

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL MINUTES

February 10, 2016
Department of Industrial Accidents
1 Congress Street, Suite 100
Boston, MA 02114-2017

Council Members Present: Steve Joyce; Steve Falvey; Bernie Mulholland; Teri McHugh; Frank Ruel; John Pulgini; Michael Kelley; Todd Johnson; Bill Corley.

Also Present: Linda Edmonds Turner, Director; Omar Hernandez, Senior Judge; Bill Taupier, Director of Administration; Karen Fabiszewski, Acting General Counsel; Marc Joyce, Senior Regional Services Manager; Alan Green, Deputy Director of Investigations; Bob Ford, CFO; Melissa Butts, Underground Economy; Virginia McCarthy, Workers' Compensation Rating and Inspection Bureau (WCRIB); John Murphy, Massachusetts Insurance Federation; Alan Pierce, Pierce, Pierce & Napolitano.

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

Absent: John Regan; Mickey Long; Executive Office of Labor and Workforce Development; Executive Office of Housing and Economic Development.

Agenda:

Chairman's Welcome

DIA Update

- Judicial Update – Omar Hernandez, Senior Judge
- Vital Statistics – Bill Taupier, Director of Administration
- Update on Regulatory Review Process – Karen Fabiszewski, Trust Fund Manager
- Budget Update – Bob Ford, CFO
- Director's Update – Director Linda Edmonds Turner

Communications

Action Items

- Minutes – August 12, 2015
- Minutes – September 9, 2015
- Minutes – October 14, 2015
- Minutes – November 18, 2015
- Minutes – December 9, 2015
- Minutes – January 13, 2016

Discussion of FY'15 Annual Report

Executive Director Update – William Monnin-Browder

National Developments in Workers' Compensation: Opt-Out, Constitutional Challenges, Cost-Shifting, Etc. – Attorney Alan Pierce, Pierce, Pierce & Napolitano

Miscellaneous

CHAIRMAN'S WELCOME

Chairman Steve Joyce began the meeting at 9:00 A.M. and asked Senior Judge Omar Hernandez to provide his Judicial Update.

DIA UPDATE

Judicial Update

Senior Judge Omar Hernandez stated that the average wait times between conciliation and conference are approximately three months in each region. With regard to outstanding hearing decisions, the Senior Judge noted that a year ago there were 65 cases on his “late decision” list, but that there are currently 30. The Senior Judge stated that the impartial list is trending in a good direction and that the DIA is currently in the process of getting contracts out. The Senior Judge stated that he is working with the Governor’s Office to determine when to begin the appointment/reappointment process, but that no timeframe has been set.

Vital Statistics

Director of Administration Bill Taupier updated Council members on the information contained within the DIA’s vital statistics report for February 2016. He offered the following statistics: Conference Queue: 600; Hearing Queue: 784; Reviewing Board Inventory: 66; Impartial Exams for FY’16 (to date): 2,445 (52 waivers); Exam Fees Collected for FY’16 (to date): \$1,094,348; Impartial Medical Examinations in FY’15: 4,146 (94 waivers); and Exam Fees Collected in FY’15: \$1,967,550.

Mr. Taupier updated the Council on the Stop Work Order (SWO) and Caseload Statistics, including the following: SWOs issued in January: 179 (8 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY’16 (to date): 1,274; fine collection for January: \$63,350; total fines in FY’16 (to date): \$612,974; SWOs issued in FY’15: 1,938; total fines collected in FY’15: \$1,188,541; compliance checks for January: 6,639; estimated number of workers now covered by workers’ compensation insurance as the result of a SWO: 3,049 in FY’16 (to date).

Mr. Taupier continued the update of the monthly vital statistics offering the following: total cases filed in January: 954; total cases filed in FY’16 (to date): 7,030; total cases filed in FY’15: 11,837; total First Report of Injury Forms (FRI) filed in January: 2,764 (2,379 filed electronically: 86%); total FRIs filed in FY’16: 19,895; total FRIs filed in FY’15: 33,353 (29,290 online). In January the number of employee claims filed: 799; number of employee claims filed in FY’16 (to date): 5,921; number of discontinuances filed: 153; the total number of discontinuances filed in FY’16 (to date): 1,093; the number of third party claims filed: 2; total number of third party claims filed in FY’16 (to date): 26.

Mr. Taupier proceeded with his update on uninsured claims (§65), offering the following: total §65 claims reported in FY’16 (to date): 75; total amount of §65 claims paid by the Trust Fund in FY’16 (to date): \$3,855,719; total §65 claims filed in FY’15: 99; total amount of §65 claims paid by the Trust Fund in FY’15: \$7,620,855; total recovery efforts against uninsured employers FY’16 (to date): \$635,725; total recovery efforts against uninsured employers FY’15: \$1,556,069.

