

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL MINUTES

April 10, 2013
Department of Industrial Accidents
1 Congress Street, Suite 100
Boston, MA 02114-2017

Council Members Present: John Regan, Chairman; Stephen Falvey; Edmund Corcoran, Jr.; Mickey Long; Teri McHugh; Todd Johnson; Antonio Frias (Ines Leonardo); Mike Doheny, General Counsel, Executive Office of Labor and Workforce Development.

Also Present: Philip L. Hillman, Director; Omar Hernandez, Senior Judge; George Noel, Deputy Director of the DIA; William Tattan, General Counsel; William Taupier, First Deputy Director of Administration; Ray Marchand, Director of Investigations; Bob Ford, Budget Director, EOLWD; William Harney, Director of OEVR; Ellen Keefe, Workers' Compensation Rating & Inspection Bureau of Massachusetts; Michael Kelley, AIM Mutual.

Advisory Council Staff: William S. Monnin-Browder; Evelyn Flanagan; Daniel White.

Absent: Stephen Joyce; Bernie Mulholland; Teri McHugh; Bill Corley; Dave Powell; John Pulgini; Dennis Hines; Executive Office of Housing and Economic Development.

Agenda:

Chairman's Welcome

DIA Update

- Judicial Update – Omar Hernandez, Senior Judge
- Vital Statistics – William Taupier, First Deputy Director of Administration

Action Items

- Minutes – March 13, 2013

Discussion of Office of Education and Vocational Rehabilitation (OEVR) – Bill Harney, Director, OEVR

Discussion of Pending Legislation

Executive Director Update – William Monnin-Browder

Miscellaneous

CHAIRMAN'S WELCOME

Chairman John Regan began the meeting at 9:00 A.M. The Chairman informed the Council that a letter was sent to the Governor relative to the elimination of the tax exemption for workers' compensation benefits proposed in House 1. He noted that the House Committee on Ways and Means did not include the provision in its budget and that he does not believe the issue will come up on the Senate side.

Chairman Regan congratulated the Senior Judge on his recent reappointment and asked him to provide his update.

DIA UPDATE

Judicial Update

Senior Judge Omar Hernandez updated Council members on the conference and hearing queues. He stated that the queues are holding steady, with the average wait time for a conference being 10-12 weeks.

The Senior Judge stated that with respect to reappointments, three judges had been interviewed the previous week and three more judges are scheduled to go before the Governor's Council today.

The Senior Judge stated that the Impartial Unit continues to do a really nice job of recruiting doctors. He explained that he and Diane Neelon recently attended a seminar by the Massachusetts Medical Society at which some doctors indicated an interest in joining the list.

Vital Statistics

First Deputy Director Bill Taupier updated Council members on the information contained within the DIA's vital statistic report for April 2013. He offered the following statistics: Conference Queue: 550; Hearing Queue: 985; Reviewing Board Inventory: 35; Impartial Exams for FY' 13 (to date): 3,800 (40 waivers); Exam Fees Collected for FY' 13: \$1,384,550; Impartial Medical Examinations in FY' 12: 3,667 (48 waivers); Exam Fees Collected in FY' 12: \$1,474,788.

Mr. Taupier updated the Council on the Stop Work Order (SWO) and Caseload Statistics, including the following: SWOs issued in March: 236 (29 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY' 13 (to date): 1,989; fine collection for March: \$151,214; total fines in FY' 13 (to date): \$1,042,560; SWOs issued in FY' 12: 2,637; total fines collected in FY' 12: \$1,381,085; compliance checks for March 2013: 5,684; estimated number of workers now covered by workers' comp insurance as the result of a SWO: 5,237 (FY' 13).

Mr. Taupier continued the update of the monthly vital statistics offering the following: total cases filed in March 2013: 1,076; total cases filed in FY' 13 (to date): 9,024; total cases filed in FY' 12: 12,646; total First Report of Injury Forms (FRI) filed in March 2013: 2,392; total FRI filed online in March 2013: 865 (36%); total FRI filed in FY' 13: (to date): 22,174; total FRI filed in FY' 12: 29,643 (9,034 online).

Mr. Taupier proceeded with his update on uninsured claims (§65), offering the following: total §65 claims reported in FY' 13 (to date): 98; total amount of §65 claims paid by the Trust Fund in FY' 13 (to date): \$3,953,992; total §65 claims filed in FY' 12: 111; total amount of §65 claims paid by the Trust Fund in FY' 12: \$7,810,128; total recovery efforts against uninsured employers FY' 13: \$1,121,633; total recovery efforts against uninsured employers FY' 12: \$1,047,057.

