347, 352-53 (Tex. 2000).

a. Waiver Provisions

In *Reyes v. Storage & Processors, Inc.*,[31] Storage and Processors (S & P) hired Ramon Reyes as a forklift operator and enrolled Reyes in S & P's Occupational Accident Employee Welfare Benefit Plan (the "Plan").[32] In connection with the Plan, Reyes executed a document acknowledging that he read and understood the Plan's rules and stipulations.[33] Reyes also signed a Plan Agreement, which waived any other claims he could bring against the company arising out of a work-related injury.[34] Eighteen months after he started, a co-worker drove over Reyes's foot with a forklift, severing it.[35] As provided by the Plan, S & P paid Reyes's medical and wage replacement benefits over a period of eighteen months.[36] Before his benefits terminated, Reyes sued S & P and his co-worker for negligence.[37] The defendants moved for summary judgment, asserting that Reyes waived his causes of action and was estopped from asserting such claims by his acceptance of the Plan's benefits.[38] The trial court granted summary judgment, but the San Antonio Court of Appeals reversed on public policy grounds.[39]

The San Antonio court briefly reviewed the historical development of the Texas Workers' Compensation Act (the "Act"), noting that subscribing employers provide a statutorily established scheme

31. 995 S.W.2d 722 (Tex. App.—San Antonio 1999, pet. denied).

32. *See Reyes*, 995 S.W.2d at 724 (describing a waiver and arbitration provision).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* Reyes received $89,891.69 in medical benefits, and $16,842.86 in wage replacement benefits. *Id.*

37. *Reyes*, 995 S.W.2d at 724.

38. *Id.* at 724-25 (requesting discontinuation of medical and salary benefits but not returning previously paid benefits).

39. *Id.* at 726-29. Before reaching the public policy issue, the San Antonio Court of Appeals rejected the contention that S & P and the co-worker failed to conclusively establish their waiver and estoppel defenses. *See id.* at 725-26. Although the court agreed that Reyes's affidavit raised an issue of fact regarding whether he understood the waiver he signed prior to executing it, the court held that the issue of fact was not material. *See id.* at 725. The court reasoned, "'[a]bsent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract, unless he was prevented from doing so by trick or artifice.'" *Id.* (quoting Vera v. North Star Dodge Sales, Inc., 989 S.W.2d 13, 17 (Tex. App.—San Antonio 1998, no pet.)). Because no summary judgment evidence suggested that Reyes lacked mental capacity or was tricked, the court held that the waiver bound Reyes, if it was enforceable. *See id.* at 725-26.

of benefits in exchange for their employees' waiver of all common law and statutory causes of action arising from workplace injuries.[40] The court also noted that although the Act does not mandate coverage, the Act discourages employers from opting-out of the system by preventing a nonsubscriber from asserting any traditional common law defense in an action brought by an injured worker.[41] Prior courts had held that an employee's waiver of claims arising out of a workplace injury in exchange for a voluntary benefits plan "that provides benefits 'measured by the terms of the Texas Workmen's Compensation Act' is enforceable and 'not contrary to public policy.'"[42] The San Antonio court noted that in those cases, the voluntary plans provided the same benefits as those required of subscribing employers.[43] The court concluded that where the benefits under a voluntary plan are substantially reduced, the intent of the Legislature would be thwarted if the employer was permitted to "reap the principal benefit of providing workers' compensation coverage—the waiver of an injured employee's common law and statutory claims—without also bestowing on the injured employee the principal benefit for which that waiver is the 'quid pro quo'—the limited but certain benefits guaranteed by workers' compensation insurance coverage."[44]

Having identified a potential problem, the court compared the benefits provided under S & P's Plan, including the waiver required in connection with that Plan, with the benefits provided under the Act and the statutory waiver contained in the Act.[45] The Plan provided far more limited benefits, while containing a more all-inclusive waiver. At its essence, the Plan enabled S & P to enjoy the advantages of a subscriber while avoiding the required provision of subscriber-level benefits.[46] Taking this into consideration, the San Antonio court held that the Plan violated public policy,

40. *Id.* at 726-27.

41. *Id.* at 727 (citing Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 511 (Tex. 1995)) (dissuading employers from choosing to become nonsubscribers).

42. *Reyes*, 995 S.W.2d at 727 (quoting Tigrett v. Heritage Bldg. Co., 533 S.W.2d 65, 70 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

43. *Id.* at 727 & n.4.

44. *Id.* at 727-28.

45. *See id.* at 728-29 (displaying a chart that summarizes the differences between the Act and S & P's plan).

46. *See id.* at 729 (remarking that S & P's plan was so one-sided in favor of the employer that it thwarted "the clear intent of the legislature").

noting that "to hold otherwise . . . would signal the end of workers' compensation insurance" because employers would readily choose a voluntary plan with a complete waiver and lower cost over subscriber status.[47] The Insurance Council of Texas recently underscored this holding by stating: "A decision by the Texas Supreme Court finding that waivers are not prohibited by the Texas Labor Code and do not thwart the intent of the legislature could result in employers no longer having an incentive to participant [sic] in the Texas workers' compensation system."[48]

Despite the prediction of the effect such waivers would have on the workers' compensation system, the Amarillo Court of Appeals expressed its disagreement with the San Antonio court's holding in two subsequent decisions.[49] In the first case, the Amarillo court noted that in specific situations, the Legislature has expressly prohibited certain contractual clauses, such as waivers, or has declared those clauses void as against public policy.[50] The court asserted, however, that the Texas Workers' Compensation Act contained no express or implied declaration of legislative intent that a waiver by a nonsubscriber's employee would be void as against public policy if the employer did not provide subscriber-level benefits.[51]

In its second decision, the Amarillo court stated that it preferred "to exercise judicial restraint and not invade the province of the Legislature."[52] The court noted that the Act prohibits a nonsubscriber from asserting three defenses to an action by an employee: (1) contributory negligence; (2) assumption of the risk; and (3) negligence of a fellow employee.[53] The Amarillo court reasoned that to hold the employee's waiver void on public policy grounds

47. *Reyes*, 995 S.W.2d at 729; *see* Mary Flood, *New Ruling May Threaten Workers' Comp*, WALL ST. J., Feb. 16, 2000, at T1 (summarizing holding).

48. *Texas Supreme Court Poised to Rule on Non-Subscriber Use of Waivers in Employee Benefit Plans*, WORKERS' COMPENSATION MONTHLY UPDATE (Ins. Council of Tex., Austin, TX), July 31, 2000, at 8, 9.

49. *See* Lawrence v. CDB Servs., Inc., 16 S.W.3d 35, 40 (Tex. App.—Amarillo 2000, pet. granted); Lambert v. Affiliated Foods, Inc., 20 S.W.3d 1, 5 (Tex. App.—Amarillo 1999, pet. granted); *see also* Mary Flood, *New Ruling May Threaten Workers' Comp*, WALL ST. J., Feb. 16, 2000, at T1 (summarizing decisions and comparing to holding in *Reyes*).

50. *See Lawrence*, 16 S.W.3d at 43-44 (commenting that on several occasions the Legislature has voided contractual arrangements between employers and employees including inequitable indemnity abuses).

51. *See id.* at 44.

52. *Lambert*, 20 S.W.3d at 5.

53. *See id.* at 6.

would result in the judicial exclusion of this fourth defense, which the Legislature chose not to exclude.[54] The Amarillo court's decisions received strong negative reaction from labor advocates, who claimed the decisions could permit employers to establish "kangaroo courts" for employees who do not have the bargaining power to resist a waiver demand.[55]

The Texas Supreme Court has yet to address the issue under the reformed workers' compensation statute. The law is clear as it existed prior to the reform.[56] As one court stated in 1980:

> The statute, on the one hand, takes away from the subscribing employer his common law defenses, and, on the other, it limits the amount of compensation recoverable by the employee. If, as in the case at bar, this balance is tipped so that the employee's benefits under the statute are substantially reduced, the clear intent of the legislature is thwarted. Thus, the contractual provision in question must be declared invalid as against public policy.[57]

b. Arbitration Provisions

Alternative benefit plans that do not require an outright waiver may impose other limits on an employee's cause of action. For example, many plans include an arbitration provision, requiring all

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54. *See id.*

55. *See* Mary Flood, *New Ruling May Threaten Workers' Comp*, WALL ST. J., Feb. 16, 2000, at T4. The legal director for the Texas AFL-CIO stated that the Amarillo cases were dangerous and "could be the death knell for the tattered safety net that now is the workers' compensation system" in Texas. *Id.* The general counsel from one employer, however, stated that the decisions support the proposition that "a deal is a deal." *Id.* The general counsel dismissed concerns about the effect the decisions would have on the workers' compensation system, asserting that "[t]he plaintiffs [sic] lawyers who think this means every employer will start raping employees isn't giving enough credit to employees." *Id.* The general counsel's statement should be evaluated in light of a Research and Oversight Council ("ROC") study that showed that only 35% of injured workers who were surveyed knew their employer was a nonsubscriber when they were hired. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., EXPERIENCES OF INJURED WORKERS EMPLOYED BY NONSUBSCRIBING EMPLOYERS 20 (Mar. 1997). Thirty percent of the workers stated they did not discover they were not covered by workers' compensation until after they were hired; 18% did not discover their employer's nonsubscriber status until they were injured; 10% did not know until sometime after their injury; and 7% did not know their employers were nonsubscribers until they were interviewed for the survey. *Id.* at 20-21.

56. *See* Hazelwood v. Mandrell Indus. Co., 596 S.W.2d 204, 206 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

57. *Id.*

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claims to be submitted to binding arbitration.[58] Like waiver clauses, Texas courts have addressed the validity of these arbitration provisions through much litigation.

In *Strawn v. AFC Enterprises, Inc.*,[59] Barbara Strawn brought suit in federal court to recover for personal injuries suffered while working at a Church's Chicken restaurant.[60] AFC Enterprises, Inc., which owned the restaurant, had an alternative plan that provided benefits to injured workers.[61] AFC conditioned employment on a prospective employee's willingness to sign a "Value Deal Agreement," which required the employee to submit all claims and disputes against AFC to binding arbitration.[62] The "Value Deal Agreement" and the benefits plan referenced one another, and AFC designed the instruments to work together.[63] As could be expected, however, the agreement was not much of a "value deal" for the employee.

AFC recognized that the benefits provided under its plan were not comparable with the statutory workers' compensation benefits.[64] Nonetheless, AFC asserted that it was not required to offer any benefits in exchange for the execution of the "Value Deal Agreement," and that the level of benefits satisfied public policy because AFC still paid minimal benefits without regard to fault.[65] Because Strawn signed a "Value Deal Agreement," AFC moved to compel arbitration.[66] Strawn argued that AFC's unilateral imposition of the arbitration provision in its benefits plan, which admit-

58. *See, e.g.*, Strawn v. AFC Enters., Inc., 70 F. Supp. 2d 717 (S.D. Tex. 1999); *In re* Turner Bros. Trucking Co., 8 S.W.3d 370 (Tex. App.—Texarkana 1999, orig. proceeding [leave denied]); *In re* H.E. Butt Grocery Corp., No. 09-99-451-CV, 2000 WL 85347 (Tex. App.—Beaumont Jan. 27, 2000, orig. proceeding) (not designated for publication).

59. 70 F. Supp. 2d 717 (S.D. Tex. 1999).

60. *See Strawn*, 70 F. Supp. 2d at 719.

61. *Id.* (referring to the plan called the America's Favorite Chicken Company Texas Employee Injury Benefit Plan).

62. *Id.* (explaining the terms of the Value Deal Agreement which provided that, "'all claims and disputes Employee may presently have or may in the future have' against Defendant [AFC], expressly including 'claims for bodily injury or physical, mental or psychological injury' must be submitted to binding arbitration").

63. *Id.*

64. *Id.* at 720. The differences are described as "striking." *Id.* at 719. By statute, an employee would be entitled to lifetime medical benefits, while the plan limited entitlement to 104 weeks for those employees who executed the Value Deal Agreement. *See id.* The plan did not pay any long-term or lifetime wage replacement benefits. *See id.*

65. *Strawn*, 70 F. Supp. 2d at 720.

66. *See id.* at 719.

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tedly provided inferior benefits, was void as against public policy.[67] In ruling on this issue, the federal district court noted that the validity of the arbitration provision depended upon "how similar an arbitral forum is to a judicial one."[68] Concluding that the two forums did not contain sufficient similarities, the court held the arbitration provision void.[69]

Texas state courts, however, remain split on the validity of arbitration provisions in connection with alternative benefit plans. For example, the Texarkana Court of Appeals affirmed a trial court's conclusion that such an arbitration provision was unconscionable.[70] The Beaumont Court of Appeals, on the other hand, upheld an arbitration provision contained in a nonsubscribing employer's benefit plan.[71] Until the Texas Supreme Court or the Legislature resolves the validity of waiver and arbitration provisions in nonsubscribers' benefit plans that provide less benefits than required by statute, employers and employees will remain in a state of flux. Employees who have signed waivers or arbitration provisions in exchange for benefits under voluntary plans will be forced to decide whether they should sue their employers in the event of a work-related injury and challenge the enforceability of the waiver or arbitration provision. Employers will need to decide whether to remain subscribers or to take advantage of the possibility that they could obtain an equally enforceable waiver by providing a voluntary plan offering fewer benefits and costing less.

The Texas Legislature should resolve this dilemma by either making workers' compensation coverage mandatory, as every other state in the country has, or mandating that nonsubscribers provide benefits equal to statutory workers' compensation benefits. In deciding whether to adopt a statute mandating the type of

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67. *See id.* at 722.

68. *Id.* at 724. The court asserted, "allowing an employer to unilaterally impose an arbitration agreement in exchange for miserly benefits can only be consistent with public policy if the arbitral forum is enough like the judicial forum that the 'quid pro quo' exchange desired by the Texas Legislature is not significantly undermined." *Id.*

69. *Id.* at 724-26. The court noted that the arbitral forum prevents the employee from having his or her claim heard by a jury. *Id.* at 724. In addition, the rules of evidence are more relaxed in an arbitral forum, and the level of judicial review is more limited. *Id.* at 724-25.

70. *In re* Turner Bros. Trucking Co., 8 S.W.3d 370, 377 (Tex. App.—Texarkana 1999, orig. proceeding [leave denied]).

71. *In re* H.E. Butt Grocery Corp., No. 09-99-451-CV, 2000 WL 85347 (Tex. App.—Beaumont Jan. 27, 2000, orig. proceeding) (not designated for publication).

coverage required of a nonsubscriber in a voluntary plan, the Legislature would have to consider the cost of administering the review of nonsubscribers' plans and enforcing penalties in the event a nonsubscriber fails to comply with the statutory requirements. In addition, the Legislature would need to consider the impact of the Employee Retirement Income Security Act of 1974 (ERISA) on legislative efforts to mandate specific coverage in nonsubscribers' plans.[72] Ultimately, Texas could save a great deal on administrative costs and could guarantee the worker minimal benefits by simply making the coverage mandatory.

2. Retaliatory Discharge

A second problem with the ability of employers to opt out of the system relates to the protection an injured worker has from termination due to injury. Section 451.001 of the Texas Labor Code prohibits an employer from terminating an employee because the employee has filed a workers' compensation claim.[73] The Legislature adopted this provision because of concerns that some employers would terminate injured workers to avoid paying benefits. Indeed, retaliatory discharge is a valid concern. Responding to one survey, 21% of injured workers reported that they were fired or laid off after a workplace injury.[74] An additional 7% of surveyed workers stated that they had been threatened with termination or lay-off after an injury.[75] Seventy-eight percent of the injured workers who had received threats cited their filed workers' compensation claim as the reason for the threat.[76]

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72. *See* Guilbeaux v. 3927 Found., Inc., 177 F.R.D. 387, 394 (E.D. Tex. 1998) (holding nonsubscribing employer's benefit plan covered by ERISA); Pyle v. Beverly Enterprises-Texas, Inc., 826 F. Supp. 206, 209-10 (N.D. Tex. 1993) (citing several cases holding nonsubscribers' plans covered by ERISA).

73. *See* Tex. Lab. Code Ann. § 451.001 (Vernon 1996). Section 451.001 prohibits a person from discharging or discriminating:

> against an employee because the employee has: (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a . . . [workers' compensation proceeding]; or (4) testified or is about to testify in a . . . [workers' compensation proceeding].

Id.

74. Research and Oversight Council on Workers' Comp., An Analysis of Workers Who Were Fired or Laid Off After a Work-Related Injury 5 (Aug. 1998).

75. *Id.* at 6.

76. *Id.*

Although Texas law protects employees of subscribers from retaliatory discharge, the Texas Supreme Court has declined to extend similar protection to employees of nonsubscribers.[77] In *Texas Mexican Railway Co. v. Bouchet*,[78] Lawrence Bouchet had injured his back in the course and scope of his employment with the Texas Mexican Railway Company (the "Railway").[79] In accordance with its internal policies, the Railway paid Bouchet's full salary, as well as medical and transportation expenses despite the fact that Bouchet's schedule was restricted to working only light-duty when he returned to work.[80] After Bouchet filed suit against the Railway for personal injury, the Railway refused to pay Bouchet's salary and travel expenses.[81] Bouchet subsequently amended the pleadings in his lawsuit to add a claim for retaliatory discharge.[82]

At trial, a jury found against Bouchet on his retaliation claim, but Bouchet appealed, asserting that the jury's verdict "was against the great weight and preponderance of the evidence."[83] The Railway responded that the retaliation claim was improper in a claim for personal injuries under federal law, and, even if the claim was proper, the evidence supported the jury's verdict.[84]

The San Antonio Court of Appeals first addressed whether the claim was proper in an action under federal law.[85] The court noted

77. *See* Tex. Mexican Ry. Co. v. Bouchet, 963 S.W.2d 52, 55-56 (Tex. 1998).

78. 963 S.W.2d 52 (Tex. 1998).

79. *Bouchet*, 963 S.W.2d at 53. Bouchet continued working after his injury until his back condition worsened to the extent that surgery was required. *See id.*

80. *Id.* at 53-54. The internal polices of the Railway required payment during the parties' negotiation of Bouchet's claims. *Id.* at 54. Bouchet's transportation expenses included the expenses incurred by Bouchet in traveling from Laredo to San Antonio for consultation with the necessary medical specialists. Bouchet v. Tex. Mexican Ry. Co., 915 S.W.2d 107, 109 (Tex. App.—San Antonio 1996), *rev'd*, 963 S.W.2d 52 (Tex. 1998).

81. *Bouchet*, 963 S.W.2d at 54. The Railway continued to pay Bouchet's medical expenses. *Id.* Bouchet sued the Railway under the Federal Employers Liability Act. *Id.*

82. *Id.* Bouchet claimed that the Railway violated article 8307c of the Texas Revised Civil Statutes (the precursor to section 451.001 of the Texas Labor Code) because the Railway retaliated against him for filing his suit by denying him benefits and discharging him. *Id.*

83. *Id.* The jury awarded Bouchet $100,000 in damages for the personal injuries he had sustained; however, the jury also found that Bouchet was 80% responsible for his injuries. *Id.* Since the jury determined that the Railway was only 20% responsible, the trial court rendered judgment requiring the Railway to pay Bouchet $20,000. *Id.* The judgment ordered that Bouchet take nothing on his retaliation claim. *Id.*

84. *Id.* (summarizing the Railway's position that recovery for retaliation was not permissible because Bouchet was not covered by workers' compensation).

