



Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Informational meeting regarding the *Federated Insurance Co. v. Summit Pharmacy* court decision

Before the:
Pennsylvania House Labor and Industry Committee

Presented by:

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Chairman Dawkins, Chairman Mackenzie and members of the PA House Labor and Industry Committee, my name is Alex Halper and I am Senior Vice President of Government Affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy association in Pennsylvania. We represent employers of all sizes, crossing all industry sectors throughout the Commonwealth. Thank you for the opportunity to participate in today's informational meeting regarding the *Federated Insurance Co. v. Summit Pharmacy* court decision.

The PA Chamber and broader Pennsylvania business community are committed to promoting safe and healthy workplaces. In the event of a work-related injury or illness, it is the employer's obligation to pay for all reasonable and necessary medical treatment, and wage-loss benefits if the individual must miss any work. This obligation was codified in 1915 through passage of Pennsylvania's Workers' Compensation Act and the "grand bargain," as it was known, has generally served its purpose of establishing a structured, more predictable process with a guarantee of support for eligible claimants.

Employers' top workers' compensation priority is to provide effective treatment to facilitate the injured worker back to full function, full health and work as soon as possible.

In addition to focusing on improving outcomes for injured workers, employers and all stakeholders should prioritize efforts to minimize unjustified and excessive cost-drivers in the system that unduly burden Pennsylvania employers while providing no discernable benefit to injured workers.

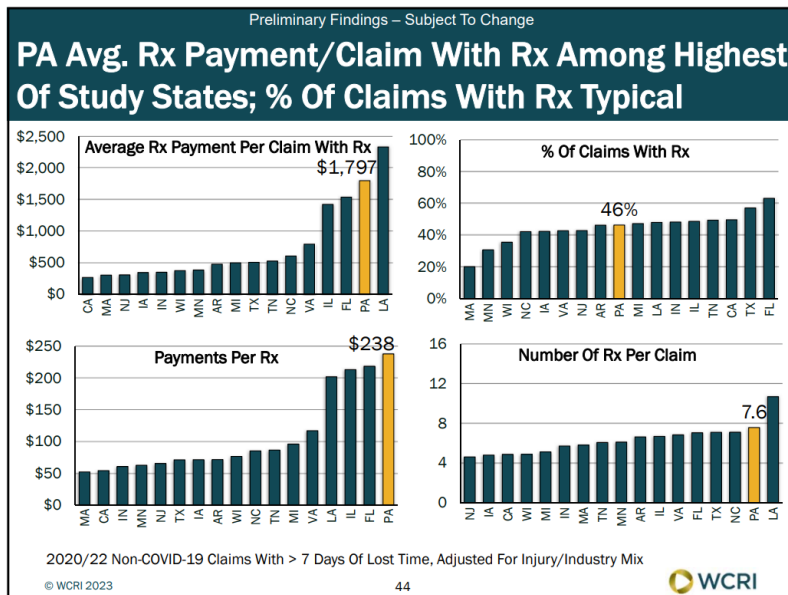
Employers are committed to the wellbeing of their workforce and invest considerably in workplace safety. This investment has helped drive down the frequency of workers' compensation claims, or the incidents of workplace injuries, leading to a general stabilization of statewide system costs over recent years and decades. At the same time, however, the severity, or average cost of individual claims, continues to increase.¹ In other words, even as statewide costs have been generally stable as the number of claims has declined, the impact is somewhat offset by increasing severity. This means that individual employer insurance premium costs, which are partially based on that employer's experience, may still be increasing, in some cases significantly.

The court decision that is the subject of today's informational meeting focuses on prescription drug costs, which have been a leading cost-driver in Pennsylvania's workers' compensation system. Rising prescription drug costs is not unusual to

¹ Pennsylvania Compensation Rating Bureau, "April 1, 2023 Loss Cost Filing Briefing Meeting, January 4, 2023.

workers' compensation or to Pennsylvania; however, Pennsylvania is increasingly an outlier state.

