AN ANALYSIS OF THE MASSACHUSETTS DEPARTMENT OF INDUSTRIAL ACCIDENTS DISPUTE RESOLUTION SYSTEM:

PROCESS, PERFORMANCE AND POLICY

A REPORT TO THE
WORKERS' COMPENSATION ADVISORY COUNCIL

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TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY i

I. INTRODUCTION ..... I - 1

II. SCOPE OF THE PROJECT AND OPERATIONAL ASSUMPTIONS ..... II - 1

A. Scope ..... II - 1
B. Operational Assumptions ..... II - 2

III. DISPUTE RESOLUTION SYSTEM MANAGEMENT: Findings & Recommendations ..... III - 1

A. Management of the Dispute Resolution System ..... III - 2
B. Management of Administrative Responsibility ..... III - 6
C. Management of Human Resources ..... III -12
D. Management of Information ..... III -19

IV. THE STAGES OF DISPUTE RESOLUTION: Findings & Recommendations ..... IV - 1

A. The Dispute Resolution System ..... IV - 1
B. Interests of the Parties ..... IV - 2
C. Initial Contact and Entry ..... IV - 5
D. Conciliation ..... IV - 8
E. Conference and Hearing ..... IV -13
F. Reviewing Board and Lump Sum Settlement ..... IV -18
G. Recommended Demonstration Projects ..... IV -21

V. APPENDICES ..... V - 1

A. Comparison of Selected State Programs ..... A - 1
B. List of Persons Interviewed ..... B - 1
C. Documents Used ..... C - 1
D. Notes on Methodology ..... D - 1
E. Legislative Changes ..... E - 1

EXECUTIVE SUMMARY

Introduction

In January 1991, ENDISPUTE Inc. and BDO Seidman were selected by the Massachusetts Workers' Compensation Advisory Council to conduct a comprehensive evaluation of the efficiency and effectiveness of dispute resolution in the Department of Industrial Accidents (DIA). Our study evaluated dispute resolution management issues and dispute resolution procedures (including conciliation, conference, hearing and Reviewing Board review).

Our methodology included interviews with Advisory Council members, DIA staff, members and staff of relevant Legislative committees, and dispute resolution system participants (e.g. workers, employers, insurers, medical providers, attorneys, etc.), as well as statistical analysis of data from DIA's DIAMETER computer system.

This report is particularly indebted to the many DIA staff who generously shared their time and thoughtful ideas with us. They should surely not be held responsible for the findings and recommendations presented here. They must, however, be acknowledged for their professionalism, understanding, and commitment to improving a system currently in trouble.

Key Findings and Recommendations

Despite significant legislative reform of the Workers' Compensation statute enacted in 1985, the Department of Industrial Accidents continues to struggle with a high incidence of disputed cases and long delays in resolving disputes. These delays reflect fundamental, systemic management and procedural problems. Our recommendations for improving the dispute resolution system aim to address these problems through wide-ranging and participatory management reforms, without major statutory changes.

1. Dispute Resolution in the Department of Industrial Accidents is a single interrelated system, with many component parts. For better or worse, it cannot be improved by one quick fix, or three or four major changes. Effective improvement will only result from analyzing this system as a whole, and putting into effect many focused changes in a consistent, steady manner.

- Recommended changes to dispute resolution procedures should be adopted and implemented as a group, not on a piecemeal or impulsive basis. Changes should be discussed and refined with the assistance of current participants in this system, including the Advisory Council, who are knowledgeable and committed to making improvements.

2. DIA is mandated by statute to administer an Alternative Dispute Resolution (ADR) system, not a substitute court system. There is strong evidence that this system can be made to work in the way the statute intended, without establishing additional or external ADR mechanisms.

   - DIA should focus its efforts on reforms that will decrease formality, promote early fact-finding, and encourage voluntary resolution of disputes.

   - DIA should increase its outreach to the worker and employer communities to encourage earlier, cooperative approaches to dispute resolution.

3. The system is not being managed to promote swift and fair dispute resolution. DIA does not monitor and guide the behavior of workers, employers or their representatives to enhance settlements and prevent misuse of the system, nor has it established clear standards and goals to define and direct its own staff's activities.

   - DIA should clarify, expand, and enforce guidelines for system participants. The guidelines should provide incentives for early resolution, identify and sanction system abusers, and recognize and reward collaborative behavior.

   - DIA should develop performance standards and conduct performance review for all staff, starting with the AJs and ALJs.

4. The DIAMETER computer system for recording case information is being used primarily as a centralized case tracking and scheduling mechanism. It does not provide useful management information in a timely fashion.

   - Working with representative system participants, the Department should identify information needed for effective management, and should redesign DIAMETER data entry and data analysis procedures to provide new management and case tracking reports. Additionally,

judges, conciliators, and regional managerial staff should be given expanded access to this system.

5. The Department's managerial decision-making structure is not consistent with its organizational structure. Central control of scheduling and staff supervision undermines regionalized service delivery.

   - Regional Managers, along with judges, conciliators and staff in regional offices, should be held accountable for providing dispute resolution services to the workers and employers in the geographic areas they serve, and should be given authority to carry out their jobs with less direct central control.

6. All components of a dispute resolution system should be coordinated and managed as a whole. Presently, the conciliation unit -- the first opportunity for successful resolution of DIA disputes -- is separated from the rest of the system, and is located under Claims Administration in the Administration Division. This does not encourage effective coordination with other dispute resolution activities.

   - The Conciliation unit and management should be transferred to the Division of Dispute Resolution, in order to encourage early settlement, improve coordination, and facilitate monitoring and assessment of the ADR system as a whole. This may require discussions within the context of collective bargaining.

7. The single most important issue currently facing the Department is the appointment, or reappointment, of the twenty judges whose terms are slated to expire between now and September, 1992. If a timely and thorough process is not immediately initiated, the dispute resolution system will, quite literally, come to a halt.

   - The Department and Administration should decide on criteria for reappointment, and conduct evaluations of sitting judges to determine which ones, if any, will be reappointed. All should be informed of the process and the outcome by early fall, in order to prevent mass departures.

   - The Administration should initiate the nomination, review and appointment process (presumably using the same criteria) as quickly as possible in order to have new appointments available as soon as former judges leave.

Section III - Dispute Resolution System Management

Overall Finding: The system is not being managed.

A. Management of the Dispute Resolution System

Finding One

The Department has not focused on the overriding goal of the Dispute Resolution system -- to resolve disputes over compensation for injuries and lost wages as quickly, effectively, informally, and efficiently as possible -- and has not established its expectations and procedures to reinforce this goal. The DIA is not mandated to operate a substitute court system; it is mandated to manage an Alternative Dispute Resolution system.

Recommendations:

1. Provide -- throughout the dispute resolution system -- incentives to encourage early settlement of claims, as well as disincentives to moving forward unless necessary.

2. Revise DIAMETER to assist in evaluating Conciliators, AJs and ALJs more on the basis of their success rate in settling claims than on the numerical statistics of how many meetings, conferences or hearings they are holding, or how many decisions they are writing.

Finding Two

The Department has failed to monitor the behavior of parties in the system effectively, in order to determine whether there are patterns of behavior -- either by groups, specific companies or specific individuals -- which contribute to excessive use of the system and hence to the delays. We are not talking about fraud, but rather about patterns of behavior which adversely affect the intended functioning of the dispute resolution system.

Recommendations:

1. The Department should, after redesigning the DIAMETER system (see below, Section III-D), monitor the system regularly in order to evaluate the occurrence and extent of such adverse behavior as excessive or inappropriate filing among insurance companies and attorneys.

2. Where such patterns are found to exist, the Department should use its regulatory power to sanction the behavior, and should monitor carefully in the future to assure that it does not re-occur.

3. The Advisory Council should, in cooperation with the Massachusetts Bar Association, encourage the development of new MCLE programs to improve attorney understanding of and skills in using mediation and other ADR strategies in the DIA dispute resolution system.

B. Management of Administrative Responsibilities

Finding One:

There is a minimal and, we believe, inadequate body of administrative rules, guidelines and forms to guide participants once they enter the DR system to carry out their responsibilities and to meet their obligations.

Recommendations:

1. Establish an Advisory Committee composed of representatives of the claimants' bar, the insurers' bar, large and small employers, organized labor, AJs and ALJs, the Conciliation Manager, and a senior DIA manager, to consider and propose needed rules and forms.

2. The Department should develop forms for use in the Dispute Resolution process which would simplify and facilitate its own processes and clarify the responsibilities of participants in the system such as physicians and other health care providers.

Finding Two

There are serious problems in the administrative relationships between the central Boston office and the regional offices which contributes to the slowness of the dispute resolution process.

Recommendations

1. Make the Regional Offices independent, accountable administrative units responsible for all aspects of the dispute resolution process, including conciliation.

2. Give Regional Managers managerial responsibility, including direct supervision of staff in their respective offices and increased access to the DIAMETER system.

Finding Three

The records of the DIA Dispute Resolution system can only be described as abysmal.

Recommendations

1. The Director of Administration, in cooperation with the Conciliation Manager, the Director of Dispute Resolution, one or more Regional Managers, the Records Manager, and representatives from the AJs and ALJs (possibly two of their secretaries), should constitute a Work Group to design and develop a standardized Record format for the Department, and identify a new DIA process to enter and maintain material in these files.

2. We also recommend that case files be regionalized, and physically maintained in the office which serves the area in which the claimant lives.

C. Management of Human Resources

Finding One

The DIA dispute resolution system (and particularly the Division of Dispute Resolution) has an ambivalent attitude toward the role and accountability of the intended dispute resolvers -- called conciliators and judges.

Recommendations:

1. We believe that the ADR and non-judicial character of this system for resolving disputes should be recognized and affirmed, or the law should be changed.

2. The work of the AJs or ALJs, on a day to day basis, should be managed by a senior and experienced member of the judges' "team," who might be called the Chief or Senior Judge.

3. The Conciliation staff, under the management of the Conciliation Manager, should be transferred into the Division of Dispute Resolution.

Finding Two

The Department has never developed AJ/ALJ job descriptions or job performance standards, nor has it conducted annual reviews or other evaluations of the performance of ALJs or AJs in the last five years.

Recommendation:

In cooperation with the Judges' Committee, the Department leadership should first define the purpose and functions of AJs and ALJs in the dispute resolution system, their norms and expectations of these roles in the context of existing legislation.

Special Finding

Between now and September 1, 1992, nine Administrative Judges and four Administrative Law Judges, who are a major proportion of the dispute resolution system, are up for re-appointment. The terms of seven backlog judges will also expire. As a group they represent an impressive reservoir of experience, skill, judgment and energy. Many of them are serving with extraordinary commitment and distinction, in the face of an enormous backlog, no control over their own schedules, cramped and crowded facilities, unclear leadership, fragmented administrative policies, no salary increases since 1986, and an uncertain future.

It is amazing that in the last six months only two of these judges have indicated their intention to resign. However, it is certain that without clear signals from the new administration, and a fair and early mutual discussion

of what they can expect, many of the best of them will soon be gone. This will certainly result in a major increase in the already critical backlog, and an undermining of current efforts to improve the system, and will send an unfortunate message to prospective judges about the DIA situation. It would also be an unfortunate waste of competent, often gifted and committed, human resources.

Special Recommendation:

The Department and the Administration should review the statutory roles and responsibilities for Administrative Judges and Administrative Law Judges, and the nominating process. Together, they should clarify the process and criteria the Administration will use in appointments.

We are completely convinced that without this process, and clear notification to sitting judges as to whether or not they may be reappointed, many judges will leave and the DDR system will be in crisis within a very short period of time.

D. Management of Information

Finding

The DIAMETER system was designed as a centralized way to schedule and track cases. It does not produce useful management information in a timely fashion.

Recommendations

1. The Department should decentralize the DIAMETER system so that each regional office has access to its own scheduling functions and can control more of the input to bring the existing information system into step with the DIA organizational structure.

2. The Department should establish a DIAMETER Users' Group, composed of representatives of participants in the dispute resolution system. This group should include both regional and central office staff, as well as representatives of employers, workers, attorneys and insurers. The group should be asked to develop recommendations for what information is needed by managers, judges, conciliators, and other participants in the

system in order to monitor, manage, and understand patterns and trends in the system, as well as to track events.

Section IV - The Stages of Dispute Resolution

A. The Dispute Resolution System

Finding:

The Department is not attempting to change the historic adversarial relationship between workers and employers, or to clarify that the 1985 statute has mandated an Alternative Dispute Resolution system, not a court system, to resolve Workers' Compensation disputes.

Recommendations:

1. The Department should improve its public information to the Workers' Compensation attorney community and should consider joint sponsorship of attorney training programs about ADR.

2. The Department should encourage union business agents to represent workers, and claims adjustors to represent insurers.

3. The Department should examine the experience of other states such as Connecticut, where the Workers' Compensation Commission actively discourages claimants from retaining an attorney.

B. Conciliation

Finding One

1. The time lag from conciliation to conference creates significant disincentives for parties to come prepared to resolve issues at conciliation.

2. Some conciliators are not making full use of their authority to require that parties make a serious effort to resolve issues at conciliation.

Recommendations:

1. Encourage conciliators to perform the role of "gatekeeper." Develop clear guidelines for conciliators' use of their statutory authority to hold and to forward cases.

2. Encourage conciliators to require additional conciliation meetings, reschedule meetings, and increase the time for meetings as appropriate to resolve disputed issues.

Finding Two

Conciliators currently feel obligated to meet with parties on highly complex cases that are clearly not amenable to conciliation.

Recommendation:

Develop criteria for conciliators to identify cases which should be referred to conference without conciliation, and allow conciliators to refer these cases based on a review of written materials only.

C. Conference and Hearing

Finding One

The current conference and hearing scheduling procedure provides standardized assignment of cases to judges, but it does not give judges enough discretion to manage their case loads for maximum efficiency.

Recommendation:

Review and revise case scheduling procedure for judges.

Finding Two

1. Judges often do not have adequate information when reviewing cases in preparation for conference.

2. Some judges do not actively promote informal case resolution before issuing a conference order.

3. Some judges are not maximizing the dispute resolution potential of their conferences before scheduling a hearing.

Recommendations:

1. Improve transfer of records from Conciliation to AJs.
2. Encourage and assist judges to seek informal resolution of disputes at conference.
3. Encourage judges to reschedule conferences, schedule additional conferences and lengthen the time for conferences when appropriate, rather than issuing orders or scheduling hearings.
4. Change MGL 152 Section 13A to allow AJs to reduce attorney fees when appropriate.
5. Enforce statutory penalties (under Sec. 14) on worker and insurer representatives who repeatedly fail to produce necessary information prior to conference.

Finding Three

Some judges have difficulty writing decisions expeditiously.

Recommendations:

1. Provide judges with opportunities to sharpen their decision-writing skills.
2. Clarify the Department's standards and expectations on how decisions should address issues of fact and law.
3. Consider the use of summary and short-form decisions for some cases.

D. Reviewing Board and Lump Sum Settlement

Finding One

The Reviewing Board is experiencing severe and increasing delay in disposing of cases appealed from hearing.

Recommendations

1. Consider limiting the Board to review of issues of law and oversight of AJ decisions.

2. Consider ways to expedite review of appealed cases, such as increased use of pre-hearing conferences and expanded use of law clerks.

Finding Two

1. The Reviewing Board has been overwhelmed by the demand for lump sum conferences (over 15,000 in FY 1990).

2. Mandatory meetings with disability analysts and reports from disability analysts are widely perceived as unhelpful to workers and judges.

Recommendations

1. Amend statutory Sec. 48 to remove the requirement for the Reviewing Board to review lump sum agreements.

2. Make worker meetings with disability analysts voluntary, but allow judges discretion to require a meeting with disability analysts in cases where a worker does not appear to be fully informed.

E. Recommended Demonstration Projects

We recommend that DIA use demonstration projects to test three additional dispute resolution procedures:

1) AJ-conciliator joint case management;

2) "Final offer" procedures for resolving earning capacity and medical disability disputes; and,

3) Limited order power for conciliators.

SECTION I

INTRODUCTION

In January, 1991, ENDISPUTE Inc. and B.D.O. Seidman were selected by the Advisory Council of the Massachusetts Department of Industrial Accidents (DIA) to conduct a comprehensive evaluation of the efficiency and effectiveness of the DIA's Division of Dispute Resolution, and to make recommendations to the Advisory Council for improving the process and procedures of Dispute Resolution. It was mutually understood that the study would examine all of the components of the DIA dispute resolution system, including conciliation activities, the DIAMETER information system, and other activities located in the Division of Administration as well as in the Division of Dispute Resolution.

While staff of the two firms have worked closely together throughout this effort, Thomas McLaughlin of B.D.O. Seidman has been primarily responsible for the computerized data collection design and analysis, while Patricia Worlock Moore and David M. Fairman of ENDISPUTE have been primarily responsible for interviews, observation, and analysis of the dispute resolution system functions.

Since our selection, we have conducted over sixty personal interviews and ten telephone interviews with individuals in the following groups: DIA judges and other dispute resolution staff, as well as senior administrators and managers; members of both the plaintiffs' and insurers' bar; representatives of large and small employers and insurance companies; physicians who provide services to individuals involved with the Workers' Compensation system; members of the Workers' Compensation Advisory Council; and members and staff of relevant Legislative Committees. We have visited Boston and each of the Regional Offices for interviews and observation. And we have conducted numerous telephone interviews with managers of Workers' Compensation programs in other states, as well as national experts in dispute resolution systems and settlement strategies. (A complete list of persons interviewed and their professional affiliations can be found in Appendix B.)

