

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL MINUTES

April 13, 2011
Department of Industrial Accidents
1 Congress Street, Suite 100
Boston, MA 02114-2017

CM Present: Vice-Chairman Edmund C. Corcoran, Jr.; Stephen Joyce; Stephen Falvey; John Pulgini; Bernard Mulholland; David Powell (Kevin Hurstack).

Also Present: Director Philip L. Hillman; Senior Judge William McCarthy; William Tattan, Deputy Director and Chief Legal Counsel; Reuben Kantor, Director of Operations; William Taupier, First Deputy Director of Administration; Jack Defina, CFO; Ray Marchand, Director of Investigations; Ellen Keefe, Workers' Compensation Rating & Inspection Bureau of Massachusetts (WCRIB); Michael Kelley, AIM Mutual Insurance Company.

Advisory Council Staff: Andrew Burton; Evelyn Flanagan; Rachel Ostrander.

Absent: CM: Chairman Mickey Long; John Regan; Teri McHugh; Antonio Frias; William Corley; Dennis Hines; 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

Action Items

- Minutes - March 9, 2011

Workers' Compensation Legislative Discussion

Georgiou v. Commissioner of the DIA

Executive Director Update

Miscellaneous

CHAIRMAN'S WELCOME

Vice-Chairman Edmund Corcoran began today's meeting at 9:00 a.m. The Vice-Chairman welcomed and recognized the new Director of the Department, Philip L. Hillman.

Director Hillman provided Council members with a background of his work experience. The new Director stated that he looks forward to working with the Advisory Council and being part of the discussions.

Council members in attendance introduced themselves and identified the constituency they serve.

Vice-Chairman Corcoran asked that Senior Judge Bill McCarthy provide the Advisory Council members with the Judicial Update.

DIA UPDATE

Judicial Update

Senior Judge William McCarthy began his update by explaining that there were three initiatives he had hoped would be complete before leaving the Senior Judge position. The first, which has already been completed, is providing robes to all DIA judges. The Senior Judge stated that the second initiative he has been experimenting with is the pairing of conciliators with administrative judges to enhance the dispute resolution process. Specifically, the Senior Judge stated that a conciliator would still meet with the parties to review each claim but the proposal would allow for a much quicker intervention. The third, and final, initiative the Senior Judge hopes the DIA will undertake is to charge a nominal fee for Section 15 petitions (petition for approval of third party settlements).

Senior Judge McCarthy informed the Council that he has been working with Secretary Goldstein to begin the process of selecting his successor for the Senior Judge position. He explained that the Senior Judge must be selected among the sitting judges and that five judges have expressed interest in the position.

Vice-Chairman Edmund Corcoran requested that the Senior Judge provide Council members with a decisions outstanding report, identifying judges who have a pattern of issuing late decisions. This report has been helpful during past the reappointment processes.

Vital Statistics

Mr. Bill Taupier updated Advisory Council members on the information contained within the DIA's vital statistic report for April 2011 (see attached). Conference Queue: 427; Hearing Queue: 375; Reviewing Board Inventory: 84; Impartial Exams for FY'11 (to date): 2,969 (43 waivers); Exam Fees Collected for FY'11: \$1,141,838. In fiscal year 2010 there were 5,069 Impartial Medical Examinations (64 waivers); Exam Fees Collected in FY'10: \$1,792,626.

Mr. Bill Taupier updated Advisory Council members on the Stop Work Order (SWO) and Caseload Statistics. The DIA issued 302 SWOs in March (53 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY'11 (to date): 2,258. Fine collection for March 2011: \$161,300; total fines in FY'11 (to date): \$931,475; SWOs issued in FY'10: 3,421; total fines collected in FY'10: \$1,110,125; compliance checks for March 2011: 4,702; estimated number of workers now covered by workers' compensation insurance as the result of a SWO: 5,762 (FY'11).

Mr. Taupier continued the update of the monthly vital statistics. Total number of cases filed in March 2011: 1,282; total number of cases filed in FY'11 (to date): 9,318; total number of cases filed in FY'10: 12,940; total number of First Report of Injury Forms (FRI) filed in March 2011: 3,074; total number of FRI filed online in March 2011: 899 (29%); total number of FRI filed in FY'11 (to date): 23,434 (6,265 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): 86; total amount of §65 claims paid by the Trust Fund in FY'11 (to date): \$4,704,649; total number of §65 claims filed in FY'10: 137; total amount of §65 claims paid by the Trust Fund in FY'10: \$6,508,487; total recovery efforts against uninsured employers FY'11: \$1,171,250; total recovery efforts against uninsured employers FY'10: \$709,946.

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): \$14,821,976; total amount paid on these claims in FY'10: \$22,877,653; total monies recovered by the Trust Fund in FY'11 (to date): \$990,733; total

monies recovered in FY'10: \$709,946; total COLA reimbursements to insurers in FY'11 (to date): \$10,910,607; total COLA reimbursements to insurers in FY'10: \$11,767,228.

