

**Massachusetts Workers' Compensation
Advisory Council Minutes**

August 11, 2010

Department of Industrial Accidents

1 Congress Street, Suite 100

Boston, MA 02114-2017

Present: Chairman Mickey Long; Vice-Chairman Edmund C. Corcoran, Jr.

CM: Stephen Joyce; Stephen Falvey; John Regan (Brad McDougal); Antonio Frias (Ines Leonardo); William Corley; David Powell; Dennis Hines; John Pulgini; Bernard Mulholland; George Noel, Department of Labor.

Also Present: Secretary Joanne F. Goldstein, Executive Office of Labor and Workforce Development (EOLWD); Senior Judge William McCarthy; Reuben Kantor, Director of Operations; William Tattan, Deputy Commissioner and Chief Legal Counsel; William Taupier, First Deputy Director of Administration; Jack Defina, Chief Financial Officer; Ray Marchand, Director of Investigations; Yvonne Vieira-Cardoza, Deputy General Counsel; Tom Wielgus, Civil Litigation Manager; Cathy McKeever, AIM Mutual Insurance Company; Ellen Keefe, Workers' Compensation Rating & Inspection Bureau of Massachusetts (WCRIB); Dan Crowley, WCRIB; Peter DiNardo, Provider Insurance; Maydad Cohen, EOLWD; Adam Peer, National Association of Professional Employer Organizations; Robert Burbidge, Genesis Consolidated Services; Tara O'Donnell, Donoghue Barrett & Singal; Carol Falcone, Falcone Associates.

Advisory Council Staff: Andrew Burton; Evelyn Flanagan.

Absent: CM: Teri McHugh; Peter A. Cook, Sr.; Department of Business Development.

Agenda:

Chairman's Welcome

DIA Update

- Judicial Update - Senior Judge William McCarthy
- Vital Statistics - William Taupier, Deputy Director of Administration
- Attorney General/FedEx Ground Settlement - William Tattan

Action Items

- Minutes - June 9, 2010

Proof of Coverage Tool - Employee Leasing Companies - Robert Burbidge, Genesis

Executive Director Update

Miscellaneous

CHAIRMAN'S WELCOME

Chairman Mickey Long began today's meeting at 9:00 a.m. The Chairman introduced Joanne Goldstein, Secretary of the Executive Office of Labor & Workforce Development (EOLWD).

Secretary Goldstein recognized George Noel, Director of Labor and Maydad Cohen, Deputy General Counsel for EOLWD. Secretary Goldstein thanked the Advisory Council for all of the hard work they conduct on a voluntary basis. The Secretary briefly reviewed her past work history with the Attorney General's Office.

Vice-Chairman Ed Corcoran thanked Secretary Goldstein for attending today's meeting. The Vice-Chairman explained that since the inception of the Advisory Council, members have closely monitored how employer assessments are spent at the DIA. Mr. Corcoran specifically referred to a recent Advisory Council concern regarding language contained in the Fiscal Year 2011 General Appropriations Act. This language authorizes the Secretary of Administration and Finance to transfer the unexpended balance of any agency's fund, trust fund or other separate account to the General Fund. The Vice-Chairman stated that this language contradicts the mandate of the Workers' Compensation Statute requiring that all revenue received by the DIA from employer assessments be kept in a special fund or trust fund "separate and apart from all other monies received by the commonwealth."

Secretary Goldstein stated that she would take note of this concern.

Secretary Goldstein provided an update on the Underground Economy Task Force. She noted that the Task Force was slated to release their second annual report within the next couple of months. She stated that a new Task Force Advisory Council was being established and that they are looking for volunteers from the business and labor communities to serve.

Secretary Goldstein stated that she was especially encouraged to see that the Advisory Council would be reviewing the vocational rehabilitation (VR) system to see what improvements can be made. She specifically asked the Council to investigate whether VR is equally accessible to non-English speaking workers.

Chairman Mickey Long thanked Secretary Goldstein for taking the time to meet with the Council. Chairman Long asked Senior Judge William McCarthy to proceed with his judicial update.

Judicial Update

Senior Judge McCarthy briefly reviewed the vital judicial statistics. The Senior Judge stated that the Reviewing Board inventory is at 93 cases and is running very smoothly. He provided Council Members with an overview of the DIA's role in reviewing and settling third party cases. The Senior Judge estimated that there are approximately 1,200 of these cases each year.

Chairman Mickey Long expressed concern regarding the recent increase to the conference queue. The Chairman noted that any increase to this time frame may not be in the best interest of either employees or employers. Chairman Long suggested that the DIA look into ways to balance the need for expedited report gathering and hearings, especially when a case is ready to proceed.

