EXHIBIT D1

# A REPORT TO THE LEGISLATIVE COUNCIL AND THE SENATE AND HOUSE INTERIM COMMITTEES ON INSURANCE AND COMMERCE OF THE ARKANSAS GENERAL ASSEMBLY (ACT 796 of 1993 and ACT 1143 of 1997)

# ANNUAL STUDY OF THE WORKERS' COMPENSATION INSURANCE MARKET IN ARKANSAS


**Prepared by:** Jimmy Harris, Director of Compliance
Arkansas Insurance Department

**Approved by:** Alan McClain, State Insurance Commissioner


**Date Submitted:** September 1, 2024

## REPORT TO THE LEGISLATURE ON ACT 796 OF 1993 THE STATE OF THE WORKERS' COMPENSATION MARKET FOR YEAR ENDING 2023

Previous reports to the Legislature have discussed in detail the condition of Arkansas's Workers' Compensation marketplace prior to the passage of Act 796 in 1993, and subsequent to the changes brought about because of Act 796.

Arkansas continues to enjoy a competitive workers' compensation market with the continuing effects of Act 796 of 1993.

In the most recent data available, Arkansas's combined ratio increased to 94.6% ranking it among the lowest of any state for which Arkansas's statistical agent, the National Council on Compensation Insurance (NCCI), compiles loss data. In 2023, NCCI filed for decreases in the voluntary market loss costs of -2.4% and in the assigned risk plan rates -4.4% In 2024 the NCCI filed for decreases of -3% for the voluntary market loss costs and -3.5% for the assigned risk plan rates. Several factors and trends in the industry may affect future rates. These factors include changes in claim frequency, increased medical costs, increasing prescription drug utilization, increased reinsurance costs, and catastrophe loading for potential terrorism losses.

## CONTINUED RATE IMPACT OF ACT 796 OF 1993

Arkansas's voluntary workers' compensation market would have disappeared and many employers would have found themselves unable to afford workers' compensation coverage, facing the choice of either closing their business or operating outside the law, had Act 796 not become reality.

The impact of the Act on workers' compensation premiums is clear and significant. Prior to its enactment rates were increasing significantly. For example, for both the voluntary market and the assigned risk plan, rates in 1991 and 1992 increased 15% and 18% respectively. Passage of the Act forestalled anticipated rate increases in 1993 and 1994, with 1993 being the first year in the last ten in which there was no rate increase. 1993 and 1994 were years of market stabilization, and subsequent years have seen significant rate reductions in both the voluntary market and the assigned risk plan. Year 2001 saw our first increase in the assigned risk plan rates while experiencing a decrease in the voluntary market. In 2023, Arkansas had the lowest loss costs in the region per $100 of payroll, $0.43, compared to the regional average loss cost of $0.52 and the countrywide average loss cost of $0.75. The Arkansas average loss costs in 2024 were -80.1% from 1995 when the law changes went into effect. There are still positive effects from this Act that benefit Arkansas employers.

| Year | Voluntary Market | Assigned Risk Plan |
|---|---|---|
| 1993 | 0.0% | 0.0% |
| 1994 | 0.0% | 0.0% |
| 1995 | -12.4% | -12.4% |
| 1996 | -8.0% | -3.7% |
| 1997 | -4.7% | -7.6% |
| 1998 | -9.1% | -8.2% |
| 1999 | -4.1% | -3.0% |
| 2000 | -4.5% | -2.0% |
| 2001 | -7.5% | -1.9% |
| 2002 | -4.5% | -1.9% |
| 2003 | 1.8% | -5.5% |
| 2004 | 0.5% | -5.1% |
| 2005 | -1.5% | -2.8% |
| 2006 | -0.5% | -2.0% |
| 2007 | -5.4% | -6.8% |
| 2007 (Effective 1/1/08) | 2.7% | 2.7% |
| 2008 (Effective 7/1/08) | -12.8% | -13.8% |
| 2009 | -7.0% | -6.4% |
| 2010 | 1.9% | 4.5% |
| 2011 | -5.8% | -9.7% |
| 2012 | -4.1% | -4.8% |
| 2013 | -7.4% | -6.7% |
| 2014 | -1.4% | -8.5% |
| 2015 | -2.1% | -3.0% |
| 2016 | -4.3% | -1.6% |
| 2017 | -8.4% | -10.6% |
| 2018 | -15.4% | -14.9% |
| 2019 | -3.4% | -4.2% |
| 2020 | -9.4% | -10.8% |
| 2021 | -1.1% | -1.6% |
| 2022 | -10.8% | -11.0% |
| 2023 | -2.4% | -4.4% |
| 2024 | -3.0% | -3.5% |