85. *Bouchet*, 915 S.W.2d at 110-11.

that the Legislature enacted a statutory cause of action to protect workers from being discriminated against for exercising their rights to workers' compensation.[86] The court found that employers most often discriminated against employees when the employee filed a claim or instituted a proceeding to recover for their injuries, or when the employee hired an attorney.[87] Although the 1989 workers' compensation reform legislation did not include the statutory cause of action, Section 451.001 of the Texas Labor Code did contain such a cause of action.[88] Subsequent to the reform's passage, most authorities viewed the statutory cause of action as a separate claim, independent of the workers' compensation statute.[89] Citing a federal district court decision, the San Antonio court noted that the Western District of Texas had held that retaliation claims do not arise under the workers' compensation laws.[90]

The San Antonio court contended that if the statutory cause of action is not tied to the workers' compensation statute, then the cause of action should also apply to nonsubscribing employers.[91] The court asserted that "[t]here is no philosophical or rational reason to prohibit retaliatory wrongful discrimination by a subscribing employer, but to let all other employers discriminate with impunity. The wrong is the same[,] and the injury to the employee is the same."[92] Noting that the language of the statute broadly prohibited retaliatory actions by a *person*, the San Antonio court held that Bouchet was entitled to seek relief under the anti-retaliatory statute.[93] The Texas Supreme Court reversed, holding that the

86. *Id.* at 111.

87. *Id.* at 110.

88. *See id.*; *see also* TEX. LAB. CODE ANN. § 451.001 (Vernon 1996) (recodifying the statutory cause of action for retaliatory discharge formerly found in Article 8307c of the Texas Revised Civil Statutes).

89. *See Bouchet*, 915 S.W.2d at 110.

90. *Id.* (citing Chatman v. Saks Fifth Ave. of Tex., Inc., 762 F. Supp. 152, 154 (S.D. Tex. 1991)). In *Chatman*, the federal court asserted, "[d]ischarging an employee for filing a workers' compensation claim is an independent statutory wrong. Rather than being part of a workers' compensation claim, a retaliatory discharge action arises from acts by an employer in the labor-management relation." *Chatman*, 762 F. Supp. at 155.

91. *See Bouchet*, 915 S.W.2d at 110.

92. *Id.*

93. *See id.* at 110-11. Whether the use of the term *person* broadened the application of the statute was previously addressed in *Hodge v. BSB Invs., Inc.*, 783 S.W.2d 310, 312-13 (Tex. App.—Dallas 1990, writ denied), which the San Antonio court cited. In a subsequent case, the Texas Supreme Court assumed that the statute proscribed the conduct of nonsub-

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plain and common meaning of the statutory provision limits its protections to employees of subscribers.[94]

This judicial holding by Texas's highest court allows a nonsubscriber's injured employee seeking compensation to be a prime target for discrimination. Workers do not choose to be injured. They should not have to suffer discrimination for seeking their rights. Clearly, this is an area that demands legislative intervention so that the employee of a nonsubscriber has the same protection against discrimination as an employee of a subscribing employer.

An unpublished decision from the Houston Court of Appeals demonstrates the abuse that the *Bouchet* holding permits.[95] In *Chemicals, Inc. v. Holland*, Randall Holland injured his back while working for a nonsubscribing employer.[96] Holland threatened to retain an attorney in order to determine his legal rights.[97] The employer's personnel director informed Holland that if he retained an attorney, he should consider himself terminated.[98] Holland hired an attorney and called the personnel director the following day.[99] The personnel director asked him, "Do you think you can come back and start suing everybody, and then just kinda walk back in?"[100] The Texas Supreme Court's decision in *Bouchet* provided the Houston Court of Appeals with the answer to that question. Because Holland's employer was a nonsubscriber, Holland could not sue for retaliatory discharge under Section 451.001.[101]

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scribers without deciding the issue because such a resolution was unnecessary in deciding the case before it. *See* Gunn Chevrolet v. Hinerman, 898 S.W.2d 817, 819 (Tex. 1995).

94. Tex. Mexican Ry. Co. v. Bouchet, 963 S.W.2d 52, 55-56 (Tex. 1998). In addition to the language of the statute, the Texas Supreme Court relied on the House Committee's analysis of the bill enacting the anti-retaliation cause of action. *Id.* at 56. The bill analysis noted that Article 8307c was intended "to protect 'persons who bring Workmen's Compensation claims or testify in such actions.'" *Id.* (citing HOUSE COMM. ON JUDICIARY, BILL ANALYSIS, Tex. H.B. 113, 62d Leg., R.S. (1971)).

95. *See* Chems., Inc. v. Holland, No. 14-97-01402-CV (Tex. App.—Houston [14th Dist.] Oct. 14, 1999, pet. denied) (not designated for publication), 1999 WL 816186.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *1.

100. *Chems., Inc.*, 1999 WL 816186, at *1.

101. *Id.* at *2-3.

B. *Solutions*

The ability of employers to opt out of the system has caused nonsubscribers to treat their employees with increasing unfairness. If the Amarillo court is correct, employers may opt out of the system and establish a benefits plan which provides fewer benefits than the workers' compensation statutes. Those nonsubscribing employers may then require that their employees waive their traditional rights, even though the employees receive substantially fewer benefits than employees of subscribers. Under *Bouchet*, the employees of nonsubscribers have lost a valuable right available to employees of subscribers—the right to sue for retaliatory discharge. This unacceptable state of affairs enables a nonsubscriber to determine whether it should retain an injured worker and pay him or her under its voluntary benefits plan, or simply terminate the worker without the fear of a retaliation lawsuit.

The Legislature has the ability to remedy the obvious unfairness that has resulted from the Supreme Court's interpretation of the rights of nonsubscribers. Specifically, the Legislature should either make workers' compensation coverage mandatory or mandate that nonsubscribing employers provide equal benefits under their alternative benefit plans.[102] In the alternative, if the Legislature elects not to make workers' compensation mandatory for all employers, it should amend Section 451.001 to permit employees of nonsubscribers to sue for retaliatory discharge.

III. Impairment Benefits

A. *Background*

All states award workers' compensation benefits based on impairment, disability, or some combination of those two concepts.[103]

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102. If the Legislature elects to mandate equal benefits, it will need to address the potential problem with ERISA. *See* Guilbeaux v. 3927 Found., Inc., 177 F.R.D. 387, 394 (E.D. Tex. 1998) (discussing preemption of state law claims by ERISA); Pyle v. Beverly Enterprises-Texas, Inc., 826 F. Supp. 206, 209-10 (N.D. Tex. 1993) (citing several cases holding nonsubscribers' plans covered by ERISA).

103. *See, e.g.*, Joint Select Comm. on Workers' Comp. Ins., Summary Research Papers, ch. 3 at 16-19 (Oct. 1988) (describing two compensation concepts); Mark A. Peterson et al., The Inst. for Civil Justice, Compensating Permanent Workplace Injuries: A Study of the California System 19 (1998) (noting differing approaches used by states); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 Rutgers L. Rev. 657, 831-32 (1998) (noting that a choice between concepts creates controversy); Charles Richard O'Keefe, Jr., Note, *The Guides to the Evaluation of*

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Impairment is a medical concept that focuses on bodily injury without regard to its effect on a worker's ability to perform a job.[104] Disability is a socioeconomic concept that focuses on the limitations that result from an impairment.[105] For example, the loss of a finger is an impairment; however, the resulting occupational disability to a concert violinist or a typist would be much greater than the resulting occupational disability to a singer or lecturer.[106]

Prior to the 1989 reform, Texas utilized a disability-based workers' compensation system that compensated workers for loss of

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Permanent Impairment and Workers' Compensation in Indiana, 27 IND. L. REV. 647, 652 (1994) (describing concepts).

104. Tex. Workers' Comp. Comm'n v. Garcia, 862 S.W.2d 61, 83-84 (Tex. App.—San Antonio 1993) (quoting AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 1-2 (Alan L. Engelberg, M.D., M.P.H. ed., 3d ed., 2d prtg. 1989)) (defining an impairment as "'an alteration of an individual's health status that is assessed by medical means'"), *rev'd*, 893 S.W.2d 504 (Tex. 1995); *see also* JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 3 at 15 (Oct. 1988) (defining impairment as "an anatomic or functional abnormality or loss"). Impairment refers to bodily injury without regard to the body's uses. *See id.* Restricted movement or the loss of an extremity are objective signs of impairment. *See id.* Pain and suffering, weakness, or shorter endurance are subjective signs of impairment. *See id.*; Charles Richard O'Keefe, Jr., Note, *The Guides to the Evaluation of Permanent Impairment and Workers' Compensation in Indiana*, 27 IND. L. REV. 647, 652-53 (1994) (defining impairment as "an 'anatomical, physiological, intellectual or emotional abnormality or loss'").

105. *See Garcia*, 862 S.W.2d at 83-84 (quoting AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 1-2 (Alan L. Engelberg, M.D., M.P.H. ed., 3d ed., 2d prtg. 1989)) (defining a disability as "an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements"); *see also* JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 3 at 15 (Oct. 1988) (defining disability as "an inability or limitation in performing certain functions as a result of an impairment"); Charles Richard O'Keefe, Jr., Note, *The Guides to the Evaluation of Permanent Impairment and Workers' Compensation in Indiana*, 27 IND. L. REV. 647, 652-53 (1994) (determining that "disability refers to 'inability or limitations in performing social roles and activities such as in relation to work, family, or to independent community living'").

106. *See Garcia*, 862 S.W.2d at 84 (noting impact from loss of finger different for bank president than for concert pianist); JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 3 at 15 (Oct. 1988) (explaining that an occupational disability due to the loss of a finger is inconsequential for an attorney but substantial for a typist); MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 20 (1998) (stating a major criticism of an impairment-based system is the failure to take into account the devastating consequence that the loss of a finger would have to a pianist as opposed to an economist). An impairment results in an occupational disability only in those instances in which the loss is of consequence to the worker's occupation. *See* JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 3 at 15 (Oct. 1988) (noting that if functions are affected by impairment only and involve non-occupational activities, the disability is non-work related).

wage earning capacity by projecting the future economic effect of their disabilities.[107] The 1989 reform legislation shifted the system from its disability base to an impairment base.[108]

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107. *See* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 511 (Tex. 1995) (noting that the former act intended to compensate for loss of wage earning capacity); *see also* Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1134 (1991) (noting that the old system redressed the reducing of earning capacity). The old system divided disabilities into two categories: specific and general. *See* Rivera v. Tex. Employers' Ins. Ass'n, 701 S.W.2d 837, 838-39 (Tex. 1986) (noting division between general and specific methods to determine compensation); *see also* MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 26-27 (1998) (noting categories of disabilities). For "specific" injuries, which were injuries to a specific member of the body listed in an established schedule, the worker received two-thirds of his average weekly wage for the number of weeks listed in the schedule. *See* Act of May 15, 1973, 63d Leg., R.S., ch. 88, § 7, 1973 Tex. Gen. Laws 190-92, *repealed by* Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 16.01(7), 1989 Tex. Gen. Laws 114 (containing a schedule of specific injuries and benefits); *see also Garcia*, 862 S.W.2d at 121 (Peeples, J., dissenting) (describing specific injury set-up under old law); MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 26 (1998) (noting specific injuries mainly encompassed injuries to extremities and eyes). For example, a worker who lost the use of one hand was paid 150 weeks of benefits. *See id.* For "general" injuries, which extended to and affected the body generally, the worker received two-thirds of the difference between his average weekly wage before the injury and his wage earning capacity at the time of the disability. *See* Act of May 15, 1973, 63d Leg., R.S., ch. 88, 1973 Tex. Gen. Laws 189-90, *repealed by* Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 16.01(7), 1989 Tex. Gen. Laws 114; *see also Garcia*, 862 S.W.2d at 121 (Peeples, J., dissenting) (detailing the circumstances in which general injury was found); MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 27 (1998) (describing the formula for payment for general injuries). Under the old system, attorneys would try to have their client's injury categorized as a "general" injury because workers with "general" injuries typically received larger awards. *See* Travelers Ins. Co. v. Marmolejo, 383 S.W.2d 380, 381-82 (Tex. 1964) (adopting the standard a plaintiff is required to meet to recover for general injury, i.e., incapacity must be caused by extension of specific injury to part of the body other than specific member); *see also* MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 27 (1998) (noting the efforts made to qualify an injury to a specific member as a general injury).

108. *See* Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1134 (1991) (noting new system relies on medical impairment as opposed to occupational disability in determining benefits); RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 1 (Aug. 1999) (comparing calculation of benefits under old system with new system); MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 27-28 (1998) (stating basis of compensation award completely revised under new law and describing change).

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1. Criticisms of Underlying Concepts

Critics of the old system contended that the subjectivity inherent in measuring the disability's effect on wage earning capacity resulted in unpredictable, inconsistent benefit awards.[109] Critics of impairment-based systems contend that such systems sacrifice fairness to the individual worker for the sake of administrative efficiency.[110] By failing to measure the effect that a particular impairment has on an individual worker's ability to work, critics assert that the impairment-based system provides "average" rather than "individual" justice.[111]

The Legislature debated the advantages and disadvantages of both types of systems before it implemented the 1989 reforms.[112]

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109. *See Garcia*, 862 S.W.2d at 83 (noting Legislature implementing 1989 reforms wanted more objective system that was subject to less dispute and provided more accuracy in prediction); *see also* MARK A. PETERSON ET AL., THE INST. FOR CIVIL JUSTICE, COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM 27 (1998) (noting subjectivity under old system invited contention). *See generally* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 831-32 (1998) (noting concerns that disability systems are subject to manipulation).

110. *See* Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1134 & n.180 (1991) (citing criticism of new system's failure to relate occupational disability and medical impairment); *see also Garcia*, 862 S.W.2d at 85-88 (noting act's failure to make adjustment for individualized factors, such as age, education, experience); JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 3 at 17-18 (Oct. 1988) (asserting individual justice is traded for administrative efficiency in impairment systems).

111. *See* JOINT SELECT COMM. ON WORKERS' COMP. INS., SUMMARY RESEARCH PAPERS, ch. 4 at 17-18 (Oct. 1988) (indicating, however, that every system, not just impairment systems, contain "average justice" to a certain degree).

112. *See Garcia*, 862 S.W.2d at 83 (identifying two primary goals of Legislature as lowering costs and increasing benefits). The Joint Select Committee on Workers' Compensation Insurance adopted fourteen policy objectives that guided its recommendations for legislative reform. *See* JOINT SELECT COMM. ON WORKERS' COMP. INS., A REPORT TO THE 71ST TEXAS LEGISLATURE 6-7 (Dec. 9, 1988). The following is a list of those objectives:

1. *SAFETY.* The system should promote safety and health in the workplace through an appropriate employer incentive system.
2. *COVERAGE.* The system should provide broad coverage of employees and work-related injuries and diseases regardless of fault.
3. *MEDICAL CARE AND REHABILITATION.* The system should provide appropriate and quality medical care directed toward prompt restoration of the workers' physical condition and earning capacity.
4. *BENEFIT ADEQUACY.* The system should provide: (a) temporary benefits that replace a high proportion of after-tax lost earnings, and (b) benefits for permanent disability that substantially alleviate the economic duress that occurs or may be expected to occur because of the disability.

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Renewing the debate as to which system better meets the goal of providing adequate, equitable, and timely benefits to injured workers is beyond the scope of this Article. Instead, the discussion will focus on identifiable shortcomings in the new impairment-based system that the Legislature can and should address to better achieve the system's goals.

2. Benefits Under Impairment-Based System

The impairment-based system adopted by Texas in 1989 offers five categories of income benefits: (1) temporary income benefits; (2) impairment income benefits; (3) supplemental income benefits;

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5. *BENEFIT EQUITY.* The system should provide similar benefits to claimants in similar circumstances and it should provide benefits that are reasonably proportionate to the severity of the injury.
6. *EFFECTIVE DELIVERY OF BENEFITS.* The system should provide both income and medical benefits which are adequate, equitable, and appropriate in a manner which is timely, humane, and cost-effective: (a) temporary, permanent, and medical benefits should be provided promptly; (b) the likelihood of disputes should be minimized, but when they occur they should be identified and resolved promptly and fairly; (c) all participants should know their rights and responsibilities; and (d) there should be objective criteria regarding the entitlement to benefits and the amount of the entitlement.
7. *AGENCY CONTROL.* The Industrial Accident Board (IAB) should have the authority and resources to administer and enforce the law and its rules, including the ability to promptly detect and appropriately address acts or practices of noncompliance on the part of any participant.
8. *POLICY CONTROL.* Policymakers in the Legislature and the IAB should be able to insure that the system operates in accordance with the law and policies properly established.
9. *RETURN TO WORK.* The system should encourage the speedy return to employment that is safe, meaningful, and commensurate with the abilities of the accident victim.
10. *INSURANCE.* The system should provide a system of insurance that is secure and efficient in the delivery of benefits.
11. *COST INTERNALIZATION.* The system should protect and relieve public and private programs of the financial burdens of work-related injuries by appropriately allocating such costs to employers.
12. *ECONOMIC VIABILITY.* Workers' compensation insurance should be available to all employers at rates that are not burdensome so that the provision of coverage does not hinder the creation of jobs and economic development.
13. *SYSTEM MONITORING.* The system should provide a mechanism for continued monitoring by and input from business and labor interests.
14. *PROTECTION AGAINST COST TRANSFER.* Costs that are not caused by work-related injuries or illnesses should not be transferred into the system.

Id. at 6-7.

(4) lifetime income benefits; and (5) death benefits.[113] Injured employees receive lifetime income benefits for a limited number of catastrophic injuries, such as the loss of both eyes, both feet, or both hands.[114] A deceased employee's family receives death benefits when a worker dies as a result of a compensable injury.[115] The Labor Code arranges the remaining categories of income benefits in a three-tier hierarchy.

Temporary income benefits, or TIBs, are the first level of income benefits paid to an injured worker. Employees receive TIBs during the "healing period"—the period during which the worker recovers from a temporary disability caused by an on-the-job injury.[116] TIBs accrue on a worker's eighth day of disability and continue until a worker reaches maximum medical improvement.[117] Maxi-

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113. TEX. LAB. CODE ANN. §§ 408.101-.187 (Vernon 1996 & Supp. 2000); *see also* William O. Ashcraft & Anita M. Alessandra, *A Review of the New Texas Workers' Compensation System*, 21 TEX. TECH L. REV. 609, 617-21 (1990) (providing an overview of benefits).

