

**THE STATE OF THE MASSACHUSETTS WORKERS'  
COMPENSATION SYSTEM**

**MASSACHUSETTS WORKERS' COMPENSATION  
ADVISORY COUNCIL  
FISCAL YEAR 1995 ANNUAL REPORT**

**December 1, 1995**

ANNUAL REPORT  
FISCAL YEAR 1995

Massachusetts Workers' Compensation  
Advisory Council

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**Massachusetts Workers' Compensation Advisory Council**

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## FISCAL YEAR 1995 IN REVIEW

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Fiscal year 1995 marked a turning point in the Massachusetts workers' compensation system. During this year, debate shifted from whether the Chapter 398 reforms were just or fair, to how their implementation could be enhanced. While the effects of individual components of the reforms are still being debated, the majority of the system's participants seem convinced that the reforms have bettered the system, at least from an efficiency standpoint.

The costs of obtaining workers' compensation insurance in Massachusetts decreased dramatically in fiscal year 1995. Effective January 1, 1995, the insurance industry and the Division of Insurance agreed to lower workers' compensation insurance rates an average of 16.5%. In two years, rates have fallen over 25%.

The Assigned Risk Pool market share for calendar year 1995 is estimated to be 35%. This represents a dramatic decline over 1992, when nearly 65% of every premium dollar was written in the assigned risk pool.

Disputed claims continued to decline, with 8% fewer cases filed than the last fiscal year. While the conference and hearing queues fluctuated, they ended the year at lower rates. The case time frames also continued to decline. Efforts were made to relieve the backlog at the reviewing board. The number of appeals made to the reviewing board increased 69% since FY'93 as the parties continue to seek interpretation and clarification of the 1991 reform provisions. There still remains a two year wait for a reviewing board decision.

The Department of Industrial Accidents worked on "fine tuning" implementation of its reform programs. The Office of Health Policy drafted revised regulations governing utilization review of workers' compensation medical treatment. In addition, the office focused on drafting specifications for the Medical Utilization Trending and Tracking System (MUTTS), and the Health Care Services Board continued to draft new treatment guidelines on chronic pain, chronic injury and asthma.

The department's trust fund explored cost saving measures by pursuing settlements, and aggressively reviewing coverage and treatment of uninsured claimants. When the trust fund was ordered to make payments for Second Injury Fund claims pre-dating 1985, the department developed a plan to pay these claims by February, 1996 at a cost of \$8 million.

The department continued to deliver personal computers to its employees, both in the Boston office and the regions, focusing particularly on the Division of Dispute Resolution. It embarked on its Court Room 2000 program, an effort to make the filing and retrieval of all case information fully automated, and to make the department a "paperless office."

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The Insurance Fraud Bureau and the Massachusetts Attorney General's Office continued to battle fraud by pursuing the investigation and prosecution of alleged fraudulent practices. Since 1991, the Attorney General's Office has attained a total of 45 convictions and indictments of workers' compensation fraud.

During the fiscal year, the courts reviewed the mandates of Chapter 398. The SJC in Neff v. Commissioner of Industrial Accidents required the DIA to make provisions to waive the impartial medical examination fee for indigent workers' compensation claimants. In Scheffler's Case, the Supreme Judicial Court affirmed the role of the impartial medical exam but found that the impartial report need not be the only evidence considered by the administrative judge when reviewing earning capacity. Finally, the Reviewing Board in O'Brien's Case found that the department's practice of scheduling a hearing before receipt of the impartial report violated the workers' compensation act.

In the legislature, over 50 bills relating to workers' compensation were filed. Despite falling insurance rates, a bill was filed to deregulate insurance rates in favor of competition. Filed as House 4047, this competitive rating legislation gained momentum through the fiscal year resulting in the Advisory Council's agreement to conduct an in-depth examination of the bill.

Although improvements were seen in FY'95 in many areas, the workers' compensation system is far from perfect. Attention must be paid to identifying which aspects of the reform have had the greatest impact and which have been counterproductive.

The Advisory Council also established a subcommittee to review the DIA's fiscal year 1996 budget request. With the cooperation of the department, the subcommittee was able to examine the budget in greater detail than in prior years. While Council members had remaining questions about the DIA's fiscal planning, the department explained that the Council needs to follow the expenditure process throughout the year as this directly impacts the development of the next year's budget request. With this in mind, the Council has established a subcommittee to review expenditures throughout fiscal year 1996, and make reports to the full Council from time to time. The Advisory Council has issued a set of concerns and recommendations found in the last section of the report.

