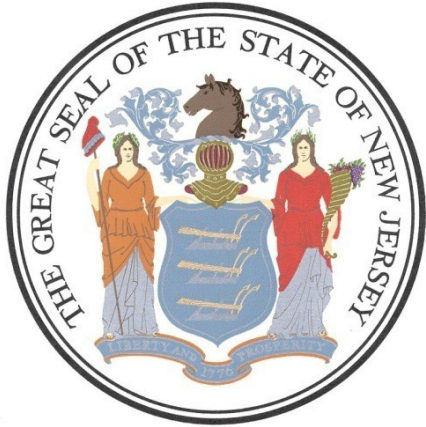


**State of New Jersey  
Office of the State Comptroller**



***INVESTIGATIVE REPORT:  
An Examination Into the Use of Medical  
Monitoring Settlements by the Division of  
Workers' Compensation and the Impact  
on the State's Pension Funds***

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## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Background.....	3
	A. Workers' Compensation .....	3
	B. Accidental Disability Pension .....	4
	C. Prohibition on Double Recoveries .....	5
	D. DWC's Policies Regarding Petitioners That Receive Disability Pensions .....	7
III.	Methodology .....	9
IV.	Investigative Findings .....	10
	A. Continuing Medical Monitoring Settlements are Inconsistent With the Workers' Compensation Act .....	11
	B. The Continuing Medical Monitoring Policy Eliminates the Financial Incentive for Injured Employees to Pursue a Workers' Compensation Judgment When They Receive an ADP.....	15
	C. DWC's Medical Monitoring and Coverage Policies Shift Substantial Financial Obligations to the State and its Pensions Funds That Otherwise Would be Paid by Insurance Providers .....	17
	D. DWC and DPB Do Not Adequately Cooperate to Protect the State's and Pension Funds' Financial Interests.....	18
	E. DWC's Approach to Settling Workers' Compensation Claims Brought by Public Employees Who Also Apply for an ADP Appears to Undermine the State's Policy on Double Recoveries .....	19
V.	Conclusion and Recommendations .....	21

## **I. INTRODUCTION**

The Office of the State Comptroller (OSC) conducted an investigation related to the use of medical monitoring settlements by the Division of Workers' Compensation (DWC), a division within the Department of Labor and Workforce Development (Department of Labor), and the impact of such settlements on the State's pension funds. OSC initiated this investigation following receipt of a complaint alleging that public employees who received an accidental disability pension (ADP) were permitted, and even encouraged, to accept medical monitoring settlements, rather than monetary settlements, in their workers' compensation cases. DWC's policies regarding such settlements result in public employees avoiding a pension offset by the Division of Pensions and Benefits (DPB), a division within the Department of Treasury. A pension offset, which is mandatory and intended to prevent a double recovery by a public employee, reduces an employee's ADP payment dollar-for-dollar, thus saving the pension funds from incurring substantial costs.

DWC's policies encourage workers' compensation petitioners to settle claims that undermine New Jersey's pension funds, provide windfalls to workers' compensation insurance providers, including joint insurance funds and private insurance companies, and provide medical monitoring and coverage to employees without evaluating whether these benefits are justified by the nature of the injury. The benefit of DWC's approach to a public employee is that the employee receives the same amount of monetary compensation through the ADP while receiving coverage for medical treatments for the work-related injury beyond the two-year statute of limitations normally in effect. The law on ADPs is that public employees may not receive more than a certain percentage of their base salary at the time of the event that made them eligible for an ADP. DWC's approach

circumvents that requirement by allowing employees to also receive medical monitoring and injury-related health coverage for life.

While public employees receive more than contemplated by state law, insurance providers appear to benefit the most from this arrangement. Public entities, including, for instance, school districts, municipalities, and counties, purchase insurance either directly or through joint insurance funds to pay compensation to public employees injured while working. Financial obligations related to workers' compensation may be substantial, especially when the injury is severe enough to justify the receipt of an ADP. Under DWC's approach, joint insurance funds and other insurance providers that otherwise would be required to make considerable workers' compensation payments pay nothing more than the costs associated with the proceeding and attorney's fees and agree to cover future medical costs related to the injury. The entity responsible by law for paying compensation to an injured public employee may end up paying nothing beyond that if the employee does not request additional medical care, which is entirely possible given that most employees who receive ADPs also retain health benefits. This allows insurance providers to avoid making payment for even the most severe, non-fatal injuries. DWC's use of medical monitoring settlements as a way to avoid pension offsets relieves workers' compensation insurance providers of substantial financial obligations they agreed to assume and would otherwise be required to satisfy.