114. *See* TEX. LAB. CODE ANN. § 408.161 (Vernon Supp. 2000); *see also* 28 TEX. ADMIN. CODE §§ 131.1-.4 (2000). Benefits are paid until an employee's death for the following six categories of benefits:

> (1) total and permanent loss of sight in both eyes; (2) loss of both feet at or above the ankle; (3) loss of both hands at or above the wrist; (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist; (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg; or (6) a physically traumatic injury to the brain resulting in incurable insanity or imbecility.

TEX. LAB. CODE ANN. § 408.161 (Vernon Supp. 2000). Loss of use under the revised act is reviewed under the same standard that existed under the old law. *See* Pac. Employers Ins. v. Dayton, 958 S.W.2d 452, 459 (Tex. App.—Fort Worth 1997, writ denied). Loss of use exists whenever the injury causes a body part to no longer possess substantial utility or the body part's condition prevents the worker from getting and keeping employment. *See id.* at 458.

115. *See* TEX. LAB. CODE ANN. § 408.181(a) (Vernon 1996). The legal beneficiaries entitled to receive the death benefit and the duration of that benefit are defined by statute and administrative regulations. *See id.* §§ 408.182-.183; *see also* 28 TEX. ADMIN. CODE §§ 132.2-.9 (2000).

116. *See* ANNETTE GULA & ZHONGMIN LI, TEX. WORKERS' COMPENSATION RES. CENTER, THE DELIVERY OF TEMPORARY INCOME BENEFITS UNDER THE TEXAS WORKERS' COMPENSATION SYSTEM-RECEIPT OF THE FIRST PAYMENT 1 (July 1993) (stating that TIBs provide monetary support for an injured worker during convalescence period). A 1993 ROC study showed that the payment of TIBs was quicker under the new system. *See id.* at 3. The study further revealed that claims involving females, workers in service occupations, and workers with an employer for less than one year may need greater assistance to ensure timely payment. *See id.* at 15-18.

117. *See* TEX. LAB. CODE ANN. §§ 408.101(a) revisor's note, 408.102(a) (Vernon 1996); 28 TEX. ADMIN. CODE §§ 124.7, 129.2 (2000). A carrier is required to begin paying TIBs no later than the seventh day after the injured worker's accrual date. TEX. LAB.

mum medical improvement is generally considered to be the earlier of: (1) the date after which "further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated" based on reasonable medical probability; or (2) "104 weeks from the date on which income benefits begin to accrue."[118]

Impairment income benefits, or IIBs, and supplemental income benefits, or SIBs, are the second and third levels of income benefits an injured worker may receive. Once the worker reaches maximum medical improvement, an impairment rating assigned to the injury determines eligibility for IIBs and SIBs.[119] Texas uses the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (the "*AMA Guides*") for purposes of assigning impairment ratings.[120] An employee receives IIBs during the "ad-

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CODE ANN. § 408.082(a)-(b) (Vernon 1996); 28 TEX. ADMIN. CODE § 124.7(c) (2000). Subject to a maximum and minimum benefit level, TIBs are paid at the rate of 70% of the difference between: (1) the worker's average weekly wage before the injury, and (2) the worker's average weekly wage after the injury. TEX. LAB. CODE ANN. §§ 408.061-.062, 408.103(a)(1) (Vernon 1996); 28 TEX. ADMIN. CODE § 129.3 (2000). If the worker makes less than $8.50 per hour, the worker will receive 75% of the difference between pre-injury and post-injury wages for the first twenty-six weeks. TEX. LAB. CODE ANN. § 408.103(a)(2) (Vernon 1996); 28 TEX. ADMIN. CODE § 129.3(f) (2000).

118. TEX. LAB. CODE ANN. § 401.011(30) (Vernon Supp. 2000); *see also* 28 TEX. ADMIN. CODE §§ 130.2(a), (c), 130.4(a) (2000). The 104 week limitation can be extended for employees who have had spinal surgery under certain limited conditions such as the surgery being performed at or near the conclusion of the 104 weeks. *See* TEX. LAB. CODE ANN. § 408.104 (Vernon Supp. 2000); 28 TEX. ADMIN. CODE § 126.11 (2000).

119. *See* TEX. LAB. CODE ANN. §§ 408.121(a), 408.122, 408.142 (Vernon 1996).

120. *See* TEX. LAB. CODE ANN. § 408.124 (Vernon 1996); 28 TEX. ADMIN. CODE § 130.1(e) (2000). Section 408.124 of the Texas Labor Code mandates the use of the third edition of the *AMA Guides*. *See* TEX. LAB. CODE ANN. § 408.124 (Vernon 1996). In 1998, the ROC surveyed insurance carriers and healthcare providers regarding whether the required use of the third edition caused confusion given that a fourth edition of the *AMA Guides* was available. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 80 (Aug. 1998). Insurance carriers believed the third edition should remain in place because doctors were better trained to use the earlier version. *See id.* at 81. Carriers believed that adopting the fourth edition would negatively impact the system because doctors would experience a steep "learning curve" in adjusting to the new edition. *See id.* Healthcare providers, however, believed that the newer version of the *AMA Guides* would result in more consistent impairment ratings and would eliminate confusion. *See id.* At the time of the survey, the ROC noted that Texas was the only state that used the third edition. *See id.* at 84. In December of 1998, the ROC recommended that the Legislature amend the Texas Labor Code to require that the fourth edition of the *AMA Guides* be used to assess impairment ratings. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., BIENNIAL REPORT OF THE RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMPENSATION 67-68 (Dec. 1998). In response, the 76th Legislature en-

justment period" to compensate workers with permanent injuries.[121] A worker receives three weeks of benefits for each percentage point of impairment, i.e., if a worker has a 10% impairment rating, the worker receives 30 weeks of benefits.[122]

A worker qualifies for SIBs only if: (1) the worker's impairment rating equals 15% or greater; (2) the worker has not returned to work or has returned to work earning less than 80% of his pre-injury wage; (3) the worker has not received IIBs in a lump sum; and (4) the worker has made a good faith effort to obtain employment commensurate with the worker's ability to work.[123] The insurance carrier reevaluates a worker's entitlement to SIBs every quarter.[124] Even workers who receive SIBs, however, are not entitled to income benefits beyond 401 weeks from the date of injury.[125]

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acted legislation which permitted the Texas Workers' Compensation Commission (TWCC) to require the use of the fourth edition. *See Spotlight on: Mid-Biennium Status of ROC's 1998 Biennial Report Recommendations*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX) Winter 1999, at 5. In November of 1999, the TWCC proposed a rule that would require use of the fourth edition if adopted. *See id.* In June of 2000, the TWCC adopted a rule that requires the use of the fourth edition for certifying examinations conducted on or after October 15, 2001. *See* 25 Tex. Reg. 5359, 5360 (2000) (to be codified at 28 TEX. ADMIN. CODE § 130.1(c)).

121. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 1 (Aug. 1998).

122. *See* TEX. LAB. CODE ANN. § 408.121 (Vernon 1996). IIBs are calculated at 70% of the worker's average weekly wage prior to the injury. *See id.* § 408.126.

123. *See id.* § 408.142; 28 TEX. ADMIN. CODE § 130.102 (2000). An employee is deemed to have made a good faith effort to obtain employment if the employee: "(1) has returned to work in a position which is relatively equal to the injured employee's ability to work; (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program" that is either (a) sponsored by the Texas Rehabilitation Commission or (b) provided by a private provider included in the Registry of Private Providers of Vocational Rehabilitation Services; (3) "has been unable to perform any type of work in any capacity," has provided a doctor's report explaining the total inability to work, and has no other records showing that the employee is able to work; or (4) has provided documentation evidencing job search efforts. *Id.* § 130.102(d).

124. *See* TEX. LAB. CODE ANN. § 408.143 (Vernon 1996); 28 TEX. ADMIN. CODE §§ 130.103-.104 (2000). The TWCC determines an injured employee's entitlement for the first quarter, but the insurance carrier determines the injured employee's entitlement in all subsequent quarters. *See id.* Over 60% of SIB claimants responding to one ROC survey stated that they were unaware that the TWCC determined eligibility for the first quarter. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 13-14 (Aug. 1998).

125. *See* TEX. LAB. CODE ANN. § 408.083 (Vernon 1996).

B. *SIBs Entitlement*

The primary goal of the workers' compensation system is to compensate injured workers during the recovery period so that the worker can return to work at the earliest possible time.[126] Of the 61,024 claims filed during the first quarter of 1991, less than 1% ultimately received SIBs, and only 12% of that 1% received SIBs through the entire 401 week period.[127] Although less than half of 1% of claimants received SIBs during the entire 401 week period, 69% of SIBs claimants who no longer received SIBs found themselves unable to return to work and forced to rely on social security, food stamps, public assistance, or aid to families with dependent children in order to survive.[128] These statistics show that the benefits paid under the impairment-based system do not sufficiently compensate the seriously injured worker for the period of time necessary for recovery.

1. Lack of Correlation Between Impairment Ratings and Ability to Return to Work

A study of 1993 claimants with impairment ratings between 8% and 14% revealed that one-third of those claimants had not returned to work.[129] The study showed that the largest change in employment experience occurred between workers with a 10% impairment rating and workers with an 11% impairment rating.[130] Thirteen percent of workers with a 10% impairment rating never returned to work, while 20% of workers with an 11% impairment rating never returned.[131]

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126. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 1 (Aug. 1997).

127. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 5-6 (Apr. 1999).

128. *See id.* at 11.

129. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN ANALYSIS OF TEXAS WORKERS WITH PERMANENT IMPAIRMENTS 4 (Dec. 1996). Of the one-third who were not working, 17% had never returned to work, and 17% had returned to work at some point but were not currently working. *See id.*

130. *See id* at 6.

131. *See id.* The next largest difference was between workers with an 11% impairment rating and those with a 12% impairment rating. *See id.* Twenty-five percent of workers with a 12% impairment rating never returned to work. *See id.*

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The lack of correlation between impairment ratings and the ability to return to work suggests that impairment ratings are poor predictors of the length of time an employee should be compensated to assist the employee during the necessary recovery period.[132] Because the largest change in employment experience occurs between workers with a 10% impairment rating and workers with an 11% impairment rating, the Legislature should consider whether the arbitrary 15% qualification requirement for SIBs works as an accurate measure of workers who need additional assistance during the recovery period.[133] Although any impairment rating percentage for SIBs qualification will be somewhat arbitrary, the return to work patterns of workers with impairment ratings between 11% and 14% demonstrate that these workers suffer from serious injuries and need an additional level of benefits to assist them.

2. Medical Examples

A few examples will illustrate the difficulty a seriously injured worker faces before receiving SIBs. For instance, Juan Gonzalez, a high school drop-out, is a long distance truck driver with no known pre-existing back problems. While unloading his truck, he hurts his lower back by rupturing the disc at the L5-S1 level, the most common form of back injury. Despite a generally successful surgery, Juan continues to experience residual pain, as well as limitation of movement.

Table 49 of the *AMA Guides* assesses Juan's condition at 12% of impairment of the whole person.[134] The whole person, of course, includes every aspect of the body: vision, hearing, the use of hands, etc. The only aspect of Juan's body affected is his back, but his truck driving days are over. Juan's back cannot tolerate the constant bouncing, nor the repetitive lifting and bending required of truck drivers. Juan's injury makes him unemployable for almost

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132. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 13 (Apr. 1999) (questioning whether impairment ratings are good predictors of impairment among the most severely injured).

133. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN ANALYSIS OF TEXAS WORKERS WITH PERMANENT IMPAIRMENTS 6 (Dec. 1996) (providing tabular comparison of return to work percentages by the impairment rating).

134. AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 73 (Alan L. Engelberg, M.D., M.P.H. ed., 3d ed., 2d prtg. 1989).

any job involving the active use of his back, yet his educational level makes other significant employment unlikely. Once Juan reaches maximum medical improvement, he will only receive IIBs for an additional thirty-six weeks (12% impairment × 3 weeks). Because he does not qualify for SIBs, the system removes Juan even though he is unable to return to work. This is neither fair nor adequate.

Mary Smith, a secretary with a high school education, works for a construction firm. She injures her neck on the job, rupturing a disc. This is another common injury that requires surgery. The surgery helps, but it leaves residual symptoms preventing Mary from further typing and other activities that require prolonged periods of bending her neck. Still, Mary has an impairment rating of only 9%. After she reaches maximum medical improvement, which cannot exceed 104 weeks, Mary will be entitled to twenty-seven weeks of IIBs (9% × 3).[135] Assuming Mary receives the entire 104 weeks of TIBs, she will only receive benefits for two and one-half years, even though she will have a lifetime of impaired income.

Although ostensibly the system provides an injured worker up to 401 weeks of benefits, even seriously injured workers rarely get close to those benefits. The highest impairment rating for a single level back surgery with residual symptoms is 12%.[136] Assuming the first surgery failed, a second surgery adds only an additional 2% for a total impairment rating of 14%.[137] A third surgery would add an additional 1%, and the injured worker would finally receive a total impairment rating of 15%, but only after three back surgeries.[138] Although the impairment ratings can be increased if impairment values are added for loss of range of motion,[139] the determination of range of motion is purely subjective. This subjectivity permits a designated doctor to determine that an injured worker with a 12% rating should only be entitled to an additional 2% impairment value for loss of range of motion, rather than the 3% necessary for the injured worker to qualify for SIBs.

135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*
139. *See* AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 74 (Alan L. Engelberg, M.D., M.P.H. ed., 3d ed., 2d prtg. 1989).

These examples are not unusual. Injured employees face these situations every day. The system precludes any consideration of the effect of an injury on an individual's livelihood. The system simply multiplies an impairment rating by three weeks, even though the rating rarely correlates to an individual's ability to return to work.[140]

3. Solutions

In most states, workers' compensation systems have some limitation on the income benefits paid to a worker.[141] These limitations can be in the form of either a dollar limit or a time limit.[142] Texas's

140. *See* Tex. Workers' Comp. Comm'n v. Garcia, 862 S.W.2d 61, 99 (Tex. App.—San Antonio 1993), *rev'd* 893 S.W.2d 504 (Tex. 1995). The San Antonio court gave the following example of the limited nature of the benefits available under the new system in considering the constitutionality of the new system.

> A 32-year-old laborer with a 10th grade education has worked the last two years earning $5 per hour. He suffers a herniated lumbar disc, undergoes one-level laminectomy and discectomy, which is reasonably successful, but is left with some loss of range of motion and radicular symptoms. He reaches maximum medical improvement after one year and receives an impairment rating of 13 percent. He returns to part-time employment, working 20 hours a week for $3.85 per hour, two years after the date of the injury. His recovery is calculated as follows:

Average weekly wage = $5 × 40 hours	= $ 200
Temporary income benefits:	
First 26 weeks = 75% of $200	= $ 150
$150 × 26 weeks	= $ 3,900.00
Second 26 weeks = 70% of $200	= $ 140
$140 × 26 weeks	= 3,640.00
Impairment income benefits:	
13 × 3 weeks = 39 weeks	
$140 × 39 weeks	= 5,460.00
TOTAL RECOVERY	$13,000.00

Id. The worker received benefits for 91 weeks. *See id.* Because he was unable to return to work for 104 weeks, he had to find some other means of assistance for the 13 weeks he did not receive workers' compensation benefits. In addition, after returning to work, he was only making $77 per week, which would likely require him to seek some form of public assistance to supplement the income he could earn.

141. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 4-5 (Apr. 1999) (providing a comparison of states' limits); *see also* U.S. DEP'T OF LABOR, *State Workers' Compensation Laws*, at http://www.dol.gov/dol/esa/public/regs/statutes/owcp/stwclaw/stwclaw.htm (last visited Sept. 25, 2000) (providing tabular comparison by state). *See generally* Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1096-97 (1999) (noting lack of uniformity in payment durations among states).

142. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN

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401 week limit, however, falls below the average national time limit by 23.6 weeks, or almost six months.[143] While economics demands that a compensation system place limits on the benefits provided injured workers, imposing a standard on initial qualification for SIBs that precludes over 99% of injured workers from receiving SIBs violates the primary goal of the system—compensating injured workers during the period necessary for recovery so that the injured worker can return to work at the earliest possible time. The absence of a correlation between impairment ratings and the ability to return to work demonstrates a need to reconsider the IIBs and SIBs tiers of the system. Why should an injured worker with an impairment rating of 14% be limited to a total of only 42 weeks of additional benefits, while an injured worker with an impairment rating of 15% has the opportunity to receive 401 weeks of benefits? The statistics demonstrate that the one percentage point difference is not sufficiently significant in terms of the worker's ability to return to work.

In order to achieve the true goal of the system, the Legislature must amend the Act to eliminate the arbitrary distinction limiting the rights of certain injured workers to IIBs. Neither the studies nor the medical models support any correlation between impairment ratings and ability to return to work. The absence of such correlation makes the 15% threshold for entitlement to SIBs benefits an arbitrary figure woven into the workers' compensation system for ease of administration. Given the gravity of an injured worker's situation, administrative convenience should not prevail.

C. *Inconsistent Impairment Ratings*

A second problem with the current impairment-based system involves inconsistent impairment ratings. Twenty-nine percent of income benefit claimants from 1991 to 1998 received more than one

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TEXAS 4-5 (Apr. 1999). *See generally* Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1096-97 (1999) (comparing limits on payment amounts and payment durations).

143. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 4-5 (Apr. 1999). Wisconsin appears to be the most generous in its limit of 1,000 weeks, while Colorado's limit appears to be the shortest at 208 weeks. *See id.*

impairment rating.[144] Impairment ratings can be assigned by multiple physicians, including the worker's treating doctor, the insurance carrier's doctor, or a doctor designated by the Texas Workers' Compensation Commission (TWCC).[145] Treating and designated doctors tend to assign similar ratings which are generally higher than those assigned by a carrier's doctor.[146] On average, a rating assigned by a treating doctor is seven points higher than a carrier's doctor, and a rating assigned by a designated doctor is five points higher than a carrier's doctor.[147] The average difference between a

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144. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 7 (Aug. 1999). Less than 2% of claims that were medical only received more than one impairment rating. *See id.*

145. *See* TEX. LAB. CODE ANN. § 408.122 (Vernon 1996) (contesting the impairment rating assigned by the treating doctor must be confirmed by a designated doctor or a doctor selected by the carrier); *see also* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 5-6, 10 (Aug. 1999) (describing types of doctors involved in impairment rating). A carrier may request a medical examination to resolve questions about: "(1) the appropriateness of the heath care received by the employee; (2) the impairment caused by the compensable injury; (3) the attainment of maximum medical improvement; or (4) similar issues." TEX. LAB CODE ANN. § 408.004 (Vernon 1996 & Supp. 2000). The regulations prevent a carrier from requesting a required medical examination more than once every 180 days with seven exceptions. *See* 28 TEX. ADMIN. CODE § 126.5 (2000). Those exceptions permit the carrier to request a required medical examination before the expiration of 180 days if a medical opinion is required to determine whether:

> (1) there has been a change in the employee's condition; (2) there is a need to change the employee's diagnosis; (3) the treatment should be extended to another body part or system, or if the extent of injury has changed; (4) the compensable injury is a producing cause of additional problems or conditions; (5) disability exists, because of newly discovered information; (6) proposed surgery, other than spinal surgery, is necessary to treat the compensable injury; or (7) the employee has reached maximum medical improvement and to determine the impairment rating when the examination relates to a body part or system that is outside the expertise of the carrier's required medical examination doctor.