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’16 (to date): \$9,291,126; total amount paid on these claims in FY’15: \$30,682,389; total COLA reimbursements to insurers in FY’16 (to date): \$2,973,266; total COLA reimbursements to insurers in FY’15: \$14,344,261.

Mr. Taupier reported that as of December 2015, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 233 (179 DIA employees, 53 WCTF employees).

Mr. Taupier presented the following accounting and finance statistics: total referral fees collected in FY' 16 (to date): \$2,233,147; total referral fees collected in FY' 15: \$3,888,246; total assessment collections in FY' 16 (to date): \$44,157,240; total assessment collections in FY' 15: \$70,934,257.

Regulatory Review Update

Acting General Counsel Karen Fabiszewski provided an update on the regulatory review process. She explained that the DIA is continuing to work with the Secretary's office on the draft regulations. She indicated that the draft regulations will next go to A&F for review and then to the Secretary of State for the promulgation and public hearing process.

Budget Update

Mr. Bob Ford, CFO, stated that DIA has offset an approximately 45% increase in salary and fringe costs since 2009 through consolidation, allowing the budget to remain relatively stable throughout that period. He noted that DIA staffing has decreased from 282 Full Time Employees (FTEs) in 2009 to 233 FTEs today. Mr. Ford explained that the DIA has also built in an additional \$7 million into the budget for medical expenses paid by EOHHS. Mr. Ford stated that Ms. Fabiszewski would explain this in more detail.

Ms. Fabiszewski explained that in certain circumstances, an injured worker might seek medical treatment and get the benefits under MassHealth. She explained that an agreement is in place between the Trust Fund and EOHHS (the secretariat that administers MassHealth) to reimburse MassHealth for medical costs that the Trust Fund would have been responsible for had the claimant not utilized MassHealth to obtain medical treatment.

Mr. Ford noted that he expects that the assessment rate will remain relatively stable over the next few years, unless there is a mild recession. He stated that the projected ending balance of the Trust Fund should run between \$11 million and \$16 million every year, which gives the DIA an ample buffer.

Chairman Joyce agreed that this is a great story and that keeping assessments low is great, so long as the DIA is working effectively and efficiently. He stated he wants to make sure the DIA has the right staffing levels to fulfill its mission.

Director's Update

Director Turner stated that with respect to Circular Letter #348, revisions to the letter are in draft form and currently being reviewed by the Secretary's office. She explained that she expects to share the draft with the working group soon.

NATIONAL DEVELOPMENT IN WORKERS' COMPENSATION: OPT-OUT, CONSTITUTIONAL CHALLENGES, COST-SHIFTING, ETC.

Chairman Joyce welcomed attorney and former Advisory Council member Alan Pierce, stating that Mr. Pierce would present on some of the recent developments in workers' compensation around the country.

Attorney Alan Pierce stated that he is a claimant's attorney and that he also has a background in insurance and self-insurance. He noted that he is currently involved with an advocacy group called Workers' Injury Law & Advocacy Group (WILG), which represents claimants and claimant's attorneys. Mr. Pierce explained that his message today is to alert the stakeholders about what is going on in workers' compensation outside of Massachusetts. Mr. Pierce noted that workers' compensation very rarely makes

national news or gathers national attention, because what is happening in one state does not directly affect another state. Mr. Pierce stated, however, that at the beginning of 2015, there were a series of reports issued by NPR and ProPublica that were disturbing—one titled “The Demolition of Workers’ Compensation” and another titled “How Much is Your Arm Worth?” He explained that OSHA also issued a very strong report on cost-shifting. He explained that cost-shifting is when medical payments resulting from workplace injuries are being shifted from workers’ compensation to other benefit systems, whether it is Social Security, Medicare, Medicaid, long or short term disability.

Mr. Pierce said that in some states, workers’ compensation systems are being challenged as to whether they satisfy their constitutional mandate. He explained that there are four cases in Florida challenging the constitutionality of certain aspects of the Florida workers’ compensation statute. He explained that legislative changes in recent years have been unfriendly to workers. The theory that the plaintiff injured workers are advancing in the cases is that the workers’ compensation system no longer provides an adequate remedy to injured workers.

Mr. Pierce explained there is also a move in some states to allow employers to opt-out of the workers’ compensation system. He noted that workers’ compensation has always been optional in Texas, though uninsured employers are open to civil lawsuits. Mr. Pierce stated that Oklahoma adopted an opt-out system a couple of years ago.