This Report is particularly indebted to the many DIA staff who generously shared their time and thoughtful ideas with us, answered our almost endless questions, and guided us to an understanding of an extremely complex system. They should surely not be held responsible for the findings and recommendations presented here; however, they must be acknowledged for their professionalism, understanding, and commitment to improving a system currently in trouble.

The Report is divided into the following sections:

I. Introduction

II. Scope of the Project and Operational Assumptions

III. Dispute Resolution System Management: Findings and Recommendations

IV. The Stages of Dispute Resolution: Findings and Recommendations

V. Appendices

SECTION II

SCOPE OF THE PROJECT AND OPERATIONAL ASSUMPTIONS

A. Scope

As outlined by the Advisory Council, the major purpose of this project was to conduct a comprehensive evaluation of the Dispute Resolution system of the Mass. Department of Industrial Accidents in order to make recommendations concerning statutory and administrative changes that might improve its functioning and the satisfaction of those it was designed to serve -- workers suffering an employment-related accident or injury, and their employers.

In accomplishing this purpose, we were asked to study, in depth, each aspect of the System's dispute resolution process, including conciliation, conference, hearing, Board review and lump sum settlement conference procedures. To analyze each procedure, we:

1. reviewed relevant statutes, regulations, studies, and related data;

2. reviewed cases and attended case-related events such as conciliations, conferences and hearings in order to observe and interview participants;

3. conducted personal and telephone interviews with representatives of each user group involved in the dispute resolution process (including claimants, employers, insurers, medical providers, claimant and insurer attorneys) and with representative dispute resolution professionals (including conciliators, lump sum analysts, administrative judges, and administrative law judges);

4. studied additional documentation and data as necessary to analyze procedural efficiency and effectiveness;

5. evaluated observational and statistical data to develop specific recommendations for each procedure.

After analyzing all of the procedures, we integrated our evaluations to develop recommendations on systemic improvements to the dispute resolution process.

B. Operational Assumptions

In carrying out these tasks, ENDISPUTE and BDO Seidman have been guided by certain assumptions about what makes for effectiveness and efficiency in organizations. Derived from the "total quality management" concepts of W. Edwards Deming and J. F. Juran, these assumptions include the following:

1. Customer satisfaction is a paramount measure of success, and organizations must constantly reaffirm their goal of improving products and services in order to satisfy customers.

   In the Massachusetts Workers' Compensation dispute resolution system, the primary customers are injured workers and their employers. Other participants in the system include attorneys; insurance companies and their representatives; physicians and other health care providers; vocational rehabilitative specialists, and Massachusetts citizens who, although they do not pay directly for these services or products, have an interest in seeing that their government agencies produce efficient and cost-effective services.

2. Organizations, including their customers and the processes by which they operate, constitute a single "system" in which all the parts are inter-related and connected. Problems in one area inevitably have an impact on other areas.

   In the DIA dispute resolution system, for example, limits of the DIAMETER scheduling system affect the ability of the Administrative Judges and conciliators to manage the effective timing of their conferences and hearings.

3. For maximum cost effectiveness, organizations must not only be <u>able</u> to define and measure production processes, but must <u>actually</u> measure those processes statistically in a stable and consistent manner. This does not mean dependence on mass inspection, since quality comes not from inspection but from improvement of the process. With leadership and training, participants in the system can be enlisted in this improvement.

   DIAMETER is the primary measurement instrument currently used by the Department of Industrial Accidents. It was designed primarily as a device to track the progress of a case through the system, to schedule events along that track, and to provide data concerning the number of those events. It

was not designed to provide information for management purposes, nor to define and measure the processes by which disputes are resolved.

4. Quality improvement comes from the top down. "The job of management is to lead, to help people do their jobs better, and to learn by objective methods who is in need of individual help."[1]

5. Quality results from continuous, consistent, and committed efforts to improve an organization's processes -- and from participation in redesigning and measuring those processes by the people engaged in producing the desired outcomes.

   We discovered again and again throughout this project, that those who operate the dispute resolution system -- the conciliators and judges, as well as DIA administrators, operations managers, schedulers, secretaries, and records people -- know a great deal about what makes things work or not work; their ideas for improving their own processes are a rich source for improvement, and should be utilized.

6. Problems in a system are -- in the vast majority of cases -- due to defects in the system and its design rather than due to individual laziness, arrogance or indifference. Most people are eager to do a good job, and distressed when they can't. Deming suggests that the proportion of problems attributable to system difficulties (rather than individual worker limitations) is at least 85/15, and may indeed be higher. Management's job is to drive out fear, remove barriers to pride of workmanship, and improve processes.

7. Training and retraining -- readily available, responsive to individual needs, and related to desired outcomes -- is key to quality improvement. External consumers may require training in how to use a system, just as internal participants and suppliers may need training and retraining in job skills, new methodologies, and -- most importantly -- in how to work effectively as teams.

8. The reduction of barriers and competition between staff areas, so that units can cooperate with each other and eliminate conflicting goals, leads to increased productivity and customer satisfaction.

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[1] W. Edwards Deming, quoted in The Deming Management Method by Mary Walton, Putnam Publishing Group, New York, 1986, chapter 11.

These operational assumptions have been key to our analysis of the DIA dispute resolution system and its current problems. They also provide a basis for our findings and recommendations for resolving those problems and improving services.

SECTION III

DISPUTE RESOLUTION SYSTEM MANAGEMENT: FINDINGS AND RECOMMENDATIONS

Goals:

The role of management is to define the purpose of the organization or unit, and then, with constancy and consistency, to identify what jobs need to be done, and to identify and provide the resources needed to carry out those jobs. This is usually best accomplished by working in cooperation and collaboration with the people who are most closely involved with those jobs, and -- ideally -- through teamwork.

What Is Working:

Since the 1985 reform legislation and its overhaul of the DIA system, much has been accomplished. Four Administrative Law Judges (ALJs) have been appointed to the Reviewing Board, and twenty-eight Administrative Judges (seven of them devoted to eliminating the backlog of cases) have been appointed to resolve disputed claims. Four Regional Offices have been opened -- in Fall River, Lawrence, Springfield and Worcester -- in order to facilitate access to the system for both employees and employers. The original backlog of 12,000 cases (as of June 1988) has been handled, at least to the level of scheduling conferences, and a large majority of this 12,000 have been resolved. In all these offices, and at all levels of responsibility, there are men and women who are extremely skilled and effective in what they do, and all whom we met were dedicated to their jobs and to serving the people of the Commonwealth.

Having said this, it must also be said that there are major problems.

Our analysis of the dispute resolution system has led us to focus on four different aspects of DIA management: management of the dispute resolution system as a whole; management of administrative responsibilities; management of human resources; and management of information.

Overall Finding: The system is not being managed.

The single most striking characteristic of the dispute resolution system, and indeed of the Department in general, is that it is **not** being managed. Centralized efforts have been made to control behavior, to establish goals for important

events, or to collect statistics regarding how many conferences have been held or hearing decisions written. This does not, however, constitute management. In fundamental ways, the Department's organization, policies and procedures do not reflect the intent of the 1985 statute. As a result, there is a high level of frustration among the staff we interviewed at every level of the agency -- regardless of their role or responsibilities. Further, this frustration is matched by the frustration -- occasionally mounting to fury -- expressed by external participants in the system -- the employees, employers, attorneys, physicians and and insurance representatives whose interactions with various staff in different parts of the Department constitute the dispute resolution system.

A. Management of the Dispute Resolution System

We have described at length the specific stages of the Dispute Resolution System, from entry, through conciliation, conference, hearings, and appeals to the Reviewing Board. (See below, Section IV.) We have also identified our findings and recommendations at each of these stages, where the behavior and interactions of dispute resolvers and the disputing parties are key to the outcome. However, it is also important to look at this entire system, and to consider it from the viewpoint of how it is, or is not, being managed.

Finding One

> The Department has not focused on the overriding goal of the Dispute Resolution system -- to resolve disputes over compensation for injuries and lost wages as quickly, effectively, informally, and efficiently as possible -- and has not established its expectations and procedures to reinforce this goal. The DIA is not mandated to operate a substitute court system; it is mandated to manage an Alternative Dispute Resolution system.

Many individuals, at every stage in this system, are attempting to manage its component parts, and some inspired few are also attempting to take actions and make decisions which will assist in managing the whole. However, there is no visible overall system management strategy tied to the goals and strategies of settlement in an ADR system.

Some examples:

- There appears to be an assumption that workers and employers are locked in an adversarial relationship, rather than that unfortunate

accidents and injuries have occurred, and both employers and workers have an interest in resolving the problems quickly and fairly.

- The Department's Management Information System (DIAMETER) is designed to collect information about the progression of a complaint through the system. It does not actively or easily provide management information such as how many cases are settled, at what stage, or in response to what factors. (See below, Section III D for further discussion and recommendations)

Recommendations:

1. **Provide -- throughout the dispute resolution system -- incentives to encourage early settlement of claims, as well as disincentives to moving forward unless necessary. Incentives might include:**

   - **Fine either party which fails to appear fully prepared at conciliation or hearing, or which appears late (or fails to appear), thus causing the meeting to be rescheduled.**

   Disincentives might include:

   - **Fine the moving party which fails to present any new or relevant evidence at the next stage.**

   - **Fine – and collect the penalty – from any party which fails to inform the other party of a relevant event (such as scheduled surgery) which might impact the claim outcome.**

2. **Revise DIAMETER to assist in evaluating Conciliators, AJs and ALJs more on the basis of their success rate in settling claims than on the numerical statistics of how many meetings, conferences or hearings they are holding, or how many decisions they are writing.** (While of course it is important to consider efficiency in managing time, the outcome and qualitative results of that time are far more important.)

Finding Two

The Department has failed to monitor the behavior of parties in the system effectively, in order to determine whether there are patterns of behavior -- either by groups, specific companies or specific individuals -- which contribute to excessive use of the system and hence to the delays. We are

not talking about fraud, but rather about patterns of behavior which adversely affect the intended functioning of the dispute resolution system.

Some examples:

- We have heard many reports from members of the bar, employers and labor, and observers, that workers experience severe problems in collecting reimbursement payments of medical fees. This appears to occur even in cases where the injury and liability are not at question, and despite a statutory mandate which requires the DIA Office of Insurance to monitor and investigate insurers' claims-handling practices. Several attorneys indicated their belief that some insurance companies automatically wait 90 days before examining a request for reimbursement of medical bills, medication, or medical travel, which results in repeated, lengthy, and costly efforts by attorneys to contact the insurer to obtain payment. The explanation given is that the insurance companies' first priority is issues of liability, and the medical bills always receive a lower priority and hence delayed action. Others are concerned that insurers are not actually using the statutory "pay without prejudice" provision, and some judges do not apply the sanctions intended to require insurers to pay in a timely fashion. All of this contributes significantly to the filing of additional claims, causing clogging and further delays in the system.

- We have heard reports from employers, observers, and even members of the bar, that a few individual attorneys and legal firms make a practice of filing an excessive number of claims under several sections of the law, and of filing claims for inappropriate actions, such as minor disputes, and even typographical errors. From our interviews, it would appear that these actions sometimes result from injured workers' unreasonable expectations, or an attitude on the part of an attorney that "If I don't take this case on, someone else will." Interviewees also frequently cited their concern with the questionable advertising and billing behavior of certain attorneys, which they believe may raise unreasonable complainant expectations of coverage under the Workers' Compensation Act. Whatever the source of this behavior, the net result is to contribute to overutilization and delays in the dispute resolution system.

- We have also heard reports from attorneys, conciliators, judges, and observers about the inadequate representation provided by the Department in claims against the Section 65 Trust Fund. Department

attorneys are often hampered in their investigations because there is no incentive for uninsured employers to cooperate, as they have already broken the law. However, the situation is particularly distressing because the Department should provide a model for the fair, equitable and rapid resolution of disputes in which it is a participating party.

- National studies conducted by the American Bar Association indicate that many attorneys have not been trained, and do not know how, to represent clients in an ADR environment; they are far more comfortable in the more traditional processes of litigation or arbitration than with conciliation or mediation -- the first line tools in the DIA system.[1]

Recommendations:

1. **The Department should, after redesigning the DIAMETER system (see below, Section III D), monitor the system regularly in order to evaluate the occurrence and extent of such adverse behavior as excessive or inappropriate filing among insurance companies and attorneys.** In conducting this evaluative assessment, the Department should not rely solely on computer information, but should discuss possible changes with its own employees and participants in the system.

2. **Where such patterns are found to exist, the Department should use its regulatory power to sanction the behavior, and should monitor carefully in the future to assure that it does not re-occur.**

   2:1 **Provide a monetary fine for any insurers whose payment of medical reimbursements show a pattern of non-responsiveness to requests for payments due, and delay in payment of more than 60 days.** It is our understanding that many insurance companies manage the performance of their claims adjustors for adherence to certain objectives and expected behavior; the criteria for successful performance is timely payment of claims. The Department should cooperate with those companies and make clear its own performance objectives and standards in the matter.

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[1] Interview with Lawrence Wray, Esq., Executive Director, Standing Committee on Dispute Resolution, American Bar Association, June 6, 1991.

2:2 **Publish annually and distribute widely the mandated report on promptness of first compensation payment by insurers and self-insurers.** Best companies should be rewarded by public recognition of their performance; companies for whom there is a pattern of slow payment of compensation, or slow or delayed payment of medicals, should be sanctioned.

2:3 **In cooperation with the Workers' Compensation Committee of the Massachusetts Bar Association, identify and seek sanctions against those attorneys who show a pattern of filing inappropriate claims.** The Department might also request the Bar Association to consider standards regarding attorney advertising, and educate the Workers' Compensation bar to departmental expectations regarding professional standards of behavior.

3. **The Advisory Council should, in cooperation with the Massachusetts Bar Association, encourage the development of new MCLE programs to improve attorney understanding of and skills in using mediation and other ADR strategies in the DIA dispute resolution system.**

4. **The Department should take steps to improve the quality of its representation of the Section 65 Trust Fund, and early, equitable resolution of Trust Fund claims.** This agency program could be a pilot demonstration for new DIA methods of resolving claims in the dispute resolution process, including methods of investigation, notification, etc. The Department should also consider using its current authority to contract out these legal representation responsibilities to private attorneys.

B. Management of Administrative Responsibilities

Finding One

<u>There is a minimal and, we believe, inadequate body of administrative rules, guidelines and forms to guide participants once they enter the DR system to carry out their responsibilities and to meet their obligations.</u> Although the Department has issued many forms and Circular Letters of policy interpretation, there are relatively few administrative devices which

would help provide incentives toward settlement and facilitate timely actions.

Some examples:

- There is no requirement which mandates the precise types of information which both parties must have available for a conciliation, conference, or hearing to occur.
- There are no established prerequisites to guide the submission (or review) of information and documents under specific sections of the law.
- There are no established criteria to guide the submission and review of claims of emergency or hardship, and consequently the treatment of such claims is extremely uneven and often unfair, and senior managers are involved excessively in reviewing each and every claim.
- There is no enforcement of the statutory mandate requiring a physician or other medical practitioner to submit a statement of initial accident or treatment.
- There is no set period of time by which depositions must be filed following a scheduled hearing.

Recommendations:

1. **The Department should establish an Advisory Committee composed of representatives of the claimants' bar, the insurers' bar, large and small employers, organized labor, AJs and ALJs, the Conciliation Manager, and a senior DIA manager, to consider and propose needed rules and forms.** We would suggest that this Committee seriously consider at least the following:

   1:1 **Develop rules which identify those documents or pieces of evidence which must be available in order to proceed with a conciliation, conference, hearing or other event.** Develop a checklist of data which parties must supply when making claims under each specific section of the statute, for all issues other than liability or request for discontinuance. Specify when this information must also be made available to the other party.

1:2 Develop specific forms, including check-off lists, which assist all parties in meeting those rules. Some observers have estimated that this use of a "pre-requisite" could eliminate 20% of the claims filed, by assuring that the case was well organized before initiation.

1:3 **Develop criteria which the Department will use in reviewing claims for emergency action or hardship,** as well as the process to be used in those reviews, and make both readily available to system users.

2. **The Department should develop forms for use in the Dispute Resolution process which would simplify and facilitate its own processes and clarify the responsibilities of participants in the system such as physicians and other health care providers.** These forms should be reviewed with the Advisory Committee and with internal teams representing Claims, Conciliation, and the Judges, and even used on a trial basis, before they are made mandatory.

We recommend consideration of the following forms:

2:1 Collect Information from the Attending Physician (or emergency room), to accompany the first actionable report of injury. We note that the Workers' Compensation Board in New York State may suspend the authorization of physicians who show a consistent pattern of failure to submit this required report, and may also refer complaints to other state agencies for suspension of license.[2] Because many physicians are not aware that they are required to submit their treatment report to the insurer, it could also be helpful for DIA to clarify in its instructions to workers that it is the workers' responsibility to request a health provider to send this treatment report to their employers' insurance company.

2:2 Improve DIAMETER entry of the form (DIA #123) used to announce the entrance of an attorney into a case, so as to eliminate the current perceived need of attorneys to file a claim in order for the computer to notify them swiftly of scheduled events. (Alternatively, the Department could consider assigning a board number to every worker who enters a first report of injury, distinguishing these "first reports only" from claims and complaints.)