28 TEX. ADMIN. CODE § 126.5(d) (2000). Notwithstanding the general 180 day rule and its exceptions, a carrier may only request a required medical examination annually after an employee's second anniversary of his initial entitlement to SIBs if the employee still is receiving SIBs and the employee's medical condition has not improved sufficiently to permit the employee to return to work. *See* 28 TEX. ADMIN. CODE § 126.5(f) (2000).

146. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 13 (Aug. 1999).

147. *See id.* While this is an average, actual differences in impairment ratings may be even more drastic. For example, in *Old Republic Ins. Co. v. Rodriguez*, 966 S.W.2d 208, 209 (Tex. App.—El Paso 1998, no pet.), the injured worker's treating physician assigned a 31% impairment rating, while both the carrier's physician and the designated doctor assigned only a 15% impairment rating. *Id.* The worker appealed the impairment rating

rating assigned by a treating doctor and a rating assigned by a designated doctor is only 1.4%.[148]

1. Explanations for Inconsistency

One explanation given for the difference in ratings is that neither treating doctors nor carrier doctors are required to receive training in the application of the *AMA Guides*.[149] The small percentage difference between the treating doctors' ratings and the designated doctors' ratings, however, belies that explanation. If training could explain the difference in ratings, then the difference between the designated doctor's rating as compared to both the treating and carrier doctors' ratings would be equal. The fact that a carrier doctor's rating varies more drastically suggests that the main reason for the difference is the carrier's desire to rush the initial rating and the possible financial incentives for rating the worker low.[150] When one percentage point can make the difference between a maximum eligibility for 42 weeks of IIBs (14% impairment × 3 weeks) versus eligibility for SIBs, which could last up to 401 weeks, the insurance company has a tremendous incentive to pressure its doctors to assign the lower rating. On the other hand, a treating physician does not have the same financial incentive as a carrier doctor to arbitrarily assign a particular rating. For this reason, legislation should create a disincentive designed to counterbalance the carrier doctor's financial incentive.

In one recent case, an injured worker, Richard Locke, challenged the relationship between an insurance carrier and one of the doctors involved in the rating process.[151] Locke's treating physician assigned a 19% impairment rating, which the carrier dis-

through all of the administrative appeals levels to no avail. *Id.* However, when the worker sued in district court, a jury awarded the worker a 31% impairment rating based on the treating physician's rating, corrected for a miscalculation. *Id.* at 209-10. The jury's finding was affirmed on appeal. *Id.* at 210-11.

148. *See* Research and Oversight Council on Workers' Comp., Impairment Rating Trends in the Texas Workers' Compensation System 14 (Aug. 1999) (explaining rating differences).

149. *See id.* at 14-15. Other explanations offered for the discrepancies include: (1) lack of specificity within the *AMA Guides*; (2) premature evaluations by carrier doctors; (3) financial incentives; and (4) professional differences. *See id.* at 15-16.

150. *See id.* at 15-16 (suggesting premature evaluations and financial incentives as possible factors).

151. *See In re* Xeller, 6 S.W.3d 618, 621 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

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puted.[152] The TWCC selected Charles Xeller, M.D. as the designated doctor.[153] Dr. Xeller examined Locke at the facilities of Medical Evaluation Specialists, Inc. (MES), which provided physicians with administrative support services.[154] After examining Locke, Dr. Xeller assigned him a 0% impairment rating.[155] Locke successfully contested Dr. Xeller's impairment rating through the administrative appeals process, which ultimately reinstated Locke's 19% impairment rating.[156]

When the carrier appealed the administrative decision in district court, Locke filed a counterclaim against the insurance carrier and a third-party claim against Dr. Xeller and MES.[157] Locke alleged that Dr. Xeller and MES "'perpetrated a fraud and engaged in a civil conspiracy' to deprive him of workers' compensation benefits."[158] The carrier dismissed its appeal and paid Locke his benefits, but Locke continued to pursue his counterclaim and third-party claim.[159] During discovery, Locke requested numerous records, including records of the carrier's payments to Dr. Xeller and MES, copies of any agreements between them, and records of medical examinations Dr. Xeller performed on other workers.[160] After numerous depositions, Locke claimed the discovery revealed that physicians working for MES routinely assigned low impairment ratings.[161] The only published decision relating to this case involves a mandamus proceeding in which the carrier challenged the scope of the discovery that Locke requested.[162] Whether Locke ultimately will prevail and, if so, whether that success will encourage other workers to file similar claims against carriers and physicians involved in the impairment rating process remains un-

152. *See id.* at 620. The worker was diagnosed "with a 'cervical sprain with probable left cervical radiculopathy' . . . bulging disks at several levels of his cervical spine and possible disk herniation at C3-4, along with spondylosis and degenerative disk disease." *Id.*

153. *See id.* From the facts of the published opinion, it is not clear why the carrier did not initially have the worker examined by a doctor of its own choice. *See id.*

154. *See id.*

155. *See id.* at 620-21 (portraying Dr. Xeller's conclusion that the treating physician's determinations were not supported by objective clinical findings).

156. *See In re* Xeller, 6 S.W.3d at 621.

157. *See id.*

158. *Id.*

159. *See id.*

160. *See id.* at 621-22.

161. *See In re* Xeller, 6 S.W.3d at 622.

162. *See id.* at 620.

clear. A successful outcome, however, should give impetus for future legislative efforts to curb abusive practices.

A second explanation given for the inconsistent impairment ratings is premature evaluations requested by the carriers.[163] Injured workers and treating doctors have both reported that a carrier's evaluation of impairment is often premature and differs from the treating doctor's evaluation because the treating doctor has more complete knowledge of the injury.[164] The premature evaluations may be attributable to the pressure adjusters have to settle claims quickly and keep costs down.[165]

2. Time Required for Multiple Ratings

In addition to the problem with inconsistency, the amount of time multiple ratings require also presents problems. An average of 137 days, or four months, elapses between the first and last rating when a worker must submit to two impairment evaluations.[166] This lapse greatly increases if a worker is required to have three evaluations, i.e., by a treating doctor, a carrier doctor, and a designated doctor. The average time lapse between the first and last rating where three ratings are required is 289.8 days, or over nine months.[167] The factors increasing the likelihood of multiple ratings are similar to the factors that increase the likelihood that SIBs claim will reach 401 weeks.[168] The similarity in these factors suggests that multiple ratings are more likely when the impairment rating is higher and when the benefits last a longer period of time.

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163. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 15 (Aug. 1999).

164. *See id.*

165. *See id.* at 15.

166. *See id.* at 17-18.

167. *See id.* at 18.

168. *Compare* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., IMPAIRMENT RATING TRENDS IN THE TEXAS WORKERS' COMPENSATION SYSTEM 18-19 (Aug. 1999) (listing factors likely to increase likelihood of multiple impairment ratings as including older workers with back sprain or strain injury), *with* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 7-8 (Apr. 1999) (asserting that older workers with injuries to their backs are more likely to qualify for SIBs and reach the 401 week limit).

3. The Dangerous Finality of Impairment Ratings and Maximum Medical Improvement

Under its rulemaking authority, the TWCC has implemented a rule that imposes arbitrary finality to the impairment rating process to the detriment of the injured worker. Rule 130.5(e) now states:

> (e) The first certification of MMI and impairment rating assigned to an employee is final if the certification of MMI and/or the impairment rating (IR) is not disputed within 90 days after written notification of the MMI and IR is sent by the Commission to the parties, as evidenced by the date of the letter, unless based on compelling medical evidence the certification is invalid because of:
> (1) a significant error on the part of the certifying doctor in applying the appropriate AMA Guides and/or calculating the impairment rating;
> (2) a clear mis-diagnosis or a previously undiagnosed medical condition; or
> (3) prior improper or inadequate treatment of the injury which would render the certification of MMI or impairment rating invalid.[169]

This rule works to the detriment of the worker by providing a great incentive for insurance company to expedite the review of the worker's case for an MMI or IR determination. The insurance company, with the assistance of its designated physician, starts the ninety-day clock running when the worker receives notice of the MMI or IR. Even if the Commission purports to tell the worker of his right to appeal this determination, the worker may not understand the finality of the rating if he delays contesting it. As currently written, the rule does not allow any escape for the unwary worker.

An additional problem arises when a worker experiences a substantial change in condition after the worker reaches maximum medical improvement. In 1998, the Texas Supreme Court held that a worker may not reopen a previous impairment rating decision even if the worker has experienced a substantial change in condition.[170] In *Lumbermens Mutual Casualty Co. v. Manasco*, Stan Manasco injured his back in January of 1992 and reached maxi-

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169. 25 Tex. Reg. 2102, 2105 (2000) (to be codified as an amendment to 28 TEX. ADMIN. CODE § 130.5(e) (2000)).

170. *See* Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60, 64 (Tex. 1998).

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mum medical improvement in October of 1992.[171] Although Manasco's treating physician assigned him a 30% impairment rating, the carrier disputed the rating.[172] A designated doctor examined Manasco and assigned him a 7% impairment rating,[173] which was upheld in a contested case hearing.[174] When the contested case hearing was decided, surgery had not been recommended or approved for Manasco.[175] Three months after the contested case hearing, a neurosurgeon recommended surgery.[176] After Manasco had the surgery in January of 1994, he sought a second conference and hearing, asserting that he had experienced a substantial change in condition and that additional evidence should be considered with regard to his impairment rating and whether he had reached maximum medical improvement.[177] Whether Manasco was entitled to reopen his impairment rating was appealed to the Texas Supreme Court. The court ultimately held that the Texas Labor Code did not permit Manasco to reopen his impairment rating.[178]

4. Solutions

In order to reduce a carrier doctor's financial incentive to assign an abnormally low impairment rating, the TWCC could require that a designated doctor conduct the second rating, rather than the carrier doctor.[179] A carrier might be less inclined to have a worker examined by a third doctor after the designated doctor has already evaluated the worker. In addition, the carrier doctor might be less inclined to assign a lower rating when faced with two substantially similar ratings by two competent doctors. It also would be useful to require a quality review if the ratings assigned by the various doctors were more than a certain percentage apart and to remove

171. *Id.* at 62.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Lumbermens Mut. Cas. Co.*, 971 S.W.2d at 62.
176. *Id.*
177. *Id.*
178. *See id.* at 64.
179. *See* 28 TEX. ADMIN. CODE § 130.5(d) (2000) (providing that carrier may request designated doctor to assess impairment "[i]f the carrier elects not to perform its own reasonable assessment").

doctors from the approved list that consistently gave higher or lower ratings than the other two doctors.

In order to decrease the time lapse between multiple ratings, the Legislature should place time limits on when doctors must complete each examination.[180] In addition, the Legislature could require a certain time period to lapse before a carrier could require an evaluation in order to prevent the carrier from requesting premature evaluations. Specifically, the Legislature should not allow an evaluation within 60 days of the injury—it is simply too early.

Allowing the worker some leeway regarding the 90-day rule relating to the certification of MMI and/or IR under Rule 130.5(e) would help in ensuring that the worker receives fair treatment. The Legislature could best accomplish this by abolishing the rule. Alternatively, the Legislature should require the Commission to specify in Rule 130.5(e) that clear and unambiguous notice of the worker's right to contest the rating, as well as the worker's right to legal representation, should accompany the letter. The Commission should also be required to explain exactly what could happen to the worker (a denial of SIBs) because of a sub-15% impairment rating. The Legislature should also impose a "good cause" exception to the finality of the certification and permit the reopening of a certification in the event of a substantial change in condition.

D. *Continuation of SIBs*

The problem of initially qualifying for SIBs is compounded by the problem created by a carrier's continual challenge during the 401 week period of a claimant's right to continued benefits.[181] The percentage of workers receiving SIBs who were involved in a bene-

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180. Although TWCC's regulations contain some time restrictions with regard to impairment rating disputes, the existing time lapse reveals that those time restrictions are ineffective or unenforced. *See* 28 TEX. ADMIN. CODE §§ 130.5-.6 (2000).

181. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 12 (Apr. 1999). SIBs claims are very likely to be disputed. *See id.* Sixty-two percent of reporting SIB claimants indicated that they had been involved in at least one SIB entitlement dispute. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 10 (Aug. 1998).

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fits dispute is "five times as high as the average indemnity claim."[182]

1. Incentive for Continual Challenges

Carriers continually dispute SIBs claims each quarter until the claims reach the 401 week level.[183] In 1994, carriers disputed 92.3% of SIBs claims.[184] The insurance company has little to lose in electing to deny SIBs in any given quarter, and the decision to deny benefits each quarter may be good business. The worker may grow weary of these endless disputes that the insurance company renews with fresh vigor every three months. Endless litigation favors the insurance company, not the worker who usually does not even have a lawyer.

2. Cost of Continual Challenges to System

In 1997, even though less than 1% of all claims reached the SIBs level, disputes regarding SIBs entitlement accounted for approximately 20% of the disputes presented at each level of the administrative appeals process.[185] The problem continues to increase. The number of SIBs disputes at the first administrative appeals level

182. *Spotlight on: An Early Look at Supplemental Income Benefits*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Summer 1996, at 3.

183. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 12 (Apr. 1999) (noting SIBs claims have multiple quarters disputed); RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 10 (Aug. 1998) (providing a chart recording the number of disputes); *Spotlight on: An Early Look at Supplemental Income Benefits*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Summer 1996, at 3 (indicating that carriers requested the conference or hearing in 71% of the benefit review conferences and 77% of the contested case hearings involving SIBs disputes). Of the carriers' disputes related to SIBs, the vast majority relate to whether: (1) the workers sought alternate employment in "good faith," and (2) the worker's underemployment or unemployment is a "direct result" of the injury. *See* TEX. HOUSE OF REPRESENTATIVES, HOUSE COMMITTEE ON BUSINESS & INDUSTRY INTERIM REPORT 1998, 76th Leg., R.S., at 48 (Dec. 3, 1998) (report of Subcommittee on Workers' Compensation Insurance Carrier Practices).

184. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., THE 401-WEEK LIMIT ON INCOME REPLACEMENT BENEFITS AND ITS EFFECTS ON INJURED WORKERS IN TEXAS 12 (Apr. 1999).

185. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 44 (Aug. 1998). Eighteen percent of issues disputed at the first level of the administrative appeals process (the benefits review conference) involved SIBs entitlement. *See id.*

more than doubled between 1995 and 1996, and the number of SIBs disputes at the second administrative appeals level more than tripled.[186] During 1997, SIBs disputes cost the TWCC approximately three million dollars.[187]

3. Solutions

The Legislature should impose penalties or sanctions against carriers who frivolously challenge claims in an effort to avoid paying a claim through the 401 week limit. The Subcommittee on Workers' Compensation Insurance Carrier Practices proposed the following method to address frivolous denials of SIBs:

> To deter carriers from raising unmeritorious SIBs disputes, TWCC should be given the statutory authority to order a carrier to pay a higher rate of interest when the carrier disputes an injured workers' entitlement to SIBs, but is ultimately required to pay SIBs by TWCC. (Recommend auction rate quoted on a discount basis for the 52-week treasury bills issued by the United States government plus 5%.)[188]

Currently, a carrier who unsuccessfully challenges an employee's entitlement to SIBs is liable only for attorney's fees incurred by the employee as a result of the dispute.[189] No increased penalty results from continuous unsuccessful challenges. A worker who has demonstrated entitlement to SIBs for six years should not be subjected to additional examinations every quarter, year after year, by a carrier who simply seeks to harass the worker. An escalating penalty or sanction system would prevent this type of carrier abuse.[190]

Twenty-two percent of issues disputed at the second level of the administrative appeals process (the contested case hearing) involved SIBs entitlement. *See id.*

186. *See id.* at 44-45.

187. *See id.* at 83.

188. *See* TEX. HOUSE OF REPRESENTATIVES, HOUSE COMMITTEE ON BUSINESS & INDUSTRY, INTERIM REPORT 1998, 76th Leg., R.S., at 56 (Dec. 3, 1998) (report of Subcommittee on Workers' Compensation Insurance Carrier Practices).

189. *See* TEX. LAB. CODE ANN. § 408.147 (Vernon 1996); 28 TEX. ADMIN. CODE § 130.108(f) (2000).

190. In 1999, the Legislature attempted to alleviate this problem by adding section 408.151 to the Texas Labor Code. *See* TEX. LAB. CODE ANN. § 408.151 (Vernon Supp. 2000). That provision prohibits a carrier from requiring an employee who is still receiving SIBs after two years to submit to a medical examination more than annually if, in the preceding year, the employee's medical condition resulting from the compensable injury has not improved sufficiently to allow the employee to return to work. *See id.* However,

The abuses of the system clearly outweigh the benefits of quarterly redetermination of claims. The system simply allows too many re-examinations. The present system is heavily weighted to keep injured workers from ever receiving any SIBs. Less than 1% of injured workers ever make it. This restrictive entry level assures that the handful of workers who qualify for this highest level are seriously injured. An annual review should suffice once a determination of SIBs eligibility has been made.

IV. Attorney Involvement, Access to the System, and Dispute Resolution

Amid a concern regarding "high insurance costs and low benefit rates,"[191] the Texas Workers' Compensation Commission formulated several goals to help reduce the cost of workers' compensation in Texas. These goals encouraged informal dispute resolution "whenever possible" and limited attorney involvement.[192] The goal of reducing attorney involvement was virtually 100% successful. In fact, the reduction succeeded so well that most workers cannot find an attorney to take their case even if they want to hire one. Eliminating attorney involvement means that a worker receives all of the compensation without having to share 25% with an attorney. This is a desirable result, and in many routine injury cases, the worker actually fares better than under the former system. In more serious injury cases, however, the lack of attorney involvement frequently results in the worker being denied justice without any practical recourse.

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absent some sort of penalty, the carrier can easily circumvent the statutory prohibition by claiming the injury has improved sufficiently to allow the employee to return to work. *Id.*

191. TEX. WORKERS' COMP. COMM'N, *History of Workers' Compensation in Texas*, *at* http://www.twcc.state.tx.us/information/history0fwc.html (last visited Sept. 25, 2000).

192. *See id.*; *see also* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM vii, 1 (Aug. 1997); *Texas Workers' Compensation Commission Ombudsman Program*, *in* TEX. WORKERS' COMP. COMM'N, INFORMATION ABOUT THE OMBUDSMAN PROGRAM AND ATTORNEY REPRESENTATION (Mar. 26, 1997). *But see Spotlight on: Depopulating the Facility: The Employer Experience*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1996, at 1, 1 (attributing the "downward spiral" in profitability not only to "rapidly escalating costs" but also to "state-set insurance rates that the insurance industry considered to be woefully inadequate, and a growing residual market burden that all insurance carriers writing business in the voluntary market were forced to share").

