

NATIONAL
ACADEMY
OF • SOCIAL
INSURANCE



**PUBLIC POLICY SUPPORTING
“OPTIONS” TO WORKERS’ COMPENSATION
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WC and Options have the Same Primary Objective



Improving the lives of injured workers.



Determining Good Public Policy

- 1. Experiments.** Encourage innovation, policy trials and experiments.
 - a. Rigorous assessments.
 - b. Don't rely on anecdotal experience of selected stakeholders.

- 2. Transparency.** Especially on contentious matters where judgment is needed.
 - a. Accurate history and description of new approaches.
 - b. Data.
 - c. Independent, unbiased review.

- 3. Challenging Preexisting Order.** Modern thinking on how economies evolve.

WC Option Industry Estimates

- **1.5 million workers:** Covered by TX and OK injury benefit plans.
- **50,000 injury claims:** Successfully resolved annually.
- **\$-0-:** Spent by regulatory agencies to support and oversee successful resolution of those claims.
- **\$125 Million Annual Claims Cost:** Combined annual incurred injury benefit and liability costs
- **\$500 Million Claims Cost Over Past Four Years:** Total incurred
- **\$1 billion in direct written premiums** over the past decade.
- **1,000 Private Sector Jobs** in program development, administration and insurance with employers and respected WC industry players.

Employee Coverage Models

WC: All workers are covered, subject to certain exemptions.