Mr. Taupier reported that as of April 2011, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 251 (201 DIA employees, 50 WCTF employees). The DIA is authorized to have 283.2 payroll positions (including all full and part-time positions).

Mr. Taupier presented the accounting and finance statistics. Total referral fees collected in FY'11 (to date): \$2,748,770; total referral fees collected in FY'10: \$3,863,852; total first report fines in FY'11 (to date): \$112,905; total first report fines in FY'10: \$109,700; total assessment collections in FY'11 (to date): \$57,285,538; total assessment collections in FY'10: \$75,002,051; total SWO fines in FY'11 (to date): \$1,420,589; total SWO fines in FY'10: \$1,597,919.

Vice-Chairman Corcoran requested that a quarterly review on OEVR be put on the agenda for next month's meeting. The Vice-Chairman explained that he was interested in the measure of circumstances surrounding OEVR.

Council Members John Pulgini and Bernie Mulholland voiced concern that the evaluation in OEVR being scheduled prematurely. They noted that it would be more useful to employees if notices were sent after the conference and receiving the judges' recommendations.

ACTION ITEMS

Vice-Chairman Corcoran asked for a motion to approve the March 13, 2011 minutes.

Motion made to approve the minutes for March 13, 2011. Motion Seconded and Passed.

WORKERS' COMPENSATION LEGISLATIVE DISCUSSION

Executive Director Andrew Burton informed the Council members that a booklet was placed in their packets providing a legislative summary of the 28 bills filed so far. Mr. Burton suggested voting for the bills be postponed until the May meeting. Mr. Burton encouraged Council members to review all the bills and contact the office if there is any bill they would like to discuss.

Executive Director Burton summarized the bills that the Council had supported in the past, as well as three new bills (HB468, SB915, SB938) that increased criminal penalties for failing to provide Workers' Compensation insurance. Mr. Burton noted that currently the maximum penalty is a \$1,500 fine or imprisonment for not more than one year or both. He explained that the new bills would impose a minimum fine of \$1,000 and a maximum fine of \$10,000. He noted that a judge would also be able to sentence the offender to a minimum of six months but not more than 2 ½ years in jail. Mr. Burton explained that the definition of a felony in Massachusetts is any crime that is punishable by imprisonment. He explained that the bills could also impose felony liability for egregious violations allowing a judge to sentence an offender to prison for a maximum of five years.

Mr. Burton stated that the only difference from the bill we supported last year is that the new bill was changed to read "jail" and not "House of Corrections." Mr. Burton noted that a call has been placed to the Attorney General's Office for a definition of each and the differences. He noted that once he had heard from the Attorney General's Office he would share the information with Council members.

The Executive Director stated that the next bill the Council supported last year is House Bill 542, which would require employers to notify employees of workers' compensation coverage or cancellation. In addition, this bill fines an employer not less than \$50 but no more than \$100 per day for failing to notify the employee.

Executive Director Burton stated House Bill 1405, which was supported by the Council last session, provides penalties for failing to timely report injuries. The bill creates an escalating fine structure, eliminating the current "two free passes" structure for failure to timely report.

Mr. Burton stated that House Bill 2868 and Senate Bill 927 concern scarring. Mr. Burton noted that the Council had supported Senate Bill 927 during the last session. Mr. Burton explained that the two bills, while similar, differ. He stated that House Bill 2868 offers separate benefits for non-surgical and surgical disfigurement. Both bills are subject to a \$15,000 maximum pay out.

The last bill discussed was House Bill 2308 filed by Representative Tom Sannicandro on behalf of the Workers' Compensation Advisory Council. This bill removes the flat-fine against employers caught without workers' compensation insurance and establishes a premium avoidance fine with 3-times the premium the employer would have paid in the assigned risk pool. Mr. Burton noted that currently there are approximately 8-12 states using some type of premium avoidance fine.

Vice-Chairman Corcoran requested that Mr. Burton provide information on the impact from the success by these states. Vice-Chairman Corcoran asked that Mr. Burton follow-up to find out how the premium avoidance is calculated and provide feedback at our next meeting.

GEORGIU v. COMMISSIONER OF THE DIA

Legal Intern, Rachel Ostrander, provided an update on the decision of *Georgiou v. Commissioner of the Department of Industrial Accidents*. Ms. Ostrander explained that from the 1990's to 2003 a select group of law firms requested and received monthly printouts from the DIA, listing the names and addresses contained on First Report of Injury Forms for injured workers. She stated that the generated printouts were used by law firms to direct mailings (advertisements) to injured workers.

Ms. Ostrander explained that the agency stopped this practice in 2003 and was sued by attorney's Peter Georgiou and James N. Ellis, Sr. She noted that the attorneys argued that the information contained within the First Report of Injury was not protected under the personal privacy exemption to the public records statute.

