REPORT OF THE
JOINT LEGISLATIVE
AUDIT AND REVIEW COMMISSION ON

Review of the Virginia Department of Workers' Compensation

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Preface

Item 11 of the 1985 Appropriations Act directed JLARC to plan and initiate a comprehensive performance audit and review of the independent agencies of State government. In 1985, these agencies included the Department of Workers' Compensation (DWC) and the State Corporation Commission.

The first study in the series, a management and organization study of the State Corporation Commission, was reported in 1986. In addition, an analysis of the Crime Victim's Compensation Program, which is administered by the DWC, was issued in 1988. This report, which concludes the series, presents staff findings and recommendations on the Virginia Workers' Compensation Act and the operations of the DWC.

Virginia appears to be in satisfactory condition concerning workers' compensation rates and competition. However, numerous areas exist where changes in statute and DWC management practices would strengthen the workers' compensation system. A more focused vocational rehabilitation effort, more aggressive attention to uninsured employers and the uninsured employer's fund, and DWC organization and management modifications would help ensure that workers' compensation claims and claimants receive necessary attention in a timely and efficient manner.

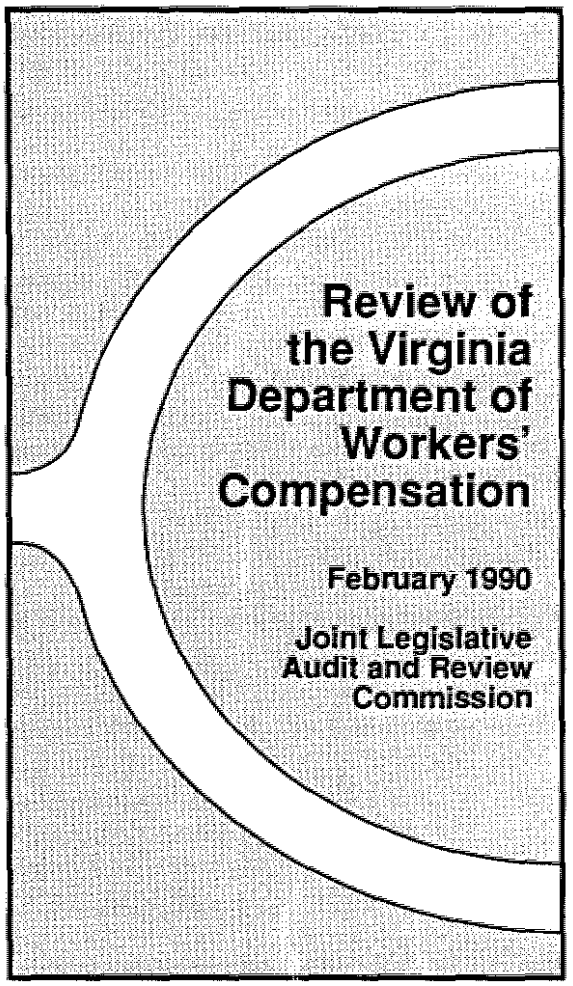
In their response to the study, the Industrial Commssioners indicated that many of the recommendations in the JLARC report are being addressed and that the DWC is adopting new procedures or improving upon existing procedures in a number of areas. In addition, the General Assembly is considering four legislative actions recommended in the report. SB 126, SB 380, HJR 18, and SJR 55 would: keep the uninsured employer's fund solvent, allow the DWC to be compensated for its activities related to the Birth-Related Neurological Injury Compensation Act, provide for recodification of the Workers' Compensation Act, and initiate further study of private vocational rehabilitation providers in Virginia.

On behalf of the JLARC staff, I wish to express our appreciation for the cooperation and assistance extended by the department staff and the Industrial Commissioners.

Philip A. Leone
Director

February 28, 1990

JLARC Report Summary



Workers' compensation is a "no fault" type of insurance system through which employees can receive cash compensation and other assistance as a result of work-related injuries and illnesses. The Virginia Workers' Compensation Act sets out the basic provisions of the worker's compensation system in Virginia, and the Department of Workers' Compensation (DWC) is primarily responsible for ensuring that the system operates smoothly.

The Workers' Compensation Act requires most Virginia employers to obtain workers' compensation insurance or to be self-insured. When an employee is injured, the employer's insurance company and the employee usually settle on a compensation agreement. In these instances, the DWC must approve the agreement and maintain a record of the agreement. When disagreement occurs, the DWC resolves the dispute through mediation or a hearing.

Twenty years ago, national concerns related to workers' compensation focused on differences among states' benefit programs. Since then, concern has shifted from the components of each state's program to the viability of the programs themselves. Recent studies indicate that a number of states have been battling such issues as high employer costs and inadequate workers' compensation rates.

Virginia has not experienced these problems. The types of benefits offered in Virginia are generally consistent with those offered in other states, yet employer costs are relatively low. Virginia's workers' compensation rates are generally lower than rates in 38 of 46 states and the District of Columbia. In addition, the State Corporation Commission reports that competition among insurance companies to write workers' compensation policies is active — another sign that Virginia's system is healthy.

Although Virginia appears to be in satisfactory condition concerning workers' compensation rates and competition, numerous areas exist where changes in statute and DWC management practices would strengthen the workers' compensation system. A more focused vocational rehabilitation effort, more aggressive attention to uninsured employers and the uninsured employer's fund, and DWC organization and management modifications would help ensure that workers' compensation claims and claimants receive necessary attention in a timely and efficient manner. Findings and recommendations in these and other areas are described in this summary and in the full text of this report.

Benefit-Related Provisions Should be Modified

Assessment of Virginia's benefit structure and administrative activities related to benefits revealed three areas that may require corrective action. First, although the majority of states require employers to obtain workers' compensation insurance coverage regardless of the number of employees, Virginia exempts employers with fewer than three employees. Second, the Virginia Employment Commission lacks written procedures for calculating the statewide average weekly wage, resulting in inflated workers' compensation benefit calculations for three months in FY 1990. Third, procedures for notifying claimants about the availability of cost-of-living supplements are inadequate.

The following recommendations are made:

- The General Assembly may wish to amend §65.1-28 and §65.1-54 of the *Code of Virginia* to delete the workers' compensation exemption for employers with fewer than three employees and to provide more specific guidance for calculating the statewide average weekly wage.

- The Virginia Employment Commission should develop written procedures concerning calculation of the statewide average weekly wage.

- The DWC should improve its claimant notification procedures regarding cost-of-living supplements.

Vocational Rehabilitation Procedures Should be Strengthened

Vocational rehabilitation services are considered an important part of workers' compensation. These services, which include such activities as evaluation, counseling, job placement, and occupational training, are designed to help injured employees return to suitable gainful employment.

Six problems were identified regarding the vocational rehabilitation of injured workers: gaps in the identification and referral process, lack of a written agreement between the DWC and the Department of Rehabilitative Services, inadequate dissemination of information to workers' compensation claimants, unclear legislative intent and statutory guidance, inadequate control over job placement services as a means to limit compensation, and lack of regulation of the private vocational rehabilitation industry.

The following recommendations are made:

- The DWC and the Department of Rehabilitative Services should formulate a written plan of cooperation and establish revised procedures to ensure more timely and comprehensive reviews of claimant files.

- The DWC should refine and prioritize its definition of the purposes of vocational rehabilitation and revise *A Workers' Compensation Guide for Employees* by adding a subsection on vocational rehabilitation services.

- The General Assembly may wish to amend §65.1-63 of the *Code of Virginia* to clarify the conditions under which employment can be procured for injured employees and may wish to direct the Department of Commerce to assess the need for regulation of the vocational rehabilitation profession.

Some Claims Management Practices are Timely and Efficient But Others Require Attention

The DWC carries out administrative as well as judicial functions as it "manages" workers' compensation claims. In the administrative area, the DWC notifies injured workers that claims may be filed and records claims in a timely and efficient manner. These internal efficiencies do not ensure that claimants receive benefits in a timely fashion, however. Although the *Code of Virginia* requires employers to notify the DWC of a work-related accident within ten days of an accident, employers are notifying the DWC on average 82 days after accidents.

In the judicial area, the DWC has initiated an alternative dispute resolution process which helps resolve some disputed cases in an expedient manner. However, a waiting period in the hearing scheduling process may unnecessarily delay the scheduling of some types of hearings. Further, not all Industrial Commissioners issue opinions within a reasonable time period. On average, two commissioners issued opinions in 21 days during 1988, while the third commissioner issued opinions in 75 days.

The following recommendations are made:

- The DWC should enhance claims management by: invoking its statutory authority to fine employers or insurance companies who fail to file first reports of accident on time, assess the 20-day waiting period for scheduling hearings, adopt an administrative order and take other steps to ensure that review opinions are rendered in a timely manner, and continue efforts in alternative dispute resolution.

- The General Assembly may wish to amend §65.1-124 of the *Code of Virginia* to allow first reports of accident to be "faxed" to the DWC, and to grant the Industrial Commission authority to define minor injuries and determine reporting requirements for those injuries.

DWC Oversight of the Uninsured Employer's Fund has been Weak

The uninsured employer's fund (UEF) was established in 1977 to provide workers' compensation benefits to employees of employers that do not meet their statutory obligation to obtain workers' compensation insurance. The DWC has sole responsibility for monitoring and managing the fund.

UEF payments increased 274 percent from 1982 to 1988. Increased use of the fund has led to concerns about the UEF's funding and management, and five major weaknesses were identified in this area. First, fund obligations will exceed revenues by 1992 if current statutory provisions are maintained. Second, the DWC does not have a proactive method for identifying uninsured employers.

Third, current practices for recovering UEF payments are not effective. By the end of FY 1989, only eight percent of the $1.26 million in UEF compensation paid was recovered from responsible employers. Fourth, the DWC's enforcement mechanisms are underutilized. Fifth, the DWC has not taken sufficient actions to address UEF problems.

The following recommendations are made:

- To ensure adequate funding of the UEF, the General Assembly may wish to: maintain the maximum UEF tax rate at one-fourth of one percent until 1995 and to increase the current assessment cap; revise §65.1-103 of the *Code of Virginia* to require employers to provide information concerning workers' compen-

sation insurance coverage; and grant the DWC authority to issue cease and desist orders against employers who fail to reimburse the UEF.

- The DWC should more aggressively oversee the operations and management of the UEF. Strengthened oversight activities should include: ensuring that all available remedies are pursued to recover compensation and collect fines; taking actions to identify uninsured employers; conducting regular analysis, monitoring, and projection of fund balances; and taking corrective action as necessary to ensure that the UEF does not become insolvent.

Revised Procedures are Needed in Additional Program Areas

The DWC is also responsible for approving self-insured employers and adjudicating cases for the Birth-Related Neurological Injury Compensation Program. Processes and procedures concerning these areas need to be strengthened to ensure that the statutory objectives of these programs and activities are met.

The following recommendations are made:

- The DWC comptroller should strengthen the self-insurance process by establishing a regular schedule for review of the financial condition of previously approved employers, consistently documenting analysis and approvals, and taking other necessary steps.

- The General Assembly may wish to amend §38.2-5018 of the *Code of Virginia* to authorize the DWC to recover expenses incurred under the Birth-Related Neurological Injury Compensation Program.

Organization of the DWC Should Be Modified to Enhance Management

The DWC appears to have the general framework necessary to carry out its assigned functions. However, several problems exist which require attention including: the use of two departmental names (Department of Workers' Compensation and Industrial Commission) which is confusing, an excessive span of control for the chief deputy commissioner, the need for greater delegation of administrative authority by the Commissioners, the need for reorganization of the claims division, a lack of written policies and procedures, and the need for strengthened manpower planning and enhanced orientation procedures.

The following recommendations are made:

- The General Assembly may wish to simplify the name of the Department of Workers' Compensation/Industrial Commission to the Workers' Compensation Commission.

- The DWC should: create an executive director position, reorganize the claims division, revise or develop written policies and procedures, ensure that upper-level managers receive regular performance evaluations, develop workload measures and maintain time records for staff, and develop a model orientation procedure for new staff.

- The Industrial Commissioners should focus on their judicial responsibilities and lessen their involvement in day-to-day administration of the DWC.

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I. Introduction

Workers' compensation is a "no fault" type of insurance system through which employees can receive cash compensation and other assistance as a result of work-related injuries and illnesses. Workers' compensation represents a compromise between employers and employees. The employer's liability is extended to cover all accidental personal injuries arising out of and in the course of employment. In return, employees give up their right to seek damages through the courts and must accept compensation amounts which are primarily set in statute. This type of arrangement provides more security for employees as well as more timely settlements.

The Virginia Workers' Compensation Act, which was originally passed in 1918, sets out the basic provisions of Virginia's workers' compensation system. Under the Act, employers are required to obtain workers' compensation insurance or to be self-insured. (Virginia employers spent an estimated $645 million to obtain this coverage in 1988.) When an employee is injured, the employer's insurance company and the employee usually arrive at a mutually agreeable and lawful settlement on the claim. When agreement is not reached, a third party becomes involved in resolving the disagreement. This third party is the Department of Workers' Compensation (DWC).

The DWC is an independent agency within Virginia State government charged with administering the Workers' Compensation Act. As an independent agency, the DWC is outside the three branches of government, and is governed by three commissioners known as the Industrial Commission. The DWC had 122 filled staff positions as of November 1989 and has an $8.2 million budget for FY 1990.

The DWC has two primary responsibilities under the Workers' Compensation Act: approving and recording claims where agreement has been reached, and adjudicating disputed claims. In 1988, 233,224 new workers' compensation cases were established in Virginia. During the same year, 3,759 cases were also adjudicated by the DWC. In addition to these primary responsibilities, the DWC also administers a variety of other programs and funds which have been assigned to it over the years. These programs involve particular groups of injured workers, victims of crime, and infants suffering from birth-related neurological injuries.

BACKGROUND OF WORKERS' COMPENSATION IN VIRGINIA

The Virginia Workers' Compensation Act was originally modeled on Indiana's workers' compensation statute. Since the passage of the Workers' Compensation Act in 1918, Virginia has provided continuous statutory protection for

employees with work-related injuries. Although the basic provisions of the current statute are similar to the original law, revisions to the Act have broadened its scope and the responsibilities of the DWC.

Intent of the Workers' Compensation Act

The activities of the DWC are largely determined by the provisions and requirements of the Virginia Workers' Compensation Act. The Act defines the composition of the Industrial Commission, specifies the powers and responsibilities of the commissioners and other agency staff, and establishes guidelines and limitations for compensating injured employees.

The primary role of the DWC is to administer the provisions of the Act. Although administering the Act requires the DWC to perform many activities related to processing uncontested claims (which comprise about 90 percent of the claims filed), the agency is also responsible for adjudicating claims on which the parties cannot reach agreement. These activities include mediating between the parties, conducting hearings for disputed claims, and reviewing appeals from the initial hearings.

Virginia's Workers' Compensation Act, like workers' compensation laws throughout the country, reflects a compromise between employees and employers. Before Virginia's Act was passed, common law principles held that an injured employee could not recover damages from his or her employer unless the employee proved in a court of law that the employer contributed to the injury through negligence. Due to the extensive common law defenses available to employers, proving employer negligence was extremely difficult and awards were inconsistent. Employers, on the other hand, were susceptible to paying the large jury awards that might result from civil litigation if they were found to be at fault.

Consequently, the Virginia General Assembly passed the Workers' Compensation Act to provide injured employees with consistent and predetermined compensation for work-related injuries without assigning fault to employers. Both employees and employers relinquish certain legal rights in exchange for certain guarantees. Employees are assured of compensation for occupational injuries or illnesses, but give up the right to pursue large civil awards by suing their employers. Employers waive common law defenses and assume responsibility for work-related injuries, but are protected from civil action by employees.

The Act encourages cooperative settlements between injured workers and their employers. However, the Act is also a means to protect the rights of both parties by deciding disputes without burdening the court system with workers' compensation cases. The sheer number of claims for work-related injuries (233,224 filed in Virginia in 1988) precludes adjudicating all cases individually.

Legislative Interest and Changes to the Act

Several legislative studies have been conducted regarding the provisions of the Virginia Workers' Compensation Act and the operations of the DWC, reflecting the General Assembly's interest in these areas. The studies have often resulted in major changes to the workers' compensation program or expansion of the DWC's responsibilities (Appendix B). For example, the Second Injury Fund was established in 1975, and the DWC was given adjudicatory and other responsibilities for the Birth-Related Neurological Injury Compensation Program in 1987.

Many changes occurred during the 1970s in response to the recommendations of the National Commission on State Workers' Compensation Laws. The National Commission issued a series of 19 recommendations designed to rectify the major differences among the states in workers' compensation laws. The National Commission recommended federal intervention if states did not adopt these provisions by July 1, 1975. Under the threat of federal legislation, many states, including Virginia, acted to adopt certain provisions recommended by the National Commission.

In addition to the numerous statutory changes which have occurred over the years, the Act has been influenced by judicial interpretation. Since 1985, the Supreme Court of Virginia and the Virginia Court of Appeals have issued several hundred opinions involving workers' compensation. The number of opinions increased significantly with the creation of the Virginia Court of Appeals. Because the courts have frequently interpreted legislative intent, it may be time for the General Assembly to recodify the Workers' Compensation Act. This would allow the General Assembly to confirm or refute the numerous judicial interpretations of legislative intent.

WORKERS' COMPENSATION IN VIRGINIA TODAY

Injured workers throughout Virginia depend on the DWC to process and adjudicate their claims in a fair and timely manner. The agency ensures that workers' rights are protected through processing and approving uncontested cases, which comprise the vast majority of the cases filed. In addition, disputed claims must be resolved by the agency before claimants involved in these cases can receive workers' compensation benefits. For example:

> *A 42-year-old female hospital worker strained her neck and shoulder lifting patients. The injury required the employee to miss eight days of work. Her employer's insurance company filed a first report of accident with the DWC, which was reviewed by DWC staff. A file for the accident was established because the employee missed enough days from work to qualify for compensa-*

tion of wages. Subsequently, the employer's insurance company filed a memorandum of agreement with the DWC which was signed by the claimant. The agreement stated that the insurance company would pay $1005 in wage compensation and $277 in medical costs. The agreement was reviewed by DWC staff to ensure that all information was complete and that the amount of compensation was correct according to the Act. The agreement was then approved by DWC staff and notification was sent to the claimant, the employer, and the employer's insurance company.

* * *

A 39-year-old male refuse collector injured his back while attempting to lift a trash container. The claimant did not seek immediate medical attention because the injury did not fully manifest itself for several days. The employer filed a first report of accident. However, the employer also refused to pay compensation for the claim, believing that the claimant's delay in seeking medical care indicated that the injury was not work-related.

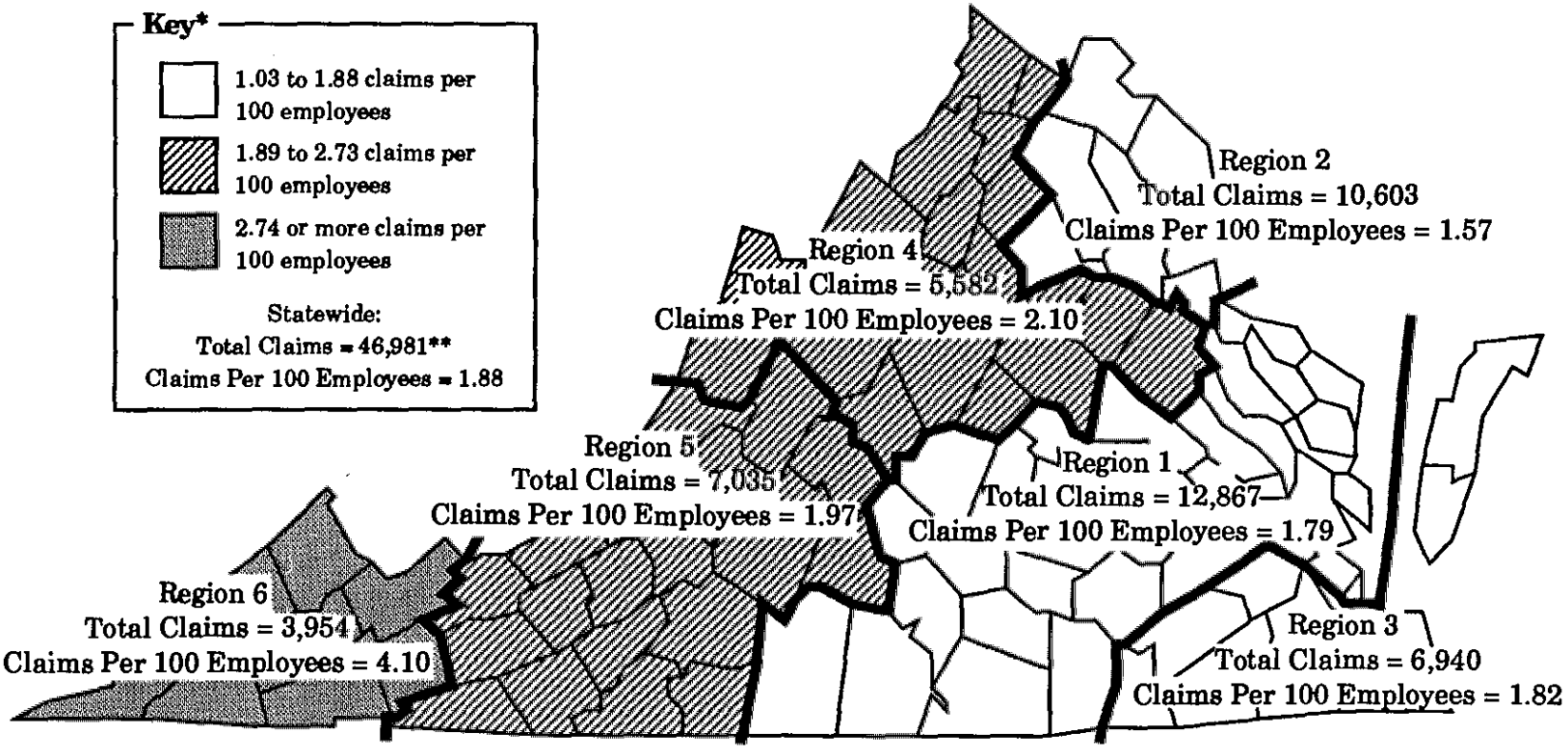
About one month after the injury, the claimant filed an application for hearing. The DWC subsequently requested medical and other information necessary for the hearing. The case was placed on the hearing docket and heard by a deputy commissioner. The deputy commissioner ruled that the medical evidence demonstrated that the injury was work-related. However, the deputy commissioner also ruled that the disability was not medically substantiated until the claimant went to the doctor. Therefore, the claimant was only awarded compensation, which amounted to $1514, for lost work days during the period after the injury was substantiated.

Work-related accidents in Virginia resulted in 1,234,400 lost work days in 1987, the most recent year for which data are available. This is equivalent to every employee in Virginia losing roughly one-half of a work day due to a work-related injury or illness during that year.

In 1988, 233,224 new workers' compensation cases were established in Virginia. The vast majority of these cases (178,655 or 77 percent) were for minor injuries for which only medical costs were paid and no compensation was paid for lost wages. Of the 54,569 new claims established involving compensation for lost work time, the region incorporating the Richmond, Southside, and Northern Neck areas of the State had the highest total number of claims (Figure 1). However, the rate of claims established per 100 employees was highest in the Southwest region — almost double the rate experienced in other regions.

Figure 1

Workers' Compensation Claims Established in 1988



* Groupings based on regional standard deviation from statewide average.

** Figure includes only claims involving compensation for lost work time. Does not include 7,588 claims for out-of-state claimants or claims for which the locality was unreported.

Note: Regional boundaries are determined by deputy commissioner jurisdictions.

Source: Industrial Commission of Virginia, *1988 Statistical Reports* ; and Virginia Employment Commission, *Covered Employment and Wages in Virginia*, June 30, 1988.

Industries with the highest incidence rates for occupational injuries and diseases include special trade contractors (e.g., plumbers, roofing and sheet metal workers), meat packers, and workers producing stone, clay, and glass products. The most prevalent type of injury is overexertion, which accounts for over 30 percent of the total cases resulting in a medical expense or lost work time. However, depending on a worker's occupation, the risk of other types of injuries may be more prevalent. For example, farming, forestry, and fishing workers are most at risk of being struck by an object (46 percent cases) and are the least likely to have overexerted themselves (17 percent of cases).

The Workers' Compensation Act delineates who is eligible to receive compensation and details specific exemptions to the coverage. The Act also specifies the types of benefits that are available to injured employees.

Employers required to obtain workers' compensation coverage have a variety of methods for obtaining coverage at their disposal, including obtaining coverage from a commercial insurance company or becoming self-insured. Premium rates for commercial insurance companies are regulated by the State Corporation Commission (SCC).

Major Provisions of the Workers' Compensation Act

Determination of employee eligibility depends on the circumstances surrounding the accident or illness and the type of employer involved. In order to receive compensation under the Workers' Compensation Act, an employee must show that the accident or occupational disease arose out of and in the course of employment. Furthermore, an employee is not entitled to workers' compensation benefits when the injury resulted from the employee's willful misconduct, attempt to injure another, intoxication, willful failure or refusal to use a safety appliance, or willful breach of an employer's safety regulation.

Workers' compensation benefits are available to about 96 percent of the employees in Virginia. However, some employees are excluded from the Act, such as: employees of interstate railroads, domestic servants, some farm laborers and taxicab drivers, casual employees (those whose employment is not in the usual course of the trade, business, occupation, or profession of the employer), and employees for most businesses with fewer than three employees regularly in service.

Some real estate salespersons and brokers, and most volunteers are also excluded from coverage. Executive officers can be exempted from the Act by giving notice to the employer that they do not wish to be bound by the provisions of the Act. This notice must be given prior to any accident resulting in injury or death. Sole proprietors and partners may elect to be included under the coverage of their business if their employees are covered by the Act.

Workers' compensation is available to Virginia employees who work out of State, if the work-related injury would have been compensable in-state. This coverage is available only if the contract of employment is made in Virginia and the employer's place of business is in Virginia.

Compensation for Work-Related Injuries and Types of Benefits

Statutory language specifies that claimants must be incapacitated for a period of seven calendar days from the date of injury before compensation payments will begin. If incapacity extends beyond 21 calendar days, then benefits can be retroactively awarded for the seven-day waiting period.

The amount of compensation depends on the length of the incapacity and the type of benefit awarded. Compensation amounts may change depending upon changes in the physical condition of the injured employee. If a change in condition occurs, the employee or employer may ask for a hearing before the Industrial Commission to increase or decrease benefits. The amount may be changed to reflect whether or not an employee is able to return to work functioning in the same capacity as before the injury.

Injured employees and their beneficiaries can receive several types of benefits: (1) medical, (2) total incapacity, (3) partial incapacity, (4) scheduled loss, (5) total and permanent incapacity, (6) death, and (7) vocational rehabilitation. Total incapacity and partial incapacity benefits are usually awarded for injuries which are not permanent in nature. Exhibit 1 displays these benefits, the amount allowed for each benefit, and the limits set on the benefits.

Benefits can generally be categorized into two major groupings: (1) medical benefits (or benefits related to medical expenses and physical rehabilitation) and (2) non-medical benefits, which are often called indemnity benefits. Benefits are sometimes provided for vocational rehabilitation of injured employees or for particular claimant groups through special benefit categories.

Medical Benefits. Medical benefits may include payment for physician services, hospitalization, and other necessary medical treatment. These benefits may continue for the life of the employee, if they relate to the compensable injury.

Section 65.1-88 of the *Code of Virginia* mandates that all necessary medical care be furnished when an employee is injured on the job. The employer (or the employer's insurance company) is required to provide a physician for the worker and any other necessary "medical attention," such as emergency treatment, hospital services, and chiropractic care. The term "medical attention" also covers medical supplies and travel expenses for medical visits.

In addition, the employer or insurance company must provide any prosthetic devices and therapeutic appliances, as well as home modifications (e.g.,

Exhibit 1

Types of Workers' Compensation Benefits

Type of Compensation	Rate or Amount	Limitations
Medical	Actual amount of prosthetic devices, medical equipment, physician fees, hospitalization, and treatment.	- Injured employee must select a physician from a panel chosen by the employer. - Cost for certain medical equipment and modification to home (e.g., wheelchair and ramp) cannot exceed $20,000.
Total Incapacity	66 2/3% of the employee's average weekly wage*	- Compensation cannot be less than 25% (unless employee's wage is less) and not more than 100% of the State's average weekly wage. - Compensation cannot exceed the average weekly wage of the injured employee. - Limited to 500-week period during the life of the employee. - Total amount of compensation not to exceed 500 times the State's average weekly wage.
Partial Incapacity	66 2/3% of the difference between the employee's weekly wage before the injury and the average weekly wage earned after the injury*	- Compensation cannot exceed 100% of the State's average weekly wage. - Limited to 500-week period from the date of the injury.
Scheduled Loss	66 2/3% of the employee's average weekly wage*	- Period of compensation varies from several weeks to 500 weeks, depending on the part of anatomy sustaining permanent loss of use.

*Weekly Benefit Amount.

Exhibit 1 - Continued

Type of Compensation	Benefits	Limitations
Total & Permanent Incapacity	66 2/3% of the employee's average weekly wage*	- Same as the total incapacity. - Period of compensation in which the injury results in the loss of any two body members, total paralysis, or injury to the brain rendering the employee totally and permanently incapacitated is unlimited, however.
Death	66 2/3% of the employee's average weekly wage*	- Compensation cannot be less than 25% and not more than 100% of the State's average weekly wage. - Compensation cannot exceed 400 weeks from date of injury for some dependents and 500 weeks for others. - Burial expenses for the deceased cannot exceed $3,000.
Vocational Rehabilitation	Actual dollar amount of services.	- Services must be reasonable and necessary.

*Weekly Benefit Amount.

Source: Section 65.1-54 *et. seq.* of the *Code of Virginia*.

wheelchair ramps) if necessary. The total cost of these appliances and modifications may not exceed $20,000. However, medical attention may be provided for as long as necessary without limitation. Employee refusal to accept medical services can result in a suspension of compensation until the employee agrees to undergo the necessary treatment.

The employer or insurance company may provide a panel of three physicians from which the claimant can choose to obtain his or her primary treatment. However, most employers and insurance companies allow claimants to go to the physician of their choice.

Indemnity Benefits. Indemnity benefits are primarily intended to replace the wages and/or to support injured workers while they are unable to work or are working for less than their pre-injury wage. Benefits for total incapacity, partial incapacity, total and permanent incapacity, and death are based on the lost earning ability of the injured employee due to the sustained injury. Lost wages are calculated using the average weekly wage of the injured employee for the 52-week period preceding the date of the injury.

The maximum amount of the average weekly wage for which the employee is reimbursed cannot be greater than the Commonwealth's average weekly wage, ascertained annually by the DWC. The minimum is set at 25 percent of the statewide average weekly wage or the employee's wage, whichever is less.

Benefits for scheduled losses are provided for the lost use of a part of the anatomy, or for disfigurement. Such losses are termed "scheduled" because a lump-sum monetary value is placed on body members for which an injury has caused a total or partial loss of use.

Death benefits are awarded if an injured employee's death occurs as a result of the compensable injury and within nine years of the date of injury. These benefits are available to dependents who are classified as wholly or partially dependent on the employee's earnings at the time of the accident. Dependents wishing to claim death benefits must do so within two years of the injured employee's death. The Act also allows burial expenses up to $3,000 to be included in death benefits for dependents.

Certain total incapacity benefits for which payments continue for more than a year may be supplemented to compensate for inflation. If an employee's combined benefit under workers' compensation and under the Federal Old-Age Survivor and Disability Insurance Act is less than 80 percent of his or her average monthly earnings prior to the injury, the employee is eligible for a cost-of-living supplement. The amount of the supplement is based on the increase (or decrease) in the Consumer Price Index from one calendar year to the next. The claimant must file a change in condition application so eligibility for the supplement can be determined.

Vocational Rehabilitation. The Act includes provisions for vocational rehabilitation training services to injured workers. Vocational rehabilitation usually focuses on either returning injured workers to the same job if possible, or preparing injured workers for employment in another occupation.

When ordered by the Industrial Commission, vocational rehabilitation training must be provided to an injured employee. This requirement represents an attempt to provide the employee with the tools necessary to become reemployed following an injury and to reduce the cost to the employer of sustained compensation. The provision of vocational rehabilitation training must, however, be "reasonable and necessary" (City of Salem v. Colegrove, 228 Va. 290, 321 S.E.2d 654 (1984)). This means that the services must be related to assisting the injured employee to learn a specific skill or trade.

Special Benefit Categories. In addition to the basic benefit offerings, the Virginia Workers' Compensation Act has three categories of benefits targeted to help specific groups of employees. These benefits are occupational disease benefits, coal miner's pneumoconiosis benefits, and second injury benefits.

Occupational disease provisions are outlined in §65.1-49 of the *Code of Virginia*. This section mandates that an employee who suffers incapacitation or death due to a disease which was contracted on the job is entitled to the same benefits as a worker who was injured in an on-the-job accident. These benefits are subject to the same maximum and minimum rates as total and partial incapacity benefits, as well as the same statutory limits on duration of benefits.

Specific provisions are made for fire fighters, police, and other public safety officers suffering from respiratory disease, hypertension, and heart disease. In such cases, these diseases are presumed to be occupational diseases if they result in a disability.

Special benefits for employees suffering from coal miners' pneumoconiosis (black lung disease) were added to the Worker's Compensation Act in 1972. These provisions offer benefits to workers suffering from black lung disease based on a special schedule regarding the severity of the exposure. They also establish maximum compensation rates and duration of benefits.

Sections 65.1-58 through 65.1-60 of the *Code of Virginia* define the limitations for second injury benefits a disabled worker may receive if he or she suffers an on-the-job injury. Currently, if a previously disabled employee sustains a work-related injury, employers must pay benefits only for the amount of disability attributable to the second injury. Benefits attributable to the first injury are paid by the Second Injury Fund.

Methods of Procuring Workers' Compensation Insurance

Virginia employers spent an estimated $645 million on workers' compensation coverage in 1988. Employers can meet the requirement for workers' compensation coverage by purchasing insurance from a commercial insurance company, purchasing insurance from the residual (or assigned risk) market, qualifying as a self-insurer, or becoming a member of a group self-insurance association licensed by the SCC. However, employers cannot pass on the cost of workers' compensation insurance to employees by deducting the cost from employee wages. Employers who are required to be insured but fail to do so may be subject to penalties.

Commercial Insurance and Workers' Compensation Rates. Most employers in Virginia obtain workers' compensation coverage through insurance companies. Employer premiums are based on, among other things, the type of industry, the occupations of the covered employees, and the employer's accident history.

Workers' compensation premium rates in Virginia are regulated by the SCC. SCC regulations allow the rates to be based on a prospective rating process. That is, the rates, known as "manual rates," reflect future compensation needs as well as past losses and expenses. The SCC approves the rates prior to the date they become effective.

The National Council on Compensation Insurance (NCCI) makes requests for workers' compensation rate changes in Virginia. The NCCI represents commercial insurance companies who elect to become members. All workers' compensation underwriters in Virginia are NCCI members.

The NCCI usually submits an annual request to the SCC to increase or decrease workers' compensation rates based on changes in numerous factors, including the amount of claims paid, overhead expenses, and investment income. During SCC rate hearings, for example, the NCCI offers into evidence data showing the amounts insurance companies paid to Virginia employees for each of the more than 500 compensation classifications. Employees are assigned to a classification based on the type of work performed (e.g., clerical office employee, cigarette manufacturing). The SCC-approved rates are the basic manual rates that commercial insurance companies in Virginia must use.

Once a manual rate has been set for a particular classification, insurance companies may "customize" that rate for an individual employer. For example, the rate for an individual employer with extraordinary loss experience may be increased above the manual rate.

Residual Market. Workers' compensation coverage is also available to employers through the residual (or assigned risk) market. The residual market provides this insurance to high-risk employers who cannot obtain coverage in the open market. These employers are assigned by the SCC to a particular insurance

company. In Virginia, the rates for companies buying insurance in the residual market are set by the SCC at levels identical to those charged to companies buying insurance in the open market. The premium ultimately charged to a high-risk employer, however, may be increased based on loss experience according to a formula approved by the SCC.

Individual Self-Insurance. Employers can also meet insurance requirements by being self-insured. About 130 employers in Virginia are self-insured. The DWC reviews and approves applications for self-insurance by individual companies.

To qualify as a self-insurer, an employer must prove his or her financial ability to pay benefits to injured workers. Employers granted self-insured status must post a bond in an amount set by the DWC. The minimum bond amount currently used by the DWC is $750,000. Usually, only large companies are self-insured in Virginia.

Group Self-insurance Associations. Employers may also form a group association and become self-insured to meet insurance requirements. Thirteen groups of employers are currently self-insured as associations. The SCC is responsible for licensing and monitoring the group self-insurance associations. The group associations are licensed by the SCC if they meet several criteria. An association must have: (1) a net worth of at least $1,000,000, (2) annual insurance premiums of at least $250,000, (3) evidence of excess insurance, (4) collateral equaling at least 25 percent of the member premiums, (5) satisfactory financial statements, (6) signed indemnity agreements holding each member jointly and severally liable for all claims of the association, and (7) other requirements as specified by the SCC.