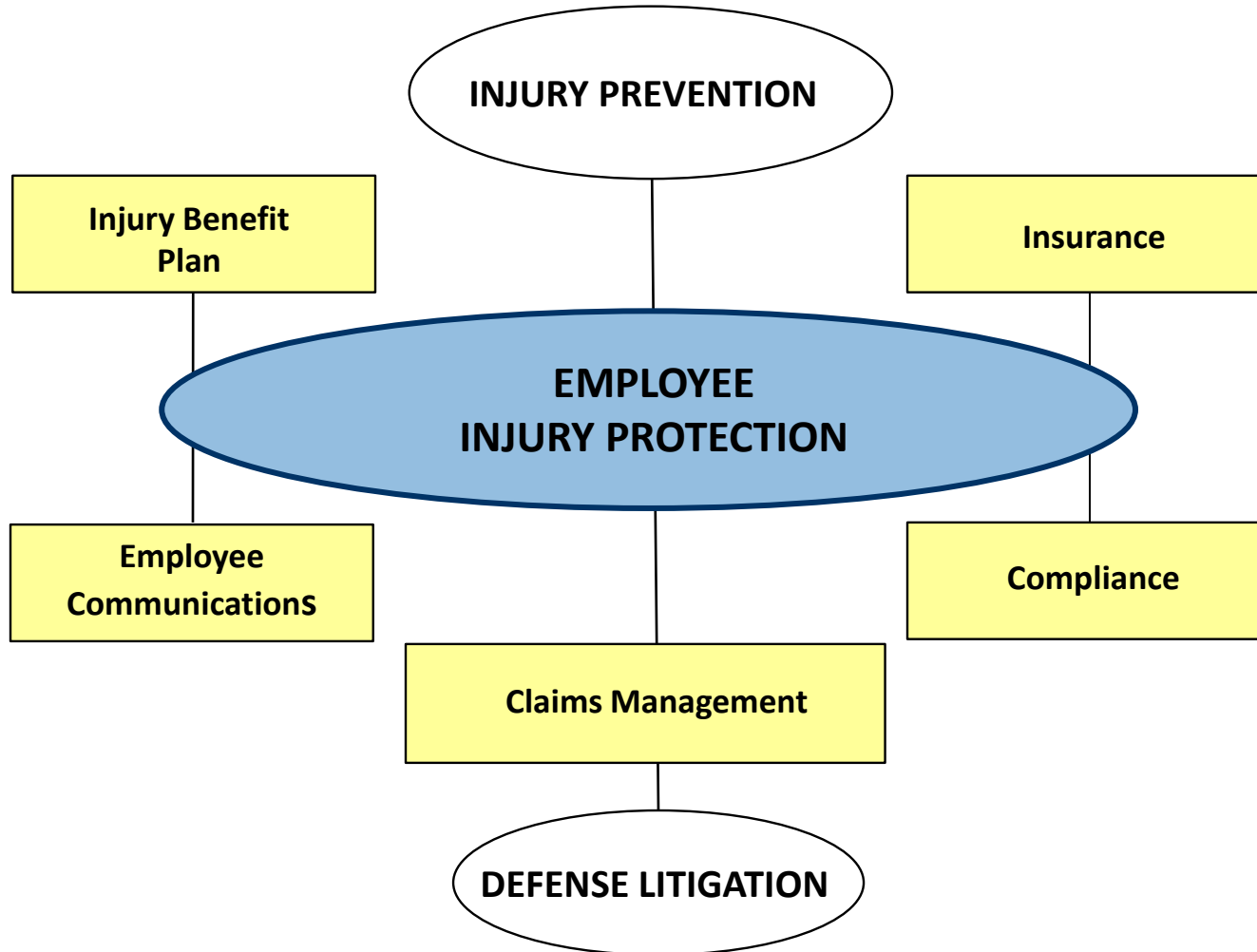
TX: Three Alternatives

1. Workers' Comp
2. Injury Benefit Plan (voluntary; no mandate)
3. Do Nothing (aka "Go Bare" or "Opt-Out")
 - ***Not a Responsible Alternative to WC!***
 - ***Not proposed in Other States.***

OK, TN, & SC: Only Two Alternatives

1. Workers' Comp
2. Injury Benefit Plan (an "Option")

Components of Injury Benefit Program



Comparing Insurance Structures

Workers' Comp



Claims
Within
Deductible/SIR

Insurance Policy
Retention

Option



Claims
Within
Deductible/SIR

Applicable State Law

Specifies All Requirements for Exemption from Workers' Comp:

- 1. Benefit Mandates**
- 2. Liability Exposures**
- 3. Financial Security Requirements**
- 4. Employer Qualification Process**

Enforcement by state regulators for violation of state Option laws

Applicable Federal Law

Employee protections, like:

- 1. OSHA**
- 2. ADA**
- 3. FMLA**
- 4. ERISA**

ERISA's Four Key Areas:

1. Disclosure Rules

- a. Written plan document
- b. Definitely determinable benefits
- c. Understandable summary to all employees

2. Fiduciary Rules

- a. Acting in the best interests of employees
- b. Consistent, reasonable, and prudent decisions in claims administration

ERISA's Four Key Areas (cont'd):