Senior Judge McCarthy stated that there may be a statutory basis for having a first conference which would consist of a judge, a conciliator and an administrator. The Senior Judge noted that this would give the judge more autonomy to expedite a conference and allow action to be taken quicker.

Senior Judge McCarthy reminded the Council members that there were two Industrial Accident Board Judges that did not make it through the reappointment process. The Senior Judge stated that both Judges continue to work and provide him with a weekly report on their activities. Senior Judge McCarthy asked that the record reflect the fact that they have both continued in the most professional manner accepting what has been requested of them.

Mr. Bill Taupier updated Advisory Council Members on the information contained within the DIA's vital statistic report for August 2010 (see attached). Conference Queue: 958; Hearing Queue: 636; Reviewing Board Inventory: 93; Impartial Exams for FY'11 (to date): 170 (6 waivers); Exam Fees Collected for FY'11: N/A. In fiscal year 2010 there were 5,206 Impartial Medical Examinations (52 waivers); Exam Fees Collected in FY'10: \$1,597,825.

Stop Work Orders/Caseload Statistics

Mr. Bill Taupier updated Advisory Council Members on the Stop Work Order (SWO) and Caseload Statistics (see attached). The DIA issued 201 SWOs in July (40 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY'11 (to date): 201. Fine collection for July 2010: \$58,550; total fines in FY'11: \$58,550; SWOs issued in FY'10: 3,421; total fines collected in FY'10: \$1,110,125; compliance checks for July 2010: 3,540; estimated number of workers now covered by workers' compensation insurance as the result of a SWO: 424 (FY'11).

Mr. Taupier continued the update of the monthly vital statistics. Total number of cases filed in July 2010: 969; total number of cases filed in FY'11 (to date): 969; total number of cases filed in FY'10: 12,940; total number of First Report of Injury Forms (FRI) filed in July 2010: 2,131; total number of FRI filed online in July 2010: 625 (29%); total number of FRI filed in FY'11 (to date): 2,131 (625 online); total number of FRI filed in FY'10: 30,443 (8,934 online). Mr. Taupier proceeded with his update on uninsured claims (§65). Total number of §65 claims reported in FY'11 (to date): 7; total amount of §65 claims paid by the Trust Fund in FY'11 (to date): N/A; total number of §65 claims filed in FY'10: 137; total amount of §65 claims paid by the Trust Fund in FY'10: \$6,011,629.

Council Member Bernard Mulholland stated that DIA is most likely experiencing a reduction in dispute resolution claims due to a combination of factors. First, Mr. Mulholland stated that less people are working due to economic downturn. He also noted that the Massachusetts economy is less reliant on heavy manufacturing jobs which historically had high injury rates. Finally, he stated that he has witnessed a trend of more employees who continue to work while injured. He believes this is because workers are afraid that when they return to work after a workers' compensation claim, they will no longer have a job waiting for them.

Mr. Taupier proceeded with the vital statistics for the Second Injury Fund (§37/37A). Total amount of §37/37A petitions paid in FY'11 (to date): N/A; total amount paid on these claims in FY'10: \$22,696,126; total monies recovered by the Trust Fund in FY'10 (to date): N/A; total monies recovered in FY'10: \$707,896; total COLA reimbursements to insurers in FY'11 (to date): N/A; total COLA reimbursements to insurers in FY'10: \$11,767,228.

Attorney Tom Wielgus, Civil Litigation Manager, stated that the decrease reflected in recovery efforts is directly related to the present economic conditions. He explained that bankruptcies are up 30% making the possibility for recovery even more difficult.

Budget/Personnel Issues

Mr. Taupier reported that as of July 2010, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 267 (216 DIA employees, 51 WCTF employees). The DIA is authorized to have 285.2 payroll positions (including all full and part-time positions).

Office of Accounting & Finance Update

Mr. Taupier presented the accounting and finance statistics. Total referral fees collected in FY'11 (to date): N/A; total referral fees collected in FY'10: \$3,863,852; total first report fines in FY'11 (to date): N/A; total first report fines in FY'10: \$109,600; total assessment collections in FY'11 (to date): N/A; total assessment collections in FY'10: \$75,002,051; total SWO fines in FY'11 (to date): N/A; total SWO fines in FY'10: \$1,599,996.

Attorney General/FedEx Ground Settlement

Deputy Commissioner and Chief Legal Counsel William Tattan provided an update on the Attorney General's recent settlement with FedEx Ground.