Uninsured Employers. Employers who fail to purchase workers' compensation insurance when required to do so may be fined up to $1,000 by the Industrial Commission and ordered to cease and desist all business transactions. Moreover, the employer may be prosecuted by the local Commonwealth Attorney for having committed a Class 2 misdemeanor. In addition, if the uninsured employer's negligence caused the employee's injury, then the employee is free to sue the employer for all damages including punitive damages under common law. The employer may not use common law defenses. The DWC maintains an uninsured employer's fund from which to pay the claim in the event the uninsured employer cannot or will not pay benefits awarded under the Workers' Compensation Act.

RESPONSIBILITIES OF THE DWC

The DWC's responsibility for processing workers' compensation claims involves two types of management functions, administrative and judicial. Administrative management functions include opening a claim file, entering the workers' compensation award, and maintaining the physical file.

Judicial management functions include conducting claims examination activities, convening hearings and reviews to adjudicate disputes regarding a claim's compensability, and determining the amount and duration of the award. The DWC attempts to resolve certain kinds of disputes without holding a hearing, through alternative dispute resolution.

Overview of Administrative Claims Management

Upon notification of a work-related injury by either an employer or employee, the agency establishes a file and notifies the parties involved that the information regarding the injury has been received. The DWC acknowledges its receipt of information by sending a form called the "blue letter" to the employee, the employer, and the employer's insurance company. In addition, a copy of the DWC's informational booklet, entitled *A Workers' Compensation Guide for Employees*, accompanies the blue letter that is sent to the claimant.

Most often, the parties reach agreement on the amount and duration of compensation and a "memorandum of agreement" is submitted to the DWC. The DWC reviews the form and either approves or rejects it based on its accuracy and completeness. Notice of the DWC's rejection of the memorandum of agreement is made by letter to the insurance company, specifying which information appears incorrect or incomplete. Once all information is received, the information is placed into the file and entered into the computerized filing system.

Overview of Judicial Claims Management

Judicial management of claims involves claims examination functions, alternative dispute resolution, and adjudication of contested cases. Claims examination functions are performed in the claims examination section of the DWC's claims division, while alternative dispute resolution and adjudication are the responsibilities of the deputy commissioners and the commissioners. Claims examiners review employer applications for hearings, award attorney fees for non-litigated cases, make lump sum determinations, determine permanent disability ratings in disfigurement cases, and answer telephone inquiries and letters.

The judicial process begins if an employer denies liability for the employee's injury, or if the parties to the agreement cannot settle on the compensation to be awarded. When a case is contested, an application for a hearing must be made with the DWC. The case will be placed on the hearing docket and will be heard unless the parties settle prior to the hearing date. Two deputy commissioners have alternative dispute resolution (or claims mediation) responsibilities. These activities are conducted with selected cases as a method to reduce the number of cases on the hearing docket.

If the case cannot be resolved through mediation activities, an adversarial hearing is held before a deputy commissioner. During hearings all witnesses testify under oath, but the common law courtroom rules of pleading and practice are not followed. For example, the deputy commissioner may decide cases based on written medical reports. The common law rules of evidence would require in-person testimony of the doctor.

The deputy commissioner will usually make a decision on the case and write an opinion. An award may be issued outlining the amount of the benefits, the frequency of compensation payments, and payment for medical treatment. Attorney fees may also be awarded. If the parties are satisfied with the award or decide not to appeal the decision, the claim is sent to the DWC claims division for final processing.

If a party is dissatisfied with the deputy commissioner's award, he or she may, within 20 days, petition the Industrial Commission for further review. The Industrial Commission will review the evidence and, if it deems advisable, rehear the case. Decisions of the Industrial Commission are appealable to the Virginia Court of Appeals and thereafter to the Virginia Supreme Court (at the Supreme Court's discretion).

Of the 3,759 disputed claims in 1988, 1047 were reviewed and had opinions rendered by the Industrial Commission. Only 191 cases were appealed to the Virginia Court of Appeals. Eight cases had writs granted on appeals to the Virginia Supreme Court.

ORGANIZATION OF THE DWC

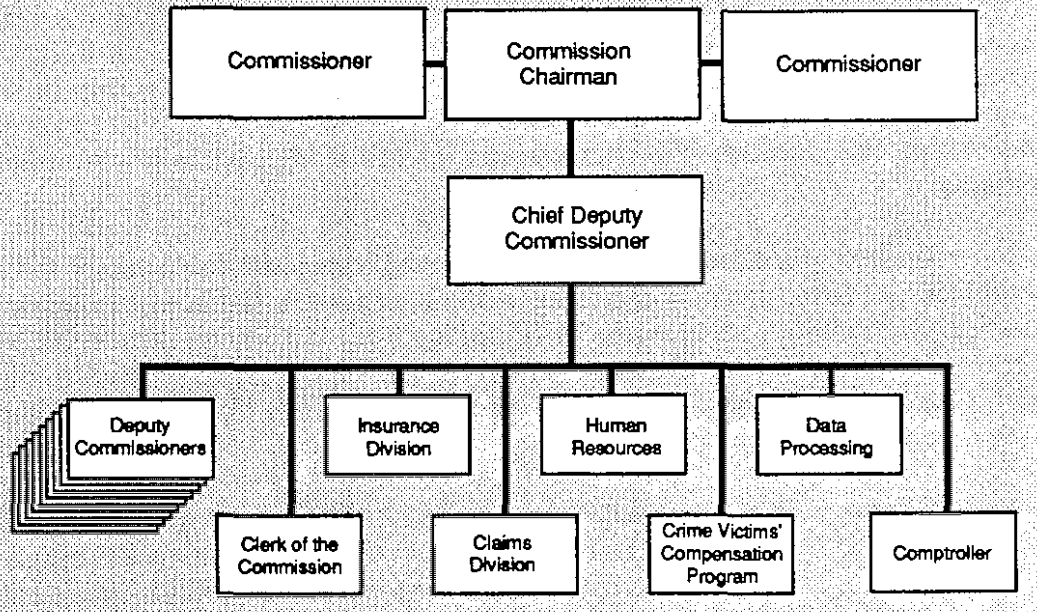
The DWC is headed by the three commissioners, a chief deputy commissioner, and seven senior managers, who make up the management team of the agency (Figure 2). While the commissioners have ultimate responsibility for the administration of the DWC, the chief deputy commissioner oversees most daily activities of the organization.

The DWC's central operations are located in Richmond. Four regional offices are maintained by the DWC in Alexandria, Lebanon, Norfolk, and Roanoke. The offices were established primarily to utilize deputy commissioners' time more efficiently by reducing the travel that used to be required to conduct hearings. The regional offices range from four to six staff, including the deputy commissioners.

The DWC is a relatively small agency, with a total of 129 authorized staff positions, 122 of which were filled as of November 1989. The operating budgets approved by the 1989 General Assembly were $7.2 million for FY 1989 and $8.2 million for FY 1990. The DWC is funded primarily from special revenues.

Figure 2

Organization of the Department of Workers' Compensation



Source: JLARC graphic of DWC structure, 1989.

The responsibilities of the DWC's personnel and agency organizational units are varied. Many of the responsibilities and powers of the judicial personnel in the agency are outlined in the Act. Activities of administrative personnel are also guided by the Act through procedures established by the agency's management team. Appendix C explains in greater detail the general duties and responsibilities of key positions and organizational units.

JLARC REVIEW OF THE DEPARTMENT OF WORKERS' COMPENSATION

Item 11 of the 1985 Appropriations Act (Appendix A) directed JLARC to plan and initiate a comprehensive performance audit and review of the independent agencies of State government. In 1985, these agencies included the Department of Workers' Compensation and the State Corporation Commission.

Specific language in the Appropriations Act directs JLARC to review:

- the appropriations and programs of these agencies to assess compliance with legislative intent,
- issues relating to management, organization, staffing, programs, and fees,
- other matters relevant to agency appropriations "as the Commission may deem necessary."

This report presents staff findings and recommendations on issues related to the Virginia Workers' Compensation Act and the operations of the Department of Workers' Compensation.

Issues

The study mandate expressed the General Assembly's interest in the DWC's organization, management, and operations. In addition, the mandate gave clear authority for JLARC to review appropriations and programs to assess compliance with legislative intent. Consequently, a broad study was designed to evaluate the following areas:

- Benefits and costs of workers' compensation,
- Vocational rehabilitation of injured workers,
- Administrative and judicial management of claims,
- Other programs and functions of the agency,
- Organization, management, staffing, and policies of the DWC.

Methods

A number of research methods were employed during this study to collect and analyze data. These methods included: (1) structured interviews with the commissioners, chief deputy commissioner, deputy commissioners, DWC central office staff, DWC regional staff, insurance companies, private rehabilitation providers, attorneys specializing in workers' compensation, and personnel from other relevant State agencies; (2) site visits to the DWC regional offices; (3) reviews of the *Code of Virginia*; (4) file and literature reviews; (5) assessments of documents used by the DWC and other organizations; (6) analysis of key DWC processes and procedures; and (7) comparison of the workers' compensation system in Virginia to other states' systems. These basic methods were used for most of the issues identified.

Other methods were designed primarily to examine the claims management activities of the DWC and the cost of workers' compensation in Virginia. Administrative and judicial management of claims was examined by conducting basic statistical analyses (e.g., average processing times, range of processing times) using the DWC's data bases. Special cost methods included: (1) calculation of the average cost of workers' compensation insurance to employers in the State, and (2) comparisons of manual rates.

Report Organization

This chapter has provided a brief overview of the workers' compensation program in Virginia. Chapter II overviews the national concerns surrounding workers' compensation and provides a more detailed examination of Virginia's benefit structure and employer costs in the State. Chapter III highlights the vocational rehabilitation components of the workers' compensation program and proposes methods for strengthening the vocational rehabilitation screening and referral process. Chapter IV discusses the DWC's administrative and judicial management of claims. Chapter V provides a broad review of the agency's functions and programs. Finally, the organization and management of the DWC are examined in Chapter VI.

II. Workers' Compensation Benefits and Costs

Like Virginia, each state has a workers' compensation program designed to provide compensation to injured workers without assigning fault. A review of studies conducted in other states indicates that workers' compensation has been a significant concern across the nation. At least 27 state legislatures have conducted over 60 studies of their respective workers' compensation systems over the past five years. These studies indicate that a number of states have been battling such issues as extremely high employer costs and inadequate workers' compensation rates.

Analysis of Virginia's system indicates that Virginia is not experiencing these types of problems. The types of benefits offered in Virginia are generally consistent with those offered in other states, yet employer costs are relatively low. In addition, according to the State Corporation Commission, competition among insurance companies to write workers' compensation policies is active, which is a sign that Virginia's system is healthy.

However, assessment of Virginia's benefit structure and the administrative activities of the DWC related to benefits revealed three areas that may require corrective action. First, the General Assembly may wish to expand coverage of the Act by eliminating the exclusion of employers with less than three employees.

Second, guidelines for the calculation and verification of the average weekly wage should be developed to avoid potentially costly errors. In addition, the General Assembly may wish to amend the *Code of Virginia* in order to clarify the data to be used in the calculation of the average weekly wage.

Third, notification of the availability of cost-of-living supplements for certain types of benefits is inadequate. Many claimants may not be receiving these benefits because they are not aware of the cost-of-living provisions or the process by which they can apply for the supplements. The DWC should improve its notification procedures to address this problem.

NATIONWIDE CONCERNS WITH WORKERS' COMPENSATION

Although each state has a workers' compensation program, these programs vary in terms of insurance coverage requirements, placement, funding, administration of the program, and specific benefit provisions. Twenty years ago, national concerns focused on the variability in the treatment injured workers received due to the differences in the states' programs. The National Commission on State Workmen's Compensation Laws was formed at that time to address problems the U.S. Congress perceived in the adequacy and equity in workers' compensation laws throughout the United States.

Since then, concern has shifted from the components of each state's program to the viability of the programs themselves. A variety of problems — including high employer costs and alleged rate inadequacy — are contributing to workers' compensation crises in several states. Analysis of Virginia's workers' compensation system presented later in this chapter indicates that Virginia is not experiencing the types of problems being experienced by other states.

High Employer Costs

High employer costs for workers' compensation coverage can affect a state's ability to compete with other states for the location of new businesses. High employer costs can also have a negative effect on employees in a state because employers may decide to risk the penalties of being caught without coverage rather than pay an exorbitant cost to obtain coverage.

Several factors can contribute to high employer costs. Among these factors are liberal benefits or longer duration of benefits, high insurer profits and administrative expenses, more hazardous industrial mix, and high litigation rates. These factors generally manifest themselves in higher manual rates for employers with commercial coverage or higher expenses for self-insured employers. (A manual rate is a basic measure of the cost of workers' compensation coverage for specific industries. Manual rates will be explained in greater detail later in this chapter.)

As a result of high employer costs, some states have been forced to make critical choices regarding their workers' compensation systems. For example, a recent study conducted by the Minnesota Legislative Auditor's Office concluded that the primary cause of the state's high costs was the liberal benefit structure. Lawmakers in that state faced the difficult decision of whether or not to restrict existing benefits, which had been in effect for a number of years, in order to begin to bring the state into a similar cost position as neighboring states. Hawaii has also experienced significant problems.

> *A 1988 study by the Minnesota Department of Labor and Industry found that workers' compensation premiums doubled in Minnesota between 1983 and 1986. Throughout the rest of the nation, the average premium increase was only 54 percent for this period.*
>
> *There appeared to be three reasons for Minnesota's high workers' compensation costs. First, assessments for several special funds increased significantly, causing insurers to raise premiums by about ten percent to make up for their higher tax payments. Second, insurers had been inaccurate in predicting their costs for injuries that occurred prior to 1983. Rates were therefore increased to cover the continuing costs of these injuries. (Minnesota has an open rate-setting system, so insurance carriers are free to set their own rates).*

Finally, Minnesota had especially high numbers of permanent injuries and generous benefits for these permanent injuries. In 1986, benefit levels for workers with permanent injuries were on average about twice as high as those for Minnesota's three neighboring states. Eighty percent of compensation payments in Minnesota go to the six percent of injured workers who have permanent disabilities.

Legislative reforms aimed at decreasing the quantity and duration of claims for permanent injuries were enacted in 1983. While the full results of these changes are not known, in January 1988, Minnesota's manual rates were still the fourth highest in the nation.

* * *

Hawaii also appears to have experienced very high workers' compensation costs through the 1980s. As a result, a moratorium was placed on workers' compensation insurance rates as a temporary cost control measure in 1983. In spite of the moratorium, Hawaii was ranked by the National Council on Compensation Insurance as the state with the highest premiums in 1984. (Forty-one states were assessed.)

A 1984 study submitted by the Legislative Auditor of Hawaii determined possible reasons for the state's high workers' compensation costs. The study stated that numerous provisions in Hawaii's workers' compensation statutes provided incentives for employees to file claims. Many types of compensation benefits were found to be more generous in Hawaii than in other states, and in some cases employees could receive compensation payments that were higher than their average weekly wage prior to the injury.

Hawaii's cost problems appear to be lessening to some degree. Projected state premium figures issued by the National Council on Compensation Insurance show Hawaii dropping to fifth place in 1988 and seventh place in 1989.

Some states have tried drastic systemic changes in attempts to control employer costs. Eleven states, including Minnesota, have discontinued regulating rates and allowed open competition among insurers in their states, hoping to enhance price and service competition. Open competition opponents assert that this type of system may affect the quality of service and may actually result in higher rates, as smaller insurance companies are driven out of the market. Results of allowing open competition are still unclear, but the overall experience of the "open competition" states in reducing costs appears to be mixed.

Rate Adequacy

A second major concern, rate adequacy, is indirectly related to the issue of high employer costs. Workers' compensation insurance rates are traditionally regulated more restrictively than other property and liability insurance rates. Regulatory organizations may limit rate increases in states where rates are perceived to be too high by employers in an attempt to keep employer costs reasonable.

Insurers do not rely solely on premiums, which are generally based on workers' compensation rates, to make a profit. Profits can also be made through investing premiums until they are needed to pay expenses and claims. However, premium rates must be "adequate" to pay expenses or claims and still allow for some profit margin. In addition, most states require that a specified amount of premiums be reserved for future benefit payments. When rates are not allowed to rise at a pace sufficient to cover increasing administrative expenses (e.g. office maintenance, office supplies, salaries) and benefit expenses (e.g., medical costs and employee wages), underwriting workers' compensation policies becomes less profitable.

Other factors can also affect the adequacy of rates. For example, excessive use of the assigned risk market and assigned risk "pools" or funds (which are designed for employers unable to obtain commercial insurance) can place a burden on insurance companies which reduces the profitability of writing workers' compensation insurance. Existing insurance companies in a state normally have to cover losses incurred by employers in the assigned risk category.

In some states, the situation has reached a point at which some insurance companies simply refuse to underwrite workers' compensation policies. For example:

> *In Texas, workers' compensation insurers are saying they are losing money despite a 148 percent increase over the last five years. Recently, the state's largest writer of workers' compensation policies announced that it would no longer write new policies in the state. The second largest workers' compensation insurer in the state also announced it was considering discontinuing writing new policies in Texas, citing losses of $235 million over the past four years. One of the primary reasons for the insurers' reluctance to write new policies was the expanded use of the assigned risk pool. Current regulations allow participation by employers whose policies were canceled for reasons other than work-place safety (e.g., insolvency). Losses in the pool are allocated to insurers based on their share of the total insurance market. Losses reached $399 million last year.*
>
> *The cost of workers' compensation insurance in Texas has also been recognized as a major impediment to economic development.*

> *A Strategic Economic Plan for Texas, submitted to the Texas legislature early in 1989, pointed out that "the cost of workers' compensation insurance has risen to a level which places Texas in a non-competitive position with other states and is a major deterrent to business retention and expansion." The plan recommends an "overhaul" of the system as soon as possible to reduce costs.*

Four other states are cited by the NCCI as having particular problems with rate adequacy: Florida, Louisiana, Maine, and Rhode Island.

STATUS OF THE STATE'S BENEFIT STRUCTURE

Comparison of Virginia's benefit structure with other states' benefit structures suggests that the types of benefits available in Virginia are generally consistent with those of other states. Variations in benefits are generally related to the amounts of benefits allowed or the duration of benefits. As noted previously, these differences result in the benefit structures of some states being more liberal, and therefore costly, than others.

Analysis of provisions recommended by the National Commission on State Workers' Compensation Laws indicates that there is one area — employer exemptions based on the number of employees — in which Virginia is not among the majority of states. The review also indicated inadequacies in the methods used for calculating and verifying the State's average weekly wage, which is used to establish limits on several provisions in the benefit structure. These inadequacies resulted in the use of an overstated average weekly wage for about three months in 1989.

Finally, it became apparent during the review that eligible claimants may not be receiving the cost-of-living supplements payable for certain types of benefits. Cost-of-living provisions are currently not included in the employee handbook, and the DWC's other notification procedures are sporadic.

Interstate Benefits Comparison Demonstrates Virginia Is Generally Consistent with Other States

Although the statutory provisions for workers' compensation benefits vary somewhat by state, all 50 states feature the same basic provisions. These provisions include medical, vocational rehabilitation, total incapacity, partial incapacity, death, and cost-of-living supplements.

JLARC staff compared the statutory provisions in each state to the 19 "essential recommendations" of the National Commission on States' Workers' Com-

pensation Laws. Although Virginia has adopted many of the recommended provisions, the General Assembly may wish to consider eliminating the numerical exemption for employers in order to be consistent with other states.

Benefit Structures Among the States. All state workers' compensation programs provide certain benefits to injured workers. However, states differ in the kinds of compensable injuries, the amount and compensable time period, and the method of payment. Benefits fall into two general categories: (1) medical benefits and (2) indemnity benefits, or benefits for wage losses due to disability. Indemnity benefits include benefits for total incapacity, partial incapacity, scheduled disability losses, and death benefits paid to employees' dependents (Exhibit 2).

Medical benefits cover expenses incurred by the employee during the course of treatment for the injury, and generally include benefits for physical and vocational rehabilitation of the employee. All states except Arkansas, New Jersey, and Ohio provide for medical benefits without time or monetary limitations.

Indemnity benefits are payable for wages lost due to incapacity resulting from an occupational injury or illness. These benefits can be for either total or partial incapacities. The compensable incapacity can be either of a temporary or permanent nature.

All states provide benefits for both temporary and permanent total disabilities. In most states, these benefits amount to 66 2/3 percent of the worker's average weekly wage. In many states, these benefits are also based upon statutorily prescribed minimum and maximum payment amounts, as well as maximum benefit periods.

In most states, partial incapacity benefits are payable at a set percentage of the difference between the worker's average weekly wages before and after the injury. However, the provisions for temporary partial incapacity benefits vary widely among the states. Most states have statutorily prescribed minimum and maximum payments.

All states also provide some form of benefits for permanent partial disabilities. Awards for this type of disability are generally based on a schedule which sets the amount and compensable period of the benefits, depending upon the part of the body which is affected. Scheduled benefits are usually paid upon the conclusion of all other benefit payments and are terminated after a specified period of time.

Death benefits are offered in all 50 states. In most cases, these provisions set forth the standard amount of compensation payable, maximum and minimum amounts payable, maximum duration of payments, and burial expenses.

Exhibit 2

Workers' Compensation Benefits in Virginia and Other States

Type of Benefit	Offered in Virginia?	Number of States Offering	Comments
Medical	Yes	50	All states also include provisions for physical rehabilitation.
Total Incapacity	Yes	50	Virginia is one of 47 states which provide benefits based on a percentage (generally 66 2/3 percent) of the employee's gross pre-injury wage. 35 states provide wage replacement benefits for the duration of the incapacity. Virginia has a 500 week limit.
Partial Incapacity	Yes	50	Benefits for temporary partial incapacity vary widely from state to state.
Scheduled Loss (Permanent Partial Incapacity)	Yes	43	Seven states base the benefits for permanent partial injuries on the degree of impairment rather than utilizing a schedule for these types of injuries.
Death	Yes	50	24 states, not including Virginia, provide a lump sum payment to the spouse upon remarriage.

Note: See Appendix D for more detailed explanation of state benefit comparison.

Source: *State Workers' Compensation Laws*, U.S. Department of Labor, 1989.

Fourteen states have statutory provisions which allow automatic cost-of-living supplements for workers receiving disability benefits. As mentioned in Chapter I, Virginia case law has resulted in a more restrictive interpretation of this statute, requiring the claimant to ask the DWC to award the increase. Ten states, including Virginia, allow cost-of-living increases for all total disability injuries. A more detailed comparison of the differences among the states' benefit structures is provided in Appendix D.

Virginia's Numerical Employer Exemption Is Inconsistent with Major Recommendations of the National Commission on State Workers' Compensation Laws. The National Commission on State Workers' Compensation Laws was formed in 1970 in accordance with the provisions of the Occupational Safety and Health Act of 1970. The National Commission developed a list of 19 recommendations which were considered "essential" to address the inadequacies the National Commission found in the states' workers' compensation laws. These recommendations broadly address the areas of coverage of the laws, benefits, and medical provisions. The states' progress in addressing these recommendations is monitored quarterly by the U.S. Department of Labor.

Virginia's workers compensation law fully or partially incorporates 11 of the provisions considered essential (Exhibit 3). The national average for number of provisions adopted is approximately 12. Of the eight provisions not completely included in the Virginia law, three have been adopted by a majority of the states.

One of the benefit areas in which Virginia is not consistent with the recommendations of the National Commission or the majority of states is employer coverage requirements. The National Commission's 1972 report asserts that employers should not be exempted from having to provide worker's compensation coverage based on the number of employees they have in service. Virginia law currently exempts employers with less than three employees from workers' compensation coverage. Virginia is one of 14 states with such an exemption. Many of these states (e.g., Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee) are located in the southeast.

Numerical coverage exemptions cause equity problems from the employee perspective. Employees working for small employers face the same potential financial hardship in case of an accident as employees working for large employers. However, the only recourse available to employees not covered by workers' compensation insurance is to seek relief through civil litigation, which can be both time consuming and costly. Conversely, the lack of coverage exposes small employers to significant liability for potentially disastrous employee injuries. According to data provided by the Virginia Employment Commission (VEC), the numerical exemption results in approximately 56,000 Virginia employees (or about two percent of the total work force in the State) being without workers' compensation coverage.

Exhibit 3

Essential Recommendations of the National Commission on State Workmen's Compensation Laws

Number of States Meeting Recommendation*	Adopted by Virginia?	Recommendation
47 (a) 23 (b)	Partial (a)	Coverage by workmen's compensation law is (a) compulsory and (b) no waivers are permitted.
35	No	Employers are not exempted from coverage because of the number of employees.
13	No	Farm workers are covered on the same basis as other employees.
0	No	Household workers and all casual workers are covered under workmen's compensation at least to the extent they are covered by Social Security.
30	No	Workmen's compensation coverage is mandatory for all government employees.
14	No	No exemptions for any class of employees, such as professional athletes or employees of charitable organizations.
27	No	Employee or survivor is given the choice of filing a workmen's compensation claim in the state where the injury or death occurred, where the employment was principally localized, or where the employee was hired.
50	Yes	Full coverage for work-related diseases is provided.
48	Yes	Temporary total disability benefits are at least 66 2/3 percent of the worker's gross weekly wage (subject to the state's maximum weekly benefit).
30	Yes	Maximum weekly benefit for temporary total disability is at least 100 percent of the state's average weekly wage.
50	Yes	Definition of permanent total disability excludes workers who retain substantial earning capacity.
47	Yes	Permanent total disability benefits are at least 66 2/3 percent of the worker's gross weekly wage (subject to the state's maximum weekly benefit).

Exhibit 3 (Continued)

Number of States Meeting Recommendation*	Adopted by Virginia?	Recommendation
28	Yes	The maximum weekly benefit for permanent total disability is at least 100 percent of the state's average weekly wage.
34	No	Total disability benefits are paid for the duration of the worker's disability or for life, without any limitations as to dollar amount or time.
33	Yes	Death benefits are at least 66 2/3 percent of the worker's gross weekly wage (subject to the state's maximum weekly benefit).
24	Yes	Maximum death benefit is 100 percent of state's average weekly wage.
17 (a) 14 (b) 22 (c) 8 (d)	No	(a) Death benefits are paid to a widow or widower for life or until remarriage and (b) in the event of remarriage, two years' benefits be paid in a lump sum to the widow or widower. (c) Benefits for a dependent child are continued at least until the child reaches 18, or beyond such age if actually dependent or (d) at least until age 25 if enrolled as a full-time student in any accredited educational institution.
50	Yes	There are no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.
44	Yes	The right to medical and physical rehabilitation benefits does not terminate only due to the passage of time.

*As of April 1, 1989.

Sources: *State Workers' Compensation Laws in Effect on April 1, 1989, Compared with the Essential Recommendations of the National Commission on State Workmen's Compensation Laws*, U.S. Department of Labor; *Report of the National Commission on State Workmen's Compensation Laws*, U.S. Government Printing Office, 1972.

Small employers are not exempt from other major employee-related programs, such as social security, State unemployment, and federal unemployment. Similarly, it may be reasonable to require employers of less than three employees to also procure workers' compensation insurance.

The numerical exemption has been reduced several times over the years to its current level of fewer than three employees. The original Act exempted employers with fewer than eleven employees. This number was subsequently reduced to seven employees in 1942, to five employees in 1970, and finally to the current level of fewer than three employees in 1973.

While requiring small employers to procure workers' compensation coverage could ultimately enhance the well-being of these employees as well as their employers, several costs do appear to be associated with this action. The chief argument against including small employers in the Act appears to be the possibility that it would increase initial costs to begin a small business or result in financial hardship on small businesses already in existence. Although only two percent of the employees in the State would be affected by the change, roughly one-third of the businesses in the State would fall into the category of employers having to obtain coverage. Estimates of the cost for small employers to obtain coverage range from a minimum of $125 to as high as several thousand dollars per year, depending on the type of business and the size of employee payroll.

According to the DWC, elimination of the numerical exemption would also increase demands on the Uninsured Employers Fund, which is funded by insurance companies and self-insured employers and is administered by the DWC. An increase in the number of employers who should have coverage, coupled with the increased number of potential claimants, would logically increase payments, but an actual projected impact is not known.

Recommendation (1). **The General Assembly may wish to consider amending Section 65.1-28 by deleting the exemption for employers with fewer than three employees. Prior to taking such action, however, the General Assembly may wish to study the financial impact of deleting the exemption.**

Two other recommended provisions have been adopted by a majority of the states but not by Virginia. One recommendation suggests allowing an employee or the employee's survivor the choice of filing a workers' compensation claim in the state where the injury or death occurred, where the employment was principally localized, or where the employee was hired. The other recommended provision would allow total disability benefits to be paid for the duration of the worker's disability or for life, without any limitations on the dollar amount or time.

These proposed provisions would not significantly enhance Virginia's benefit structure. Currently, employees may file a claim with the DWC if the injury

occurred in the State. Case law appears to cover all other contingencies that may occur with multi-state workers.

Regarding removal of limits on total disability benefits, the argument in favor of this recommendation is compelling for permanent total injuries. Workers with permanent disabilities obviously present the type of wage-loss problem that workers' compensation programs were designed to address. Virginia's law places no limits on these injuries.

On the other hand, compensation for temporary total injuries, by definition, should not be perceived to be permanent. The perception of permanence could act as a disincentive to return to work. Given this potential problem, the 500-week limit does not seem unreasonable and is liberal compared with other states utilizing a time limitation.

Procedures for Calculation and Verification of the Average Weekly Wage Should Be Improved

With the exception of medical and vocational rehabilitation benefits, limits on the amounts of most types of benefits depend on the calculation of the average weekly wage for the Commonwealth. JLARC staff discovered inconsistencies in the calculation of the FY 1990 average weekly wage provided by the VEC and used by the DWC to determine the limits on these benefits.

Consequently, the average weekly wage used by the DWC for a three-month period was overstated, which resulted in overpayments by insurance companies and employers to injured employees. A conservative estimate of the financial impact of using the overstated average weekly wage indicates that if the error had not been discovered, insurance companies and self-insured employers would have made almost $350,000 in excess payments to claimants during FY 1990.

Discrepancies Discovered In Calculation of Statewide Average Weekly Wage. DWC staff annually request data necessary to generate the statewide average weekly wage from the VEC. The calculation involves dividing the gross annual wages for covered employees in the State by the average number of employees (Figure 3). VEC staff generally provide the aggregate data used to calculate the average weekly wage and the final calculated figure in letter form.

VEC staff state that data utilized for the DWC average weekly wage calculation should not include wages of federal employees because these employees are not covered by Virginia's Workers' Compensation Act and because federal pay scales tend to artificially inflate the average weekly wage. Information gathered from past requests confirms that federal employees were not included in the data provided.

Figure 3

Calculation of Average Weekly Wage

Step One

$$\frac{\text{Total Wages for FY 1988}}{\text{Average Monthly Workers for FY 1988}} = \text{Average Annual Wage}$$

Step Two

$$\frac{\text{FY 1988 Average Annual Wage}}{52} = \text{Average Weekly Wage for Accidents Occurring During FY 1990}$$

Source: *Code of Virginia*, Section 65.1-54.

However, data provided to the DWC for the average weekly wage to be used during FY 1990 included federal wages and employees. Data provided to the DWC resulted in an average weekly wage of $393. The correct data, which excludes federal wages and employees, results in an average weekly wage of $382. This discrepancy in the calculation resulted in some claimants being paid up to $11 more per week than the amount they should have been paid. Upon detection and confirmation of the error, JLARC took immediate steps to ensure that the VEC, DWC, SCC, and other affected parties were notified of the correct information.

The VEC and DWC Should Develop Procedures for Annual Data Request. The VEC indicated that written internal procedures did not exist for handling the DWC request. Further, the DWC staff stated that insufficient data was provided to verify the calculation. Procedures should be developed by both agencies to address these problems.

One possible reason cited for the confusion regarding the data to be used in the calculation was the lack of specificity in the *Code of Virginia*. Section 65.1-54 of the *Code*, which specifies the method for calculating the average weekly wage to be used by the DWC, does not specifically state that federal employees should not be included in the calculation. However, the use of the phrase "total insured workers" in this section of the *Code* seems to imply that this may have been the intent of the General Assembly because federal workers do not receive benefits under Virginia's Workers' Compensation Act.

Certain other groups of employees are not necessarily covered by the Act. For example, employers with fewer than three employees, officers of corporations, and sole proprietors are not required to obtain coverage. However, these employees should be included in the data used to calculate the average weekly wage because the *Code* specifically provides that their employers may elect to obtain coverage. There are no such provisions for other employees exempted from the Act. These employees (e.g., interstate railroad employees) are automatically excluded from the VEC data base because they are not required to be covered by unemployment insurance, and there is no elective provision for coverage.

Recommendation (2). **The VEC should develop written internal procedures to consistently handle the DWC request for the calculation of the statewide average weekly wage. In addition, the DWC should review the data used in the calculation of the average weekly wage by the VEC to verify the accuracy of the calculation.**

Recommendation (3). **The General Assembly may wish to amend Section 65.1-54 of the *Code of Virginia* to specify that federal employees and the wages of federal employees should be excluded from the data used to generate the average weekly wage for the DWC.**

Procedures for Notifying Claimants Regarding Cost-of-Living Supplements Should Be Improved

Section 65.1-99.1 of the *Code of Virginia* specifies that cost-of-living supplements shall be payable to certain claimants. Cases that qualify for cost-of-living supplements are those in which compensation is being paid for either total incapacity or death. This section of the *Code* also outlines eligibility for cost-of-living supplements and the method for calculating these supplements.

Claimants are eligible for cost-of-living supplements if the combined entitlements under the Virginia Workers' Compensation Act and the Federal Old-Age Survivors and Disability Insurance Act equal less then 80 percent of the claimant's average monthly earnings. According to the Act, adjustments for cost-of-living should be based on changes in the United States Average Consumer Price Index and be made on a yearly basis.

The DWC does not systematically notify potentially eligible claimants of the cost-of-living provisions. In addition, information regarding the cost-of-living provisions is not included in the informational booklet sent to claimants at the time of their initial contact with the DWC. Therefore, the usual ways claimants may become aware of the provisions are through their attorneys, contacts with DWC staff, or personal review of the Act.

Although certain insurance companies provide cost-of-living benefits to claimants automatically, some eligible claimants are not receiving these benefits.

Data obtained from the DWC indicates that over 55,000 claims were closed in FY 1989. Approximately 18 percent of these claims (10,105 claims) were potentially eligible for cost-of-living increases each year that their cases were open. However, only 12 percent (1,183 claims) of the potentially eligible claimants received the increases. Because claimants must file for a change of condition before eligibility can be determined, it is unclear how many eligible claimants are not receiving the cost-of-living increases to which they are entitled.

In order to ensure that claimants are aware of the cost-of-living provisions, the DWC should take two steps to improve notification practices. First, the employee handbook should be revised to include a section describing the cost-of-living provisions and the conditions under which claimants are eligible. Second, the DWC should develop a computer program that identifies claimants who may be eligible for cost-of-living supplements. At least once a year, these claimants should be sent notification of their potential eligibility and the procedure for filing for the change in condition.

Recommendation (4). **In order to improve the agency's notification procedures and ensure equitable treatment of claimants regarding the cost-of-living provisions, the DWC should:**

(1) Revise the employee handbook to include information on the cost-of-living provisions, and

(2) Implement procedures by which potentially eligible claimants are alerted on an annual basis of the provisions and the application process.

COSTS OF WORKERS' COMPENSATION IN VIRGINIA

Managing the cost of workers' compensation is a concern among employers in Virginia. JLARC staff estimate that in 1988, employers paid approximately $645 million for workers' compensation premiums or claims. The overwhelming majority of these funds, about $548 million, were paid to insurance companies in the form of premiums. Businesses also paid roughly $37 million in premiums to group self-insured associations in 1988. In addition, individual self-insured companies paid an estimated $60 million in workers' compensation claims.

If operated in an efficient and effective manner, the workers' compensation system protects both employers and employees in the State. However, if workers' compensation premium costs are too high, it can hamper the ability of certain employers to conduct business profitably. This affects employers currently operating in the State and could affect the decisions of prospective employers to locate in the State.

On the other hand, if the premiums are too low, insurance companies could become reluctant to underwrite workers' compensation policies in the State. This could make it difficult for some employers to obtain coverage and, consequently, place affected employees in jeopardy of not being compensated for on-the-job injuries.

JLARC staff examined two measures of employers' cost in the State and found that costs were relatively low compared to other states in the region and in the nation. Although it is unclear exactly why costs are relatively low, Virginia's regulatory process apparently plays a major role.

Measures of Workers' Compensation Costs Indicate Virginia Is a Low-Cost State

Two primary measures of the cost of workers' compensation to employers were examined: (1) individual manual rates and (2) adjusted averages of manual rates. These measures vary in their degree of accuracy (in terms of ability to reflect actual employer costs) and appropriateness for use in interstate comparisons. (See Appendix E for a detailed explanation of advantages and disadvantages of the measures.) However, both measures indicate that Virginia is a low-cost State.