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## **ADVISORY COUNCIL**

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The Massachusetts Workers' Compensation Advisory Council was created by the Massachusetts General Court on December 10, 1985 with passage of Chapter 572 of the Acts of 1985. Its function is to monitor, recommend, give testimony, and report on all aspects of the workers' compensation system, except the adjudication of particular claims or complaints. The council also periodically conducts studies on various aspects of the workers' compensation system.

The Advisory Council is mandated to issue an annual report evaluating the operations of the Department of Industrial Accidents and the Massachusetts workers' compensation system. In addition, members are required to review the annual operating budget of the Department of Industrial Accidents, and, when necessary, submit its own recommendation.

The Advisory Council is comprised of leaders from labor, business, the medical profession, the legal profession, the insurance industry and government. Its sixteen members are appointed by the governor for five year terms and include: five employee representatives (each of whom is a member of a duly recognized and independent employee organization); five employer representatives (representing manufacturing classifications, small businesses, contracting classifications, and self-insured businesses); one representative of the workers' compensation claimant's bar; one representative of the insurance industry; one representative of the medical providers; and one representative of vocational rehabilitation providers.

The employee and employer representatives comprise the voting members of the council, and the council cannot take action without the affirmative vote of at least seven voting members. The council's chairperson and vice-chairperson rotate between an employee representative and an employer representative.

The Advisory Council is required by law to meet when the chairperson calls for a meeting or upon the petition of a majority of members. It usually meets on the second Wednesday of each month at 9:00 a.m. at 600 Washington Street, 7<sup>th</sup> Floor Conference Room, Boston, Massachusetts.

Meetings are open to the general public pursuant to the Open Meeting Laws (M.G.L., ch. 30A, sec. 11A).

### **Studies**

The Advisory Council over the years has conducted a number of studies on workers' compensation, some of which were performed at the request of the legislature.

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The following are studies conducted by the council:

The Analysis of Friction Costs Associated with the Massachusetts' Workers' Compensation System, Milliman & Robertson, John Lewis, (1989).

Analysis of the Massachusetts Department of Industrial Accidents' Dispute Resolution System, Endispute, Inc., B.D.O. Seidman, (1991).

Assessment of the Department of Industrial Accidents & Workers' Compensation System, Peat Marwick Main, (1989).

Medical Access Study, Lynch-Ryan, The Boylston Group (1990).

Report on Competitive Rating, Tillinghast, (1989).

Report to the Legislature on Competitive Rating, Massachusetts Workers' Compensation Advisory Council, (1989).

Report to the Legislature on the Mark-up System for Case Scheduling, Massachusetts Workers' Compensation Advisory Council, (1990).

Report to the Legislature on Occupational Disease, Massachusetts Workers' Compensation Advisory Council, (1990).

Report to the Legislature on Public Employees, Massachusetts Workers' Compensation Advisory Council, (1989).

Study of Workers' Compensation Wage Replacement Rates, Tillinghast; Professor Peter Kozel, (1994).

Study of Workers' Compensation Insurance Rate Methodology, The Wyatt Company, (1994).

In 1995, the Advisory Council contracted with the firm of J.H. Albert to conduct an in-depth analysis of the effects of implementing a system of competitive rating of workers' compensation insurance in Massachusetts.

The Advisory Council's studies are available for review Monday through Friday, 9:00 a.m. - 5:00 p.m. at the Massachusetts State Library, State House, Room 341, Boston, Massachusetts, 02133 or by appointment at the offices of the Advisory Council, 600 Washington Street, 2<sup>nd</sup> Floor, Boston, Massachusetts (617) 727-4900 ext. 378.

## STATUTORY PROVISIONS TO RESOLVE DISPUTES

### Workers' Compensation Claims

When an employee is disabled or incapable of earning full wages for five or more calendar days, or dies, as the result of a work related injury or disease, the employer must file a First Report of Injury. This form must be sent to the Office of Claims Administration at the DIA, the insurer and the employee within seven days of notice of the injury. If the employer does not file the required First Report of Injury with the DIA, it may be subject to a fine.