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[2] Teleconference with Edward Silverman, Principal Workers' Compensation Claims Examiner, New York, June, 1991.

2:3 Revise the "Employee's Claim for Benefits" (Form 110) to include more information to facilitate the insurer's review and investigation of the claim. Revisions would include date and location of first medical treatment, names of witnesses, etc.

2:4 Revise and unify in one form the various procedures for amending inaccurate or revised information on a claim (such as dates, times, or parties) to avoid submitting an entirely new claim. This would assist the judges in joining various components of a single case, and would reduce the apparent ballooning of claims.

Finding Two

There are serious problems in the administrative relationships between the central Boston office and the regional offices which contribute to the slowness of the dispute resolution process. Pursuant to the reforms of 1985, and with the purpose of encouraging greater flexibility and making DIA more responsive to its users, DIA established four Regional Offices. However, the Department did not transfer full management responsibility to its own Regional Managers, instead retaining significant central control over such crucial areas as supervision of key personnel, access to the computer system, record-keeping, and scheduling of conciliation and other dispute resolution events. While the continuation of such centralized control may have been useful in the initial transition, we believe it is now contributing to job-related interpersonal conflicts, and to slowing down the resolution of cases. It should be ended. Trust in the abilities and accountability of managerial and professional staff is the foundation of any effective management operation.

Recommendations

1. **Make the Regional Offices independent, accountable administrative units responsible for all aspects of the dispute resolution process, including conciliation.** (See Recommendations re Conciliation, Section IV D).

2. **Give Regional Managers managerial responsibility, including direct supervision of staff in their respective offices.** This means, specifically, such employees as disability analysts, dispute resolution administrative clerks, principal clerks and judges' secretaries, and would include the ability to allocate and re-allocate work load in peak demand periods, as necessary. Currently many regional staff are theoretically

supervised on a day-to-day basis from the central office, which has led to problems and resultant tensions. Responsibility and accountability should be fully lodged in the regional management structures.

3. **Give Regional Managers and, at their discretion, regional staff under their supervision, increased access to the DIAMETER computer system to correct inaccurate or inadequate initial data concerning a case; input new data gathered by conciliators and judges in conciliations, conferences, and hearings; and maintain the computerized case records while the case is active.**

In order to accomplish a successful transition to this regionalized responsibility, Regional Managers would be expected to select such employees carefully, to assure their participation in training provided by the central office, and to work closely with the Judicial Support Manager. Regional Managers would of course be accountable for the performance of their staff.

Finding Three

The records of the DIA Dispute Resolution system can only be described as abysmal. Virtually every participant in the process we spoke with mentioned serious problems in the collection, filing, retrieval, handling and availability of case records. Attorneys for both sides expressed frustration at the lack of a standardized "file of record," starting with first report of injury, and at later losses of evidence such as medical reports, requiring both time and expense to replicate and re-submit. Conciliators expressed frustration at having only a one-page "tracking sheet" with minimal information on the claim, and no actual file to which their Recommendations could be attached. Administrative Judges expressed frustration at incomplete, unreliable, unorganized, and sometimes lost files. Some said that conciliators' recommendations were so often separated from the files that they found it hard to count on them as part of the resolution process. AJs and ALJs both expressed anger and frustration at having to consider requests for discontinuances or for permanent and total compensation in a long-standing case, only to discover that most of the previous proceedings -- including transcripts and dispositions -- were missing.

It must be noted that during the last year, with the management of the Records in new hands, improvement has been noted. The process of retrieving files from the Record Room (or even, much harder, from the Archives) and supplying them to the dispute resolution system has been

reorganized and upgraded. However, even if the manila file folder with the claimant's name can be retrieved and delivered to the conciliators or judges, it may still be missing one or more major component parts; it is still unbound and un-punched; there is still no list of expected document contents; and there is the frustration of having all the files held centrally so that each time a file is needed, it must be retrieved from the Record Room and driven by courier to the Regional Office.

Our interviews suggest that many of the judges keep the files -- physically -- in their offices between Conference and Hearing as the only way to assure that the necessary information, if once they gather it, will be available to them when needed. Also, many conciliators make copies of the files on cases they hear "just in case" questions subsequently arise and the files either can't be found or have been partially lost.

It can truly be said in this context that for want of a file, the opportunity for early resolution may very well be lost.

Recommendations

1. **We recommend that the Director of Administration, in cooperation with the Conciliation Manager, the Director of Dispute Resolution, one or more Regional Managers, the Records Manager, and representatives from the AJs and ALJs (possibly two of their secretaries), constitute a Work Group to design and develop a standardized Record format for the Department, and identify a new DIA process to enter and maintain material in these files.** It would also be useful to have members of the Workers' Comp Sub-Committee of the Massachusetts Bar Association review the proposed Record procedures before they are finally issued as Department policy.

2. **We also recommend that case files be regionalized, and physically maintained in the office which serves the area in which the claimant lives.** All future files opened after a certain date would then be opened and also maintained by that Regional Office.

   We understand that managers in the Central Office have several concerns with regionalization of records (and other functions):

   - additional space would be required.
   - additional staff would be required in the regions

- more records might be lost in the transition
- regional staff don't know how to establish and maintain a records system

Some of these concerns may have some validity, but can easily be addressed:

- Additional space will be required, but most regional offices need additional space in any case, so both purposes could be accomplished by a single office expansion or move.

- Regional Managers will have to identify accountable staff, and in some instances additional staff might be required, but fewer staff will be needed in the central office, and the time and money spent for transporting records from Boston to Worcester, Springfield, Lawrence and Fall River would be saved.

- The reorganization would have to be carefully managed, but we believe a successful moving plan could be achieved. It might also provide an opportunity to review the completeness of the records of active cases, thus further facilitating the development of a more useful case records.

- Regional records staff would need to be carefully trained in their new responsibilities, and the central office Records Manager should play a key role in designing and carrying out this training, and in providing assistance during an interim period.

C. Management of Human Resources[3]

The focus of this section is on the management of the human beings who provide the services of the dispute resolution system, in Boston and in the four regional offices. Our analysis indicates that they have not been well managed. The old central administration does not appear to have understood the requirements of an ADR system, or the role of these "non-judicial judges" in it -- what they do, how they do it, or what they need to do it well. Under a new administration, however, there is a "window of opportunity" to change this situation. Virtually every single person with whom we spoke, no matter what their relationship to the

[3] It is difficult to find the right words for this concept. We believe that one of the major functions of an effective administration is to manage the human beings who constitute its most important and most sensitive resource with care, responsiveness, and efficiency.

dispute resolution system, expressed a fervent hope that the opportunity will not be lost.

Finding One

The DIA dispute resolution system (and particularly the Division of Dispute Resolution) has an ambivalent attitude toward the role and accountability of the intended dispute resolvers -- called conciliators and judges. The AJs and ALJs are called judges (a term at the core of a court system of precedents and rights) but are expected to mediate and settle cases in a less formal alternative to traditional litigation. Reflecting this ambivalence, the training and background of the AJs and ALJs differs widely -- some are lawyers, some are not; some have previous legislative or judicial experience, some have business, managerial, labor, or mediation experience. The Division of Dispute Resolution has been directed by non-lawyers, with no judicial or ADR experience, who have nonetheless been expected to supervise and control a large group of men and women many of whom are -- or perceive themselves to be -- responsible not to that Director or even the Commissioner, but only to the Governor who appoints them. And conciliators, who have a crucial potential capacity to encourage early dispute resolution, and to organize issues and materials in cases which must go forward, are located outside of DDR in the Division of Administration. It is a complex and difficult situation.

Recommendations:

1. **We believe that the ADR and non-judicial character of this system for resolving disputes should be recognized and affirmed, or the law should be changed.** Under current statute, this was supposed to be an Alternative Dispute Resolution process -- intended to resolve most issues in dispute informally or semi-formally, fairly, efficiently, quickly, and cheaply. Other states call those who resolve Workers' Compensation disputes "Commissioners," or "Hearing Examiners," or "Adjudicators," or "Hearing Officers," or other such neutral terms; some also call them judges. Regardless of what they are called, however, the agency should be organized to support the type of dispute resolution system it intends to provide.

2. **The work of the AJs or ALJs, on a day to day basis, should be managed by a senior and experienced member of the judges' "team," who might be called the Chief or Senior Judge.** Whether this person is drawn from among either the ALJs or AJs, the role must be

filled by someone with considerable experience with judges' responsibilities, proven leadership abilities, an understanding of the law and alternative forms of settlement, and proven managerial skills in handling people, paperwork and bureaucratic systems.

3. **The Conciliation staff, under the management of the Conciliation Manager, should be transferred into the Division of Dispute Resolution,** in order to improve the coordination between conciliators and judges, and to reflect in agency organization the fact that conciliation is an integral part of the dispute resolution system.

Finding Two

The Department has never developed AJ/ALJ job descriptions or job performance standards, nor has it conducted annual reviews or other evaluations of the performance of ALJs or AJs in the last five years. Statistics are produced through DIAMETER and other sources for the numbers of conferences, hearings, or lump sum hearings held or written decisions written by the judges, but these are merely numerical facts. Even those whose statistics appear favorable (high numbers of conferences or hearings held, or decisions written) agree that these numbers are not helpful in arriving at a useful qualitative assessment of how effective they have been in their respective roles. As one judge said, "I would like to be evaluated on the quality and quantity of the settlements I mediate, and the differential complexity of the cases I decide, not the number of conferences I hold or decisions I write."

Recommendations:

1. **In cooperation with the Judges' Committee, the Department leadership should first define the purpose and functions of AJs and ALJs in the dispute resolution system, as well as norms and expectations of judges' roles in the context of existing legislation.** They should take into account the importance of teamwork in accomplishing these functions, both teamwork between judges and conciliators, and teamwork among the AJs and ALJs as they manage their workload.

2. **This group should also decide how AJs and ALJs will be held accountable, and what standards will be used to assess their work.** Annual performance evaluations, particularly those based on numerical quantitative assessments of productivity, tend to discourage innovation and risk-taking, encourage competition about the wrong things,

and undermine teamwork. Human beings are not machines, and cannot be programmed to identical workloads. However, we believe that the dispute resolution system will work much more swiftly and efficiently by defining the focus of accountability, and then by giving the judges the flexibility and responsibility to manage their own work.

In general, performance standards should focus on AJ/ALJ ability to resolve disputes fairly and swiftly, rather than on the number of orders issued or decisions written. This means DIA must evaluate information on agreements or settlements reached at or after conference and hearing; and on types and complexity of cases, as well as rates of appeals, production of orders and discussions, etc.

Since the statute requires that potential candidates be evaluated, it is not unreasonable to expect that the same criteria used to evaluate sitting judges would also be applied to candidates.

A question has been raised about the use of an oral and/or written testing process in the selection and/or reappointment of judges. While the scope of this project has precluded any serious examination of this issue, we are aware that some states (such as California, Colorado and Michigan) use testing and civil service examinations as part of the selection process, and give preference to high scorers. Our initial examination of the question raises two problems:

- Written tests which can be graded numerically can only measure certain types of informational knowledge; they are limited as a way to assess other important qualities and skills.

- Prior tests have not proven to be helpful indicators about how people actually perform in a specific job, particularly where experience may dictate and shape changes in behavior.

Written tests may be useful for certain evaluation aspects; however, if used for selection or reappointment, they should be a relatively minor component of the overall evaluation processes.

3. **The Department should encourage the judges to become a functioning work team, in an effective working relationship with their colleagues, other employees, and the Department's administrative leadership.** This has already happened to an important degree in each of the Regions, but not in the central office, where it is badly needed. The Judges' Committee should be used as a sounding board

for policy development, managerial communication, and ideas for improving the system, and should be encouraged to work closely with all the judges in promoting collegiality, cooperation, and management of work flow and production.

Finding Three

It is not clear how the Department has determined the adequacy of the current numbers of AJs and ALJs (including recall judges) in relation to work load, either in terms of the growing backlog, or in terms of a steady on-going annual projection of case numbers. Within the present dispute resolution system, without significant changes, the backlog will increase, jeopardizing the whole operation. However, we believe, based on our observations and analysis, that if many of the proposed managerial and systemic changes are instituted, the current number of judges would be reasonably adequate (except for the Reviewing Board; see Section IV F).

Recommendation

The Department should monitor the work load impact of these changes as they occur, and should, in cooperation with the Judges' Committee, re-assess staff and other resource adequacy annually.

Finding Four

There is no presently formalized orientation or staff development program for dispute resolution staff, either AJs, ALJs or conciliators, nor for dispute resolution management and support staff. In light of the varied professional background, experience and training of the dispute resolution staff, the lack of a well structured orientation program is a serious defect, and one that contributes to limiting the productivity of new judges during their first several months.[4] At one point the more senior judges had instituted an informal "mentoring" program of observation and informal sharing of information, and several years ago more formal lectures on the process and procedures were given by at least one of the senior ALJs, but today neither activity is occurring. Nor are there on-going staff development or continuing education programs for dispute resolution staff. Management and support morale also suffer when prospects for mobility within the department seem limited.

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4 See statistics on judges' numerical productivity from the FY 1989 and FY 1990 Workers' Compensation Advisory Council Annual Reports.

Recommendations

1. **The Division of Dispute Resolution, in cooperation with the Judges' Committee, should develop an orientation program for all in-coming judges.** While there will be some variation due to differing backgrounds, the orientation should include a thorough review of the statute, regulations, and rules of procedures of the department, as well as its forms; review of fact-finding and hearing procedures; review of any departmental practices and standards of expectation for writing conference orders and hearing decisions; and similar areas of practice.

2. **Dispute Resolvers -- both conciliators and judges -- should be required to participate in on-going staff development programs, to maintain and further develop their skills and information.** Participation in continuing education should be encouraged in areas such as medical issues (for example, new data on repetitive movement syndrome or environmental toxins); employment and rehabilitation trends; and new national standards (such as the Americans with Disabilities Act) with potential impact on Massachusetts employers and workers.

3. **The Department should consider combining the titles Conciliator I and Conciliator II into one title.** Currently staff in these two positions do identical work, working side by side, carrying the same level of responsibility. This inequity occasionally causes tensions, particularly when a Conciliator II vacancy occurs; it should be corrected.

4. **Management and support staff should have opportunities for training to improve their skills in their current positions, and to train for lateral and upward mobility within the Department.** Examples might include training in information system management, informal job-information sessions for support staff with managers and senior dispute resolution staff, and some time and funding allocation for career development activities outside the Department.

Special Finding

Between now and September 1, 1992, nine Administrative Judges and four Administrative Law Judges, who are a major proportion of the dispute resolution system, are up for re-appointment. The terms of seven backlog judges will also expire. As a group they represent an impressive reservoir of experience, skill, judgment and energy. Many of them are serving with extraordinary commitment and distinction, in the face of an enormous

backlog, no control over their own schedules, cramped and crowded facilities, unclear leadership, fragmented administrative policies, no salary increases since 1986, and an uncertain future.

It is amazing that in the last six months only two of these judges have indicated their intention to resign. However, it is certain that without clear signals from the new administration, and a fair and early mutual discussion of what they can expect, many of the best of them will soon be gone. This will certainly result in a major increase in the already critical backlog, and an undermining of current efforts to improve the system, and will send an unfortunate message to prospective judges about the DIA situation. It would also be an unfortunate waste of competent, often gifted and committed, human resources.

Special Recommendations:

1. **The Department and the Administration should review the statutory roles and responsibilities for Administrative Judges and Administrative Law Judges, and the nominating process. Together, they should clarify the process and criteria the Administration will use in appointments. They should also clarify whether the Administration intends to consider any reappointments of sitting judges, and make their intentions known to those potentially involved.**

   We are completely convinced that without this process, and clear notification to sitting judges as to whether or not they may be reappointed, many judges will leave and the DDR system will be in crisis within a very short period of time.

2. **Another difficulty in the appointment process may result from state personnel regulations; many sitting judges have accrued large amounts of vacation time and if not reappointed, they will go off-line long before their replacements can start being trained in hearing cases. This will further exacerbate the delays.**

   We urge the Administration to explore solutions to this problem immediately. Ideally, this means that new appointments should come on line for orientation and training a month before the sitting judge leaves. Since most terms expire in May and June of 1992, replacements should be appointed and available no

later than April 1992, and that the evaluation and nominating process should be initiated no later than September 1991.

D. Management of Information

It can accurately be said that the existing management information system, or DIAMETER, is doing exactly what it was supposed to do -- scheduling and tracking cases as they make their way through the dispute resolution process. It can also accurately be said that the system is capable of producing an enormous quantity of data.

The weak points of the system are two-fold. First, although the system may be able to produce a great deal of data, from a management point of view it produces little usable information. Second, the definition of what constitutes usable management information is changing considerably as pressure for reform of the underlying workers' compensation system grows. This section analyzes some of the problems with the existing information system and offers some recommendations on how to reform it.

At the heart of the DIAMETER system is a profoundly passive notion of the dispute resolution process. Translated into words, that notion would sound like this message to insurers, injured workers, or third party claimants: tell us you have a dispute about some aspect of a case and we will provide the facilities for you to resolve it. As a consequence, the information that DIAMETER seeks -- or, more accurately, the information that it is best at processing and presenting -- is of a largely technical, procedural nature such as names, addresses and meeting dates.