Individual Manual Rates. The manual rate represents the average cost of workers' compensation coverage for each industry. Manual rates are set for each occupational classification by the SCC based on data provided by the National Council on Compensation Insurance (NCCI). The NCCI periodically (usually on an annual basis) files a request for a rate hearing on behalf of the insurance industry. These requests are then ruled on by the SCC.

Several factors may affect the manual rates in a state, including the benefit structure, the regulatory structure, the types of industries operating in the state, the accident records of the industries, and insurance company expenses and profits. In addition, manual rates tend to overstate the employers' actual costs due to various pricing mechanisms that may be applied to individual employers (Appendix F).

Nevertheless, manual rates reflect the various economic, political, and sociological factors that affect rates in a particular state. Therefore, they provide an indication of the relative costs among various industries and among states with similar rate-setting environments.

Table 1 presents the 25 largest occupational classifications in Virginia, determined by the amount of covered payroll, for comparison. Manual rates are presented in terms of dollars of premium per $100 of payroll. Because manual rates are based in large part on the loss experience of each occupation, one can get a general idea of the injury risks involved in certain occupations. For example, the rate for trucking is higher than that of automobile salespeople because, generally, the risks of injury are much higher.

Table 1

Comparison of Manual Rates for 25 Largest Occupational Classifications*
Virginia, Florida, North Carolina, South Carolina, Tennessee
(Rates per $100 Payroll)

Classification	Virginia	Florida (% Diff.)	North Carolina (% Diff.)	South Carolina (% Diff.)	Tennessee (% Diff.)
Trucking NOC**	$8.12	$21.14 (160%)	$6.06 (-25%)	$8.65 (7%)	$5.77 (-29%)
Carpentry - Construction of Detached Private Residences	7.47	22.13 (196)	6.00 (-20)	14.54 (95)	8.80 (18)
Plumbing NOC	4.76	11.36 (139)	3.28 (-31)	3.44 (-28)	4.05 (-15)
Chauffeurs & Helpers NOC - Commercial	4.09	9.20 (125)	2.81 (-31)	4.99 (22)	3.80 (-7)
Electrical Wiring - Within Buildings	3.71	10.53 (184)	3.22 (-13)	6.30 (70)	3.44 (-7)
Police Officers & Drivers	3.00	7.17 (139)	1.80 (-40)	2.66 (-11)	5.17 (72)
Auto Service & Repair Centers & Drivers	2.70	8.42 (212)	3.10 (15)	5.34 (98)	NA
Meat, Grocery, Provision Store (Combined) - Retail	2.59	4.53 (75)	1.43 (-45)	2.43 (-6)	1.88 (-27)
Convalescent or Nursing Home - All Employees	2.39	9.46 (296)	NA	3.02 (26)	5.66 (145)
Restaurant - NOC	1.96	5.84 (198)	1.79 (-9)	2.51 (28)	2.90 (48)
Colleges or Schools - Professional and Clerical	0.21	0.92 (338)	0.32 (52)	0.45 (114)	0.44 (110)
Colleges or Schools - All Other Employees	1.87	6.34 (239)	1.83 (-2)	2.17 (16)	3.04 (63)
Cigarette Manufacturing	1.45	2.50 (72)	0.32 (-78)	1.04 (-28)	1.05 (-28)
Clothing Manufacturing	1.31	2.93 (124)	0.94 (-28)	1.44 (10)	2.28 (74)
Store Risks - Retail NOC	1.21	2.90 (140)	0.85 (-30)	1.84 (52)	1.25 (3)
Department Store - Retail	1.13	2.42 (114)	0.85 (-25)	1.42 (26)	1.45 (28)
Office Machine or Appliance Installation, Inspection, Repair	0.71	1.97 (177)	1.13 (59)	1.59 (124)	1.35 (90)
Hospital - Professional Employees	0.68	2.85 (319)	0.79 (16)	0.89 (31)	1.05 (54)
Engineers or Architects - Consulting	0.57	2.23 (29)	0.60 (5)	0.89 (56)	1.02 (79)
Salespersons, Collectors, or Messengers - Outside	0.51	1.39 (173)	0.49 (-4)	1.00 (96)	0.66 (29)
Telephone or Telegraph Apparatus Manufacturing	0.50	3.01 (502)	0.92 (84)	0.86 (72)	1.10 (120)
Clerical Office Employees - NOC	0.25	0.57 (128)	0.23 (-8)	0.45 (80)	0.27 (8)
Physicians - Including Clerical	0.25	0.59 (136)	0.14 (-44)	0.48 (92)	0.20 (-20)
Auditors, Accountants, Factory or Office Systematizers- Travel	0.19	0.43 (126)	0.15 (-21)	0.23 (21)	0.27 (42)
Attorney - All Employees & Clerical, Messengers, Drivers	0.13	0.50 (285)	0.13 (0)	0.28 (115)	0.23 (77)
AVERAGE	$2.07	$5.65 (173%)	$1.57 (-24%)	$2.76 (33%)	$2.29 (11%)

* Rates in effect as of July 1, 1989. Occupational classifications selected based on size of covered payroll in Virginia for policy years 1984-1986.

** NOC = Not Otherwise Classified. NOC classifications include businesses that are not otherwise captured in a specific classification.

NA = Not Available. Classification not used in State.

Source: National Council on Compensation Insurance State Rate Pages as of July 1, 1989.

Virginia's manual rates were compared to the manual rates in other southeastern states. The comparison involved only the other most proximate southeastern states utilizing NCCI services and a prior approval rate-setting regulatory system. These states include Florida, North Carolina, South Carolina, and Tennessee.

Averages of the 25 classifications among the states demonstrate that only North Carolina has a lower average than Virginia. This is further confirmed by examining individual rates. North Carolina is lower in 17 of the 24 classifications used in both states.

However, compared to Florida, Virginia is lower in all 25 rates examined. Similarly, Virginia is lower than South Carolina in 21 of the 25 rates used for the comparison. Compared to Tennessee, Virginia is lower in 17 of the 24 classifications used in both states.

It is important to remember that while manual rates provide a valuable tool for demonstrating relative cost differences among the states, two factors prevent manual rates from demonstrating the actual cost paid by employers for insurance: (1) adjustments to the rates made by insurance companies for individual employers, and (2) the ability of employers to self-insure. These factors should not have a significant effect on the comparisons and, as demonstrated in the next section, measures can be developed to control for certain adjustments. However, they should be noted in order to prevent the perception that individual manual rates or averages reflect actual employer costs.

Adjusted Averages of Manual Rates. Manual rates can be adjusted to account for many of the factors that affect manual rates. A nationally recognized expert on workers' compensation costs has developed a measure which attempts to adjust averages of manual rates for a variety of factors, including industrial mix and the use of competitive devices (e.g., rate deviations and premium discounts). The adjusted average manual rate can be a valuable evaluation tool because it allows for relatively quick and accurate rate comparisons among states by controlling for differences in industrial mix and competitive devices.

Table 2 presents the adjusted average manual rates for the comparator states used in this section. Virginia's relative ranking compared to other southeastern states used for this section changes somewhat when rates are adjusted for industrial mix and use of competitive devices. Tennessee in particular drops below Virginia in terms of adjusted average rates. This indicates that after adjustment for industrial mix and competitive devices, Tennessee employers pay less for workers' compensation coverage than employers in Virginia.

However, Virginia's adjusted average rate is still lower than those of 38 states. According to the national ranking among 46 states and the District of Columbia, Virginia ranks thirty-ninth, well within the lowest quarter of the jurisdictions included in the calculation.

Table 2

Adjusted Manual Rates for Private Insurance Companies in Virginia and Other Southeastern States

State	Adjusted Manual Rate*	Rank Among Jurisdictions**
Florida	2.19	8
South Carolina	1.28	33
Virginia	1.08	39***
Tennessee	0.97	44
North Carolina	0.80	46
National Average	1.79	—

* Rates in effect as of July 1, 1987.
** 46 States and the District of Columbia.
*** Two jurisdictions tied for 39th place.

Source: Data provided by Dr. John Burton and *John Burton's Workers' Compensation Monitor*, January 1989.

It should also be noted that certain aspects of Virginia's benefit structure, in terms of duration of benefits and benefit amounts, are more liberal than the benefit structures in both North Carolina and Tennessee. Therefore, the slightly higher manual rates in Virginia may reflect higher or longer benefit payments to injured employees.

Regulatory Process Appears to Help Keep Employer Costs Low

As the information in the previous section demonstrates, the cost for workers' compensation coverage to Virginia employers is relatively low. This situation helps create a positive environment for businesses operating in the State currently and may give Virginia a competitive edge in business location decisions. Rate regulation by the SCC appears to be a major factor controlling employer costs.

As mentioned earlier in the chapter, the issue of premium rate adequacy has led to problems in some states with insurance company willingness to under-

write workers' compensation policies. Despite a disagreement with the NCCI over the methodology used to adjust rates, representatives of the SCC and the Office of the Attorney General do not believe that Virginia will experience the same type of workers' compensation problems.

Employer Costs Are Influenced By Regulatory Mechanisms. The discussion earlier in the chapter explained that several factors contribute to the manual rate levels. In addition, the manual rates may not reflect the ultimate cost to employers, due to a variety of incentive or discount programs offered to individual employers. However, in Virginia, as is the case throughout most of the country, one of the primary influences on the level of manual rates is the decisions of the organization regulating the rates. In Virginia, this organization is the SCC.

SCC staff and independent actuarial consultants, as well as representatives of the Office of the Attorney General (OAG), examine the various components of the NCCI rate request. A major portion of the request for rate adjustments is based on the most recent loss experience of the industry, or the portion of premium dollars which is needed to finance benefit costs. Other factors included in the rate request include trends in benefit costs (including changes in medical costs and wages) compared to changes in employee payroll, insurance company administrative expenses, changes in the benefit structure, alterations in insurance company tax obligations, and insurer profits.

Most employer costs (about 85 percent) in the State are in the form of premiums paid to private insurance companies, which are based at least in part on the manual rates approved by the SCC. The remaining 15 percent of costs are composed of payments and premiums of self-insured employers or group self-insured associations.

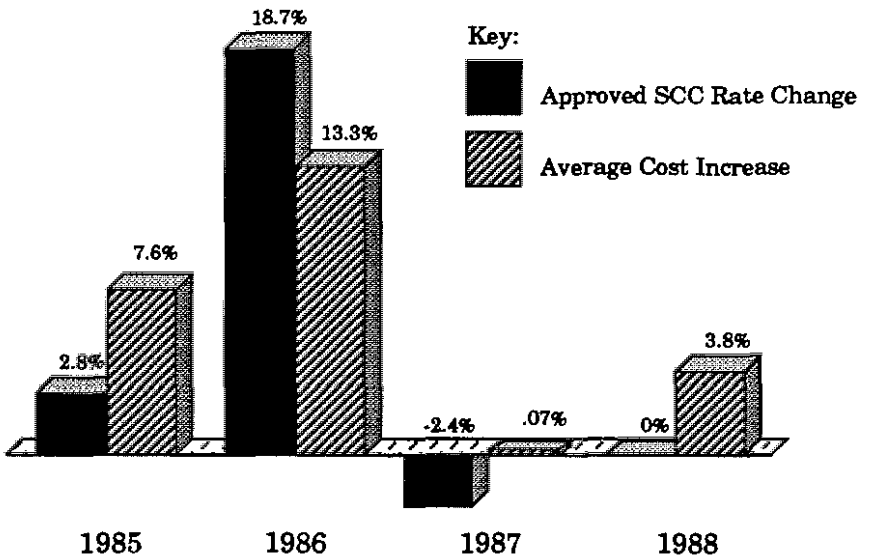
Therefore, it is not surprising that fluctuations in the average cost for all employers, including self-insured employers, tend to follow changes in the manual rates approved by the SCC, as shown in Figure 4. Percentage increases in the average cost from 1985 through 1988 range from .07 percent to 13.3 percent. The average cost is the estimated amount actually paid by employers in the State (minus any dividends) divided by the employers' payrolls (Figure 5).

SCC and NCCI Disagree on Methods Used to Assess Rate Requests. In 1986, the SCC instituted a change in the methodology used to assess the profit component of the rate requests submitted by the NCCI. The new methodology attempts to account for the investment return that insurance companies make on employer premium funds that they hold until the funds are needed to pay claims. This has led to disagreements between the SCC and the NCCI regarding the calculation of the rate of investment return and final rates approved by the SCC.

A specific area of contention — the amount of the premium funds on which the rate of return is based — resulted in the decision by the NCCI not to file

Figure 4

Comparison of Increases in Average Cost to Employers With Rate Changes Approved by the SCC 1985-1988



Note: Actual effective dates of approved rate increases occurred two to four months prior to the beginning of calendar year listed. For example, approved increase shown for 1985 actually became effective October 1, 1984.

Source: JLARC analysis of data provided by National Council on Compensation Insurance, Department of Workers' Compensation, State Corporation Commission, and National Foundation for Unemployment and Workers' Compensation.

Figure 5

Calculation of Average Cost

$$\text{Average Cost} = \frac{\text{Amount of Written Premiums Minus Dividends Paid}}{\text{Amount of Payroll Covered by Policies}} \times \$100 \text{ of Payroll}$$

Source: JLARC adaptation of information from John F. Burton, Jr. and Alan B. Krueger, "Interstate Variations in the Employers' Cost of Workers' Compensation with Particular Reference to Connecticut, New Jersey and New York," in James Chelius, ed., *Current Issues in Workers' Compensation*, W. E. Upjohn Institute for Employment Research, (Kalamazoo, Michigan: 1986).

for a rate adjustment for 1990. The NCCI believes that certain premium funds should not be counted in the rate-making process as funds insurance companies can use to earn investment income. The funds NCCI believes should be excluded relate to approved rate deviations and dividends paid to employers, which the NCCI contends are ultimately returned to the employers. Therefore, according to the NCCI, little if any investment income is made on these funds.

The SCC, on the other hand, asserts that approved rate deviations and dividends are voluntary payments to the employers. There is no guarantee that the funds will be given to the employers. Therefore, they must be counted as potential funds on which investment income can be earned. In addition, an SCC representative stated that the funds are generally held for a period of time before they are given to the employers, so profits are realized through the investment of those funds.

The disagreement has led to a wide disparity in the amount of the overall increase in manual rates requested by the NCCI and the amount ultimately approved by the SCC (Table 3). Consequently, since the SCC began examining insurance companies' rates of return on investments of premium funds (including deviations and dividends) in 1986, manual rates have only been allowed to increase a total of 3.3 percent.

In lieu of filing for a rate adjustment this past year, the NCCI filed a petition for declaratory judgment on the dividends and deviations issue. A petition

Table 3

History of NCCI Rate Requests and SCC Approvals 1984-1988

Approved Effective Date	Amount Requested by NCCI	Amount Approved by SCC
10-1-84	7.2%	2.8%
9-1-85	27.6	18.7
10-1-86	7.4	-2.4
10-15-87	19.7	0.0
11-1-88	25.2	5.7

Source: *National Council on Compensation Insurance 1989 Annual Statistical Bulletin.*

for declaratory judgment is a method by which the filing party hopes to have a particular issue considered by an adjudicatory body, in this case the SCC, outside of a normal hearing process. The NCCI wanted the issue to be considered separately from normal rate hearing proceedings because, according to the NCCI, the issue is sufficiently complex and unique that it should be resolved separately.

SCC staff and the OAG disagreed with the NCCI and filed for dismissal of the petition on the grounds that the issue could not be decided out of the context of a rate hearing. They asserted that the documentation necessary to support a procedural adjustment of this type is primarily the same information necessary for a rate adjustment request.

SCC and OAG representatives also stated that the SCC commissioners have ruled on the issue through the past three rate hearings. They said that the NCCI still has the option to file for a rate hearing and appeal the decision of a rate hearing to the Supreme Court, where the SCC's interpretation of the investment income issue could be tested. The SCC dismissed the petition.

Because the SCC did not receive a response regarding the dismissal of the petition, SCC staff became concerned that insurance company earnings under the current rates may be higher than anticipated due to improved loss experience over the past year. Therefore, the SCC has taken steps to obtain data from the NCCI in order to examine the appropriateness of the current rates. The SCC's actuarial consultants will examine the data to determine if the most recent data indicates that the current rates should be adjusted.

While there does not appear to be an immediate problem, the "tug-of-war" between the regulatory restrictions on premiums and the profitability of workers' compensation insurance will have to be monitored carefully. As previously mentioned, other states have experienced serious problems with enticing insurance companies to underwrite workers' compensation policies when restrictions became too severe for the line of insurance to be profitable.

Discussions with SCC and OAG staff indicate that they do not believe this type of situation will occur in Virginia. SCC staff stated that although Virginia was among the first states to examine investment return as part of workers' compensation rate requests, other states are now adopting similar methodologies. In addition, SCC experts hired to examine past rate requests concluded that the line was still profitable. According to SCC staff, competition among insurance companies to write workers' compensation policies is active, which is a sign that the system is healthy.

III. Vocational Rehabilitation of Injured Workers

Vocational rehabilitation services are considered an important part of most workers' compensation programs. Vocational rehabilitation services include evaluation, counseling, job placement, and occupational training, and are designed to help injured employees return to suitable gainful employment. These services usually focus on either returning injured workers to the same job if possible, or preparing injured workers for employment in another occupation. The following case examples illustrate typical situations where vocational rehabilitation is used with workers' compensation:

> *After severely cutting his hand on a power saw, a lumber yard employee was out of work for several months. Part of the employee's compensation award included vocational rehabilitation services. The vocational rehabilitation counselor provided the employee with vocational evaluation and counseling, and developed a rehabilitation plan, agreed to by the employer, that would assist the employee to return to the same job after a six-month recuperation.*

* * *

> *A construction laborer's foot was amputated after being crushed under a steel beam. The employer disputed the employee's claim for compensation, claiming the employee had violated safety rules. Due to the nature of the injury and the possibility that the case would not be quickly resolved, the deputy commissioner asked the Department of Rehabilitative Services to evaluate the employee's vocational rehabilitation needs. An extensive vocational rehabilitation plan was developed which included vocational counseling, retraining and placement services, as well as time lines and alternatives for funding to ensure the employee received services regardless of the outcome of the dispute.*

Research in the field of vocational rehabilitation indicates its benefits compared to the cost of providing services. For example, several studies have found a benefit-to-cost ratio of five-to-one, indicating that rehabilitation regularly returns more in productivity gains to society than the costs of providing services. In addition, early referral to and onset of vocational rehabilitation services following a work-related injury has been shown to be related to improved return to work rates and recovery of pre-injury earnings.

Most states (as well as the District of Columbia) and the federal government have recognized the importance of vocational rehabilitation for injured workers and have provisions for these services within their workers' compensation

statutes. The need to provide for the vocational rehabilitation of injured workers has long been recognized in Virginia as well. The State's workers' compensation statute, as amended in 1920, provided for the creation of a division for vocational rehabilitation under the direction and control of the Industrial Commission.

Today the Department of Rehabilitation Services (DRS) is responsible for ensuring that disabled Virginians receive rehabilitation services. Due to the importance of vocational rehabilitation services to injured employees, the DWC and the DRS have developed procedures to identify and refer some injured workers to rehabilitation counselors in local DRS offices across the State.

However, these procedures have resulted in some injured workers who may need vocational rehabilitation services being overlooked. Modifying administrative procedures, developing a formal plan of cooperation between the DWC and the DRS, and improving communication to workers' compensation claimants regarding the benefits and consequences of vocational rehabilitation services would improve these procedures.

In addition, statutory guidance is unclear regarding vocational rehabilitation of injured workers. Clarification of legislative intent would provide a better foundation for joint DWC and DRS actions and ensure consistent treatment of injured workers.

Finally, considerable concern was expressed by personnel within the DWC and the DRS regarding the quality of services furnished by some private vocational rehabilitation providers. Therefore, the potential need for State regulation of private sector vocational rehabilitation service providers should be explored.

THE VOCATIONAL REHABILITATION PROCESS

The *Code of Virginia* authorizes the DWC's involvement in the vocational rehabilitation of injured workers. According to §65.1-88 of the *Code*, the employer shall furnish reasonable and necessary vocational rehabilitation training services at the direction of the Industrial Commission. Disputes over proposed services, which must take into account the employee's pre-injury job and wage classifications, age, aptitude and level of education, chance of success in a new vocation, and relative costs and benefits of the services, are decided by the Industrial Commission. The *Code* further requires injured workers to accept vocational rehabilitation training services provided by the employer, or the workers may be barred from receiving further compensation.

Although the DWC has the authority to order vocational rehabilitation services, DWC personnel do not have the expertise to evaluate whether the services are warranted. The DWC and the DRS have therefore established a working

arrangement to incorporate vocational rehabilitation into the workers' compensation process.

Although the DWC and the DRS work cooperatively to ensure that some injured workers are referred for vocational rehabilitation services, there are three problems related to the current process. First, procedures developed by the two agencies to identify and refer injured workers systematically exclude large numbers of injured workers who may need a vocational rehabilitation evaluation and services. In addition, the timing of the DRS supervisor's review of injured workers' files delays the identification of some injured workers needing vocational rehabilitation evaluations.

Second, the DWC and the DRS have not developed a formal cooperative agreement concerning vocational rehabilitation referrals and each agency's role in the process. The agencies have taken a positive step by cooperating and working together. However, the DWC has been hesitant to enter into a formal cooperative agreement with the DRS.

Third, information that is distributed by the DWC does not sufficiently explain the purpose and expected outcomes of vocational rehabilitation services. According to DRS personnel, injured workers are often not receptive to vocational rehabilitation services. Lacking sufficient knowledge, injured workers may resist cooperating with the DRS and other service providers, jeopardizing their ability to return to work as well as their continued eligibility for benefits.

Identification and Referral of Workers' Compensation Claimants

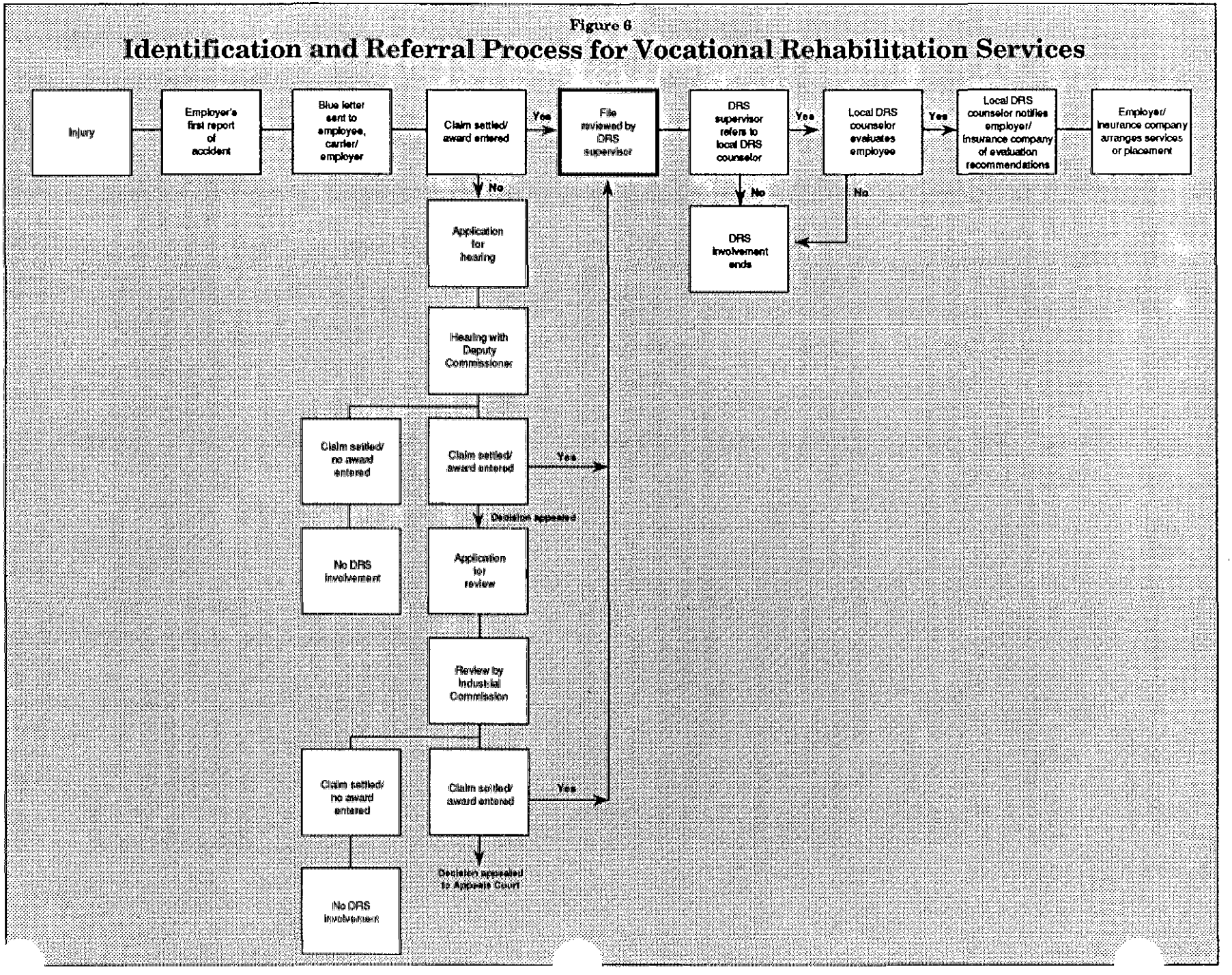
The DWC provides work space for three DRS employees, including one supervisor and two clerical staff, at its Richmond office. The DRS supervisor is responsible for reviewing claimant files and determining if the injured workers should be referred to local DRS counselors for vocational evaluations. The DRS supervisor reviews approximately 12,000 workers' compensation files each year. Figure 6 demonstrates the current procedure at the DWC for identifying and referring injured employees to local DRS offices.

Major Steps in the Process. The awards unit of the DWC's claims division forwards workers' compensation files to the DRS supervisor after the claimant's compensation has been determined. Only claims involving compensation for time lost from work are reviewed by the DRS supervisor. Minor injuries and those with medical expenses less than $500, which together account for the majority of injuries filed with the DWC each year, are not reviewed by the DRS supervisor because the employee usually does not lose time from work and no workers' compensation file is created.

Medical information in the file helps the DRS supervisor to assess if the claimant will be physically able to return to his or her previous occupation. If no

Figure 6

Identification and Referral Process for Vocational Rehabilitation Services



Source: JLARC analysis, 1989.

medical information is contained in the file, the supervisor returns the file to the DWC file room and requests another review in 30 days.

Injured workers considered appropriate for vocational evaluation services are referred to counselors in local DRS offices. From FY 1987 through FY 1989, the DRS supervisor made 3281 workers' compensation referrals to local DRS counselors (Table 4). Two-thirds of those referrals were made by the DRS supervisor after reviewing claimant files. The remaining referrals were made at the request of other sources including local DRS counselors, claimants' physicians and/or attorneys, and claimants themselves.

After receiving referrals from the DRS supervisor at the DWC, counselors in local DRS offices attempt to contact the injured worker and set an appointment to obtain more information regarding his or her need for a vocational evaluation. According to DRS policy, the counselor's first priority is to determine if the claimant will be able to return to the same job with the same employer. If this is not possible, the counselor will try to (in order of priority): (1) return the worker to a different job with the same employer, (2) return the worker to the same or another job with a different employer, or (3) arrange vocational retraining for the worker. If the claimant has already returned to work, or has failed to respond to the counselor's attempts at contact after 60 days, the case is closed and the insurance company or employer is notified.

Screening Criteria. In addition to the initial consideration regarding the employee's injury, the DRS supervisor uses other criteria to decide if cases should be reviewed or referred. First, the DRS supervisor determines if the employer or carrier is one with which he has a verbal agreement allowing automatic referrals to DRS for vocational evaluations. If the DRS supervisor does not have an agreement with the employer or carrier, the injured employee's file is not reviewed.

Table 4

DWC Referrals to Local DRS Counselors FY 1987 - FY 1989

Reason for Referral	FY 1987	FY 1988	FY 1989	Totals
DRS File Review	628	746	782	2156
Other Source Request	341	341	443	1125
Totals	969	1087	1225	3281

Source: JLARC analysis of data provided by DRS supervisor, 1989.

Second, workers with certain types of serious injuries (e.g., spinal cord injuries, amputations, and loss of vision or hearing) receive automatic referrals to DRS because of the severity of their injuries. These types of injuries will almost always need some vocational rehabilitation services because the workers are less likely to be able to return to their pre-injury employment.

Third, the DRS supervisor does not review files unless the employee is a resident of Virginia. Therefore, non-residents injured while working within Virginia are not referred for DRS vocational evaluations.

Early Identification Procedures Should Be Revised

According to procedures in effect during the review of the DWC, the DRS supervisor is not likely to see workers' compensation files until an award has been entered. In addition, the DRS supervisor reviews a file only if the employer or insurance company has agreed to allow a direct referral to a local DRS office when the DRS supervisor believes a vocational evaluation is needed. These procedures delay the DRS supervisor's review of files and automatically eliminate several thousand claimants from access to an evaluation of their vocational rehabilitation needs. Early identification procedures could be improved if: (1) claimant files were reviewed earlier and (2) more claimant files were reviewed.

Timing of DRS Review. Two problems exist related to the timing of the DRS supervisor's review of claimant files. First, because workers' compensation files are not reviewed by the DRS supervisor until an award has been entered, claimants and the deputy commissioners do not receive early information regarding the need for vocational rehabilitation services. This means that no recommendations regarding the injured worker's need for vocational rehabilitation services are available and services will not be awarded at the time of the hearing. Exceptions may occur if a deputy commissioner has previously requested that the DRS supervisor review a file on the docket. However, according to the DRS supervisor, he only receives approximately six such requests per year.

A review of 27 Industrial Commission opinions related to vocational rehabilitation services that were issued between 1985 and 1988, as well as interviews with commissioners and deputy commissioners, indicated that the Industrial Commission usually orders vocational rehabilitation services only when there is prior evidence documenting the need for these services. In only one case out of the 27 that were reviewed did the Industrial Commission itself initiate an order for vocational rehabilitation services without such prior information.

According to DWC documents and staff, the Industrial Commission will order vocational rehabilitation when evidence documents the need for services. The Industrial Commission has used the following types of evidence in the past: (1) a written rehabilitation plan identifying the claimant's abilities and vocational goals,

(2) a recommendation for services from the claimant's physician or a specific request for services by the claimant, (3) documentation that jobs within the injured worker's capacity are available within the local labor market, and (4) documentation as to whether services have been previously provided or offered by the employer or insurance company.

These types of information would routinely be included in vocational rehabilitation evaluations and rehabilitation plans. However, as previously stated, these documents are not usually available to the deputy commissioner or Industrial Commission at the time a hearing or review occurs due to the timing of the DRS supervisor's review.

The second problem regarding timing is that the DRS supervisor's review of claimant files usually occurs later than is considered appropriate for effective intervention. This means that claimants are not gaining access to services when they might benefit from them the most. A review of 30 workers' compensation files indicated that on average it takes four months from the time of injury for a claim to be settled and an award entered, meaning that it usually takes at least that long before the DRS supervisor reviews the file.

Early intervention is generally believed to enhance the outcomes of vocational rehabilitation. For example, a 1986 study of vocational rehabilitation outcomes conducted by the Workers' Compensation Research Institute (WCRI) demonstrated the benefits of early intervention. The study determined that early intervention influenced higher rates of return to work, completion of the vocational program, and earnings recovery. The WCRI study found that 71-78 percent of the claimants who began participating in vocational rehabilitation programs within three months of their injuries returned to work. These results compared favorably with a 67-71 percent return to work rate for claimants who began vocational rehabilitation programs within 12 months and a 61-63 percent return to work rate for claimants who began vocational rehabilitation programs within 36 months of the injury. In conducting the study, the WCRI employed standard statistical techniques to control for other contributing factors such as age, gender, medical diagnosis, occupation, industry, and earnings at time of injury.

Initiating a rehabilitation program within as little as three months of receiving a work-related injury would require early intervention by DRS staff to begin the review, referral, and evaluation process. DRS officials suggested that a reasonable guideline would be for the DRS supervisor to review files within 30 days of the DWC opening the workers' compensation claim. Following this guideline would also provide deputy commissioners with the necessary information in time to make a decision at the hearing as to whether vocational rehabilitation services should be ordered.

Recommendation (5). **The DWC and the DRS should develop procedures to ensure that workers' compensation claims are reviewed by the DRS supervisor or other personnel within 30 days after a file has been**

created by the DWC. At a minimum, the review should determine whether, based upon the nature of the injury or disability and the medical information related to the case, the case should be referred for a vocational rehabilitation evaluation and development of a vocational rehabilitation plan. If a referral appears warranted, the DRS supervisor should notify the insurance company or the self-insured employer, as well as the claimant. In addition, the DRS supervisor should ensure that his determination becomes part of the claimant's file. The insurance company or self-insured employer would still be responsible for choosing the vocational rehabilitation provider to perform the evaluation.

Referral Agreements with Insurers. A total of 30 self-insured employers and insurance companies have verbally agreed to allow the DRS supervisor to refer their injured workers to local DRS offices for vocational rehabilitation evaluations. When the DRS supervisor encounters a file from an employer or insurance company with which he does not have a referral agreement, the file is returned to the DWC file room without being reviewed. The majority of workers' compensation claims are from the approximately 260 insurance companies, 113 self-insured employers, and 12 group self-insured associations that have not agreed to this automatic referral process. Although interviews with some of these insurance companies indicated that they arrange for vocational rehabilitation services, in effect there is no way to monitor whether these claimants are receiving vocational rehabilitation services when needed.

Data from the DWC indicated that the 30 self-insured employers and insurance companies with which the DRS supervisor has verbal agreements accounted for approximately 20 percent of the workers' compensation claims filed during 1987 and 1988 (Table 5). Of these claims, approximately seven percent, or 1,518 injured workers, were referred to local DRS offices for a vocational rehabilitation evaluation.

Determining the need for vocational rehabilitation among the other 85,000 injured workers during these two years is difficult because these files were not reviewed by the DRS supervisor. However, assuming the rate of need for vocational rehabilitation among these injured workers was equivalent to those whose files were reviewed by the DRS supervisor, as many as 3,000 injured workers each year were deprived of an opportunity for early identification and referral to vocational rehabilitation services during 1987 and 1988. Since such a potentially high number of claimants may not be receiving needed rehabilitation services, it appears that the DRS supervisor should be reviewing all claims involving lost work time.

Recommendation (6). **The DWC and the DRS should develop procedures to ensure that all lost time files, including those from insurers who have not agreed to automatic referrals to DRS vocational rehabilitation evaluation services, are reviewed by the DRS supervisor or other personnel within 30 days after the file has been created by the DWC.**

Table 5

Workers' Compensation Files from Insurers Who Allow DRS Vocational Rehabilitation Referrals Compared to Total Number of Files Established 1987-1988

Calendar Year	Number of Files Established	Number of Files Reviewed*	Difference
1987	52,033	10,860	41,173
1988	54,569	10,374	44,195
Totals	106,602	21,234	85,368

* Actual number of files reviewed may be slightly higher since the number of claims from third party claims administrators could not be quantified.

Source: JLARC analysis of DWC statistical reports, 1989.

The DWC and the DRS Should Develop a Cooperative Agreement

The working relationship between the DWC and the DRS appears to be cooperative and flexible. However, a formal written cooperative agreement is needed to specify the expectations and responsibilities of the two agencies in identifying and addressing the needs of injured workers regarding vocational rehabilitation services.

Both agencies have a mutual interest, but different responsibilities, in ensuring that the vocational rehabilitation needs of injured workers are addressed. The Industrial Commission has the authority to order the provision of services, but DWC personnel do not have the expertise to evaluate whether vocational rehabilitation services are warranted. DRS staff provide this expertise on site at the DWC, but do not have a statutory obligation to do so.

A formal written agreement between the agencies appears necessary for three reasons. First, according to DRS officials, §51.5-2 of the *Code of Virginia* requires the DRS and other agencies providing services to disabled persons to develop a plan of cooperation to promote the fair and efficient provision of rehabilitative and other services to persons with disabilities. Second, developing a formal written agreement would help each agency to clarify its expectations of the current working relationship by: (1) documenting each agency's commitment in terms of

personnel and resources, and (2) outlining the differing responsibilities of DWC and DRS personnel. Third, a written cooperative agreement would ensure continuity of services in case of personnel changes.

Recommendation (7). **The Department of Workers' Compensation and the Department of Rehabilitative Services should develop a formal written plan of cooperation. The plan should establish the roles and responsibilities of each agency regarding identifying and addressing the needs of injured workers for vocational rehabilitation services. The cooperative agreement should strive to maintain the level of communication and flexibility that currently characterizes the working relationship between the two agencies.**

Dissemination of Information to Injured Employees Regarding Vocational Rehabilitation Services Appears Inadequate

Reluctance of injured workers to accept and cooperate with vocational rehabilitation services is a major problem encountered by DRS personnel and private providers. Injured workers often do not understand how vocational rehabilitation relates to workers' compensation or that the intent of the Act is for them to return to productive employment.