A. *Background*

Before the 1989 reforms, workers resolved approximately 85% of disputes through lump-sum settlements, also known as "compromised settlement agreements" or "CSAs."[193] The parties settled the overwhelming majority of disputes informally, and those that ended up going to trial usually settled before reaching a jury verdict.[194] Nevertheless, there was heavy attorney involvement, both at the pre-hearing stage and, of course, in subsequent judicial review. Claimant attorneys opposed experienced insurance attorneys, and many a young lawyer learned how to try a case by handling workers' compensation claims. Some claimed that "[a]ll that lawyering (plaintiff and defense) resulted in $450 million being taken out of the $2 billion Texas W/C [workers' compensation] system in 1988."[195] Jim Kaster, the employer representative on the Industrial Accident Board, toured the state speaking to business groups and insulting lawyers to the delight of audiences:

> Unfortunately, there are too many lawyers who are greedy and look at an injured worker only as a means to get a fee out of the system. In fact, someone once said if you took all the lawyers in Texas and laid them end to end, it would be a good thing.[196]

As a result of efforts like this, the 1989 Act "created a multi-level administrative dispute resolution system to allow disputes to be resolved informally, rather than in the courtroom . . . ."[197] However, the elimination of the attorney from the system sometimes came at the expense of the insured worker. A brief examination of the current claim and dispute resolution procedures is necessary to under-

193. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 40 & n.31 (Aug. 1998).

194. *See id. But see Spotlight on: Strengths and Weaknesses in the Texas Workers' Compensation System*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1998, at 5 (stating that the number of dispute resolution proceedings "under the new law is significantly fewer than under the old law").

195. Memorandum from Johnnie B. Rogers, President, Bicameral Consultants, Inc., to Texas Employers for Workers' Compensation Reform (on file with the author).

196. *Changes in Workman's Compensation Urged*, VALLEY MORNING STAR, Apr. 8, 1988, at A8.

197. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 40 (Aug. 1998).

stand fully the obstacles that the system has created for injured workers.

1. From Injury to Submitting a Claim

As established by the Texas Labor Code, a worker must notify his employer within thirty days of sustaining any injury.[198] The worker's notification to his employer of a work-related injury is crucial because it sets the process in motion that ultimately informs the worker of the procedure for claiming benefits.[199] If the worker fails to notify the employer, the employer and the employer's insurance carrier are generally relieved from liability.[200] If the worker notifies the employer properly, the employer must then notify its insurance carrier within eight days of learning of the injury.[201] The Labor Code requires the insurance carrier, in turn, to notify the Commission of the injury within seven days.[202]

After the employer notifies the insurance carrier of the worker's injury, the Labor Code affords the insurance carrier seven days to begin payment or dispute the payment of benefits.[203] If the carrier refuses to pay benefits to a worker, it must notify both the worker and the Commission in writing of its decision.[204] A carrier that ref-

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198. *See* TEX. LAB. CODE ANN. § 409.001(a) (Vernon 1996). When the Texas Labor Code and the respective Commission's Rule are similar, I cite only to the Labor Code. In the case of an occupational disease, the worker must notify the employer no later than thirty days after the date when "the employee knew or should have known that the injury" may be employment-related. *Id.* § 409.001(a)(2).

199. *See* 28 TEX. ADMIN. CODE § 120.2 (2000). The Commission requires employers to furnish a notice to workers who have been injured that summarizes the workers' rights and responsibilities under the workers' compensation system. *See* TEX. LAB. CODE ANN. § 409.013 (Vernon 1996); *see also* 28 TEX. ADMIN. CODE § 120.2(e) (2000) (specifying the particular contents of the required summary). The Commission also furnishes information to employers that explains the employer's rights and responsibilities, as well as the Commission's services and procedures. *See* TEX. LAB. CODE ANN. § 409.011 (Vernon 1996).

200. *See* TEX. LAB. CODE ANN. § 409.002 (Vernon 1996). The Code provides certain exceptions to this general rule. *Id.* If an employer has actual notice of the worker's injury, "the commission determines that good cause exists for failure to provide notice in a timely manner," or if neither the employer or the carrier contest the claim, then the lack of timely notice does not relieve the employer or carrier of liability. *Id.*

201. *See* TEX. LAB. CODE ANN. § 409.005(a), (b) (Vernon 1996).

202. *See id.* § 409.005(d).

203. *See id.* § 409.021(a).

204. *See id.* § 409.021.

uses to pay a worker's benefits must advise the worker of the process for requesting further information from the Commission.[205]

A worker seeking benefits under the Act must file a written claim with the Commission within one year of the date of injury.[206] The benefits available to the worker depend upon several factors, such as the type of injury, the amount of time that the worker is absent from work, and whether the worker is in a reduced wage earning capacity.[207] If the worker fails to file a claim for compensation within one year after the injury, the Act normally relieves the employer and the insurance carrier from liability.[208]

A worker's initial contact to the Commission is with a Customer Assistance Representative (CAR).[209] The CAR, at least one of whom is located in each Commission office, provides three functions. The CAR provides information about the Commission's role in handling the worker's claim, advises injured workers of their rights and responsibilities under the Act, and verifies the worker's contact information in the system.[210]

2. Disputes

The worker, employer, and insurance carrier all have standing to dispute various aspects of the worker's claim for benefits.[211] For

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205. *See id.* In addition, the carrier must inform the worker of the right to request the first stage of the dispute resolution process—the benefit review conference (the "BRC"). *See id.*

206. *See* TEX. LAB. CODE ANN. § 409.003.

207. To illustrate, SIBs are awarded at 80% of the "*difference* between *80 percent of* [the worker's] *average weekly wage* and [the worker's] *weekly wage after the injury.*" TEX. WORKERS' COMP. COMM'N, Pub. No. PI96-002A, INFORMATION FOR INJURED WORKERS—BENEFITS 6 (Nov. 1996). The Commission provides the following hypothetical for computing SIBs:

> For example, if your average weekly wage was $500, and your injury caused you to lose all of your income, your supplemental income benefits would be $320 a week:

Your average weekly wage	$500
80 percent of $500 (.8 × 500) equals	400
minus your wage now	- 0
equals	$400
80 percent of $400 (.8 – 400) equals	$320

Id.

208. *See* TEX. LAB. CODE ANN. § 409.004 (Vernon 1996).

209. *See* TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 2, 2-1 to 2-3 (Oct. 21, 1996) (on file with the author).

210. *See id.* at 2-1.

211. *See* 28 TEX. ADMIN. CODE § 141.1(a) (2000).

example, a worker might dispute a low impairment rating that prevents him from obtaining supplemental income benefits.[212] An insurance carrier or employer might refuse to pay benefits because it regards an injury as not compensable.[213] In addition, one claim can trigger issues in several areas.[214] For instance, an issue related to the compensability of a claim often concerns whether the worker sustained the injury in the course and scope of his employment. A procedural issue might arise if one party is late in filing either a report or claim. Awards of income benefits frequently trigger issues relating to the impairment level suffered by a worker.

a. Early Resolution

In addition to its three primary duties, the CAR also provides a limited dispute resolution function.[215] If the CAR cannot help the worker resolve a dispute with the employer or insurance carrier, the Commission refers the worker to a Dispute Resolution Officer (DRO). The DRO "is responsible for handling claims with disputed issues to attempt prompt resolution."[216] The DRO's responsibilities include contacting the parties, as well as identifying and clarifying the issues among the parties.[217] The Commission reminds DROs that "[m]uch of dispute resolution is information gathering rather than mediation."[218] The Commission recognizes that "[i]f disputing parties have all information, they are in a better position to resolve the dispute."[219] If the parties cannot resolve the

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212. *See* Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 253 (Tex. 1999) (explaining the link between an impairment rating and worker benefits).

213. *See* Downs v. Cont'l Cas. Co., No. 04-99-00111-CV, slip op. at 1, 2000 WL1210839, at *1 (Tex. App.—San Antonio Aug. 16, 2000, no pet. h.) (explaining carrier's denial of benefits after the Commission found that the decedent's death was not compensable).

214. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 41 (Aug. 1998); AMY E. LEE ET AL., TEX. WORKERS' COMP. RESEARCH CTR., LITIGATION AND CONTROVERSY: AN ANALYSIS OF THE TEXAS WORKERS' COMPENSATION ADMINISTRATIVE DISPUTE RESOLUTION SYSTEM 5 (June 1995) (identifying general issues that parties typically raise in the dispute resolution process).

215. *See* TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 5, 5-2, & ch. 8, 8-1 to 8-2 (Oct. 21, 1996) (on file with the author).

216. *Id.* at 8-1.

217. *See id.* at 8-4.

218. *Id.*

219. *Id.*

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dispute, the DRO begins the process of setting the claim for a benefit review conference (the "BRC").[220]

The Commission encourages parties to resolve disputes themselves.[221] To this end, Commission staff attempt to foster communication in order to resolve disputes informally.[222] A 1995 survey indicates the results of efforts by CARs and DROs at helping parties to resolve disputes in this manner. Approximately 95% of all workers during the 1991-94 period resolved their claim without dispute.[223] If the aggrieved parties cannot resolve the dispute among themselves, then they may proceed under the Commission's formal dispute resolution process.

b. Formal Resolution

Although several layers in the formal dispute resolution process exist, aggrieved parties need not complete all steps in the process. Parties may cease their pursuit of relief or, with certain exceptions, resolve their disputes at any time.[224] Exhausting all the administrative remedies and presenting the dispute(s) at each stage before proceeding to the next level in the process are normally prerequisites to obtaining judicial review of a dispute.[225] These obviously

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220. *See* TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 8, 8-5 (Oct. 21, 1996) (on file with the author).

221. *See* TEX. WORKERS' COMP. COMM'N, *Resolving Workers' Compensation Claim Disputes*, *at* http://www.twcc.state.tx.us/information/dispute.html (last visited Sept. 25, 2000).

222. *See id.*

223. *See Attorney Representation of Injured Workers Is Low Following 1989 Reforms*, TEX. MONITOR (Tex. Research and Oversight Council on Workers' Comp., Austin, TX), Spring 1996, at 11, 11.

224. *Cf.* TEX. LAB. CODE ANN. § 408.005 (Vernon 1996).

225. *See id.* § 410.024 (requiring parties "[e]xcept as otherwise provided by law or commission rule" to attend a BRC as a prerequisite to a CCH or arbitration); *id.* § 410.151 (entitling parties to a CCH if they have participated in a BRC and stating that an issue not raised at a BRC may not be considered at the CCH except under certain conditions); *id.* § 410.251 (allowing judicial review of cases in which a party has exhausted the available administrative remedies); *id.* § 410.302 (limiting judicial review to the issues decided by the commission appeals panel). In the absence of a timely appeal, decisions of the CCH and appeals panel are final. *See id.* §§ 410.169, 410.205.

The United States Supreme Court addressed the question of issue exhaustion during the 2000 term. *See* Sims v. Apfel, 120 S. Ct. 2080, 2084 (2000). The plurality opinion of the court, in light of Justice O'Connor's concurrence, appears to be that in a non-adversarial administrative review context, issue exhaustion is not required unless otherwise imposed by regulation or statute. *Compare id.* at 2086 (plurality opinion), *with id.* at 2086-87 (O'Connor, J., concurring). Because issue exhaustion is imposed by regulation and statute

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important procedural steps set the stage for any judicial review, but in the great majority of cases the worker takes these steps without the aid of a lawyer.[226]

The dispute resolution process begins in earnest when one (or more) of the parties requests a BRC.[227] At the BRC, the benefit review officer helps facilitate discussion between the parties (typically the worker and the insurance carrier).[228] Although regarded as "an attempt to resolve disputes through mediation,"[229] the review officer may order the carrier to pay benefits to the worker.[230]

A party unsatisfied with the results of the BRC may request a contested case hearing (the "CCH").[231] An officer employed by the Commission presides at the hearing, examines evidence, and issues a decision on the dispute.[232] Normally, before participating in a CCH, a party must have attended the BRC.[233] As an alternative to the CCH, the parties may consent to participate in binding arbitration.[234]

Parties may appeal the decision of the hearing officer to the Commission's three-judge appeals panel.[235] Attendance at the CCH is a prerequisite to submitting the dispute to the panel.[236] As the appeals panel hears no oral argument, both parties file written statements with the panel regarding the contested issues.[237] If the panel reverses the hearing officer's decision, the panel either renders its own decision or remands the dispute back to the CCH

in the workers' compensation context, *Sims* would likely be inapplicable to the Texas system.

226. *See* WILLIAM MITCHELL ET AL., TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 7 (June 1995) (stating that 91.7% of injured workers were not represented by attorneys in 1995).

227. *See* TEX. LAB. CODE ANN. § 410.023 (Vernon 1996).

228. *See id.* §§ 410.021, 410.026.

229. *See* TEX. WORKERS' COMP. COMM'N, *Resolving Workers' Compensation Claim Disputes*, *at* http://www.twcc.state.tx.us/information/dispute.html (last visited Apr. 18, 2000).

230. *See* 28 TEX. ADMIN. CODE § 141.6(a)(1) (2000).

231. *See* TEX. LAB. CODE ANN. § 410.151 (Vernon 1996).

232. *See id.* §§ 410.163, 410.165.

233. *See id.* § 410.151.

234. *See id.* § 410.104.

235. *See id.* § 410.202.

236. *Cf.* TEX. LAB. CODE ANN. § 410.203(a)(1) (Vernon 1996) (requiring the appeals panel to consider the record from the contested case hearing).

237. *See id.* § 410.203(a)(2); 28 TEX. ADMIN. CODE § 143.2(a) (2000).

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level.[238] If still unsatisfied, either party may then seek judicial review of the panel's decision in a Texas district court.[239] In addition, either party may appeal the trial court's decision to the court of appeals. Finally, a party may seek discretionary review by the Texas Supreme Court.[240]

3. Representation Alternatives

Under the Texas Labor Code, the worker, insurance company, and employer may retain counsel.[241] This Article focuses, however, on insurance company and worker representation, because the insurance company usually represents the employer's interests in a dispute with the worker. Although the Act limits attorneys, whether representing carriers or workers, in the amount they may charge for their services,[242] the parties do not share parity in how they pay for their attorneys' fees. Although both the carrier and the worker may employ non-attorneys to represent their interests,[243] the parties face different constraints in paying fees to such lay individuals.[244]

If an attorney represents a worker, the attorney's fee is typically limited to 25% of the worker's recovery and is deducted from any recovery that the worker receives.[245] In addition, if an insurance carrier unsuccessfully challenges a commission determination of supplemental income benefits, "the insurance carrier is liable for reasonable and necessary attorney's fees incurred by the employee."[246] The Labor Code also specifically excludes such fees

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238. *See* TEX. LAB. CODE ANN. § 410.203(b) (Vernon 1996).

239. *See id.* §§ 410.251-52.

240. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 41 (Aug. 1998).

241. *See* TEX. LAB. CODE ANN. § 410.006 (Vernon 1996).

242. *See* 28 TEX. ADMIN. CODE § 152.4 (2000). The maximum hourly rate is $150. *Id.* § 152.4(d). The Commission Rules also specify certain limits for various services, such as "[d]irect dispute resolution negotiation with the other party (per month)" is 3.0 hours, or "[p]reparation and submission of an agreement or settlement" is 1.0 hour. *Id.* § 152.4(c)(3), (4). The Commission may approve fees that are in excess of these caps. *Id.* § 152.4(b).

243. *See* TEX. LAB. CODE ANN. § 410.006(a), (b) (Vernon 1996).

244. *See* TEX. ADMIN. CODE § 152.4(d)(2) (2000).

245. *See* TEX. LAB. CODE ANN. § 408.221(b), (h) (Vernon 1996).

246. *See id.* § 408.147(c).

from the 25% limitation.[247] Workers may also allow a friend or union colleague to assist them, as long as these non-attorneys do not charge the worker a fee.[248]

For workers not represented or assisted during the dispute resolution process, the Commission offers the services of an ombudsman without cost to the worker.[249] Ombudsmen are Commission employees with training in dispute resolution and the handling of workers' compensation claims.[250] Although greatly limited in the type of work they may perform for the worker, ombudsmen generally advise a worker on how best to present his case at each stage of the dispute resolution process.[251] Unlike attorneys, ombudsmen face severe limitations in the type of assistance they can render on behalf of injured workers. For example, ombudsmen cannot hire an investigator on behalf of the injured worker, assist the worker during judicial review of the case, or provide a letter of protection to a worker's medical providers.

These limitations reduce the options available to a worker in pursuing a claim and increase the likelihood that the worker might choose to resolve the case outside of the dispute resolution process, even if such a resolution does not serve the worker's best interest. However, if a worker is represented by an ombudsman, the worker's recovery is not reduced by fees that an attorney would otherwise charge.[252] In contrast, insurance companies enjoy greater flexibility than workers in funding counsel or employing non-attorneys. Although unable to utilize the ombudsman program,[253] carriers frequently use their adjusters in the dispute resolution process.[254] While the insurance carrier is responsible for paying attorneys' fees or the salaries of its adjusters, the carrier has

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247. *See id.*

248. *See id.* § 410.006(a).

249. *See id.* § 409.041(b)(4), (5).

250. *See Texas Workers' Compensation Commission Ombudsman Program, in* TEX. WORKERS' COMP. COMM'N, INFORMATION ABOUT THE OMBUDSMAN PROGRAM AND ATTORNEY REPRESENTATION (Mar. 26, 1997). *See generally* TEX. LAB. CODE ANN. § 409.042 (Vernon 1996).

251. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 5-6 (Aug. 1997).

252. *See id.* at 9.

253. *Cf.* TEX. LAB. CODE ANN. § 409.041(a) (Vernon 1996) (explaining that the program is designed "to assist injured workers and persons claiming death benefits").

254. *See id.* § 410.006(b).

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the flexibility of treating these fees or salaries as a cost of insuring employers. As a consequence, carriers can offset this cost in the form of higher premiums.[255]

B. *Problems with Limiting Attorney Involvement on Behalf of Workers*

Providing alternatives to legal representation is important in reforming the workers' compensation system in Texas. The driving force behind the 1989 reform was to "decrease costly litigation and minimize attorney involvement" in the dispute resolution process.[256] By affording workers alternatives to legal representation, the Act has succeeded in minimizing the cost of insuring employers because attorney involvement has decreased.[257] However, the social price has been high, especially in the serious injury case that is likely to be permanent.

The goal of limiting lawyer involvement in workers' compensation cases has spawned three related problems. First, the supply and demand for lawyers has suffered an artificial change. Lawyers lack the incentive to take workers' compensation cases, even where bona fide disputes exist. Similarly, workers lack the incentive to hire lawyers because: (1) their recovery will be reduced by attor-

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255. *See* Edward Moscovitch & James R. Chelious, *Reform at the State Level in the U.S. and Australia—The Massachusetts Experience with Workers' Compensation Reform, in* 1996 WORKERS' COMPENSATION YEAR BOOK I-190, I-199 (John F. Burton, Jr. ed., 1995) (indicating that the 1985 reforms required the insurance carriers to pay the claimant's attorneys fees which some observers have blamed for the increased costs); *see also* WILLIAM MITCHELL ET AL., TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 22 (June 1995) (stating that "[a]ttorney fees are deducted from the WC income benefits of the injured workers who hire attorneys").

256. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 47 (Aug. 1998); *see also* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 1 (Aug. 1997).

257. *Cf. TDI Report Shows Workers' Compensation Losses Continue to Drop in 1994*, TEX. MONITOR (Tex. Research and Oversight Council on Workers' Comp., Austin, TX), Spring 1996, at 7, 7 (reporting that the Texas Department of Insurance ("TDI") "indicates that there have been considerable cost reductions, which can be attributed to a number of factors including the new law"); *Attorney Representation of Injured Workers Is Low Following 1989 Reforms*, TEX. MONITOR (Tex. Research and Oversight Council on Workers' Comp., Austin, TX), Spring 1996, at 11, 11 (stating that only 8% of injured workers hired attorneys between 1991-94, compared with over 50% under the old law).

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ney fees; and (2) a free "alternative" exists with the ombudsman program.

Second, although lawyer involvement has been reduced, the Texas Workers Compensation Commission has failed to improve worker awareness of their rights under the new system. While the ombudsman program provides useful assistance, it suffers from a burgeoning case load. The ombudsmen, although typically experienced in insurance adjuster tasks, may not have the best training in coping with the complex medical and legal issues that many workers compensation claims present.

Third, and most importantly, these reforms have created a lopsided representation scheme. The 1989 Act established a claim and dispute resolution mechanism that reduced lawyer involvement on behalf of workers, but not insurance companies. This lopsided representation breeds abuse by insurance companies who use the appeals process to foreclose worker recovery. Workers who lack representation or skill at navigating the dispute resolution system may unwittingly allow their future medical benefits to be taken away on appeal.

1. Act Unfairly Limits the Supply of (and the Demand for) Attorneys to Represent Workers Who Have Legitimate Disputes

At its core, the Act alters the supply of, and demand for, attorneys who will represent workers. In analyzing the pre-reform system, the Joint Select Committee on Workers' Compensation Insurance found that "[t]he system, intended to be a no-fault, uncontroversial system, manifest[ed] a very high level of attorney involvement and increasing levels of controversy and litigation."[258] In addition, the Texas Trial Lawyers' Association noted that lawyers took most of the blame for the litigious nature of the system.[259]

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258. JOINT SELECT COMM. ON WORKERS' COMP. INS., A REPORT TO THE 71ST TEXAS LEGISLATURE 5 (Dec. 9, 1988).

259. *See* Tex. Trial Lawyers' Ass'n, Workers' Compensation Reform in the 71st Legislature: Where We've Been, Where We Are, and Where We Are Going 8 (Aug. 23, 1989) (unpublished manuscript, on file with the author) (stating that the public perceives that "[t]rial lawyers are the reason that the workers' compensation system is 'out of control.' They have eroded a no-fault system into a 'feeding trough for their own special interest.' They have obstructed attempts at meaningful reform of the system").

As a result of reforms to the workers' compensation system, workers interested in challenging disputes face overwhelming obstacles in securing legal representation. In the post-reform era, most injured workers simply cannot find an attorney to take their cases.[260] As noted as early as five years into the new system, "[o]f those injured workers involved in a dispute . . . 23 percent had no attorney but tried unsuccessfully to hire one."[261] Eighty percent of workers who contacted more than one attorney in order to find counsel "said they were turned down by the other attorneys they contacted."[262]

The difficulty in hiring attorneys, although attributable to several factors, stems primarily from the lack of financial incentive for attorneys to represent workers in the administrative process.[263] A worker who does not raise a dispute may have given up because he is unable to secure an attorney, or simply did not know enough to assert his rights.[264] A worker who has raised a dispute, however, faces other problems. Many attorneys have a strong preference for representing workers who draw benefits because the attorneys may then draw their fee from these benefit payments. Some self-inter-

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260. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 49-50 (Aug. 1998) (indicating that 56% of the workers in the study who did not hire an attorney tried to hire an attorney and that 77% of these workers who were unsuccessful in hiring an attorney said that the attorneys whom they contacted were unwilling to take their case). Among the primary reasons the attorneys gave the workers for not being willing to represent them was "no financial incentive to take the case." *See id.* at 50. Fifty-nine percent of the attorneys contacted for the 1998 survey indicated that they are not currently accepting workers' compensation cases; their most common reason was "lack of financial incentive to pursue workers' compensation cases." *Id.* Overall, only 8.7% of *all* workers' compensation claimants in the 1998 survey were represented by an attorney. *See id.* at 47. Because a small percentage of all claims trigger disputes, the percentage of attorneys who represent workers during the administrative dispute process is much higher.

261. *Attorney Representation of Injured Workers Is Low Following 1989 Reforms*, TEX. MONITOR (Tex. Research and Oversight Council on Workers' Comp., Austin, TX), Spring 1996, at 11, 11 (discussing the statistics relating to attorney representation).

262. WILLIAM MITCHELL ET AL., TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 1 (June 1995) (detailing the statistics).

263. *See id.* at 25 tbl. 4. Among workers who tried to, but did not hire attorneys, the categories representing the most significant reasons were "Attorney Did Not Feel Case Was Strong," followed by "Attorney Said There Was Insufficient Financial Incentive." *Id.* at 27 tbl. 5.

264. *Cf. id.* at 7 (failing to identify workers who were not involved in disputes *and* had attempted to hire an attorney).

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ested attorneys may also delay the prompt resolution of workers' cases because as long as the benefit checks continue, they continue to draw a fee.[265] One view, taken by the Research and Oversight Council, regards attorneys as being unwilling to accept workers' compensation cases.[266] Most attorneys cannot make their overhead, much less a profit, on workers' compensation cases. Consequently, these attorneys refuse to take workers' compensation cases.

The ombudsman program and a direct reduction of workers' benefits to offset attorneys' fees are two other factors that contribute to the decreased demand for attorneys. In theory, workers now have a free alternative to legal representation in the form of the ombudsman program.[267] By reducing their benefits to offset attorneys' fees, workers now face a grave disincentive to seeking legal representation. Although a worker's recovery prior to the reform was also subject to attorney's fees,[268] these were not paid until the carrier refused to make further payments. Even then, the 25% was taken from the lump-sum settlement, and the weekly benefits were never invaded. Under the present system, the fees are deducted directly from the weekly compensation on which the injured party attempts to survive.[269]

265. *Cf.* WORKERS' COMP. RESEARCH INST., *CompScope Multi-State Benchmarking Project Briefing* –Austin, TX, June 8, 2000 (indicating that Texas has a longer duration of disability, 17 weeks, "14 week average for 8 states").

266. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 15 (Aug. 1997) (suggesting that injured workers' failed attempts to hire attorneys may indicate "a lack of willingness of attorneys to participate in the reformed workers' compensation system").

267. *See id.* at 9 (indicating that 65% of injured workers chose ombudsman assistance "[b]ecause the ombudsman program is free"). Because workers in this survey were allowed to give more than one reason for selecting ombudsman assistance, other reasons included: (1) workers did not "understand how the workers' compensation system worked" (77%); (2) workers could not "find an attorney to take their case" (53%); and (3) someone told the worker to use an ombudsman (47%). *See id.*

268. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 47 (Aug. 1998) (feigning astonishment at the prospect that "attorneys sometimes received as much as 25 percent of the injured worker's settlement" under the old law). As discussed earlier, attorneys' fees are likewise capped at 25% under the new law.

269. *See* TEX. LAB. CODE ANN. § 408.221(b) (Vernon 1996) (explaining attorneys' fee paid from claimant's recovery).

Although the Commission tells workers that they have a right to legal representation, the Commission nonetheless discourages workers from hiring attorneys from the beginning of the claims process. The letter the Commission sends to injured workers states, in part: "If you DO NOT have an attorney, it is not necessary that you obtain one in most cases."[270] The Commission's website more clearly states the worker's right to hire a lawyer: "An injured worker has the right to hire an attorney to help the worker get benefits or to help resolve disputes."[271] Unfortunately, many workers disregard the importance of Commission mailings and do not have access to the Internet. At one time, the Commission had a policy of notifying (or attempting to notify) workers by telephone of their rights.[272]

If a worker chooses not to retain an attorney (or cannot do so) at an early proceeding such as the BRC, the worker is only marginally more likely to hire an attorney for a later proceeding.[273] The number of workers unrepresented by attorneys and unassisted by ombudsmen, although relatively constant in the BRC and CCH stages, mushrooms at the appeals panel level. Almost half of all

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270. TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 2, Pub. No. EES-41 (Oct. 21, 1996) (on file with the author) (emphasis added). *But cf. id.* at ch. 5, 5-2 (directing customer assistance personnel to "provide clear and precise answers" to customers who are not represented). For injured workers who are represented by attorneys, customer assistance personnel need only "assist the customer with his/her needs and encourage communication with the attorney." *Id.* The system also reduces the demand for attorneys by incorporating the practice of law into the information-sharing function of the DRO (who is not normally an attorney). The duties of the DRO include: "Explain the law, rules and/or Appeals Panel Decisions which may be applicable and how they may effect [sic] the issue(s) in dispute. Define options which maximize the interests of all the parties and the alternatives if resolution cannot be attained." TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 8, 8-4 (Oct. 21, 1996) (on file with the author); *see also* TEX. GOV'T CODE ANN. § 81.101 (Vernon 1998) (defining the "practice of law," in part, as "a service rendered out of court, including the giving of advice . . . requiring the use of legal skill or knowledge . . . the legal effect of which under the facts and conclusions involved must be carefully determined").

271. TEX. WORKERS' COMP. COMM'N, *Injured Worker Rights and Responsibilities, at* http://www.twcc.state.tx.us/information/workerrights.html (last visited Sept. 25, 2000).

272. TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 2, 2-5 (Oct. 21, 1996) (on file with the author).

273. *See* TEX. WORKERS' COMP. COMM'N, PUB. NO. EX 99-005A, TEXAS WORKERS' COMPENSATION SYSTEM DATA REPORT 16 tbl. 4.3 (June 1999) (comparing the total number of workers who contest hearings with the total who appeal).

workers seek no representation or formal assistance by the time they complete the dispute resolution process.[274]

Limiting attorney involvement and lowering carriers' costs are desirable goals,[275] but injured workers have paid the price. Even among workers who resolved their dispute by "mutual agreement" at the CCH level, 68% regarded the system as unfair.[276] This data could mean the worker felt "railroaded" by the system, regardless of whether the worker was represented by an attorney or assisted by an ombudsman.[277] Among the few attorneys who still represent workers, economic pressure often demands a resolution of the claim before too much work is done.[278] An attorney constrained by the economic pressures of an unrealistic fee schedule and faced with long odds of prevailing before the appeals panel, finds more motivation to reach a resolution without vigorous advocacy.[279]

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274. *See id.* at 18.

275. *Cf.* Timothy A. Watson & Michael J. Valen, *A Historic Review of Workers' Compensation Reform in Florida*, 21 FLA. ST. U. L. REV. 501, 523 (1993) (stating that critics of the Florida workers' compensation system blame the system's woes "on the high cost of claimants' attorneys' fees"). Determining what percentage attorney fees comprise overall system costs in Texas is difficult. Yet, in 1986, the last year for which such data is available under the pre-Act regime, attorneys who represented injured workers "received 5% of the total amount paid out in the workers' compensation system, while insurance carrier lawyers received over 8%." Tex. Trial Lawyers' Ass'n, Workers' Compensation Reform in the 71st Legislature: Where We've Been, Where We Are, and Where We Are Going 8 (Aug. 23, 1989) (unpublished manuscript, on file with the author).

276. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 7 fig. 2 (Aug. 1997).

277. The results of the survey do not indicate that the result is different depending upon whether workers hired attorneys or consulted ombudsmen. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 7 (AUG. 1997); *see also id.* at 8 (indicating that injured workers with ombudsman assistance were slightly more likely to regard the dispute resolution process as "unfair" (68%) as workers who had attorney representation (67%)).

278. A recent continuing legal education seminar entitled "Workers' Compensation in Texas" was taught by three attorneys who focused their perspective on employer or carrier representation. The first lawyer is a member of the Society for Human Resource Management; the second devotes her practices "primarily in the management aspects of employment and labor law," while the third lawyer "continues to represent insurance carriers and employers on workers' compensation matters." LORMAN EDUC. SERVS., WORKERS' COMPENSATION IN TEXAS—San Antonio, Texas, Oct. 25, 2000. The likelihood that such a seminar would be taught from the worker's perspective is slim because of the paucity of attorneys who represent workers.

279. *See* TEX. WORKERS' COMP. COMM'N, PUB. NO. EX99005A, TEXAS WORKERS' COMPENSATION SYSTEM DATA REPORT 18 (June 1999); *see also* RESEARCH AND OVER-

Such resolution may be a desirable goal, but it is often reached at the expense of the injured worker.

2. Ombudsman Program Lacks Resources and Focus to Handle Serious or Complex Disputes Effectively

A significant number of workers involved in disputes regard the system as unfair.[280] One reason may be the cumbersome nature of the appeals process.[281] Workers face a labyrinth in order to achieve relief.[282] Because multiple issues may be in dispute at any one time,[283] the administrative dispute resolution process may "string out" the worker's claim. In the absence of legal representation, workers must investigate their case, consult experts when necessary, speak to both medical as well as legal issues, and comply with the maze of procedural requirements,[284] with only a highly

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SIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 43 (Aug. 1998) (stating that "[i]n general injured workers prevail in fewer disputes as they move through the dispute resolution process").

280. *Cf.* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN ANALYSIS OF TEXAS WORKERS WITH PERMANENT IMPAIRMENTS 23 (Dec. 1996) (indicating that only 57% of those who had attended a BRC, and less than half of those who had attended a CCH, felt the conference was conducted fairly). The report also states that "ratings of satisfaction with the results . . . [correlated] to ratings of fairness of the proceedings: of those satisfied with the results of their BRC, 97 percent felt that the conference was conducted fairly. Only 26 percent of those dissatisfied with the results felt that the conference was conducted fairly." *Id.*

281. *See Spotlight on: Comparison of Injured Workers Who Use Attorneys or Ombudsmen in Disputes*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1997, at 1, 3 (stating that many workers regard the reformed system as unfair because of the length of time required to resolve a dispute and because "too much attention is paid to the insurance carrier during the hearing").

282. *See* Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60, 65 (Tex. 1998) (Spector, J., dissenting) (arguing that "an uninformed worker proceeds [through the administrative process] at his or her peril").

283. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN EXAMINATION OF STRENGTHS AND WEAKNESSES OF THE TEXAS WORKERS' COMPENSATION SYSTEM 41 (Aug. 1998) (indicating that multiple issues may be disputed at the same time in Texas because the issues are resolved as they arise).

284. Because procedural issues are more prevalent in later stages of dispute resolution, workers may face increased difficulty in achieving victory on the merits as they progress further through the dispute resolution process. *See Dispute Resolution Process Analyzed by Key Issues*, RES. REV. (Tex. Workers' Comp. Research Ctr., Austin, TX), Dec. 1994, at 1, 2 (explaining that procedural issues are more prevalent in later stages of dispute resolution).

overworked ombudsman to assist them.[285] Although the routine injury in which the parties do not dispute the facts or issues does not present a problem, common disputes—such as the extent of the injury, cause of the injury, scope of employment, and wage rate—arise with some frequency.[286] When an insurance company raises such a dispute, the worker faces a distinct disadvantage.

Limited staffing of Commission personnel who interact with workers, limited worker understanding of the system, and the potential for limited employer cooperation exemplify the various problems that hinder a worker's access to the system. A multi-layered dispute resolution system further hinders workers who seek relief.[287] Many of these problems, if viewed as standing alone, would not cause much mischief. Together, such factors hinder the worker's ability to access the compensation system freely. Worse, the lack of incentives to promote attorney involvement on behalf of the worker further frustrates the worker's pursuit of relief.

Because the Act limits attorney involvement in the claim and dispute resolution process, workers gain less access to the only means by which they may seek relief for work-related injuries. In a 1996 survey, only about half of workers rated between 8-14% impaired knew that they could dispute that impairment rating.[288] The survey further indicated that worker awareness of their rights under the dispute resolution system correlated directly to educa-

285. *See Lumbermens*, 971 S.W.2d at 64 (Spector, J., dissenting) (emphasizing that the Act "is riddled with procedural pitfalls where a worker may unwittingly waive rights"). Although the ombudsman may be well intentioned, his burgeoning caseload limits his ability to provide thorough advice and assistance to the worker. The ombudsman is also limited in his ability to "manage" the case on behalf of the worker, which can result in relief being delayed or denied altogether. In what is hopefully an unusual case, an ombudsman advised a worker not to appeal a disputed impairment because "it would not be 'profitable'" to do so. *See id.* at 65. Although the worker had evidence of a change of condition, which otherwise would necessitate a reevaluation of his claim, he followed the advice of his ombudsman and chose not to appeal the CCH decision. *See id.*

286. *See* AMY E. LEE ET AL., TEX. WORKERS' COMP. RESEARCH CTR., LITIGATION AND CONTROVERSY: AN ANALYSIS OF THE TEXAS WORKERS' COMPENSATION ADMINISTRATIVE DISPUTE RESOLUTION SYSTEM 10 (June 1995).

287. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 8 (Aug. 1997) (indicating that of those injured workers who regarded the dispute resolution process as unfair, 88% stated that "it takes too long to resolve a dispute").

288. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN ANALYSIS OF TEXAS WORKERS WITH PERMANENT IMPAIRMENTS 19-20 (Dec. 1996).

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tional level: "44 percent of the respondents with less than a high school degree, 57 percent of high school graduates, and 58 percent of respondents with more than a high school education indicated they knew of the right to dispute their impairment rating."[289] Among all injured workers, 73% responded in a 1995 survey that "they knew little or nothing about WC [workers' compensation] at the time of their injury."[290]

Whether workers properly understand their rights and responsibilities regarding workers' compensation is tied directly to the Commission's educational initiatives (or lack thereof) and employer compliance with the Act. The Act requires employers to notify their workers of the existence of workers' compensation and provide information on filing a claim.[291] Notice of the worker's injury to the employer should trigger notice to the worker of his or her rights and duties under the Act. Whether workers truly understand their rights, however, is another matter entirely. Of those injured workers who hired attorneys and whose employers subsequently fired or laid them off due to the injury, 46% sought legal representation because "[t]hey didn't understand the workers' compensation system."[292] Even workers already in the system nonetheless fall through the cracks. In a 1998 poll, "[a] large percentage of SIB recipients (54.5 percent) [of those injured workers surveyed] do not remember receiving information from TWCC about how to apply for SIBs. Of those who did remember, . . . 26.4 percent indicated that it was difficult to read and understand."[293]

By reducing worker access to attorney representation, as well as the incentive for employers to reach out to workers, the Act has failed to protect those employees least able to assert their rights on their own behalf. These workers, with limited educational backgrounds, are those likely in need of the greatest protection because they bear the ultimate burden for complying with the Act's injury reporting requirements. Indeed, if a worker fails to report a work-

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289. *See id.* at 20.

