

*ANNUAL REPORT*  
*FY '91*

*Massachusetts Workers' Compensation Advisory Council*

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## INTRODUCTION

This is the fifth annual report of the workers' compensation Advisory Council. It surveys the Department of Industrial Accidents and the workers' compensation system primarily over the 1991 fiscal year, which encompasses the period from July 1, 1990 through June 30, 1991. A descriptive overview of the Advisory Council and some of its major activities during the past fiscal year is included in the introduction.

Those who follow workers' compensation in Massachusetts know that the 1991 fiscal year was a difficult period for the commonwealth's workers' compensation system. At every level of the system, there were widespread complaints about inefficiencies and costs.

Prompted by the system's troubles, virtually all media outlets devoted significant attention to workers' compensation throughout the year. Along with their news coverage of workers' compensation matters, both print and broadcast media devoted features and editorials to such issues as problems of the system, reform proposals, and other related stories. The system is entering its ninth decade and as it does so the parties for whom it was established- employees and employers- wrestle with numerous issues in their efforts for continued improvement.

## **The Workers' Compensation Advisory Council**

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The Massachusetts Workers' Compensation Advisory Council was established by the 1985 amendments to monitor the workers' compensation system and make recommendations for its continued improvement. As an extension of the cooperative precedent set by the mid-1980s workers' compensation reform effort, the Council is comprised of representatives of the major constituencies in the workers' compensation system.

Ten voting members serve on the Council, five representing employers and five representing employees. In addition, four nonvoting members are appointed to represent the claimant's bar, the medical community, vocational rehabilitation providers, and the insurance industry. The Secretary of Labor and the Secretary of Economic Affairs are ex-officio members. A list of the Council members and their respective affiliations is set forth in Appendix A.

The Advisory Council meets on a monthly basis to review various issues concerning the Department of Industrial Accidents and the workers' compensation system. In FY'91 the Council conducted 13 full meetings and 2 subcommittee meetings. Since its inception in late 1986, the full Council has to date held 58 meetings. Five subcommittee meetings have also been held. Formal action by the Council requires an affirmative vote of seven voting members. A list of the Council's agendas for the past fiscal year is set forth in Appendix B.

Several changes in Council membership were made during the past year. Amy Vercillo of Rehab Re-employments replaced Evelyn Wedding as the rehabilitation representative on the Council. At the beginning of the 1992 fiscal year, employer manufacturing representative Jim Cronin of Raytheon Corporation was replaced by Antonio Frias, Sr., of S and F Concrete and his term expires on June 25, 1996. In addition, Paul Meagher's resignation was submitted as the statutory representative from the Associated Industries of Massachusetts, and he was replaced as a Council member in October of 1991 by John Gould, CEO of Associated Industries of Massachusetts, to a term which expires on June 25, 1995. John Marr of Travelers Insurance was appointed to replace John Antonakes as the insurance representative in October of 1991 and his term expires June 25, 1992. Edward Sullivan, Jr., of Local 254 of the Service Employees International Union, AFL-CIO was

appointed as Council member in October, 1991 to a term expiring on June 25, 1996, replacing Joseph Faherty.

### **Council Studies**

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#### **Dispute Resolution Study**

Since shortly after the implementation of the reform law in 1985, there has been widespread concern with the existence of lengthy delays for proceedings at the DIA. Much of the discussion on reducing these delays has focused upon possible ways to make improvements in the dispute resolution system. Discussions by the Advisory Council have tended to question whether existing procedures could be substantially improved through administrative initiatives or, alternatively, whether new procedures would have to be introduced through legislative action. In order to provide some basis for understanding where flaws in the system exist, or how resources could be better used, the Advisory Council decided to sponsor a study of the current dispute resolution system. The Council contracted with BDO Seidman and Endispute, Inc. to perform this study. A copy of the Executive Summary is included as Appendix C.

In observing the state of the dispute resolution system, the research team concluded that the system was not managed. The point did not simply refer to the supervisory aspects of management, but more generally to the lack of coherent strategies and structures for mobilizing diverse resources towards the achievement of particular DIA goals. The study was primarily concerned with the expeditious processing and resolution of workers' compensation cases. The project was not confined to studying either the output of administrative judges or the division of dispute resolution.

The report cites the absence of formalized orientations or staff development programs for dispute resolution personnel, including administrative judges, administrative law judges, conciliators, managers, and support staff, as an example of how the system is not managed. The report suggests that organizational effectiveness would be enhanced with the provision of training opportunities to improve skills, as well as for lateral and upward mobility.

Some examples are offered of how skill enhancement could improve operations. One recommendation is to encourage judges to become part of a functioning work team with

colleagues, other employees, and administrators. It is also recommended that conciliators be brought within the division of dispute resolution to support this goal. The report suggests that judges' secretaries be used for case management in order to broaden their responsibilities, fitting them into the team approach, and perhaps improve case management.

The report notes the diverse backgrounds and experiences of judges as instrumental for staff development programs. The report also stressed the importance of a timely and efficient appointment process for judges. Appointment criteria and thorough evaluations were seen to be critical to the system's future effectiveness since the majority of terms expire over a five month period in 1992. The report recommended informing employees of the process and the outcome by the latter part of 1991 in order to avoid mass departures and make timely replacements possible.

