



## ANALYSIS OF THE COMMITTEE SUBSTITUTE FOR OKLAHOMA SENATE BILL 1062

**NCCI estimates that replacing the current Oklahoma workers compensation (WC) statutes with the proposed Committee Substitute for Senate Bill 1062 (SB 1062) could result in significant savings in overall WC system costs in Oklahoma. NCCI has quantified the provisions of SB 1062 that can be measured objectively and estimates the changes could result in a combined impact of -14.2% (-\$138M)<sup>1</sup> on overall WC system costs. NCCI has also provided comments on other provisions for which an impact is anticipated but has not been explicitly quantified. Some of the provisions that have not been quantified may produce significant<sup>2</sup> additional savings in the long-term, although the impact in the short-term is unclear.**

**In the analysis that follows, NCCI relied upon the 2/18/2013 version of SB 1062. If SB 1062 undergoes any substantive changes from that analyzed herein or data necessary to analyze provisions not explicitly quantified in this document becomes available, NCCI may supplement this document with additional analysis at a later date.**

### **Summary**

SB 1062 would create Title 85A, a new WC statute which would fundamentally change the existing Oklahoma WC system both in concept and in its entirety. The proposed changes to the WC Act would apply only to claims for injuries and death based on accidents which occur on or after January 1, 2014. Benefits available for claims with dates of injury prior to January 1, 2014 would continue to be based on current law (i.e., Title 85).

There are many provisions in this proposal that may produce an impact to overall WC system costs in Oklahoma. NCCI has focused on those provisions that are expected to create the greatest impact, either financially or procedurally.

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<sup>1</sup> Overall system costs are based on NAIC Annual Statement data as provided by A.M. Best and data on self-insurance approximated using the National Academy of Social Insurance's August 2012 publication "Workers' Compensation: Benefits, Coverages, and Costs, 2010". The estimated dollar impact is the percent impact(s) displayed multiplied by A.M. Best 2011 written premium of \$790M for Oklahoma and an estimated \$179M of losses for self-insureds. These figures do not include the policyholder retained portion of deductible policies or adjustments for subsequent changes in premium levels. The use of premium as the basis for the privately insured portion of the dollar impact assumes that expenses and other premium adjustments will be affected proportionally to the change in benefit costs.

<sup>2</sup> Significant in this context is defined as an impact on overall system costs in excess of 5%.



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The following table contains provisions for which an explicit overall system cost impact is being provided:

Statute Section <sup>3</sup>	Impact Description	Estimated System Cost Impact	
		(%)	(\$)
85A-41(A)	Shortening of the waiting period from 7 to 3 days and removal of the 21 day retroactive period	-0.1%	-\$1M
85A-41(A)	Decrease in the temporary total disability (TTD) maximum duration from 156 weeks to 104 weeks	-1.3%	-\$13M
85A-41(A)	Decrease in the TTD maximum weekly benefit from 100% to 70% of the state average weekly wage (SAWW)	-2.6%	-\$25M
85A-41(C)	Removal of the permanent partial disability (PPD) minimum weekly benefit of \$150	-0.2%	-\$2M
85A-41(C)	Decrease in the PPD maximum weekly benefit from \$323 to \$250	-5.6%	-\$54M
85A-41(C)	Change in PPD Durations and Reclassify Partial Loss of Use as Non-Scheduled PPD Benefit	-3.2%	-\$32M
85A-41(D)	Decrease in the permanent total disability (PTD) duration from the maximum of social security retirement age and 15 years to 450 weeks	-1.1%	-\$11M
85A-43	Eliminating the remarriage lump sum award for a surviving spouse and other death benefit changes	-0.7%	-\$7M
85A-46(C)	Changes in the Medical Fee Schedule	-0.2%	-\$1.9M
	<b>Combined Impact on Overall WC System Costs*</b>	<b>-14.2%*</b>	<b>-\$138M*</b>

\* The estimated cost impact displayed for each bill section was derived independently from the other proposed changes. As the changes to each bill section are not independent, the combined impact is not equal to the sum of the component impacts.

<sup>3</sup> Section numbers referenced in this document pertain to SB 1062 unless otherwise noted



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The below table displays provisions that are expected to impact overall system costs, but for which the magnitude and/or timing of emergence is uncertain. Note that if data necessary to analyze any of these provisions becomes available, NCCI may supplement this document with additional analysis at a later date:

<b>Statute Section</b>	<b>Section Description</b>
85A-41(C)	PPD benefit section changes including the Multiple Injury Trust Fund
85A-19 to 85A-27	Changing from Court System to an Administrative System
85A-41(C) and 85A-56	Changing to the Current Edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment"
85A-120 to 85A-133	Creating the Oklahoma Employee Injury Benefit Act
85A-134 to 85A-162	Establishing the Workers' Compensation Arbitration Act



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### ACTUARIAL ANALYSIS OF OKLAHOMA SB 1062

NCCI has estimated an impact on overall WC system costs in Oklahoma for the following provisions. **The estimated cost impact displayed for each provision below was derived independently from the other proposed changes. As the changes to each bill section are not independent, the combined impact is not equal to the sum of the component impacts.**

#### ***Shortening of the waiting period from 7 to 3 days and removal of the 21 day retroactive period***

Currently, the length of time required for the injured worker to be away from work prior to being eligible for lost-time benefits (i.e., the waiting period) is 7 days. If the injured worker is unable to return to work after 21 days (i.e. the retroactive period), the worker is entitled to lost-time benefits during the waiting period. The proposal shortens the waiting period to 3 days and removes the retroactive period. Note that the proposed waiting and retroactive periods are the same as those in effect prior to the enactment of Senate Bill 878.