Figure 1: Notification of Injury

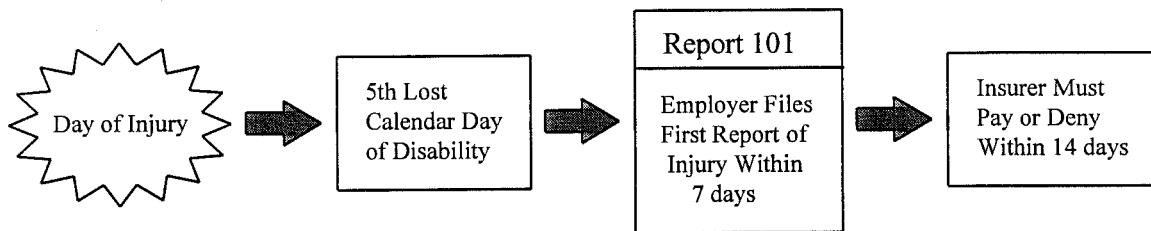
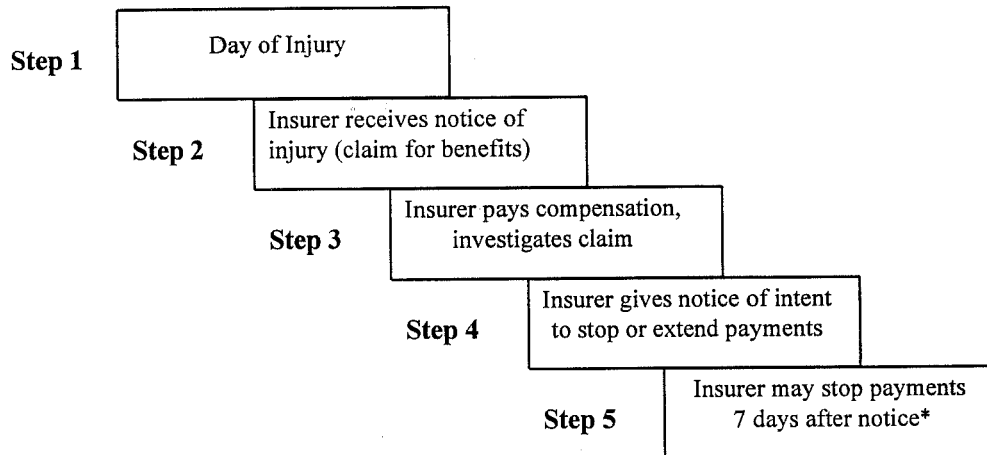


Figure 2: Voluntary Payment



\*The insurer may stop payments unilaterally (with seven days notice) only if the case remains within the 180 day "pay without prejudice period," and the insurer has not been assigned or accepted liability for the case. Otherwise, the insurer must file a "complaint" and go through the dispute resolution process.

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The insurer then has 14 days upon receipt of an employer's first injury report to either pay the claim or to notify the DIA, the employer, and the employee of refusal to pay.<sup>1</sup>

When the insurer pays a claim, it may do so without accepting liability for a period of 180 days.<sup>2</sup> This is the "pay without prejudice period" that establishes a window where the insurer may refuse a claim and stop payments at its will. Up to 180 days, the insurer can unilaterally terminate or modify any claim as long as it specifies the grounds and factual basis for so doing. The purpose of the pay without prejudice period is to encourage the insurer to begin payments to the employee instead of outright denying the claim.<sup>3</sup>

After a conference order or the expiration of this 180 day period, the insurer may no longer unilaterally stop payments. The insurer must request a modification or termination of benefits based on an impartial medical exam and other statutory requirements. A discontinuance or modification of benefits may take place no sooner than 60 days following referral to the division of dispute resolution.

### Dispute Resolution Process

Requests for adjudication may be filed by either an employee seeking benefits, or an insurer seeking a modification or discontinuance of benefits following the payment without prejudice period. A case can be resolved at any point during the DIA's three step dispute resolution period either by voluntary means (which may include a lump sum settlement) or by the decision of an administrative judge or administrative law judge.

Conciliators may "review and approve as complete" lump sum settlements, a standard that allows the conciliator to review a completed lump sum settlement. Conciliators or the parties at conciliation may also refer a case to a lump sum conference where an administrative law judge will decide if a lump sum settlement is in the best interest of the parties.

Administrative judges at the conference and hearing may approve lump sum settlements in the same manner that an ALJ approves a settlement at the lump sum conference. AJs and the ALJs must determine whether a settlement is in the best interest of the employee, and a judge may reject a settlement offer if it appears to be inadequate.

Dispute resolution begins at conciliation, where a conciliator will attempt to resolve a dispute by informal means. Disputes should go to conciliation within 15 days of receipt of the case from the Division of Administration.