## PAYROLL AND EXPERIENCE MODIFIER

Reported payroll in Arkansas continues to increase while premiums for insureds continue to decrease. In 2023 the average experience modifier increased slightly to 0.96 from 0.945. The 2023 countrywide average experience modifier is 0.950.

## ASSIGNED RISK PLAN

The assigned risk plan has seen a history of decline in population since the passage of Act 796 except for a gentle upward trend during 2002 through 2004. It is down from a record high of $150,000,000 in 1993, but up from a low of $6,566,275 in September 2000. Voluntary carriers continue to tighten underwriting and maintain their minimum premiums. The assigned risk estimated premium volume through June 2024 was $15,702,881 as compared to $18,484,281 for 2023. As of June 2024, small premium employers (less than $2,500 in annual premium) constituted approximately 69.3% of the plan policy volume with an average of $1,104 in premium per policy. Average plan premium per policy as of June 2024, was $3,070 for all 4,493 policies in the plan. The top five business classifications seeking coverage in the assigned risk plan were involved with the construction and farming industries.

In 2008, NCCI filed a Voluntary Coverage Assistance Program (VCAP), which has helped to remove some employers from the assigned risk plan by allowing voluntary carriers to file their underwriting guidelines for comparison to new applications submitted. When an application is received by NCCI, it is compared to the filed guidelines and if the risk appears to meet a company's guidelines, the application will be forwarded to the agent/insurer to determine whether they will make a voluntary offer of coverage. This program was approved effective October 1, 2008. As of the quarter ending in June 2024, 361 employers were removed from the assigned risk plan, saving those employers, on average 7.82% in premium.

## PLAN ADMINISTRATION/SERVICING CARRIERS

The NCCI is an "Advisory Organization" licensed in Arkansas to assist its member insurers with ratemaking and data collection activities. Effective July 1, 2023, the Commissioner re-appointed NCCI as Administrator for the Arkansas assigned risk plan until at least July 1, 2026.

Arkansas participates in the oversight of the market and the NCCI through a multi-state working group of the National Association of Insurance Commissioners (NAIC). The working group monitors data reliability and any other issues that arise involving the market.

In recent years, Arkansas has also participated in a multi-state examination of the NCCI in its role as an advisory organization licensed pursuant to Ark. Code Ann. §23-67-214. Participation in the examination task force and periodic reviews of this nature function to assure the quality of the data, as well as presenting the opportunity to improve existing systems and procedures. An advisory organization examination is designed to find concerns with statistical reporting and error correction. These concerns are remedied and monitored by a working group of the National Association of Insurance Commissioners (NAIC). The exams ensure the errors never become significant enough to affect the overall reliability of the data reported by the NCCI for the State of Arkansas. NCCI's most recent examinations showed no significant issues.

The staff in Little Rock continues to resolve many policy related service problems and provides Arkansas agents and insureds easy, immediate access to responsive company personnel. The effectiveness is apparent in the reduction of the number of complaints received by the Insurance

Department and the reduction in the number of appeals reaching the Appeals Board. The NCCI personnel assigned to service Arkansas are knowledgeable and committed to providing excellent service.

Attached is Exhibit "A" entitled *Arkansas Plan Premium Report July 2024;* the exhibits are prepared by the NCCI and provide detailed information on risk profiles such as average premium size, top ten classifications by code and by premium, and a list of contacts within NCCI for specific areas of concern.

NCCI provides, at no charge to the agent, the option to submit assigned risk applications online. Upon successful submission, the customer receives a confirmation code and application identification number for reference. There are significant savings to the plan when an application can be processed electronically. Arkansas agents have been extremely responsive to this initiative with 100% of applications being submitted online in 2024.