All of the downsides of DWC's use of medical monitoring settlements in the manner discussed in this report fall on the State's pension funds and, ultimately, New Jersey taxpayers, as financial obligations that would have been satisfied by insurance providers are placed on the pension funds. Each dollar saved by an employer or its insurance provider is a dollar that must be paid by a pension fund. This report identifies

specific changes that should be implemented by DWC and DPB to prevent the State from incurring these unnecessary expenses.

DWC and DPB were provided with drafts of this report and asked to comment on OSC's findings and recommendations. Their responses have been considered and, to the extent appropriate, addressed in this final version of the report.

## **II. BACKGROUND INFORMATION**

### **A. Workers' Compensation**

The Workers' Compensation Act, *N.J.S.A.* 34:15-1 to -146, provides for compensation to injured workers without consideration of fault.<sup>1</sup> “The workers' compensation system is remedial social legislation aimed at providing income protection and medical services to workers injured in the workplace. It provides benefits, although somewhat less than the full loss, for work-related injuries regardless of fault.”<sup>2</sup> Workers' compensation laws function as a compromise between an employer and employee “in which each party surrender[s] certain advantages in order to gain others which are of greater importance to the parties and to society.”<sup>3</sup>

In New Jersey, the workers' compensation system is administered by DWC, which under the Workers' Compensation Act “shall have the exclusive original jurisdiction of all claims for workers' compensation benefits.” *N.J.S.A.* 34:15-49.

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<sup>1</sup> [https://www.nj.gov/labor/forms\\_pdfs/wc/pdf/wc\\_research.pdf](https://www.nj.gov/labor/forms_pdfs/wc/pdf/wc_research.pdf), at p 3.

<sup>2</sup> *Wright v. Port Auth. of N.Y. & N.J.*, 263 N.J. Super. 6, 14-15 (App. Div. 1993) (citing Jon L. Gelman, 38 *N.J. Practice, Workers' Compensation Law* § 1, at 2-3 (1988)).

<sup>3</sup> [https://www.nj.gov/labor/forms\\_pdfs/wc/pdf/wc\\_research.pdf](https://www.nj.gov/labor/forms_pdfs/wc/pdf/wc_research.pdf), at p 3.

A claim for workers' compensation is initiated through the filing of a claim petition, which must be filed within two years after the date on which an accident occurred or within two years from the date a worker became aware of an employment-related disability. The calculation of workers' compensation benefits is made based on a percentage of an employee's pay and the extent of the injury or disability, either by a judge following a contested hearing or through a settlement. *N.J.S.A. 34:15-20* provides that a DWC judge may approve

a lump-sum settlement of the controversy . . . with the consent of the parties, after considering the testimony of the petitioner and other witnesses, together with any stipulation of the parties, and after such judge of compensation has determined that such settlement is fair and just under all the circumstances, enter "an order approving settlement."

(Emphasis added).

*See also N.J.A.C. 12:235-3.13(a)(3)* (providing that a "Section 20 settlement" may be approved by the court when "[t]he settlement is determined to be fair and just under the circumstances").

Attorneys who represent workers' compensation claimants in proceedings at DWC may be awarded reasonable fees for their services, not to exceed 20 percent of the judgment or award. *N.J.S.A. 34:15-64*.

## **B. Accidental Disability Pension**

DPB serves as the administrator of ten pension funds, including the Public Employees' Retirement System (PERS), the Police and Firemen's Retirement System (PFRS), and the Teachers' Pension and Annuity Fund (TPAF). Each pension fund is governed by a board of trustees or commissioners that possess a fiduciary obligation to

protect the fund. DPB administers the funds in accordance with the funds' enabling legislation.

As part of its responsibilities as the administrator of the State's pension systems, DPB processes applications for ADPs. ADPs are awarded by the pension funds in accordance with their respective statutory provisions.<sup>4</sup> To obtain an ADP, in accordance with those statutes, an injured employee generally must show:

- (1) the employee is permanently and totally disabled;
- (2) the disability is a direct result of a traumatic event that is (a) identifiable as to time and place, (b) undesigned and unexpected, and (c) caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);
- (3) the traumatic event occurred during and as a result of the member's regular or assigned duties;
- (4) the disability was not the result of the member's willful negligence; and
- (5) the member is mentally or physically incapacitated from performing his or her usual or any other duty.<sup>5</sup>

As part of its administration of the pension funds, DPB calculates and credits offsets due to the receipt of workers' compensation benefits administered by DWC in accordance with the law.

### **C. Prohibition on Double Recoveries**

New Jersey courts have long recognized that workers' compensation laws are intended to prohibit the double recovery of both workers' compensation and disability

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<sup>4</sup> See, e.g., *N.J.S.A.* 43:15A-43, Public Employees' Retirement System, *N.J.S.A.* 43:16A-7, Police and Firemen's Retirement System, *N.J.S.A.* 43:8A-9, State Pensions and Retirement Alcoholic Beverage Control Officers.