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<sup>1</sup> If there is no notification or payment has not begun, the insurer is subject to a fine of \$200 after 14 days, \$2,000 after 60 days, and \$10,000 after 90 days.

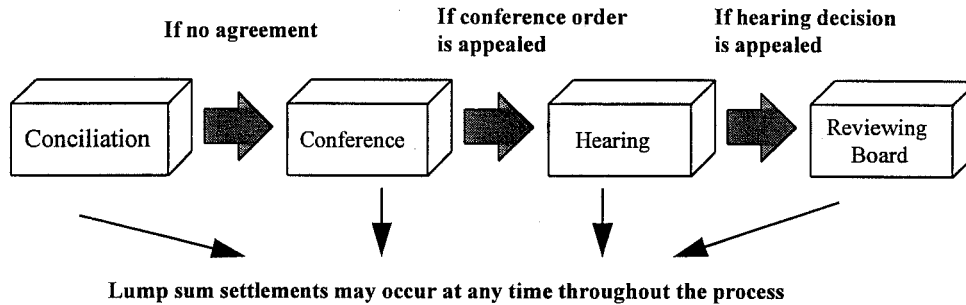
<sup>2</sup> The pay without prejudice period may be extended up to one year under special circumstances. The DIA must be notified seven days in advance.

<sup>3</sup> According to M.G.L. 152 8, "An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the Division of Administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the insurer's intention to contest any issue and shall state that in order to secure ad-dittoing benefits the employee shall file a claim with the department and insurer within any time limits provided by this chapter."

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**Figure 3: Dispute Resolution**

**START:** 30 days after the onset of disability, or immediately following an insurer's "deny", the employee may file a claim with the DIA and Insurer.



A dispute not resolved at conciliation will then be referred to a conference where it will be assigned to an administrative judge who will retain the case throughout the process if possible. The insurer will pay an appeal fee of 65% of the state average weekly wage (SAWW), or 130% of the SAWW if the insurer fails to appear at conciliation. The purpose of the conference is to compile the evidence and to identify the issues in dispute and the administrative judge may require injury and hospital records. The administrative judge is required to make a decision within seven days of the conclusion of the conference. This order may be appealed to a hearing within 14 days.

At the hearing, the administrative judge reviews the dispute according to oral and written documentation. The procedure at a hearing is formal and a verbatim transcript of the proceedings is recorded by a stenographer. Witnesses are examined and cross-examined according to the Massachusetts Rules of Evidence. The administrative judge may grant a continuance for reasons beyond the control of any party. Either party may appeal a hearing decision within 30 days.

This time limit for appeals may be extended up to one year for reasonable cause. A fee of 30% of the state average weekly wage must accompany the appeal. The claim will then proceed to the reviewing board where a panel of administrative law judges will hear the case.

At the reviewing board, a panel of three administrative law judges will review the evidence presented at the hearing and may ask for oral arguments from both sides. They can reverse the administrative judge's decision only if they determine that the decision was beyond the scope of authority, arbitrary, capricious, or contrary to law. The panel is not a fact finding body, although it may recommit a case to an administrative judge for further findings of fact.

All orders from the dispute resolution process may be enforced by the Superior Court of the Commonwealth. Reviewing Board cases may also be appealed to the Appeals Court. The cost of appeals are reimbursed to the claimant (in addition to the award of the judgment) if the claimant prevails.



## Alternative Dispute Resolution Measures

**Arbitration & Mediation** - At any time prior to five days before a conference, a case may be referred to an independent arbitrator. The arbitrator must make a decision whether to vacate or modify the compensation pursuant to §12 and §13 of M.G.L. Chapter 251.

The parties involved may agree to bring the matter before an independent mediator at any stage of the proceeding. Mediation shall in no way disrupt the dispute resolution process and any party may proceed with the process at the DIA if they decide to do so.

**Collective Bargaining** - An employer and a recognized representative of its employees may engage in collective bargaining to establish certain binding obligations and procedures related to workers' compensation. Agreements are limited to the following topics: supplemental benefits under §§34, 34A, 35, 36; alternative dispute resolution (arbitration, mediation, conciliation); limited list of medical providers; limited list of impartial physicians; modified light duty return to work program; adoption of a 24 hour coverage plan; establishing safety committees and safety procedures; establishing vocational rehabilitation or retraining programs.

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## SUMMARY OF BENEFITS UNDER CHAPTER 152

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An employee who is injured during the course of employment, or suffers from work related mental or emotional disabilities, as well as occupational diseases, is eligible for workers' compensation benefits. The largest expense for benefits is the weekly indemnity payments which provide compensation for lost income during the period the employee cannot work. Indemnity payments vary, depending on the average weekly wage of the employee (AWW) and the degree of incapacitation.