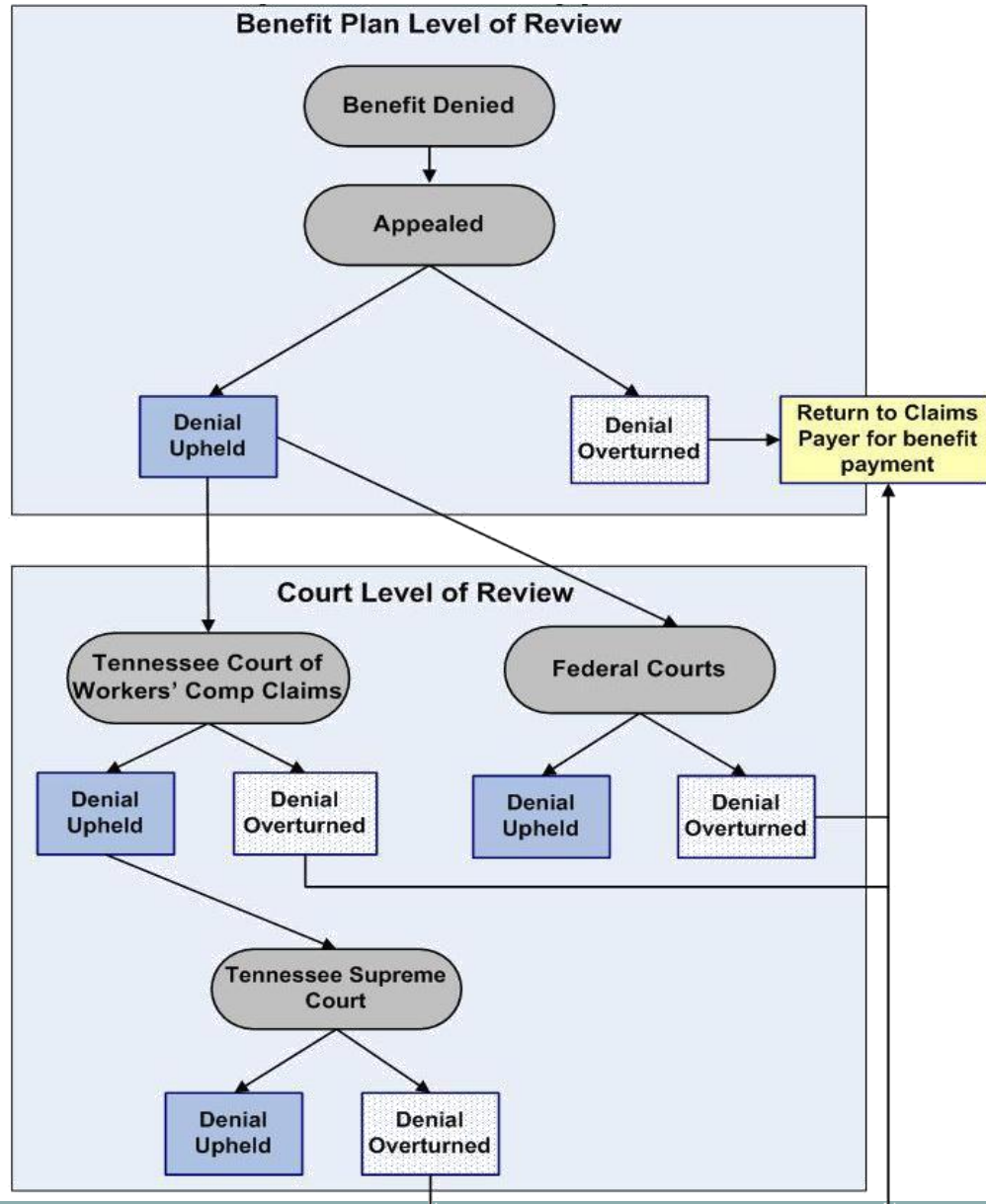
3. Claim Procedures (see below)

- a. No-cost administrative appeal
- b. Access to state or federal courts (see below)

4. Enforcement - Civil and Criminal Penalties

- a. For violation of disclosure rules
- b. For wrongful denial of benefits
- c. For violation of fiduciary requirements (personal liability)
- d. For discrimination or retaliatory discharge
- e. Complaints to U.S. Department of Labor

Tennessee Option Benefit Appeals Process



Tennessee Option Benefit Appeals Process

Benefit Plan Level of Review

- Initial benefit denial is made by designated plan fiduciary (insurance carrier, TPA, or employer representative)
- Appeals heard by Committee or Final Review Officer
- Appeals Committee can be comprised of:
 - A. Employees who were not involved in initial claim determination and not subordinate to initial claim decision maker; or
 - B. Vendors hired to perform Appeal functions
- Claim must be reviewed de novo with no deference to initial claim decision
- Medical judgments on appeal require advice from a new medical provider
- Substantial employee rights to submit and review all evidence and help build the administrative record
- Significant percentage of all appealed claim denials are overturned

Court Level of Review

- At the Court Level of Review, any potential conflicts of interest are considered as judges weigh the evidence, set the bounds of discovery, and render decisions
- Employee can file any dispute in state or federal court after exhausting Benefit Plan Level of Review