<sup>5</sup> *Richardson v. Bd. of Trs.*, 192 N.J. 189, 192 (2007).

pension benefits for injured workers stemming from the same injury.<sup>6</sup> The State of New Jersey has litigated this issue in order to defend that position.<sup>7</sup> Specifically, in connection with a dispute concerning whether an injured public worker was entitled to receive both workers' compensation and a disability pension, the Attorney General argued on behalf of the State as follows:

It is the position of the State of New Jersey that any award of workers' compensation must be reduced by an award of an ordinary disability pension based upon the same disability. It has been the longstanding public policy in New Jersey that dual recoveries for the same injury must be prohibited. This policy has consistently been repeated in our legislative enactments and judicial decisions.<sup>8</sup>

The Attorney General noted that the State's position was motivated in part by concerns regarding the financial impact on the State of double recoveries:

There is to be no double recovery, and there is to be none particularly in the case of a public entity because such entities, by their nature, are to be financially protected to the end that they might serve the public well and at the least possible cost.<sup>9</sup>

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<sup>6</sup> See, e.g., *Conklin v. City of East Orange*, 73 N.J. 198, 205 (1977) ("The statutory purpose is to allow the employee the more advantageous of the respective benefits, but to require the offset heretofore mentioned in order to avoid double recovery for the same disability."); *Young v. Western Electric Co.*, 96 N.J. 220, 231 (1984) ("[A]n underlying theme of the workers' compensation law is that there should not be duplicative payments for the same disability"); *Bunk v. Port Authority*, 144 N.J. 176, 189 (1996) ("[A]n underlying theme of the Workers' Compensation law that is there should not be duplicate payments for the same disability. . . . [T]he question . . . is one of the legislative intent.").

<sup>7</sup> *Rosales v. State Dept. of the Judiciary*, 373 N.J. Super. 29 (App. Div. 2004).

<sup>8</sup> See Respondent-Appellant's Brief, *Rosales v. State Dept. of the Judiciary*, p. 1, Docket No. 2110-02T3 (June 9, 2003).

<sup>9</sup> *Id.* at p. 40.



The Attorney General prevailed in its position in that appeal. The Appellate Division reversed the workers' compensation judge, ruling, consistent with decades of preceding jurisprudence in workers' compensation matters, that a pension offset was required to prevent a double recovery. The court ruled that "*N.J.S.A. 34:15-43* proscribes receipt of both a Workers' Compensation award and an ordinary disability retirement based on the same injury and resulting disability. The offset must be utilized."<sup>10</sup>

**D. DWC's Policies Regarding Petitioners That Receive Disability Pensions**

On November 16, 2006, a former DWC Director and Chief Judge issued a memorandum to "[a]ll Judges and Attorneys" regarding "Public Employee Pension Issues Affecting Workers' Compensation Awards." The memorandum established "procedures . . . for workers' compensation matters that involve public pension issues" and stated that it was issued "[i]n consultation with the New Jersey Division of Pension and Benefits, which . . . reviewed this memorandum for consistency with Pension and Benefits policies." The procedures established in the memorandum apply to both ordinary and accidental disabilities pensions administered by DPB. Regarding ADPs, the memorandum states:

With respect to Accidental Disability Pensions, the Division of Pension and Benefits is entitled to a dollar for dollar offset on the pension portion (not the annuity portion) of a pension award for worker's compensation benefits payable to a petitioner who is also receiving an Accidental Disability Pension. Any issues concerning the offset amount would be under the jurisdiction of the Division of Pension and Benefits and would not be re-viewable [sic] by the workers' compensation court. A worker has the right to pursue both an Accidental Disability Pension and a workers' compensation award.

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<sup>10</sup> *Rosales*, 373 N.J. Super. at 45.

The memorandum states that a workers' compensation petitioner who has also sought an ADP may (1) "[p]rosecute the workers' compensation case to settlement or judgment"; (2) "[v]oluntarily dismiss the workers' compensation case"; or (3) "[a]ccept a continuing medical coverage and/or monitoring settlement with no payment of workers' compensation cash benefits." Regarding the third option, the memorandum further states that the medical benefits are not subject to the two-year statute of limitations and continue for the life of the petitioner or until further order of the court.

The November 16, 2006 memorandum assigns to the injured employee the obligation to advise DPB regarding the settlement of the workers' compensation claim. The memorandum is silent regarding who is required to notify DPB in the event the third option, a medical monitoring settlement, is chosen.

On August 25, 2011, the former Chief Judge issued a second memorandum to DWC judges and attorneys regarding settlements of workers' compensation claims brought by petitioners that have received an ADP. The memorandum recommended certain language be included in orders when a petitioner received an ADP and a continuing medical monitoring settlement. The memorandum reiterated that continuing medical benefits would not be subject to the two-year statute of limitations and would continue for the life of the petitioner or until further order of the court.