The most recent Annual Servicing Carrier Performance Review conducted by NCCI reveals either "Commendable" or "Satisfactory" scores for all areas for Arkansas's servicing carriers. For the period commencing January 1, 2023, to December 31, 2025, the carriers are Technology, Liberty Mutual and AmGuard Insurance Company and Continental Indemnity.

## SUMMARY OF INSURANCE DEPARTMENT'S CRIMINAL INVESTIGATION DIVISION

Before the passage of Act 796 of 1993, there had never been a criminal prosecution in Arkansas for workers' compensation fraud committed by employees, employers or healthcare providers. Act 796 of 1993 created the Workers' Compensation Fraud Investigation Division and made any type of fraud committed within the workers' compensation system a Class D Felony (maximum six years of incarceration and/or $10,000 fine). The Division was renamed the Criminal Investigation Division (CID) during the 2005 Legislative Session to come in line with its present mandate to investigate not only workers' compensation fraud but all types of insurance fraud. Fraud in the workers' compensation system was perceived to be epidemic. Since the majority of employers were in the "plan," there was little, if any, incentive for thorough investigation of possibly fraudulent insurance claims and few consequences to those caught making intentional misrepresentations. Act 796 changed the entire landscape of the workers' compensation system, particularly the detection, prevention and prosecution of workers' compensation fraud.

The actual prosecution of a workers' compensation fraud case is contingent on many factors. Key among those factors is the elected prosecutor's willingness to carry a case forward. If the information provided from an investigation is not enough to meet the standards found at Ark. Code Ann. § 11-9-106 for conviction, a prosecutor will be unwilling to pursue the case. Local law enforcement agencies often do not have the resources to investigate workers' compensation fraud. Fortunately, the investigative authority of the Criminal Investigation Division allows the Arkansas Insurance Department to supplement these often under-funded local agencies. However, the Division is no longer dedicated to a single purpose for complex investigations, as it is tasked to investigate all insurance fraud under Title 23 (1100 total cases in 2022) and not just workers' compensation fraud under Title 11.

Consequently, even though workers' compensation fraud is still an important and integral part of the Criminal Investigation Division, it accounts for less than one percent (.027%) of the referrals that come into CID as compared to insurance fraud as defined under Title 23. As all these complex cases evolve, they frequently require investigators to work through a myriad of leads to develop a case. Occasionally, even with the Division's dedicated resources, there simply is not enough information for a prosecutor to prosecute the crime.

While the number of actual prosecutions varies from year to year, the possibility of investigation and prosecution is a constant deterrent. Any lessening of CID's enforcement powers would likely result in a re-emergence of both frequency and severity of fraud committed by employees, employers, and healthcare providers.

None of the bordering states have Insurance Fraud Divisions actively investigating criminal workers comp cases, they refer them to their designated Workers Comp Commission unless they appear to be criminal, wherein they refer the cases to their Attorney General.

In fact, many cases are not carried forward to prosecution. In many instances where there is not enough evidence to prosecute the case, the threat of prosecution is enough to get the parties involved to settle the cases outside of court, resulting in restitution for the aggrieved parties. While not technically prosecutor wins, these cases result in positive outcomes for injured workers in the state.

In the 2023 reporting period, there were 24 workers' compensation referrals received by AIDCID. Of those referrals, 15 were closed with 9 forwarded for investigation. Two cases were referred for prosecution with both cases being eventually closed, after it being determined that they lacked sufficient evidence for successful prosecution. Since the creation of the Division in 1993, 174 cases have been referred for prosecution, which resulted in 123 convictions.

## SELECTED WORKERS' COMPENSATION DECISIONS

## FISCAL YEAR 2023

## Arkansas Court of Appeals

**Compensability, Employment Services.**
***Jeffrey Harvey v. University of Arkansas,*** 2024 Ark. App. 178 (March 13, 2024).

Jeffrey Harvey was employed as a generalist for the University of Arkansas. His job entailed maintenance, repairs, and various other duties related to the University facilities. His work hours are 8:00 a.m. to 4:30 p.m., and he is assigned to the Holcombe, Futrall, and Gatewood dormitories. On February 2, 2022, he stayed overnight in the Holcombe dormitory because there was impending inclement weather, and the University needed essential personnel for the next day to shovel snow, salt sidewalks, and perform other tasks. The roads were impassable, and he would not have been able to drive to work from his home in Bella Vista. Staying in the dorm also benefited him personally since the University paid "double time and a half" as inclement-weather compensation.