This is why the reports that DIAMETER produces are so difficult for the outsider to penetrate, and so unsatisfying for the various participants in the system who want information to help them better manage the process. It also explains why there is a repeating cycle in which the system never produces incisive management data, causing it to be taken less seriously, which causes participants to be less reliable in providing data in the first place, which undermines the system's credibility, and so on.

Finding One

The "loop back": A critical feature of the dispute resolution process is the existence of what we call a "loop back" mechanism. (See diagram on following page.) The "loop back" works like this. Stages in the dispute

resolution process always proceed from the initial statement of a dispute to conciliation, to conference, to hearing, with numerous variations of these basic steps possible in between. However, once a dispute initiated by the worker, the insurer, or a third party such as a health care provider runs its course, it is possible that one of the parties wants to dispute the final outcome or challenge a new issue. In this case, under DIAMETER, the proceedings begin all over again.[5]

This "loop back" occurs in about 15% of the accidents in our sample.[6] Some new actions are inevitable in a wage loss benefit delivery system in which wage earning capacity changes over time. However, if delay seems to work to the advantage of one of the participants, there is a strong temptation to re-open the process for tactical reasons.

While there are administrative mechanisms, such as the possibility of joining, that are intended to provide for a linking up of otherwise disparate injuries suffered by one person in a single accident, our analysis suggests that disaggregating cases from accidents to claims encourages all concerned to view an injured employee as the sum of a series of events connected to a set of injuries rather than as a single whole person. It would be as if we had set out to purchase a new car by separately ordering each part from auto supply stores rather than going to a new car dealer. Not only is this fragmented approach enormously inefficient; it would be far more costly -- and our "new" car probably wouldn't work in the end anyway.

Finding Two

The quality of the dispute resolution system's performance depends on whether or not outside participants in the system provide prompt and reliable information; at present they do not. While a formal evaluation of such factors as the promptness, reliability and accuracy of initial case-related documents reaching DIA was outside the scope of this project, it would appear that there is considerable room for improvement in this aspect of information-gathering. We will discuss what might be done about this problem in the recommendations section of this section.

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[5] This loop back mechanism should not be confused with the multiple access loopbacks, frequently designed into dispute resolution systems to facilitate resolution of differences at the earliest possible stage.

[6] The 15% estimate includes all cases where a new issue is disputed.

Finding Three

The structure of the information system is out of step with the department's organizational structure. It is ironic that the heavily centralized, command-and-control objectives of DIAMETER were being implemented in 1988, precisely the same time when the department was decentralizing its operations by opening field offices. As a scheduling and tracking tool, DIAMETER is nicely suited to a single-site dispute resolution system. For the past few years, however, the DIA has operated multiple sites. Many of the deficiencies in this area presently felt by the regional offices develop because centralized information technology is asked to operate in a decentralized environment.

Recommendations

We believe that few of the things that the DIA needs to do to improve its management information system should involve spending large amounts of money. What we propose instead is a re-focusing and perhaps a modest re-tooling of the existing system.

1. **The Department should decentralize the DIAMETER system so that each regional office has access to its own scheduling functions and can control more of the input to bring the existing information system into step with the DIA organizational structure.**

2. **The Department should establish a DIAMETER Users' Group, composed of representatives of participants in the dispute resolution system. This group should include both regional and central office staff, as well as representatives of employers, workers, attorneys and insurers. The group should be asked to develop recommendations for what information is needed by managers, judges, conciliators, and other participants in the system in order to monitor, manage, and understand patterns and trends in the system, as well as to track events.**

3. **DIAMETER should begin producing brief, comprehensible and easy to read reports regarding how well the system as a whole is doing at any one time.** At the very least, administrators should be able to know at any given time how long it is taking, on average, to resolve a case entering the system, and where the delays, again on average, are taking place. By continually monitoring this information, administrators

would be able to adjust their allocation of resources to meet changing system needs.

3:1 Indicators of numbers of settlements at (or immediately following) each stage (i.e. conciliation, conference and hearing) by type of issue, length of time since injury, name of employer and insurer, and name of dispute resolver.

3:2 Indicators of behavior of insurers and employers — quarterly and annual reports indicating number of employers' first reports, claims against individual employers and their insurers, and the progress of these claims through dispute resolution. Managers should review this information for timeliness of initial payments, timeliness of medical payments, etc., and should follow up with insurers and employers whose patterns indicate slow responses.

3:3 Patterns of employee claims — quarterly review of claims by employee name to assure that all claim actions relating to a given employee are joined, and annual review to identify possible patterns of employee behavior.

3:4 Indicators of attorney involvement in cases, as differentiated from *pro se* cases, by type, duration, stage of settlement, etc., to monitor attorney behavior.

As a measure of effectiveness of dispute resolution ability, it would also be helpful if management knew at any one time the percentage of cases passing through the system that had been re-opened -- the "loop back" effect. This information could be a rough indicator of the system's ability to achieve resolutions both parties accept and, again, would be a simple but powerful measure of performance.

SECTION IV

THE STAGES OF DISPUTE RESOLUTION: FINDINGS AND RECOMMENDATIONS

A. The Dispute Resolution System

Finding:

The Department is not attempting to change the historic adversarial relationship between workers and employers, or to clarify that the 1985 statute has mandated an Alternative Dispute Resolution system, not a court system, to resolve Workers' Compensation disputes. One effect of the continuing adversarial relationship can be seen in the high rate of attorney involvement in cases, particularly in the early stage of conciliation where no formal actions are occurring. The Department does not provide any incentives for disputants to manage their own cases, and some observers believe an adversarial relationship encourages the use of attorneys at every stage of the dispute resolution system.

Analysis of our random selection of cases on the DIAMETER system indicates an interesting pattern of comparison between the length of time *pro se* employees spent in different stages of disputes, and the length of time employees with attorneys spent in those stages. Cases in which a claims adjuster represented the insurer also resolved more swiftly than cases in which the insurer was represented by an attorney. (See Charts on following page.) To some extent, attorney involvement may be attributed to the complexity of certain types of cases, delays in initial reports, or disputed liability, as well as lawyers' roles in protecting clients' rights.

Available data does not allow us to determine the actual reasons for the longer time periods when attorneys are present. However, in a recent national study, the American Bar Association has discovered that many attorneys are unfamiliar with the concepts and procedures of Alternative Dispute Resolution (ADR), and do not know how to adapt their traditional techniques to ADR settings and situations.[1]

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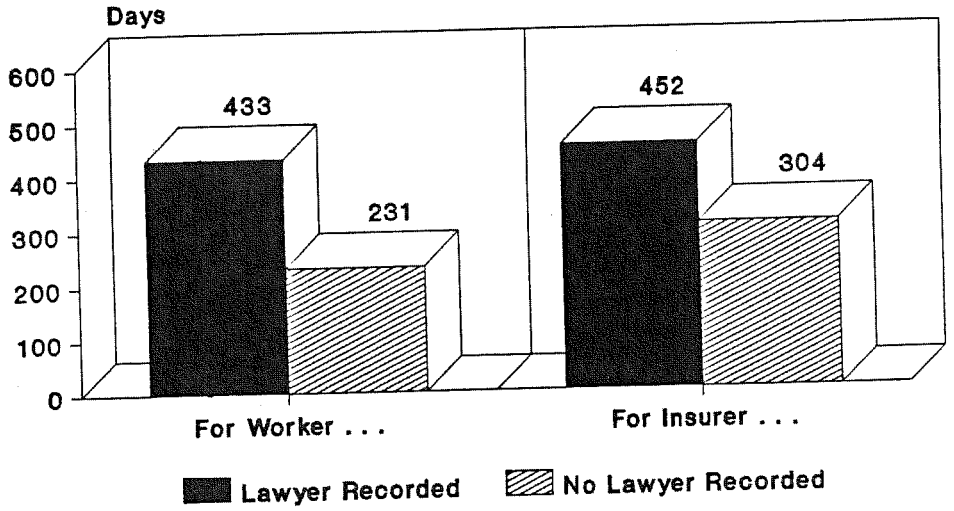
[1] Telephone interview with Lawrence Wray, Executive Director, Standing Committee on Dispute Resolution, American Bar Association, June, 1991.

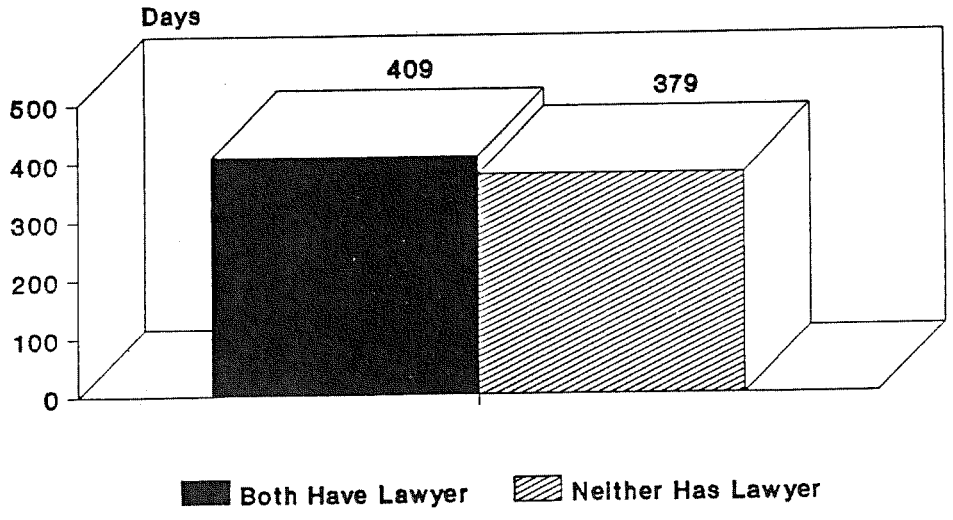
EFFECT OF LEGAL REPRESENTATION
Average Minimum Elapsed Time
Whether Other Side Has Lawyer or Not



From date of injury to case resolution

Figures are irrespective of whether or not other party was represented by attorney.

EFFECT OF LEGAL REPRESENTATION
Average Minimum Elapsed Time
When Records Show . . .



From date of injury to case resolution

Recommendations:

1. **The Department should improve its public information to the Workers' Compensation attorney community and should consider joint sponsorship of attorney training programs about ADR** in cooperation with the Massachusetts Bar Association. (See also Section IV C below for findings and recommendations on DIA information and outreach.)

2. **The Department should encourage union business agents to represent workers, and claims adjustors to represent insurers.** We believe that this policy, combined with some of the other recommendations, would facilitate more rapid settlement and reduce the adversarial nature of many proceedings.

3. **The Department should examine the experience of other states such as Connecticut, where the Workers' Compensation Commission actively discourages claimants from retaining an attorney,** especially for undisputed claims. (Connecticut workers may, of course, retain an attorney, but at their own expense.) According to data from the Connecticut Legislative study, 60% of Connecticut claims are settled without the use of an attorney.[2]

4. **The Department should conduct a comparative pilot project in one or more regions to collect and analyze data on the factors which differentiate attorney-assisted cases from others of the same nature and type, as a guide to decide whether, and if so how, to encourage disputing parties to settle at least the simpler cases without resort to legal involvement.**

B. Interests of the Parties

Each of the parties, or participant groups, in the Workers' Compensation program in Massachusetts has an interest in the Dispute Resolution system, some more obvious and apparent than others. Both as individuals and as members of a group, they are part of the same system, and thus affected by the behavior of others in that system. As dispute resolution analysts and as consultants, we have

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[2] "Workers' Compensation in Connecticut," Connecticut Legislative Program Review and Investigative Committee, January, 1991. See also "An Employee's Pocket Guide To Connecticut Workers' Compensation," Division of Worker Education, Connecticut Workers' Compensation Commission.

made a special effort both to identify these parties and to understand their interests in the system -- how they do or do not benefit from the system as it currently exists, what incentives they may have to behave the way they do, and how they might be affected by any changes to be made in that system.

Analysis suggests these parties and their interests to be as follows:

- **Employed Workers:** Employed workers have a major interest in knowing that the Workers' Compensation system will respond quickly, fairly and equitably to any job-related claims. They also have an interest in being able to return to their jobs as quickly as possible, since extensive research indicates that the earlier the return to work, the higher is the likelihood of successful reintegration into the workforce. In reality, some workers develop an interest in prolonging their use of Workers' Compensation benefits and compensation, apparently as a response to a real or perceived sense of having been badly treated initially by either employer or insurer, and in the present labor market, some workers may also find an interest in over-utilizing Workers' Compensation benefits preferable to being unemployed.

- **Employers:** Massachusetts employers, both large and small, have an interest in creating as safe a workplace as possible for their employees, in knowing that their insurance rates are as low as reasonably possible, that both injured workers and insurers provide timely and accurate information on claimed compensation and expenses, that the compensation and expenses are paid in a timely manner, and that any disputes regarding such claims are settled fairly and expeditiously. In reality, the interest and ability of some large employers to encourage early return of workers to modified work programs is not shared by many smaller employers with less flexible job functions, and a number of employers do not believe that the interests of insurers are always identical with their own, despite the fact that insurers are supposed to represent them.

- **Insurance Companies:** have an interest in opposing fraudulent or questionable claims, in making a fair profit, and in participating in a dispute resolution system that settles disputes quickly and fairly, based on accurate, complete and timely information. In the reality of the current recession, many insurance companies are reducing staff, combining and centralizing offices, seeking higher rates, and reducing the level of their claims investigations efforts. Their interests in making their businesses more cost effective sometimes conflict with employer interests in low rates or worker interests in rapid resolution of disputed claims.

- **Attorneys:** have an interest in providing accurate information to their clients regarding their rights and responsibilities, and in achieving a fair and equitable outcome of the dispute as quickly as possible, at a fair rate of pay. They also have an interest in seeing that other attorneys meet or exceed responsible professional standards. In reality, attorney interests in serving their clients are sometimes in tension with insurer efforts to reduce dispute costs at specific stages, and occasionally attorney interests in resolving a dispute may conflict with insurer claims adjustor interests in minimizing total payments, or with their clients' needs.

  Massachusetts is the only state in the country in which there is no co-payment by the employee and the insurer of attorney's fees. Additionally, the fee schedule is set up in such a way that higher fees are paid for more extensive use of the dispute resolution system.

- **Physicians and other Medical Personnel:** have an interest in providing timely professional care that restores patients to the highest possible level of functioning, in providing necessary information to patients and insurers, and in being paid for their services quickly and at a fair rate. Like attorneys, they also have an interest in seeing that other medical personnel meet fair professional standards, and that all medical providers are reimbursed in an equitable manner. In reality, different medical personnel operate differently within the system -- as chiropractors are able to bill for separate service components more easily than are surgeons, and the current rates of reimbursement for medical evaluations put physicians' interest in fair pay in conflict with their interest in serving patients in need.

- **Employees of the DIA:** have an interest in providing a fair, equitable and efficient service, receiving respect and fair recompense for the jobs they do, and satisfaction from working effectively with others in the system.

Many of these interests are non-competitive and mutually reinforcing. However, as a number of those we interviewed pointed out, at certain points in the dispute resolution system the interests of one or more groups may be in tension and even occasional opposition. It is at these junctures that the difficulties and delays are most likely to arise.

C. Initial Contact and Entry

Goals: As a public agency vested with great responsibilities and limited resources, DIA should make effective use of its initial contacts with participants in the Workers' Compensation system (i.e. injured workers, employers, their representatives and service providers) to prevent disputes if possible, and expedite their resolution if necessary. To be successful, the initial contact process must:

- encourage participants to talk with each other to resolve issues without resorting to formal dispute resolution procedures;
- provide full information to participants about their rights and responsibilities under the Workers' Compensation law;
- provide information about the department's programs and procedures and how to use them;
- require parties who wish to use DIA dispute resolution procedures to submit to DIA, and exchange with each other, all information relevant to the issues in dispute;
- record case information for case tracking and statistical analysis;
- forward accurate case information and complete documentation to the relevant dispute resolution unit (e.g. conciliation, DDR, Reviewing Board, etc.).

To accomplish these goals, DIA must respond promptly and accurately to participants' requests for information, require prompt and accurate submission of necessary information from participants, and maintain an effective record-keeping and forwarding system to analyze and use information required from participants.

Although initial contact and entry were not the primary focus of our study, they have a significant impact on dispute resolution activities. Our interviews and review of statistical data identified several problems at this stage. They also suggested that improvements at this stage could help prevent disputes, and promote the early resolution of disputes that cannot be prevented.

Finding One

DIA's public outreach to workers is generally adequate, but could be substantially improved. The DIA pamphlet *Your Guide to Workers' Compensation Law* is overly complex, and provides more information than is initially needed by most workers. There is anecdotal evidence that the telephone hotline is often busy, although the information provided is usually correct. Our interviews also indicate that difficulties in obtaining clear and prompt answers from the Department contribute to some workers' decisions to seek help from an attorney.

Recommendations

1. **Simplify and update the *Guide to Workers' Compensation Law*.** Include a simple flowchart that helps workers decide whether benefits are due and what action (if any) they need to take to receive benefits. Note options for action prior to claims filing, including direct discussion with the employer or insurer.

2. **Increase staffing for the information hotline.** Make it a policy not to give case scheduling information to attorneys over the hotline. Conduct periodic checks of the hotline to verify accuracy and availability of information provided.