A template order used by a workers' compensation judge in matters involving continuing medical monitoring includes the following boilerplate text:

Petitioner has been awarded and accepted an accidental disability pension effective \_\_\_\_\_. To resolve the workers' compensation case, Parties have agreed: to provide Petitioner with reasonable and necessary treatment for injuries related to the \_\_/\_\_/\_\_ accident; all authorized medical expenses have been or will be paid by Respondent pursuant to [the November 16, 2006] memorandum; petitioner is entitled to

continuing medical treatment in the future, to be provided and paid for by the Respondent for the conditions related to the injuries Petitioner sustained in their accident; this Order shall not be subject to the 2 year statute of limitation period to reopen a claim and such medical benefits shall continue for the life of the petitioner or until further order of the court; the parties further agree these benefits will continue during receipt of pension or until further Order of this Court. This is an agreement between the parties, in which the Court makes no findings as to permanent disability or approval and signs the Order only to memorialize said agreement and closing case.

DWC continues to operate under the 2006 and 2011 memoranda.

### **III. METHODOLOGY**

OSC's investigation was initiated as a result of a complaint concerning the use of continuing medical monitoring settlements in workers' compensation cases in which a public employee receives an ADP. The complaint alleged that the use of such settlement agreements improperly allowed public employers to shift the cost of a workers' compensation award to State pension funds by avoiding the statutorily-required offset of an ADP. OSC's investigation found that continuing medical monitoring settlements detrimentally impact the State and its pension funds.

To conduct this review, OSC interviewed employees within DPB and the Office of the Attorney General, Division of Law. OSC also interviewed DWC judges and private attorneys who specialize in workers' compensation law.

OSC examined relevant documents, including but not limited to regulations, statutes, case law, memoranda, DPB fact sheets, and a limited number of workers' compensation petitioners' files.

A draft of this Report was provided to the Department of the Treasury, DPB, the Department of Labor, and DWC to give them an opportunity to comment on the issues

identified during the course of our investigation. Responses we received were considered in preparing this final report and have been addressed herein where appropriate.

In response to the draft report, the Department of Labor, on behalf of DWC, committed to rescinding the 2006 and 2011 memoranda and adopting regulations that facilitate a pension offset when a workers' compensation petitioner also seeks an ADP.

In its response to the draft report, DPB acknowledged the validity of OSC's findings, but questioned whether it possessed the statutory authority to implement OSC's recommendations.

#### **IV. INVESTIGATIVE FINDINGS**

Through this investigation, OSC examined the approach used by DWC to settle workers' compensation claims using continuing medical monitoring settlements and the waiver of the two-year statute of limitations imposed by *N.J.S.A. 34:15-51*. OSC issues the following findings and concludes that the continuing medical monitoring settlements are wasteful and cause unnecessary harm to the State and its pension funds.

The observations in this report regarding the medical monitoring policies do not apply beyond the use of medical monitoring as a way to settle a workers' compensation claim brought by an employee who has received an ADP. In an appropriate case, based on the facts presented, and when not used as a way to avoid a pension offset, medical monitoring may be appropriate. *See Taylor v. State of New Jersey*, 91 N.J.A.R.2d 21, 1990 WL 456757 (Workers Comp. 1990) (requiring respondent to conduct "annual monitoring examinations due to the petitioner's exposure to the asbestos" and holding that "should asbestosis develop and the petitioner require medical treatment, that treatment should be offered by the respondent").

**A. Continuing Medical Monitoring Settlements are Inconsistent With the Workers' Compensation Act**

DWC's policies for settling workers' compensation cases using medical monitoring settlements are inconsistent with the Workers' Compensation Act in several ways.<sup>11</sup>

DWC's medical monitoring approach sidesteps the issue of income replacement. This is contrary to the Workers' Compensation Act's focus on providing a percentage of weekly wages to injured employees. *N.J.S.A. 34:15-12(a)*, for instance, provides that for "injury producing temporary disability" a petitioner may receive "70% of the worker's weekly wages received at the time of the injury." "This compensation shall be paid during the period of such disability, not however, beyond 400 weeks." *Ibid.* Similarly, for "disability total in character and permanent in quality, 70% of the weekly wages received at the time of injury" are paid to a petitioner "for a period of 450 weeks" and subject to extension for identified reasons. *N.J.S.A. 34:15-12(b)*. DWC's approach disregards these standards and instead inserts an entirely new form of benefit that is disconnected from a petitioner's weekly wages. DWC has considerable flexibility in how it carries out its implementation of the Workers' Compensation Act, but the creation of a new form of workers' compensation benefit that fundamentally alters when and what insurance providers pay, all without statutory authorization, likely goes too far.