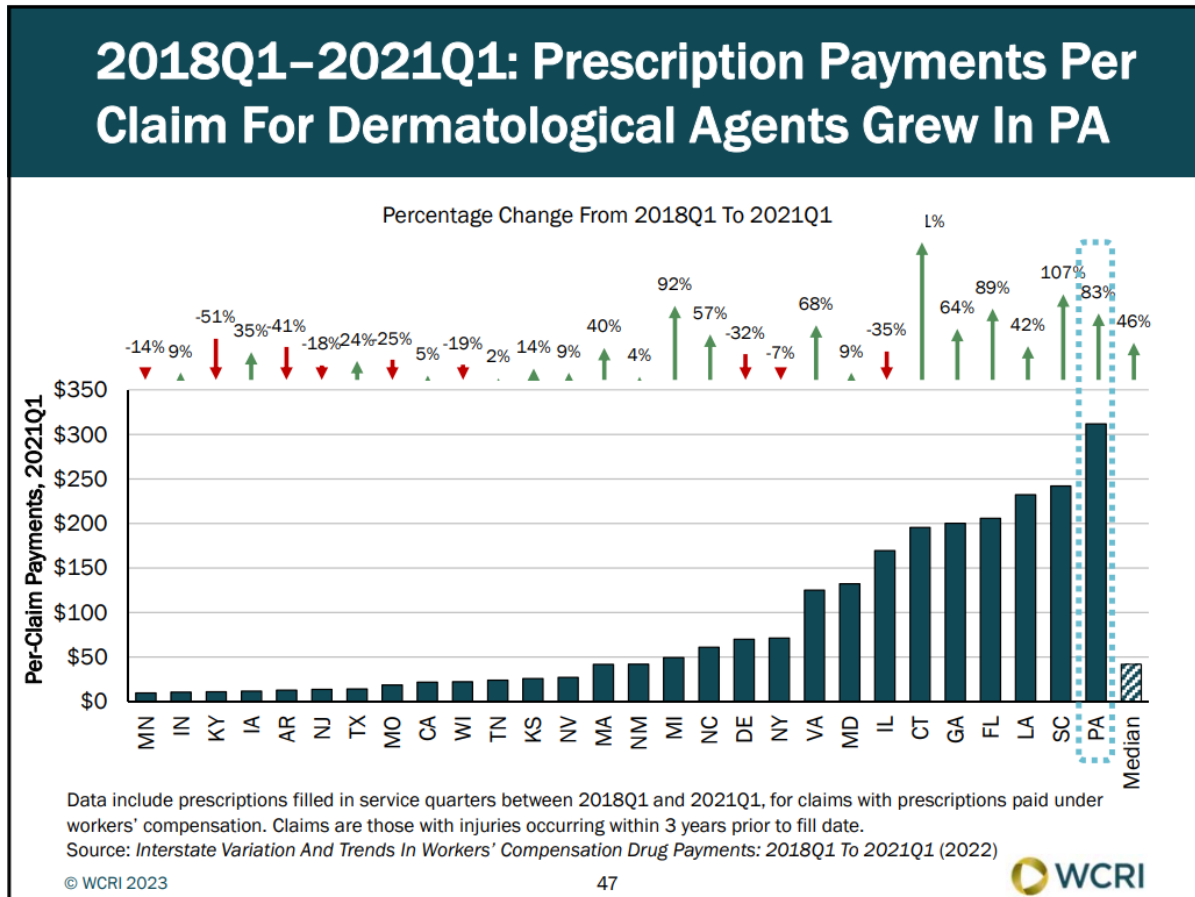
The Workers' Compensation Research Institute regularly analyzes state workers' compensation systems and presented a report last year to their Pennsylvania Advisory Committee which showed noteworthy trends in prescription drug use among injured workers in Pennsylvania.² For example, the study showed that, among the study states, Pennsylvania had the second highest average prescription drug cost per claim at a level more than double the median study state. Additionally, Pennsylvania had *the highest* payment per prescription at \$238, nearly triple the median study state.



That same WCRI report explored the growing prevalence of so-called demagogical agent prescriptions, or medications applied to the skin. A state-by-state analysis

² Fisher, Kathy and Monnin-Browder, Will. Workers' Compensation Research Institute, "Pennsylvania Advisory Committee meeting," July 20, 2023.