At approximately 6:30 a.m. the next morning, Harvey took a shower, slipped while stepping out of the shower, and fell on his backside. He crawled to his bed, called his supervisor, and then called 911. He was taken by ambulance to the hospital and evaluated in the emergency room for a couple of hours. He was diagnosed with a compression fracture in his lumbar spine and was off work from February 3, 2022 to May 11, 2022.

Mr. Harvey conceded that he was not required to stay on campus due to the inclement weather, and none of his supervisors had said he needed to stay on campus. He also agreed that his regular start time was 8:00 a.m. and that he had not yet clocked into work on the morning of his injury. Finally, he explained that at the time of his injury, he was not on the maintenance department's emergency on-call list because he had a medical release.

The Administrative Law Judge found that Harvey had failed to meet his burden of proving that he suffered a compensable injury because he had not been performing employment services at the time of his injury. In making his decision, the ALJ relied on *Lopez v. James Divito Racing Stable*, 2021 Ark. App. 257, 625 S.W.3d 742. In *Lopez*, the claimant worked with racehorses stabled at Oaklawn, and during racing season, Oaklawn provided complimentary rooms to some race teams, including Lopez's team. On the morning of March 6, 2017, Lopez awoke to a fire and the smell of smoke. He jumped out of a second-story window to escape the fire and injured his back. Lopez filed a workers' compensation claim contending that he suffered a compensable injury, but the Commission found that he was not performing employment services when he was injured. Importantly, the Commission found that Lopez was not required to live on premises as a condition of his employment but chose to stay at Oaklawn because it was free and convenient. In affirming the Commission's decision, this court held, Lopez was not within the time and space boundaries of his employment when he was injured. He had returned from dinner, there was no race the next day, and his set work hours did not begin until later that morning. What Lopez was doing at the time of the injury—sleeping—was not inherently necessary for the performance of his job as a hot walker. He was merely attending to his own personal needs. Lopez was not indirectly advancing his employer's interest either. The fire apparently occurred at 5:45 a.m., which was before his work began. Lopez was free to do as he pleased and had no employment obligation of any kind as he slept in a room above the stables provided for his convenience. Lopez's back injury was not compensable under Arkansas law. *Id*. at 9, 625 S.W.3d at 747–48.

The ALJ found that the present case is similar to *Lopez*. Harvey was not required to stay in a dorm room on campus on the night of February 2; instead, he volunteered to stay. He was not told by any of his supervisors that he needed to stay. Further, he was not on call and would not

have been contacted for an emergency situation between the hours of 4:30 p.m. and 8:00 a.m. Harvey's work hours did not begin until 8:00 a.m. on February 3. The ALJ concluded that at the time of Harvey's fall, he was merely attending to his own needs. "Claimant was free to do as he pleased and had no employment obligation as he slept in a dorm room provided for his own convenience. Therefore, claimant was not performing employment services at the time of his injury." Harvey appealed to the full Commission, which affirmed and adopted the ALJ's decision.

The Court of Appeals affirmed the Full Commission decision. The Court noted that Harvey volunteered to stay at the dormitory rather than attempt to drive in to work the next day. The University did not require him to stay as a condition of employment, and he was not on call between the hours of 4:30 p.m. on February 2 and 8:00 a.m. on February 3. His fall occurred at approximately 6:30 a.m. on February 3, when he was attending to personal needs and not within the time and space boundaries of his employment. Like Lopez, Harvey was not performing any activity inherently necessary for the performance of his job, and he was not indirectly advancing his employer's interests. At the time that the fall occurred, Harvey was free to do as he pleased and had no employment obligation of any kind. The Court concluded that Harvey was not performing employment services at the time of his injury and affirmed the denial of benefits.

**Temporary Total Disability Benefits.**
***Reed v. M.A.Mortensen Companies,*** 2024 Ark. App. 253 (April 17, 2024).

In this case, the claimant, Leonard Reed, worked as a truck driver and was injured on October 20, 2017. A four-pound piece of metal struck his right leg which caused severe injuries. Following surgeries on his right leg the claimant was found to have reached maximum medical improvement on April 5, 2018 and could return to light-duty work. The claimant received temporary total disability benefits until his healing period ended on April 5, 2018.