Finding Two

1. DIA's outreach to employers is generally inadequate. Smaller employers in particular do not seem to be familiar with DIA statutes and regulations. Our interviews suggest that employers who are not aware of their rights and responsibilities in the Workers' Compensation system may be less responsive to injured workers. Employers' failure to respond to the initial reports of injury quickly and helpfully is a significant factor which influences later workers' decisions on whether or when they are ready to return to work, decisions which may lead to continued disputes with employers and insurers and higher costs.

2. DIA outreach to employer representatives (insurance claims adjustors and attorneys) is more successful than outreach to employers, but is not as successful as outreach to workers and their attorneys. Based on our interviews, claims adjustors and insurer attorneys are generally perceived as being less familiar with DIA statutes, regulations and policies than claimant attorneys. Unfamiliarity often leads to inaccurate and incomplete

reporting of case information to DIA. It should be noted that insurers' internal management practices (e.g. rotating responsibility for a case among several claims adjustors) and high turnover in insurers' workers' compensation staff contribute significantly to this problem.

Recommendations:

1. **Revise and distribute the *Employer's Guide to Workers' Compensation*.** In collaboration with the Advisory Council and other participant representatives, the Department should revise the "Managing Your Injuries" section to suggest immediate and sustained contact with injured workers to ensure that they are receiving medical care and benefits due. Revise the "Vocational Rehabilitation" section to encourage temporary or ongoing job modification to get recovering employees back to work.

2. **Increase the number of seminars on Workers' Compensation issues offered by DIA to employers, labor representatives, insurers and attorneys.** Involve regional office managers and staff in seminar planning. Recruit outstanding members of each group to speak to their peers about systemic issues, DIA law and regulations. Make DIA representatives available to answer questions at every seminar.

3. **Create DIA awards for employers, labor organizations, insurers, attorneys and medical providers, to recognize outstanding practices and programs that help prevent disputes.**

Finding Three

1. DIA's collection of information from parties, particularly collection of first report, claim, discontinuance, and insurer voluntary payment forms, is inadequate. Our interviews confirm the indication in the Advisory Council's FY1990 Report that a large number of cases are reaching conciliation and conference without one or more of these forms.[3] Although the Department seems to be making strides toward enforcement of first report requirements, enforcement of other documentation requirements is not as consistent. Further, information which is collected is not consistently entered onto DIAMETER. Inconsistent documentation and data entry compromises both statistical analysis and the activities of dispute resolution staff.

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[3] See Workers' Compensation Advisory Council Final Report, FY 1990, pp.19-20, and Table 5, p.59.

2. The exchange of case records and documents among DIA's claims administration unit and dispute resolution units (conciliation and DDR) is erratic. There is little internal understanding or agreement among claims administration, conciliation and DDR on which unit or individual has responsibility for transferring case files. The result is a steady pattern of lost forms and documents.

Recommendations:

1. **Review current data entry procedures and work with EDP staff to ensure that information received is entered consistently and accurately onto DIAMETER.**

2. **Restructure record-forwarding system to ensure that all relevant forms and documents received by DIA are transferred to the appropriate dispute resolution staff in a timely fashion.** No one unit is responsible for this problem; addressing it will require changes to the record-keeping and transfer system as a whole. (See also recommendations on regionalization of filing system, Section III, page 11)

D. Conciliation

Goals:

The conciliation process gives the parties an opportunity to exchange information and resolve disputed issues themselves, in a time- and cost-efficient way. To be successful, the process must:

- identify the issues in dispute;
- facilitate parties' exchange of all relevant information about the issues;
- encourage discussion of possible areas of agreement (e.g. on liability, disability, earning capacity etc.);
- clarify the strengths and weaknesses of the parties' positions on those issues which cannot be resolved;
- ensure that cases which cannot be resolved by conciliation proceed to conference in a timely fashion, and that the judge will have all relevant

information (including documentation and the conciliator's recommendation) prior to the conference.

Our list of goals suggests that the conciliation process depends heavily on the dispute resolution skills and powers of the conciliator and a serious effort by the parties to resolve disputed issues.

Based on our interviews and review of statistical data, conciliation appears to be achieving some of its goals some of the time. The vast majority of issues can be resolved or substantially narrowed at conciliation, if parties are prepared to work and conciliators have the skills and powers to help them.

Currently, approximately 40% of cases where both parties appear at conciliation do not go forward to conference.[4] While we believe that conciliation is fundamentally an asset to the dispute resolution process, its effectiveness is compromised by several factors identified below. Our recommendations aim to:

- give conciliators some additional discretion to promote the resolution of disputes; conciliators currently do not have power to issue binding orders (see also Demonstration Project 3, page IV - 28);
- change parties' attitudes and expectations of the conciliation process; and
- raise the percentage of cases resolved at conciliation, while allowing highly complex disputes to move rapidly to conference if necessary.

Finding One

1. The time lag from conciliation to conference creates significant disincentives for parties to come prepared to resolve issues at conciliation. This lag contributes to a vicious cycle: experienced attorneys and claims adjustors expect a significant percentage of cases not to resolve at conciliation; they do not provide full documentation (especially medical reports) at conciliation because they do not want to pay the additional expense to update it for conference; consequently, conciliation becomes a *pro forma* step toward conference, rather than a significant dispute resolution opportunity. This attitude in turn contributes to excessive

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[4] This figure qualifies the "50% resolved" statistic often referred to by DIA staff and system users. Since approximately 23% of cases referred to conciliation in FY1990 were withdrawn by the parties or DIA, adjusted or requested lump sum prior to conciliation, or referred to DDR without conciliation, the resolution rate for cases where both parties appeared for conciliation in FY1990 was roughly 40%. This calculation is based on data from the Advisory Council FY1990 Final Report, Appendix F, "Conciliation Statistics."

rescheduling and lateness: when claimants' and insurers' representatives overbook, they often fail to appear for conciliation meetings.

2. Some conciliators are not making full use of their authority to require that parties make a serious effort to resolve issues at conciliation. Conciliators currently have statutory authority to hold cases until the moving party appears and provides requested information, and to refer cases to DDR when responding parties do not appear or have settlement authority (Sec. 10(2) and 10(3)). Many conciliators take full advantage of their statutory powers; others, however, do not. Our interviews suggest that some conciliators do not fully understand their authority, while others do not see themselves as active "gatekeepers" with responsibility to promote full exchange of information and sincere efforts by the parties to narrow and resolve issues.

   If conciliation can reduce the percentage of cases referred for conference, we believe the time delay between conciliation and conference will also be substantially reduced. In addition, research and demonstration projects by the American Bar Association suggest an additional advantage of focusing resources on conciliation: relatively "young" disputes generally require less investment of time, effort and dollars to resolve than disputes which have "aged."[5]

Recommendations:

1. **Encourage conciliators to perform the role of "gatekeeper." Develop clear guidelines for conciliators' use of their statutory authority to hold and to forward cases.** The guidelines should address documentation, appearance and settlement authority. They should be developed by the Conciliation Unit DDR managers and AJs working together (see Section III B above for recommendation on incorporating Conciliation Unit in DDR).

   1:1 **Develop a DIA checklist itemizing the documents which must be produced by the moving and responding party for each claim or complaint issue** (e.g. wage statements for average weekly wage disputes; recent medical reports for disability disputes, etc.).

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[5] ABA research results reported by Lawrence Wray, Esq., Executive Director, Standing Committee on Dispute Resolution, American Bar Association.

1:2 **To reduce no-shows, develop and enforce guidelines on parties' requests for rescheduling, and guidelines on withdrawal and forwarding of no-show cases.** We acknowledge and encourage the efforts the conciliation unit is already making in this area.

1:3 **To reduce appearances by representatives without settlement authority, clarify and enforce guidelines on withdrawal and forwarding of cases where representatives do not have adequate settlement authority.** The guidelines should distinguish power of attorney from actual case settlement authority.

2. **Encourage conciliators to require additional conciliation meetings, reschedule meetings, and increase the time for meetings as appropriate to resolve disputed issues.** Inform parties of their right to appeal to the Conciliation Manager if aggrieved by the conciliator's requirements, and their responsibility to state the basis for their grievance.

2:1 **Improve coordination between Claims Administration and Conciliation to ensure that conciliators have copies of all relevant forms filed with DIA prior to conciliation.** Conciliators currently must take on faith representations by the parties that they have filed the required forms (see also Initial Contact and Entry finding #3, page IV - 7, and recommendations 3:1 and 3:2, page IV - 8).

2:2 **Encourage conciliators to use their telephones to inform parties about missing documents and discuss case issues.** Upgrade the telephone system to allow conciliators to set up conference calls with two or more parties.

Finding Two

1. Due to the "loop-back" phenomenon (filing of new claims and complaints arising from accidents already in the dispute resolution system), conciliators are expending time to meet with parties on issues which could be joined to existing cases. Our statistical sample indicates that approximately 5% of all claims and complaints filed arise inappropriately from existing cases (see also findings and recommendations on the loop-back in Section III D, Management of Information).

2. Conciliators currently feel obligated to meet with parties on highly complex cases that are clearly not amenable to conciliation. Because conciliators currently do not have adequate case information before meeting with the parties, they cannot identify and refer highly complex cases.

Recommendations:

1. **Provide conciliators in each office with access to a computer for review of DIAMETER case data.** Several computers could be shared among Boston conciliators. Access to DIAMETER will allow conciliators to review new cases to see whether they should be joined with existing cases elsewhere in the system.

2. **Develop criteria for conciliators to identify cases which should be referred to conference without conciliation, and allow conciliators to refer these cases based on a review of written materials only.** (For the most complex cases, we assume that only a brief review will be necessary before referral.) The effectiveness of this policy will depend heavily on timely and complete transfer of records from Claims Administration to Conciliation.

Finding Three

In the Boston and Fall River conciliation units, there are serious privacy and space problems. The Boston conciliators' area is completely transparent to sound, undermining the confidentiality of discussion and often making it difficult for conciliators or parties to concentrate. Further, parties waiting for conciliation in Boston often stand directly outside the conciliators' offices, contributing to the noise and privacy problems. In Fall River, conciliation suffers from more general space problems.

Recommendations:

1. **In all offices, enforce the DIA rule that parties must wait in the reception area. Improve coordination among parties, receptionists and conciliators so that conciliators are notified promptly when all parties are present.**

2. **Upgrade the Boston conciliation area to ensure confidentiality and reduce noise.**

E. Conference and Hearing

Conference Goals

The conference is designed to resolve issues which were not resolved at conciliation. To be successful, the conference must:

- review information provided at conciliation;
- review any information that was not available to the parties at the time of conciliation;
- give the parties an opportunity to resolve their dispute informally, with the assistance of the AJ acting as mediator and case evaluator;
- give the parties a clear evaluation of the facts and legal merits of their case;
- if necessary, produce an order based on an adequate review of the case by the AJ.

The conference stage of the dispute resolution system should provide a useful opportunity for parties with strong disagreements to "reality-test" their arguments with someone who has the power to issue a binding order. Theoretically, a large percentage of disputes should resolve at conference without a written order. Parties who receive an order should be satisfied that they have had a fair review. They should be convinced that there is no reason to appeal their case unless significant new information appears after conference (e.g. a medical relapse, new evidence on earning capacity, etc.).

Hearing Goals

As with conference, the goal of the hearing process should be to resolve issues that could not be resolved at earlier events. To be successful, the hearing must:

- review information provided at conference;
- provide for review of any information that was not available to the parties at the time of conference, or information requested by the judge in preparation for the hearing;
- give the parties another opportunity to resolve their dispute, with the assistance of the AJ acting as case evaluator and mediator;

- if necessary, produce a decision based on an adequate review of the case by the AJ.

Since the goals of conference and hearing are nearly identical, only those cases with great legal and/or factual complexity should require the formality of a hearing process. If conference is reaching its goals, only a small proportion of cases should be proceeding to hearing.

Conference is generally an effective dispute resolution event; approximately 70% of cases referred for conference are resolved prior to hearing.[6] But the time required to reach conference after conciliation is unacceptably high, currently averaging approximately 6 1/2 months statewide.[7] Hearings are also effective in resolving disputes (approximately 70% of hearing decisions are not appealed [8]), but the time from close of hearing to issuing of decisions is excessive.[9]

Finding One

The current conference and hearing scheduling procedure provides standardized assignment of cases to judges, but it does not give judges enough discretion to manage their case loads for maximum efficiency.

Recommendation:

1. **Review and revise case scheduling procedure for judges.** Representatives of the judges, Director of DDR, the DDR Operations unit, Conciliation and Claims Administration and Regional Managers should all participate in this review. Ideas for consideration include the following:

   1:1 allow judges to manage the scheduling of an assigned case load from conciliation through conference and, if necessary, hearing. Some pilot demonstration of this may be necessary. While such an experiment would clearly identify potential difficulties and individual variations in case load management, it would also illustrate the feasibility of judicial case management of specific assigned loads;

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6 This estimate is based on data from the Advisory Council FY1990 Final Report, p. 31, and on estimates provided by DIA managers based on judges' current caseloads for conference and hearing.

7 Median time from conciliation to conference = 202 days. Data from DIA DIAMETER Report 391: "Case Timeframe Statistics for Events Starting from 1/1/90 to 5/30/91."

8 A significant number of appealed decisions are resolved prior to Reviewing Board review, but many may resolve simply because of the delay between decision and Reviewing Board review. Data on decisions appealed from Advisory Council FY 1990 Final Report, p.33.

9 DIAMETER data indicate that the median time from close of hearing to decision was 50 days for hearings closed between 1/1/90 and 5/30/91.

1:2 revise the conference scheduling process so that all cases referred from conciliation are scheduled to be conferenced within 3 months after referral;[10]

1:3 revise the judges' conference cycle so that it matches the anticipated flow of referrals from conciliation;

1:4 use recall judges if necessary to conference "conference backlog" cases (i.e. cases scheduled for conference prior to the effective date of any new scheduling process), because this provides a time-efficient point of intervention in the delay.

(See also our findings and recommendations on Management of the Dispute Resolution System, Section III A).

Finding Two

1. Judges often do not have adequate information when reviewing cases in preparation for conference. As noted above, problems with DIA's internal record-keeping and record-transfer system result in incomplete files being sent to judges; often the file contains only the initial case tracking sheet or a few of the documents submitted at conciliation, without the conciliator's recommendation. This lack of information means that judges spend a good deal of conference time obtaining background information from the parties.

2. Some judges do not actively promote settlement before issuing a conference order. Based on our interviews, it appears that some judges have not considered mediation or case evaluation as useful tools to resolve disputes at conference, while others are actively using them. Even judges who are familiar with mediation and case evaluation techniques and wish to use them are hindered by the short time allowed for conferences and by the public setting, which limits opportunities for confidential discussion between the judge and the parties.

3. Some judges are not maximizing the dispute resolution potential of their conferences before scheduling a hearing. Based on our interviews and observation of conferences, it appears that some judges are scheduling

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10 This "3 months" timeline is a proposed interim goal for the Department. Based on our research, three months appears to be an achievable goal, and a time frame which could alter participants' expectations and behavior. We encourage the Department to strive for the statutory 28-day timelines as a longer-term objective, but do not believe it is achievable within the next year.

hearings when all relevant information is not available on the day of conference, rather than holding the conference order or scheduling a second conference. This tendency creates more hearing events, which are more time-consuming for both the parties and the judges than conferences.

Recommendations: The Department should:

1. **Improve transfer of records from Conciliators to judges via Claims Administration.** (See also our recommendations on reorganization of the DIA record-keeping system, in Section III.A, and incorporation of the Conciliation Unit in the Division of Dispute Resolution, in Section III B.)

2. **Encourage and assist judges to seek informal resolution of disputes at conference.** Increase opportunities for training in dispute resolution techniques, peer discussion and dissemination of information about successful dispute resolution strategies.

3. **Encourage judges to reschedule conferences, schedule additional conferences and lengthen the time for conferences whenever there is a possibility of settling at conference, rather than issue orders or schedule hearings, which are more complex and time-consuming.**

4. **Change MGL Ch. 152 Section 13A to allow AJs to reduce attorney fees when appropriate.** Develop guidelines and criteria for reducing attorney fees.

5. **Enforce statutory penalties (under Sec. 14) on worker and insurer representatives who repeatedly fail to produce necessary information prior to conference.**

Finding Three

Some judges have difficulty writing decisions expeditiously. Our interviews with AJs and ALJs indicate that there is significant variation in judges' familiarity with legal writing methods, in their perception of how a written decision should address issues of fact and law; and in how long a decision should be. Some judges are very concerned about having their decisions overturned by the Reviewing Board. These factors contribute to the drafting of too-lengthy decisions, and to some judges' feeling that they must set aside a great deal of time to write each decision.

Recommendations:

1. **Provide judges with opportunities to sharpen their decision-writing skills.** The Department might offer in-house workshops led by senior judges or the Reviewing Board, and/or CLE time and funding for judges to attend workshops elsewhere.

2. **Clarify the Department's standards and expectations on how decisions should address issues of fact and law.** Representatives of the AJs, Reviewing Board and the Director of DDR should collaborate in defining standards and expectations.

3. **Consider the use of summary and short-form decisions for some cases.**

Finding Four

Some judges are not maximizing the potential of their secretarial staff to handle conference and hearing administration. While some judges use their secretaries to perform a variety of conference and hearing administration tasks (e.g. finding lost information, tracking information requested, filing case rescheduling forms, etc.), others tend to perform these tasks themselves, making inefficient use of the resources available. Secretarial management is complicated by the division of management responsibility among judges, the judicial support manager, and regional office managers.