DRS personnel and private vocational rehabilitation providers indicated that workers' compensation claimants are often complacent and unwilling to cooperate with rehabilitation services while they are receiving compensation. According to DRS personnel, claimants become accustomed to not working and do not look to the future when compensation payments will expire. Better education of injured employees regarding vocational rehabilitation was suggested as a method to address this problem.

Although the DWC sends an informational booklet to injured employees discussing their rights and obligations under the Act, material relating to vocational rehabilitation is subsumed within a section referring to medical treatment. In addition, the information provided does not adequately describe the process for determining the need for, the purpose of, or the types of vocational rehabilitation services available to injured workers.

Recommendation (8). **The Department of Workers' Compensation should revise the informational booklet entitled "A Workers' Compensation Guide for Employees" by adding a subsection devoted to vocational rehabilitation services. Current information in the booklet regarding vocational rehabilitation should be transferred to the new subsection and supplemented to inform injured workers of the purpose for vocational rehabilitation services, the types of services available, and the employee's responsibilities to cooperate with the services that are provided or dispute their appropriateness before the Industrial Commission.**

UNCLEAR LEGISLATIVE INTENT AND STATUTORY GUIDANCE

Under §65.1-88 of the *Code of Virginia*, the Industrial Commission is empowered to order "reasonable and necessary vocational rehabilitation training services" and to approve proposed services in the case of disputes. However, the statute does not reflect the types of vocational rehabilitation services that are routinely available to injured workers or acknowledge the comprehensive range of services that are found in other states. Finally, the statute does not clearly specify the expected outcomes of vocational rehabilitation.

In the absence of clear statutory intent, the Industrial Commission and the courts have decided the types and purpose of services included within the Act. The General Assembly may wish to consider clarifying its intent regarding vocational rehabilitation.

Statutory Reference to Vocational Rehabilitation Appears Too Narrow

Although §65.1-88 of the *Code of Virginia* provides for vocational rehabilitation of injured employees, only one type of service, vocational rehabilitation training, is specifically identified. It is unclear, however, whether the legislature intended to restrict the types of vocational rehabilitation under the Act only to vocational rehabilitation training services.

Both the Industrial Commission and the courts have cited §65.1-88 in disputes involving a wide range of vocational rehabilitation services, including but not limited to training. For example, in some cases the Industrial Commission has ordered vocational evaluations of injured workers.

The Act also lacks the comprehensiveness found in other states. The majority of other states use broader terms to identify the vocational rehabilitation services that are provided through their workers' compensation statutes.

The Concept of Vocational Rehabilitation Encompasses a Broad Range of Services. Vocational rehabilitation training, whether for a specific job or in the form of education, is only one of many types of vocational rehabilitation services and may not be applicable for the majority of workers' compensation cases. DRS personnel and private vocational rehabilitation providers indicated that training is usually the rehabilitation option of last resort in workers' compensation cases. Other vocational rehabilitation services typically provided in workers' compensation cases include labor market assessments, vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, and follow-up.

The first step for determining whether there is a need for vocational rehabilitation usually involves a vocational evaluation. According to private provid-

ers of vocational rehabilitation services, vocational evaluations should assess the worker's physical capabilities, education, aptitude, work history, transferable skills, interests, and hobbies. In addition, the evaluation should address whether the employee will be able to return to the same or another job with the same employer, or if the individual characteristics of the employee can be matched with other job opportunities in the local labor market. A rehabilitation plan recommending a specific rehabilitation service is usually developed after a vocational evaluation has been conducted.

Judicial Interpretations of the Statute Have Expanded the Range of Services. Both the Industrial Commission and the Supreme Court of Virginia appear to broadly interpret the types of vocational rehabilitation services that are under the purview of §65.1-88. A review of 27 Industrial Commission opinions related to vocational rehabilitation services and three cases before the Supreme Court of Virginia indicated that both judicial bodies have cited §65.1-88 of the *Code of Virginia* when deciding cases dealing with employees' refusal of several types of vocational rehabilitation services, including vocational evaluations and job placement. Therefore, the actions of the Industrial Commission and the Supreme Court appear to have expanded the range of services under §65.1-88 to include several types of vocational rehabilitation activities and not limit them to training services.

In addition, the Industrial Commission has cited §65.1-88 in conjunction with §65.1-63 of the *Code*, which refers to consequences for an employee who refuses employment within his or her capacity. Citing the two sections together has the effect of expanding the types of vocational rehabilitation services available to injured employees to include job placement services provided by vocational rehabilitation counselors. Most employment opportunities in dispute result from job placement services provided by vocational rehabilitation counselors.

Other States Provide for Comprehensive Vocational Rehabilitation Services. Workers' compensation laws in most states provide for a wide range of vocational rehabilitation services to injured employees. Statutes in 46 states and the District of Columbia use broader language than Virginia in referring to rehabilitation services available for injured workers. Terms used in these states and the District of Columbia include: vocational rehabilitation services, vocational rehabilitation, vocational assistance, and rehabilitation program. Virginia is the only state whose statutes refer exclusively to vocational rehabilitation training, potentially limiting injured workers' access to other more appropriate vocational rehabilitation services.

In addition, workers' compensation statutes in 16 states identify the specific types of services associated with vocational rehabilitation for injured workers (Exhibit 4). Eight states identify a comprehensive range of services that may include: vocational evaluations, vocational counseling, job modification, job development, job placement, on-the-job training, training, and education. Seven other states refer broadly to rehabilitation services and specifically include retraining and

Exhibit 4

Specific Vocational Rehabilitation Services Identified in Other States' Statutes

State	Statutory Reference
Florida	Retraining, testing, counseling, evaluation, and job placement
Kansas	Retraining and job placement, evaluation
Louisiana	Training and education
Maryland	Coordination of medical services, assessment evaluation, counseling, plan development and monitoring, training, job development, and job placement
Massachusetts	Evaluation, counseling, education, work place modification, retraining, on-the-job training, and job placement
Minnesota	Evaluation, counseling, job analysis, job modification, job placement, on-the-job training, or retraining
Montana	Evaluation, planning, delivery of goods and services
New Mexico	Evaluation, counseling, and job placement
North Dakota	Evaluation, counseling, education, work place modification, retraining including on-the-job training, and job placement assistance
Kentucky	Retraining and job placement
Michigan	Retraining and job placement
Nebraska	Retraining and job placement
New Hampshire	Retraining and job placement
Oklahoma	Retraining and job placement
South Carolina	Retraining and job placement
Vermont	Retraining and job placement

Source: JLARC analysis of state workers' compensation statutes, 1989.

job placement. Finally, one state, Louisiana, defines rehabilitation as meaning training and education for suitable gainful employment.

By specifying the types of vocational rehabilitation services available to injured workers, statutes in other states clarify which services are considered appropriate for workers' compensation cases. At a minimum, if Virginia were to drop the word "training" from its workers' compensation law, the intent to allow a wider range of rehabilitative options for injured workers would be clearly established.

Recommendation (9). **The General Assembly may wish to revise §65.1-88 of the *Code of Virginia* to remove the word "training" when used to describe vocational rehabilitation services available to injured workers. In addition, the General Assembly may wish to further clarify §65.1-88 by providing a list of the vocational rehabilitation services which could be provided to injured workers. Such services might include: vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education, and retraining.**

Identification of Vocational Rehabilitation Outcomes is Needed

Unlike statutes in many other states, the Workers' Compensation Act of Virginia does not specifically state the intent or prioritize the expected outcomes of vocational rehabilitation services received by injured workers. This lack of stated intent or expected outcomes results in insufficient guidance for determining when vocational rehabilitation services are appropriate for injured workers.

The intent of vocational rehabilitation is generally consistent among the 30 states (Appendix G) which specify its purpose in statute: to restore the employee to suitable gainful employment. In addition, workers' compensation statutes in eight of the 30 states provide guidance for prioritizing the expected outcomes of vocational rehabilitation services. This is usually done through establishing some variation on the following criteria: (1) returning to the same job with the same employer, (2) returning to a different job with the same employer, (3) returning to work at the same or a different job with a different employer, and (4) retraining.

During the 1989 legislative session, the General Assembly attempted to clarify the intent of §65.1-88. A statement was added specifying that the determination of the types of vocational rehabilitation training services to be provided to an employee shall "take into account the employee's pre-injury job and wage classification; his or her age, aptitude and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services." Although this revision is a first step forward, it still does little to clarify the objective for offering vocational rehabilitation services.

Lacking specific legislative guidance, the Industrial Commission has offered its own interpretation of the purposes of vocational rehabilitation. In a 1988 opinion, the Industrial Commission stated that reasonable and necessary vocational rehabilitation services have two objectives: "(1) to return an injured employee to gainful employment, and (2) to reduce the compensation liability of the employer."

While this definition appears to begin clarifying the objectives for vocational rehabilitation, further clarification appears necessary to indicate the relative priority of the two objectives. The primary emphasis of vocational rehabilitation should be to return injured workers to gainful employment. Undue emphasis on reducing the compensation liability of the employer, without appropriate consideration of the worker, could contribute to the types of problems described in the next section of this report. Clarification of the purpose and expected outcomes of the vocational rehabilitation services within the Act could help to ensure that appropriate services are provided to injured workers.

Recommendation (10). **The DWC should refine its definition of the purpose of vocational rehabilitation to indicate an emphasis on returning injured employees to gainful employment. Reducing the compensation liability of the employer should be stated as a second priority. Further, the General Assembly may wish to amend §65.1-88 of the *Code of Virginia* to clarify the purpose and expected outcomes of the vocational rehabilitation services addressed by the statute.**

PRIVATE REHABILITATION AND JOB PLACEMENT SERVICES MAY NEED REGULATION

The vocational rehabilitation services provided to injured employees are not regulated or otherwise controlled by the State. There is a perception among the Industrial Commissioners and deputy commissioners, DRS personnel, and some insurance companies that services provided by certain private vocational rehabilitation vendors are designed primarily to assist insurance companies in forcing injured employees off of compensation. Although evidence did not indicate the practice was widespread, it did appear to occur with the delivery of some job placement services. Part of the problem appears to be that the private vocational rehabilitation industry is not regulated or otherwise controlled by the State.

Tighter Controls Are Needed over Job Placement Services

DWC deputy commissioners and DRS personnel indicated concern over the use of private and insurance-company-owned rehabilitation and job placement services. A major criticism of some private services was that they may be primarily oriented toward placing the workers' compensation claimant in the first available

job that can be found. Thus, the focus of their efforts may be to get the claimant off compensation and save the carrier further expense, rather than to find a suitable job opportunity for the claimant.

Section 65.1-63 of the *Code of Virginia* requires employees to cooperate with efforts to procure suitable work, which was defined by the Supreme Court of Virginia in 1985 as employment within the employee's residual capacity resulting from the accident. If employees do not cooperate, they face loss of compensation unless the Industrial Commission rules that the refusal was justified.

The Virginia Supreme Court has held that the Workers' Compensation Act does not require employers to reemploy their injured workers. Rather, according to the Supreme Court, the Act encourages employers to procure work for partially incapacitated employees. Therefore, some employers and insurance companies hire vocational rehabilitation specialists to assist in this process. Industrial Commission rules allow insurance companies to suspend compensation payments pending a change-in-condition hearing before a deputy commissioner, which may put pressure on claimants to accept any job that will provide income.

Many private rehabilitation providers attempt to provide quality services to workers' compensation claimants. However, according to deputy commissioners who hear these cases, other providers will only inform claimants of job advertisements in newspapers or arrange interviews for questionable jobs. If the claimant does not accept one of these jobs, the rehabilitation specialists will inform the insurance company that the claimant has refused to cooperate with placement efforts.

Deputy commissioners, claimants' attorneys, and insurance company representatives indicated that job placement practices were sometimes exclusively designed to force claimants off of compensation, as the following case examples demonstrate:

> *An insurance company claims manager reported that, prior to his becoming claims manager, some private vocational rehabilitation providers would come into the company's office, review workers' compensation files, and identify claimants for their services. The marketing approach used by these vocational rehabilitation providers made it clear that they were less interested in providing the claimants with suitable vocational rehabilitation services than they were in helping the company to get the claimants off of compensation. When he assumed his current responsibilities, the claims manager indicated that he stopped the practice due to the questionable orientation and procedures of the providers.*

* * *

A deputy commissioner told of a hearing requested by an insurance company in which the claimant was a 50-year-old former state trooper disabled with a heart condition. A vocational rehabilitation specialist hired by the insurance company had only provided interview opportunities as counter help in fast food establishments, which did not take into account the types of skills and abilities used by the claimant in his previous occupation. When the claimant refused to cooperate, the insurer filed for a hearing to have the claimant's compensation terminated. This case resulted in a compromise settlement.

* * *

A claimant who had been a construction worker received work-related back and neck injuries. Although the claimant lived in West Virginia, the rehabilitation specialist hired by the employer's insurance company wanted the claimant to drive to Fairfax County for interviews involving jobs that would have required standing for extended periods. According to the deputy commissioner assigned to the case, the specialist did not consult with the claimant's physician regarding whether the claimant could drive or stand for extended periods. The insurance company still requested a hearing to terminate the employee's compensation for non-cooperation, which was denied by the deputy commissioner.

* * *

A claimant previously employed as a day shift laborer received a work-related foot injury that prevented her from continued employment in that occupation. Through a rehabilitation specialist hired by the insurance company, the claimant received a job referral as a private security guard on the 4:00 to midnight shift at a State office building. The claimant did not have a driver's license, and if she had taken the job would have had to walk a distance of one mile to the bus stop nearest her home. Although the rehabilitation specialist knew the claimant did not have a driver's license, he still reported the claimant's refusal of the job as unjustified. In addition, the rehabilitation specialist took the claimant to one interview for a food service job that would have required her to stand for several hours.

Due to the occurrence of these types of questionable practices related to job placement services, standards for determining an employee's need for job placement services should be established. Revisions to §65.1-63 should be considered that would identify the conditions under which job placement and procured employment should be allowed.

Recommendation (11). **The General Assembly may wish to amend §65.1-63 of the *Code of Virginia* to clarify the conditions under which employment can be procured for injured employees. The amended section would state "If an injured employee refuses employment procured for him suitable to his capacity, and which takes into account the employee's pre-injury job and wage classifications, age, aptitude and level of education, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.**

The Need for Vocational Rehabilitation Regulation Should be Assessed

The private vocational rehabilitation industry in Virginia operates without State regulation. Although many vocational rehabilitation providers in the private sector obtain some form of professional certification, the industry appears to be the only "helping profession" without State licensure requirements for private practitioners. There is a general concern among some personnel at the DWC and the DRS, claimants' attorneys, and some private rehabilitation providers over the lack of State regulation of the industry.

In Virginia, licensure is required for private practice in most professions that provide services to help people undergoing personal crisis. Examples of professionals who must be licensed in order to sell their services in the private sector include counselors, psychologists, and social workers. In addition, the State regulates employment agencies and employment counselors acting as brokers for persons seeking jobs and employers with positions to fill. Although some private vocational rehabilitation providers interviewed by the study team had obtained certification from professional organizations, this is not required by Virginia law. All seven private vocational rehabilitation providers interviewed by the study team stated there was a need for some control within the industry.

The DRS periodically approves private vendors from whom it purchases vocational rehabilitation services. However, the approval process ensures primarily that the vendor is a licensed business and complies with State and federal labor laws, the Civil Rights Act of 1964, and the Rehabilitation Act of 1973. None of these laws require certification or licensure of vocational rehabilitation staff. In addition, private vocational rehabilitation providers who do not contract with DRS are not required to meet even these minimum requirements to practice in Virginia.

Recommendation (12). **The General Assembly may wish to direct the Department of Commerce to assess the potential need for State regulation and licensing of vocational rehabilitation professionals.**

IV. Claims Management

The Department of Workers' Compensation (DWC) is responsible for processing, managing, and adjudicating all workers' compensation claims in Virginia covered by the Workers' Compensation Act. In addition to processing new claims, the agency has continuing responsibility for managing the ongoing, or open, claims from previous years.

Responsibility for processing workers' compensation claims at the DWC involves two types of management functions, administrative and judicial. Administrative management functions include opening a claim file, entering the workers' compensation award, and maintaining the physical file.

Judicial management functions include conducting claims examination activities, convening hearings and reviews to adjudicate disputes regarding a claim's compensability, and determining the amount and duration of the award. The DWC also attempts to resolve certain kinds of disputes without holding a hearing through alternative dispute resolution.

Review of the administrative management functions indicates that improvements are needed concerning the activities of the DWC, employers, and insurance companies regarding notification to the agency of work-related injuries. Review of the DWC's judicial management procedures indicates that two actions should be taken to reduce the waiting period for hearings and reviews. In addition, alternative dispute resolution activities should be continued to reduce the case load of the deputy commissioners.

ADMINISTRATIVE MANAGEMENT OF CLAIMS

Assessment of procedures for the administrative management of claims and of new workers' compensation claim files created between 1986 and 1988 indicates that the DWC generally appears to perform these administrative functions in a timely and efficient manner. The agency responds quickly to notices it receives of work-related injuries, reviews and enters compensation awards accurately, and utilizes effective procedures to monitor claims at regular intervals to ensure they are progressing through the internal process in a timely manner. In general, the DWC attempts to notify claimants of their rights under the Act as quickly as possible. In addition, most responsibilities related to administrative management of claims are clearly delineated within the claims division.

However, these internal procedures do not ensure that claimants are receiving benefits in a timely fashion. Two problems were noted regarding the

timeliness and the methods of employers and insurers notifying the DWC of work-related injuries. First, employers and insurance companies are not complying with State laws requiring them to notify the DWC of major work-related injuries in a timely manner. Stricter enforcement of the DWC's sanctioning authority in conjunction with a minor revision to statutory reporting requirements could resolve this problem.

Second, the DWC is out of compliance with statute because of the alternative reporting mechanism it has established for certain injuries. The DWC has established separate reporting requirements and procedures for minor injuries (which do not result in claims for workers' compensation or the creation of a claim file) which are different from the requirements for other injuries. Although the different reporting requirements appear to be logical and reasonable, they are technically in violation of statutory requirements.

Overview of Administrative Claims Management

The administrative claims management process (or claims processing functions), include creating, updating, and maintaining claimant files. Three units within the DWC's claims division have responsibilities for the claims processing function: (1) the first report unit, (2) the awards unit, and (3) the records unit (Figure 7).

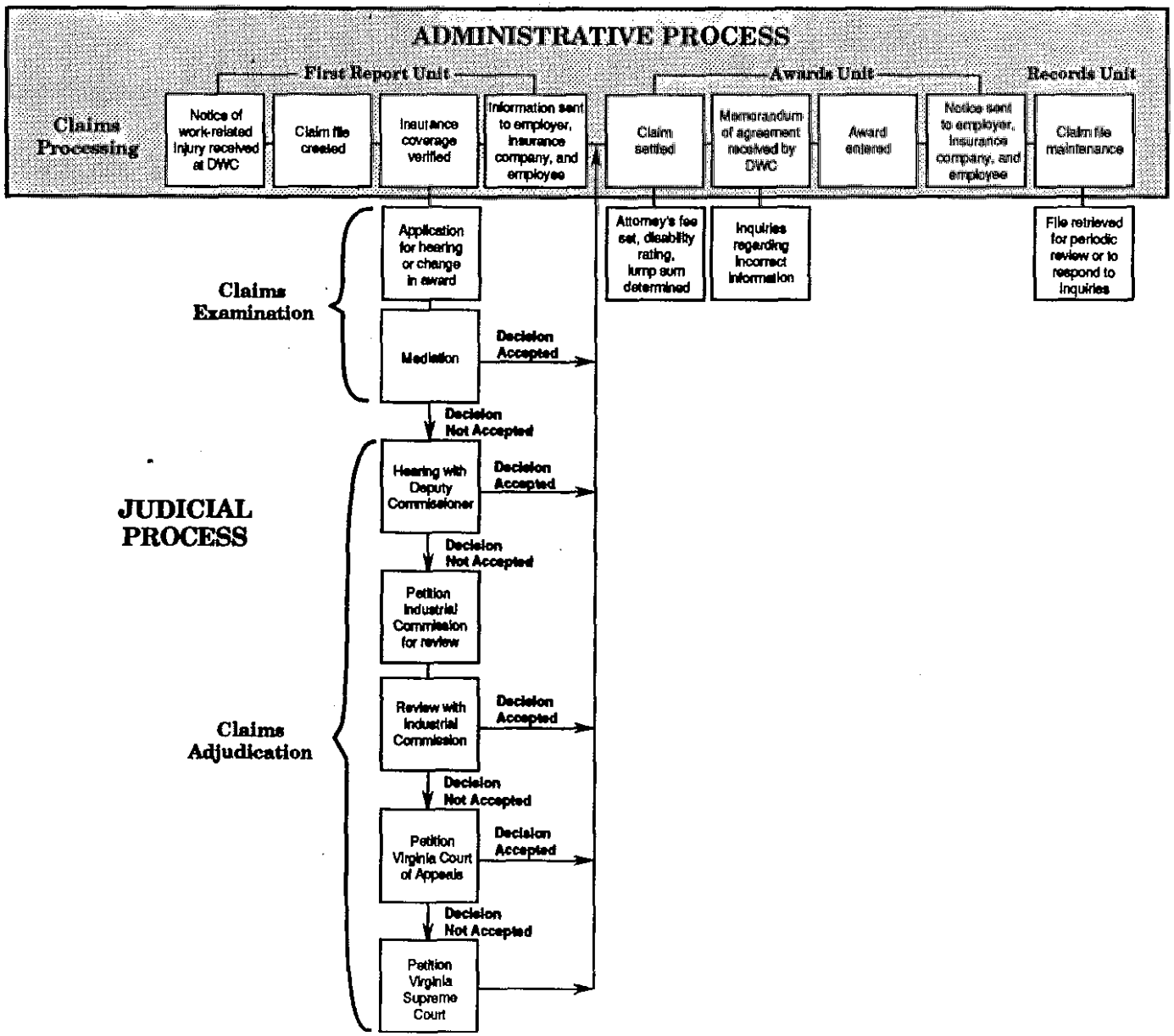
For each new claim, the DWC creates a file. A typical workers' compensation claim file contains information regarding: (1) the claimant, employer, and insurance company; (2) the nature and extent of the claimant's work-related injury; (3) the injured worker's average weekly wage; and (4) the medical treatment received by the injured worker.

Between 1986 and 1988, over 155,000 new claim files were established with the agency (Table 6). The majority of workers' compensation claims proceed from the creation of a claim file, through the entering of an award for compensation, and culminate in the closing of the file after the period of compensation has expired. A smaller number of new claims, about 43 percent, are closed without a compensation award being entered. Each type of action requires administrative processing on the part of the claims division.

Responsibilities of the First Report Unit. The first report unit is responsible for creating new files when the DWC is notified of a work-related injury. In addition to the "hard," or paper, copy of the file, the first report unit also enters information regarding the injury, the employee and employer, and the insurance company into the DWC's computer system. Sufficient checks appear to be in place to ensure that electronic data entry is accurate.

Figure 7

Overview of Administrative and Judicial Processes



Source: JLARC analysis, 1989.

Table 6

Workers' Compensation Claims Processed by the Department of Workers' Compensation, 1986-1988

	1986	1987	1988	Total
Claims Established	49,046	52,033	54,569	155,648
Awards Entered	42,691	43,575	46,522	132,788
Awarded Cases Closed	35,040	34,481	33,671	103,192
No Award Cases Closed	19,727	23,834	23,482	67,043

Source: Industrial Commission of Virginia, *1988 Statistical Reports*, January 1989.

The DWC acknowledges its receipt of information regarding an injury by sending a form called the "blue letter" to the employee, employer, and insurance company. This form summarizes the information that the DWC has received and indicates any additional information needed for the file.

The copy of the blue letter that is sent to the employee contains information regarding the employer's responsibilities to provide workers' compensation coverage and the conditions under which the employee may seek compensation and payment of medical bills related to the injury. A copy of the DWC's informational booklet, entitled *A Workers' Compensation Guide for Employees*, accompanies the copy of the blue letter that is sent to the employee.

Responsibilities of the Awards Unit. The awards unit approves or rejects compensation agreements between the employee, employer, and insurance company and enters the award into the file and the computer. Compensation agreements are executed on a form called the memorandum of agreement, which sets out the amount and duration of compensation. Approval or rejection of the memorandum of agreement depends upon whether all required information is completely and accurately provided. Once all of the correct information has been received, notice of the DWC's approval of the memorandum of agreement is mailed to the employee, the employer, and the insurance company using a standard form.

Responsibilities of the Records Unit. On average, the DWC maintains files on almost 200,000 claims. The records unit is responsible for maintaining, updating, and controlling the movement of files within the agency. The records unit staff match incoming mail with files, pull and deliver files to other personnel throughout the DWC, and search for files that cannot be found in the file room. Files that are needed by other personnel in the DWC move in and out of the file room regularly, as other personnel in the DWC need the files to respond to inquiries for information, enter awards, and for other reasons.

Additional Administrative Management Functions. Two smaller units also have responsibilities related to claims processing. First, the mail room receives incoming mail and routes it to the appropriate destination within the agency. Second, the microfilm unit is responsible for identifying files appropriate for microfilming and coordinating the process. Closed files that have not had any activity for three years are microfilmed and then destroyed.

Improvements Are Needed In Reporting Injuries to the DWC

The DWC typically becomes aware of work-related injuries in one of three ways. First, the employer or insurance company may notify the DWC of major injuries by filing the Employer's First Report of Accident form. Second, the DWC may be informed of major injuries when employees or their representatives file a claim directly with the agency. Third, employers and insurance companies may file a monthly report of minor injuries for certain injuries.

Problems were observed regarding the timeliness with which employers notify the DWC of work-related injuries and with monthly reporting for minor injuries. Although workers usually notify their employers immediately when they receive work-related injuries, employers and insurance companies are not notifying the DWC of major injuries within the statutory time limit. The DWC has not sufficiently used its authority to deal with this problem.

In addition, the DWC has allowed employers and insurance companies to notify the agency of minor work-related injuries once a month. Allowing this type of reporting procedure does not appear to adversely affect claimants and helps to relieve some of the paperwork in the claims division. However, this procedure technically violates statutory reporting requirements.

Employers and Insurance Companies Are Not Complying With Notification Requirements. Section 65.1-124 of the *Code of Virginia* specifies that a first report of injury must be made in triplicate in writing and mailed to the Industrial Commission within ten days after a work-related injury occurs or the employer has knowledge of it. According to procedures currently in effect at the DWC, the first report form is required for all major injuries. These injuries include those resulting in: (1) medical costs above $500, (2) more than seven days time lost from work, (3) the death of the injured worker, or (4) permanent disability or disfigurement.

A review of 30 randomly selected workers' compensation files indicated that workers typically notify their employers within the first day of receiving major work-related injuries. However, first reports were received by the DWC an average of 82 days after the date of injury (Table 7). In the 30 files reviewed, only one employer's first report was received within the ten-day requirement. One first report was received 476 days (1.3 years) after the date of injury, while in a second case the report was received after 474 days. Two of the files reviewed contained no first reports.

Table 7

Timeliness of Filing Employer's First Reports with the DWC

File No.	Days From Injury to Employer's Notice	Days From Employer's Notice to Ins. Co.'s Notice	Days From Ins. Co.'s Notice to DWC's Receipt	Days From Employer's Notice to DWC's Receipt
1	0	unknown	unknown	16
2	0	15	12	27
3	0	unknown	unknown	22
4	1	7	18	25
5	0	8	5	13
6	23	5	3	8
7	0	unknown	unknown	19
8	0	29	9	38
9	0	unknown	unknown	108
10	0	7	34	41
11	0	7	13	20
12	0	15	5	20
13	0	14	27	41
14	0	14	6	20
15	0	45	169	214
16	0	16	5	21
17	0	33	4	37
18	0	unknown	unknown	35
19	0	108	366	474
20	0	unknown	unknown	36
21	0	29	106	135
22	0	unknown	unknown	31
23	0	unknown	unknown	476
24	0	10	47	57
25	0	unknown	unknown	25
26	1	unknown	unknown	53
27	1	72	132	204
28	0	unknown	unknown	no date
29	no report	no report	no report	no report
30	no report	no report	no report	no report
Average	00.93	25.53	56.53	82.11

Source: JLARC analysis of DWC claims files, July 1989.

Notifying the DWC of major work-related injuries is important because it means that the agency is able to inform injured employees immediately of their rights under the Workers' Compensation Act and to monitor the progress of claims. Delays in notification mean the DWC has no knowledge of work-related injuries. Consequently, the agency cannot ensure that employees' rights are protected or that they receive compensation in a timely manner.

The following hypothetical example, using the average times from Table 7, demonstrates the effect of an employer's failure to report a work-related accident within the required time frame:

> *An employee receives a work-related injury on August 1 and reports to his employer the same day. The employer agrees to pay the employee 50 percent of his average wage, which is less than the 66 2/3 to which he is entitled. The employer completes the first report and submits it to his insurance company 26 days after the injury occurred (August 27). After 56 days (October 22), the DWC receives notice of the injury from the insurance company. Meanwhile, the injured employee remains out of work according to the doctor's orders and is unaware that he was eligible to receive additional compensation for his injury until he receives information from the DWC (October 31). By the time all documentation for the memorandum of agreement (which determines the correct amount for the employee's compensation) is received and the memorandum is approved, it is the beginning of December, or four months after the injury.*
>
> *If the employer and insurance company had complied with statute and notified the DWC of the August 1 accident within 10 days (August 11), the employee would have received information from the DWC by the end of the month (August 30). Allowing one month for submission of additional information to complete the memorandum of agreement, the employee would receive the correct compensation just two months after the accident (October 1).*

Several DWC personnel indicated that the ten-day filing requirement may not give employers and insurance companies sufficient time to submit the report. However, Virginia's ten-day reporting period is not different from the majority of states. Forty-four states, the District of Columbia, and the federal government require submission of employer's first reports for major injuries, other than fatalities, within ten days or less of the injury (Table 8). Virginia is one of 21 states having a ten-day requirement. Ten states require immediate notification of injuries that result in the employee's death.

Still, the reporting provisions could be modified slightly to aid compliance by employers and insurance companies. During the 1989 legislative session,

the General Assembly modified the statutory definition of "filed" (§65.1-2.1 of the *Code of Virginia*) to make it easier for employers and claimants to meet filing requirements for hearings and reviews. Specifically, the change in the definition allowed facsimile (fax) transmissions of hearing and review applications. Modifying the language in §65.1-124 of the *Code* to allow facsimile transmissions of first reports could help employers and insurance companies meet the ten-day filing requirement.

Recommendation (13). **The General Assembly may wish to revise 65.1-124 of the *Code of Virginia*, changing the requirement that first reports be "mailed" to the Industrial Commission, by allowing such reports to be "filed" with the Commission as specified in §65.1-2.1 of the *Code*. However, the requirement that first reports be received only in the Richmond office of the Commission should be maintained.**

Fining Employers for Not Filing First Reports. According to §65.1-127 of the *Code of Virginia*, the DWC may fine employers or insurance companies up to $250 each time they fail to meet the requirements for making a first report. The DWC, however has not sufficiently used its authority to impose fines upon employers and insurance companies which refuse or neglect to make first reports in a timely manner.

Table 8

Timeliness Requirements for Submission of Employer's First Reports

Type of Injury	1-5 Days	6-10 Days	11-15 Days	Over 15 Days
Non-Fatality	12	33	3	3
Fatality	10	0	0	0

Notes: Numbers in columns represent the number of states imposing the specified requirement. The District of Columbia is included.

In addition to the submission requirements imposed by the states, two federal acts also impose requirements for certain groups of employees. The Federal Employees Compensation Act requires first reports to be filed immediately upon notification of an injury, while the Longshoremen and Harbor Workers Compensation Act requires first reports to be filed within 10 days.

Source: *Analysis of Workers' Compensation Laws*, U.S. Chamber of Commerce, 1989.

Claims division personnel do not monitor if first reports are received within the statutory time period. In addition, the DWC's claims manager and other claims division personnel indicated there are no actions taken against employers or insurance companies which fail to meet the ten-day reporting requirement for first reports. This represents a significant weakness in ensuring that workers' compensation processes are executed in a timely fashion and that claimants' rights are protected.

The DWC should apply the sanctioning authority given it by the *Code* and fine employers and insurance companies who do not comply with filing requirements for the first report of accident. This would help ensure that cases are handled in a timely fashion.

Recommendation (14). **The Industrial Commission should apply the authority given to it in §65.1-127 of the *Code of Virginia* to impose fines upon employers or insurance companies who fail to file first reports within the required time period. The commission should issue notices to all insurance companies underwriting workers' compensation policies in the State, all self-insured employers, and all group self-insurance associations that it intends to enforce the ten-day reporting requirement. Following this notice, the commission should begin to issue show cause orders to employers and insurance companies requiring them to give evidence why they should not be fined.**

The Code Should Be Amended to Allow Monthly Reporting of Minor Injuries. The DWC allows employers and insurance companies to use a monthly report to notify the agency of minor injuries, rather than requiring notification of these injuries within the usual ten-day time period. Minor injuries are defined as injuries resulting in less than seven days lost from work and total medical costs less than $500. These injuries also cannot result in the employee's death, permanent disability, or disfigurement. These injuries account for the majority of work-related accidents each year (Table 9). Notification of these injuries normally does not result in the creation of a file, but the employee does receive a copy of the DWC's informational booklet in case it becomes necessary to file a claim later.

Since there is no file created when a minor injury occurs, the DWC only needs information that allows it to inform the injured worker of his or her rights. Therefore, information listed on the minor injury report includes: (1) the employee's name, address, and social security number; (2) the employer's name; (3) the date of accident; and (4) the total monthly medical costs associated with the injury. In addition, a single minor injury report filed by an insurance company may be used to report work-related injuries from workers of several employers.

Statutory reporting requirements call for all work-related injuries to be reported to the DWC within ten days. Although monthly reporting for minor injuries does not appear to adversely affect employee notification of their rights under the Act, it is a violation of current statutory reporting requirements.

Table 9

Notice of Work-Related Injuries Processed by the Department of Workers' Compensation, 1986-1988

	1986	1987	1988
Minor Injuries	165,719	184,891	178,655
Major Injuries	49,046	52,033	54,569
Totals	214,765	236,924	233,224

Source: JLARC analysis of DWC statistical data, 1989.

Recommendation (15). **The General Assembly may wish to revise §65.1-124 of the *Code of Virginia* to specifically grant the DWC authority to define minor injuries and to determine reasonable reporting requirements for minor injuries.**

JUDICIAL MANAGEMENT OF CLAIMS

If an injured employee and the employer or insurance company cannot agree on whether the employee should receive workers' compensation benefits, either party may ask the Industrial Commission to resolve the dispute. Delays in resolving disputes can dramatically affect injured workers. They are frequently unemployed and not receiving workers' compensation benefits while the Industrial Commission is processing the case.

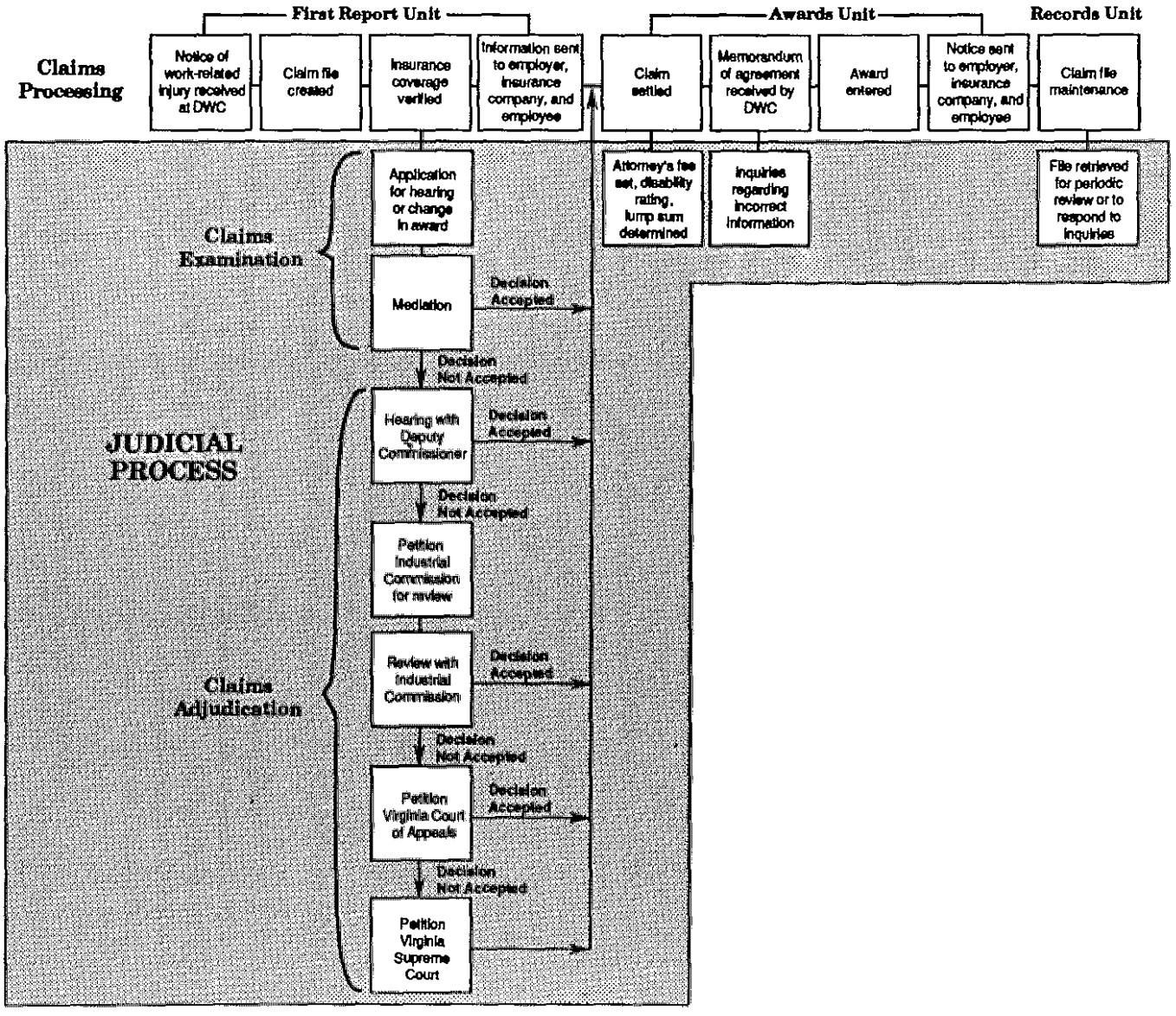
Although most steps in the adjudication process appear reasonable and necessary, two actions could be taken to enhance the timeliness of the process. First, a twenty-day waiting period currently in the process should be assessed and guidelines developed to clarify when the waiting period should be implemented. Second, actions must be taken to ensure that review opinions are issued in an expedient manner. Also, the alternative dispute resolution activities of the DWC should be continued to further reduce the deputy commissioners' case load.