290. *See* WILLIAM MITCHELL ET AL, TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 9 (June 1995).

291. *See* 28 TEX. ADMIN. CODE § 110.101 (2000).

292. RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., AN ANALYSIS OF WORKERS WHO WERE FIRED OR LAID OFF AFTER A WORK-RELATED INJURY 17-18 (Aug. 1998).

293. RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 11 (Aug. 1998).

related injury within the time allowed under statute, the Act generally forecloses that worker from recovery. If workers do not understand how to fulfill their responsibilities under the claim process, then the relief they so desperately need will escape them.

Assuming the worker knows to report his injury, understands the instructions that the Commission furnishes him, and files his claim in a timely manner, the worker has not necessarily won the battle to gain access to the system. If the worker cannot retain counsel to aid in resolving his claim, he may have to rely upon the aid of Commission personnel to navigate the system. If an unrepresented worker who becomes embroiled in a dispute decides to enlist the help of an ombudsman, the ombudsman may be unable to provide more than a nominal level of service to the worker. The Research and Oversight Council recently noted that ombudsmen shoulder a heavy caseload. During May 1997, for example, "63 ombudsmen [the total number of ombudsmen in the state] provided assistance in 2,611 cases. The largest caseload for one ombudsman during this month was 94 cases."[294] Even these numbers do not truly represent the caseload because five of the ombudsmen actually act as "senior ombudsmen" assigned to the Commission's office in Austin. The senior ombudsmen's administrative and managerial duties impose considerably upon the time they may devote to assisting workers. These figures may also exaggerate ombudsman involvement for another reason. One injured worker might have multiple

294. RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 11-12 n.9 (Aug. 1997). The ROC noted that the McAllen and Midland/Odessa field offices had the highest average caseloads with approximately 74 and 63 cases per ombudsmen respectively. *Id.* Assuming that an ombudsman worked each of the 21 working days in May 1997, and devoted 8 hours per day to his assigned workers, an ombudsman with 60 cases in May 1997 would be able to devote an average of 2.8 hours to each injured worker per month for counseling, case preparation, hearing attendance, as well as communication with the carrier or its representative. Yet, only 27% of the injured workers surveyed in 1997 reported meeting with their ombudsman for between one and five hours during the entire process. *See id.* at 12 fig. 4. In fact, 13% reported meeting with their ombudsman for less than the statutory minimum, fifteen minutes. *See id.*; *see also* TEX. LAB. CODE ANN. § 409.041(b)(5) (Vernon 1996) (defining the statutory minimum). Not surprisingly, workers who were represented by attorneys had meetings of greater frequency and duration than workers who were represented by counsel. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 11-12 (Aug. 1997). Workers with attorney representation were twice as likely to meet with their attorney for more than five hours. *See id.* at 12.

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disputes. Even when an ombudsman assists the worker with only one dispute, the Commission regards the ombudsman as assisting the worker, even if the assistance covers a very limited scope.

Ombudsmen are usually sympathetic to the unrepresented workers' helplessness and make a concerted effort to assist them. In fact, a 1997 survey showed worker satisfaction as being slightly higher with ombudsmen than with attorneys.[295] Workers represented by attorneys prevailed only slightly more often than their counterparts aided by ombudsmen.[296] Ombudsmen are in short supply, and the high number of injured workers create an increased demand for ombudsmen, especially in certain regions.[297] Under the old act, several thousand attorneys represented workers; today, 63 ombudsmen try to do the same job. As a result, ombudsmen are overworked.

Although ombudsmen work hard and are well-motivated, most are understaffed and overwhelmed by the caseload. In cases involving no dispute, 78.2% of all injured workers reported feeling either "extremely satisfied" or "somewhat satisfied" with the Commission's claim assistance.[298] These feelings changed dramatically, however, if a worker's claim had a dispute. Of those workers with a dispute, 48.3% were either "somewhat dissatisfied" or "very dissatisfied" with the assistance they received with their claim.[299]

The heavy caseload of the ombudsmen and the high number of claims the Commission must handle increases the pressure on a

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295. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 13 (Aug. 1997).

296. *See* WILLIAM MITCHELL ET AL., TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 32-34 (June 1995).

297. *See* AMY E. LEE ET AL., TEX. WORKERS' COMP. RESEARCH CTR., LITIGATION AND CONTROVERSY: AN ANALYSIS OF THE TEXAS WORKERS' COMPENSATION ADMINISTRATIVE DISPUTE RESOLUTION SYSTEM 7 (June 1995) (showing the regional distribution of disputes during first nine months of 1994).

298. *See* WILLIAM MITCHELL ET AL, TEX. WORKERS' COMP. RESEARCH CTR., ATTORNEY INVOLVEMENT IN THE TEXAS WORKERS' COMPENSATION SYSTEM 17 (June 1995) (delineating the injured workers' satisfaction with TWCC claim assistance).

299. *See id.* Whether the worker had an attorney was not instrumental in achieving satisfaction. In addition, the data is not clear as to whether the worker waited until a dispute arose before hiring an attorney. Even if this information were known, it might not be important because the worker's satisfaction with the assistance he had received, if given at all, may be in reference to the amount of help that the worker received *until* the point when a disputed issue arose.

worker to resolve his dispute.[300] This pressure may play a role in encouraging an unrepresented worker to resolve his claim at an early stage. In addition to this pressure from the Commission, the worker faces repeated visits to physicians, physical therapists, and other specialists aiding in his rehabilitation. In light of such time and logistical pressures, a worker may feel frustrated and want the process to end quickly. While this pressure may be beneficial when it forces the able worker to return to work, such pressure obviously and unjustly punishes the worker who is incapable of working.

3. Reforms Limit Attorney Involvement on Behalf of Workers, but Not Carriers

Although the Act has reduced the frequency with which workers hire attorneys, it has not encouraged similar limitations on the part of carriers.[301] The Act has thus resulted in an uneven representation scheme to handle disputes of workers' compensation claims.[302] The Act sets the worker adrift amid a complex scheme with little more than a hope of seeking the fair adjudication of his claims. This lopsided scheme appears most noticeably after a BRC because

300. *Cf.* TEX. WORKERS' COMP. COMM'N, MASTER OPERATIONS MANUAL USER'S GUIDE, ch. 8, 8-1 (Oct. 21, 1996) (on file with the author) (explaining the duties of the customer assistance staff and dispute resolution officers in the context of resolving disputes promptly); *id.* at 8-3 to 8-5 (requiring a dispute resolution officer to review a claim before the parties proceed to a benefit review conference). In reality, the parties pass through two levels of mediation (with the dispute resolution officer and the benefit review officer) before the dispute is ever heard by an administrative law judge at the CCH. By system design, well over 100 days passes between the date of injury and the contested case hearing. *See* AMY E. LEE ET AL., TEX. WORKERS' COMP. RESEARCH CTR., LITIGATION AND CONTROVERSY: AN ANALYSIS OF THE TEXAS WORKERS' COMPENSATION ADMINISTRATIVE DISPUTE RESOLUTION SYSTEM 4 (June 1995).

301. *See* Tex. Workers' Comp. Comm'n v. Garcia, 862 S.W.2d 61, 99 (Tex. App.—San Antonio 1993) (explaining that carriers' "attorneys *will be paid* based on the hours worked *regardless of how large or small the recovery, regardless of whether they win or lose, and regardless of how many trips through the system are taken*") (emphasis added), *rev'd*, 893 S.W.2d 504 (Tex. 1995); *see also* Edward Moscovitch & James R. Chelious, *Reform at the State Level in the U.S. and Australia—The Massachusetts Experience with Workers' Compensation Reform*, *in* 1996 WORKERS' COMPENSATION YEAR BOOK I-190, I-199 (John F. Burton, Jr. ed., 1995) (relating that "[w]e are struck by the observation . . . [that the fee limitations and detailed time keeping required of workers' compensation attorneys] removed only claimant lawyers; carrier lawyers remained").

302. *See* TEX. WORKERS' COMP. COMM'N, PUB. NO. EX99-005A, TEXAS WORKERS' COMPENSATION SYSTEM DATA REPORT 18 (June 1999) (indicating that attorney representation for the insurance carrier has increased from 1993-99 and that, among the various administrative hearings, attorney representation has been more frequent among insurance carriers than workers from 1993-99).

workers are less likely to retain counsel during the administrative appeal process. Insurance companies, however, become more likely to retain counsel in the same situation.[303] Carriers have an incentive to take advantage of this uneven playing field by launching unmeritorious appeals in order to foreclose future benefits. As a result of the difficulty and disincentive workers face in retaining counsel, combined with the inadequate substitute that the ombudsman program provides for serious or complex cases, a lopsided scheme emerges. While the insurance carrier has access to adequate representation, a seriously injured worker lacks the resources to muster proper representation. Even more striking is the diminished role that attorneys play in providing financial assistance to injured workers. The Labor Code expressly prohibits attorneys from making loans to injured workers to cover interim expenses.[304]

The disparities in representation is patently unfair. The current system allows an insurance company to pass along the cost of defending claims to employers. Workers cannot pass along their costs, and must suffer a diminished recovery for successfully fighting for their benefits if they employ counsel. These circumstances, along with a workers' inability to mobilize an adequate legal challenge, allow insurance companies to abuse the administrative ap-

303. *See Workers' Compensation System Performance Analyzed*, RES. REV. (Tex. Workers' Comp. Research Ctr., Austin, TX), Feb. 1995, at 1, 4 (providing data on attorney involvement at the BRC level). From 1992-94, attorney representation on behalf of carriers consistently outpaced that of workers:

Percent of Claims with Attorney Involvement at BRC
(First three quarters of injury year)

Year	On Behalf of Carriers	On Behalf of Workers
1992	37.9%	27.1%
1993	43.2%	25.1%
1994	50.8%	26.4%

Id; *see also Spotlight on: Strengths and Weaknesses in the Texas Workers' Compensation System*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Fall 1998, at 1, 5 (explaining that although the percentage of workers represented by attorneys in 1997 has dropped from 90% (pre-reform) to 35% (post reform), "[a]ttorney representation is still high for insurance carriers"). *See id.* In fact, the system fails to discourage carriers from retaining counsel or employing laypersons to represent their interests during the dispute resolution process. Notably, the Act does not place restrictions on the retainers paid to outside counsel, or on the salaries paid to in-house counsel. *See* 28 TEX. ADMIN. CODE § 152.1(b) (2000) (stating that "[a]n attorney shall not receive an amount greater than the fee approved by the commission, *notwithstanding any agreements between the parties, including retainer fee agreements*") (emphasis added).

304. *See* TEX. LAB. CODE ANN. § 415.007 (Vernon 1996).

peals process. Under the current scheme, insurance carriers have incentive to appeal unfavorable administrative decisions relating to the payment of benefits to workers. If a carrier obtains a reversal of an unfavorable decision, the carrier receives a refund of what it previously paid out to the worker as a result of the interlocutory order or the appeals panel decision.[305] More importantly, a favorable verdict enables the carrier to foreclose the possibility of paying future medical benefits to the worker; i.e., if the injury is determined not to be work-related. Because the carrier receives its reimbursement from the subsequent injury fund,[306] the worker typically has little incentive to press the fight after a favorable administrative decision. Many unrepresented workers do not know that their future medical benefits are at risk. They may well view it as a dispute between the insurance company and the subsequent insurance fund.

Although the worker's future medical benefits are at stake, the worker is unlikely to be able to hire a lawyer. Workers' attorneys receive no compensation for future medical benefit recovery.[307] Consequently, although a worker may have the better argument, the insurance company has no reason to appeal the decision. If the insurance company succeeds in pursuing its appeal, the company can obtain recovery from the subsequent injury fund and foreclose the possibility that the worker will receive future medical benefits. Theoretically, the worker has a legal right to recover against the carrier for a bad faith denial of benefits.[308] Unfortunately, the standard articulated by the Supreme Court of Texas imposes liability upon an insurance carrier for a bad faith denial of benefits only "if the insurer knew or should have known that it was reasonably clear that the claim was covered."[309] Insurance companies under

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305. *See* 25 Tex. Reg. 2090, 2095 (2000) (to be codified at 28 TEX. ADMIN. CODE § 116.11).

306. *See* TEX. LAB. CODE ANN. § 410.032 (Vernon 1996) (requiring the subsequent injury fund to reimburse an insurance carrier for overpayments of benefits made under an order if that order is reversed or modified); *id.* § 410.205 (permitting an insurance carrier to recover reimbursement of benefits paid if a court modifies or reverses an appeals panel decision); *An Evaluation of the Texas Subsequent Injury Fund*, TEX. MONITOR (Research and Oversight Council on Workers' Comp., Austin, TX), Summer 1999, at 5, 5.

307. *See* 28 TEX. ADMIN. CODE § 152.1(c) (2000).

308. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 56 (Tex. 1997) (discussing the standard by which an insurer may be held liable for denial of benefits).

309. *Id.*

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today's tests can easily demonstrate an absence of bad faith. As a result, successfully asserting that a carrier denied the payment of benefits in bad faith is difficult.[310]

Other than avoiding the potential liability for a bad faith denial, the carrier has no disincentive (other than the cost of attorney's fees) to appeal or seek judicial review. Meanwhile, the worker probably will not have an attorney and cannot retain one. Not only does the worker often find hiring an attorney cost prohibitive, the Commission prohibits its ombudsmen from assisting workers involved in lawsuits. Although the Commission properly prohibits its ombudsmen to practice law, insurance companies can exploit the system to the detriment of the worker. This is hardly justice, even of the "Law West of the Pecos" variety.

C. *Solutions*

If the former workers' compensation system suffered from too many lawyers, the present one suffers from too few lawyers, especially for the seriously injured worker. Limits on access to attorneys hinder the workers' ability to learn about, and exercise, their rights under the system. The strain on ombudsmen renders the free assistance offered by the Commission incapable of standing as an adequate substitute for licensed legal representation.

Despite the cooperation of workers, employers, and carriers, and the ease with which some claims can be resolved, good faith disputes will nonetheless continue. It is true that attorneys sometimes cause unnecessary disputes, and the intent of the Legislature to limit attorney involvement can be respected on philosophical grounds. Likewise, no one seriously disputes that the worker benefits by receiving all of the compensation, rather than sharing it with lawyers. After all, it is the Workers' Compensation Act, and not the Attorneys' Compensation Act.[311] The weakness of the current

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310. *Cf. id.* at 69 (Hecht, J., concurring) (stating that "[a]s long as liability for a claim is fairly debatable, and hence not reasonably clear, an insurer may deny the claim without acting in bad faith").

311. *Cf.* Edward Moscovitch & James R. Chelious, *Reform at the State Level in the U.S. and Australia—The Massachusetts Experience with Workers' Compensation Reform, in* 1996 WORKERS' COMPENSATION YEAR BOOK I-190, I-200 (John F. Burton, Jr. ed., 1995) (explaining that "[a]lthough claimant lawyers have an important role to play, workers' compensation systems should be designed to meet the needs of injured workers and their employers, not the lawyers, doctors, and other professionals who work in the system").

system, though, is that it unfairly favors carriers and employers[312] and discourages legitimate claims. The system denies workers their "day in court" and opportunity for appellate review. The Legislature must strike a balance between allowing attorney representation of workers and discouraging litigiousness in the dispute resolution process. In the absence of attorney representation of workers, the Legislature should prevent insurance carriers from taking advantage of workers unrepresented by counsel. Finally, for workers seeking Commission assistance, the Legislature must greatly expand the ombudsman program.

1. Change the Economics of Legal Representation for Workers and Insurance Companies

One method through which the Legislature could provide better protection to injured workers is to change the economics of legal representation as it applies to both injured workers and the insurance companies. The Legislature could implement this change through three primary additions to the current system. First, the Legislature should establish a process allowing workers with a bona fide dispute to hire an attorney on a contingency fee basis. Second, when an injured worker succeeds in challenging an insurance company, the company should pay the worker's attorney's fees. Third, the Legislature should establish a fund to help injured workers defray the costs of medical experts in highly complex cases. While implementing any of the three changes would help the injured worker in the current system, adopting all three changes would create a system that more fairly balances the interests of all parties.

a. Establish Gatekeeper Program to Allow Contingent Fee Recovery in Select Cases

Workers and carriers should play on a level field. By limiting attorney involvement on behalf of workers, the Act has achieved savings at the expense of the worker. Once a bona fide dispute arises, attorney involvement should not be discouraged. If the worker is successful, the insurance companies should be required

312. *See id.* at I-199 (stating that "[w]e hope that most workers would not need a lawyer . . . [but have] heard enough stories of employer abuse to believe that lawyers should be available to those injured workers victimized by such employers").

to pay the workers' attorneys fees.[313] If the worker does not have a legitimate claim, then neither he nor the attorney should recover anything. Of course, there is always the problem of deciding when a bona fide dispute exists. One solution is to implement a procedure to certify when a bona fide dispute exists. This certification would be a prerequisite for the worker's attorney to qualify for a contingent fee recovery. Such an arrangement would allow the system to work before attorney involvement. However, once the parties reach an impasse, as determined by a neutral party, equal access to customary legal representation would be provided for all parties. Such a policy would also discourage routine curtailing of benefits by the insurance company.

The individual who knows the most about a case and could best decide whether a case merits certification is the worker's ombudsman. Yet, insurance carriers may not necessarily regard the ombudsman as exercising objectivity in deciding whether a case should receive certification. Creating a strictly independent body to review cases for certification, however, would burden the system unnecessarily. The better alternative is to place the duty of certification upon the senior ombudsmen, or perhaps benefit review officers, who are regarded as independent of an adversarial process.

In order to discourage bad faith appeals and disputes by the insurance company, the amount of contingent fee recovery could increase with each "rung" of the dispute resolution ladder. For example, an attorney would be entitled to a 15% contingent fee recovery if the matter concludes at the BRC. If the worker must hire an attorney for a CCH, the recovery could be higher, perhaps 20%. A successful result at the appeals panel level could garner a

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313. *See* TEX. HOUSE OF REPRESENTATIVES, HOUSE COMMITTEE ON BUSINESS & INDUSTRY INTERIM REPORT 1998, 76th Leg., R.S., at 57 (Dec. 3, 1998) (reporting the findings of the Subcommittee on Workers' Compensation Insurance Carrier Practices). During the course of the subcommittee's study, two questions that arose for further consideration were:

> Should injured workers be required to give up to 25% of their income benefits when they retain an attorney to assist them with the dispute resolution system?
>
> Should insurance carriers pay the equivalent of 25% when the injured worker prevails at the hearing?