DWC's approach is also detached from the statutory process for approving settlements of workers' compensation claims. DWC's medical monitoring approval process is different than the process established by statute to evaluate a settlement that

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<sup>11</sup> It is important to note that only a court can formally determine whether DWC's approach to settling claims using medical monitoring is lawful. This report does not purport to conclusively address that issue.

does not include weekly benefits, but does include a lump sum payment of benefits. One of the template orders used by a worker's compensation judge makes clear that the settlement agreement is not reviewed substantively, stating "[t]his is an agreement between the parties, in which the Court makes no findings as to permanent disability or approval and signs the Order only to memorialize said agreement and [to close the] case." *N.J.S.A. 34:15-20*, which appears to be the closest relevant statute, authorizes a lump sum payment and the entry of "an order approving settlement"

with the consent of the parties, after considering the testimony of the petitioner and other witnesses, together with any stipulation of the parties, and after such judge of compensation has determined that such settlement is fair and just under all the circumstances.

The November 16, 2006 DWC memorandum and template order by comparison identify no relevant standards that could be applied to determine whether a medical monitoring settlement is fair and just. Unlike for lump sum payments, there is no comparable statute relating to, and thus no statutory standards for evaluating, medical monitoring settlements.

The Workers' Compensation Act also establishes standards for when a statute of limitations applies to bar claims due to the passage of time. *N.J.S.A. 34:15-51*. DWC's continuing medical monitoring settlements disregard this statute of limitations. This is not a case-specific waiver, but rather a wholesale waiver that has been preapproved by DWC and that is available any time a petitioner who has received an ADP elects to take a medical monitoring settlement.

DWC's medical monitoring settlements also provide lifelong medical benefits related to the work injury beyond the statute of limitations without meeting any of the exacting standards otherwise required by the Workers' Compensation Act. DWC's

approach, as detailed in the suggested language for orders approving the medical monitoring settlements, provides that “such medical benefits shall continue for the life of the petitioner or until further order of this court.” By comparison, under the Act, compensation benefits are paid for up to 450 weeks. After that, compensation benefits cease unless the employee has submitted to rehabilitation or can show because of the employee’s injury that it is impossible for the employee to obtain wages equal to those earned at the time the injury occurred. When benefits are extended beyond 450 weeks, the employee’s case is subject to periodic reconsideration. The continuing medical monitoring settlement approach has no standards for lifetime benefits and there are no periodic reconsiderations. The Workers’ Compensation Act’s provisions involving impossibility and periodic reconsiderations are more stringent than the approach used by DWC in medical monitoring settlements.

Finally, DWC’s medical monitoring settlements depart from the Act’s provision addressing attorney’s fees, which directs fees to not “exceed 20% of the judgment.” *N.J.S.A. 34:15-64*. Because there is no monetary judgment awarded in the case of a medical monitoring settlement, it is not possible to calculate attorney’s fees using the statutory standard. DWC though ensures that petitioners’ attorneys receive counsel fees by awarding \$2,500 or, in some cases, basing the fee on a projection of the likely value of the workers’ compensation claim. According to documents reviewed by OSC, judges have awarded up to \$50,000 in attorney’s fees in a medical monitoring settlement that included no judgment for monetary benefits.

It is noteworthy that DWC did not use rulemaking when it instituted and amended the medical monitoring settlement policies through memoranda. DWC’s establishment of a distinct set of policies involving medical monitoring in cases involving ADPs, if

otherwise appropriate, would have been better instituted through rulemaking than through the issuance of a memoranda. The medical monitoring settlement policies informally adopted by DWC are intended to apply to any public employee who is injured; may be applied generally and uniformly to all employees who receive an ADP; operate prospectively; establish a legal directive that is not obviously inferable in legislation; were not previously expressed in any official and explicit agency determination, adjudication or rule; and involve an interpretation of law or policy. All of these factors weigh in favor of rulemaking being appropriate.<sup>12</sup>

As compared to the informal approach used by DWC, the benefits of rulemaking are that the rules are publicly available in the New Jersey Administrative Code; must be reevaluated every seven years under *N.J.S.A. 52:14B-5.1b*; and are subject to legislative oversight when they are adopted or readopted in accordance with the Legislative Review Clause of the New Jersey State Constitution. *N.J. Const.* art. V, § 4, ¶ 6. In the absence of regulations that implement DWC’s medical monitoring and coverage policies, the Legislature was likely never formally notified of DWC’s policies involving medical monitoring settlements. When a significant amount of public funds are at stake, the transparency and accountability available through rulemaking serve the public better than policymaking by memoranda.