Fiduciary Duty

- A person making a claim determination is considered a fiduciary
- Fiduciaries must interpret and apply all plan provisions in the best interest of the employee, must communicate truthfully, and have a duty of loyalty to employees
- Any fiduciary who breaches any of these duties may be held personally liable for harm caused by that breach

Why ERISA has Withstood the Test of Time

Employee Protections:

- Definitely Determinable Benefits
- Full, Understandable Communications
- Fiduciary Duties
- Full and Fair Review of Claims

Fiduciary Duties:

- Duty of consistency
- Duty of loyalty
- Duty to not discriminate or retaliate
- Duty to communicate honestly in clear, plain language

Elements of a full and fair claim review:

- **Claim filing support**
- **Timely claims processing**
- **Adherence to terms of the benefit plan**
- **Opportunity to submit evidence, request information, or challenge information in the claim file**
- **Explanation of any benefit denial**
- **Explanation of how to appeal or correct their claim**

Elements of a full and fair review: (cont'd)

- **Ability to retain a lawyer**
- **No cost to appeal**
- **New, non-subordinate appeal decision maker**
- **New medical expert on appeal**
- **Court can supplement the record or allow discovery if the facts warrant**
- **Court review is deferential only if above requirements are met**

Six WC Option Premises

1. There is no perfect, heavenly-ordained formulation of the “Grand Bargain”.

The key is to ensure that Benefit Mandates and Liability Exposures are in balance.

Foundation of the Grand Bargain

*An inverse relationship between
the level of injury benefit mandate and
the extent of employer liability exposure:*

Higher Benefits → Less Liability

Lower Benefits → More Liability

Overview of Option Models

Benefit Mandates and Liability Exposures in Balance

Higher Benefits → Less Liability
Lower Benefits → More Liability

Texas	Tennessee	Oklahoma & South Carolina
No Benefit Mandate coupled With Unlimited Negligence Liability	Strong Benefit Mandate coupled with Limited Negligence Liability	Mirror or Exceed WC Benefit Mandate coupled with Exclusive Remedy Rule

Why does Texas Option have Lower Benefits & More Limitations?