Most of the recommendations outlined in the report would not require legislative action, but were instead geared to the administrative authority already vested in the DIA. The report was provided to the department on July 2, 1991.

#### **Public Employee Study**

The Council also released a study concerning public employees and the workers' compensation law. The report identifies the need for a comprehensive and reliable information base for monitoring the workers' compensation system for public employees. Since the law is elective for all public employers except the commonwealth, accurate information on which public employers have accepted the law, and which of their employees are covered, is a necessary prelude to further examination of public employee issues.

The report also notes the uncertainty faced by employees of public entities that have not accepted the act or have chosen not to include certain employment categories in their acceptance of the law. For instance, many communities do not include teachers in their coverage. A question exists as to what remedy may be available for those workers injured in the course of employment if they are not covered. Many of the report's recommendations are intended to generate discussion of the fiscal and administrative implications of the current law, while some simply seek to update the statute with respect to amendments that would clarify the law for the current situation.



**SECTION 1**  
**Overview of the**  
**Department of Industrial Accidents\_\_\_\_\_**

The Department of Industrial Accidents is empowered with the authority under Chapters 23E and 152 of the Massachusetts General Laws to administer the workers' compensation system. This system covers nearly all civilian employees in the private sector and most employees in the public sector. The DIA's enabling legislation is set forth in Massachusetts General Law Chapter 23E. The majority of the substantive and procedural elements of the system are set forth in c. 152. The department is situated within the Executive Office of Labor, but is not subject to its jurisdiction, pursuant to Massachusetts General Law Chapter 6A §17C.

Departmental Activities

During the past fiscal year, the department issued six circular letters. While not necessarily binding as precedent in any formal context, they have provided background and guidance for parties and practitioners since initially promulgated in 1934. The letters issued during the past fiscal year with their corresponding topics are:

# 254      10/1/90      COLA Reimbursements, Maximum  
and Minimum Weekly Compensation Rates

# 255      10/12/90      Agreement Between Insurers  
Providing Claims Handling Services replacing the  
Agreement appended to Circular Letter #243 dated August  
30th, 1989

# 256      12/6/90      Supplemental Requests for  
Additional Reimbursement under Section 37 or 37A of  
M.G.L.c.152

# 257      12/15/90      Reimbursement for Latency  
Benefits

# 258      5/15/91      Motion Sessions for Expedited  
Conferences

\* # 159      5/16/91      1991 Certified Vendors  
The Office of Education and Vocational Rehabilitation  
Certification of (91) Vocational Rehabilitation  
Providers In the Commonwealth.

(\* Circular Letter #159 should be Circular Letter  
#259)

**Publication of Reviewing Board Decisions/  
Annual Statistics**

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As noted in last year's report, the decisions of the reviewing board are being published after long delay. At this writing, four volumes have been printed. They contain digests of the cases, subject indexes and official citations for the decisions issued. As the extent of the case law interpreting the 1985 changes grows, these volumes should assist parties in evaluating the merits of their respective positions.

The Council receives statistical information from the DIA as mandated by §12 of c. 23E. In addition to ongoing requests for information and reports, the Council is provided with biannual data on a number of areas of departmental activity. It does not appear that the DIA has furnished statistics to the legislature, as required by statute. Since the 1985 amendments were enacted, the DIA has published only one document containing some of the statistics relevant to the discussion of the workers' compensation system. The Council has in the past supported the DIA's use of its administrative authority, as set forth in §63 of c. 152, for research purposes, including assignment of a person to generate information, analysis, and research papers.

**Department Rules**

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The DIA is empowered to enact rules to augment and provide clarity to chapter 152. The need for such regulations is widely accepted. Regulations should supplement the legislation, but not exceed the scope of the law to the detriment of any party. The Supreme Judicial Court has held that a single member or the reviewing board may not disregard rules that have been properly promulgated by the rule making body to the prejudice of a party's essential rights. DaLomba's Case, 352 Mass 598,603 (1967).

In amending a number of its rules during the past fiscal year, the department abandoned some of the procedures regarding notification and solicitation of input that had previously been followed. At a hearing held on January 25, 1991 on certain proposed rule changes for self-insurance, the Council was unable to review or take a position on the proposed changes because it was not notified of the hearing. The Council was later informed that no one was in attendance to speak either in favor of or against the proposed changes. A notice of the hearing was published in the Massachusetts Register of January 18, 1991.

Two proposed changes were initially envisioned for 452 CMR 5.04, which deals with the requirements for a new applicant for a self-insurance license. In §2(c), the minimum level of standard unmodified premium was increased from \$300,000 to \$750,000. A second change, which would have amended 5.04 2(e) by changing the inter or intra state experience modification factor from "1.25 or higher" to "1.25 or lower", was not promulgated.