Recommendation:

Encourage judges to use their secretaries for case administration. Encourage judges to contact the judicial support manager when they feel additional training or guidance will be useful for their secretaries, and when their secretaries have exceptionally high workloads. Allow the judicial support manager to assign work to secretaries during low-workload periods. We acknowledge and encourage the efforts that the judicial support unit is making in this area.

F. Reviewing Board and Lump Sum Settlement

Goals:

The Reviewing Board is the ultimate appeal for parties unable to resolve their disputes at earlier stages of the dispute resolution process. Under current statute, it also reviews proposed lump sum agreements to confirm that they are in the best interest of the worker.

To accomplish its appeal review goals, members of the Reviewing Board must:

- review the issues raised by appellants;
- provide oversight of AJ decisions to ensure that parties have received a full and fair hearing and a well-founded decision;
- return decisions to judges for further findings of fact if necessary; and
- issue a Reviewing Board decision, if necessary.

To accomplish its current lump sum review functions, Board members must:

- confirm that the worker understands the economic (and possibly medical) trade-offs involved in the settlement; and
- reject the settlement if it is not in the best interests of the worker.

Finding One

The Reviewing Board is experiencing severe and increasing delay in disposing of cases appealed from hearing. The Reviewing Board is currently reviewing cases approximately 2 1/2 years after appeal from hearing. The Board's backlog is increasing by approximately 100 cases annually; in FY 1991 the Board estimates it will dispose of 345 cases; and there are 1,279 cases pending.[11] The recent departure of one member and the upcoming expiration of all three remaining members' terms will further compound the current backlog.

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[11] Data on time scale of backlog and increase in number of cases for review were provided by members of the Reviewing Board. Data on cases resolved in FY 1991 and cases pending was provided by the Reviewing Board via the DDR Operations unit.

Recommendations

1. **Consider adding two ALJs, in order to double the number of panels for review of appeals.** If, however, the ALJs are no longer required to review lump sums, there might not be a need to increase the number. Other options include using AJs as members of reviewing panels, and using recall judges to eliminate some or all of the backlog.

2. **Consider limiting the Reviewing Board to review of issues of law and oversight of AJ decisions.** It is not entirely clear that fact-finding is the source of delay in reviewing cases, nor that limiting the Board to reviewing issues of law will expedite ALJs' decisions, but it may be that some percentage of cases hinging on issues of fact are being appealed, and would be eliminated by narrowing the Board's scope.[12]

3. **Consider ways to expedite review of appealed cases, such as increased use of pre-hearing conferences and expanded use of law clerks.** ALJs, AJs and DDR managers should collaborate to seek expedited review procedures. The ALJs are beginning to experiment with pre-hearing conferences, which appear to be successful in resolving a significant number of cases. Law clerks have been helpful for researching case precedents and other case review tasks; the Department should encourage recruitment and consider expanding their use.

4. **Encourage the Reviewing Board to issue short-form decisions when affirming AJ decisions.**

5. **Put ALJs on the DIAMETER system to facilitate electronic transfer of case-related documents, and to incorporate Reviewing Board case dispositions in DDR statistical reports. The Department should also encourage ALJs to collaborate more closely with the AJs in policy and day-to-day case management.**

Finding Two

1. The Reviewing Board has been overwhelmed by the demand for lump sum conferences (over 15,000 in FY 1990). Despite the new DIA practice which allows AJs to recommend approval of lump sum agreements for formal approval by the ALJs, Board members are still spending two days a

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[12] The Advisory Council's 1990 Final Report does not indicate any increase in cases appealed from hearing after the SJC's November 1988 decision on Lettich's Case: 497 appeals were filed in FY 1988; 477 in FY 1989, and 465 in FY 1990. See Advisory Council FY 1990 Final Report, Appendix L.

week on lump sum reviews and conferences. In FY 1990, they approved 99% of lump sum agreements they reviewed. Based on discussions with the ALJs, the AJs, senior employer and worker representatives and senior DIA managers, we are persuaded that the ALJs should not be used to review lump sum settlements (except perhaps by special request of a party).[13]

2. Mandatory meetings with disability analysts and reports from disability analysts are widely perceived as unhelpful to workers and judges. Statistical data and interviews indicate that very few workers change their minds about proceeding with a lump sum as a result of the mandatory meetings.[14]

   The lump sum review process is designed to safeguard the interests of workers. While acknowledging the legitimate concern of workers and their representatives about the complexity of financial and legal issues involved in lump sum agreements, most of the people we interviewed, including several labor representatives, do not feel the current procedures are helpful.

Recommendations

1. **Remove the statutory requirement for the Reviewing Board to review lump sum agreements.** Develop guidelines allowing AJs to review all lump sum agreements. In line with certain pending legislation, consider allowing judges and conciliators discretion to review agreements below a certain dollar threshold based on written documentation, if an attorney has filed, and an affidavit has been submitted; AJs could be required to hold a conference with the parties to review settlements above this dollar amount. AJs and DDR managers might designate some AJs as "lump sum specialists," particularly for Sec. 15 lump sums (to indemnify 3rd party liability.)

2. **Make worker meetings with disability analysts voluntary, but allow judges discretion to require a meeting with disability analysts in cases where a worker does not appear to be fully informed.** Allow judges discretion to require a report from the disability analyst.

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[13] Figures for lump sum conferences held and percentage approved from Advisory Council FY 1990 Final Report, p. 37 and Appendix L. Estimate of days per week spent on lump sums based on interviews with Reviewing Board members.

[14] 3.7% of requests for lump sums were withdrawn by a party in FY 1990; the percentage withdrawn by the worker is not recorded. From Advisory Council 1990 Final Report, p.27.

G. Recommended Demonstration Projects

We recommend that DIA use demonstration projects to test three additional dispute resolution procedures:

1) AJ-conciliator joint case management;

2) "Final offer" procedures for resolving earning capacity and medical disability disputes; and

3) Limited binding order power for conciliators.

A number of system participants have proposed immediate implementation of one or more of these procedures. We are only recommending them as demonstration projects for three reasons. First, if our numerous recommendations on system management and the stages of dispute resolution are implemented, there may be no need for these additional procedures. Second, there is less consensus among system participants and within DIA on these additional procedures than on most of our recommendations. Third, they may require temporary waiver of certain regulations and some discussions in the context of collective bargaining. Many of those we interviewed had specific concerns about one or more of the procedures, which we have noted in our discussion below. Despite these concerns, each of the proposed demonstrations has merit and should, we believe, be explored.

Well-managed demonstration, monitoring and evaluation of these procedures, rather than immediate adoption or rejection, will be most useful to the Department and system participants. We strongly recommend that the Department use an outside body to establish evaluation guidelines, gather data during the project, and report findings to the Department. One option would be for the Advisory Council to sponsor independent evaluations of such projects.

We have identified the problem each demonstration is designed to address, the project goals, the actual procedure involved, key considerations, and suggestions on evaluation.

I. AJ-Conciliator Joint Case Management

Problem: Conciliators and AJs do not currently coordinate their management of disputed cases, which often leads to duplication of effort for both DIA staff and disputants. Further, disputants are less inclined to make a serious effort at

conciliation if they believe that an AJ is likely to read the facts of the case differently at conference.

Demonstration goals: The demonstration should test three propositions:

- Teaming AJs and conciliators may result in more appropriate management and earlier resolution of cases;
- Teaming improves disputants' satisfaction with case process and outcome;
- Teaming improves productivity and job satisfaction for AJs, conciliators, and related support staff.

Procedure: We recommend conducting this demonstration over a minimum of 12 months with a sub-set of AJs and Conciliators. Prior to the start of the demonstration, the Department should consult with experienced DIA staff and system users to refine the proposed procedure. All DIA staff and system participants should be notified about the demonstration project at least one month before the start date. The demonstration would proceed as follows:

1) AJ-conciliator teams are selected by the Conciliation Manager and the Director of Dispute Resolution to reflect the range of experience and training in the two groups. (We recommend involving all conciliators and judges at two regional offices, and a subset of conciliators and judges at the Boston office.) Judges and conciliators who decline to participate would be assigned to a control group. Participants who have career advancement opportunities within the DIA during the demonstration should be able to leave the project if necessary. Otherwise, we recommend that participants commit to their team assignments for the duration of the demonstration.

2) Prior to the start of the demonstration, all AJ-conciliator teams meet together to develop a shared approach to case management. Based on this meeting or meetings, conciliators and AJs should have a clear sense of how they will review each type of claim and complaint. The conciliator will use this information when advising parties at conciliation. The conciliators and AJs also develop guidelines on scheduling cases for conference after referral from conciliation (assumes implementation of our recommendation to give judges responsibility for scheduling their cases – see Recommendation 1:1, page IV - 14).

3) When a case is first scheduled for conciliation, it is randomly assigned to an AJ-conciliator team. The same AJ will have jurisdiction if the case proceeds to conference and hearing.

4a) Prior to conciliation, the conciliator generally will not consult with the AJ about a case, unless the conciliator feels that some aspect of the case documentation is exceptionally unusual or raises an especially complex issue.

4b) At conciliation, the conciliator tells the parties which AJ is assigned to the case. The conciliator also tells the parties that if they are unable to resolve the dispute at conciliation, s/he will be making a recommendation to the AJ on when the case should be scheduled for conference. The conciliator may discuss the AJ's general approach to the disputed issue(s), based on his/her experience working with the AJ.

5) If the case is not resolved at conciliation, the conciliator has responsibility for ensuring transfer of the complete case file, including documents and recommendation, to the AJ. (The conciliator might personally transfer the file, or confirm transfer by Claims Administration staff, etc. Whatever procedure is used, it should be standardized and made explicit to all units and offices involved in the demonstration.)

6) Prior to scheduling a conference, the AJ reviews the conciliator's recommendation, including the recommendation on when the case should be scheduled for conference. The judge may ask the conciliator for additional information or clarification on the case. To respond to the AJ's request, the conciliator may review the file and/or contact the parties directly. Based on his/her review of the case file and any additional information provided by the conciliator, the AJ schedules the case for conference.

7) If the case does not settle at conference, the conciliator generally will not be involved further.

Key considerations and suggestions for evaluation:

a) Determining the effect of teaming on early dispute resolution

AJ-conciliator teaming is expected to increase the percentage of cases resolved at conciliation, and to decrease the number of outstanding claims/complaints in cases that must be referred to conference. Since AJ-conciliator teaming is only one potentially significant factor in dispute resolution, and some team activities may be more useful than others, careful data-gathering and analysis will be necessary to determine teaming's actual significance.

Suggested evaluation: Participating conciliators and AJs briefly note their case-related activities for each case. A control group of non-participating conciliators and AJs keeps similar notes. The independent evaluator develops a database of the cases the participants and the control group are working on, indicating for each case the issues involved, which issues are resolved at each stage of the dispute resolution process, and all factors that may influence resolution, including AJ-conciliator team activities. The database should include both quantitative and qualitative data (e.g. observation of events, interviews, review of notes, etc.).

At the end of the demonstration, evaluators should compare the resolution of issues by the AJ-conciliator teams to resolution by the control group (after screening cases to maximize the comparability of the sample), to determine teaming's possible impact, and to identify which specific activities are the most effective in producing settlement.

b) Determining impact of teaming on disputants' satisfaction with case process and outcome.

Suggested Evaluation: Disputants whose cases are managed by AJ-conciliator teams should be asked to indicate their satisfaction with case outcomes. Questionnaires should explore both qualitative and quantitative responses, and a random subset of disputants should be interviewed to clarify questionnaire responses. A control group of disputants should be asked the same questions in the same way.

c) Determining impact of teaming on DIA participants' productivity and job satisfaction.

A number of AJs and conciliators whom we interviewed were concerned about the potential for interpersonal dynamics to limit team effectiveness. While we understand these concerns, we believe that it is worthwhile to conduct the demonstration even if not all teams are equally enthusiastic about their partnerships. *Ad hominem* concerns should not dictate departmental procedures Careful selection of AJ-conciliator teams, and the initial option to decline to participate, should minimize the potential for interpersonal problems. If such problems do arise during the course of the demonstration, DIA participants should contact the evaluators. The evaluators should conduct a confidential interview, identify the perceived problem, make suggestions for resolving it, continue to monitor the situation, and record their observations.

Suggested evaluation: At the six-month mark and at the end of the demonstration, evaluators should conduct a confidential survey of DIA participants, seeking both narrative and quantitative assessments of the way teaming has affected productivity and job satisfaction. A control group should be asked the same questions in the same way.

Based on their survey and interview data, the evaluators should identify the factors which make for good AJ-conciliator teams. While a sample this small cannot predict all the criteria for effective teams, it should be sufficient to determine whether the team approach should be adopted as part of DIA dispute resolution management.

II. "Final Offer" Procedure to Resolve Earning Capacity and Medical Disability Disputes

Problem: Parties often propose dramatically different estimates of a worker's earning capacity and extent of medical disability. They tend to use medical reports from "employee" or "insurer" physicians who may favor their respective interpretations of the facts. Parties have few incentives to base their proposals on a thorough analysis of the worker's earning potential and unbiased physician determination of medical disability. Reviewing the other party's extreme earning capacity proposals and biased medical reports further polarizes the issues. Therefore, neither party is satisfied when conciliators recommend or judges order a compromise between their proposals.

Demonstration Goals: The "final offer" procedure would require the judge to choose one party's proposed resolution, without authority to compromise between them, as the decision. This procedure is designed to encourage each party to be more moderate than the other in its offer, in hopes that the judge will select their offer as the more reasonable. It has been used successfully in a variety of contexts, including collective bargaining and commercial arbitration.[15] The Wisconsin Workers' Compensation System currently uses a final offer procedure for medical disability disputes, with considerable success.[16]

We note that an alternative procedure--mandating use of a single medical report from an impartial physician chosen by the parties or the judge--has also been proposed. While we believe this procedure has some potential, our interviews

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15 See Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved* (San Francisco: Jossey-Bass Publishers, 1988), pp.57-8.

16 See Boden, L.I., *Reducing Litigation: Evidence from Wisconsin* (Cambridge, MA: Workers' Compensation Research Institute, 1988). Wisconsin uses a standardized rating system for physicians to use when determining medical disability.

suggest that very few physicians are seen as impartial by both workers and employers. Given this problem, it seems more workable to try the proposed final offer demonstration, which leaves the choice of physician up to the parties. If this demonstration does not achieve its goals, the Department may wish to consider further exploring the impartial physician model.

The final offer demonstration would apply to a test set of cases involving earning capacity or medical disability disputes. A group of AJs designated by DIA would administer the procedure. The demonstration should test whether use of this procedure:

- Promotes earlier resolution of earning capacity and medical disability disputes;
- Increases parties' satisfaction with case process and outcome;
- Increases DIA staff productivity by reducing time spent considering earning capacity and medical disability issues.

Procedure: We recommend conducting this demonstration over a minimum of 24 months. Prior to the start of the demonstration, the Department should consult with experienced dispute resolution system designers and experienced DIA staff and system users to refine the proposed procedure. All DIA staff and system participants should be notified about the demonstration project at least one month before the start date. The demonstration would proceed as follows:

1) The Department develops guidelines describing the procedure and detailing requirements for the submission of last offers and supporting documentation.

2) The Director of Dispute Resolution designates AJs in two regional offices and a subset of the Boston office to participate in the demonstration. (The designated AJs should be representative of the full set of AJs in terms of experience in DIA and other important characteristics.) The Department briefs designated AJs on the procedure.

3) DDR reviews cases referred to designated AJs to identify cases involving earning capacity and/or medical disability issues. DDR sends guidelines explaining the final offer procedure to the parties prior to conferences with the designated AJs. Use of the procedure is mandatory for these cases.

   There is some evidence that when final offer systems are introduced without extensive education of system users, confusion and unrealistic

expectations may lead to extreme disparities between offers. When this occurs, judges must essentially choose between one injustice and another. Therefore, we strongly recommend extensive outreach to employer and worker representatives who may be required to use the final offer procedure. The Department, in cooperation with the Massachusetts Bar Association, should also offer training sessions for attorneys to practice using this procedure.

4) If parties are unable to resolve earning capacity and/or medical disability disputes at conference in the usual way, the designated AJ would require them to submit an offer proposing an earning capacity and/or specifying the nature and extent of medical disability, and providing supporting documentation (e.g. labor market survey data, medical report, etc.). The parties may discuss their offers with the AJ and/or each other prior to submitting them.

   We do not think it makes sense to prohibit parties from discussing their offers, since discussion may lead them to discover that the difference between offers is small enough for mutual compromise to bridge the gap.

5) The AJ reviews the offers and chooses one of them as the basis for the order.[17]

   If parties are required to use DIA guidelines to document earning capacity and medical disability, the AJ's review process will be considerably simplified. The AJ will need to review each party's documentation of the facts. Assuming that the presentation of the facts is accurate, the AJ must only decide whose interpretation of the facts is more reasonable.

6) Parties who have submitted offers may appeal a conference order, but may not submit new offers at hearing unless there is new evidence to support them. (The Department should develop clear guidelines on what constitutes new evidence.)