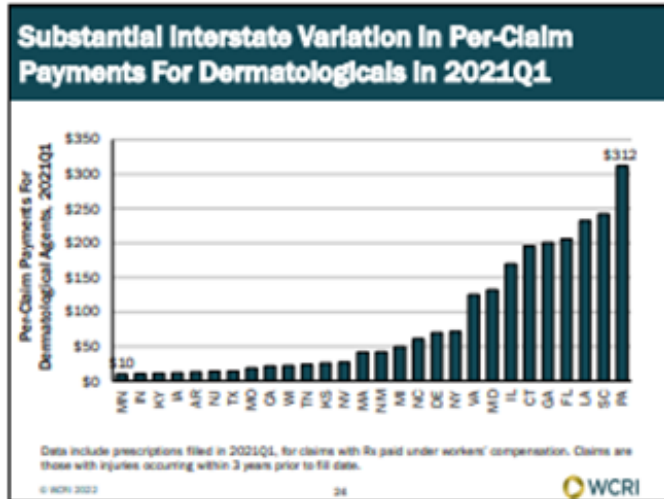
showed Pennsylvania had *the highest* prescription payments per claim for dermatological agents, an amount that increased 83 percent between 2018 and 2021.



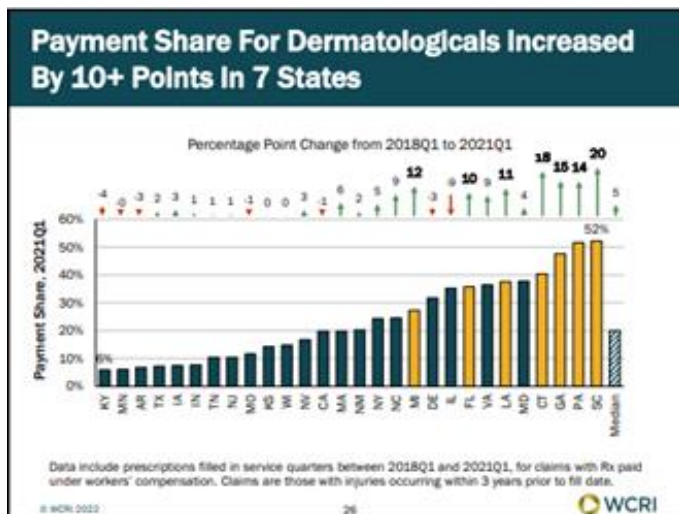
Another study from the Workers’ Compensation Research Institute titled *Interstate Variation and Trends in Workers’ Compensation Drug Payments*³ analyzed in greater detail some alarming prescribing patterns of dermatological medications and found Pennsylvania to be an extreme outlier. PA employers are paying by far the most for

³Workers’ Compensation Research Institute, “Interstate Variation and Trends in Workers’ Compensation Drug Payments,” Sept. 28, 2022.

dermatologicals at \$312 per claim when most states are below \$50.



The report also showed that dermatologicals in PA account for over 50 percent of total prescription drug payments while the median state was 20 percent.



Pennsylvania has long struggled to deter and combat abuse in the workers' compensation system as it relates to prescription drugs. Legislation had to be passed a

number of years ago to address a rising trend of certain providers dispensing the medications they were prescribing, which was shown to distort prescribing behavior and increase costs. Several years later, the Philadelphia Inquirer published a multi-part exposé detailing an arrangement in which a worker's compensation plaintiff's firm had partnered with a physician group to open their own joint pharmacy through which their clients/patients were funneled and prescribed outrageously expensive topical compound creams.⁴

These incidents as well as Pennsylvania's high costs for medication and status as an outlier with respect to prescription drug costs in workers' compensation can be attributed to multiple factors. Pennsylvania lacks many of the safeguards that other states have long employed to reasonably control costs and prevent misuse or overprescribing, such as managed care options or treatment guidelines. Similar, the PA Chamber has championed legislation to establish a prescription drug formulary, which other states like California and New York have passed to address overprescribing and addiction in workers' compensation. While that legislation passed both the PA House and Senate, it was unfortunately vetoed by then-Gov. Tom Wolf.

Another key factor is the manner in which how prescription drug costs are priced in

⁴ Bender, William. "Talk about an unholy alliance!: Lawyers, doctors and pharmacies." The Philadelphia Inquirer. Sept. 22, 2017

Pennsylvania's workers' compensation system. The law provides that employers will pay for prescription drugs for injured workers at a rate of 110 percent of average wholesale price, and for decades, the Bureau of Workers' Compensation (the Bureau) designated a pricing guide known as the Red Book as the source to use in drug pricing disputes.