In addition to direct indemnity payments, the insurer is required to furnish the worker with adequate and reasonable medical and hospital services, and medicines if needed. The insurer must also pay for vocational rehabilitation services if the employee is determined to be suitable by the DIA.

The Statewide Average Weekly Wage (SAWW) is determined under subsection (2) of Chapter 151A §29 and promulgated by the Director of Employment and Training. As of October 1, 1995, the SAWW is \$604.03. Below is a list of the SAWW's since 1991 and the maximum (SAWW) and minimum benefit levels for §34 and §34A claims:

*Table 1: SAWW Benefits*

	<u>Maximum Benefit</u>	<u>Minimum Benefit</u>
10/1/91-	\$515.52	\$103.10
10/1/92-	\$543.30	\$108.66
10/1/93-	\$565.94	\$113.19
10/1/94-	\$585.95	\$117.19
10/1/95-	\$604.03	\$120.81

### Indemnity and Supplemental Benefits

The following are the various forms of indemnity and supplemental benefits employees may receive, depending on their average weekly wage, state average weekly wage, and their degree of disability.

**Temporary Total Disability (§34):** Compensation will be 60% of the employee's average weekly wage (AWW) before injury while remaining above the minimum and below the maximum payments that are set for each form of compensation. The maximum weekly compensation rate is 100% of the state average weekly wage (**\$604.03**), while the minimum is 20% of the SAWW (**\$120.81**) if claims involve injuries occurring on or after October 1, 1995. The limit for temporary benefits is 156 weeks.

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**Partial Disability (§35):** Compensation is 60% of the difference between the employee's AWW before the injury and the weekly wage earning capacity after the injury. This amount cannot exceed 75% of temporary benefits under §34 if they were to receive those benefits. The maximum benefits period is 260 weeks for partial disability, but may be extended to 520 weeks.

**Permanent and Total Incapacity (§34A):** Payments will equal 2/3 of AWW following the exhaustion of temporary (§34) and partial (§35) payments. The maximum weekly compensation rate is 100% of the state average weekly wage (**\$604.03**), while the minimum is 20% of the SAWW (**\$120.81**) if claims involve injuries that occurred on or after October 1, 1995. The payments must be adjusted each year for cost of living allowances (COLA benefits).

**Death Benefits for Dependents (§31):** The widow or widower that remains unmarried shall receive 2/3 of the worker's AWW, but not more than the state's AWW or less than \$110 per week. They shall also receive \$6 per week for each child (this is not to exceed \$150 in additional compensation). There are also benefits for other dependents. Benefits paid to all dependents cannot exceed 250 times the state AWW plus any cost of living increases (COLA). Children under 18 may, however, continue to receive payments even if the maximum has been reached.

Burial expenses may not exceed \$4000.

**Subsequent Injury (§35B):** An employee who has been receiving compensation, has returned to work for two months or more, and is subsequently re-injured, will receive compensation at the rate in effect at the time of the new injury (unless the old injury was paid in lump sum). If the old injury was settled with a lump sum, then the employee will be compensated only if the new claim can be determined to be a new injury.

### Attorney's Fees

The dollar amounts specified for attorney's fees are listed in M.G.L. c.152 §13A(10). As of October 1, 1995 subsections 1 through 6 were updated to reflect adjustments to the State Average Weekly Wage. Below is a summary of the attorney's fee schedule.

(1) When an insurer refuses to pay compensation within 21 days of an initial liability claim, but prior to a conference agrees to pay the claim (with or without prejudice), the insurer must pay an attorney's fee of **\$782.45** plus necessary expenses. If the employee's attorney fails to appear at a scheduled conciliation, the amount paid is **\$391.25**.

(2) When an insurer contests a liability claim and is ordered to pay by an administrative judge at conference, the insurer must pay the employee's attorney a fee of **\$1,117.85**. The administrative judge can increase or decrease this fee

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based on the complexity of a case and the amount of work an attorney puts in. If the employee's attorney fails to appear at a scheduled conciliation, the fee may be reduced to \$ **558.90**.

(3) When an insurer contests a claim for benefits other than the initial liability claim as in subsection (1) and fails to pay compensation within 21 days yet agrees to pay the compensation due, prior to conference, the insurer must pay the employee's attorney fee in the amount of **\$558.90** plus necessary expenses. This fee can be reduced to **\$279.45** if the employee's attorney fails to appear at a scheduled conciliation.