In a 2021 hearing before an Administrative Law Judge, Mr. Reed contended that he was unable to return to work as his employer had told him there was no light-duty work available. He contended he was entitled to additional TTD benefits beyond April 5, 2018. The ALJ agreed with the claimant and the employer appealed to the Full Workers' Compensation Commission.

The Commission overruled the ALJ's finding and held that the claimant's healing period did not extend beyond April 5, 2018. The Commission noted that after receiving the FCE report, the claimant's treating physician assessed a 0 percent impairment rating and reiterated his opinion from earlier office visits that Mr. Reed was capable of returning to light-duty work. Dr. Wassell noted that the FCE report reflected a lack of reliable effort by Mr. Reed. Dr. Wassell then released Mr. Reed from his care.

The Court of Appeals affirmed the Commission's decision and noted that it was within the Commission's purview to weigh the evidence, interpret medical opinions, and translate into findings of fact only those portions of testimony it deemed worthy of belief. The Court found that the Commission's decision displayed a substantial basis for the denial of relief and therefore was affirmed.

## Full Commission Opinions

**Compensability.**
***Jeremy Grigg v. Integrated Stair Systems*, H206756, September 6, 2023.**

The claimant contended that he sustained compensable injuries to his lumbar and thoracic spine on August 29, 2022. He asked for temporary total disability benefits and payment of medical expenses. The respondent employer contended that medical evidence had not been provided that indicated a compensable injury had occurred.

An Administrative law Judge found that the claimant had failed to satisfy his burden of proving that he sustained a work-related injury on August 29, 2022. The Full Commission reversed the ALJ decision and found that the claimant did prove he had sustained a compensable injury. The Full Commission noted that the administrative law judge "essentially determined that the claimant was not a credible witness." The Commission then stated that "an administrative law judge's findings with regard to credibility are not binding on the Full Commission." The Full Commission determined that after their de novo review that the claimant was in fact a credible witness. The Full Commission noted that there were inconsistencies in the claimant's testimony and that he was a "poor historian." Nevertheless, the decision of the ALJ was reversed and benefits awarded to the claimant.

**Dual Employment.**
***Humphries v. FNA Group, LLC, G905793*, April 3, 2024.**

In this case, a temporary staffing agency provided employees to a manufacturing company for work on their production lines. The staffing agency maintained an office in the manufacturing facility with its own entrance and facilities. Employees were recruited by the staffing agency but the manufacturing company determined their working hours, breaks, pay rates, dress codes, and who would be line leaders. The manufacturing company also determined pay raises for employees and maintained the right to fire employees. The claimant was injured while working on the manufacturing company's production line. The staffing agency and the manufacturing both claimed the other was the actual employer at the time of the injury. The issue was whether the manufacturing company was a dual employer of the claimant and therefore protected under the Exclusive Remedy provisions of Ark. Code Ann. §11-9-105.

A hearing was held and an administrative law judge determined that the manufacturing company failed to prove by a preponderance of the evidence that it was a dual employer of the

claimant and therefore entitled to exclusive remedy protection. The manufacturing company appealed.

The Full Commission reversed the decision of the ALJ and found that the manufacturing company was a dual employer of the claimant at the time of his injury. The Full Commission noted that not only did the manufacturing company specifically assign the claimant to the baler with no input from the staffing agency, and that the manufacturing company also controlled every aspect of the claimant's work from when he arrived to what he wore on a day-to-day basis. The manufacturing company also determined what the claimant would earn and if he was entitled to more pay and reimbursed the staffing agency for the claimant's pay. The only role the staffing agency had over the claimant's employment was his initial hiring and administrative duties such as payroll.

**Employee-Employer Relationship, Employment Services.**
***Escobedo v. Jake's Janitorial Services*, H104889, April 18, 2024.**

In this case, the issue centered on which of three possible employers was responsible for workers' compensation benefits to the injured employee. The claimant, Ruth Escobedo, testified that she met with a representative of Jake's Janitorial Services and was "hired" to perform cleaning services. The claimant was assigned to clean various buildings on and around the campus of the University of Arkansas in Fayetteville. On November 12, 2019, the claimant and a co-worker arrived at one of the University fraternity houses. As the claimant was getting out of the car in the parking lot, she slipped and fell. She sustained an injury to her left knee.