While reducing the waiting period to 3 days is expected to increase benefit costs, eliminating the retroactive period is expected to decrease benefit costs. The estimated net effect may be to change TTD indemnity benefit costs by -0.4%. TTD indemnity benefits represent approximately 16.1%<sup>4</sup> of total indemnity benefits and indemnity benefits represent 53.5%<sup>5</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that the changes to the waiting and retroactive periods could result in a -0.1% (= [16.1% x -0.4%] x 53.5%), or -\$1M, impact on overall system costs in Oklahoma.

#### ***Decrease in the TTD maximum duration from 156 weeks to 104 weeks***

Currently, payments for TTD benefits shall not exceed 156 weeks except in cases of consequential injury, when up to 52 weeks of additional benefits may be awarded. The proposal would limit the maximum duration to 104 weeks.

Based on Oklahoma transactional data licensed to NCCI for accident years 2006 through 2009, reducing the maximum duration for TTD benefit compensation from 156 weeks to 104 weeks is estimated to impact temporary disability indemnity costs by -0.8% on TTD-only claims and -10.7% on the TTD portion of PPD indemnity claims. Since TTD indemnity costs represent approximately 16.1%<sup>4</sup> of total indemnity benefits, the impact may be -0.1% (= 16.1% x -0.8%) to total indemnity costs. The TTD portion of PPD claims represents approximately 30.0%<sup>6</sup> of PPD indemnity costs, and PPD indemnity costs represent approximately 75.5%<sup>4</sup> of total indemnity benefits in Oklahoma, so the impact may be -2.4% (= [30.0% x 75.5%] x -10.7%) to total indemnity costs. Therefore, the combined impact of this change may be -1.3% (= 53.5% x [-0.1% + -2.4%]), or -\$13M, to overall WC system costs in Oklahoma.

<sup>4</sup> Based on NCCI Workers Compensation Statistical Plan data for policies effective during the 24-month period ending 5/31/2009, for Oklahoma

<sup>5</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014

<sup>6</sup> Based on Oklahoma Workers' Compensation data licensed to NCCI



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### ***Decrease in the TTD Maximum Weekly Indemnity Benefit from 100% to 70% of the SAWW***

Currently, the maximum weekly wage-replacement (indemnity) benefit for TTD is limited to 100% of the Oklahoma SAWW. The proposal seeks to decrease the TTD maximum weekly indemnity benefit to 70% of the SAWW.

To quantify the impact on overall system costs from the proposed decrease in TTD maximum weekly benefits, NCCI used a countrywide distribution of workers and their wages indexed to Oklahoma's average wage level. Based on this distribution, the benefits for approximately 41% of injured workers and 62% of workers' wages in Oklahoma would be affected by the proposed change to the maximum weekly benefit amounts. NCCI estimates that indemnity benefit costs may change by -4.9% in Oklahoma due to the proposed decrease to the TTD maximum weekly benefit.

The proposed changes to TTD wage-replacement compensation would explicitly affect indemnity benefits only. Indemnity benefits represent 53.5%<sup>7</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that decreasing the TTD maximum weekly indemnity benefit could result in a -2.6% (= 53.5% x -4.9%), or -\$25M, impact on overall system costs in Oklahoma.

### ***Removal of the PPD Minimum Weekly Indemnity Benefit of \$150***

Currently, the minimum weekly indemnity benefit for PPD is \$150. The proposal seeks to eliminate the fixed minimum weekly indemnity benefit for PPD.

Based on a countrywide distribution of workers and their wages indexed to Oklahoma's average wage level, NCCI estimates that eliminating the PPD minimum weekly indemnity benefit could result in a -0.5% impact to PPD indemnity losses. PPD indemnity benefits represent approximately 75.5%<sup>8</sup> of total indemnity benefits and indemnity benefits represent 53.5%<sup>7</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that the impact on total WC system costs in Oklahoma from this provision could be -0.2% (= [75.5% x -0.5%] x 53.5%), or -\$2M.

### ***Decrease in the PPD Maximum Weekly Indemnity Benefit from \$323 to \$250***

Currently in Oklahoma, the permanent partial impairment (PPI) maximum weekly indemnity benefit is \$323 for injuries with accident dates between August 27, 2010 and August 26, 2015.

Under the proposal, the PPD maximum weekly indemnity benefit would be reduced to \$250 for all injuries with accident dates on or after January 1, 2014.