Overview of Judicial Claims Management

There are several steps in the adjudication process (Figure 8). The first step is a review of an application for hearing by the claims examination section of the claims division. If the review indicates that a hearing is justified, a hearing is scheduled.

Figure 8

Overview of Administrative and Judicial Processes



Source: JLARC analysis, 1989.

The second step is a hearing before a deputy commissioner. Parties who are dissatisfied with the deputy commissioner's decision may ask the Industrial Commission to review the decision. The decision of the Industrial Commission may be appealed to the Virginia Court of Appeals. The Supreme Court of Virginia is the final court to decide a workers' compensation case.

Pre-hearing Procedures. The DWC's judicial process is initiated when an injured worker, insurance company, or employer applies to the DWC for a hearing. The claims examination section assesses the circumstances surrounding the dispute based on the information provided in the application. In many cases, additional information (e.g., medical reports) is requested by claims examination staff. If the dispute appears to be valid and attempts by the section to resolve the dispute are unsuccessful, the case is placed on a deputy commissioner's hearing docket. The commission clerk then notifies the opposing parties that an application for hearing has been filed.

Before the hearing takes place, each party has the opportunity to learn about the other party's evidence and defenses by requesting that the deputy commissioner approve interrogatories, depositions, and subpoenas. Interrogatories are written questions sent to the parties and potential witnesses. The interrogatories must be answered in writing and under oath. Depositions involve recording and transcribing a witness's answers to specific questions. The answers must be made under oath. Subpoenas can be issued for witnesses to appear at the hearing or for documents, such as medical reports, to be delivered to the DWC. Once pre-trial procedures are completed, the dispute is ready to be heard by a deputy commissioner.

Hearings by Deputy Commissioners. Workers' compensation hearings are similar to trials in Virginia's General District and Circuit Courts. The party requesting the hearing is responsible for presenting documents, testimony, and other evidence to support a decision in his or her favor. The opposing party is responsible for submitting evidence sufficient to refute the first party's evidence.

Following the hearing, the deputy commissioner reviews the documents admitted into evidence, reviews the notes he or she made during the hearing, and writes an opinion resolving the dispute. In their written opinions, deputy commissioners outline the facts of the case, their decisions (including any benefits to be paid), and the rationales supporting their decisions.

Reviews by the Industrial Commission. Within 20 days of the deputy commissioner's decision, either party may ask for a review of the deputy commissioner's decision. According to the Rules of the Industrial Commission, the party requesting the review may decide whether the parties will be given an opportunity to appear before the commissioners and argue their positions. If oral argument is not requested, the case is reviewed based solely on the records and documents contained in the DWC file. Analysis of data for a six-month period in

1988 indicates that oral argument was requested in approximately 85 percent of the cases reviewed.

The commission clerk, at the direction of the chairman, assigns cases equally among the three commissioners. For each case, a commissioner reviews all medical reports, photographs, and other documents admitted as evidence by the deputy commissioner. The commissioner also reviews a transcript of the hearing showing the statements made by the parties, the witnesses, and the deputy commissioner.

The commissioner prepares a first draft of the Industrial Commission's opinion and circulates it among the other two commissioners. If one or both of the other commissioners sign the draft, it becomes the opinion of the Industrial Commission. If neither of the other commissioners signs the draft, the draft becomes a dissenting opinion and one of the other two commissioners drafts the opinion of the majority of the Industrial Commission. The commissioners meet weekly to discuss cases being reviewed.

Time Frame for Adjudication Could Be Shortened

Analysis of judicial case records for 1988 indicates that it took an average disputed case approximately 257 days (eight and one-half months) to proceed from application for hearing to final review opinion. On average, 135 days were required to process cases through hearings before deputy commissioners. An additional 122 days were required to process cases through reviews before the Industrial Commission.

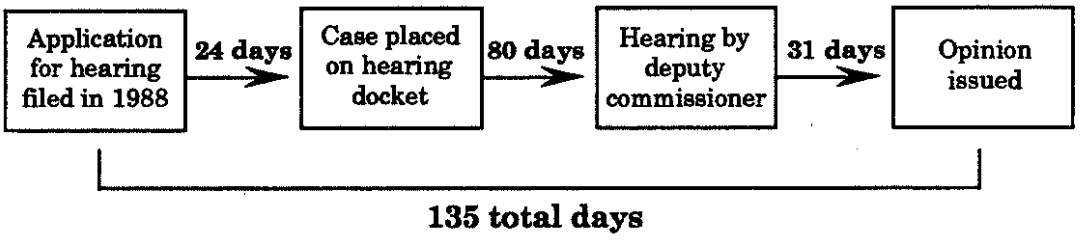
Attention to two areas should enhance judicial processing times. First, current practices concerning a 20-day waiting period to schedule a hearing should be assessed. Second, commissioners should take steps to ensure that opinions are issued in an expedient manner.

Timeliness of Deputy Commissioner Hearings. For hearing applications filed in 1988, the hearing process was completed within an average of 135 days (four and one-half months) from the date of application (Figure 9). Once an application was filed, it took an average of 24 days for the case to be placed on the docket, 80 days for the hearing to occur, and 31 days for an opinion to be issued.

Deputy commissioners are required by a DWC administrative order to issue opinions within three weeks of the hearing or the closing of the record. The DWC monitors deputy commissioner performance in this area and requires each deputy to submit quarterly reports on cases exceeding the three-week deadline. Although a number of cases do exceed the deadline, this is sometimes caused by the need for submission of additional evidence, such as medical reports, after the hearing has taken place. When the case load of a deputy commissioner becomes

Figure 9

Average Number of Days to Hear Workers' Compensation Cases in 1988



Source: JLARC analysis of DWC judicial data, 1989.

backlogged, one of the commissioners or another deputy commissioner will assume some of the deputy's cases.

Twenty-Day Waiting Period Should Be Assessed. When a claimant files an application for a hearing, the DWC claims division usually waits 20 days before assigning the case to a deputy commissioner's hearing docket. (According to DWC staff, in some instances cases are immediately placed on a hearing docket.) After receiving a claimant's application for hearing, the claims division sends a letter to the insurance company or self-insured employer indicating that the claimant has requested a hearing and asking whether the claimant will be paid. If the claim is rejected or the DWC does not receive a response within 20 days, the application for hearing is assigned to a deputy commissioner's docket.

This procedure is designed to reduce the number of cases placed on hearing dockets. If the insurance company or self-insured employer responds that the claim will be paid, a hearing is not required. This reduces the number of files deputy commissioners have to handle.

The DWC does not maintain statistics showing how often insurance companies reply that they agree to pay the claim without a hearing. JLARC staff examined 33 randomly selected 1989 applications for hearings. Only 17 of these applications contained sufficient data for analysis. In only three of the 17 cases (18 percent) did the insurance companies respond within 20 days that the claim would be accepted. This finding is consistent with one claims assistant's estimate that fewer than 20 percent of the claims were accepted before being placed on the hearing docket. This suggests that roughly four out of five claimants are unnecessarily waiting up to 20 days for their hearings to be placed on the docket.

It appears that once an attorney has applied for a hearing on behalf of a claimant, the insurance company typically has already refused to pay the claimant.

The insurance company's refusal to pay the claim is the reason why the claimant sought the attorney's assistance. Given the high number of claims that do not appear to be settled within the 20-day period, and the fact that the total hearing and review process takes an average of eight and one-half months, the DWC should do everything it can to reasonably streamline the adjudication process. This would include eliminating the 20-day waiting period whenever possible.

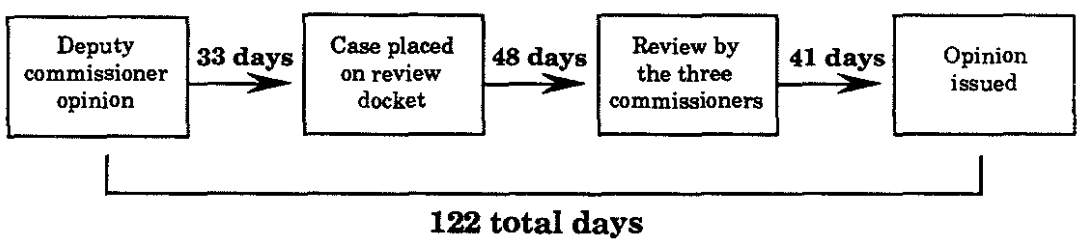
Recommendation (16). **The DWC should begin monitoring insurance company responses to the request-for-hearing notification letters that are issued by the claims division. The monitoring effort should focus on determining if particular types of claims tend to be settled within the 20 day waiting period. Considering these findings, the DWC should develop guidelines to help staff identify claims which should be docketed immediately and those which should wait 20 days prior to being docketed. The guidelines should also take into consideration the requirements of the alternative dispute resolution process.**

Timeliness of Industrial Commission Review. Analysis of available data indicates that reviews held in 1988 were resolved within an average of approximately 122 days (or four months) following the deputy commissioner's opinion (Figure 10). In 29 percent of the 1988 hearings, a party requested a review by the Industrial Commission.

With the exception of one commissioner's opinions, the DWC issues review opinions in a timely manner. In 1988, the DWC issued opinions an average of 41 days following the review date. Two commissioners issued opinions in an average of approximately 21 days, while a third commissioner took an average of 75 days to issue opinions (Figure 11). The first two commissioners completed over 83

Figure 10

Average Number of Days to Review Workers' Compensation Cases in 1988

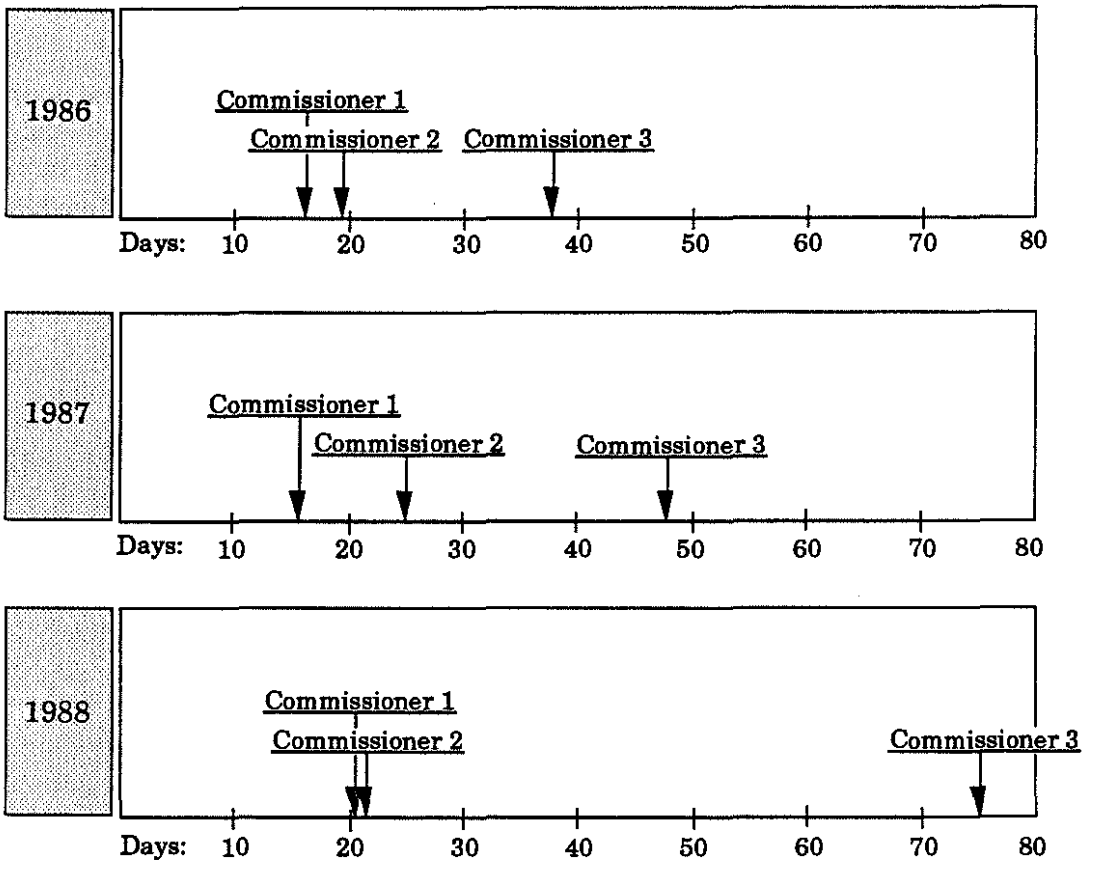


Note: Excludes reviews without oral argument because data were not available.

Source: JLARC analysis of DWC judicial data, 1989.

Figure 11

Average Number of Days Between Review and Opinion by Commissioners 1986-1988



Note: Excludes reviews without oral argument because data were not available.

Source: JLARC analysis of DWC judicial data, 1989.

percent of their opinions within 30 days, while the third commissioner completed only seven percent of his opinions during that period. While the length of time necessary to issue opinions has increased slightly since 1986 for two commissioners, it has doubled for the third commissioner.

The number of cases reviewed by the commissioners has not changed significantly since 1986 (Table 10). In addition, interviews with the commissioners indicate that they are assigned an equal number of cases for which they are responsible for writing opinions. According to the third commissioner, he substituted for a deputy commissioner in January 1988 for five days of hearings. While hearing cases for the deputy commissioner, the third commissioner continued to be

Table 10

Total Number of Review Opinions Issued by the Industrial Commission

Year	Number of Review Opinions
1988	917
1987	861
1986	914

Source: DWC annual statistical reports, 1986 through 1988.

assigned review opinions to write. According to the commissioner, he fell behind in writing review opinions and has been unable to catch up.

Recommendation (17). **The DWC commissioners should take steps to ensure that review opinions are rendered in a timely manner. Several actions are necessary. First, as was done for hearing opinions by deputy commissioners, the DWC should adopt an administrative order specifying time frames for review opinions to ensure the commissioners have a common understanding of processing expectations. Second, consideration could be given to a slightly reduced caseload for the chairman. This would accommodate the administrative oversight requirements of the position. A 35-35-30 split in cases assigned could be considered. Third, to correct the current backlog, responsibility for writing opinions should be shifted temporarily among the commissioners. Fourth, once the backlog is cleared, each commissioner should generate opinions within the specified period of time.**

Alternative Dispute Resolution Activities Should Be Continued

The DWC has implemented an innovative procedure to resolve minor disputes prior to and without the necessity of a hearing. The DWC staff refer to this as alternative dispute resolution.

When applications for hearings are filed with the DWC, claims division staff refer certain files to a deputy commissioner for alternate dispute resolution. The deputy commissioner reviews the files and determines whether the situation could be resolved by contacting the parties directly. The deputy commissioner then contacts each party and identifies the specific issues in dispute. He offers advice concerning the dispute and proposes ways in which the parties can agree on a settlement. If the parties reach an agreement, the deputy commissioner enters an order in accordance with the agreement and the case is not scheduled for a hearing.

One deputy commissioner, on a full-time basis, and another deputy commissioner working on a part-time basis, are responsible for alternative dispute resolution. Both deputy commissioners are experienced hearing officers and knowledgeable concerning workers' compensation law.

Of the six attorneys specializing in workers' compensation who indicated they had cases involved in alternative dispute resolution, five favored continuation of this procedure. One attorney was opposed to alternative dispute resolution because if a case was not resolved, the parties had to wait an additional period of time before the hearing could take place. According to DWC staff, cases which have not been resolved by alternative dispute resolution are currently given priority when being scheduled for hearings.

According to DWC staff, deputy commissioners issue an average of approximately 35 to 40 opinions per month. The deputy commissioner conducting alternative dispute resolution on a full-time basis is able to resolve approximately 49 cases per month without hearings. This suggests that a deputy commissioner engaged in alternative dispute resolution may be able to reduce the judicial case load of the DWC much quicker than the average deputy commissioner hearing cases. As DWC staff become more proficient at alternative dispute resolution, the DWC should assess whether additional staff should be assigned to this function.

Recommendation (18). **The DWC should continue its efforts in the area of alternative dispute resolution to reduce the DWC judicial case load and encourage the timely settlement of claims.**

V. Other Programs and Functions of the DWC

In addition to its claims management and judicial functions related to workers' compensation, the DWC has been assigned numerous other responsibilities, including (1) administrative, judicial, and fiscal management of claims filed against the uninsured employer's fund; (2) management of the administrative and second injury funds; (3) approving and monitoring self-insured employers; (4) processing and adjudicating claims filed under the Birth-Related Neurological Injury Compensation Program; and (5) statewide coordination of the Medical Costs Peer Review Program. The DWC also administers the Crime Victims' Compensation Program, which was the subject of a previous JLARC report and will not be covered in this chapter.

Although it is reasonable to initially question DWC involvement in some of these programs and functions, review of the agency's activities in each area indicates that there is a logical rationale for the DWC's involvement. This review also indicates, however, that the DWC needs to revise or strengthen a number of its processes and procedures to ensure that the statutory objectives of these programs and activities are met.

THE UNINSURED EMPLOYER'S FUND AND PROGRAM

The uninsured employer's fund (UEF) was established in 1977 (*Code of Virginia* §65.1-146 through §65.1-152) to provide workers' compensation benefits to employees with work-related injuries whose employers do not meet their statutory obligation to obtain workers' compensation insurance coverage. The DWC's responsibilities related to the UEF include: (1) administrative management of claims against the fund, (2) claims investigation, (3) adjudicating claims against the fund, (4) authorizing compensation payments from the fund, (5) recovering payments from the fund, and (6) monitoring awarded claims regarding the injured worker's medical management, vocational rehabilitation, and return to work.

Since its inception and until the beginning of 1989, the UEF was managed by a single claims technician who was supervised by the chief deputy commissioner. During 1989, modifications in the program included placing the UEF under the supervision and management of the insurance manager and hiring a new UEF adjuster. So far, these changes appear to have benefitted the program through direct managerial oversight and initiating the development of written policies and procedures. However, additional improvements are needed.

There are five major areas where changes in statute or procedures would enhance the operations of the UEF. First, the authorized tax rate for the program,

which was increased in 1987, is scheduled to return to the original assessment level in 1991. However, this return may jeopardize the fund's ability to meet continuing compensation commitments.

Second, the DWC usually becomes aware of uninsured employers only after a claim has been filed by an injured worker and a check reveals there is no record of insurance for the employer. DWC personnel indicated they believed there was a problem with the identification of uninsured employers, but they did not know what to do about it.

Third, the UEF pays out large sums each year to injured employees; however, most of the money is never recovered. Alternatives to the methods used by DWC to attempt recovery are needed.

Fourth, the DWC's efforts to collect fines imposed against employers who have failed to obtain workers' compensation insurance coverage appear insufficient. Although collection rates are higher than recovery of compensation payments, most fines remain unpaid.

Fifth, currently all claims under the jurisdiction of the uninsured employer's program must be heard by the Industrial Commission. More efforts at mediation should be made in this area.

Statutory Limits on Fund Revenue Should Be Revised

Section 65.1-147 of the *Code of Virginia* requires the maximum tax rate for the UEF to decrease from one-fourth of one percent to one-eighth of one percent on January 1, 1991. In addition, the *Code* suspends collection of the UEF tax whenever the fund balance exceeds $650,000 at the end of the calendar year. It appears that both these statutory limits may restrict the fund balance to the point where it may not cover the cost of claims against the fund.

Current Tax Rate Should Be Retained. On January 1, 1987, the maximum tax rate for the UEF was raised from one-eighth of one percent to one-fourth of one percent. This increase was intended to be temporary, and was implemented to cover the costs of workers' compensation claims from coal workers when the Virginia Independent Coal Producers Group Self-Insured Association became insolvent. Several indicators, however, suggest that a return to the one-eighth of one percent tax rate will not be sufficient to pay future claims against the UEF.

First, the rate at which payments from the UEF have increased over the past six years has exceeded the rate of growth in premiums collected by carriers (which serve as the tax base for the UEF). Comparing FY 1982 to FY 1988, the tax base grew by 48 percent, while payments from the fund grew by 274 percent (Table 11).

Table 11

Uninsured Employer's Fund
Changes in Tax Base and Payments
FY 1982 - FY 1988

Fiscal Year	Tax Base*	Percent Change	Payments	Percent Change
1982	$512,543,785	—	$165,101	—
1983	497,610,812	-2.9	225,264	36.4
1984	497,072,435	-0.1	329,207	46.1
1985	547,889,393	10.2	373,850	13.6
1986	614,573,571	12.2	584,630	56.4
1987	702,930,163	14.4	539,230	-7.8
1988	760,788,486	8.2	618,043	14.6
Change 1982-1988	$248,244,701	48.4	$452,942	274.3

*Premiums collected by carriers serve as the tax base.

Note: Does not include UEF payments for Virginia Independent Coal Producers Group Self-Insured Association which began in April 1988.

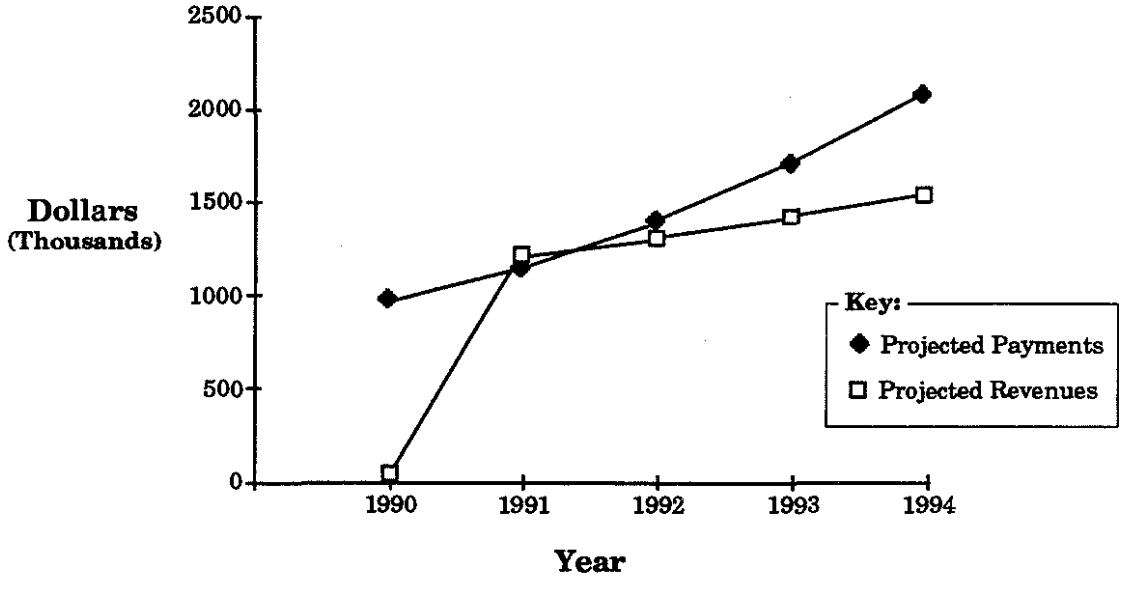
Source: JLARC analysis of DWC Fund Status Reports, November 1989.

Second, short-term projections of payments and revenues also point to a problem. JLARC staff used the yearly tax bases from 1979 through 1988 and UEF expenditures from 1982 through 1989 to project future costs and revenues for the UEF from 1990 through 1994 (Figure 12). The JLARC projections show the UEF's payments may exceed revenues by 1992.

Since the payment of claims from the UEF for the Virginia Independent Coal Producers Group Self-Insured Association was an unusual situation, the calculations excluded the compensation that was paid on these claims. Therefore, the projection that was used reflects cost expectations without the influence of the temporary payments. Although actual future costs and revenues may be influenced by changes in factors such as medical costs, the employment rate, and the general state of the economy, these projections show general expected trends based on historical figures.

Figure 12

Uninsured Employer's Fund Payment and Revenue Projections



Note: Revenues projected using .125% tax rate. Figures used for projection of costs exclude payments made for the Virginia Independent Coal Producers Group Self-Insured Association. Revenues are projected at $0 for 1990 because the UEF fund balance exceeded $650,000 as of December 1989, thus prohibiting the DWC from assessing the UEF tax.

Source: JLARC projection using historical DWC payment and revenue data.

It should be noted that the DWC cannot assess a tax to generate revenues for the UEF in 1990 due to a fund balance exceeding the $650,000 limit. The DWC believes that the balance in the UEF, which was $1,406,193 as of December 1989, will be sufficient to pay claims against the UEF during 1990. The DWC comptroller stated he anticipated that the UEF will only have a balance of between $100,000 and $200,000 at the end of the year, which will enable the DWC to assess a tax for the UEF in 1991.

Third, the number of new claims against the UEF has generally increased each year since 1982. Between 1982 and 1988, the number of cases increased by more than 257 percent (Table 12). The only exception to the year-to-year increase was in 1987, when the number of claims decreased slightly from the previous year.

Recommendation (19). **The General Assembly may wish to maintain the tax rate for the uninsured employer's fund at one-fourth of one percent until January 1, 1995. Prior to the date of the rate reversion, the DWC should reassess the adequacy of the rate, and take appropriate actions to ensure that revenues are available to cover obligations.**

Table 12

Claims Filed Against the Uninsured Employer's Fund FY 1982 - FY 1988

Fiscal Year	Total Claims	Change From Previous Year
1982	98	—
1983	106	8
1984	153	47
1985	172	19
1986	263	91
1987	257	(6)
1988	350	93

Note: Does not include Virginia Independent Coal Producers Group Self-Insured Association claims.

Source: JLARC analysis of data from DWC insurance manager, November 1989.

Statutory Maximum Should Be Increased. Section 65.1-147 of the *Code of Virginia* states that if the fund has in excess of $650,000 at the end of any calendar year, no tax shall be assessed for the next calendar year. Therefore, in setting this provision, it appears that the General Assembly was anticipating that $650,000 would cover the fund's expenses for one year.

The $650,000 limit was appropriate when the UEF was established in 1977, but it is becoming too low to meet current yearly costs of the fund. Compensation and medical payments from the fund totaled $618,043 in FY 1988, and if costs continue to increase as they have over the past six years, payments in the coming years will be even higher.

Recommendation (20). **The General Assembly may wish to amend §65.1-147 of the *Code of Virginia* to change the current fund balance limitations imposed on the uninsured employer's fund. One of two options could be considered. First, the specific dollar amount of the current limit could be increased. Second, the limitation could be changed to allow assessment if the balance is below the budgeted expenditures for the upcoming fiscal year.**

Procedures for Identifying Uninsured Employers Could Be Improved

Increases in the number of claims filed each year and in the amount of compensation paid by the fund point to another problem with the UEF. That is, the DWC does not have a proactive method for identifying uninsured employers. Currently, the DWC becomes aware of uninsured employers only after a claim has been filed and verification procedures reveal there is no record of insurance for the employer. Interviews with DWC personnel indicated they believed there is a problem with early identification of uninsured employers, but they do not know what to do about the problem.

During the 1989 legislative session, the General Assembly responded to the problem of uninsured employers by requiring local commissioners of revenue to distribute information printed and issued by the DWC regarding the State's workers' compensation requirements. Most commissioners of revenue will begin distributing the information during December 1989 and January 1990, when local businesses renew their business licenses.

Informing local businesses of State requirements to obtain workers' compensation insurance will not ensure compliance among uninsured employers, however. A more effective method would be to require local businesses to provide information regarding the number of workers they employ, as well as the name of their workers' compensation insurer when they file for a business license.

Recommendation (21). **The General Assembly may wish to revise §65.1-103 of the *Code of Virginia* to require local officials who license employers to conduct business under Chapter 37 of §58.1, or the State Corporation Commission which charters employers to conduct business under §12.1-12, to require employers to provide information regarding the number of workers they employ, as well as the name of their workers' compensation insurer.**

Recovery from Employers of Compensation Paid from the UEF

Current efforts to recover compensation and medical payments made from the UEF appear to be inadequate. From 1986 to 1988, a total of 870 claims were investigated by UEF program personnel at the DWC. Twenty-two percent, or 192 claims, were determined compensable by the Industrial Commission. Of the remaining 678 claims, most were either withdrawn or the employer was found to have insurance coverage.

Of the 192 compensable claims, 116 eventually received compensation, totalling $1,264,023 by the end of FY 1989, from the uninsured employer's fund (Table 13). However, only $99,206, or approximately eight percent, was recovered from the responsible employers.

Table 13

Compensation Paid and Recovered Uninsured Employer's Fund, CY 1986-1989

	1986	1987	1988	Total
Amount Paid*	$510,839	$451,748	$301,436	$1,264,023
Amount Recovered*	81,427	17,779	0	99,206
Difference	$429,412	$433,969	$301,436	$1,164,817
Number of Claims	36	49	31	116

* For each column, dollar amounts reflect compensation payments and recoveries for claims established in that year plus payments and recoveries through June 30, 1989.

Source: JLARC analysis of UEF claims and payments, 1989.

Once payments have been made from the UEF, §65.1-150 of the *Code of Virginia* authorizes the Industrial Commission to recover from the employer payments made by the UEF and specifies that it shall "exhaust all remedies at law....to collect the amount of the award made to the claimant."

Currently, the UEF attempts to recover compensation payments in three primary ways. First, liens are generally filed in circuit court within the employer's locality. These liens are updated every six months. Second, the DWC submits a file of outstanding debts to the Department of Taxation to attach the employer's tax refund. Third, occasionally, the uninsured employer's program will request assistance from the collections unit within the Office of the Attorney General (OAG). OAG staff admitted that collection efforts related to these files are a low priority due to limited success with previous collection efforts. None of these procedures appear to be effective in helping the DWC to recover compensation payments made from the fund, however. Therefore, the General Assembly may wish to consider providing the DWC with additional sanctioning authority against these employers.

According to personnel from the DWC and the OAG, success with recovering compensation payments is compromised because of the type of employers who are likely to be uninsured. These uninsured employers were typically described as: (1) having few assets, (2) "fly-by-night operators," or (3) likely to go bankrupt. Another problem identified was that judgments are typically entered against the business name, not the individual owner of the enterprise, making collection efforts against individuals impossible.

Analysis of 22 randomly selected claims compensated by the UEF between 1986 and 1988 indicated that the profile of the "typical" uninsured employer as identified above was accurate in many cases. Ten of the uninsured employers were no longer in business, four of them having filed bankruptcy. However, at least half of the employers appeared to be still operating, while only one of them had reimbursed the UEF for compensation paid to an injured employee.

The DWC's authority to recover compensation payments is considered to be of limited utility by personnel within the agency, as well as within the OAG, primarily because the agency has not been given sufficient authority to enforce its collection efforts. If the DWC were granted greater enforcement authority, such as the power to issue cease and desist orders against employers for nonpayment of compensation, it could be used to prevent uninsured employers from continuing to operate until they agreed to make good faith efforts to repay the fund.

Recommendation (22). **The General Assembly may wish to revise §65.1-150 of the *Code of Virginia* to authorize the Industrial Commission to take additional actions against employers that fail to satisfy their obligations to compensate their injured workers. The General Assembly may wish to grant the Industrial Commission authority to issue cease and desist orders against these employers.**

Fine Collection Methods Should Be Improved

Section 65.1-106 of the *Code of Virginia* authorizes the Industrial Commission to levy fines of not less than $50 and not more than $1,000 against employers that fail to comply with requirements to obtain workers' compensation insurance. Also, §65.1-106 authorizes the Industrial Commission to issue cease and desist orders against employers who fail to comply with orders to obtain insurance. Finally, §65.1-106.1 provides that employers who knowingly fail to provide the Industrial Commission with evidence that they have obtained workers' compensation insurance shall be guilty of a Class 2 misdemeanor.

From 1986 through 1988, $62,125 in fines were levied against uninsured employers. Of this amount, $23,088 (37 percent) was collected through the end of FY 1989. The same methods employed by the UEF to recover from employers compensation paid by the fund are used to collect fines. However, there is a somewhat higher success rate with fine collections than with recovery of compensation, perhaps because the fines usually involve less money than compensation payments.

The DWC does not maintain any statistics regarding how often uninsured employers comply with orders to obtain workers' compensation insurance. In addition, the chief deputy commissioner could recall only one instance since the beginning of the program when a cease and desist order was actually issued. By not

monitoring employers' compliance with Industrial Commission orders, not filing criminal charges against employers who fail to comply, and not issuing cease and desist orders, the DWC is demonstrating that these employers will not suffer because of their failure to obtain workers' compensation insurance.

Recommendation (23). **The DWC should begin immediately to track employer compliance with orders to obtain workers' compensation insurance. In addition, the Industrial Commission should use its authority to issue cease and desist orders to employers who fail to provide proof that they have obtained insurance.**

Clearly Compensable Claims Under the UEF Should Be Mediated

Most commissioners and deputy commissioners agreed that at least half of the claims filed against the UEF were clearly compensable. Requiring that clearly compensable claims be brought to hearing increases the volume of cases on the hearing docket and delays the claimants' receipt of compensation.

The major concern among DWC officials and OAG staff is that the employer's right to due process would not be protected if clearly compensable claims were awarded without a hearing. However, mediation of these cases would help protect the employer's rights while relieving the hearing docket of excess cases.

How Compensability Is Determined. A clearly compensable claim is one where investigation leads to the determination that the employee was injured arising out of and in the course of employment. Under current UEF procedures, a claim against an uninsured employer is referred to the hearing docket once it has been determined: (1) there is no record of insurance for the employer, (2) the State has jurisdiction over the case, and (3) an investigation of the injury has been completed. When the case is referred to the hearing docket, the UEF program also notifies the OAG by letter of the claim. Upon the OAG's notification to the UEF that the case has been assigned to an assistant attorney general, the UEF forwards a copy of the file to the assistant attorney general.

Under ordinary circumstances, an insurance company would reach a voluntary agreement compensating the employee for the injury and time lost from work within 14-20 days of being notified about the injury. This means the injured employee would begin receiving compensation within the first month of the injury. However, a review of 22 randomly selected files indicated that it takes, on average, 120 days from the date of notice for a hearing to occur on UEF claims. Therefore, it may take at least six times longer for an injured worker of an uninsured employer to receive compensation.

To ensure that the employer and the uninsured employer's fund have a chance to defend against claims, hearings are always held on UEF claims. However,

this may cause undue hardship for claimants who first must wait for a hearing and then wait an additional 20 days after the opinion is issued in order to determine if the employer will pay the compensation. Only then can claimants request payment from the uninsured employer's fund. A more equitable process should be developed that ensures awards for clearly compensable cases are determined quickly and that claimants begin receiving compensation in a timely manner.

Mediation Efforts Should Be Increased. Section 65.1-148 of the *Code of Virginia* grants the OAG discretion in defending the UEF against claims. Current and former attorneys from the OAG indicated decisions to defend the UEF against a specific claim depended upon several factors, including whether the employer was represented by counsel, the employer's defenses, the amount of compensation involved in the case, and whether the claim was clearly compensable. At times, hearings are held where the only party to the claim who appears is the claimant.

Once an injury has been investigated and the facts of the claim indicate it is compensable and under the jurisdiction of the UEF, the insurance division should communicate its findings to the OAG. If the OAG agrees with the findings of the investigation and indicates it will not defend the fund against the claim, the UEF should refer the claim to the DWC's mediation program. The mediation program will contact the employer and the employee and attempt to arrange a voluntary settlement of the claim.