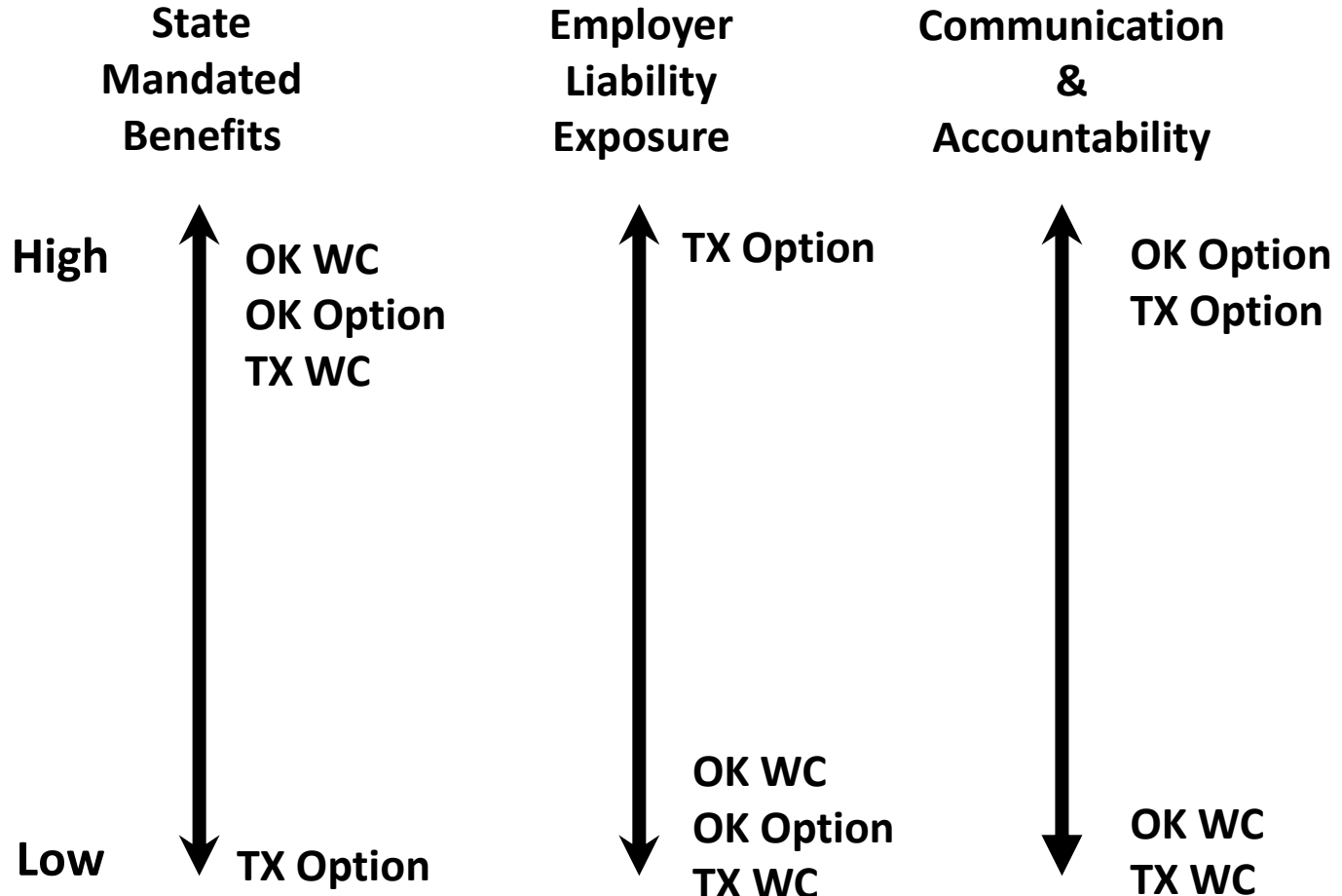
Balancing Voluntary Benefit Entitlements and Unlimited Negligence Liability Exposure

- Economic
- Non-economic and
- Punitive damages

93 Awards and Settlements of \$1 million or more

- 15 court verdicts
- 11 arbitration awards
- 42 settlements

Public Policy Comparison



Six WC Option Premises

2. Good Communication supports Accountability and Expands Provider Access

- **WC is a mysterious realm for injured workers**
- **But ERISA requires Option injury benefits to be fully communicated in language they can understand**

So what does accountability look like?

What does Employee Accountability look like?

- **Immediate Accident Reporting**
(subject to “good cause” exception)
 - a. **More immediate medical care, with**
 - b. **Early determination of extent of injury, leading to**
 - c. **More effective medical management, and**
 - d. **Better medical outcomes**

What does Employee Accountability look like?

- **Immediate Accident Reporting**

Also supports:

- e. **Timely investigation of the claim**, prior to changes to the accident scene and with better availability of witnesses,
- f. **Drug and alcohol testing**, with valid results that support important legal defenses, and
- g. **Correction of any unsafe condition** that jeopardizes the safety of other workers.

What does Employee Accountability look like?

- **Time Limit to receive First Medical Treatment**
- **Direction of Medical Care to the Best Providers**
- **Following Treatment Instructions**
- **Persistency of Medical Care**

Accountability Expands

Access to the Best Providers:

- **Physicians want to see injured workers sooner and have them follow the treatment plan to achieve better medical outcomes**
- **They want payment fast, fair and with a minimum of paperwork**

Medical providers should also be Accountable:

For example:

- **Obtain a comprehensive medical history**
 - ✓ Not just the claimant's version
- **Adequate physical examination**
- **Review of current and past diagnostic tests and imaging**
- **Supported, not speculative, reasoning**
 - ✓ "Evidence-Based Medicine"