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<sup>7</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014

<sup>8</sup> Based on NCCI Workers Compensation Statistical Plan data for policies effective during the 24-month period ending 5/31/2009, for Oklahoma



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Based on a countrywide distribution of workers and their wages indexed to Oklahoma's average wage level, NCCI estimates that decreasing the PPD maximum weekly indemnity benefit would result in a -13.8% impact to PPD indemnity losses. Indemnity benefits for PPD claims represent approximately 75.5%<sup>9</sup> of total indemnity benefits and indemnity benefits represent 53.5%<sup>10</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that the impact on total WC system costs in Oklahoma from this section would be -5.6% (= [75.5% x -13.8%] x 53.5%), or - \$54M.

Note that the reduction to the PPD maximum weekly indemnity benefit may lead to some delays in claimants reaching maximum medical improvement (MMI) to qualify for PPD benefits. Specifically, injured workers with higher pre-injury wages may have additional incentive to extend the period of TTD benefits, which are currently limited to 100% of the current SAWW<sup>11</sup>. While this may offset some of the potential savings, it was not contemplated in the above estimate.

### ***Change in PPD Durations and Reclassify Partial Loss of Use as Non-Scheduled Benefit***

The proposal seeks to decrease the maximum number of weeks for non-scheduled PPI indemnity benefits from 500 to 450. The direct cost impact on non-scheduled PPI awards resulting from this proposed decrease would be -10% (= 450 / 500 - 1). The impact calculation may be simplified in this way since non-scheduled PPI claim duration is calculated by multiplying the disability rating by the number of weeks specified in the statutes. For the direct impact of this proposed change, NCCI assumed that the average disability rating would remain unchanged and did not factor in any potential interaction with other provisions of this proposal (e.g. moving from the Fifth Edition of the AMA Guides to the Sixth Edition and eliminating non-scheduled PPD awards for workers who return to pre-injury or equivalent job).

In addition, the durations of PPI indemnity benefits due to the amputation, total loss of use or partial loss of use of specified parts of body is currently determined by a statutory schedule. The proposal seeks to reclassify the partial loss of use of the parts of body currently listed in the statutory schedule as a non-scheduled benefit. To estimate the impact that could result from this provision, NCCI compared the distribution of weeks by body part currently awarded to the potential distribution of weeks awarded using disability ratings based on available data from other NCCI states and the proposed 450 week maximum. Based on this analysis, NCCI estimates an average impact of -14.5% on the affected PPI indemnity benefits resulting from the change in compensation for partial loss of use injuries previously considered scheduled members.

The durations for PPI indemnity benefits due to the amputation or total loss of use of scheduled members would not materially change under SB 1062.

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<sup>9</sup> Based on NCCI Workers Compensation Statistical Plan data for policies effective during the 24-month period ending 5/31/2009, for Oklahoma

<sup>10</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014

<sup>11</sup> Such an incentive may be reduced if the TTD maximum weekly indemnity benefit decreases to 70% of the SAWW and the maximum duration for TTD injuries is reduced.



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Based on NCCI's Workers Compensation Statistical Plan data, non-scheduled PPI indemnity benefits comprise approximately 35.5%<sup>12</sup> of indemnity costs and PPI indemnity benefits resulting from the partial loss of use of the scheduled member comprise approximately 17.1%<sup>12</sup> of indemnity costs in Oklahoma. Therefore, NCCI estimates that the combined impact on indemnity costs in Oklahoma from the changes in PPD durations could be -6.0% (= -10.0% x 35.5% + -14.5% x 17.1%). Since indemnity benefits represent 53.5%<sup>13</sup> of overall WC system costs in Oklahoma, NCCI estimates that the impact on total WC system costs in Oklahoma from this section would be -3.2% (= -6.0% x 53.5%), or -\$32M.

Note that language in Section 42(A) states that the schedule of durations by part of body contained therein is for those eligible for PPD compensation under Section 41(C)(3). This appears to be a typographical error as that section describes the reduction in awards for PPD claims with a pre-existing impairment, whereas Section 41(C)(5) more appropriately references the schedule of durations applicable to amputation and permanent total loss of use.

### ***Decrease in the permanent total disability (PTD) duration from the maximum of Social Security age and 15 years to 450 weeks***

Currently, PTD indemnity benefits are paid until the injured worker becomes eligible for 100% Social Security retirement benefits or for 15 years, whichever is longer. For most current workers, the age of full Social Security retirement is 67 years. The proposal would entitle the permanently and totally disabled worker to a lump sum equal to 70% of the employee's average weekly wage, not to exceed the state average weekly wage, times 450.

Based on comparison of current estimated PTD benefit costs using annuities with an average age at injury of 40 to proposed PTD benefit costs based on a lump sum of 450 weeks, NCCI estimates that PTD indemnity benefits could change by -65.9% under the proposal. PTD indemnity benefits represent approximately 1.6%<sup>13 14</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that the impact on total WC system costs in Oklahoma from this provision could be -1.1% (= 1.6% x -65.9%), or -\$11M.

### ***Eliminating remarriage lump sum for surviving spouse and other death benefit changes***

SB 1062 proposes to change the following death benefits:

- Currently, surviving spouses are eligible to receive 2-years' indemnity benefits, payable in one lump sum, upon remarriage. The proposal would eliminate this benefit.
- Currently, death benefits to surviving spouses continue as long as the surviving spouse remains unmarried. Under the proposal, benefits would "terminate at the earlier of death, remarriage, or becoming eligible for social security."