Key considerations and suggestions for evaluation:

a) Determining the effect of final offer procedure on dispute resolution

Suggested evaluation: As with all pilot programs, the key is to isolate the effect of the final offer procedure from other factors that may affect dispute

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[17] In Wisconsin, judges are allowed to modify the bids by +/- 5%, but no higher than the highest offer, nor lower than the lowest offer.

resolution. The evaluators should develop a database of case information for final offer cases, and for a control group of cases involving earning capacity and medical disability issues. At the end of the demonstration, they should compare the two sets of cases (after screening to maximize comparability) to determine the effect of the final offer procedure on the timing of case outcomes.

b) Determining the effect of final offer procedure on parties' satisfaction with case process and outcome

Suggested evaluation: Parties who participate in the final offer demonstration project should be asked to indicate their satisfaction with case process and outcome. Questionnaires should ask for both qualitative and quantitative responses, and a random subset of parties should be interviewed to clarify their questionnaire responses. A control group of parties with earning capacity/medical disability disputes who do not use the final offer procedure should be asked the same questions in the same way.

c) Determining the effect of final offer procedure on DIA staff productivity

It is not clear whether the final offer procedure will save time or effort on the part of AJs. As noted under Procedure step 5 above, the AJ's review process should be somewhat more straightforward if parties are required to submit standardized documentation to justify their earning capacity and medical disability proposals. On the other hand, the need to choose one of the proposals may lead AJs to scrutinize both proposals more carefully than when they have discretion to order a compromise.

Suggested evaluation: AJs participating in the demonstration should briefly note case-related activities and time spent for each final offer case. Evaluators should compare these time records to the records of an AJ control group for comparable cases. Evaluators should be able to determine time savings, if any, from using final offer procedure. The evaluators should also seek qualitative assessments of the final offer procedure from AJs involved in the demonstration, particularly on whether they feel compelled to spend more time reviewing offers than they did when they had discretion to order compromises.

III. Limited Order Power for Conciliators

Problem: The Department currently is unable to make early, binding decisions on cases involving minor issues (e.g. small dollar claims/ complaints) and cases where one party's position is clearly untenable.

This problem arises primarily from the long time lag between conciliation and conference, and from the lack of clear DIA guidelines on what documentation it will require parties to submit in support of their claims/complaints. Our recommendations suggest ways to reduce the time lag and to screen out cases where one party cannot provide documentation to support its position. If they are implemented, we believe that there will be significantly less need to give conciliators order powers.

If our recommendations are not implemented, or if they are not successful in addressing the source of this problem, then a demonstration project which tests limited order power for conciliators may be appropriate. It should be noted that if fully adopted, this shift in conciliator responsibilities would require statutory change.

Goals: The demonstration project should test whether increasing conciliator authority for certain types of disputes:

- Leads to earlier resolution of disputes in a fair and equitable manner;
- Increases parties' satisfaction with case process and outcome;
- Increases conciliator and AJ productivity and job satisfaction.

Procedure: We recommend conducting this demonstration over a minimum of 12 months. A representative group of conciliators would use the procedure on some of the cases assigned to them, as follows:

1) Conciliation Manager and Director of Dispute Resolution, in consultation with conciliators, AJs and the Advisory Committee, develop guidelines specifying the issues on which conciliators will have authority to issue orders. We recommend that the Department consider order power for the following issues:
   - payment of medical bills and attorney fees;
   - average weekly wage determination;
   - penalties for no-show, inadequate documentation and inadequate settlement authority;
   - Sec. 36 compensation;

   and possibly other relatively well-defined issues.[18]

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[18] It is possible that the Department would have to utilize Regulations allowing conciliators to exercise order power authority on a temporary basis for the purpose of such a demonstration program.

2) Conciliation Manager selects conciliators from two regional offices and a subset of the Boston office to participate in the demonstration. (The selected conciliators should be representative of the full group of conciliators in terms of DIA experience and other important factors.) Conciliators are trained to use the new authority according to the guidelines. AJs could be used to help train conciliators.

3) Prior to meeting with participating conciliators, parties receive information explaining order power procedure. The Department should also provide training for attorneys who wish to practice using the procedure.

4) At conciliation, participating conciliators will have authority to issue orders on all issues specified in the demonstration DIA guidelines. The conciliators may use this order power authority to resolve specified issues when parties are unable to reach agreement. Conciliators may also choose not to use order power. Conciliators' orders are written, distributed to parties, copied for DIA file and recorded in DIAMETER.

5) Parties who are not satisfied with conciliators' orders may appeal them within a limited period. Appellants must state the grounds for their appeal, and enclose a copy of the conciliator's order with the appeal.

6) At conference, AJs have full discretion to modify conciliators' orders, if the evidence produced at conciliation (or new evidence not available at the time of conciliation) documents the need for such a change. Judges are encouraged to affirm conciliator's orders under any other circumstances. When modifying a conciliator's orders, AJs note the basis for the modification. A copy of the note is forwarded to the conciliator and to the Conciliation Manager.

7) The Conciliation Manager meets periodically with participating conciliators to review the demonstration, and to identify and resolve problems if necessary.

Key considerations and suggestions for evaluation:

a) Determining the effect of order power procedure on dispute resolution

Suggested evaluation: As with the other demonstrations, the key is to isolate the effect of the order power procedure from other factors that may affect

dispute resolution. The evaluators should develop a database of cases where the conciliator uses order power, and a control group of similar conciliated cases where the conciliator does not use order power. At the end of the demonstration, they should compare the two sets of cases (after screening to maximize comparability) to determine the effect of the order power procedure on case outcomes. Adoption of such a procedure would require statutory change.

b) Determining the effect of order power procedure on parties' satisfaction with case process and outcome

Our experience as mediators and arbitrators leads us to believe that the non-coercive aspect of conciliation promotes free exchange of information and creative thinking about ways to resolve disputes. A possible problem is that the higher degree of authority may make parties hesitant to speak freely and frankly, and consequently hinder the effectiveness of conciliation more than order power helps it.

Suggested evaluation: Parties who participate in the order power demonstration project should be asked immediately after resolution of the case to indicate their satisfaction with case process and outcome, and to indicate whether knowing that the conciliator had order power affected their behavior. Questionnaires should ask for both qualitative and quantitative responses, and a random subset of parties should be interviewed to clarify their questionnaire responses. A control group of parties with earning capacity/medical disability disputes should be asked the same questions in the same way.

c) Determining effect of order power on conciliator and AJ productivity and job satisfaction

A number of conciliators are frustrated by their lack of authority to issue binding orders on what they see as "open and shut" cases. Some AJs also feel that some cases should be resolved by an order at conciliation; others think it is not appropriate or useful for conciliators to have such authority. While we acknowledge both conciliators' and AJs' concerns, the major test of this procedure's success should be whether it decreases the percentage of cases referred and appealed to conference. Attention should also be given to the effects of the procedure on productivity and job satisfaction for both conciliators and AJs.

Suggested evaluation: Conciliators and AJs who are assigned order power cases should briefly note case-related activities and time spent for each order power case. Evaluators should compare these time records to the records of a conciliator/AJ control group for comparable cases. Evaluators should be able to

determine whether using order power saves time spent working on a case for either conciliators or AJs.

The evaluators should also seek qualitative assessments of the order power procedure from conciliators and AJs involved in the demonstration. Interviews with conciliators should seek to correlate the conciliators' strategies for using this authority with successful settlements. The interviews should explore conciliators' view of the types of issues, parties, and representatives that are more amenable to resolution when order power is used, and how they decide when not to use order power. Interviews with AJs should clarify what factors influence AJs' decisions to affirm or modify conciliators' orders.

SECTION V

APPENDICES

APPENDIX A

Comparison of Selected State Programs

APPENDIX B

List of Persons Interviewed

APPENDIX C

Documents Used

APPENDIX D

Note on Methodology

APPENDIX E

Recommended Legislative Changes

APPENDIX A

A COMPARISON OF SELECTED STATE PROGRAMS

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
CA	Injury report filing • Worker reports injury to employer. Employer reports injury to, and files claim with, insurance carrier. Insurance either accepts or rejects claim. Agency Response • If there is any type of dispute, any interested party can get help from an Information and Assistance Officer. IAO helps parties in fact-finding and informs parties of rights, benefits, and obligations. • Disputed case goes to Workers' Comp. Appeals Board (WCAB) where an ALJ holds a formal hearing. Within 20 days of decision, any party can file a Request-for-Reconsideration with a 7-member appeals board. 3 members hear request.--affirms decision or grants reconsideration. • Voluntary arbitration for any issue, and effective 1/1/90--mandatory arb. for some issues.	Workers' Comp. Consultant • Consultants are Info. and Assist. Officers. Officers: 1. assist and advise parties of rights, benefits, and obligations, 2. review and may audit medical reports, and comp. payments. Supervising W.C. Consult. • Supervises consultants and assists with complex and sensitive cases. Contact person with ALJ. ALJ • Presiding officer in judicial proceedings. • Must be member of The Bar with either 2 years exp. as DIA Attorney, or 5 years exp. practicing law. • Civil service appointments Judges may not receive salary as a WC judge while any case is pending and undetermined for 90 days after submitted for decision. Appeals Board • 7 member board. Governor appointees for six years (just increased from 4 years). 5 of 7 must be attorneys.	• Most workers with disputes are represented by attorneys. • Fees must be approved by ALJ--usually 9-12% of award. • Fee is paid from a worker's award. • Because medical and disability fees are set by schedule, ALJs cannot give workers higher awards to cover attorneys' fees. • A fee schedule is currently being developed for attorneys' fees.	• Workers can see doctor of their choice only if, prior to injury, the worker notified employer of that doctor's name. Otherwise, the employer must arrange for medical care. Employer's doctor does not have to be previously designated • Worker can choose own physician after first 30 days of care if additional treatment is required. • ALJ can request an independent review of the exam reports and makes final decision.	• Insurance companies are not required to make payments before a dispute is resolved. • Some workers are seeking benefits under independent insurance while claim is being disputed. If employer's insurance is found responsible for covering expenses and paying benefits to worker, ALJs are requiring that employer's insurance reimburse independent insurance co.	• IAOs audit medical bills and worker's comp. payments if requested, Department or any party may request an audit. • ALJs tend to limit their review of medical reports to one from each party. (Not a formal policy). • CA has a pilot program for a computerized case-tracking system. Dept. claims the system reduced time needed to perform clerical functions previously done manually. Workload backlogs were eliminated and employee morale increased. Statewide implementation of the system is expected to increase workloads without a proportionate increase in staffing. • Perception that current data may be unreliable--data has many sources (some computerized) non-computerized data may be unreliable because staff is anticipating new system.

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
CO	Injury Report Filing • Worker must report injury within 4 working days (45,403 claims in 1989). • Employer refers worker to doctor, or if employer agrees, worker can choose doctor at time of injury. • Employer files report within 10 days with insurance co. Insurance has 25 days to accept or reject claim. • If there is a dispute over any issue, any party may request either mediation or hearing. • Director of Div. of Labor can refer any case to a pre-hearing conference to take evidence.(92 pre-hearing conferences in 1990) Mediation • Mediator from Div. of Labor. Most are handled over the phone. Mediator may recommend, does not make decisions. If no agreement, either party can request hearing. Proceeding cannot be used as evidence in a hearing. (399 cases reviewed for ADR, 230 mediations, 219 resolved in 1990)	Mediator • Trained in Workers' Comp. issues • Does not make decisions, but can suggest agreements ALJ • Conducts informal settlement conferences • Conducts formal hearings • Decides cases Special ALJ • Special one-time appointment by Director of Div. of Labor from any court or any division for sole purpose of taking evidence for formal hearing.	• Most attorneys work on "contingency fee" basis. • Division of Labor, upon request, may review the reasonableness of the fee. 20% or less of the amount in dispute is considered reasonable.	• Insurance can request that the worker sees their doctor (at their expense). • Worker can change doctors only after requesting permission from the insurance company. Insurance company has 20 days to give or deny permission. Worker can request hearing to review insurance company's decision.	• Must accept or deny claim within 25 days. Payments begin after acceptance or dispute is resolved. • Must approve or deny a worker's request to see another doctor within 20 days.	• By requiring workers to obtain permission to change doctors, Colorado tries to make it difficult for workers to shop for doctors and thus prevent dueling doctor disputes. This, however, may make it difficult for workers to get necessary specialty care.

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
CO	Settlement Conferences • Informal hearing held by ALJ to discuss strengths and weaknesses of each party's position. Voluntary, all parties must agree to hold conference. Pre-Hearing Conference • Informal hearing to take evidence to ensure case is ready for hearing. Conducted by ALJ. Hearings • Formal legal proceeding with record taken. Conducted by ALJ. ALJ usually decides without lengthy opinion. (9,670 appl. for hearings in 1989, 3732 hearings held, 8,852 total appl. in 1990) Appeals • Party can appeal decision to Industrial Claims Panel within 20 days. 60 day time limit to review case (no hearing held) Can affirm decision or grant reconsideration. • Can appeal to Colorado Court of Appeals within 20 days of decision.					

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
CT	Injury report filing • Worker reports injury to employer. (50,822 reported accidents in 1990) Employer files claim with insurance carrier and Workers' Comp Commission. Employers have 28 calendar days to contest the claim. Employer response options • Employer issues voluntary agreement if employer and worker reach agreement on compensation. Commissioner's office must review agreement for compliance with statues before approval by a Commissioner. (25,719 voluntary agreements in 1990, 3,653 other stipulations) • If there is a dispute over any issue,either the employer or worker can request an Informal Hearing before a Commissioner. (43,684 informal hearings in 1990)	Commissioners • 13 total Commissioners--8 district,4 at-large, 1 Chairman • Impartial mediators and factfinders at Informal Hearings • Makes recommendations at Informal Hearings • Decides case at Formal Hearing • Administrative official nominated by governor, confirmed by legislature, serves a 5 year term and can be impeached. • As a group, the Commissioners have the power to adopt and change rules, methods of procedure, and forms. • Commissioners maintain list of approved doctors from which worker chooses initial treating doctor.	• The Workers' Comp. Commission does not usually encourage injured employees to retain an attorney; however, Commissioners inform workers of their right to legal counsel. • Attorneys are hired at the injured employee's own expense. Attorneys' fees are usually a percentage of the settlement, but no more than 20%. • Because medical and disability fees are set by schedule, Commissioners cannot give workers higher awards to cover attorneys' fees.	• Workers have the right to select their own doctor after receiving initial treatment from a doctor on Commissioner--approved list of doctors. • All examining doctors must give a report to the worker. Medical bills are sent directly to the insurance carrier and not to the claimant.	• Insurance companies are required to begin payments within 35 days of report of injury. • Insurance may make payment without prejudice for up to 6 weeks. • Insurance companies must continue payments during dispute over termination.	• CT, in their information brochures, encourages workers to avoid using attorneys. • Because the worker continues to receive benefits until the dispute is resolved, there seems to be little incentive for the worker to settle.

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
CT	• If the dispute is not resolved at the Informal Hearing, either party can request a Formal Hearing (2,676 formal hearings in 1990). • The same Commissioner who attended the Informal Hearing also presides over the Formal Hearing. The Commissioner's decision (award or dismissal) at the formal hearing is binding, can be appealed to Compensation Review Division, Appellate Court, then State Supreme Court. for award or dismissal decisions.(1,193 Awards/Dismissals) • To terminate benefits, the insurance company must file a notice of intent and medical report with the Commission, who then notifies the worker. Termination occurs 10 days after Commission approves and notifies worker. Worker can contest termination and request informal hearing.					

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
NY	Injury report filing • Mandatory filing with agency for employer, physician, carrier (after notice from employer or physician). Worker: • Notify employer in writing within 30 days of injury, 2 yrs. from occupational illness. Must miss 7+ working days due to injury. • File claim within 2 yrs. of injury. Carrier response options • Accept liability and begin payment . • Accept liability but withhold payment until compensable damage is documented (7+ lost work days and/or medical costs) • "Controvert" claim: refuse liability and submit reasons to agency. Claims handling by Agency • Claims Examiner: collects reports from all parties; monitors carrier response. • May seek to settle uncontroverted claims without AJ hearing (Motion Calendar)	Claims Examiners • Primarily administration. • May propose settlement of uncontroverted cases. • Low pay, tedious workload, high turnover. • Number of Examiners continually changes as staff are reassigned to cover backlog at different steps of process. Conciliators • Created by 1990 reform, must be attorneys, attempt to resolve less-complex cases. • Most system users feel unnecessary extra step. AJs (Referees) • Hear all controverted cases • Called "Referees" in statutes, Appointed as AJs. • Civil service after 1990 reform; previously political • Civil Service grade 28 ($52K start --$62K max) • Must be attorneys with 5 years trial experience.	• Fees set by AJ case-by-case--based on itemized attorney account of services rendered--not a percentage of award. • Paid from worker's settlement, not in addition to award No statute maximum--although feees are not determined as a percentages, they are generally around 10% for small awards (<$2000), smaller percentage for larger awards. • Claimants represented by attorneys in approx. 60% of cases. • Carriers represented by attorneys in higher-dollar cases • Small number of firms dominate WC practice; WC attorneys' salaries average over $100,000	• Physicians must be authorized for WC practice by county medical board • Fee structure set by WC agency; may not charge less; may petition for more • Worker may seek treatment from any WC physician. Carrier may request exam by own physician • AJ may request independ. physician review, but not bound by this opinion	• Carriers have some incentive to make initial payment • If carriers controvert initial payment and lose, they may not subsequently reduce payments without a hearing automatically scheduled by department. • If carriers make initial payment, and if claimant's doctor determines there has been no temporary or permanent disability, or if worker has returned to work, carrier may reduce or terminate payments without automatic hearing. Hearings requested by approx 20% of workers. • No incentive to accept hearing decision, may withhold payment pending Review Board appeal,but may be fined for blatant dilatory tactics. • Carriers also gain interest from assets held against claims.	• NY handled 210,000 claims in 1989, and held 610,000 conferences and hearings. • Starting the 1991 calendar year, NY had a backlog of 40,000 cases. No single step in the process has the greatest backlog. NY is understaffed--management continually reassigns staff to area with greatest backlog (staff constantly changing tasks) Conciliators and AJs not reassigned (backlog is before conferences). Aspects of the system that might apply to MA include • motion calendar: provides a way to screen out the cases that do not require hearing, allows examiner to expedite settlement, and preserves parties' rights to a hearing.