The pension funds would have retained an incalculable, but no doubt substantial, amount of money if DWC had not adopted medical monitoring and coverage policies for petitioners who receive an ADP, not departed from a focus on weekly wages, not created

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<sup>12</sup> “[A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process.” *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 331 (1984).



a different process for dismissing the claims, not waived the statute of limitations, and not created new rules for attorney's fees. Even if it were well within DWC's discretion to create the medical monitoring settlement policies, using that discretion in a way that causes financial harm to the State and its pension funds and that relieves insurers of their financial obligations is wasteful and inadvisable. Creating such policies in contravention of existing statutes is especially problematic.

**B. The Continuing Medical Monitoring Policy Eliminates the Financial Incentive for Injured Employees to Pursue a Workers' Compensation Judgment When They Receive an ADP**

Workers' compensation proceedings are adversarial in nature. Petitioners in those proceedings seek to maximize their workers' compensation benefits and respondents are permitted to dispute petitioners' claims and argue for a lower amount or shorter duration of benefits. Attorneys for petitioners have an incentive to advocate for their clients to receive benefits because their fees are based on the amount of the award their clients receive. Attorneys may receive up to 20 percent of a judgment amount, with the fees normally being paid in part out of the funds due the petitioner and in part by the respondent.

The incentive for a petitioner to maximize workers' compensation benefits disappears when the petitioner receives an ADP because any workers' compensation award will reduce the ADP dollar-for-dollar up to the amount of the award. A workers' compensation petitioner who has received an ADP cannot receive additional funds from a workers' compensation insurance provider without receiving reduced pension payments, which means there is no net benefit available to the petitioner.

A workers' compensation attorney representing an employee who has received an ADP may still pursue the petitioner's claim, and possibly receive a higher attorney's fee.

Our investigation revealed that at times this happens, either because a judge refuses to implement DWC's medical monitoring and coverage settlement policies or because the petitioner declines the settlement. When that occurs, the funds the petitioner receives are offset dollar-for-dollar by a reduction in the ADP payment, and a windfall to the insurance provider is avoided.

DPB, which on behalf of the pension funds has a substantial financial interest in what occurs in workers' compensation proceedings initiated by recipients of ADPs, has not taken measures to prevent DWC's medical monitoring and coverage policies from undermining DPB's interests. DPB, for instance, has not adopted regulations that address how its interests will be protected when a petitioner receives an ADP, which is especially important given that its interests are not represented in workers' compensation proceedings. Under the current system, the petitioner, a person who has no fiduciary obligation to the pension funds and no direct personal incentive to protect those funds, possesses the exclusive ability, in nearly all instances, to decide whether the pension funds do or do not receive an offset worth potentially hundreds of thousands of dollars.

DWC could change or eliminate its medical monitoring and coverage policies, and it is noteworthy that some DWC judges do decline to follow those policies. When judges take that approach, workers' compensation insurance providers must pay petitioners in the normal course, and DPB in turn recognizes an offset that financially benefits the pension funds. This suggests that it is possible, as discussed further in this report, for DWC and DPB to fulfill their purposes within state government without harming the other entity's interests and without creating windfalls for insurance providers.

**C. DWC's Medical Monitoring and Coverage Policies Shift Substantial Financial Obligations to the State and its Pensions Funds That Otherwise Would be Paid by Insurance Providers**

OSC's investigation found that DWC judges regularly approve medical monitoring settlements that result in workers' compensation petitioners receiving both an ADP and medical benefits beyond the two-year statute of limitations.

From 2016 to 2019, the boards of the pension funds approved 728 ADPs and, of those, at least 114 ADP applicants also entered into medical monitoring settlements. DPB's records may not include all of the employees who entered into medical monitoring settlements because a total of 446 ADP applications were open at the time of our investigation.

Without evaluating each claim for workers' compensation that led to a settlement involving continuing medical coverage, it is not possible to calculate reliably how much the State and the pension funds have lost as a result of the 114 or more medical monitoring settlements. DPB staff contend that the cost has been significant, but did not have an estimate of the total amount.

In view of the nature of the injuries that provide a basis for an ADP (permanent and total disability as a result of a traumatic force), it is likely that workers' compensation insurance providers have greater potential financial obligations in these matters compared to ordinary disability pensions or incidents that do not lead to the receipt of a disability pension. It is also noteworthy that we have reviewed settlement documents in which employees who were seriously injured and demonstrated they were permanently disabled could have sought and presumably would have been awarded hundreds of thousands of dollars in workers' compensation, which would have reduced the funds paid out by the pension funds dollar-for-dollar.

In the absence of reliable data regarding how much workers' compensation insurers avoided paying to injured employees, it is not possible to project how much has been lost since 2006, when the first medical monitoring memorandum was issued. It is clear though that the medical monitoring settlements are causing financial harm to the pension funds and have exacerbated the underfunded status of the pension funds.