Recommendation (24). **Claims against the UEF program which appear to be clearly compensable should be referred to the DWC's mediation program. Mediation should proceed towards developing a settlement between the DWC, the employee, and the employer that specifies: (1) the amount and duration of compensation that is due to the employee, (2) the employer's obligation to pay the compensation and any medical expenses related to the injury, (3) the employer's obligation to provide to the DWC within 10 days proof of having obtained workers' compensation insurance, and (4) a minimum fine against the employer for not having workers' compensation insurance. Failure to comply with the agreement by the employer should result in a fine, issuance of a cease and desist order, or other legal actions. Employers with a bona fide desire to comply with the compensation order, but demonstrating financial difficulty, should be placed on a scheduled repayment plan while the UEF assumes responsibility for making compensation and medical payments related to the claim.**

DWC Has Not Taken Sufficient Actions to Address UEF Problems

The problems with the UEF that were identified during the JLARC review have persisted for several years without the DWC taking significant actions to address them. For example, the problems associated with recovering compensation paid from the UEF and collecting fines against uninsured employers are well

known within the agency. However, the DWC has not attempted to develop statistics to document the problem or to propose solutions to the General Assembly. Neither have any proposals been developed to assist the agency in early identification of uninsured employers.

In addition, the DWC has been aware for at least a year that the uninsured employer's fund may be headed toward financial difficulties. However, proposals have not been developed to address the problem.

Although one commissioner stated that the DWC has mentioned the low fund balances to the General Assembly a number of times, the DWC has not formulated any type of formal legislative presentation or request. Another commissioner stated that he believes it is his job to administer the Workers' Compensation Act, not to change it. Because the DWC has direct authority over all aspects of this fund, the commissioners should be taking a leading role in ensuring the fund has adequate revenues to cover its statutorily mandated obligations.

Recommendation (25). **The DWC should more aggressively oversee the operations and management of the uninsured employer's fund. Strengthened oversight activities should include: (1) regular data gathering and analysis regarding compensation paid from the UEF, (2) ensuring that all available remedies are pursued to recover compensation and collect fines, (3) developing proposals for an early identification program for uninsured employers, and (4) monitoring and projecting fund balances and taking corrective action as necessary to ensure that the state's uninsured fund does not become insolvent.**

ADMINISTRATION OF SPECIAL FUNDS

In addition to the uninsured employer's fund, the DWC is responsible for administering two other special funds. The administrative fund was created to pay the salaries and necessary expenses of the agency in carrying out the provisions of the Virginia Workers' Compensation Act. The second injury fund was established in 1975 to provide assistance to employers when a previously disabled employee suffers a second work-related injury resulting in an additional disability.

Once a year, the DWC collects revenues for special funds from insurance companies, self-insured employers, and group self-insurance associations providing workers' compensation insurance in the State. As is the case with the UEF, the tax rates and fund balances for the administrative and second injury funds are capped by statute.

The DWC's management of the administrative and second injury funds appears to be appropriate. However, there are areas associated with each fund that require attention.

The statutory balances for the administrative fund appear appropriate. However, unlike the statutory language related to the UEF, the Act does not specify at what point during the year the balance for the administrative fund should be checked. The DWC has decided for itself when to check the administrative fund balance and to set the tax assessment rate, yet no approved policy or procedures have been developed in this area. In addition, infrequent use of the second injury fund raises questions regarding its utility and purpose. The General Assembly may wish to address these questions by reassessing the fund and its purpose.

The Administrative Fund

According to §65.1-129 of the *Code of Virginia*, the administrative fund was created to pay the salaries and expenses of the DWC related to carrying out the provisions of the Virginia Workers' Compensation Act. The fund is financed by taxes assessed on the total premiums collected by each insurance company providing workers' compensation insurance coverage to any employer in Virginia. Taxes for employers who are self-insured or members of group self-insurance associations are assessed based on the premiums that would be charged to similar industries or businesses, using current manual insurance rates in Virginia.

The maximum tax rate for the administrative fund is 2.5 percent. Currently the fund balance appears to be monitored appropriately, and assessment practices have been in accordance with broad statutory provisions. However, an approved written policy and procedures need to be developed.

Fund Balances Have Been Appropriate. According to Sections 65.1-136 and 65.1-137 of the *Code of Virginia*, if a "surplus accrue in the fund in excess of one year's budgeted expenditures..., the Commission shall authorize a corresponding credit upon the collection for any year or make refunds of taxes collected in such amounts as are necessary to maintain a fund balance not to exceed one year's budgeted expenditures." The intention of this provision appears to be to maintain the administrative fund at a reasonable level, without an excessive balance. This provides for adequate operating funds for the DWC, while ensuring that carriers are not taxed excessively. A review of balances retained in the administrative fund since 1983 indicated that fund balances have approximated the amount of one year's appropriation.

An Approved Written Policy and Procedures Should Be Developed. Although Sections 65.1-136 and 65.1-137 of the *Code* specify that taxes cannot be assessed at the maximum rate when the administrative fund balance exceeds one year's budgeted expenditures, an important element has been left out of these sections of the Act. Specifically, the Act does not state in which part of the yearly cycle the balance should be checked. However, the DWC comptroller has established an informal policy of checking administrative fund balances at the end of the calendar year and has developed procedures for recommending the tax assessment

rate, based on the year-end balance, for the following fiscal year's operating revenues. A written policy and accompanying procedures should be established in writing and approved by the DWC.

Recommendation (26). **The DWC should ensure that the agency's comptroller establishes written procedures for determining the tax assessment rate for the administrative fund. These procedures should describe the specific monitoring and projection activities to be conducted, as well as the specific time of the year when the balances in the administrative fund are to be reviewed.**

The Second Injury Fund

The second injury fund (*Code of Virginia* §65.1-138 through §65.1-145) was created in 1975. Although it is not specifically stated in the *Code*, the purpose of the second injury fund appears to be twofold: (1) to encourage employers to hire previously disabled workers, and (2) to protect employers from high insurance costs that could result when a previously injured or disabled employee suffers a second injury. As such, workers' compensation insurers may request a partial reimbursement of compensation paid to a previously disabled employee, if the employee should receive an additional disability from a subsequent work-related injury.

Revenues for the second injury fund are derived from a tax of one-quarter of one percent on worker's compensation premiums. When the fund has a balance in excess of $250,000 in any fiscal year, no tax can be assessed until the balance is below $125,000.

The Second Injury Fund Is Underutilized. Throughout its existence, the fund's low utilization rate has resulted in a relatively high fund balance. Therefore, only one tax assessment has been made for the fund, in 1976. Since that time, the fund balance has remained above $125,000, thereby eliminating the need for further assessments. In addition, $223,092 was transferred from the second injury fund to the General Fund in FY 1985 (Table 14).

The low utilization rate of Virginia's second injury fund is difficult to explain. Highly restrictive eligibility criteria for the program have been eliminated since 1980. However, the utilization rate of the program has not increased significantly. It appears that an in-depth study of the fund may be necessary to determine why utilization remains low.

The Second Injury Fund Is Not Achieving Its Purpose. Infrequent activity appears to be preventing the second injury fund from achieving its purpose. From 1983 through 1988, the DWC received only 22 requests for reimbursement from the second injury fund. Only four of these requests were eligible for funding.

Table 14

Second Injury Fund Payments and Fiscal Year-End Cash Balance FY 1982 through FY 1988

Fiscal Year	Second Injury Fund Expenses	Cash Balance at Fiscal Year-End
1982	$ 0	$458,093
1983	10,000	448,093
1984	0	448,093
1985	8,478	216,523 *
1986	5,002	211,521
1987	36,312	175,209
1988	23,958	151,251

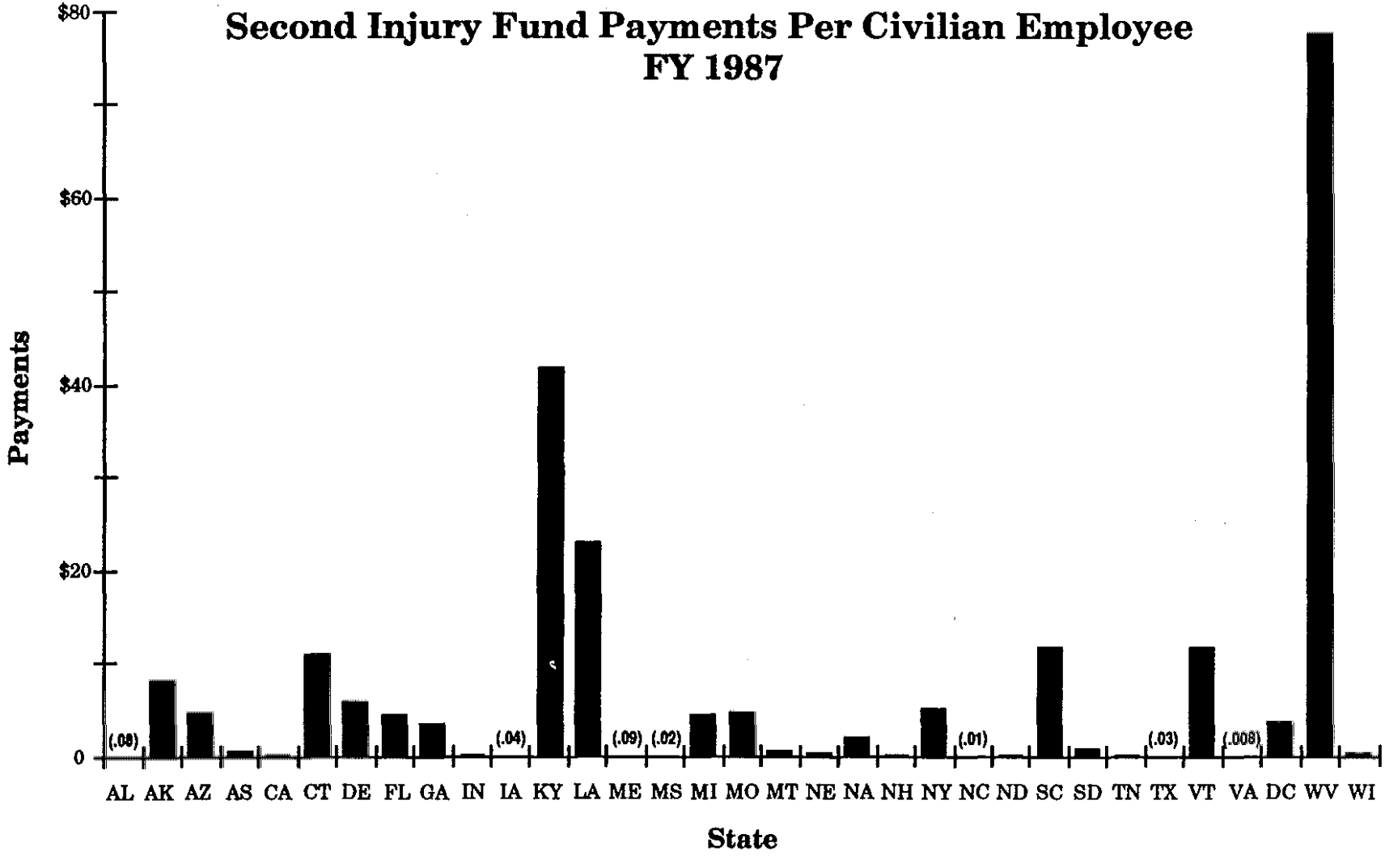
* Cash balance reflects $223,092 transferred to the General Fund.

Source: JLARC analysis of DWC Fund Status Reports, 1989.

Also, utilization of Virginia's second injury fund is minimal compared with other states. Of 33 states for which second injury fund data were available, Virginia had the lowest rate of payment for FY 1987, paying only .008¢ per civilian employee (Figure 13). Two of Virginia's neighboring states, Kentucky and West Virginia, had higher payments than all other states. This was due to the high incidence of coal miners' pneumoconiosis (black lung) in these states. At least 13 of the states with higher rates of second injury fund payments have more restrictive eligibility requirements than Virginia.

The restrictive nature of Virginia's second injury provisions has been acknowledged for nearly ten years. Several of the eligibility requirements for the second injury fund were revised during the 1980s, after a study by the Workmens' Compensation Subcommittee of the House Committee on Labor and Commerce. The subcommittee recommended changes in the eligibility requirements due to the lack of utilization of the fund. However, implementation of these recommendations has not resulted in a significant increase in utilization.

Figure 13



Sources: U.S. Bureau of the Census, *County and City Date Book, 1988*; and U. S. Department of Labor, *State Workers' Compensation: Administrative Profiles.*

Additional study of the reasons for the fund's low utilization rate appears warranted. The General Assembly may wish to further study the second injury fund. This assessment should specifically address: (1) the intent of the statutory provisions; (2) whether or not modification of statutes appears warranted; (3) what, if any, changes should be made to the eligibility requirements for reimbursement; and (4) projected payments from the fund resulting from changes in eligibility criteria.

APPROVAL AND MONITORING OF SELF-INSURED EMPLOYERS

Section 65.1-104.1 of the *Code of Virginia* allows approved employers to be individually self-insured for workers' compensation. To qualify for self-insurance, an employer must apply to the DWC and prove its financial ability to pay injured workers directly as claims arise. As of August 1989, 130 Virginia employers were self-insured.

The DWC has established a fairly informal process for reviewing and approving individual self-insurance applications. The general activities undertaken by the comptroller in the review process appear to be appropriate. However, four changes are necessary to strengthen the self-insurance process. These changes concern the need for consideration of composite financial data in the analysis of applications, weak or nonexistent documentation, nonexistent follow-up monitoring, and a lack of written policies and procedures.

Approval and Oversight Process

Employers who wish to become self-insured must submit a completed application to the DWC. Along with the application, the employers must also submit audited financial statements reflecting their financial status for the most recent two years.

Upon receipt of this information, the DWC comptroller assesses the employer's financial condition. The comptroller performs certain ratio analyses, and generally assesses the employer's financial history to render an opinion as to whether the employer appears able to pay workers' compensation benefits from its own resources. The commissioners make the final decision as to whether the employer will be granted self-insured status.

Pursuant to statute, the DWC requires each self-insured employer to post a bond securing payment of compensation liabilities. The minimum bond amount currently required by the DWC is $750,000.

Once an employer has complied with the self-insurance requirements and has provided a satisfactory bond, a self-insurance certificate is issued. This

certificate remains in force until cancelled by the DWC or surrendered by the employer.

Periodically, the DWC will request that approved self-insured employers submit information regarding their financial status and the payment of compensation claims. This information, however, is not systematically used to monitor the self-insured employers.

Approval and Monitoring Procedures Should Be Strengthened

The basic procedures used by the DWC to assess and approve self-insured employers appear to be reasonable. The types of information collected from the employer, and the types of financial assessments conducted by the comptroller, are generally similar to those recommended by the International Association of Industrial Accident Boards and Commissions in its *Model Rules and Regulations for Workers' Compensation Administrators Governing Self-Insurance*. Actions in four areas, however, would strengthen the individual self-insurance process.

First, although the comptroller performs ratio analyses, he does not have a comparator for his findings. The comptroller indicated that he considers the ratio findings in the context of very general rules of thumb. Acceptable ratios vary significantly between industries, however.

Several financial and accounting experts, including Dun and Bradstreet and Robert Morris Associates, annually publish detailed composite financial information which includes ratio assessments and other data by specific industry. This information is routinely used by financial executives and others who must determine if an employer is in a strong or weak position relative to its industry. Consideration of this data would aid the comptroller in his assessments of the financial standing of self-insurance applicants.

Second, documentation for many decisions in this area has been weak or nonexistent in the past. To illustrate, review of 11 randomly selected files indicates that (1) four files did not contain any evidence of why the application was approved or denied, (2) four files contained only selected ratios calculated by the comptroller without showing any further analysis, and (3) three files contained the comptroller's or chief deputy commissioner's recommendation regarding self-insurance without any explanation of the decision.

Within the past year, the commissioners have begun keeping minutes during their weekly meetings. These minutes sometimes outline the commissioner's decisions regarding self-insurance applications. This information, however, is not detailed, nor is it transferred to the applicant's file.

Third, the DWC does not monitor employers once they have been accepted for self-insurance. Even though the DWC periodically requests updated

financial information from self-insured employers, the comptroller does not routinely assess whether the employer's financial status has deteriorated or otherwise shifted.

In contrast, the SCC reviews its self-insured workers' compensation groups annually. The SCC recently moved to this review cycle when one of its approved groups became insolvent. In light of the problems experienced by the SCC, the DWC should initiate routine monitoring. The comptroller has stated that he would like to initiate monitoring activities in the future.

Fourth, written procedures are lacking in this area. Because of the inconsistent documentation mentioned above, it is impossible to determine if a consistent assessment process is conducted for each application. A formal written procedure would ensure that a standardized procedure has been developed. It would also provide the commissioners and others with a better understanding of how recommendations concerning self-insurance are derived.

Recommendation (27). **The DWC comptroller should strengthen the self-insurance process by (1) making use of available composite financial data when analyzing applications for self-insurance, (2) precisely and consistently documenting the analysis and recommendations behind each approval or denial for self-insurance, (3) specifically documenting the commissioners' decisions regarding self-insurance and including this documentation in each application file, (4) establishing a regular schedule to review the financial soundness of approved self-insured employers, and (5) drafting written procedures for the self-insurance process.**

THE BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM

The Birth-Related Neurological Injury Compensation Program (*Code of Virginia* §38.2-5000 *et seq.*) was established in 1987. The program's intent was to provide an exclusive remedy outside of common law and to create a fund for making compensation payments to infants suffering a birth-related neurological injury. The program has a board of directors appointed by the Governor with responsibility for administering the program and compensation fund.

The DWC has several statutory responsibilities regarding the Birth-Related Neurological Injury Compensation Act. Under the Act, the agency's responsibilities are similar to its processing and adjudication functions regarding workers' compensation. However, provisions have not been made to reimburse the DWC for its expenses associated with the program. These provisions should be established to protect the integrity of the workers' compensation administrative fund.

Responsibilities Appear Reasonable

Under §38.2-5003 of the *Code*, the Industrial Commission is authorized to process and adjudicate all claims filed under the Birth-Related Neurological Injury Compensation Program. The Industrial Commission's responsibilities include: (1) receiving and adjudicating claims; (2) receiving petitions from claimants and arranging for serving the petitions upon the program, any physicians and hospitals named, the Board of Medicine, and the Department of Health; (3) approving requests to issue interrogatories and depositions; (4) receiving and reviewing reports from a panel of physicians as to whether a specific injury meets the definition of a birth-related neurological injury; and (5) enforcing its orders.

To date, no birth-related neurological injury claims have been filed under the program, making it difficult to assess the DWC's performance. However, as articulated in statute, the DWC's responsibilities under the program are similar to its processing and adjudication responsibilities for workers' compensation claims and therefore appear reasonable.

In addition, the Virginia court system appears to be the only other State government structure that might be appropriate for carrying out the DWC's responsibilities under the program. However, since the Birth-Related Neurological Injury Compensation Program was specifically designed to provide an alternative to the courts, placing the program within the court system appears to be inconsistent with legislative intent.

The DWC's Expenses Should Be Reimbursed

To fulfill its statutory responsibilities under the Birth-Related Neurological Injury Compensation Program, the DWC will use its administrative and judicial divisions, as well as the commissioners. However, no provisions have been made in the Birth-Related Neurological Injury Compensation Act to reimburse the DWC for its expenses. In addition, language in the Virginia Workers' Compensation Act does not allow the DWC to use agency administrative funds for purposes other than administering the Act.

The DWC's operating expenses are derived from annual assessments against self-insured employers, group self-insurance associations, and insurance companies underwriting workers' compensation insurance in Virginia. Section 65.1-136 of the *Code of Virginia* specifically provides that these assessments shall be used to fund the administration of the Virginia Workers' Compensation Act and shall not be used for any other purpose. Therefore, processing and adjudicating claims for birth-related neurological injuries represent an expense that the DWC is not allowed to pay from its administrative fund.

Since the DWC has several responsibilities under this program, consideration should be given to establishing procedures for reimbursing the agency's expenses from the Birth-Related Neurological Injury Compensation Fund. This would ensure that workers' compensation insurers are not unlawfully and unfairly taxed for claims related to the Birth-Related Neurological Injury Compensation Program.

Recommendation (28). **The General Assembly may wish to amend the Birth-Related Neurological Injury Compensation Act (*Code of Virginia* §38.2-5000 *et seq.*) to authorize the Department of Workers' Compensation to recover expenses incurred when fulfilling its responsibilities under the Act.**

MEDICAL COSTS PEER REVIEW PROGRAM

The Medical Costs Peer Review Program was created in 1980 as an alternative to instituting a medical fee schedule for controlling medical costs. The DWC is charged with providing administrative support for the program and the Industrial Commission serves as the appeals court for cases heard under the peer review system.

The Peer Review Process

Insurance carriers or employers may file a complaint with the DWC if they believe a physician is overcharging for workers' compensation services. The case is then assigned for a review by one of five regional peer review committees operating in the State.

The regional committees are composed of five physicians practicing in the region who typically accept workers' compensation patients. If the decision of the regional committee is unfavorable to the physician, the regional committee sets the fee at a "reasonable amount." Notification of the peer review committee's decision is sent to the physician, the party requesting the review, and the DWC. The physician has the right to appeal the decision to the Industrial Commission.

The DWC's Role In the Peer Review Process Appears Appropriate

Given that the activities of the program are related to resolving particular aspects of workers' compensation cases, the DWC's duties for the program seem appropriate. However, the Medical Costs Peer Review Program is having very little direct demonstrable effect on medical charges. During 1987 and 1988, only 32 cases were heard, resulting in only about $27,000 in total charge reductions. The program

appeared to be experiencing increased activity in 1989, particularly in the Eastern Shore area.

Despite widespread support for the program's purpose among members of the program's Statewide Coordinating Committee (which promulgates regulations and provides guidance for the operations of the regional committees), insurance companies apparently remain skeptical about its ability to affect fee reductions. Members of the Coordinating Committee generally believe that simply having the Peer Review Program in place may serve as a deterrent to physician overcharges. They also generally expressed support for the actions of the regional committees for the cases which were filed with the program.

VI. DWC Organization and Management Concerns

The organization and management of the Department of Workers' Compensation (DWC) were examined from a variety of perspectives, ranging from the overall placement of the agency in Virginia State government to the agency's training activities for staff. Although the agency appears to have the general framework necessary to carry out its assigned functions, the assessment indicated several weaknesses that require attention.

Given the unique responsibilities of the DWC, its independent status appears appropriate. However, simplification of the agency's nomenclature may assist claimants and the general public in understanding the structure and function of the DWC and the Industrial Commission.

Analysis of the high-level structure and management of the DWC revealed that two changes are required. First, an executive director position should be created to oversee the daily operations of the agency. Second, the administrative roles of the commissioners should be defined in writing with emphasis placed on the delegation of virtually all administrative responsibilities to the executive director.

An assessment of the structure and management of each DWC division revealed significant problems in the claims division. A reorganization of the claims division is proposed which involves separating the current claims department into two distinct divisions according to administrative and claims examination/judicial functions.

Generally, the DWC needs to develop written policies and procedures to guide the work of the agency and to make its personnel policies more comprehensive. Although the personnel policies of the DWC appear to be generally adequate, JLARC staff found problems with the application of certain policies.

Several indicators were examined that demonstrated weaknesses in the staffing practices of the DWC. The DWC does not carry out any type of systematic manpower planning. Consequently, requests for additional staff positions are not well justified and the actual need for requested positions is unclear. In addition, employee orientation, particularly for deputy commissioners, is inadequate.

In contrast to the problems found in the central office, site visits and interviews conducted with regional staff indicate that the organization and management structure of the DWC's regional offices appear appropriate. Although the small size of the offices results in less distinct separations of job responsibilities and functions, this seems to enhance the cooperation necessary to process and adjudi-

cate claims. However, recent problems with staff turnover suggest that additional management training is needed for the deputy commissioners heading these offices.

ORGANIZATIONAL STATUS

The DWC is an independent agency in State government, meaning that it operates with a broader level of autonomy than agencies placed in the executive branch and does not have the direct secretarial oversight of typical executive branch agencies. Concern has been expressed in the past that this lack of oversight and budgetary control could lead to unresponsiveness by the DWC. However, despite certain organizational problems detailed later in the chapter, the independent status of the DWC seems to be appropriate given its unique functions. In addition, the General Assembly may wish to consider simplifying the name of the agency to reduce the confusion caused by the double nomenclature currently in use (the Department of Workers' Compensation and the Industrial Commission).

Independent Agency Status Appears Appropriate

Different states have placed their workers' compensation programs in varying branches of government. Twenty-eight states have assigned responsibility for this program to the executive branch, while four states have utilized the judicial branch. Eighteen states, including Virginia, have created independent agencies for these programs, placing responsibility outside of the three traditional branches of government.

Given the dual judicial/administrative responsibilities of the DWC, its independent status appears appropriate. Independent agency status helps ensure that (1) agency leadership does not change with every election and (2) that an impartial, non-political environment is provided within which the DWC's adjudicatory functions can be carried out.

Agency Name Should Be Clarified and Simplified

The DWC is known by two different names — the Department of Workers' Compensation and the Industrial Commission — due to the intermixing of the names in statute. The use of two agency titles can lead to confusion over the identification of the agency and its specific functions.

According to §65.1-10 of the *Code of Virginia*, the Industrial Commission "is continued within the Department of Workers' Compensation." Based on interviews with DWC staff, the titles "Industrial Commission" and "Department of Workers' Compensation" are used synonymously by the commissioners and DWC

staff. The three commissioners simply hold the top management positions of the DWC and do not comprise a separate organizational entity.

Simplification of the agency's nomenclature may assist claimants and the general public in understanding the structure and function of the DWC and the Industrial Commission. Agency staff report that they sometimes receive telephone calls requesting information on industries in the State. These telephone calls not only disrupt the work of DWC staff, but indicate the confusion that the use of the current titles can cause.

Although the organization could utilize either the Department of Workers' Compensation or the Industrial Commission exclusively, neither title seems to capture the full purpose of the agency or the functions of the commissioners. A logical alternative to utilizing two names for the agency would be to rename the agency the "Workers' Compensation Commission." The title "Workers' Compensation Commission" would reflect both the existence of the commissioners and the organization's purview over matters related to compensation of workers from all occupational categories. In addition, by eliminating references to the term "industrial" in the title, the new title would help prevent any confusion about the functions of the agency.

Forty-one other states utilize one name for their workers' compensation program. Of these 41 states, 29 utilize a name that features the term "workers' compensation" in the title. Only four states besides Virginia have a single department which utilizes two names to distinguish between their administrative and judicial components.

Recommendation (29). **The General Assembly may wish to consider simplifying the name of the Department of Workers' Compensation/ Industrial Commission to the Workers' Compensation Commission.**

HIGH-LEVEL STRUCTURE AND MANAGEMENT

Analysis of the high-level structure and management of the DWC revealed two primary problems. First, the variety and complexity of the chief deputy commissioner's responsibilities indicate that the position is required to perform too many functions. In order to relieve the chief deputy commissioner of some of these responsibilities, an executive director position should be created to supervise the administrative functions of the agency.

Second, the administrative roles of the commissioners are unclear. Currently, commissioners regularly become involved in relatively minor agency administrative matters. This can result in delays in management decisions and can circumvent the chain of command. In addition, involvement in administrative

matters may also detract from the time the commissioners have available to carry out their judicial responsibilities.

With the exception of the commission chairman, commissioners should not be involved with the day-to-day administrative operations of the agency. As part of the creation of the executive director position, the commissioners should specify the authority to be given to both the chief deputy commissioner and the executive director. Emphasis should be placed on the delegation of virtually all administrative responsibilities to the executive director with oversight provided by the commission chairman.

Executive Director Position Should Be Created

The chief deputy commissioner currently serves as the judicial and administrative coordinator and manager for the DWC. Two factors indicate that this high-level structure should be changed. First, the chief deputy commissioner has an excessively large span of control. Second, the position is vested with complex and diverse job responsibilities.

Chief Deputy Commissioner's Span of Control Is Excessive. Span of control is an important organizational concept because there are limitations to the number of subordinates one supervisor can manage effectively. The American Management Association has developed general guidelines as an aide to assessing span of control (Table 15).

The chief deputy commissioner currently has 17 people (including his secretary) reporting directly to him. In addition, he is responsible for overseeing some duties of the Peer Review Coordinator. In contrast, the average span of control for other upper-level managers in the agency is 3.7, which is well within the AMA's recommended guidelines.

One indicator of the inordinate demands placed on the chief deputy commissioner by the excessive span of control is his inability to complete management staff performance evaluations. At the time of the review, DWC management staff had not received formal performance reviews in over two years. The last review was done before the prior chief deputy commissioner left the agency. The chief deputy commissioner acknowledged that performance evaluations had not been performed for these staff and cited time and more pressing priorities as the reasons.

Chief Deputy Commissioner's Job Responsibilities Are Too Broad. The role of the chief deputy commissioner evolved over time from primarily a judicial function into one which is increasingly administrative. Although it may have been possible for one person to perform both functions when the agency was smaller, the increasing administrative demands on the position make this extremely difficult.

Table 15

Span of Control Guidelines

Type of Work Supervised	Span of Control
Technical and Analytical Jobs	3-7
Semi-analytical, Non-technical Jobs	4-8
Administrative Jobs	6-10
Clerical Routine Tasks	10-20
Manual Routine Tasks (Without a Lead Worker)	12-25

Note: The AMA suggests that the following factors also be considered when determining whether a span of control is appropriate: (1) the complexity of the tasks supervised, (2) the supervisory skill of the manager, (3) the level of skill and experience of the subordinates, (4) the physical proximity of subordinates to the manager, and (5) the number of functional areas supervised by the manager.

Source: American Management Association.

While the commissioners have ultimate responsibility for the administration of the DWC, the chief deputy commissioner oversees the daily activities of the organization. All senior managers with administrative functions report to the chief deputy commissioner. These managers include the comptroller, the human resources officer, the claims manager, and the senior computer programmer/analyst.

However, the chief deputy commissioner also retains many functions which are either partly or totally judicial in nature. For example, the chief deputy commissioner supervises the deputy commissioners by monitoring their opinions and conducting their performance appraisals. His judicial responsibilities include reviewing compromise settlements between employers and employees, approving interrogatories and depositions, assigning some cases to the docket, sitting and hearing cases on review before the full commission when a commissioner must be absent, and answering legal questions by the clerk and other staff. The chief deputy commissioner also monitors Industrial Commission opinions and Court of Appeals opinions.

The chief deputy commissioner stated that he regularly works overtime in order to keep pace with his judicial and supervisory duties. He estimated that his supervisory duties comprise about 80 percent of his work day and that these duties leave little time for agency planning. He also stated that his judicial activities, in particular reviewing petitions and orders for compromise settlements, required him to take work home nightly in order to be completed in a timely fashion.

Executive Director Position Should Be Established. An executive director position should be created for the DWC to establish a more logical and reasonable management structure. This position should report directly to the chairman of the commission and oversee the overall operations of the DWC. The chief deputy commissioner position would continue to oversee the judicial functions of the agency and would report to the executive director (Figure 14).

The executive director would be responsible for direct oversight of divisions with primarily administrative functions (i.e., the comptroller's office, data processing division, insurance division, and the Crime Victims' Compensation Program). Agency planning and agency budget development would also be under the purview of the executive director.

The chief deputy commissioner would retain responsibility for overseeing the clerk's office and the nine deputy commissioners. In addition, the chief deputy commissioner would also be responsible for such judicial activities as responding to legal inquiries related to the Act and hearing reviews when it is necessary for a commissioner to be absent.

As will be described in detail later in this chapter, JLARC staff propose separating the current claims division into two divisions to further clarify the supervision of administrative and judicial functions of the DWC. The executive director would oversee the claims processing division, which would be composed of the five units currently supervised by the claims administrative supervisor. These functions generally require little interpretation of the Act. The chief deputy commissioner would oversee the new claims examination division, which would be composed of the claims examiners, claims assistants, and agency mediation functions.

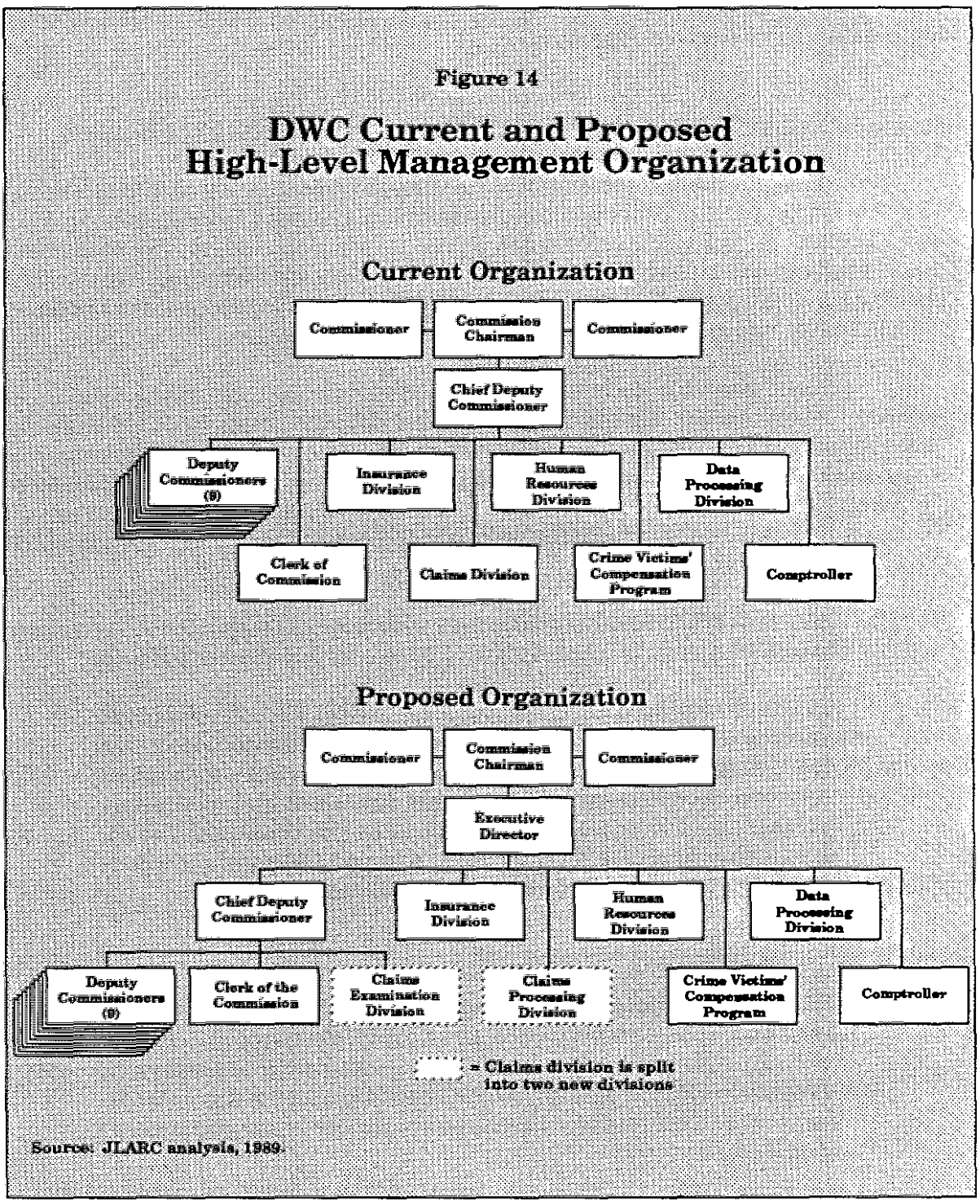
There are three advantages to the separation of the administrative and judicial functions of the agency. First, the primary focus of the agency is the administrative processing of claims. The separation of functions should enhance the oversight of the administrative processing of claims because the manager of this function will report directly to the executive director. Currently, the manager of the processing function must go through another layer of management with primarily judicial functions within the claims division.

Similarly, the consolidation of the judicial functions and the chief deputy commissioner's reduced span of control will enhance the oversight of these functions. This type of reorganization will allow the chief deputy commissioner to devote more time to special projects, such as developing consistent procedures for the deputy commissioners and dispute resolution activities.

Third, the chief deputy commissioner will presumably have more time to sit on hearings and reviews. This will provide scheduling relief for the commissioners and deputy commissioners and could help avoid potential delays when deputy commissioners or a commissioner must be absent.

Figure 14

DWC Current and Proposed High-Level Management Organization



Source: JLARC analysis, 1989.

Recommendation (30). **The DWC should create an executive director position. The position should report to the commission chairman. All division managers, including the chief deputy commissioner, should report to the executive director.**

Administrative Roles of Upper-Level Management Need Clarification

Despite the recommendations of a management study conducted by the Virginia Department of Management Analysis and Systems Development in 1980 and the shift of many administrative duties to the chief deputy commissioner, commissioners are still involved in relatively minor administrative matters and purchases. There appears to be a continued reluctance among the commissioners to delegate administrative authority to more appropriate positions.

Commissioner involvement in administrative matters has at least three negative effects on the organization. First, it detracts from the time that the commissioners have available to perform their primary function, adjudicating disputed workers' compensation claims. Second, it can adversely affect the timeliness of management decisions which could be made without commissioner involvement. Third, it circumvents the organizational chain of command and can lead to conflicting instructions to subordinates.