<sup>12</sup> Based on NCCI Workers Compensation Statistical Plan data and data licensed to NCCI

<sup>13</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014



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- Currently, in the case there is no surviving spouse, one surviving child receives 50% of the death benefit<sup>14</sup>, and additional surviving children receive 15% of the death benefit up to a combined maximum of 100%. Under the proposal, in the case there is no surviving spouse, the benefit to each surviving child would be 50% of the death benefit up to a combined maximum of 100%.
- Current law allows dependent parents, brothers, sisters, grandparents and grandchildren to obtain benefits in the case there are no surviving spouse or children. The proposal grants benefits only to dependent legal guardians in the case there are no surviving spouse or children.
- Currently, death benefits to dependents other than to the surviving spouse or children are paid while the dependents are unmarried and actually dependent, and under the age of 18 in the case of minors (with some exceptions). The presumption is that dependency is no longer than 3 years. The proposal grants benefits to "the earlier of death, becoming eligible for social security, obtaining full-time employment, or five (5) years from the date benefits under this section begin." Dependency is established at the time of injury.

With the assumption that 67 represents the age at which the surviving spouse becomes eligible for social security, NCCI estimates that changes resulting from this section of the proposal could impact total death benefits by -24.8%. Based on NCCI's Workers Compensation Statistical Plan data, death benefits comprise approximately 5.5%<sup>15</sup> of indemnity costs, and indemnity benefits represent 53.5%<sup>16</sup> of overall WC system costs in Oklahoma. Therefore, NCCI estimates that the impact on total WC system costs in Oklahoma from this section would be -0.7% (= [5.5% x -24.8%] x 53.5%), or -\$7M.

### ***Changes in the Medical Fee Schedule***

Currently, the Oklahoma physician fee schedule is based on Relative Value Units (RVU) produced by the Centers for the Medicare and Medicaid Services (CMS) multiplied by conversion factors determined by the Oklahoma Workers Compensation Court Administrator. Specifically, radiology services that are compensable are reimbursed at the lesser of the 2010 Oklahoma Fee Schedule or 207% of the Medicare Fee Schedule. Evaluation and Management (E & M) services are currently reimbursed at not less than 150% of the Medicare Fee Schedule

The proposal is to revise the maximum reimbursement for radiology services to be the lesser of the 2010 Oklahoma Fee Schedule and 150% of Medicare. E & M services are proposed to be reimbursed at not more than 150% of the Medicare Fee Schedule. The reimbursements for all the other sections of the medical fee schedule remain unchanged from current maximums.

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<sup>14</sup> Equal to the lesser of the employee's average weekly wage (AWW) and the SAWW.

<sup>15</sup> Based on NCCI Workers Compensation Statistical Plan data for policies effective during the 24-month period ending 5/31/2009, for Oklahoma

<sup>16</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014



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Note that the specific medical fee schedule guidelines underlying this proposal were not provided to NCCI. For this analysis, NCCI assumes that the future maximums for E & M services will be at exactly 150% of Medicare. To the extent that the final implemented maximums for E & M services are less than 150% of Medicare, and once the final specific medical fee schedule guidelines are available, the estimated impact stated above may change. In addition, this analysis uses the 2012 Medicare Publication to calculate the proposed maximums.

NCCI's methodology to evaluate the impact of medical fee schedule changes includes three major steps:

1. Calculate the percentage change in reimbursements
  - a. Compare the current maximums to the proposed maximums by procedure code and determine the percentage change by procedure code
  - b. Calculate the weighted-average percentage change in reimbursements for the fee schedule revision (or implementation) using observed payments by procedure code as weights
2. Estimate the price level change as a result of the revised fee schedule
  - a. NCCI research by Frank Schmid and Nathan Lord (2012), "Impact of Changes to Physician Fee Schedules in Workers Compensation", suggests that a portion of a change in maximum reimbursements is realized on payments impacted by the change.
    - i. In response to a fee schedule decrease, based on this research NCCI assumes that payments will decline by approximately 50% of the fee schedule change.
    - ii. In response to a fee schedule increase, based on this research NCCI assumes that payments will increase by approximately 80% of the fee schedule change, where the magnitude of the response depends on the relative difference between actual payments and fee schedule maximums (i.e. the price departure). The formula used to determine the percent realized for fee schedule increases is  $80\% \times (1.10 + 1.20 \times (\text{price departure}))$ .
3. Estimate the share of costs that are subject to the fee schedule
  - a. To categorize payments that are subject to the fee schedule the estimated share is based on a combination of fields, such as procedure code, provider type, and place of service, as reported on the NCCI Medical Data Call.

### Physician Fee Schedule Changes

In Oklahoma, payments for physician services represent 36.3%<sup>17</sup> of total medical payments. To calculate the percentage change in reimbursements for physician services, we calculate the percentage change in current reimbursement to proposed reimbursement for each procedure. The overall change in reimbursements for physician services is a weighted average of the

<sup>17</sup> Based on NCCI Medical Data Call for Oklahoma for Service Year 2011



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percentage change in reimbursements by procedure code weighted by the observed payments by procedure code as reported on NCCI’s Medical Data Call for Oklahoma for Service Year 2011.