Mr. Tattan explained that in 2007 the Attorney General's Office cited FedEx Ground for violating the Independent Contractor Law by misclassifying its drivers, failing to provide workers' compensation, failing to pay overtime to certain drivers, and neglecting to deduct and withhold state income taxes. Mr. Tattan noted that the Attorney General's office signed a settlement agreement with FedEx Ground for \$3 million - \$442,000 of which, will be earmarked for the DIA. As a result of the settlement agreement, FedEx Ground must revamp their business model to comply with the Independent Contractor Law of Massachusetts.

ACTION ITEMS

Chairman Long asked for a motion to approve the minutes for June 9, 2010.

Motion made to approve the minutes for June 9, 2010. Motion Seconded and Passed.

PROOF OF COVERAGE TOOL - EMPLOYEE LEASING COMPANIES (ELC)

Executive Director Andrew Burton introduced Mr. Robert Burbidge, President of Genesis Consolidated Services.

Mr. Robert Burbidge presented a brief overview of the services that Employee Leasing Companies (ELCs), also known as Professional Employer Organizations (PEOs), provide to their clients. He stated that ELC/PEOs offer expertise in the areas of finance, human resources practices, health care, retirement, etc. Mr. Burbidge emphasized that his company was not an employee recruiter but rather they do human resources outsourcing by partnering with small businesses.

Mr. Burbidge explained that an ELC/PEO may sponsor workers' compensation coverage for their clients. He stated that the ELC/PEO is the policyholder while the client is identified by an endorsement.

Mr. Burbidge explained that he is concerned that the DIA's Proof of Coverage Tool (POC) creates unintended access to an ELC/PEO's client lists. He explained that this can happen when a user conducts a search and types in the name of an ELC/PEO and a city or town. The results not only show the policy the ELC/PEO has secured for its internal employees, but also every client company of the ELC/PEO in that city or town. Mr. Burbidge stated that such search results create an unfair advantage for competing ELC/PEOs who thereby gain access to proprietary and confidential client lists.

Mr. Burbidge introduced Mr. Adam Peer, Assistant Director of the National Association of Professional Employer Organizations. Mr. Peer concurred with the concerns of Mr. Burbidge and offered what he believed would be a fair solution to this dilemma. He stated that the POC application could easily be reconfigured so that the following two goals could be reached:

1) When searching for the name of an ELC/PEO, the policy an ELC/PEO has secured for internal employees is returned. Search results would not identify every client.

2) When searching for the name of a small business client, the name of the client would be returned along with the name of the ELC/PEO and the policy secured by the ELC/PEO.

Chairman Mickey Long stated that the POC tool was designed to provide the public with transparency in assisting with the identification of potential workers' compensation fraud. The Chairman expressed his concern that the POC tool could lose its effectiveness if the proposed change is made. He stated that if several client companies of an ELC/PEO are misclassifying their employees, the public has the right to know what other client companies a particular ELC/PEO is insuring to determine if there is a trend of misclassification.

Mr. Burbidge stated that he is only against the public having access to the ELC/PEO client lists so that it is not made available to his competition. He agreed that the client list should be available for investigators who are looking into trends on misclassification.

Council Members expressed concern that dishonest employers could use the ELC/PEO as shield protecting them from misclassification fraud. It was noted that the ELC/PEO is the entity that signs the insurance policy and therefore ultimately liable if insurance fraud existed.

Mr. Burbidge stated that there is no incentive for an ELC/PEO to knowingly misclassify their client companies which are subject to annual audits by the insurance industry.

Mr. Peer further stated that ELC/PEO regulations in Massachusetts subject client companies to fraud charges for acts of material misrepresentation.

Discussion centered on whether a process could be implemented to allow the public access to an ELC/PEO client list if it can be proved that a trend in fraud is occurring with three or more client companies.

Chairman Mickey Long thanked today's guests for their input and asked that the Advisory Council further discuss this matter at the September meeting.

EXECUTIVE DIRECTOR UPDATE

Executive Director Andrew Burton informed the Council members that Governor Deval Patrick had signed into law the Private Right of Action legislation (Senate Bill 2375) that was endorsed by the Advisory Council. Mr. Burton stated that he will be drafting a thank you letter to various parties who helped make this new law possible.

Mr. Burton reminded the Council members that the next scheduled meeting would take place on September 8, 2010 at 9:00 a.m.

MISCELLANEOUS

Chairman Long thanked everyone for attending today's meeting.

Motion made to adjourn the meeting. Motion Seconded and Passed.

The next meeting of the Advisory Council is scheduled for Wednesday, September 8, 2010, at 9:00 AM, at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114.