Examples of direct commissioner involvement in administrative matters and inadequate delegation of administrative authority include the following:

> *In an attempt to conserve water costs, one of the commissioners became directly involved in the placement of sprinklers on the DWC building grounds. The commissioner's involvement necessitated the development of a memorandum from the agency procurement officer to the commission chairman explaining the rationale for the original placement of the sprinklers and the watering schedule, which were ultimately retained.*
>
> * * *
>
> *There is no formal guideline for the amounts or types of purchases that should be brought to the commission for approval. Consequently, relatively minor purchases — such as a request for a computer software package — are passed up to the commission for approval. This results in unnecessary delays in the purchase of goods and services.*
>
> * * *

Rather than requesting information through the chief deputy commissioner, one commissioner went directly to the data processing programmer/analyst to make a data request. The commission chairman subsequently went directly to the data processing programmer/analyst and instructed him not to compile the information requested by the other commissioner. Conflicting instructions such as this tend to confuse staff members and convey an impression that problems exist in upper-level management. This situation should have been resolved between the commissioners themselves, or through the chief deputy commissioner, without involving other subordinates in the agency.

Another indication that the commissioners should be less involved in direct administration of the agency is the length of time it takes one commissioner to generate review opinions. (This finding was presented in the previous chapter.) Fewer administrative activities would give this commissioner more time for his judicial responsibilities.

With the exception of the commission chairman, the duties of the commissioners should be focused on their judicial responsibilities. However, the commissioners should continue to be involved in the approval of agency policies and budgets, and the hiring and dismissal of specified judicial personnel.

Recommendation (31). **The DWC should develop written guidelines outlining the administrative matters in which the commissioners should be involved, including: (1) approval of agency policies and budgets, (2) approval of major unbudgeted expenditures, and (3) hiring and dismissal of specified judicial personnel. The primary focus of the commissioners should be on judicial matters. The duties of the commission chairman should also focus on judicial responsibilities, but the chairman should also be responsible for oversight of the executive director and providing the commission with organizational status updates.**

ORGANIZATION OF THE CLAIMS DIVISION

The structure and management of each DWC division was assessed during the review. The assessment revealed significant structural problems in one division: the claims division.

The claims division is by far the largest division in the agency, containing almost one-half of the agency's total staff. The size of the division and the diversity of the functions it performs have contributed to problems in the relationships between the two main sections of the division, the claims processing section and the claims examination section. These problems are exacerbated by structural deficien-

cies within the sections and the fragmentation of certain claims-related activities in the insurance division.

For these reasons, a reorganization of the claims division is proposed. The reorganization involves separating the current claims department into two distinct divisions according to administrative and claims examination/judicial functions. As part of the reorganization, supervision of clerical staff in the claims examination section should be consolidated in one supervisory position. Functions which are currently fragmented between the claims division and the insurance division or are inappropriately placed in one of those divisions should be realigned to consolidate similar functions. Finally, active negotiations should be undertaken between the new divisions to define specific areas of responsibilities in writing and to resolve prior disputes between the claims processing and the claims examination sections.

Claims Division Should Be Separated into Two Divisions

The claims division is currently divided into two sections, according to the two different types of tasks performed in the division (Figure 15). The processing section is responsible for activities related to the processing, storage, and circulation of files. The primary functions of the processing section often involve following a complex set of procedures depending on the components of individual cases. However, the duties involve little contact with the public or discretionary interpretation of the Act.

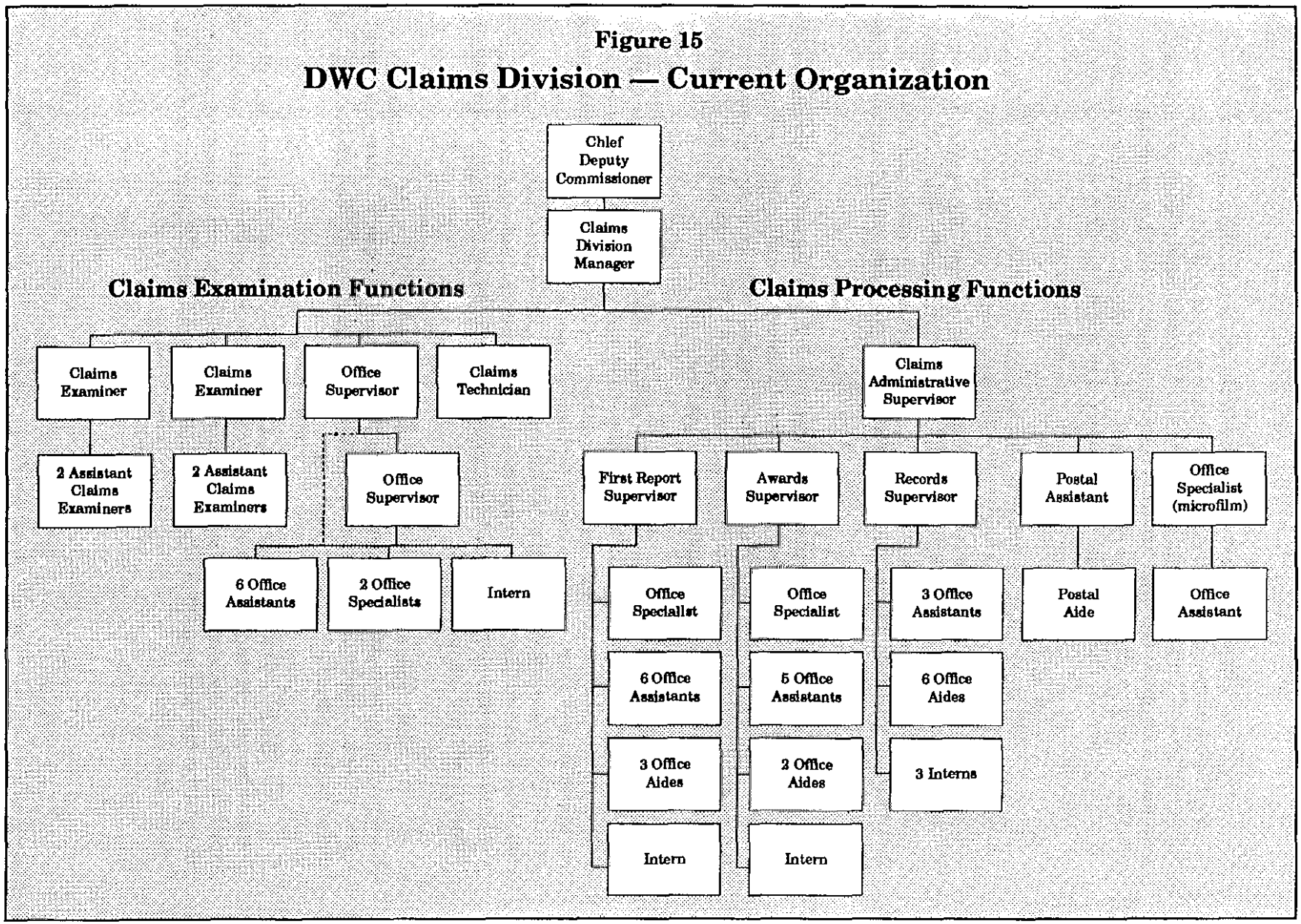
On the other hand, the functions of the claims examination section requires frequent contact with the public. In addition, the claims examination and dispute resolution functions of the section require discretionary actions regarding the Act in order to handle the problems that arise in cases that are not routine. These types of duties will likely increase if the DWC chooses to enhance its alternative dispute resolution activities.

The claims division should be separated into two divisions for four primary reasons. First, although the two sections rely on one another to coordinate the complete handling of a claim, the functions of the two areas are markedly different.

Second, the diversity of duties makes close supervision of both sections difficult for a single manager. The claims manager is functionally aligned with the activities of the claims examination section. His main functions include the determination of the appropriate action on problematic cases and answering inquiries from outside parties. Consequently, he has very little daily contact with the operations of the processing section. The claims manager has delegated all but final approval of most section activities and procedural changes to the claims administrative supervisor, who heads the processing section.

Figure 15

DWC Claims Division — Current Organization



Source: JLARC analysis, 1989.

Third, the disproportionate size of the claims division reduces the ability of the claims manager to effectively manage the entire division. Organizational theory suggests that the appropriate size for a first-level organizational unit ranges from ten to 30 staff, utilizing between three and eight subordinate managers. The claims division currently has 43 full-time staff and ten subordinate managers. Other agency divisions range from one to ten full-time staff with one or two managers.

Fourth, during the review, serious communication problems were noted in relations between the two sections. Problems with utilizing proper chain of command and a lack of communication between the two sections appear to contribute to consistent intradivisional disputes. Reorganization would provide an opportunity to clarify the roles of the two areas and define specific responsibilities in order to improve channels of communication between the two areas and to address existing disputes.

The new claims processing division should be supervised by the claims administrative supervisor. This position should report directly to the new executive director position. The claims manager should retain responsibility for supervising the work of the claims examiners and assistants. This position should report directly to the chief deputy commissioner position.

Recommendation (32). **The claims division should be divided into two separate divisions: the claims processing division and the claims examination division. The claims processing division should be composed of the current first report, awards, and records units and the mail and microfilm functions. The claims examination division should encompass the activities of the claims examiners, assistant claims examiners, claims technician, alternative dispute resolution staff, public contact personnel, and associated clerical staff.**

The claims administrative manager position should report directly to the new executive director position. The claims manager position, which heads the claims examination division, should report to the chief deputy commissioner position.

As part of the reorganization of the claims division, meetings should be conducted between managers of the two new claims divisions to resolve areas of conflict. Regular meetings between division supervisors should be implemented to prevent interdivisional problems from developing in the future.

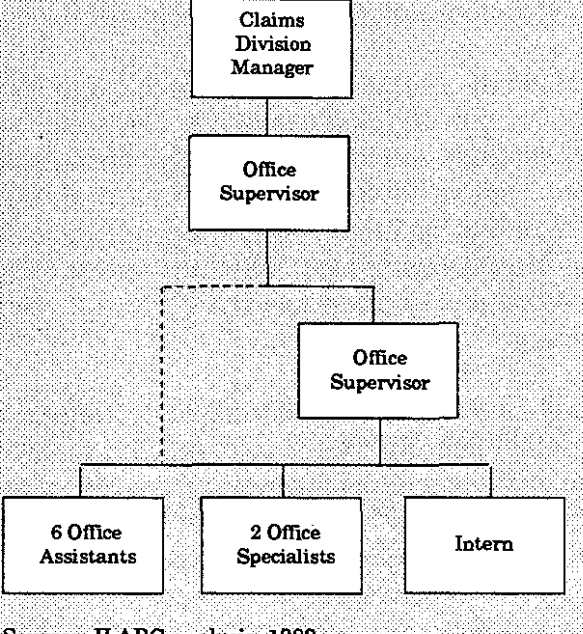
Supervision of Clerical Staff In the Claims Examination Section Should Be Consolidated into One Position

Two individuals currently supervise the clerical staff in the claims examination section of the claims division. A lower-level supervisor and a higher-level supervisor are responsible for overseeing eight full-time clerical positions (Figure 16).

The dual supervision of the clerical positions in the claims examination section seems unnecessary. The higher-level supervisor conducts the performance evaluations and maintains leave records for the clerical staff. However, the lower-level supervisor takes primary responsibility for determining workload assignments and performs most of the direct supervision of the clerical staff.

The responsibilities of the two supervisor positions are further complicated because the higher-level supervisor also acts as secretary for the claims manager. According to the higher-level supervisor's job description, over 40 percent of her job responsibilities are related to her secretarial duties. Another 25 percent of her time, according to the job description, is spent typing letters to request first reports of accidents from employers or insurance companies, which is a duty that could be delegated to clerical staff.

Figure 16
Current Organization of DWC Claims Examination Section Clerical Staff



Source: JLARC analysis, 1989.

The DWC should vest supervisory responsibility for this unit in one position by eliminating one of the supervisor positions. At the same time, a secretarial position could be created to perform secretarial functions for the claims manager.

Recommendation (33). **The DWC should consolidate supervisory responsibilities over clerical staff in the claims examination section by eliminating one of the current supervisor positions. Appropriate adjustments should be made to job descriptions and position classifications to reflect the elimination of the position and the realignment of job responsibilities. If necessary, a secretarial position could also be created to perform secretarial functions for the claims manager.**

Fragmented Functions Should Be Realigned

Two functions in the DWC appear to be inappropriately placed in the agency. These functions involve the claims processing section of the claims division and the insurance division.

The first function concerns the verification of insurance coverage, which is fragmented between the insurance department and the first report unit of the claims division. This fragmentation can cause delays in the processing of claims.

Personnel in the first report unit attempt to verify insurance coverage by calling the employer, the insurance company named on the employer's first report, and the National Council on Compensation Insurance. If unable to verify coverage, the first report unit sends the file to the DWC's insurance division, where additional, and sometimes duplicative, attempts are made to verify coverage.

Keeping track of insurance coverage is a major function of the insurance division. Personnel in the division maintain the most up-to-date information regarding insurance coverage within the DWC. In contrast, having first report unit personnel attempt to resolve coverage verification problems detracts from their primary functions of reviewing first reports, establishing files, and entering the relevant information into the computer. The first report supervisor estimated that attempts to verify coverage may delay the DWC's acknowledgement of its notice of an injury by one to three days.

The second functional fragmentation of responsibilities occurs in the processing of minor injury reports that employers and insurance companies submit to the DWC on a monthly basis. Minor injury reports serve as the first notice — and often the only notice — the DWC receives that a minor work-related injury has occurred. However, rather than processing the reports in the first report unit, where information for all other injuries is processed, a clerk in the insurance department performs this function. Four other clerks in the insurance department

also spend about one hour each day entering data from the minor injury reports into the computer instead of performing their normal insurance functions.

From an organizational procedures standpoint, minor injury reports are most logically the responsibility of the first report unit. Insurance division staff should not be required to perform this function, which, according the supervisor of the insurance division's clerical staff, can cause backlogs in their other duties. Both the manager of the insurance division and the supervisor of the division's clerical staff suggested that the function should be transferred to the first report unit. Consideration should be given to reassigning responsibility for these reports to the first report unit.

Recommendation (34). **The DWC should ensure that all files for which the employer's insurance coverage cannot be immediately verified are sent from the first report unit to the insurance division. Personnel in the insurance division should be assigned primary responsibility for determining whether an employer is covered by required workers' compensation insurance. The DWC should assess the need for shifting personnel currently performing this task in the first report unit to the insurance division.**

Recommendation (35). **The DWC should reassign responsibility for the processing of minor medical reports from the insurance division to the first report unit of the claims processing division. Consideration should be given to assigning personnel in the insurance department currently performing this function to the first report unit.**

POLICIES AND PROCEDURES

Written policies and procedures are necessary to guide ongoing operations and assist with management and staff decision-making. Written policies and procedures can ensure that (1) appropriate and expected procedures are identified and defined for all work areas, (2) work activities are in compliance with statute, and (3) a framework exists for analyzing personnel training and development needs. The DWC needs to develop written policies and procedures to guide the work of the agency. The agency should also make its personnel policies more comprehensive. In addition, policies regarding performance evaluations should be followed.

Written Policies and Procedures Are Needed

While some work areas in the DWC have written policy and procedure manuals, the majority of its divisions and sub-divisions operate with fragmented written procedures, such as job descriptions or administrative memoranda, or on

the basis of unwritten practices established over time (Table 16). Three areas within the agency are in the process of developing written policies and procedures manuals for the first time.

The DWC does utilize a written personnel policy to guide employee policies and relations. A review of the agency's written personnel manual revealed that the DWC's personnel policies are generally thorough and are consistent with existing statutes. However, provisions regarding time records, unemployment compensation, wage garnishments, safety and health, and conflict of interest should be added to the agency's personnel policy manual to ensure that personnel policies are fully understood by staff.

Table 16
Status of DWC Policies and Procedures

	Existing	Under Development	Non-Existent
Judicial Divisions			
Deputy Commissioners			●[1]
Regional Offices			●[1]
Clerk of the Commission			●[1]
Claims Examination		●	
Administrative Divisions			
Bailiffs			●
Comptroller			
Fiscal Operations			●
Self-Insured Employers			●
Claims Processing			●
Data Processing	●[2]		
Insurance			
Coverage		●	
Uninsured Employer's Fund		●	
Second Injury Fund			●
Personnel	●[2]		
Crime Victim's Compensation	●		
Peer Review	●		

[1] Partially covered by rules of the Industrial Commission and administrative bulletins.

[2] Need to be revised.

Source: JLARC review of DWC policies and procedures, 1989.

Written Policies Should Be Developed to Guide DWC Work Activities. Most agency divisions do not currently have written policies and procedures. The agency has relied primarily upon supervisors or co-workers to pass on the policies and procedures for particular areas to new workers. This practice presents a risk that institutional knowledge will be lost if critical employees leave the agency. It can also lead to inconsistency in policies or procedures because there is no written reference to consult when questions arise. Finally, the inconsistency or lack of written policies and procedures can result in misunderstandings or disputes among staff because duties and responsibilities are not clearly articulated.

The lack of written policies and procedures has caused problems in the past and could cause problems in the future. For example:

> *Certain clerical staff in the claims examination section are responsible for answering, screening, and routing telephone calls. Clerical staff complain that the assistant claims examiners and claims examiners occasionally refuse to accept telephone calls for no apparent reason. On the other hand, assistant claims examiners and claims examiners state that little if any screening is done and that they spend a great deal of their time answering basic questions that should have been handled by the clerical staff. There are no written guidelines available to help staff sort out responsibilities in this area.*
>
> * * *
>
> *The DWC comptroller is responsible for annually examining the fund balances and assessing taxes for the administrative fund and the uninsured employers fund. Although the methods that the comptroller has established generally appear to be appropriate, the procedures to conduct these activities are not in written form. The commission chairman and the comptroller acknowledge that nobody else in the agency knows the procedures to conduct these important activities and that a replacement would require a significant amount of time to become familiar with these unique aspects of the comptroller's job.*

Written policies and procedures assist in the orientation of new employees by providing step-by-step documentation of the processes in their work areas. They also preserve the institutional memory of the agency when critical personnel depart and assist with internal agency evaluations of work procedures and products. For these reasons, written procedures for all major areas of DWC operations are essential.

Recommendation (36). **All divisions and subdivisions within the DWC should develop written policies and procedures. As a starting point,**

job descriptions for personnel within specific work areas should be assembled in manual form. In addition, policies and procedures manuals should include: (1) references to statutory authority, (2) broad policy statements which clarify work objectives, (3) specific descriptions of critical work functions, and (4) examples of key documents related to the work area. Target dates should be established for finalizing written policies and procedures in all divisions and subdivisions. All policies and procedures should be reviewed for updates and revisions at established intervals.

Personnel Policies Should Be Supplemented. The DWC interprets §2.1-116 and §12.1-18 of the *Code of Virginia* to mean that it is exempt from the State's Personnel Act. Therefore, the DWC develops its own personnel policies and procedures. According to the DWC's human resources officer, the DWC attempts to maintain as much consistency as possible between its personnel policies and those of State agencies under the Personnel Act.

Personnel policies and procedures developed by the DWC appear to address most situations in a comprehensive manner. There is a personnel policy manual available for review by employees located in each division and subdivision. Also, each employee receives a copy of the employee's handbook.

However, some policies and procedures recommended by human resources experts are not found in the DWC's personnel policy manual or the employee's handbook (Table 17). These include policies regarding time records and unemployment compensation. In addition, information regarding wage garnishments, safety and health, and conflict of interest are addressed in the employee's handbook but not in the personnel policy manual.

Time Sheets and Unemployment Compensation. The DWC does not specify any policy regarding employee time records. As will be explained in detail later in the chapter, time sheets are important for effective management and human resource planning. All DWC employees should be required to record their work hours on standardized, agency-wide time sheets.

In addition, the DWC does not appear to have any policy referring to unemployment compensation. A statement should be included in the policy manual indicating the agency's compliance with State and federal laws regarding unemployment compensation.

Garnishments, Safety and Health, and Conflict of Interest. Policies concerning wage garnishments, safety and health, and conflict of interest, are included in the agency's employee handbook. However, they are not included in the agency's personnel policy manual.

Regarding wage garnishments and safety and health policies, the employee's handbook states that the DWC complies with State and federal laws in

Table 17
DWC Personnel Policies

Recommended Policy	Contained in DWC Manual			Specific DWC Policy
	Yes	No	Partial	
Absence (Absenteeism)	●			sick leave; inclement weather; absence without leave
Benefits	●			holidays; health and life insurance; retirement
Civic Duty (Jury duty, Voting)	●			civil leave
Complaint Procedure	●			grievances
Discipline	●			demotion; employee standards of conduct; cause for disciplinary action; suspension, demotion, and removal
Employment	●			announcement of vacancies; disqualifications; age requirement; nepotism; recruitment; selection appointment and placement; vacancies; method of certifying appointments
EEO (EEO complaint procedure)	●			affirmative action plan; recruitment
Leave of Absence	●			leave without pay; military leave
Orientation	●			orientation of new employees
Pay, Records (Workday, Time records, Overtime, Garnishment)			●	hours of work; compensatory leave; compensation plan; personnel records and reports
Performance Appraisal	●			performance evaluation; salary advancement; bonus
Promotion and Transfer	●			job structuring and upward mobility; transfer; probationary period; pay rate adjustments
Safety and Health		●		
Temporary Employment	●			part-time and temporary employment
Terminations	●			resignations
Training and Development	●			general policy; education
Unemployment Compensation		●		
Vacations	●			annual leave
Workers' Compensation	●			workers' compensation and injury leave

Source: Mary F. Cook, *Human Resource Director's Handbook*; and DWC personnel manual, 1989.

these areas. Since procedures are already in place regarding these areas, policy statements should be drafted and included in the official personnel manual.

In addition, the employee's handbook addresses several conflict of interest issues, including solicitation and acceptance of gifts, outside employment, and supervisory employment relationships between spouses or other relatives within the agency. However, both the employee's handbook and the personnel policy manual lack any mention of conflict of interest when a relative of a DWC employee is employed within the insurance industry or regularly appears before the DWC in another capacity. Since the objectivity of the agency in deciding disputes between injured workers and insurance companies must be unimpeachable, it is necessary for the DWC to specifically address kinship relationships between its employees and those of the private insurance industry. Therefore, the conflict of interest policy identified in the employee's handbook should be revised and a policy statement should be drafted for the official personnel manual.

Recommendation (37). **The DWC should revise its personnel policies and procedures to include policies regarding time records, unemployment compensation, wage garnishments, safety and health, and conflict of interest.**

Reallocation Policy Should Be Revised

Although many of the DWC's personnel policies are similar to executive branch policies promulgated by the DPT, the DWC's position reallocation policy is different. The DWC's policy appears to be too broad.

In the executive branch, in order for a position to qualify for a reallocation, changes in position duties and responsibilities must occur gradually. Otherwise, an agency may have to consider establishing a new position, for which the established open recruitment and selection procedures associated with promotional opportunities must be applied.

The DWC personnel policy does not currently require that position responsibilities change gradually in order to qualify for reallocation. Consequently, position reallocations at the DWC can occur as work assignments are shifted, giving the appearance that a new position has been created.

The type of reallocation allowed by the current policy could contribute to a perception among agency staff that promotional opportunities are sometimes awarded without appropriate procedures being followed. Seventy percent of the agency staff interviewed during the review responded that the most qualified candidate does not always receive the promotion.

Recommendation (38). **The DWC should examine and revise its position reallocation policy to be more consistent with the reallocation policy promulgated by the Department of Personnel and Training.**

Performance Evaluations for Upper-Level Management Should Be Conducted

Non-supervisory personnel of the DWC generally appear to receive timely annual evaluations, in accordance with the agency's written personnel policy. However, at the time of the review, upper-level management of the DWC — which is comprised of the chief deputy commissioner and seven division managers — had not received performance evaluations in almost two years. Deputy commissioners also receive infrequent performance evaluations.

Generally, performance evaluations for upper-level staff and deputy commissioners are the responsibility of the chief deputy commissioner. Upper-level management staff stated that the last performance evaluations they received were when the previous chief deputy commissioner left the agency in the summer of 1987. Further, management staff also indicated that prior to the 1987 evaluation, they had not received evaluations for many years. One current manager stated that he could recall receiving only three evaluations during his 21 years with the agency.

In addition, the current chief deputy commissioner has not received an evaluation since he took the position in August 1987. The chairman of the commission is responsible for conducting the chief deputy commissioner's performance evaluation.

Recommendation (39). **The DWC should take steps to ensure that performance evaluations for upper-level management are conducted in a regular and timely manner.**

DWC STAFFING AND ORIENTATION

Due to its status as an independent agency, the DWC is not restricted by the funded employment levels outlined in the biennial Appropriations Act. Therefore, the agency is able to increase its employment level as agency management determines that the need for additional positions exists, provided that adequate funds are available for the positions.

A comprehensive staffing analysis was not conducted during the DWC review. However, several indicators were examined that demonstrated weaknesses in staffing practices. These weaknesses concern systematic manpower planning and employee orientation. Because of weaknesses in the manpower planning area, it is currently unclear how much need exists for additional positions within the DWC.

Manpower Planning Is Insufficient

DWC management consistently cited the need for additional staff in interviews. However, despite modest increases in a variety of general workload measures — such as number of cases filed, number of awards entered, and number of calls received — there is little evidence that additional staff are needed.

The lack of evidence to document the need for additional staff is a result of insufficient manpower planning by the DWC. Systematic manpower planning is necessary for the efficient use of staff and to prevent over- or under- staffing of agency functions. Two weaknesses found in the DWC's staffing practices indicate a need to improve the agency's manpower planning process: (1) the general absence of specific, objective, measurable criteria to measure employee workload and (2) the failure to utilize time sheets or work logs for agency staff.

Most divisions in the DWC do not maintain specific workload data for staff. Divisions that do maintain workload data either recently began the practice or have altered the types of information collected, thus reducing its usefulness in assessing longitudinal workload. Consequently, staffing justifications recently submitted to the Department of Planning and Budget (DPB) reflect subjective judgments of the need for additional staff rather than objective and quantifiable indicators. For example:

> *A June 1989 request for five additional positions submitted to the DPB included no documentation of the need for positions. Notes on the request written by the DPB analyst indicated that "increased workload" was the only justification for the positions cited by the DWC comptroller.*

Available statistics and indicators provide mixed conclusions regarding the need for additional staff. General statistics compiled by the DWC appear to indicate that agency workload has increased. For example, the number of files created by the claims division increased about 30 percent between 1986 and 1989. Similarly, claims division staff assert that the number of telephone calls has increased 30 percent over the last three years.

However, indicators such as staff overtime, staff turnover, and use of contracted services, fail to substantiate the need for additional staff. Overtime for non-supervisory staff throughout the agency over the past three years has been minimal. While overtime records alone do not necessarily indicate either under-staffing or over-staffing in an agency, they do provide one tool to assess the need for additional staff.

DWC overtime records for non-supervisory and non-professional staff (which comprise about 84 percent of the DWC's total staff) show that over the past three years, each staff member worked an average of 4.3 hours of overtime per year.

About 90 percent of the overtime worked by non-supervisory and non-professional personnel during that period was not related to the processing or examination of claims in the central office, but was composed mainly of bailiff overtime due to travel and overtime worked by central office transcribers.

Another possible indicator of the need for additional staff is agency turnover. However, the DWC's turnover rate for the most recent fiscal year is not noticeably higher than other agencies of similar size and is below the State average (Table 18). This is particularly noteworthy because the DWC has a higher proportion of clerical employees — which generally experience high turnover rates — than other agencies.

The agency's contracts for services also do not indicate the need for additional personnel. Most current DWC services contracts are for services such as landscaping and equipment repair, which are services that would not typically be performed by agency staff in a relatively small agency. Significantly, during FY 1989 there were no outlays related to the agency's contract with a temporary clerical firm, meaning seasonal fluctuations or backlogs were handled by existing staff.

Table 18

DWC and Other State Agency Turnover FY 1989

Agency	Average Number of Employees	Turnover Rate*
Department of Workers' Compensation	118	6.78
Department of Housing and Community Development	112	7.6
Virginia Supplemental Retirement System	101	5.7
Department of Commerce	103	10.68
Statewide**	76,389	11.67

* Calculated by dividing the number of employee separations by the average number of employees during FY 1989.

** Includes classified employees only.

Source: Department of Personnel and Training PM3235 report, FY 1989.

Further, the DWC has recently brought a major computer system on line. The system should have an impact on staff workload and result in some staffing efficiencies. For example:

> *Due to the inadequate file tracking system of the old computer, staff in the records unit of the claims division used to spend as many as 400 hours per month attempting to locate files throughout the agency. The new computer system allowed the agency to add 21 additional staff or organizational units to the tracking system, providing more precise information on the location of files. In addition, unlike the old computer system, the new system enables records unit staff to track the charge history of a file for as many as eight charge changes, which should also allow staff to locate files quicker.*

Given the inconsistency of available data, better and more consistent measures of workload should be developed and utilized throughout the agency. One specific measure that should be implemented is the keeping of time sheets.

Time sheets serve as an important mechanism for assessing manpower needs within an agency. They can be used to track hours spent on major activities or projects and to assess overtime worked by employees. This information can be used to examine the workload and productivity of employees and can serve as a basic measure on which to base future staffing requests.

Recommendation (40). **The DWC should strengthen its manpower planning process by (1) developing and implementing quantifiable, objective workload measures throughout the agency, and (2) requiring that staff keep time sheets or work logs. These measures of staff workload and workload distribution should be used by agency management to plan for future staffing needs, to develop future staffing justifications, and to allocate existing staff resources. In addition, the agency should closely monitor the effects of the new computer system on staff workload.**

Orientation and Training for Staff Is Inadequate

New employees are provided with only a general overview of the agency's overall mission and the functions of other agency divisions. Newly-hired deputy commissioners receive only a short orientation, during which they observe other deputy commissioners, before they are required to begin hearing cases. In addition, management training for regional deputy commissioners appears to be needed.

Employee Orientation Procedures Should Be Improved. Current orientation procedures for new employees include individual briefings by the DWC's human resource officer and the supervisor in the area where the employee will be

working. Upon being hired by the agency, the human resource officer provides new employees with an overview of the DWC's independent status within State government and an explanation of its implications regarding personnel policies and practices. The remainder of this phase of the orientation includes a tour of the agency by the human resource officer and receipt of a roster of DWC employees.

The supervisor in the new employee's assigned work area is responsible for orienting the employee to that area. The content of this phase of the employee's orientation is set by the supervisor. According to the human resource officer, this orientation should include information regarding how the work area fits into the overall work performed by the DWC. However, there does not appear to be any method for evaluating whether the orientation to the new employee's assigned work area is adequate.

Recommendation (41). **The human resource officer should develop a model orientation procedure to be followed by all divisions and subdivisions within the DWC. Divisions would modify the orientation procedure to fit their own needs. At a minimum, the orientation should include: a thorough overview of division operations, an organization chart of the division, a review of division policies and procedures, introductions to other division personnel and the type of work they perform, and examples of the type of work the division turns out.**

In addition, each new employee should be required to complete an evaluation form after going through orientation. These evaluations should be reviewed by the human resource officer, and the orientation procedure should be periodically modified to meet the needs of new employees.

Training Opportunities for Deputy Commissioners Are Limited. Newly-hired deputy commissioners receive minimal orientation or training related to the requirements of the job. The current orientation program for newly-hired deputy commissioners consists primarily of observing other deputy commissioners. Occasionally, even this limited training has not been made available to new deputy commissioners due to the pressing need to conduct hearings.

While watching other deputy commissioners conduct hearings and write opinions may be a useful exercise, it is not sufficient given the general lack of hearing experience of newly-hired deputy commissioners. Most new deputy commissioners come from a litigation background. Therefore, their hearing experience tends to be primarily based on a litigator's advocacy perspective, rather than an objective adjudicatory perspective. Similarly, the writing skills of the newly-hired deputy commissioners are generally based on writing briefs that utilize arguments to persuade readers, rather than writing balanced opinions based on the facts presented in a case.

In addition, several of the deputy commissioners reported having little background in the Workers' Compensation Act and the relevant case law before joining the DWC. New deputy commissioners should be briefed on important aspects of the statute prior to conducting hearings.

The need for management training for deputy commissioners in the regional offices was mentioned briefly earlier in the chapter. Two of the regional offices have recently experienced almost complete turnover in clerical staff and bailiffs. Interviews with regional staff and other documentation indicate that management in these offices was often confrontational and counterproductive. The recent turnover in the regional offices and employee complaints of poor management appear to justify providing management training for deputy commissioners.

Recommendation (42). **A formal training program should be developed and implemented for newly-hired deputy commissioners. This training program should include components related to (1) overall DWC functions, structure, and processes, (2) review and application of the Workers' Compensation Act, (3) conduct of hearings, (4) management training, and (5) writing skills. Current deputy commissioners who require training in any of the component areas should be included in those areas of the formal training program.**

Appendixes

Appendix A

DWC STUDY MANDATE

"Immediately upon the passage of this Act, and pursuant to the powers and duties specified in §30-58.1, *Code of Virginia*, the Joint Legislative Audit and Review Commission shall plan and initiate a comprehensive performance audit and review of the operations of the independent agencies funded in this section, to ascertain that sums appropriated have been, or are being, expended for the purposes for which such appropriations have been made, and to evaluate the effectiveness of the programs in accomplishing legislative intent. Such audit and review shall consider matters relating to the management, organization, staffing, programs and fees charged by the independent agencies and such other matters relevant to these appropriations as the Commission may deem necessary. The Commission shall report on its progress to the 1986 session of the General Assembly and to each succeeding session until its work is completed. In carrying out this review, the Auditor of Public Accounts and the independent agencies shall cooperate as requested and shall make available all records and information necessary to the completion of the work of the Commission and its staff."

Source: Item 11, Chapter 619, 1985 Acts of Assembly.

Appendix B

MAJOR CHANGES TO THE VIRGINIA WORKERS' COMPENSATION ACT AND DWC RESPONSIBILITIES

Year	Change to Structure
1918	- Workers' Compensation Act passed by General Assembly.
1920	- Vocational rehabilitation benefits added.
1924	- Loss of hearing and disfigurement of head and face added to scheduled injury benefits.
1930	- Employer requirement to pay for medical services expanded from 30 days to 60 days; expansion to 180 days allowable at order of Industrial Commission.
1942	- Number of employees for employer exemption lowered from 11 employees to 7 employees.
1944	- Occupational disease schedule added.
1950	- Act recodified.
1960	- Medical benefits expanded to include expense and repair of prosthetic devices.
1964	- Disfigurement portion of scheduled benefits expanded to include hands, arms, and legs.
1968	- 1950 Act recodified. - Vocational rehabilitation section deleted from Act.
1970	- Maximum reimbursement limit for partial incapacity benefits expanded from 300 to 500 weeks. - Number of employees for employer exemption lowered from 7 employees to 5 employees. - Paralysis or incapacity from brain injuries added to scheduled benefits. - Occupational disease schedule repealed; replaced by comprehensive coverage of all occupational diseases meeting definitional criteria.
1972	- Time limitation on reimbursement of permanent total injuries and medical expenses removed. - Coal miner's pneumoconiosis benefits added.
1973	- Number of employees for employer exemption lowered from 5 employees to fewer than 3 employees.
1975	- Flexible calculation of statewide average weekly wage introduced. - Vocational rehabilitation benefits reinstated. - Cost-of-living supplements added for total disability and death benefits. - Second injury fund created.
1976	- Disfigurement portion of scheduled benefits expanded to include disfigurements to whole body. - Crime Victims' Compensation Program created.
1977	- Uninsured employer's fund established.
1980	- Medical peer review system created.
1982	- Medical benefits expanded to include chiropractic care.
1986	- "Ordinary disease of life" benefits added to occupational benefits.
1987	- Scheduled benefits section altered to allow payment of scheduled benefits in addition to total and partial incapacity benefits. - Birth-Related Neurological Injuries Compensation Act passed.
1989	- Standards of quality for vocational rehabilitation added.

Source: JLARC analysis of *Code of Virginia*.

Appendix C

RESPONSIBILITIES OF DWC PERSONNEL AND ORGANIZATIONAL UNITS

The responsibilities of DWC's key personnel and agency organizational units are varied. Some positions and units are focused primarily on administrative functions, while others are responsible for judicial functions. The responsibilities of the various personnel and units are described below.

The Commissioners

Under §65.1-10 of the *Code of Virginia*, the Industrial Commission consists of three commissioners who possess equal power. The primary responsibilities of the commissioners are to hear contested claims, award benefits, and write opinions.

The commissioners are elected by the General Assembly and serve for six-year staggered terms. The *Code* requires that they elect one of their members to serve as chairman for a term of three years. The chairman's powers are not greater than those of the other members. However, in practice, he is responsible for overseeing the daily operations of the agency.

The *Code* also delineates the composition of the Industrial Commission. No more than one commissioner can be classified through prior employment or affiliation as having primarily represented employers. In addition, only one can be elected who was classified as having primarily represented employees through prior employment or affiliation.