The current reimbursements and proposed reimbursements are calculated as follows:

Current Reimbursement

Currently, the Oklahoma Workers Compensation Court (OWCC) publishes maximum allowable reimbursements (MARs) for physician services.

Proposed Reimbursement on or after 1/1/2014

***Radiology Services***

For each relevant procedure,

Proposed Reimbursement = Lesser of 2010 OK Fee Schedule MAR or 150% of Medicare MAR

The 150% of Medicare MAR (using 2012 Medicare Publication) is calculated as follows:

$$[(\text{Work RVU} \times \text{GPCI}_{\text{Work}}) + (\text{PE RVU} \times \text{GPCI}_{\text{PE}}) + (\text{MP RVU} \times \text{GPCI}_{\text{MP}})] \times \text{CF} \times \text{Multiplier}$$

- Where: 2012 RVU = Relative Value Unit for Physicians,
- 2012 PE = Practice Expense
- 2012 MP = Medical Malpractice Insurance
- 2012 GPCI = Geographic Price Cost Index
- 2012 Conversion Factor (CF) = \$34.0376
- Multiplier = 150%

The 2010 OK Fee Schedule MAR is published by the OWCC.

***E &M Services***

For each relevant procedure,

Proposed Reimbursement = 150% of Medicare MAR (as shown above)

The change in maximums by service category due to the proposed revision to the physician fee schedule is shown in the following table:



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<b>Category</b>	<b>Cost Distribution<sup>18</sup></b>	<b>Impact</b>
Anesthesia	5.7%	0.0%
Surgery	30.5%	0.0%
Radiology	11.3%	-24.9%
Pathology and Laboratory	2.6%	0.0%
General Medicine	5.8%	0.0%
Physical Medicine	19.0%	0.0%
Evaluation & Management	14.1%	-1.3%
Physician Payments with no specific MAR	11.0%	0.0%
<b>Impact on Total Physician Costs</b>	<b>100.0%</b>	<b>-3.0%</b>

Since the reimbursements for physician services decreased, NCCI expects that 50% of the decrease will be realized on physician price levels. The impact on physician payments, after the 50% offset, is -1.5%.

The above impact on physician payments is then multiplied by the percentage of medical costs attributed to physician payments in Oklahoma (36.3%) to arrive at the impact on medical costs of -0.5%. The resulting impact on medical costs is then multiplied by the percentage of benefit costs attributed to medical costs in Oklahoma (46.5%<sup>19</sup>) to arrive at the estimated impact on overall workers compensation costs in Oklahoma of -0.2% (\$-2M).

The impacts due to the proposed medical fee schedule are summarized in the table below:

		<b>Impact</b>
(1)	Impact on Physician Payments in Oklahoma	-1.5%
(2)	Physician Payments as a Percent of Medical Costs in Oklahoma <sup>20</sup>	36.3%
<b>(3)</b>	<b>Impact on Medical Costs in Oklahoma due to Proposed Physician Fee Schedule = (1) x (2)</b>	<b>-0.5%</b>
(4)	Medical Costs as a Percentage of Overall Workers Compensation Benefit Costs in Oklahoma <sup>20</sup>	46.5%
<b>(5)</b>	<b>Total Impact on Overall Workers Compensation System Costs in Oklahoma = (4) x (5)</b>	<b>-0.2%</b>

**Combined Impact**

**NCCI estimates that the revisions to the Oklahoma’s Workers Compensation statutes discussed above could result in an impact of -14.2% (-\$138M) on the overall workers compensation system costs in Oklahoma.**

<sup>18</sup> Based on NCCI Medical Data Call for Oklahoma for Service Year 2011

<sup>19</sup> Based on Policy Years 2009 and 2010 Oklahoma Financial Call data projected to 1/1/2014.

<sup>20</sup> Based on NCCI Medical Data Call for Oklahoma for Service Year 2011



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NCCI did not provide a specific cost impact of the provisions that follow. Some of these provisions have the potential to produce significant<sup>21</sup> savings in the long-term, although the impact in the short-term is unclear. If these changes are enacted, any impacts to overall system costs in Oklahoma would be reflected in future Oklahoma loss cost filings. Note that if data necessary to analyze any of these provisions becomes available, NCCI may supplement this document with additional analysis at a later date.

### **Other Proposed Changes:**

#### ***PPD Benefit Section Changes***

Section 85A-41(C) contains the following three major changes:

#### **1. Non-Scheduled PPD only Available if Unable to Return to Pre-injury or Equivalent Job**

The current statute states<sup>22</sup>:

No permanent disability shall be awarded unless there is objective medical evidence of a permanent anatomical abnormality. In determining the existence of such an abnormality, the Court may consider if there is credible medical evidence that the ability of the employee to earn wages at the same level as before the injury has been permanently impaired.

Current practice is to award permanent disability even if the employee returns to work at pre-injury wages. The proposal allows non-scheduled PPD benefits only "if the injured employee is unable to return to his or her pre-injury or equivalent job because of permanent restrictions resulting from the injury, but is not permanently totally disabled". The term "equivalent job" is defined as a job paying 100% or more of the injured worker's pre-injury average weekly wages.