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
NY	Controverted Claims • Agency must schedule conference for all controverted claims. • *scheduling prioritized based on potential impact to worker* • no payments until AJ decision. • parties may submit settlement stipulation for AJ approval at any time Conference: • Administered by AJ • Fact-finding • Clarify witnesses and evidence for hearing • Schedule hearing within 20 days • Approx 90% resolved before hearing (10% go to hearing) Hearing: • Administered by AJ, Decides case, sets benefits-- Short form (fill in the blank style) for decisions No payment pending decision. • Less than 1% of hearing decisions are appealed.	Review Board (13 judges) • Political appointments • Assisted by review analysts who draft decisions • Review Board Chair appoints AJs.			• Carrier attorneys generally paid by appearance, not by case. • State Insurance (pool of last resort) handles about 40% of all claims (rising slowly)	• Attorney fee structure: case-by-case discretion is arguably better than a fee-per-appearance structure; dramatic variations in compensation and consequent judge-shopping are potential problems. • Case priority screening: promotes fast hearing for cases where workers are at risk. • Review analysts: expedite review and decision of cases by Review Board.

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
WI	Injury report filing • Worker reports injury. Employer submits injury report to carrier and agency within 4 days. Carrier response options • On 80% of number of all claims, insurance carriers are required to make first payments (without prejudice) within 14 calendar days. • For other 20%, more time can be spent gathering information. No time limit, rather time can be reviewed for "inexcusable delays." No review criteria Agency Complaint Handling • Complaining party files claim with department. Department notifies other parties within 20 days. A hearing is scheduled for all claims. • At any time, employer and worker can enter into a compromise agreement concerning the employer's liability and worker's benefits--must be approved by ALJ.	Hearing Examiners (ALJ) • Assists in Administration of Hearings • Approves compromise agreements • Hears disputed claims • Determines attorney's fees • Required to be attorneys Labor and Industry Review Commission • Commission does not hold hearings. Reviews appealed claims; may affirm, reverse, set aside, or modify the findings or the order, in whole or in part, or direct the taking of additional evidence.	• Attorney's fees are determined by ALJ • ALJ determines fees by "balancing the need to preserve the maximum amount of benefits for the injured worker and the need for fees which are sufficient to insure adequate representation for claimants" There is no statutory objective criteria. • Attorneys cannot charge fees on contingency basis for insurance carriers, employers, union, social service agency, or public agency. • The maximum attorney's fee is 20% of the award, not including medical costs. • In cases where there is admitted liability and there has been no hearing. The maximum fee is 10% of the amount of the claim or $100, whichever is less.	• The employer chooses doctor, worker can have their own doctor present at examination. Employer, insurance, and department must request copy of report from doctor. Doctor not required to automatically send copies of medical report. • A medical report is required after 3 weeks of first receiving benefits to determine if worker should continue to receive benefits. • Insurance companies either pay for medical costs or deny liability. ALJ reviews these appeals and makes a decision. There is no appeal from this decision. This has not been challenged since first initiated 1/1/86. • ALJ relies on treating physician's report to determine benefits. May require an examination by a 3rd party doctor at the employer's expense; ALJ not bound by this opinion.	• Insurance companies are required to pay 80% of all claims within 14 days of the last day worked after an injury. • For the remaining 20% of the claims, the insurance companies can use extra time to collect facts. • The theory behind this process is that insurance companies should just pay for the "easy" cases, but have time to research the complex cases. • Must notify agency and worker 7 days before stopping payments. Hearings are scheduled for termination disputes.	Monitoring and regulation of workers' comp insurance is very high in Wisconsin. ALJs usually rely on treating physician's report to determine benefits. Prevent overstating injury with a "final offer arbitration" system where ALJ must pick a report--ALJ cannot choose middle-ground between two reports. Weaknesses in the Wisc. System: • inconsistency in attorney's fee-setting between ALJs. No statutory attorney fee schedule. • Doctors can recover more money from Workers' Comp than Medicare, thus some non work-related injuries may be claimed as work-related. (only perceived--no stats to prove) Only 7% of all injury claims are litigated (i.e. are heard by ALJ).

State	Description of Process	Agency Staff Roles	Attorneys' Fees/Roles	Medical Examinations	Insurance carriers	Systemic Issues
WI	Hearings • Pre-hearing conferences are held if requested by the agency or any party--generally for complex cases. Conferences are fact-finding sessions held before a hearing. • Pre-hearing conferences used to be required; however the parties were often unprepared, and thus over time, effectiveness of the conferences declined. Conferences are no longer required. • At hearing, the ALJ decides based on testimony and medical exams given. Decision required within 90 days of final hearing. • The ALJ's decision may be appealed to the Labor and Industry Review Commission within 21 calendar days of ALJs decision. • Within 30 calendar days of Commission's decision, any party can appeal to the circuit court.					

APPENDIX B

LIST OF PERSONS INTERVIEWED

Antonakes, John; Liberty Mutual Insurance Company

Berman, Samuel; Advisory Council Member

Borgman, Kenneth; Assistant Vice President & Manager, Government and Internal Affairs, Liberty Mutual Insurance Co.

Brooker, Rosalind; Administrative Judge

Brunelle, Joseph; Conciliator

Bump, the Honorable Suzanne; Member, House of Representatives

Candia, David; Conciliation Manager

Casella, Charles; Conciliator

Claimant 1

Claimant 2

Claimant 3

Claimant 4

Coleman, Norris; Administrative Judge

Connecticut Workers' Compensation Office (Information Received)

Constantine, Joseph; Data Processing Manager

Corcoran, Edmund; Assistant Director, Workers' Compensation & Medical Services, MBTA

Cronin, James; Executive Offices/Industrial Relations, Raytheon Co.

D'Ambrosio, Tony; Deputy Director of Operations, New York Workers' Compensation Board

DaDalt, Anthony; Administrative Judge

Day, Stevens; Executive Director, Advisory Council

Draft, Kenneth; Director, California Information and Assistance Bureau

Elliot, Nancy; Administrative Judge

Faherty, Joseph; Chair, Advisory Council; Massachusetts AFL-CIO

Farmer, James; Glaziers & Glass Workers Union, Local 1044, AFL-CIO

Ferin, Bruce; Administrative Judge

Gabrilla, Leonard; Worcester Regional Office Manager

Garretson, James, Esq.; Geary, Weafer & Garretson

Gromelski, Frank; Administrative Judge

Heffernan, Richard; Administrative Judge

Hefler, Ralph; Conciliator
Horn, Walter; First Deputy Director of Administration
Johnson, Todd; Conciliator
Jones, Thomas; Staff Member, House Commerce and Labor Committee
Joyce, Mark; Springfield Regional Office Manager
Lane, John; Commissioner, DIA
Langton, Maryanne; Director, Office of Education and Rehabilitation
Leary, Brion; Assistant Manager, Applications
Lee, Howard; Administrative Judge
Leroy, Jacques; Administrative Judge
Lewis, John; Independent Consultant
Lundregan, Richard; Director, Office of Insurance
Mastey, Henry; Fall River Regional Office Manager
McCarthy, William; Administrative Law Judge
McGuinness, James; Administrative Judge
Meagher, Paul, Esq.; Legal Counsel, MA Rating & Inspection Bureau
Mulholland, Bernard, Esq.; Law Offices of Bernard Cohen
Mure, Douglas V.; Vice-Chair, Advisory Council, Vice President, Perini Co:
Nieves, Maritza; Lawrence Regional Office Manager
Novick, Emily, Esq.; Kehoe, Doyle, Playter & Novick
O'Malley, James; Assistant Executive Director, Wisconsin Workers' Compensation Division
Pearson, Barbara; Administrative Law Judge
Phelps, Jennifer; Conciliator
Pierce, Alan, Esq.; Pierce, Schneider & Ricci
Pierre, Deborah; Judicial Support Manager
Rogers, Richard; Administrative Judge
Rubbiccio, Carol; Conciliator
Russell, William; Conciliator
Ryan, James; Administrative Judge
Sharek, Steven; Conciliator
Shea, Noreen; Operations Manager
Silveira, Stephen; Deputy Commissioner for Administration
Smith, David; Director, Division of Dispute Resolution

St. Amand, James; Administrative Judge

Stephens, Richard; California Information Officer

Sullivan, Timothy; Conciliator

Taub, Fredrick; Administrative Judge

Vahratian, Ervin; Director of Mediation Services, Michigan Bureau of Workers Disability Compensation

Van Parys, Martha; Administrative Officer, Colorado Department of Labor

Vieira-Cardoza, Yvonne; Conciliator

Wall, Richard, Esq.; Uehlein & Nason

Wray, Lawrence, Esq.; Executive Director, Standing Committee on Dispute Resolution, American Bar Association

Wyman, Dr. Edwin, Jr.; Massachusetts General Hospital

Zuckerman, Mark; Staff Member, Senate Commerce and Labor Committee

APPENDIX C

DOCUMENTS CONSULTED

Massachusetts Legislation and Regulations

Massachusetts General Laws Chapters 152, Ch. 23E, Ch. 30A Section 14.

Massachusetts State Regulations 452 CMR: 1.00 - Adjudicatory Files; 2.00 - Payment of Benefits; 3.00 - Workers' Compensation Trust Fund; 4.00 - Vocational Rehabilitation; 5.00 - Insurers and Self-Insurers; Department of Industrial Accidents.

Workers' Disability Compensation Act, 418.207, Department of Labor.

Nason, Leonard Y. and Richard A. Wall, *Massachusetts Workers' Compensation Reform Act: As Amended - 1990 Edition*, (St. Paul, Minnesota, West Publishing Co., 1990.

Department of Industrial Accidents Documents[1]

"A Guide to Allocating Resources between Mediation and Adjudication." Massachusetts Department of Industrial Accidents.

"Employer's Guide to Workers' Compensation," Department of Industrial Accidents Brochure.

Massachusetts Workers' Compensation Advisory Council - Annual Reports 1987, 1988, 1989, 1990.

"Operations Procedural Manual," for Administrative Judge and Administrative Law Judge secretaries. Department of Industrial Accidents Manual.

"Reforming the System". Department of Industrial Accidents, Fiscal Years 1985 -1989.

"Your Guide to Workers' Compensation Law," Department of Industrial Accidents Brochure.

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[1] In addition to the documents listed in this section, we reviewed numerous DIAMETER reports, DIA forms and memoranda pertaining to dispute resolution.

Consultants' Reports

"Assessment of the Department of Industrial Accidents and Workers' Compensation System; Phase I Final Report," A Report Presented to the Massachusetts Workers' Compensation Advisory Council by Peat Marwick Main & Co., June 28, 1989.

"Massachusetts Workers' Compensation Reform: A Complex Maze of Forms, Statutory Provisions, Regulations, and Dates," by Richard A. Wall, Esq., and "The Case Against The Trust Fund," by Leonard Y. Nason, Esq., presented at the Association of Trial Lawyers of America 1989 Annual Convention, July 15-22, 1989.

"Medical Care Access Study," A Report Presented to the Massachusetts Workers' Compensation Advisory Council by Lynch, Ryan & Associates, June 27, 1990.

"Report on the Analysis of Friction Costs Associated with the Massachusetts Workers' Compensation System: A Report Presented to the Massachusetts Workers' Compensation Advisory Council" by Milliman & Robertson and John Lewis, June 29, 1990.

"Workers' Compensation: Strengthening the Social Compact For the 21st Century." Insurance Information Institute, 1990.

Newspaper Articles

Series on Workers' Compensation, by David Armstrong, The Boston Herald, April 2-5, 1991.

"Workers' Compensation Plan An Early Winner," by Charles Stein, Boston Sunday Globe. May 5, 1991.

Documents from Other States

"The Injured Worker: Rights to Workers' Compensation Benefits and How to Obtain Them," California Department of Industrial Relations, January 1, 1991.

"The Colorado Workers' Compensation Act," Colorado Division of Labor, 1990.

"Pocket Guide," Colorado Department of Labor and Employment, Division of Labor, 1990.

"The Workers' Compensation Act," State of Connecticut, Board of Commissioners, January 1, 1989.

"Workers' Compensation in Connecticut," Connecticut Legislative Program Review and Investigative Committee, January 1991.

Workers' Compensation Timetable, New York Workers' Compensation Board, September 1990.

"On the Job Injury," New York Workers' Compensation Board, June 1990.

"Rehabilitation, What Every Worker Should Know," New York Workers' Compensation Board, August 1990.

"Reducing Litigation: Evidence From Wisconsin," by Leslie I. Boden, Workers' Compensation Research Institute.

Wisconsin Act #64, Relating to Various Changes in the Workers' Compensation Laws, 1989.

Wisconsin Act #173, Relating to Various Changes in the Workers' Compensation Laws, 1987.

"Workers' Compensation Act of Wisconsin," Wisconsin Department of Industry, Labor and Human Relations, February 1987.

APPENDIX D

NOTE ON METHODOLOGY

To study the underlying quantitative performance of the dispute resolution system, we requested that the data processing office of DIA produce a randomly chosen data sample from the years 1988-90 that we would be able to input into our own computer system for close analysis. To obtain the sample, we developed a list of randomly chosen accident numbers that showed some form of case resolution, and we asked for all other information about the employee involved in that accident, including any and all other compensable accidents. Our sample produced a total of 573 employees who registered 863 accidents requiring a total of 3,594 events to resolve 1,051 injuries claimed under 3,047 sections of the law.

Virtually all calculations referred to in the body of the report, including the graphs and charts, refer to injuries occurring on or after November 1, 1986. We chose this date to further improve the quality of our sample data since it represents the major point after which the various DIA systems were fully operational under the terms of the Workers' Compensation reform act.

It should be noted that, since DIAMETER is chiefly a scheduling and tracking tool and was not intended to be used in a primarily research mode, our sample was subject to the same limitations as the population from which it was drawn. For example, although there was information about monetary settlements in particular cases, it appeared that the details of many resolutions were missing. In this and many other instances where we felt that the data itself might be unreliable, we chose not to make calculations or interpolations. As a consequence, we were unable to determine in a reliable fashion many of the outcome measures that we would have preferred to obtain.

A certain amount of interpretation of the existing data was often necessary. For instance, a record would often show two conferences as being scheduled for the same accident. In that case, we were forced to assume that the first conference did not occur or was unsuccessful, and so we measured the elapsed time as of the second and presumably definitive conference. Nevertheless, we are confident that our findings show the true proportions of the various aspects being measured, and, more important, that our work suggest future areas of investigation that DIA management might profitably undertake.

APPENDIX E

LEGISLATIVE CHANGES REQUIRED TO SUPPORT RECOMMENDATIONS

Based on our analysis of the Department, we believe that it would be counterproductive to introduce major statutory changes at this time. There are opportunities for dramatic improvement within the current statutory framework. We encourage the Department and the Administration to provide support and oversight for administrative changes over the next 12 months. Subsequent statutory changes should address only those areas which cannot be addressed by administrative action.

Implementation of our recommendations will generally require administrative action, not legislative change. Most of our administrative recommendations will not require formal DIA rule-making, although we have recommended changes to some of the Department's rules.[1]

Following is a summary of the recommendations whose implementation will require legislative changes, with a citation of the relevant statutory sections and any relevant DIA rules for each.

1. The Conciliation staff, under the management of the Conciliation Manager, should be transferred into the Division of Dispute Resolution (p. III-14).

   - Will require amendment of MGL Ch. 23E, § 6 and § 9, and MGL Ch. 152, § 10, among others. Will also require change in DIA Rules, such as 452 CMR Section 1.08.

2. Change MGL Ch. 152 Section 13A to allow AJs to reduce attorney fees when appropriate (p. IV-16).

   - Will require amendment of MGL Ch. 152 § 13A.

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[1] We have suggested rule changes to define and penalize inappropriate behavior by system participants (see p. III-5), itemize documents which must be provided to support each claim/complaint (see p. III-7), etc.

3. Consider limiting the Reviewing Board to review of issues of law and oversight of AJs' decisions (p. IV-19).

   - Might require amendment of MGL Ch. 152, § 11C, and DIA Rules, 452 CMR Section 1.15.

4. Remove the statutory requirement for the Reviewing Board to review lump sum agreements (p.IV-20).

   - Will require amendment of MGL Ch. 152 § 48.

5. Make worker meetings with disability analysts voluntary (p.IV-20).

   - Will require amendment to MGL Ch. 152 § 48 and DIA Rules 452 CMR Section 1.22.