(4) When an insurer contests a claim for benefits or files a complaint to reduce or discontinue benefits by refusing to pay compensation within 21 days, and the order of the administrative judge after a conference reflects the written offer submitted by the claimant (or conciliator on the claimant's behalf), the insurer must pay the employee's attorney a fee of **\$782.45** plus necessary expenses. If the order reflects the written offer of the insurer, no attorney fee should be paid. If the order reflects an amount different from both submissions, the fee should be in the amount of **\$391.25** plus necessary expenses. Any fee should be reduced in half if the employee's attorney fails to show up to a scheduled conciliation.

(5) When the insurer files a complaint or contests a claim and then either a) accepts the employee's claim or withdraws its own complaint within 5 days of a hearing, or b) the employee prevails at a hearing, the insurer shall pay a fee to the employee's attorney in the amount of **\$3,912.35** plus necessary expenses. An administrative judge may increase or decrease this amount based on the complexity of the case and the amount of work an attorney puts in.

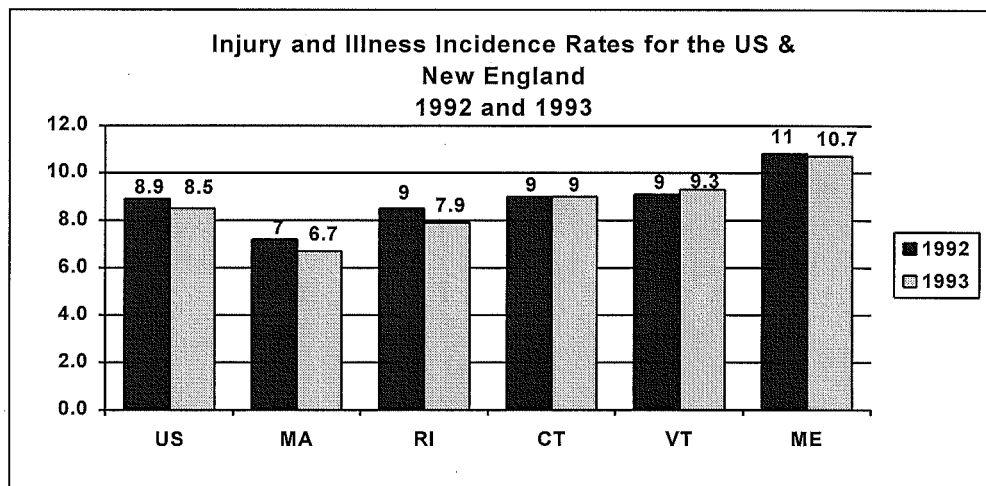
(6) When the insurer appeals the decision of an administrative judge and the employee prevails in the decision of the Reviewing Board, the insurer must pay a fee to the employee's attorney in the amount of **\$1,117.85**. An administrative judge may increase or decrease this amount based on the complexity of the case and the amount of work an attorney puts in.

## OCCUPATIONAL INJURIES AND ILLNESSES

Every year the Massachusetts Department of Labor and Industries in cooperation with the U.S. Department of Labor, Bureau of Labor Statistics, conducts an *Annual Survey of Occupational Injuries and Illnesses* in Massachusetts. The survey is based upon non-fatal injuries that occurred in the private sector workforce (not including the self-employed, farms with fewer than 11 employees, private households, and employees in Federal, State and local government agencies). A sample of 250,000 employer reports nationwide and 10,000 in Massachusetts are examined, in an effort to represent the total private economy for 1993.

The initial results of the 1993 annual survey were released in March of 1995. In 1993 the Commonwealth averaged 2,411,000 workers in the private sector workforce. Of these workers, 132,400 experienced some sort of job-related injury or illness. This means that for every 100 full-time workers, 6.7 were injured in 1993 (incidence rate). This is a decline from 1992 when the incidence rate was 7.2 cases per 100 full-time workers. Out of the 132,400 cases, 59,400 were serious enough to keep workers from their jobs for at least a day (or required restricted work activity).

Figure 4: Injury and Illness Incidence Rates



Source: *Labor and Industries News*, March 9, 1995

Note: No state-specific data for N.H.

For the second year in a row, Massachusetts displayed the lowest overall rate of workplace injuries in New England with an incidence rate of 6.7. This makes the Commonwealth the only New England state to remain below the national average for two consecutive years.