To the extent that fewer PPD indemnity benefits would be awarded, the proposal could result in a reduction in PPD indemnity benefit costs. Changes resulting from this section of the proposal could directly impact the award portion of the partial loss of use of previously scheduled members and non-scheduled PPD indemnity benefits, which comprise approximately 52.6%<sup>23</sup> of all indemnity costs. Since indemnity benefits comprise 53.5%<sup>24</sup> of total WC system costs in Oklahoma, changes from this portion of the bill could directly impact 28% (= 52.6% x 53.5%) of total WC system costs. However, the extent to which any such savings might emerge is unknown.

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<sup>21</sup> "Significant" in this context is defined as an impact on overall system costs in excess of 5%.

<sup>22</sup> Oklahoma Workers Compensation Statutes, Section 85-333(E).

<sup>23</sup> Based on NCCI Workers Compensation Statistical Plan data and data licensed to NCCI

<sup>24</sup> Based on NCCI Financial Call data for policy years 2009 and 2010, for Oklahoma, trended to 1/1/2014



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To illustrate the potential magnitude that changes to PPD awards may have on overall WC system costs in Oklahoma, the following **hypothetical** example is included:

Description	Example 1	Example 2
1. Partial Loss of Use of Previously Scheduled Members and Non-Scheduled Indemnity PPD as a % of Indemnity Costs	52.6%	52.6%
2. Hypothetical Percentage of Non-Scheduled PPD Benefit Costs for Workers that Return-to-Work at or Above Their Pre-Injury Wage Under the Proposed Law	25%	50%
3. Hypothetical Impact of Eliminating Non-Scheduled PPD Benefits for Those That Return-to-Work at or Above Their Pre-Injury Wage = (2) x -1	-25%	-50%
4. Impact on Indemnity Benefit Costs = (1) x (3)	-13.2%	-26.3%
5. Indemnity as a % of Overall Benefit Costs	53.5%	53.5%
6. <b>Hypothetical</b> Impact on Overall System Costs = (4) x (5)	-7.1%	-14.1%

The examples in the table above show how a decrease in non-scheduled PPD indemnity benefit costs could be expected to translate to overall system costs. As Example 1 illustrates, if 25% of the non-scheduled PPD indemnity benefit costs are attributed to workers who return to their pre-injury or equivalent jobs (row 2), then this provision of the proposal would eliminate 25% of non-scheduled PPD indemnity benefit costs (row 3). Since the partial loss of use of previously scheduled members and non-scheduled PPD indemnity benefit costs currently represent approximately 52.6% of all indemnity costs (row 1), the impact to indemnity benefit costs would be -13.2% (row 4). Finally, since indemnity benefit costs are approximately 53.5% of overall benefit costs in Oklahoma (row 5), the impact on overall system cost of this hypothetical example could be -7.1% (row 6). Note that if the percentage of non-scheduled PPD indemnity benefit costs for workers who return to their pre-injury or equivalent jobs (row 2) was 50% (as in Example 2) instead of 25%, the impact on overall system costs would be -14.1% (row 6).

**The above table is included for illustrative purposes only and is not to be interpreted as NCCI’s estimated cost impact for this provision.** Note that other provisions contained in this proposal, if enacted, may affect the percentage of costs displayed in rows (1) and (5) and thereby the hypothetical savings indicated in the above table.

2. Functional Impairment Reduction from Pre-existing Condition and the Multiple Injury Trust Fund

A new provision in section 85A-41(C)-3 seeks to reduce a PPD or PTD award “by the amount of functional impairment determined to be preexisting.” When the employer against whom the injured worker is seeking benefits was the same employer at the time of the preexisting injury, the award would be reduced by the “current dollar value.” The “current dollar value” would be determined by “multiplying the percentage of preexisting impairment by the compensation rate



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in effect on the date of the accident or injury against which the reduction will be applied". In all other cases, "the employer against whom benefits are currently being sought shall be entitled to a credit for the percentage of preexisting impairment."

The language in 85A-41(C)-3 is nearly identical to the language in Kansas statute 44-501(e). In Oklahoma, the term "functional impairment" is not defined or used in any other section, which may lead to inconsistency and uncertainty in interpretation. Per stakeholder input, while there is currently some ability to reduce liability on PPD awards due to preexisting conditions, the proposed changes may lead to more frequent reductions in such cases. In addition, it is unclear whether a reduction to the employer's liability would lead to increased liability to the Oklahoma Multiple Injury Trust Fund (MITF), since "the fund shall pay the injured employee the difference between the employer's liability and the balance of his or her disability or impairment that results from all disabilities or impairments combined."

Currently, for actions in which a subsequent injury occurs on or after November 1, 2005 and results in combined disabilities that constitute a PTD, the employer is "liable only for the degree of percent of disability which would have resulted from the subsequent injury if there had been no preexisting impairment." In such situations, the MITF would pay the remainder of PTD benefits. The MITF does not currently incur liability for PPD claims.