The PA Chamber and employers have argued for years that Red Book prices are frequently not aligned with actual average wholesale prices, particularly for generic drugs, and facilitate abuse of the system, such as charging exorbitant prices for the aforementioned compound creams and other questionable treatments.

In January of 2024, the Commonwealth Court issued a decision in the case of *Federated Mutual Insurance Company v. Summit Pharmacy*. This case revolved around a pharmacy which had been dispensing prescriptions drugs to a workers' compensation claimant beginning in 2019 and submitting claims to the employer's insurance carrier totaling over \$100,000, with costs determined by the Red Book. Eventually, the employer objected to the cumulative costs which seemed excessive. They cited bills submitted between April 2021 and September 2022 totaling about \$74,000 and compared those costs to the amount determined by a different pricing source, the National Average Drug Acquisition Cost Index (NADAC), which totaled a little over \$1,500. NADAC is managed by the federal government for use in other healthcare

programs such as Medicaid, and is based on a survey of pharmacies focused on their wholesale acquisition costs.

The Court’s analysis and decision confirmed what Pennsylvania employers have known for some time: the Pennsylvania business community is frequently severely overcharged for their injured workers’ prescription drugs. The Court cited one example of a bottle of generic Prozac, for which the Red Book would charge approximately \$2,000, but the NADAC acquisition price is \$9. We have had employers share numerous similar examples of significantly higher drug costs, such as one employer who was charged the Red Book-determined price of \$777 for Duloxetine, the generic alternative for Cymbalta, when NADAC would charge \$5.87.

One defense attorney submitted several other examples:

Drug	Red Book AWP	NADAC	Savings
TOPIRAMATE 100 MG Tab	\$431.74	\$1.36	\$430.38
PREGABALIN 200 MG CAPSULE	\$834.32	\$1.98	\$832.24
DICLOFENAC SODIUM 3% GEL	\$3,892.22	\$11.63	\$3,880.59

According to one of the attorneys involved in the *Federated* case, nearly every generic drug commonly used in workers' comp carries a Red Book price of up to 100-fold

higher than actual average wholesale prices. This attorney recently cited ondansetron, a common generic anti-nausea drug often given to address side effects of other drugs, for which NADAC charges \$1.83 but an employer who is self-insured for workers' compensation was charged \$1,225.35.

Ultimately the Commonwealth Court asserted in *Federated* that the Workers' Compensation Act mandates the use of actual Average Wholesale Prices and ruled that the Red Book is not accurate and can no longer be used as a tool for pricing drugs in the Pennsylvania workers' compensation system. The Commonwealth Court directed the Bureau to "promptly identify and publish in the Pennsylvania Bulletin a different nationally recognized schedule to be used to determine the AWP for purposes of resolving payment disputes for pharmaceuticals." They further remanded the case back to the Hearing Officer to apply the new standard, once one was selected by the Bureau. A couple months later, on March 22nd, the court denied a petition to stay the decision.

Since that time and to this day the Bureau has not selected an alternative pricing guide. In August, the Pennsylvania Supreme Court agreed to hear the appeal but also did not grant a stay, meaning the Red Book remains invalid and the *Federated* decision is in effect until the Supreme Court rules on the case.

In the meantime, Pennsylvania employers are in a state of limbo. We understand thousands of prescription drug disputes remain unresolved. Many employers are reportedly maintaining their Red Book-based policies for pricing medications out of fear that the Supreme Court will overturn *Federated* and allow employers to continue to be price gouged.

We urge lawmakers to work collectively and with all stakeholders on a resolution that maintains workers' access to medication without returning to the untenable reality under which employers existed for decades. If that resolution involves some other drug pricing source, it is important for lawmakers to recognize that utilization of a specific source for workers compensation does not indicate that the source is appropriate in different contexts. It is also important to note that not all pricing sources are comprehensive and therefore additional policies may be necessary to supplement a new source. Finally, Lawmakers should also ensure that adoption of a new pricing source does not inadvertently limit access to prescription drugs for injured workers.

Thanks again for the opportunity to participate in this discussion. I am happy to answer any questions.