Chief Deputy Commissioner

The role of the chief deputy commissioner has evolved over time from primarily a judicial function into one which includes increasing administrative responsibilities. However, the chief deputy commissioner still retains many judicial responsibilities. The current chief deputy commissioner serves as the organizational point of contact between the commissioners and staff in the DWC. Theoretically, all senior managers report to him, although the clerk of the commission and the commission comptroller have frequent direct contact with the commissioners. The chief deputy commissioner is also responsible for supervising the deputy commissioners by monitoring their opinions and conducting their performance appraisals.

The chief deputy commissioner's judicial responsibilities include reviewing compromise settlements between employers and employees, approving interrogatories and depositions, assigning some cases to the docket, and answering legal

questions by the clerk and other staff. The chief deputy commissioner also monitors Industrial Commission opinions and Court of Appeals' opinions.

Deputy Commissioners

The deputy commissioners serve as judges and are granted the powers to subpoena witnesses, administer oaths, take testimony, and hear contested cases. They also set their own dockets, decide cases and issue awards, and write opinions. Occasionally they will interview parties to a compromise settlement.

Deputy commissioners may be appointed by the commissioners as needed to carry out statutory and delegated responsibilities. Five deputy commissioners are located at regional offices established by the Industrial Commission. Three deputy commissioners, located at the Richmond office, may also travel to other locations to hear cases. One deputy commissioner primarily focuses on claims mediation. A tenth deputy commissioner position exists within the agency but fills an administrative role. This position oversees the claims division, and is counted in the claims division personnel count.

Clerk of the Commission

Many duties of the clerk's office resemble the duties of a clerk's office for a Circuit Court. The clerk oversees eleven employees who receive filings, set the Industrial Commission's docket, and transcribe workers' compensation hearings. The clerk of the commission reports to the chairman and to the chief deputy commissioner on a regular basis.

Commission Comptroller

The comptroller is responsible for all matters related to the financial operation of the DWC, including preparing the DWC's budget, payroll processing, overseeing contractual services for the DWC, and reimbursing employee business expenses. The comptroller monitors the special funds administered by the DWC and is responsible for revenue collections from insurance companies for these funds. In addition, the comptroller reviews financial statements of companies applying for status as self-insured companies.

The comptroller supervises the agency's purchasing/operations officer. An administrative staff person responsible for the Medical Cost Peer Review Program and self-insured employers matters is also placed in the comptroller's office. The comptroller's office employs nine personnel in addition to the comptroller.

Claims Division

The claims division is the largest department in the DWC and is responsible for all activities related to administering claims. There are currently 53 personnel in the division. The division is divided into two main sections: (1) claims processing, and (2) claims examination.

Claims processing includes five sections: the first report unit, the awards unit, the records unit, the mail distribution unit, and the microfilm unit, and employs a total of 35 personnel. Claims examination involves 18 personnel including the claims division manager, two claims examiners, four assistant claims examiners, a claims technician, and 10 clerical positions.

Insurance Division

The insurance division is responsible for verifying employer workers' compensation coverage and monitoring cancellations, reinstatements, and rejections for insurance coverage. In addition, the division administers claims under the uninsured employer's and second injury funds. The division employs eight staff members.

Data Processing Division

Statistical information concerning claimants, employers, and the numbers and types of work-related injuries is processed by the data processing division. This division also develops, monitors, and maintains all computer resources for the DWC. It provides guidance on the use of DWC computer systems, and is the agency liaison between the DWC and the Virginia Department of Information Technology. The insurance division was a part of this division until 1987. Two personnel work in this division.

Human Resources Division

The personnel division administers the DWC's personnel policies and procedures, monitors compliance with equal employment opportunity guidelines, and handles agency recruitments and terminations. Agency personnel policies and procedures are modeled after the Virginia Personnel Act, although the Act does not apply to employees of the DWC. Two employees work in this division.

Crime Victims' Compensation Program

This program has a director and three full-time employees. These personnel are responsible for administering compensation to victims of violent crimes. JLARC completed a review of the Crime Victims' Compensation Program in December 1988. Therefore, this review does not include an assessment of the Crime Victims' Compensation Program.

Appendix D

INTERSTATE BENEFITS COMPARISON

Workers' compensation programs are offered in all 50 states. Although the types of benefits are similar, specific statutory provisions differ. The types of benefits offered in the states include medical benefits, total incapacity benefits, partial incapacity benefits, death benefits, vocational rehabilitation benefits, occupational disease benefits, and cost-of-living supplements.

Medical Benefits

Medical benefits vary little across the country. Statutes in all states contain provisions to cover the full cost of treating injuries that are determined to be work related. None of the states has a limit on the duration or the amount of medical benefits. Physical rehabilitation, which is generally considered a part of complete medical benefits, is provided by all 50 states. None of the states place any limitations on physical rehabilitation benefits.

Total Incapacity Benefits

Total incapacity benefits are available in all 50 states. Generally, two types of compensation - permanent total and temporary total benefits - are available under these provisions. In most cases, these provisions establish the standard amount of compensation payable, maximum and minimum amounts payable, and maximum duration of payments.

Statutory benefits for total incapacity are fairly uniform throughout the states. There are two methods which states use in the computation of total compensation. Virginia is one of 47 states which provide total benefits based on a percentage of employee's pre-injury wage. Other states compute total benefits on the basis of the employee's spendable earnings. The three states which use this method pay benefits equal to 80 percent of these earnings.

Each state utilizes a maximum and a minimum amount for total incapacity benefits. In most states, the maximum amount payable for total incapacity equals a percentage of the state average weekly wage. Virginia is one of 19 states in which the maximum compensation for permanent total incapacity is 100 percent of the state average weekly wage. Fourteen states have a maximum lower than Virginia's, ranging from 66 2/3 to 90 percent of the state average weekly wage. Six states have a higher maximum, ranging from 110 to 200 percent of the state average weekly wage.

Minimum compensation is generally established based on a percentage of the average weekly wage or is mandated by law. Virginia is one of 21 states using a

flexible percentage minimum. Twelve states, including Virginia, further mandate that the minimum benefits equal the employee's actual wage if that amount is less than the calculated minimum.

The states are very uniform with regard to duration of total disability payments. Forty-three states, including Virginia, allow compensation for permanent total incapacity to continue for the duration of the disability. Only seven states have a time limit for disability payments.

A larger number of states place a time limit on temporary total disabilities. Thirty-six states allow compensation to continue for the duration of the disability. Virginia and 13 other states, however, set time limits for temporary total compensation. These time limits range from 208 weeks to 700 weeks. Virginia's time limit is 500 weeks.

Virginia has no offset provisions with regard to total disability. However, 22 states reduce total disability benefits when an injured employee is receiving benefits from other sources. Many states have offset provisions for more than one entitlement. Nineteen states reduce total benefits if the employee is receiving social security benefits, ten states reduce total benefits if the employee is receiving unemployment benefits, and eight states reduce total benefits if the employee is receiving benefits from an employer-funded pension plan.

Partial Incapacity Benefits

All 50 states have statutory provisions for partial incapacity benefits. In most cases, these provisions set forth the standard amount of compensation payable, maximum and minimum amounts payable, and maximum duration of payments.

Statutory benefits for permanent partial incapacity are fairly uniform throughout the states. There are two methods which states use in the computation of partial compensation. One method bases benefits on a percentage of the difference in wages earned before and after the injury. Most states, including Virginia, use this method to calculate partial incapacity benefits. Other states calculate partial disability as a percentage of total disability. In general, states use the same percentage values which are used in cases of total disability. Statutory benefits for temporary partial incapacity vary greatly throughout the states, depending on how the statute is administered.

Death Benefits

Death benefits are offered in all 50 states. In most cases, these provisions set forth the standard amount of compensation payable, maximum and minimum amounts payable, maximum duration of payments, and burial expenses.

Most states provide death benefits on the basis of the employee's pre-injury wage. Virginia is one of 27 states which provide the same amount of death benefits, regardless of the number of dependents. Other states make distinctions based on whether the dependents include a spouse and children, just a spouse, or just a child.

Duration of death benefits varies greatly across the states. Thirty states provide death benefits for children until the age of eighteen. Spouses in these states are provided benefits for life or until remarriage. Upon remarriage, 24 states provide a lump sum payment. Most of these states extend benefits for children while they are full-time students, or if they are disabled.

Virginia is one of eighteen states which has an established limit for duration of death benefits. Along with eight other states, Virginia limits death benefits to 500 weeks. All 50 states provide burial expenses as a part of death benefits. Five states, including Virginia, further provide expenses for transportation of the deceased.

Vocational Rehabilitation Benefits

Virginia is one of 46 states that has specific statutory provisions for vocational rehabilitation. Generally, employees are entitled to a certain portion of disability payments while undergoing rehabilitation, as well as expenses related to the rehabilitation process.

Most states provide some type of benefits during a period of vocational rehabilitation. Virginia, along with 31 other states, provides temporary total disability benefits to workers undergoing vocational rehabilitation. Most states, including Virginia, require the employer or insurance carrier to bear the cost of vocational rehabilitation services.

Occupational Disease Benefits

Occupational disease benefits are provided in all states. Generally, compensation for an occupational disease is the same as compensation for an on-the-job injury. Few states provide benefits for an "ordinary disease of life," or diseases to which the general public is exposed. Virginia, however, does have "ordinary disease of life" provisions, if such diseases are contracted while on the job and this can be established under strict rules of evidence.

In addition, some states have special provisions for disability arising from certain occupational diseases. Virginia, for example, has specific provisions for coal miners' pneumoconiosis, along with Ohio, West Virginia, Pennsylvania and Kentucky. Other states have provisions which may be more appropriate to their states'

industries. Special provisions of other states include asbestosis, silicosis, and irradiation. A number of states also presume heart attacks or respiratory conditions to be occupational diseases in the case of police and firefighters. Virginia has such a presumption for police and firefighters.

Cost-Of-Living Supplements

Fourteen states allow automatic cost-of-living supplements for workers receiving disability benefits according to statute. As mentioned in Chapter II, Virginia case law has resulted in a more restrictive interpretation of this statute, requiring the claimant to apply for a change in condition to receive the supplement. Ten states allow cost-of-living supplements for all total disability injuries. Virginia is one of these states. Some states allow cost-of-living supplements for temporary total incapacity only, while others allow cost-of-living supplements for permanent total incapacity only.

Nine states, Virginia among them, allow cost-of-living supplements annually for all total disability benefits, starting the first year after the injury. Three states allow annual cost-of-living supplements starting two years from the date of injury, and two states allow cost-of-living supplements three years from the date of injury. One state simply allows ten cost-of-living supplements during the course of the injury.

Appendix E

ADVANTAGES AND DISADVANTAGES OF WORKERS' COMPENSATION COST MEASURES

Two primary measures of workers' compensation costs to employers are used in this report to demonstrate interstate cost variations: individual manual rates and adjusted manual rate averages. In addition, the average cost to employers in the State is presented to illustrate cost trends. These measures vary in their degree of accuracy (in terms of ability to reflect actual costs) and appropriateness for use in interstate comparisons.

Individual Manual Rates

One measure of the cost of workers' compensation insurance is the manual rate established for each individual industry. The manual rate represents the average cost of workers' compensation coverage for each industry. For example, the manual rate for the trucking industry might be expressed as $1.54 per $100 of payroll. In contrast, the average cost, which will be discussed later, encompasses all industries in a state.

Manual rates are set by the State Corporation Commission based in part on information and industry classifications provided by the National Council on Compensation Insurance (NCCI). Thirty-three states currently use the NCCI as the designated rate-making organization, including Virginia and six other southeastern states. Six other states use NCCI in an advisory capacity. In these states, NCCI simply collects and organizes the data necessary for rate setting for the states' rate-making organizations.

Individual rates can help demonstrate the extreme variance in the cost for workers' compensation insurance between industries within one state. Individual rates also can be compared among states with similar industrial mixes and rate-setting environments because the rates generally take into account all of the factors that influence workers' compensation costs in a state.

However, manual rates tend to overstate the actual cost to employers. Insurers are able to adjust, or "tailor" rates for individual employers according to such characteristics as company size and accident history. An NCCI publication estimated that more than 90 percent of premiums qualified for some type of adjustment. There are five basic types of adjustments. First, insurers may adjust a company's premium according to the company's experience rating, which is its safety record compared with the average safety record of other companies in its classification. Second, insurers may offer premium discounts to companies with larger payrolls. States affiliated with the NCCI usually adjust the premiums according to an NCCI formula

or schedule for these two types of adjustments. These formulas or schedules must generally be approved by the state regulatory agency.

Third, some states allow insurers to substitute a retrospective rating plan for experience rating and premium discount. Retrospective rating plans base the employer's premium on the company's size and actual accident experience for the year of the policy. In other words, the amount the employer pays is determined after the policy year is completed and is based solely on that year's safety performance. In contrast, experience ratings are based on safety performance for several prior years.

Fourth, in most states, employers are charged a flat fee (an "expense constant") to cover the minimum expenses of issuing and servicing a policy. Fifth, insurance companies in some states are able to offer dividends to employers with good loss experiences during a policy year, which effectively reduces the cost of workers' compensation insurance.

The second factor that prevents manual rates from reflecting actual employer cost is the increased ability of insurers to compete for business in states with regulated rates. Among the methods allowed in many of these states are deviations and schedule ratings. Deviations allow insurance companies to reduce all manual premiums by a fixed percentage, generally with the prior approval of a state regulatory agency. Schedule ratings allow insurers to reduce an employer's premium based on appraisal of the employer's safety program and management.

The effect of insurer adjustments and the ability to compete varies from state to state. A nationally-recognized workers' compensation expert has estimated that on average, the adjustments made by insurers to manual rates (including experience rating, premium discounts, retrospective rating, flat charges, and dividends) collectively reduce the rates between 14.3 to 15.5 percent.

The effect of the adjustments is comparable for the NCCI-affiliated states. Consequently, the adjustments should not have a significant effect on the comparisons. The effect of the increased ability of insurers to compete within regulated environments is less clear.

Adjusted Averages of Manual Rates

Adjusted averages of individual manual rates allow for relatively quick and accurate interstate comparisons. Manual rates can be adjusted for differences in the industrial mix and competetive devices in each state prior to the calculation of an average. Rates are adjusted by utilizing a single constant payroll distribution for the industries selected for calculating the average. As demonstrated in the example provided in the next section (Average Cost), the proportions of industries represented in a state's total payroll can dramatically affect the resulting average premium cost. In addition, adjustments are made to the rates based on the use of competetive devices in each state.

Adjusted average manual rates still do not completely adjust for all of the factors that may effect the actual cost to employers. However, they do provide a fairly reasonable overall picture of relative costs among the states.

Average Cost

The average cost, which is also known as the earned premium ratio, is a useful tool for assessing overall cost trends within the State. This cost is calculated by dividing the annual premiums of all insured employers (or benefit payments made by self-insured employers) by the total payroll of these employers and is generally expressed in terms of premium cost per $100 of payroll. The measure is the most accurate reflection of the actual overall average cost of workers' compensation in the State because it utilizes actual premium cost data for most employers in the State.

However, the value of calculating the average cost is limited for uses other than demonstrating overall cost trends within the State. Premium data for private insurance companies are generally aggregated to total benefit payments without reference to payroll or industry type. The aggregation of the data means that adjustments cannot be made for individual industries and, therefore, the average cost cannot be appropriately used for interstate comparisons.

For example, state A and state B have identical rates for three occupational classifications and identical total payrolls. However, trucking, which is a high-risk occupation with correspondingly high workers' compensation rates, comprises a higher proportion of total payroll in state A. When the average cost is calculated for the two states, it will appear that costs are higher in state A than in state B simply because state A has a higher proportion of employees engaged in high risk (and high workers' compensation cost) occupations (Figure 1).

Figure 1

Example of Effects of Industrial Mix on Average Cost Calculations

State A

Occupational Classification	Avg. Cost per $100 of Payroll	x	Proportion of Total Payroll	=	Total
Truckers	$10.00		.50		$5.00
Hotel Employees	5.00		.25		1.25
Clerical	1.00		.25		.25
Total Average Cost per $100 in State A:					$6.50

State B

Occupational Classification	Avg. Cost per $100 of Payroll	x	Proportion of Total Payroll	=	Total
Truckers	$10.00		.25		$2.50
Hotel Employees	5.00		.45		2.25
Clerical	1.00		.30		.30
Total Average Cost per $100 in State B:					$5.05

Source: JLARC analysis.

Appendix F

FACTORS INFLUENCING MANUAL RATES AND EMPLOYER COSTS

1. The benefit levels of workers' compensation laws vary.

2. The administration of the law in each jurisdiction can be organized differently (an industrial commission operation *vs.* a court operation), and the attitudes of the administrators themselves may be different. For instance, one state may have a very liberal administrative body, whereas another has a very conservative one.

3. The relative activity of attorneys acting on behalf of claimants varies.

4. The quality of the labor force within each jurisdiction might differ from state to state. This would have an impact on the number, types, and severity of injuries which occur and their cost.

5. The economic complexion of the states might be quite different. The class rates from a state with a predominantly industrial economy may not be comparable with those from a state which is primarily agricultural in nature.

6. The intensity and success of safety programs undertaken by employers differ. The degree of employer and employee cooperation in safety programs may also have an effect on this factor.

7. Wage levels vary by state, and the average wage will affect the weekly benefit paid to an injured worker. Thus, it will have an impact on the average cost per case in a jurisdiction.

8. The availability of medical and hospital facilities must be considered, and the activity of physicians and hospitals in setting fees for compensation cases may be involved.

9. Insurance carrier administrative expenses and profits allowed in each state may vary.

There are other factors in the workers' compensation pricing system which come into play in determining the ultimate cost of an employer's insurance. These factors include:

1. Application of an experience rating system which measures the degree to which the individual employer's own loss record varies from the average.

Appendix F
(continued)

2. Application of a premium discount program.

3. Optional retrospective rating plans giving immediate effect to the loss record of individual insureds.

4. Other individual risk rating plans, such as schedule rating.

5. Payment of dividends by insurance carriers to policyholders.

6. Individual carrier rate deviations which are permitted in some states.

Source: National Council on Compensation Insurance and JLARC analysis.

Appendix G

PURPOSE OF VOCATIONAL REHABILITATION AS DEFINED IN OTHER STATE WORKERS' COMPENSATION STATUTES

Alabama	Restore to gainful employment
Alaska	Return to suitable gainful employment in the following order of preference: (1) work at the same or a similar occupation, (2) work site modification and vocational training for the same or a similar occupation, (3) on-the-job training for a new occupation, (4) vocational training for a new occupation, and (5) academic training for a new occupation
Florida	Suitable gainful employment or self-employment which is reasonably attainable in light of the individual's age, education, previous occupation, and injury and which offers an opportunity to restore the individual as soon as practical and as nearly as possible to his average weekly earnings at the time of injury
Georgia	Restore to suitable employment
Hawaii	Restore earning capacity as nearly as possible to that level which the worker was earning at the time of injury and to return the injured worker to suitable work in the active labor force as quickly as possible in a cost-effective manner
Idaho	Assist in reducing the period of temporary disability resulting from an injury and to aid in restoring to gainful employment with the least possible permanent physical impairment
Indiana	Restore to useful employment
Kansas	Restore the ability to perform work in the open labor market and to earn comparable wages, priorities: (1) return to the same work for the same employer; (2) return to the same work, with accommodation, for the same employer; (3) return to other work, with or without accommodation, for the same employer; (4) return to the same work for another employer; (5) return to other work for another employer; and (6) reeducation and training
Kentucky	Restoration to gainful employment
Louisiana	Suitable gainful employment, meaning employment or self-employment which is reasonably attainable and which offers an opportunity to restore the individual as soon as practical and nearly as possible to his average earnings at the time of injury
Maine	Restoration to suitable employment, to the maximum extent practicable, consistent with: (1) return of the employee to his preinjury job with the same employer, with retraining if necessary; (2) return of the employee to his preinjury job with the same employer, with work place modification and retraining if necessary; (3) return to employment with the preinjury employer in a different position, with retraining if necessary; (4) on-the-job training with the preinjury employer; (5) employment with a new employer, with retraining if necessary; (6) on-the-job training with a new employer; and (7) career retraining

Appendix G (continued)

Maryland	Enable, as soon as possible, to secure suitable gainful employment, including self-employment, which restores to the extent possible to the level of support at the time of injury, giving due consideration to the employee's qualifications, interests, incentives, preinjury earnings and future earning capacity, the nature and extent of the injury, and the current and future condition of the labor market
Massachusetts	Restore to suitable employment as near as possible to preinjury earnings
Michigan	Restore to useful employment
Minnesota	Return to suitable gainful employment by returning to a job with the former employer or to a job related to former employment, or by placing in a job in another work field, or by placing in a job with a higher economic status than would have occurred without the disability if it can be demonstrated that this is necessary to increase the likelihood of reemployment.
Montana	Return to work, with a minimum of retraining, as soon as possible after an injury occurs by choosing the first appropriate option: (1) return to the same position, (2) return to a modified position, (3) return to a related occupation suited to the claimant's education and marketable skills, (4) on-the-job training, (5) short term retraining (less than 24 months), (6) long term retraining (48 months maximum), or (7) self-employment
Nebraska	Restoration to gainful employment
Nevada	Aid in returning to work or to assist in lessening or removing any resulting handicap
New Hampshire	Restore to suitable employment
New Mexico	Return to gainful employment in the following priority: (1) preinjury job with the same employer, (2) modified work with the same employer, (3) job related to former employment, or (4) suitable employment in a nonrelated work field
North Dakota	Restore to substantial gainful employment with minimum of retraining, as soon as possible after an injury occurs, by choosing the first appropriate option: (1) return to the same position; (2) return to a modified position; (3) return to a related occupation suited to the worker's education, experience, and marketable skills; (4) on-the-job training; (5) short term retraining of 52 weeks or less; (6) long term retraining of 104 weeks or less; (7) self-employment
Ohio	Return to work or to assist in lessening or removing any resulting handicap

Appendix G (continued)

Oklahoma	Restore to gainful employment
Oregon	Return to employment which is as close as possible to the worker's regular employment at a wage as close as possible to the worker's wage at the time of injury
Rhode Island	Return to remunerative employment
South Carolina	Restore to suitable employment
South Dakota	Restore to suitable, substantial and gainful employment
Vermont	Restore to suitable employment
Washington	Become employable at gainful employment using the following priorities: (1) return to the previous job with the same employer, (2) modification of the previous job with the same employer including transitional return to work, (3) a new job with the same employer in keeping with any limitations or restrictions, (4) modification of a new job with the same employer including transitional return to work, (5) modification of the previous job with a new employer, (6) a new job with a new employer or self-employment based upon transferable skills, (7) modification of a new job with a new employer, (8) a new job with a new employer or self-employment involving on-the-job training, (9) short term retraining and job placement
Wisconsin	Restoration to gainful employment

Source: JLARC analysis of state workers' compensation statutes, 1989.

Appendix H

AGENCY RESPONSES

As part of an extensive data validation process, each State agency involved in a JLARC assessment effort is given the opportunity to comment on an exposure draft of the report. This appendix contains the response by the Department of Workers' Compensation (Industrial Commission) and the Department of Rehabilitative Services.

Appropriate technical corrections resulting from the written comments have been made in this version of the report. Page references in the agency response relate to an earlier exposure draft and may not correspond to page numbers in this version of the report.

WILLIAM E. O'NEILL, CHAIRMAN
CHARLES G. JAMES, COMMISSIONER
ROBERT P. JOYNER, COMMISSIONER

COMMONWEALTH of VIRGINIA

LAWRENCE D. TARR, CHIEF
DEPUTY COMMISSIONER
LOU-ANN D. JOYNER, CLERK

DEPARTMENT OF WORKER'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794
RICHMOND, VIRGINIA 23214

December 29, 1989

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
General Assembly Building, Suite 1100
Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

The Commissioners are pleased to enclose a response to your exposure draft titled Review of the Department of Workers' Compensation dated December 13, 1989. While our response does not address in detail each of your chapters and recommendations, it attempts to highlight specific areas of agreement and other areas in which we would recommend different approaches or solutions to your suggestions.

The Commission extends its appreciation to you and your staff for its cooperation and professional approach to the appraisal of our work over the last twenty months.

Sincerely,

William E. O'Neill

Enclosure

William E. O'Neill

Charles G. James

Robert P. Joyner

RESPONSE TO THE REVIEW OF THE DEPARTMENT OF WORKERS' COMPENSATION BY THE JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION (EXPOSURE DRAFT DATED DECEMBER 13, 1989)

The General Assembly has enacted a workers' compensation law in Virginia to respond to the needs which arise from injuries in the workplace. The law is intended to provide workers injured by industrial accidents necessary medical care and wage-replacement benefits, delivered efficiently and promptly.

Our law is a legislative compromise which considers the interests of the injured worker and the employer. The law provides for an independent State agency to catalog and monitor injuries and claims. Every employer with three or more employees is required either to contract with an insurance company or to qualify for self-insurance in order to provide for injured workers. The law encourages employers and their insurance carriers to agree to voluntary payment of compensation benefits. In the absence of such agreement, the Industrial Commission has the responsibility to process a claim for compensation and, if necessary, to hear the disputed claim in a judicial proceeding.

The Commission gives voice and action to the plan laid down by the General Assembly. In most cases the Commission decisions are final. Less than four-tenths of one percent of cases in which files are opened and awards are issued in a given year go beyond the Commission for appellate review. Although only ten percent of all workers' compensation claims are litigated at hearing or on Review, a substantial proportion of Commission resources is committed to disposition of litigated issues.

As the law has expanded, the litigation process has become more complex and has required more time, money and resources from the employee, employer and Commission. Therefore, it has been a principal goal of the Commission to reduce litigation by the fair application of administrative processes to reduce the time needed to deliver benefits to injured workers.

In the report of the Commission on the Future of Virginia's Judicial System submitted this year to the Chief Justice, it was recommended that dispute resolution mechanisms, in addition to traditional adjudication, should be available in civil cases. It was also recommended that trained specialists help parties to disputes select a method most appropriate for resolving their dispute. Extra-judicial forums such as arbitration, mediation and conciliation were recommended.

The JLARC staff report refers to alternative dispute resolution as it is now being implemented by the Commission. We intend to expand upon this administrative process to expedite

delivery of benefits to injured workers. Such methods are also recommended through administrative means by John Burton, a specialist in workers' compensation administration who is also utilized as a source by JLARC staff in its exposure draft. The trend in those states which have shown interest in expediting benefit services is to experiment with administrative tools to reduce expensive and time-consuming litigation.

The audit by JLARC staff has been helpful to the Commission in many ways. It has helped us to focus on our basic functions and to improve our organization and our delivery of benefits. During the audit by JLARC staff, we underwent a self-imposed management study directed by the Department of Information Technology which identified many of the issues addressed in the JLARC report.

Many of the recommendations of the JLARC staff have already been addressed by the Commission and we have agreed either to adopt new procedures or improve upon existing procedures in the following recommended areas:

-Tighten up enforcement procedures by levying statutory penalties

-Audit claims and hearing procedures to ensure efficient and timely response to claims applications

-Revise publications and forms to improve communication with injured workers and employers and to otherwise instruct injured workers concerning their rights

-Confer with the Department of Rehabilitative Services and adopt a formal mutual agreement which will meet the requirements specified in the Act

-Track uninsured employers to require insurance coverage and to pursue payment of awards entered against the Uninsured Employers Fund

-Strengthen our self-insurance certification and review procedures to protect against default resulting from economic changes

-Define the roles of the Commissioners and the Chairman concerning initiation and implementation of policies and procedures

-Refine the management and operation of the Claims Division to obtain optimum efficiency and timely handling of claims

-Improve evaluation of manpower needs and documentation of individual positions throughout the Commission in order to aid planning for future needs

-Review practices and procedures involved in personnel recruitment and training

A key feature of the JLARC staff report makes recommendations which apply to both the Industrial Commission and the Department of Rehabilitative Services and address the need for administrative and legislative evaluation of the relationship between workers' compensation and vocational rehabilitation. We commend the JLARC staff for its focus on this subject which needs attention.

JLARC staff has also recommended several statutory changes. We make comment only on those which we believe require additional consideration.

Recommendation 1. Code § 65.1-28 requires an employer to obtain insurance coverage if it has three or more employees. In accord with the recommendation of the National Commission in 1972, Recommendation 1 suggests that the numerical limitation be eliminated and that all regular employees be covered in Virginia. Although the Commission has no objection to this recommendation, we note specifically that it relates to about two percent of employed workers in Virginia and to about one-third of Virginia employers. In 1973 the General Assembly reduced the numerical requirement from five to three employees.

The impact of any additional action which would affect the requirement of employers to obtain coverage should be evaluated for the probable increased cost to the Uninsured Employers Fund.

Staff recommendations 9, 10, 11 and 12 all relate to vocational rehabilitation evaluation, training and licensing. We believe that any statutory change should have the benefit of careful study by the appropriate committees and by the Department of Rehabilitative Services and the Department of Commerce.

Recommendations 19 and 20 relate to funding of the Uninsured Employers Fund, and the Commission is in agreement with these recommendations. We specifically request that the Commission be permitted to levy an assessment, as provided in Recommendation 20, if the balance of the Fund falls below budgeted expenditures.

The Commission supports the suggestion that the name of the agency be changed to the Workers' Compensation Commission. Department of Workers' Compensation and Industrial Commission are both included in the Act as it now stands.

Recommendation 21 would require local officials who license employers and the SCC which charters employers to provide information to the Commission about the number of workers employed and the name of the workers' compensation insurer. While the Commission has no objection to this requirement, we believe that the impact of this requirement on the licensing officials and the Commission would require study to determine cost effectiveness.

Recommendation 22 would authorize the Industrial Commission to issue a cease and desist order and, thereby, to require an employer to stop business operations for failure to pay an award. This authority may be too broad in view of other remedies available. The Commission now has authority to issue a cease and desist order if an employer fails to obtain insurance under the Act (Code § 65.1-106). Staff has recommended that the Commission use its present authority to a greater degree than it has in the past. We have agreed to do so.

In all, the recommendations of JLARC staff are beneficial and furnish a sound basis for continuing review of our policies, procedures and operations. While there is not full agreement by the Commission with specific recommendations, particularly with regard to arrangement of the table of organization (Recommendation 30), we believe that the JLARC audit can result in substantial improvement in our delivery of workers' compensation services.

Finally, we point out that the Virginia Workers' Compensation Act needs study and selective recodification. It has been more than twenty years since the Act has been reviewed by the Code Commission and many sections of the statute have undergone separate changes. In addition, the Supreme Court and the Court of Appeals have added adjective law. Although we believe that the basic principles of the Act are sound and should be preserved, there are many areas, some of which have been addressed by JLARC staff, in need of study and revision. The Industrial Commission has addressed its request to the Code Commission for an appropriate in-depth study which would include contributions from labor, industry, insurance carriers, medical providers and attorneys representing employers and employees.

The Industrial Commission wishes to thank JLARC and the members of its staff for its courtesies over the last twenty months.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF WORKER'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794
RICHMOND, VIRGINIA 23214

December 29, 1989

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
General Assembly Building, Suite 1100
Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

The purpose of this letter is to comment on two items reported on pp. 171-172 of the exposure draft of your staff review of this agency.

The first is the statement that a Commissioner became directly involved in the placement of sprinklers on the DWC building grounds. This is correct as far as it goes. I came by our office on a Sunday afternoon and found that garden hose and sprinklers had been deployed about the yard where we were attempting to get a stand of grass. Portions of the yard were literally under water while other areas were entirely dry. The guard and I moved the sprinklers so that the dry areas could be watered and the flooded areas allowed to drain. I heard nothing further of this incident until it appeared in your report.

Had I been asked about this matter before it was reported, I would have pointed out that the previous Thursday we discussed purchasing two or three lengths of garden hose and sprinklers which would be adequate to water the yard. The cost was estimated at approximately $50.00 to $75.00. By Sunday this expenditure had grown to over $500.00. I do not think that under the circumstances it was "necessary" for our purchasing officer to write the memorandum [copy attached] to which you refer. The memorandum is inaccurate in its statement that the original placement plan was ultimately retained. The fact is that it was necessary to move the hoses on a regular basis. As a final footnote to this episode, I learned in December of this year that on April 6, 1989, a contract was signed obligating us to pay $1000.00 per month to mow our yard.

This amounts to an effective hourly rate of between $100.00 and $125.00 for unskilled labor.

The second matter I will comment on is the fact that I was denied access to certain agency records. In late 1986 I felt that there was a trend towards denying a disproportionally high percentage of claims by several of our Deputy Commissioners. In February 1987 I talked with our statistics department and was advised that with a minor adjustment to an existing program, a report could be developed showing the percentage of cases in each office in which compensation was awarded or denied. The cost of this was minimal and the report was subsequently provided [copy attached] which showed that five of our offices were denying between 55 and 66 percent of the claims. One office was awarding 63 percent of the claims and the other two offices were dividing approximately 50-50. I had some question as to the accuracy of these figures and requested the report again at the end of April 1987. At that time, I was advised that the Chairman had issued instructions that I was not to be given this information if I requested it. I felt, under the circumstances, it was futile to pursue the matter further. I continue to feel that it is a very serious matter for a Commissioner to be denied access to records of the agency that he has some responsibility in supervising.

In closing you will note that I have signed the majority report and concur in the statements set forth in it.

Respectfully submitted

Robert P. Joyner,
Commissioner

RPJ/vll

Enclosure

TO: Charles James, Chairman

FROM: Bruce Harris, Procurement Officer

DATE: November 2, 1987

SUBJECT: **LAWN SPRINKLER PLAN**

Attached, please find the basic layout which Mr. Rice and I feel would give maximum coverage of the lawn area with the minimum amount of sprinkler relocation. This design would enable the guard to cover the entire lawn area in 1-1/2 hours. The total cost of this project is $536.69 for hoses, sprinkler heads and couplers.

This setup was in effect as of Friday evening, October 30, and was utilized effectively by the guards on Saturday and Sunday. Mr. Joyner redesigned the layout on Sunday afternoon, removing hoses from the couplers and deleting five of the "round" sprinklers and several of the couplers (total cost $99.79) and gave them to the guard on duty. While his setup will still water the entire lawn area, the hoses must be moved several times, increasing the watering period to approximately 6 hours. Also, the guard must now move each sprinkler. I know from personal experience while placing the sprinklers that the area becomes extremely muddy after watering, and quite a mess would result from the guard moving the sprinklers.

I have been instructed by Mr. White, of Richmond Landscapes, that we need to water the entire lawn area <u>every</u> morning for one to two weeks to a depth of 1 inch, and then water once weekly until temperatures prevent watering. It is to be noted that the guard did not water the entire lawn area this morning as his shift ends at 8:30 A.M. and I had instructed him to begin no earlier than 6:30 A.M., not allowing him enough time to complete the watering.

It is my recommendation that we return to the original setup to maximize the coverage, while minimizing the watering time and mess involved. Also, this would enable the guards to water the entire lawn area before their shift ends each day.

P!

COMMONWEALTH OF VIRGINIA

02/05/87 INDUSTRIAL COMMISSION - ICVOPN

OPINION STATISTICS FOR 1900

	OPINIONS WRITTEN	CASES AWARDED	CASES DENIED	OTHER	AVERAGE DAYS TO OPINION
POWELL/TALTON	381	176 50%	175 50%	30	36
WILHOIT	27	10 37%	17 63%	0	35
YATES	431	175 41%	251 59%	5	45
ALEXANDRIA	684	395 63%	230 37%	59	47
COSTA	620	222 39%	350 61%	48	49
MACBETH	454	209 49%	227 51%	18	75
STEWART	395	171 44%	217 66%	7	36
PIERCE	320	129 41%	189 59%	2	32

COMMONWEALTH OF VIRGINIA

02/05/87 INDUSTRIAL COMMISSION - ICVOPN

COMMONWEALTH of VIRGINIA

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December 28, 1989

Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building
Richmond, Virginia 23215

Dear Mr. Leone:

We appreciate the opportunity to review the portion of the exposure draft relative to the Review of the Department of Workers' Compensation. We too are interested in the types of vocational rehabilitation that are provided to injured workers in the Commonwealth.

In reading the draft, we found some inaccuracies that are noted below:

- p. 77: State Residency - DRS can provide services to individuals who are otherwise eligible for services without regard to Virginia residency.

- p. 97: "employment procured" - DRS does not procure employment for individuals. We provide a service or services which enables the individual to become employed.

- p. 97: "State regulation" - Although some DRS personnel may have opinions as to the need for state regulation of private rehabilitation providers, DRS has adopted no position.

On a more general level, we are willing to work with JLARC and DWC to evaluate recommendations and develop specific plans. Should we realize an increased level of responsibility in this area, we would have to re-evaluate the level of resources dedicated to this function.

In conclusion, we look forward to your final report and to further discussion.

Sincerely,

J. A. Dolhock for S.L. Urofsky

Susan L. Urofsky
Commissioner

SLU/JAR:go

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Recent JLARC Reports

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The Virginia Division of Volunteerism, December 1983
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An Assessment of the Secretarial System in the Commonwealth of Virginia, January 1984
An Assessment of the Roles of Boards and Commissions in the Commonwealth of Virginia, January 1984
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Interim Report: Status of Part-Time Commonwealth's Attorneys, January 1989
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