Section 59 of the proposal would expand the liability of the MITF to include "all cases of permanent disability or impairment in which there has been previous disability or impairment." The proposal states reduced liability would be incurred by an employer of any employee with a permanent partial disability or impairment, from a compensable injury or otherwise, that suffers a subsequent compensable injury which results in a permanent partial disability or impairment that is greater than that which would have resulted in the subsequent injury alone. If enacted, some benefits for PPD claims are expected to shift from employers/insurers to the MITF.

Further, the proposal states that "the fund shall pay the injured employee the difference between the employer's liability and the balance of his or her disability or impairment that results from all disabilities or impairments combined." To the extent that functional impairments reduce the employer's liability on PPD claims, additional costs may transfer to the MITF.

Due to the interaction between the functional impairment offset to an employer's liability on PPD claims and the inclusion of PPD claims in the scope of the MITF, the impact of the proposal in this area is unknown. In addition to an expected increase in the benefits paid by the MITF, the inclusion of PPD claims in the scope of the MITF can be expected to increase the administrative costs of the fund. The transfer of liability from an employer to the MITF on claims for PPD in which the employer received a functional impairment offset may result in more litigation costs. Note that qualifying permanent partial disability claims were covered by the MITF for claims filed prior to November 1, 1999. Due to escalating liabilities, legislation was enacted to eliminate eligibility for these types of claims from the MITF.

### 3. PPD Award(s) Subject to a Maximum Disability Rating

Section 85A-41(C)-4 states that "a permanent partial disability award or combination of awards granted an injured worker may not exceed a permanent partial disability rating of 100% to the



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body as a whole.” To the extent that workers receive a combination of PPD awards in excess of 100%, NCCI estimates that some system cost savings may result from this provision. However, the magnitude of such savings is unknown since NCCI does not have data on awards or combination of awards exceeding a PPD rating of 100% available at this time. Note that if data necessary to analyze this provision becomes available, NCCI may supplement this document with additional analysis at a later date.

### ***Changing Court System to an Administrative System***

Current law states that the WC Court shall be conformed of 10 judges, 7 in Oklahoma City and 3 in Tulsa. The judges are to be appointed by the Governor with the consent of the Senate from a list of 3 persons supplied by the Judicial Nominating Commission, and the judges are to serve 8-year terms.

The proposal aims to create an administrative law system for accidents occurring on or after January 1, 2014<sup>25</sup>. It would create a 3-person Commission, where the Commissioners are appointed by the Governor and confirmed by the Senate to 6-year terms. Among its duties, the Commission would appoint as many Administrative Law Judges (ALJs) as necessary and hear appeals of decisions by the ALJs, as well as make the necessary rules and regulations. The ALJs would hear and determine claims for compensation and conduct hearings related to any rule or judgment of the commission. The Governor would have the power to remove commissioners with cause.

The administrative system in the proposal is very similar to the administrative system currently in place in Arkansas (Ark. Code § 11-9-201 through § 11-9-209 (2012)). However, implementing an administrative system in Oklahoma that is similar to the system in another state does not guarantee the same outcomes in terms of costs and interpretation of statutes/regulations.

The impact of this change is unclear due to the uncertainty in how claims resolved using the ALJs appointed by the Commissioners will differ from those adjudicated by the existing WC Court judges. Oklahoma stakeholders have indicated that court awards, and thereby settlements, have dramatically increased since 2006. NCCI does not have the detailed data necessary to estimate a possible change in awards. Also, claimant attorney involvement in Oklahoma has historically been approximately twice that of the countrywide average<sup>26</sup>. This may be, at least partially, attributable to the use of a court-based system. To the extent that the establishment of an administrative system decreases the amount of future benefit awards and litigation, significant<sup>27</sup> system costs savings may emerge over time. If enacted, any such impact would be reflected in future loss cost filings in Oklahoma.

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<sup>25</sup> Section 85A-118 creates the Workers' Compensation Court of Existing Claims to hear disputes for claims arising before January 1, 2014, which will be governed by the existing WC Act. This court will only exist until November 1, 2017.

<sup>26</sup> Based on NCCI Detailed Claim Information Call data

<sup>27</sup> "Significant" in this context is defined as an impact to overall system costs in excess of 5%. The magnitude of the potential impact is dependent on the enactment of and interaction with other provisions contained in the proposal.



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The proposal is a complete rewrite of the current Oklahoma WC statute. As such, there is potential for additional litigation involving issues such as conflicting or ambiguous language, inadvertent omissions, or other challenges to the legislation. If enacted, this may lead to uncertainty in how some provisions contained in the proposal are interpreted and applied in the near-term.

### ***Changing to the Current Edition of the AMA's "Guides to the Evaluation of Permanent Impairment"(the "Guides")***

Currently the Fifth Edition of the Guides is promulgated for use in Oklahoma in determining the extent and nature of permanent partial impairment. Under the proposal, the current edition of the Guides would be used instead. The current edition of the Guides at this time is the Sixth Edition.

The AMA published the Sixth Edition of their Guides in December 2007. Unlike previous editions, the Sixth Edition includes a philosophical change in the way impairment ratings are determined and, as shown in a recent study from NCCI<sup>28</sup>, has resulted in a decrease in impairment ratings compared to those rated using the Fifth Edition.