**D. DWC and DPB Do Not Adequately Cooperate to Protect the State's and Pension Funds' Financial Interests**

OSC's investigation revealed that DWC and DPB do not effectively work together to advance the State's interests. The agencies do not periodically conform their policies to ensure that the State's financial interests are protected, do not share databases, and do not have effective protocols for communicating regarding pension offsets.

This siloed arrangement is not appropriate given that the two divisions have long-established and overlapping missions involving compensation to injured workers. Although they are in different agencies and operate under different statutes, both offices are responsible for complying with clear legislative mandates involving the avoidance of double recoveries for work-related injuries. In order to be effective in carrying out their responsibilities, DWC and DPB must share information about pension offsets.

Two examples revealed through our investigation demonstrate what appears to be an absence of coordination and cooperation. The 2006 and 2011 memoranda that establish DWC's medical monitoring and coverage policies both suggest that DPB was involved in the development of the policies. The 2006 memorandum says that it was prepared "[i]n consultation with the New Jersey Division of Pension and Benefits, which has reviewed this memorandum for consistency with Pension and Benefits policies." The 2011 memorandum states that it was prepared "[i]n consultation with other agencies."

DPB staff, though, disclaims any involvement in, or endorsement of, the memoranda that form the basis of DWC's policies.

It also appears that DWC and DPB do not have effective systems or policies in place to facilitate communication regarding pension offsets. The 2006 memorandum provided by DWC directs petitioners to advise DPB regarding the petitioner's receipt of workers' compensation benefits if there is a monetary judgment or settlement. This places the obligation to communicate information from one agency to another agency on an injured employee whose financial interests could actually be harmed by DPB being in possession of that information. If a medical monitoring settlement is reached, the memorandum is silent on who is responsible for notifying DPB. Different judges appear to handle the issue in different ways, and there are some indications judges expect both a petitioner's and an insurance provider's lawyers to notify DPB. Not surprisingly, DPB has trouble obtaining information regarding pension offsets. DPB staff must spend time calling private attorneys in an attempt to obtain information that is in the possession of DWC. DPB's ability to close ADP files is substantially hampered by its inability to easily access information in the possession of DWC.

In view of the financial impact noted here, DWC and DPB should collaborate to develop policies that are subject to rulemaking and memorialized in regulations to provide maximum protection to the pension funds.

**E. DWC's Approach to Settling Workers' Compensation Claims Brought by Public Employees Who Also Apply for an ADP Appears to Undermine the State's Policy on Double Recoveries**

In addition to causing financial harm to the State and its pension funds, DWC's medical monitoring and coverage policies are problematic because they undermine New Jersey's decades-old policy of avoiding double recoveries. The longstanding prohibition

on the receipt of both workers' compensation and an ADP that together result in a double recovery is intended to protect public funds while ensuring that injured employees are adequately compensated. The New Jersey courts have not ruled on whether the receipt of an ADP, plus something of value, such as continuing medical benefits for life, constitutes a double recovery. The reasoning underlying the court decisions on this issue though suggests that DWC's policies permit double recoveries in violation of the law.

Our review of medical monitoring settlement agreements indicates that public employees accept medical monitoring and coverage as a way to avoid a pension offset and without a factual basis demonstrating such benefits are appropriate. One workers' compensation claimant indicated in a sworn statement that he had "applied for and was granted an Accidental Disability Pension" and understood "that any award of permanent disability that is granted to [him] through the workers' compensation court for my work injury would result in a dollar for dollar offset." With nothing more to gain through workers' compensation, the employee reported that "[t]herefore, rather than receiving an award of permanent disability, the [public employer] has agreed to provide [the employee] with ongoing medical benefits." This illustrates how a decision that provides a windfall to insurers and financially harms the pension funds also results in a double recovery.

In such a circumstance, the prohibition against double recoveries would seem to apply with equal force to the combination of disability pension benefits and lifetime medical monitoring and coverage benefits. In the State's brief in *Rosales*, the Attorney General argued that "[t]here is to be no double recovery, and there is to be none particularly in the case of a public entity because such entities, by their nature, are to be financially protected to the end that they might serve the public well and at the least

possible cost.”<sup>13</sup> Going forward, as DWC and DPB establish policies, they should be guided by this sentiment, which is grounded in decades of jurisprudence and repeated expressions of legislative intent.

## **V. CONCLUSION AND RECOMMENDATIONS**

This report identifies a set of policies created and implemented by DWC that cause unnecessary financial harm to the State and the pension funds. This financial harm can be avoided in the future if DWC and DPB implement changes that ensure the pension funds benefit from the offsets required by law when a workers’ compensation petitioner petitions for both an ADP and workers’ compensation. The two agencies should take whatever steps are necessary, in accordance with applicable law, to prevent medical monitoring settlements from causing further financial harm to the State of New Jersey and its pension funds.