Mr. Taupier proceeded with the vital statistics for the Second Injury Fund (§37/37A), stating the following: total amount of §37/37A petitions paid in FY' 13 (to date): \$18,809,685; total amount paid on these claims in FY' 12: \$24,198,415; total COLA reimbursements to insurers in FY' 13 (to date): \$7,748,885; total projected expenses FY' 13: \$14,500,000 total COLA reimbursements to insurers in FY' 12: \$20,077,659.

Mr. Taupier reported that as of March 2013, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 240 (189 DIA employees, 51 WCTF employees).

Director Hillman stated that he anticipates six people will be added to the headcount in May. He expects the new hires to include a bilingual person for the public information desk, a regional manager in Fall

River, a Counsel II and at least three Rehabilitation Review Officers. He also noted that one of the new investigators is bilingual.

Mr. Taupier presented the following accounting and finance statistics: total referral fees collected in FY' 13 (to date): \$2,873,398; total referral fees collected in FY' 12: \$3,774,237; total first report fines in FY' 13 (to date): \$40,608; total first report fines in FY' 12: \$115,000; total assessment collections in FY' 13 (to date): \$44,909,671; total assessment collections in FY' 12: \$82,117,762; total SWO fines in FY' 13 (to date): \$1,042,560; total SWO fines in FY' 12: \$1,381,085.

Council member Steve Falvey noted that under the current statute, employers have to really work to get a fine, since you need three or more failures to report in one year before being fined.

Mr. Long asked if the DIA pursues personal liability against the owners of companies whose employees seek indemnity from the Trust Fund, or whether the Agency stops its pursuit at the corporate entity.

General Counsel Tattan indicated that the Agency pursues personal liability against individuals to prevent people from hiding behind the corporate veil. Mr. Tattan stated that they do settle some cases when they decide the person really cannot pay. He indicated that in that case, an installment payment plan will be instituted or they will settle with a lump sum amount. Mr. Tattan explained that they are able to look at the person's background and real estate records when making these decisions.

Mr. Long stated that from what he has heard, there is a substantial amount of money left on the table because there are people opening and closing businesses to avoid their obligations. He asked if the Agency could provide an answer as to how much is deemed uncollectable and report that number on a yearly basis.

Mr. Bob Ford stated that in May or June, he planned on having a discussion related to the write-offs for this year. He noted that they are going to have to write off amounts related to SWOs and the Trust Fund. He proposed that the Council wait until the next meeting since he was still in the process of finalizing the numbers. Mr. Ford stated that if SWOs are on the books a couple years, the fines continue to accumulate at \$100 a day causing the number to become unrealistic. He indicated that the Agency is meeting with individuals from Administration & Finance and the Comptroller's Office to discuss capping this liability.

Council member Ed Corcoran stated that while SWO fines are amounts that the Agency would like to collect, he is particularly interested in the Trust Fund uncollectable amounts, because money paid by the Trust Fund is funded by employers of the Commonwealth through the assessment process.

Chairman Regan stated that Director of the Department of Unemployment Assistance (DUA) presents the DUA Advisory Council with a number that she recommends is debt uncollectable, explains why it is uncollectable and asks that council to approve it. He suggested that this process could help at DIA since it would give the Council the information as to what the number is and it would also give the Agency some comfort that the amount of the write-off is sanctioned by this group.

Chairman Regan also suggested that it may be worth looking into M.G.L. c. 151A provisions regarding successor/alter ego corporations to see if any of it is importable into M.G.L. c. 152 to cause more difficulty for either the alter-ego or the successor.

Mr. Long suggested thinking more about whether something could be done relative to licensing in order to prevent employers who receive a SWO from opening an alter ego business.

General Counsel Tattan stated that he would look into whether importing certain concepts from M.G.L. c. 151A might help address the successor/alter ego situation.

Council member Falvey noted that a SWO sounds a lot worse than it is and that most people get a SWO and pay the fine and then they are done with it. He stated that a three year debarment sounds pretty severe, except there is no penalty for working while debarred. Mr. Falvey explained that the company cannot bid on new work but they can finish the work they have on the books. They can actually reorganize a number of times putting the corporation in their spouses name and the owner becomes the foreman on the job, still collecting the prevailing wage making \$100,000 a year. He noted that this issue will come up with the Council discusses legislation.

Director Hillman mentioned that the Agency is in the final stages of an audit by the Auditor's Office and stated that they would bring the results to the Council. He suggested that the audit be placed on the agenda once the report is complete.

ACTION ITEMS

A motion was made to approve the March 13, 2013 minutes.

Motion seconded and carried.