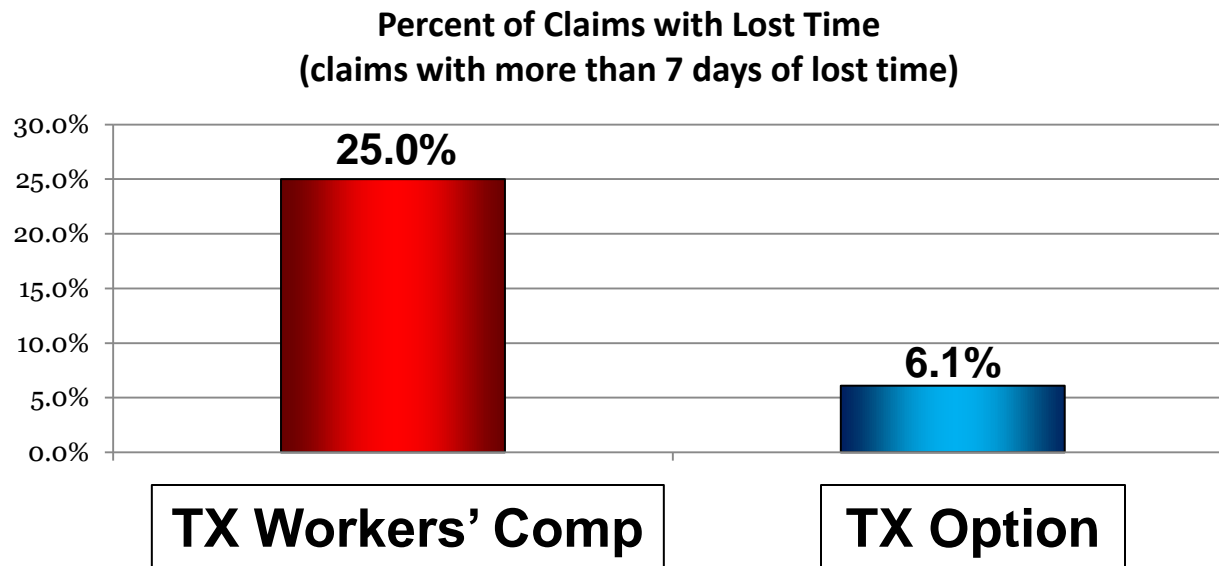
See Public Policy white paper at pp. 24-28 on "Best Practices in Medical Management"

Six WC Option Premises

- 3. Employee and Medical Provider Accountability supports Better Medical Outcomes**