Ms. Ostrander informed the Council members that on February 22, 2011, the Massachusetts Court of Appeals sided with the Department of Industrial Accidents (DIA) in the ongoing public records lawsuit. Ms. Ostrander explained that in its decision of *Georgiou v. Commissioner of the Department of Industrial Accidents*, the appellate court upheld a lower court's determination that the names and addresses of injured employees are within the privacy exemption for "public records," and therefore are not available for public disclosure.

Ms. Ostrander stated that since 2007, several legislative attempts have been made to both protect and exclude these records under the privacy exemption of the public records law. She explained that during the current legislative session, Representative John P. Fresolo filed House Bill 3209 which would explicitly protect all information contained within the First Report of Injury under the privacy exemption. She noted that this legislation was originally introduced on behalf of the Massachusetts Association of Insurance Agents in 2007.

EXECUTIVE DIRECTOR UPDATE

Executive Director Andrew Burton referred to the April 12, 2011 signed agreement from the Commissioner of Insurance Joseph G. Murphy holding the workers' compensation rates at its current level until at least September 2012. He noted that the WCRIB had originally asked for an overall 6.6% increase. Last year an agreement with WCRIB cut rates by 2.4%. This agreement saved employers approximately \$65 million in annual workers' compensation insurance premiums.

Executive Director Burton stated that during last month's meeting there had been numerous questions concerning the history of American International Group (AIG). Mr. Burton provided a timeline summarizing the key events that have taken place concerning their alleged misreporting of workers' compensation premiums as general or commercial automobile liability premiums. Mr. Burton pointed out four major events on the timeline.

Executive Director Burton informed the Council that during 1989-1991 AIG personnel repeatedly warned high ranking employees that the practice of mischaracterizing premiums paid on the workers' compensation line of insurance is illegal.

Executive Director Burton explained that the New York Attorney General Eliot Spitzer launched an investigation on AIG, which led to a \$1.6 billion settlement agreement over civil fraud charges. As part of the Agreement, AIG is required to establish a \$343.5 million fund to make payments to all 50 states for:

- (1) Alleged injury caused by its underpayment of workers' compensation premium taxes and all other related fees and assessments between 1985 and 1996 (\$42,280,740).
- (2) Alleged injury caused by AIG's underpayment of workers' compensation residual market assessments between 1985 and 1996 (\$301,216,234).

Executive Director Burton stated that on August 20, 2009, NCCI filed a lawsuit against AIG on behalf of participating insurance companies of the National Workers' Compensation Reinsurance Pool ("Pool"). The complaint sought more than \$1 billion in damages from AIG for its role in underreporting of workers' compensation premiums which unfairly increased state residual market contributions made by insurers. The federal judge in Chicago dismissed the complaint stating that NCCI lacks standing to assert claims involving the Pool. The individual insurers then filed suit on their own behalf.

Executive Director Burton explained that on June 30, 2010, AIG filed a counter suit against members of the pool. The same federal judge in Chicago issued a ruling allowing AIG to pursue a lawsuit accusing rival insurers of illegally conspiring to cause it harm in the workers' compensation market. Mr. Burton noted that the counter suit continues today.

The Executive Director stated that on December 17, 2010, AIG entered into a settlement agreement requiring the insurer and its affiliates to pay a total of \$100 million in fines to insurance regulators in all 50 states. He noted that the agreement requires AIG to pay an additional \$46.5 million to 26 states for back premium taxes and assessments which should have been paid if they had been properly reporting insurance premiums. Finally, the agreement requires AIG to enter into a "Compliance Plan" to ensure future conformity with insurance rating and reporting requirements.

Executive Director Burton stated that the agreement is also contingent upon the court's dismissal with prejudice of the following pending cases: Safeco Insurance Company of America v. AIG and AIG v. ACE INA Holdings. Mr. Burton explained that currently, the 50-State Settlement Agreement is being held up by Liberty Mutual's refusal to agree to the terms of the settlement in Safeco.

Executive Director Andrew Burton informed the Council members that the House Ways and Means budget is scheduled to be released this afternoon. Mr. Burton stated that after comparing it to the Governor's House 1 Budget, he would forward the information to Council members.

MISCELLANEOUS

Executive Director Burton informed the Council that this was Rachel Ostrander's last Council meeting and he would like to thank her for all her hard work. Mr. Burton noted that Ms. Ostrander has been our legal intern for approximately 4 months. He stated that Ms. Ostrander was phenomenal and that she brought much to the Council, including fresh ideas.

Vice-Chairman Edmund Corcoran took this time to recognize Director George Noel. He stated that Director Noel's participation with the Council has been remarkable and that no one in his position has been more attentive. Mr. Corcoran stated that Director Noel's representation speaks for itself and his participation is greatly appreciated.

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

The next meeting of the Advisory Council is scheduled for Wednesday, May 11, 2011, at 9:00 AM, at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017