OFFICE OF EDUCATION AND VOCATIONAL REHABILITATION (OEVR) UPDATE

Mr. Bill Harney, Director of OEVR, presented a slide showing the Return to Work (RTW) statistics. He indicated that of the 241 completed IWRPs in FY'12, 109 employees have returned to work and 132 have not been placed. Mr. Harney explained that coming up with a success or failure rate is hard to capture since after 60-90 days the case is closed upon completion of the plan.

Mr. Long asked if employment information might be available through some kind of interagency cooperation.

Director Hillman stated that there are legal barriers and confidentiality issues related to obtaining employment issues from other agencies.

Mr. Long expressed frustration that this information is not made available for statistical purposes. He stated that the question is not where the individual works or how much the individual is paying in taxes, just whether the individual is employed.

General Counsel Mike Doheny explained DOR would violate their confidentiality statute to provide such information, but that there might be other avenues to explore.

Chairman Regan stated that the principle of confidentiality is a very important principle but not if you are just asking if the person is employed. He stated that DUA has that information. He indicated that when someone previously collecting unemployment insurance shows up on a payroll, there is a triggering event notifying DUA that the person now has a job. He noted that the data is there and when someone gets a job DUA knows. There is an agency that has that initial notice that somebody has been employed and there must be a way to cross-correlate those names. He indicated that collecting this information would greatly improve the data.

Council member Ed Corcoran asked if OEVR had done any benchmarking with other states doing VR. He also asked if Mr. Harney thought it was time to look at the suitability issue relative to who gets over the bar to get into VR programs to increase participation and if he believed the criteria was too difficult.

Mr. Harney explained that they already receive comments from providers questioning OEVR's decision to find someone suitable. He stated the OEVR has an obligation to ensure that the insurer/employer's money is spent wisely.

Council member Teri McHugh stated that the issue that concerns her is that there are people who are motivated to return to work but they do not have a GED or English as their first language and they are immediately deemed unsuitable. She suggested putting something in place to allow someone to work on their GED or start ESL. Ms. McHugh noted that another reason someone is deemed not suitable is because they are still treating, but whether or not they are suitable really depends on the treatment—someone may be treating once every three months, or be in physical therapy which can now be done anywhere between 6:00 AM and 9:00 PM.

Mr. Harney stated that someone is not deemed unsuitable simply because of a GED or language difficulties. Mr. Harney explained that those deemed unsuitable are provided with information about other available resources that could help them.

Ms. McHugh suggested that the determination letters note these referrals. She also suggested that they reevaluate the terminology for deeming someone not suitable by providing different categories as to why they are not suitable. Ms. McHugh suggested that it could say that you are not suitable right now but could be suitable given some sort of plan.

Mr. Regan suggested that Mr. Harney spend some time thinking about how to present the data to the Council so that the Council can have a better understanding of the process. The Chairman explained that he was more sensitive than ever to how important it is both to the injured workers in the system and helping them get back to work. He explained that he also wants to make sure that money is being well spent and that there is good use for the money going through the system. He suggested that Mr. Harney come back on a quarterly basis, next in September, to update the Council, since now he has a sense of what the Council is looking for.

EXECUTIVE DIRECTOR UPDATE

Executive Director Monnin-Browder thanked everyone who had completed their Conflict of Interest training and reminded those members who have not had a chance to do it yet, to do it as soon as possible.

Executive Director Monnin-Browder stated that the House budget will be released today.

MISCELLANEOUS

Chairman Regan stated that potential problems with the use of proxies have been brought to his attention. He indicated that the concern is that the Open Meeting Law (OML) does not contemplate their use. He suggested that, in an abundance of caution, it is safer and better for the Council to not risk a challenge by using proxies.

General Counsel Doheny stated that his understanding of the OML, a quorum is only established by the number of people present in the room. He noted that the regulations now allow for remote participation, though a physical quorum must be established.

Mr. Long stated that the Council should draft something to all members informing everyone that proxies will not be used, however if there is a physical quorum present that a member can participate remotely.

Mr. Long asked if there is a point the Council can declare a vacancy if someone does not show up so many times in a certain period.

Chairman Regan noted that if people are going to travel to meetings there should be an expectation that there is a quorum present. He stated that at a minimum, members should be reminded that they need to be here, certainly in May, where there will be serious issues discussed like the legislative agenda that is something everyone needs to participate in.

Mr. Corcoran stated that he had the privilege of being Chair of this Council two different times. He explained that on a few occasions, he had urged the Executive Director to send letters informing members that it was their duty and responsibility to attend meetings and politely suggesting that they consider giving up their appointed position if they were unable to attend.

The Chairman asked Mr. Monnin-Browder coordinate with DIA staff on a response.

The Chairman adjourned the meeting.

The next meeting of the Advisory Council is scheduled for Wednesday, May 8, 2013, at 9:00 A.M., at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017.