Better Medical Outcomes

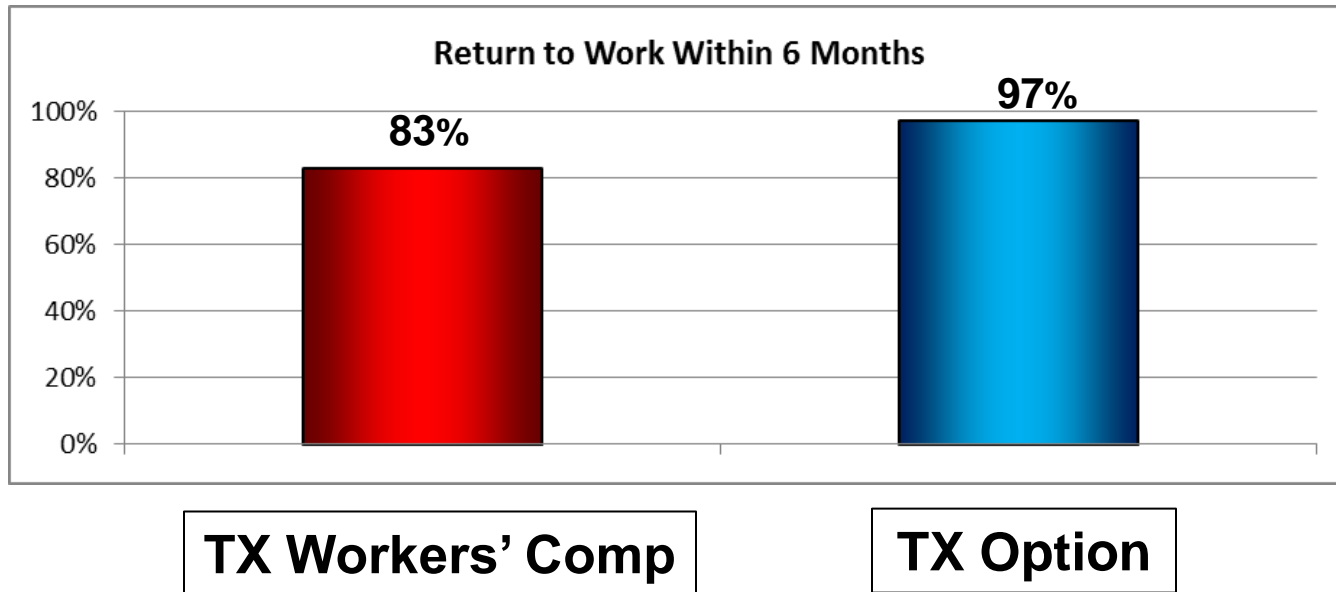
Fewer disabled employees



Source: "Options to Workers' Compensation: Positive Outcomes for Injured Workers and Employers", PartnerSource, January 2016