Mr. Pierce explained that these opt-out systems usually allow large companies to create their own workplace injury plans and mandate that the company-sponsored plans provide benefits equivalent to the workers’ compensation laws. Mr. Pierce stated that the employers who have taken advantage of these alternative benefit schemes are generally the large and self-insured employers. Mr. Pierce explained that these plans are not regulated, are outside the workers compensation laws, and often do not provide equivalent benefits. He explained that the Oklahoma law states that these plans are ERISA plans under federal law.

Mr. Pierce provided some examples of some of the limitations in one large employer’s alternative benefit plan (ABP). He explained that the ABP provides that if an injured worker goes into a nursing facility for recovery, the plan will not cover the cost of the food and housing. Therefore, Mr. Pierce explained, the plan will presumably only cover the medical attention that the worker gets while at the facility. He noted that the example ABP also provides that all aspects of medical care are the sole prerogative of the company and the company-selected doctor and the employee has no right to a second opinion doctor. He explained that the plan also allows medical benefits to be terminated at any time by the claims administrator if the worker is late for a medical appointment. Furthermore, he explained, the claimant is barred from seeking benefits under the plan unless the claimant had reported the injury before the end of their shift and provided a written injury report that has to be given before the end of the shift.

Mr. Pierce explained that, pursuant to the example ABP, disputes would be heard by an arbitrator selected by the employer. He explained further that if there is an appeal from the arbitrator’s decision, the dispute would go to federal court. He stated that under ERISA, the standard in evaluating a plan administrator’s decision is whether the administrator’s actions were arbitrary or capricious. He stated that all the control is in the hands of the plan administrator and the employer.

Mr. Pierce stated that the opt-out proponents have formed an association called Association for Responsible Alternatives to Workers’ Compensation (ARAWC). He explained that the association has argued to large employers and legislators that the economy has changed and, as a result, employers should have the ability to design and administer their own programs. Mr. Pierce stated that ARAWC is seeking to introduce opt-out legislation in states that are generally pro-business and very receptive to these large

employers and their lobbying efforts. He explained that the strategy of the proponents of opt-out is that the more states adopt it, the easier it will be to move into other states.

ACTION ITEMS

A motion was made to approve the Advisory Council's FY'15 Annual Report.

Motion seconded and carried.

A motion was made to approve the August 12, 2015 minutes.

Motion seconded and carried.

A motion was made to approve the September 9, 2015 minutes.

Motion seconded and carried.

A motion was made to approve the October 14, 2015 minutes.

Motion seconded and carried.

A motion was made to approve the November 18, 2015 minutes.

Motion seconded and carried.

A motion was made to approve the December 9, 2015 minutes.

Motion seconded and carried.

A motion was made to approve the January 13, 2016 minutes.

Motion seconded and carried.

EXECUTIVE DIRECTOR UPDATE

Executive Director William Monnin-Browder stated that on January 29, 2016, the Division of Insurance (DOI) held a hearing on the Workers' Compensation Rating and Inspection Bureau's (WCRIB) request for a rate increase of 6.4%. He explained that the proposed effective date of the rate increase is July 1, 2016.

MISCELLANEOUS

House Bill 3972

Council member John Pulgini expressed concern about a bill that recently moved to Third Reading in the House. He explained that House Bill 3972 would allow insurers to deny workers' compensation benefits to a worker who is 65 years or older and out of work for two years, unless a presumption that the individual would be out of the workforce could be overcome. Mr. Pulgini stated that this bill would add §34A permanent and total disability to M.G.L. c. 152, §35E. Mr. Pulgini stated that this bill would drastically change the Act and the intent of the Act. He suggested that the Advisory Council discuss the bill and perhaps make a recommendation one way or another to the administration or to the legislature.

Chairman Joyce stated this issue will be added to next month's agenda. He asked Council Members to review the bill in advance of the next meeting.

Meeting Schedule

Chairman Steve Joyce suggested that the Council discuss meeting attendance. He noted that Advisory Council members are all volunteers with other jobs and responsibilities. He suggested that the Council consider whether a different date or time that would be more convenient for everyone.

Council member Steve Falvey asked Acting General Council Karen Fabiszewski if the seats on the Council which are specifically designated to organizations could be delegated to others within the organization in the event that the named member is unable to attend the meeting.

Chairman Joyce asked Ms. Fabiszewski if she could look into the public meeting laws and see if the law allows for proxy voting.

Ms. Fabiszewski indicated that she would look into both issues.

Meeting adjourned.

The next meeting of the Advisory Council is scheduled for Wednesday, March 9, 2016, at 9:00 A.M., at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017.