The NCCI study evaluated the impact of the Sixth Edition of the AMA Guides on impairment ratings in the state of Montana, Tennessee, and New Mexico. The results of this study provided evidence that a decrease in the average impairment rating is realized when a state switches from the Fifth Edition to the Sixth Edition of the AMA guides, all else being equal. After controlling for claim maturity, the three states studied show:

- In Montana, the average impairment decreased by approximately 28%
- In Tennessee, the average impairments decreased by approximately 25% and 16% for whole body and part of body, respectively
- In New Mexico, the average impairments decreased by approximately 32% and 6% for whole body and part of body, respectively

Other states analyzed by NCCI that did not switch editions of the Guides (i.e., retained the fifth edition) also showed a reduction in the average medical impairment rating over the same period of time, but to a lesser degree.

The Fifth Edition of the Guides explicitly allows doctors to increase impairment ratings for PPD for pain, adding up to 3% for quantitative evaluations of pain and unspecified increases for qualitative evaluations. However, current Oklahoma law explicitly excludes complaints of pain from consideration in determining impairment<sup>29</sup>.

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<sup>28</sup> Moss, Robert, David McFarland, CJ Mohin and Ben Haynes. *Impact on Impairment Ratings from Switching to the American Medical Association's Sixth Edition of the "Guides to the Evaluation of Permanent Impairment"*. NCCI, July 2012.

<sup>29</sup> NCCI previously estimated that changes in the definition of "objective medical evidence" to specifically exclude pain in PPD impairment determinations included in HB 2650 from the 2010 session could decrease total system costs by 1.5%.



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NCCI is currently undertaking research to determine how the results of the above study could be used in estimating the impact on system costs of switching from the Fifth Edition to the Sixth Edition of the Guides for other states. When such information becomes available, NCCI may supplement this document with additional analysis at a later date. Note that the extent of potential savings from this provision can be expected to depend on how the Guides are used in practice to determine impairment ratings as well as how disputed impairment ratings are ultimately decided.

### ***Employee Injury Benefit Act***

Sections 85A-120 through 85A-133 of the proposal (the “Employee Injury Benefit Act”) seek to create an option (the “option”) for providing benefits to injured workers in lieu of the current Oklahoma Workers Compensation Act. There is no such system under current Oklahoma law.

The key provisions of the Employee Injury Benefit Act are as follows:

- An employer may be qualified for the option if it has completed the notification requirements and has established a written benefit plan
- The written benefit plan must provide for benefits at least as generous to injured workers as the benefits provided under the Workers Compensation Act
- The provisions of the Workers Compensation Act defining covered injuries, medical management, dispute resolution, funding, penalties, etc., will not apply unless specifically included in the written benefit plan
- Employers may self-insure or contract with an insurer to supply benefits; if self-insured, the employer must provide the Insurance Commissioner with securities, an irrevocable letter of credit or a surety bond, or show proof of excess coverage
- The creation of the “Oklahoma Option Insured Guaranty Fund” and the “Oklahoma Option Self-Insured Guaranty Fund”, which will be funded through taxes and assessments
- Exclusive remedy protections will be the same as under the Workers Compensation Act
- Outlines minimum appeal rights to coverage denials

In essence, employers would be able to become a “qualified employer” by choosing the option of the Employee Injury Benefit Act and opting out of the Workers Compensation Act. While the impact to total WC system costs in Oklahoma is unclear, below are several considerations related to the Employee Injury Benefit Act:

- Which employers would choose to be “qualified employers” is unclear, as is the average loss experience in relation to those employers that continue to “subscribe” to the Workers Compensation Act
- To the extent that the loss experience of the “qualified employers” is different from the experience of the “subscribers,” and the volume of loss experience that leaves the



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“subscriber” market, the loss costs of “subscribers” may be significantly different, by classification or on an overall basis, than current approved loss costs

- Benefits to injured workers of “qualified employers” may be substantially different from “subscriber” benefits due to varying definitions of covered injuries, medical management, etc.
- There is uncertainty as to how the dispute resolution mechanism would function under the Employee Injury Benefit Act

### ***Workers’ Compensation Arbitration Act***

Sections 85A-134 through 85A-162 of the proposal (the “Workers’ Compensation Arbitration Act”) set out regulations related to binding arbitration. There are no such regulations under current Oklahoma law.

The proposal would make agreements to arbitrate be valid and enforceable if the employer has provided notice of the agreement and the employer, or the employers’ Certified Medical Plan, has filed an alternative dispute resolution program, or the agreement is subject to the Federal Arbitration Act. The proposal goes on to specify the arbitration process. Appeals to actions related to arbitration would fall under the judicial review of district courts.

The required use of arbitration may result in some cost savings in certain cases. Any savings would be contingent on the usage and type of arbitration agreements implemented as well as their effectiveness in reaching a quicker compromise between the parties. Such potential cost savings may emerge as a result of the ability of the parties to reach a resolution sooner and eliminate the need for a hearing. These factors could potentially result in a decrease in the cost of certain claims by expediting the dispute resolution process, which may result in some savings on overall WC system costs. Note that this Act would apply only to “subscribers” of the Workers Compensation Act, and not to employers choosing the Employee Injury Benefit Act option.