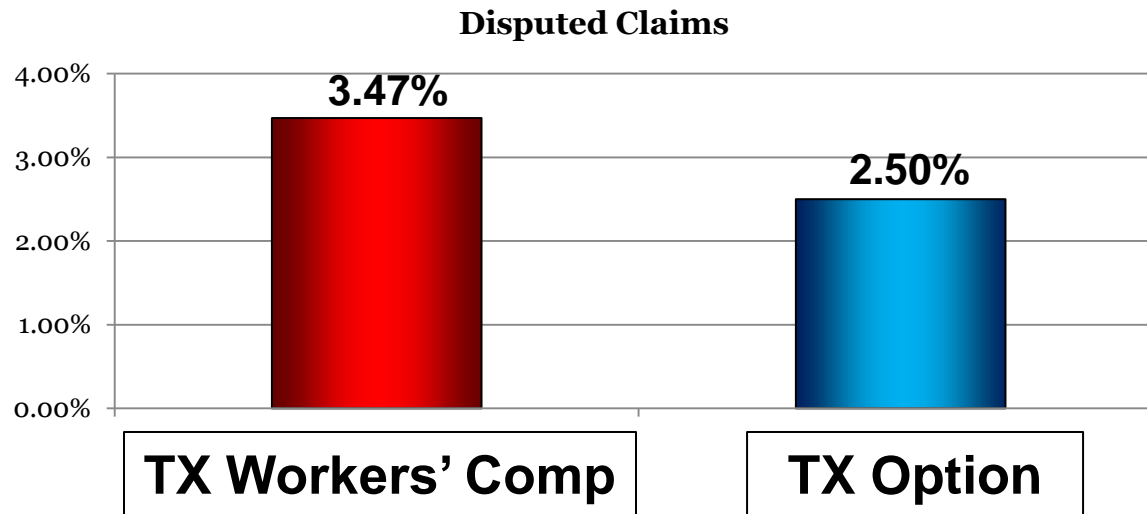
Better Medical Outcomes

Faster return to work



Six WC Option Premises

4. Communication and Fiduciary Duty leads to Fewer Disputes



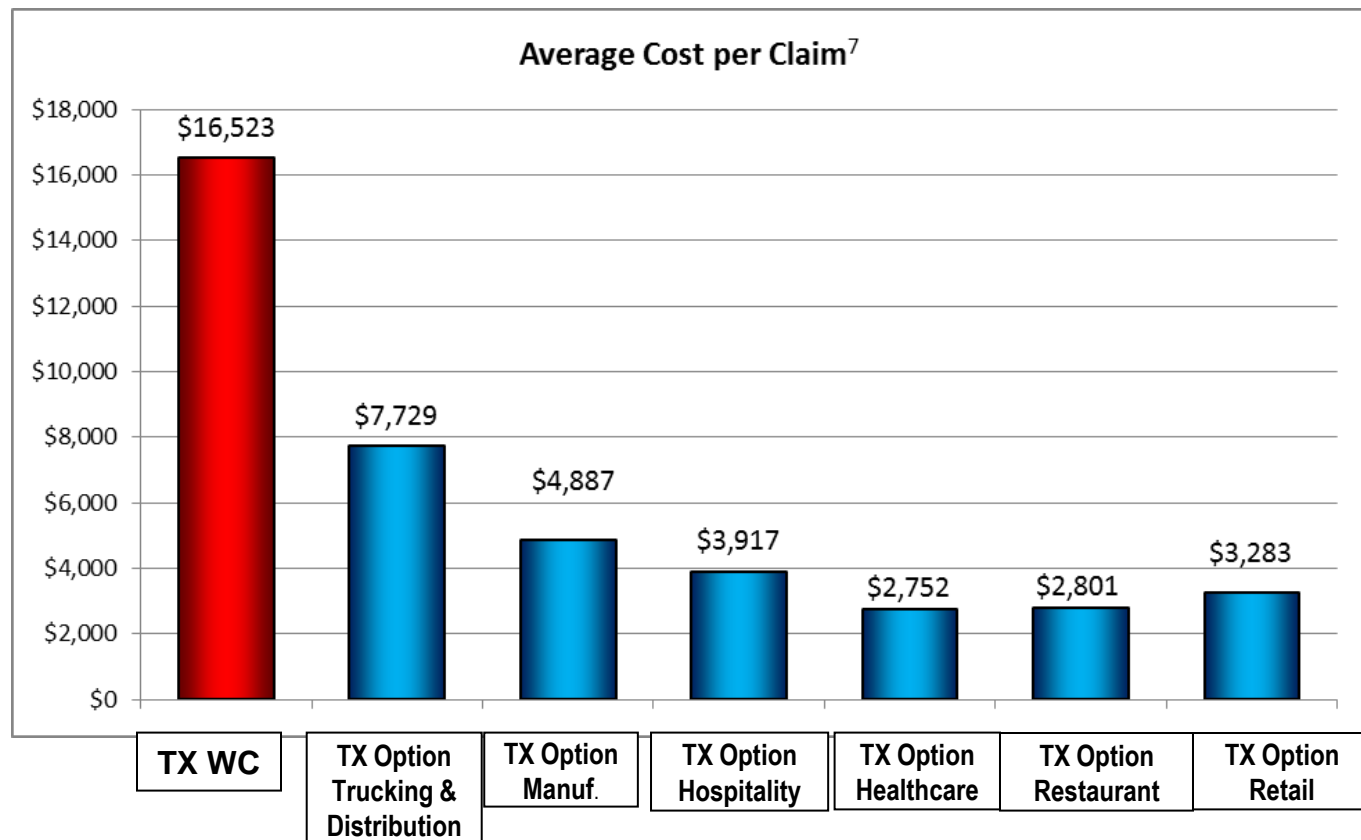
Six WC Option Premises

5. **Better Medical Outcomes and Fewer Disputes lead to Less Cost Shifting**
6. **Insurance Markets Should Compete on Coverage * and Price**

* Subject to statutory minimums

What Other Positive Changes Then Occur?

1. Lower total employer cost



What Other Positive Changes Then Occur?

- 2. Improved Wage Replacement Benefits and Process**
- 3. Higher Option Insurance Agent Commissions**
- 4. Lower Workers' Compensation Premiums**
- 5. Lower Taxpayer Expense**
- 6. Economic Development**

RESOURCES:

**“Options to Workers’ Compensation:
Public Policy Analysis” – www.partnersource.com**

**Publications Summary -
www.partnersource.com/mediacompilation**

More Information Needed?

Association for Responsible Alternatives to Workers' Compensation

“The Option Resource Guide”

- 28 Q&A's
- Summary of Nine Past Analyses & Reports

www.arawc.org

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