The claimant filed a workers' compensation claim and contended that either Jake's Janitorial Services, the University of Arkansas, or another company, Absolute Janitorial Services, was the actual employer for workers' compensation purposes on the date of injury. The issues in the claim included whether the claimant sustained a compensable knee injury as she contended,

which entity was the statutory employer on the date of the injury, and which entity should bear responsibility for benefits in the event the claim were found to be compensable.

A hearing was held before the Administrative Law Judge and testimony of various witnesses was presented. The ALJ found that a preponderance of the evidence proved that Jake's Janitorial Services was the statutory "employer" for purposes of workers' compensation on the date of the claimant's injury. The ALJ also found that the claimant's knee injury was compensable even though it allegedly occurred in the parking lot before she had started cleaning the building assigned to her. The ALJ also found that Absolute Janitorial Services had contractual relationships with both the University of Arkansas and Jake's Janitorial Services. By virtue of these contractual relationships the ALJ found that Absolute Janitorial Services had liability for any and all compensation awarded to the claimant.

The Full Commission affirmed and adopted the ALJ Opinion. One Commissioner dissented from the majority opinion's finding that the claimant proved she had sustained a compensable knee injury. The dissent noted that at the time of her injury the claimant was merely getting out of her car when she fell in the parking lot on her way to begin her work day. The dissent noted that the claimant was not performing employment services at the time of her injury.

.

## NATIONAL MARKETS IN GENERAL

While Arkansas continues to experience increases in the average indemnity and medical cost per lost time claim, claims frequency continues to decline resulting in a continued decline in rates upon which premiums are based. Arkansas's market remains strong and competitive.

The attached state of the industry report Exhibit "B" entitled *State of the Line* graphically depicts the sound condition of the workers' compensation marketplace; still, the NCCI continues to discover that workers' compensation results are affected by several factors that are having an impact on the market:

- Medical services contribution to the costs of claims;

- Impact of fee schedule updates on physician payments;
- Mega claims in workers' compensation;
- Motor vehicle accidents in workers' compensation;
- Changing employee demographics effects on claims frequency; and
- Hazard group updates;

The incidence of workplace injuries continues to fall since the reform efforts of 1993. This means fewer injured workers – the most valuable outcome imaginable for workers, their families, and employers.

## CONCLUSION

Absent the reforms encompassed in Act 796 of 1993, it is doubtful Arkansas's employers would now have the option of voluntary workers' compensation insurance. Rather, the assigned risk plan, designed to be a market of "last resort," would have become Arkansas's market of "only resort." The General Assembly is to be highly commended for its leadership in reforming the workers' compensation market in our State while protecting the interests of the injured worker.

Arkansas's employers need quality workers' compensation products in the voluntary market at affordable prices. The creation of good jobs requires a marketplace where all businesses, regardless of size, can grow. Maintaining a stable workers' compensation system is essential for this growth. The evidence shows the reforms have worked. Frequency has experienced a dramatic decrease and continues that trend. The incidence of fraud has been reduced through high-profile fraud prosecutions, employee compensation rates and benefits have been increased, and workers injured within the course and scope of their employment have received timely medical treatment and the payment of much improved indemnity benefits. Eroding the positive changes incorporated into Act 796 would be counterproductive to continued economic growth and development.

Prepared for submission by: September 1, 2024

cc: The Honorable Sarah Huckabee Sanders, Governor
The Honorable Hugh McDonald, Secretary, Department of Commerce
The Honorable Dale Douthit, Chairman, AWCC
The Honorable Michael R. Mayton, Commissioner, AWCC
The Honorable Scott Willhite**,** Commissioner, AWCC
Mark McGuire, Chief Executive Officer, AWCC
Mr. Russ Galbraith, Insurance Chief Deputy Commissioner, AID
Mr. Nathan Culp, Public Employee Claims Division Director, AID
Mr. Paul Keller, Criminal Investigation Division Director, AID