Pursuant to *N.J.S.A. 52:15B-15* and *N.J.S.A. 52:15C-11(a)*, OSC therefore recommends the following corrective actions be taken by DWC and DPB:

1. Rescindment by DWC of the 2006 and 2011 memoranda and any other documents that institute policies that encourage and facilitate medical monitoring and coverage settlements as a stand-alone form of workers’ compensation benefit. The current policies should be replaced with interim instructions that direct DWC judges to proceed in the normal course with claims brought by employees who have applied for or received ADPs. DWC should be clear that the adjudication of workers’ compensation claims brought by applicants for or approved recipients of ADPs must result in a monetary judgment, a settlement based on weeks of benefits, or a Section 20 settlement in order for the attorney to receive attorney’s fees, unless other considerations not involving the policies that are the subject of this report indicate a different approach is appropriate. This recommendation does not apply to workers’ compensation cases involving occupational disease and continued medical monitoring in which the facts justify such relief and in which medical monitoring and coverage is not used simply to avoid a pension offset.

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<sup>13</sup> See Respondent-Appellant’s Brief, *Rosales*, p. 40.

2. Adoption of regulations by DWC, in coordination with DPB, that prevent windfalls to workers' compensation insurance providers and that protect the State's and the pension funds' interests at the intersection of workers' compensation and disability pensions, including through the efficient facilitation of pension offsets, as contemplated by applicable laws. To accomplish this, DWC and DPB should ensure that a workers' compensation petitioner and the petitioner's attorney possess a sufficient incentive or a mandate to pursue a workers' compensation recovery. DPB could require that pending workers' compensation proceedings either be completed, or at minimum that the amount workers' compensation benefits be fairly projected, with an appropriate review by a DWC judge, prior to awarding an ADP. Following the conclusion of the workers' compensation proceeding, DWC and DPB should coordinate to ensure that the appropriate pension offset was implemented by DPB.
3. Adoption of regulations by DPB, in coordination with DWC, that protect the State's and the pension funds' interests at the intersection of workers' compensation and disability pensions, including through the efficient facilitation of pension offsets, as contemplated by applicable laws.
4. Execution of a memorandum of understanding between DWC and DPB that facilitates information sharing between the agencies regarding pension offsets and any other matters that relate to the State's prohibition of double recoveries.

The Department of Labor and DPB provided comments in response to the above recommendations. The Department of Labor, on behalf of itself and DWC, agreed to implement Recommendation 1, stating that "[t]he Director/Chief Judge of the DWC will issue a memorandum that is consistent with this recommendation," thereby rescinding the 2006 and 2011 memoranda. The Department of Labor likewise agreed with Recommendations 2 through 4, stating that the Department and DWC would work toward the adoption of regulations with DPB and a memorandum of understanding as necessary to protect the State's pension funds and prevent windfalls to insurance carriers, consistent with OSC's findings and recommendations.

DPB agreed with OSC's findings, but contended that legislation may be needed to implement OSC's recommendations. DPB did not identify any limitations on its statutory authority or in the laws creating the pension funds that prevent DPB from implementing



the recommendations in this report. DPB correctly noted that under *Conklin v. East Orange*, 73 N.J. 198, 204 (1977), an injured employee may seek "the more advantageous of the benefits payable under the respective statutory provisions." The opportunity to pursue the "more advantageous" benefits is not undermined by the effective administration of pension offsets and the avoidance of double recoveries. Indeed, *Conklin* also states that "[t]he statutory purpose is to allow the employee the more advantageous of the respective benefits, but to require the off-set heretofore mentioned in order to avoid double recovery for the same disability." These concepts are reconcilable. Employees may continue to pursue "more advantageous" benefits while DPB implements rules that avoid double recoveries and set reasonable expectations regarding pension offsets.

No law prohibits DPB or DWC from using their discretion in ways that achieve their respective statutory goals, prevent double recoveries, and ensure pension offsets are fairly applied. The precise ways in which the agencies seek to accomplish these goals should take into account their other statutory obligations and their expertise while avoiding and discouraging any outcomes that cause unnecessary financial harm to the pension funds.

There may be very limited instances in which an injured employee does not petition for workers' compensation benefits prior to or while seeking an ADP. DPB notes that no law requires an injured employee seeking an ADP to petition for workers' compensation; that "every applicant for accidental disability has a basis to file a Workers' Compensation Claim Petition"; and that the standard for receiving workers' compensation benefits is "much lower." In view of those facts, the Legislature could further protect the pension funds and require insurers to pay for risks they assumed by

requiring an employee to petition for workers' compensation as a condition of receiving an ADP. This approach would prevent pension funds in all instances from being used prematurely to compensate injured employees who have not exhausted their workers' compensation benefits. Although such legislation would strengthen DPB's ability to protect pension funds, it does not appear that legislation is needed to empower DPB to adopt rules that protect the pension funds in the vast majority of cases.