Id.; *cf.* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., BIENNIAL REPORT OF THE RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMPENSATION 77 (Dec. 1998) (recommending "that the issue of carrier liability for workers' attorney fees be examined . . . for consideration in the next legislative session").

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33% recovery. Matters taken to judicial review, which are rare, could be capped at a 40% recovery. At the heart of the contingency recover system is the economic disincentive for a worker's attorney to bring suit. If this is insufficient to dissuade frivolous suits by workers or their attorneys, courts may rely upon the Texas Civil Practice and Remedies Code to punish counsel for frivolous pleadings.[314]

b. Charge Victorious Worker's Attorney's Fees to Insurance Company

When a dispute arises, forcing insurance companies to pay a workers' attorney's fees if the worker succeeds (whether certified to receive a contingent recovery or limited to the flat fee per action under the Commission's rules) would: (1) further discourage insurance companies from pursuing unmeritorious disputes; and (2) encourage workers to seek counsel. Insurance companies already absorb the cost of their own representation, whether by in-house or retained counsel, or by lay employees. The employer ultimately pays, perhaps indirectly, in the form of premiums.

Charging a victorious workers' attorney's fees to the insurance company would breed a safer work environment because employers would be more alert to the business disadvantage of compensation claims and ensuing disputes. Likewise, charging successful workers' attorney's fees to the insurance company would foster employer cooperation (after an injury) and promote insurance company willingness to pay valid claims without the hindrance of a dispute. Florida, for example, requires the insurance carrier to pay a "reasonable" fee in three circumstances: (1) if the employer or carrier has filed a notice of denial and the claimant prevails; (2) if there is a denial of compensability and the claimant wins compensation; and (3) if the worker successfully asserts a claim for medical benefits.[315]

314. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001-.006 (Vernon Supp. 2000).

315. PETER S. BARTH, WORKERS COMP. RESEARCH INST., WORKERS' COMPENSATION IN FLORIDA: ADMINISTRATIVE INVENTORY 42 (Aug. 1999).

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c. Help Defray the Cost of Medical Experts in Complicated Claims

The Commission is currently considering establishing a medical experts fund. This fund would help workers, ombudsmen, and workers' attorneys defray the costs of hiring medical experts in toxicology cases. Such claims present difficulties for the worker because of the expense for the medical testimony needed to establish a causal relationship between the work and the injury. The insurance company can bear the cost of its witnesses much more readily than the worker. Such a fund, with sufficient allocations, would provide the needed resources to workers and their ombudsmen or lawyers to fight on a level playing field with the insurance company.

2. Expand the Ombudsman Program

Serious questions remain as to the ombudsman program's capacity to handle future demands.[316] Adding more ombudsmen to the thin ranks, both in the field as well as to the "senior ombudsmen" level, would be an important first step to ensuring that a worker receives quality assistance. Hiring more ombudsmen, though, fulfills only part of the solution. The Commission must also be able to retain ombudsmen. Salary increases for field ombudsmen would recognize the important contribution ombudsmen make in seeking justice for injured workers.[317] Likewise, increasing the compensa-

316. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., A COMPARISON OF INJURED WORKERS WHO USE ATTORNEYS OR OMBUDSMEN IN THE TEXAS DISPUTE RESOLUTION SYSTEM 19-20 (Aug. 1997). The ROC stated the larger problem of the ombudsmen's ability to render thorough assistance as springing from the wave of SIB disputes:

> One area of concern, however, lies in the numbers of injured workers who tried, but were unable to hire attorneys, because their failed attempts may be an indication of a lack of willingness of attorneys to participate in the reformed workers' compensation system. This concern will escalate as the number of disputes over an injured worker's entitlement to SIBs continues to increase rapidly (footnote omitted). If the trend continues, ombudsmen will be hard pressed to give injured workers the level of assistance that they deserve even as injured workers are forced to rely even more on ombudsmen assistance because attorneys won't take their cases.

Id.

317. One former Commission employee, Chris Lam, said he enjoyed serving as an ombudsman "immensely." Telephone Interview with Chris Lam, Regional Risk Manager, Manpower, (Aug. 16, 2000) (on file with the author). As a field office ombudsman in Fort Worth, he received $2,899 per month, which included the $2,749 monthly base pay for an

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tion of senior ombudsmen would provide incentive to field ombudsmen to undertake increased responsibilities as they develop experience and expertise.[318]

Guaranteeing that an ombudsman receives proper training also protects the injured worker. The Commission acknowledges the limitations of ombudsmen. Certain types of disputes, such as "compensability of occupational disease or chemical exposure claims,"[319] may exceed an ombudsman's area of expertise. Even in other disputes, the "candidness of the doctor" is at the center of the dispute resolution process. Rather than merely having familiarity with the work performed by insurance adjusters in the workers' compensation arena, ombudsman should have greater familiarity with medical terminology and industrial accidents. For example, ombudsmen would benefit from clarification and guidance regarding the assignment of impairment ratings.[320]

Ombudsmen, like all non-attorney Commission employees who interact directly with workers, cannot give legal advice. If the job requires an ombudsman to render the equivalent of legal advice, the ombudsman should advise the worker, unequivocally, of the right to seek outside representation. Although unrepresented workers must understand the consequences of their choices in order to make effective decisions,[321] workers should know they will

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"Ombudsman I" and a $150/month merit raise. *Id.* His gross annual salary was $34,788. *Id.* Lam was regarded as a top ombudsman with a good future. *Id.* But, the salary was modest, and significant financial advancement was non-existent. *Id.* He left after three years. *Id.*

318. Before leaving the Commission, Lam had the option of applying for the position of "lead ombudsman" in the Fort Worth office. Telephone Interview with Chris Lam, Regional Risk Manager, Manpower (Aug. 16, 2000) (on file with the author). Such a promotion (to "Ombudsman II") would have translated into a raise of approximately $100/month. *Id.* By leaving the Commission to work for Manpower as a regional risk manager (one who assesses and handles claims of temporary workers who are hurt on the job), Lam received an immediate raise of $708/month with superior chances of advancement. *Id.*

319. *See Texas Workers' Compensation Commission Ombudsman Program*, *in* TEX. WORKERS' COMP. COMM'N, INFORMATION ABOUT THE OMBUDSMAN PROGRAM AND ATTORNEY REPRESENTATION (Mar. 26, 1997).

320. *See Dispute Resolution Process Analyzed by Key Issues*, RES. REV. (Tex. Workers' Comp. Research Ctr., Austin, TX), Dec. 1994, at 1, 4 (pointing out that disputes regarding "impairment ratings, account for a large percentage of issues at every level of the dispute resolution process").

321. *See* Lumbermens Mut. Cas. Co. v. Manasco, 971 S.W.2d 60, 65 (Tex. 1998) (Spector, J., dissenting) (stating that "it is imperative that the ombudsmen fully inform unrepresented claimants of the consequences of their decisions at each step in the administrative adjudication process").

not have an attorney to provide them with legal advice unless they can retain one by entering into a contract for legal services.

Although ombudsmen play an important role in educating workers regarding their rights and responsibilities under the workers' compensation system, education should take a proactive posture. Today's workers have little awareness of the system that they often must depend upon once they suffer an injury. For most workers, workers' compensation provides the only relief for medical expenses and lost income. If the worker is to remain on his own under the present system, he or she at least needs to be educated more fully.

V. Assistance in Returning to Work

One-third of claimants with impairment ratings between 8% and 14% could not return to work.[322] One-fourth of workers who initially qualified for SIBs, but who no longer received them, did not return to work.[323] Sixty-nine percent of SIBs claimants who no longer received SIBs have been forced to rely on social security, food stamps, public assistance, or aid to families with dependent children in order to survive.[324] Of the SIBs claimants who returned to work, 88% returned to a different job, and only 9% of these returnees earned at least 80% of their pre-injury wages four and one-half years after the injury.[325]

These statistics demonstrate a crucial need for programs to assist injured workers in their efforts to return to work. Given the goal of returning injured employees to work quickly, programs that assist in that process are important to the success of the system. In 1997, the Research and Oversight Council on Workers' Compensa-

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322. *See* Research and Oversight Council on Workers' Comp., An Analysis of Texas Workers with Permanent Impairments 4 (Dec. 1996). Of the one-third who were not working, 17% had never returned to work, and 17% had returned at some point but were not currently working. *See id.*

323. *See* Research and Oversight Council on Workers' Comp., Supplemental Income Benefits: Statistical Update and Survey Results 18 (Aug. 1998).

324. *See* Research and Oversight Council on Workers' Comp., The 401-Week Limit on Income Replacement Benefits and Its Effects on Injured Workers in Texas 11 (Apr. 1999).

325. *See* Research and Oversight Council on Workers' Comp., Supplemental Income Benefits: Statistical Update and Survey Results 17-18 (Aug. 1998); Research and Oversight Council on Workers' Comp., An Analysis of Texas Workers with Permanent Impairments 4-5 (Dec. 1996).

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tion studied two return-to-work programs available in Oregon: the Preferred Worker Program and the Employer at Injury Program.[326] Florida offers a similar return-to-work program.[327]

Oregon established the Preferred Worker Program in 1987 to offer financial incentives to employers offering employment to disabled workers with closed workers' compensation claims.[328] Those incentives include: (1) premium exception—excepts the disabled worker for purposes of calculating the employer's workers' compensation premium for a period of three years; (2) wage subsidy—subsidizes 50% of the worker's wage for a period of six months; (3) claim cost reimbursement—reimburses the costs of any workers' compensation claims by the employee that are filed within three years; and (4) work site modification and obtained employment purchases—paying for work site modifications (up to $25,000) and certain purchases, such as tools, equipment, and redesign.[329] From

326. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 1 (Aug. 1997). The two programs are part of Oregon's Reemployment Assistance Program. *See* OR. ADMIN. R. 436-110-0002 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). Assistance is provided under the Reemployment Assistance Program "to preclude or reduce nondisabling claims from becoming disabling claims, preclude on-the-job injuries from recurring, reduce disability by returning injured workers to work sooner and to help injured workers remain employed." OR. REV. STAT. § 656.622(2) (1999). The program is administered by the Director of the Department of Consumer and Business Services. *See id.*

327. *See* FLA. STAT. ANN. § 440.49 (West 2000).

328. *See* OR. ADMIN. R. 436-110-0002, 436-110-0300 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 7 (Aug. 1997).

329. *See* OR. ADMIN. R. 436-110-0300 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* Chess Trethewy, *Senate Bill 369: Another Chapter in the Political Saga of Workers' Compensation in Oregon*, 32 WILLAMETTE L. REV. 217, 243 (1996); RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 7-8 (Aug. 1997). Any new compensable injury or occupational disease the preferred worker experiences during the premium exemption period is also not included in the calculation of the employer's experience rating. *See* OR. ADMIN. R. 436-110-0300(1) (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). In addition to reimbursing the cost of the claim, the Oregon Legislature amended the statute in 1995 to clarify that the reasonable cost of the claims administration would also be reimbursed. *See* OR. REV. STAT. § 656.622 (1999); *see also* Chess Trethewy, *Senate Bill 369: Another Chapter in the Political Saga of Workers' Compensation in Oregon*, 32 WILLAMETTE L. REV. 217, 243 (1996) (noting statutory amendment resulted from state's failure to reimburse costs of claims administration as program developed). The wage subsidy is greater for injured workers who are classified as

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1991 to 1996, employers who utilized the Preferred Worker Program hired a total of 6,320 workers.[330] Workers and employers who participated gave the program high ratings.[331] Eighty-one percent of workers and 90% of employers ranked the program as good or excellent.[332] Only 3% of workers indicated that they were terminated after the program benefits expired.[333] There was no indication whether the employer received any penalty in such an event. Penalizing the employer, however, would likely decrease that type of program abuse.

The second return-to-work program offered by Oregon is called the Employer-at-Injury Program.[334] This program provides financial incentives for employers offering light duty opportunities to permit workers with open claims to return early.[335] The incentives

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having an exceptional disability. *See* OR. ADMIN. R. 436-110-0300(3)(a) (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). The wage subsidy for workers with exceptional disabilities extends a period of one year and the reimbursement rate is 75% of the workers' wages. *See id.* An "exceptional disability" is a disability "equal to or greater than the complete loss, or loss of use, of both legs" or certain types of brain injuries. *See* OR. ADMIN. R. 436-110-0005 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). A worksite modification permits the purchase, modification or supplementation of equipment or the change of the work process to enable a preferred worker to perform the job functions. *See* OR. ADMIN. R. 436-110-0300(5) (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). Obtained employment purchases are the miscellaneous items a worker is required to purchase in order to accept or keep a job. *See* OR. ADMIN. R. 436-110-0300(4) (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). Obtained employment purchases include such items as educational instruction, tuition, books, starter tools and equipment, clothing, moving expenses, rental allowances, union fees, and certification and licensing fees. *See id.*

330. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 9-10 (Aug. 1997).

331. *See id.* at 13.

332. *See id.*

333. *See* OR. ADMIN. R. 436-110-0002 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 13 (Aug. 1997).

334. *See* OR. ADMIN. R. 436-110-0002 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 14 (Aug. 1997).

335. *See* OR. ADMIN. R. 436-110-0510 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 14 (Aug. 1997).

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offered include: (1) wage subsidy—subsidizing 50% of the worker's wage for a period of three months; and (2) worksite modification and program purchases—paying for work site modifications (up to $2,500) and certain program purchases.[336] In 1995, 11% of Oregon's workers' compensation claimants participated in an early return-to-work program.[337]

Florida's preferred worker program reimburses employers who hire preferred workers for the workers' compensation premiums related to those workers for a period of three years.[338] The Florida program defines a preferred worker as "a worker who, because of a permanent impairment resulting from a compensable injury or occupational disease, is unable to return to the worker's regular employment."[339] The Florida program is intended to facilitate the employment, reemployment, and accommodation of injured workers.[340] The program is also designed to protect employers from liability when a preferred worker aggravates the preexisting injury.[341]

Although Texas has studied both Florida and Oregon's programs, the state has taken no action to adopt similar programs. Given the success of these return-to-work programs, Texas should consider similar programs in order to better position injured workers to meet the goal of returning to employment. Currently, the Texas Rehabilitation Commission provides the only return-to-work assistance for injured workers. Given that 88% of SIBs claimants return to a different job, vocational rehabilitation is critical in as-

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336. *See* OR. ADMIN. R. 436-110-0510 (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000). *See generally* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 14 (Aug. 1997). Program purchases include tuition, fees and books for instruction to update skills to meet job requirements, mandatory tools and equipment, and clothing. *See* OR. ADMIN. R. 436-110-0510(3) (2000), *available at* http://arcweb.sos.state.or.us/rules/OARS_400/OAR_436/436_110.html (as of Sept. 15, 2000).

337. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., RETURN-TO-WORK PROGRAMS IN OREGON AND THEIR APPLICABILITY TO TEXAS 15 (Aug. 1997).

338. *See* FLA. STAT. ANN. § 440.49(8) (West Supp. 2000); *see generally* Richard H. Weisberg & Mary Ingley, *The Special Disability Trust Fund*, FLORIDA WORKERS' COMPENSATION PRACTICE §§ 7.3, 7.44 (The Florida Bar 1996) (noting program was created in 1993 and replaced provision that directly reimbursed employers who hired an individual who was unemployed for two or more years due to a permanent impairment), WL WCP FL-CLE 7-1.

339. FLA. STAT. ANN. § 440.49(2)(b) (West Supp. 2000).

340. *See id.* § 440.49(1).

341. *See id.* § 440.49(2)(a).

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sisting these workers in returning to the job market. Nevertheless, only 43% of SIBs claimants are sent to the Texas Rehabilitation Commission, and only half of those sent found the program helpful.[342] Insurance carriers only volunteered to pay a private provider of retraining, career counseling or job placement services for approximately 5.5% of SIBs claimants.[343] Texas should recognize vocational rehabilitation as a critical part of the system by establishing a mandatory vocational rehabilitation program paid for by the carrier as an expense necessary to return the worker to work. This will create an additional economic incentive for the employer to put the injured employee back to work.

VI. CONCLUSION

A decade has lapsed since the massive reform to the Texas workers' compensation system. Although many areas of the current system work well, others do not. This Article highlights some problems and possible solutions. Based on this survey, the Legislature should consider the following recommendations:

1. Make the workers' compensation system mandatory for all employers, or regulate the alternative benefits plans offered by non-subscribing employers to ensure equal benefits are provided.
2. Enact legislation prohibiting discriminatory or retaliatory discharge against employees of non-subscribing employers.
3. Decrease the 15% threshold for SIBs entitlement to 11%.
4. Enact quality review measures and statutory penalties to prevent inconsistent impairment ratings by insurance and treating doctors and to decrease the amount of time permitted to lapse when multiple ratings are assigned. Prohibit carriers from conducting premature evaluations by requiring a certain period of time to lapse between the date of injury and the date a carrier can request an evaluation.
5. Abolish Rule 130.5(e). Alternatively, require the Commission to communicate the worker's rights very clearly following a certification of MMI or IR; provide a "good cause" exception to the certification's finality. Permit certifications with regard to maximum medical improvement and impairment ratings to be reopened in the event of a substantial change in condition.

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342. *See* RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMP., SUPPLEMENTAL INCOME BENEFITS: STATISTICAL UPDATE AND SURVEY RESULTS 15-16 (Aug. 1998).

343. *See id.*

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6. Implement an escalating penalty or sanction system to prevent continual unmeritorious challenges to SIBs continuation, payable to the injured worker.
7. Restrict SIBs review to an annual, rather than a quarterly, review.
8. Permit senior ombudsmen or benefit review officers to certify cases as having a bona fide dispute. After certification, the worker's attorney would charge a contingency fee.
9. Require insurance companies to pay the attorneys' contingency fee when the worker's claim is successful.
10. Help defray the worker's cost of medical or other scientific experts in complicated claims.
11. Expand the ombudsman program and provide training to ombudsmen in complex medical and scientific issues.
12. Implement a pilot return-to-work program using the Oregon or Florida plans as models and implement a mandatory vocational rehabilitation program paid for as a system cost.

Ten years ago, the Legislature responded to a call to rewrite the workers' compensation law because it was unworkable for employers. Much of this revision met its goal, especially for temporary routine injuries. It is now clear, however, that the system is inadequate for the seriously injured employee. The system needs additional legislation to meet the overall goal to compensate injured workers during the period necessary for their recovery so that workers can return to work at the earliest possible time. The small, but important, percentage of workers who are too badly injured to ever return to meaningful employment are entitled to have access to the full 401 weeks of benefits and should not simply be kicked out of the system in two to three years.

Common law is not static but requires judicial consideration in response to the ever-changing problems and needs of society. The same principal applies to statutory law. Legislation cannot be permitted to remain static when evidence of a need for change is presented. When the workers' compensation system fails to meet its goal, injured workers are unable to return to work and are forced to rely upon public assistance. Implementing changes to the current system can prevent this unintended result. The 1989 Legislature responded to the call for a need to change a system that had proven costly to business. The 2001 Legislature should respond to the call for a need to make changes in a system that is costly to society as a whole.

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