The former rule has had a brief history. This entire section was filed as an emergency regulation on November 9, 1989. The filing indicated that, along with the other proposed rules, it would have no fiscal effect on either the public or private sector. The amount was set at \$300,000, although an amount of \$500,000 was considered. The department's explanation for this change was that it is generally not cost effective to self-insure with a smaller premium due to the fixed costs, surety bond, legal expenses, reinsurance, and the variable costs, mainly consisting of the self-retention of all workers' compensation payments. As of April 26, 1991, the minimum level for new applicants is \$750,000. This increase in the minimum level of unmodified manual premium by 150% was noted as having no fiscal effect on either the public or private sector.

The DIA proposed additional rule changes, a notice of which was published in the Massachusetts Register on June 18, 1991. Copies of the proposed changes were provided by the department and reviewed by the Council at its July 10, 1991 meeting. The changes concerned the addition to the definitions of the term "filed" and "necessary expenses", as well as the establishment of certain penalties for the nonpayment of referral fees.

The Council reviewed the proposed changes in accordance with current law and regulations. It unanimously decided to not support any of the proposed changes as written. A copy of the proposed rules is enclosed as Appendix D. The Council expressed particular concern with a proposal to deprive insurers of their defenses for nonpayment of the referral fee. While citing a number of issues in its discussion on this rule, it emphasized that the penalty was inconsistent with the statute and that the rule would harm employers by charging them for losses in cases where the insurer could not raise a defense. Through higher losses, employers would pay for insurer behaviors over which they had no control.

At the hearing on July 22, 1991, the parties in attendance were informed that the DIA had changed some of its proposed rules. While some of the changes were apparently in response to the position provided by the Council to the DIA on July 12, 1991, the Council requested the DIA's future consideration in providing sufficient notice to interested parties to allow them an opportunity to discuss the changes with their respective constituencies. The DIA has not taken any action on its proposed rules as of this writing.

Penalties/Fees

The level of attorney involvement is a continuing focus of discussion. Information is still incomplete on the cost of legal payments in the workers' compensation system. In the rate-making process, payments for defending claims are included in expenses and payments for prosecuting claims included in losses. The Council has requested this information at rate hearings and the Commissioner of Insurance has suggested that the data be developed. The industry has attempted to produce this information in a good faith effort to document the legal costs associated with workers' compensation, but to date the information is not available.

Since the 1985 reform, all claimant attorney fees for disputed matters falling under the relevant amendments have been paid by insurers where the claimant prevailed. Until additional information is available, the Council will utilize data provided by the Department. Figures utilized here reflect voluntary compliance and will likely underestimate amounts since information is often not provided to the DIA as required by law. The totals for matters in DDR are believed to be more accurate. Listed below are the amounts reported for the last three years. The first series of figures are generated by the filing of agreements, pay forms, or resume forms in the Division of Claims Administration and the second cover matters before judges in the Division of Dispute Resolution and include conferences, hearings, lump sums and reviewing board cases.

**TABLE I**  
**Attorney Fees & Penalties Awarded**  
**Prior to DDR For Event Dates In Fiscal Year (RPT 306)**

	<u>FY'1989</u>		<u>FY'1990</u>		<u>FY'1991</u>	
	<u>NO.</u>	<u>AMOUNT</u>	<u>NO.</u>	<u>AMOUNT</u>	<u>NO.</u>	<u>AMOUNT</u>
\$7 Pen.	97	\$109,548	60	\$76,789	46	\$54,638
\$8 Pen.	4	\$1,806	11	\$5,800	9	\$7,572
Atty.Fees	1,309	\$1,070,343	1,493	\$1,371,981	2,290	\$1,912,290
Atty.Fees With \$7 or \$8	82	\$67,755	43	\$35,343	33	\$26,664

**Attorney Fees & Penalties Awarded  
In DDR For Disposition Date In Fiscal Year (RPT 307)**

	<u>FY'1989</u>		<u>FY'1990</u>		<u>FY'1991</u>	
	<u>NO.</u>	<u>AMOUNT</u>	<u>NO.</u>	<u>AMOUNT</u>	<u>NO.</u>	<u>AMOUNT</u>
\$7 Pen.	41	\$36,868	48	\$94,139	21	\$30,578
\$8 Pen.	8	\$4,612	11	\$17,089	9	\$14,818
Atty.Fees	13,939	\$50,712,048	19,853	\$74,990,649	23,224	\$88,840,224
Atty.Fees With \$7 or \$8	35	\$37,918	38	\$49,241	25	\$33,092

In matters prior to referral to the DDR, \$7 penalties have continued to drop and are less than half of the FY'89 totals, while \$8 penalties have slightly increased. While the number of attorney fee awards have risen over 50%, the total amount has increased 39%, possibly indicating that where information is reported, it includes lower fees. The totals and individual amounts of fees with the penalties continue to drop. If the information reported is reflective of the system as a whole, it would indicate greater conformance with the law's requirements. However, given the lack of complete information, there may simply be a greater reluctance to file information indicating penalty payments.

Attorney fees awarded for disposition dates in the last fiscal year grew 18.4% over FY'90 and have increased 75% over FY'89. The average award for FY'91 was \$3,825, while in the prior two years the averages were \$3,777 and \$3,638, respectively. The small growth in average awards has not kept pace with the increases in the SAWW, the relevant determinant for the computation of many of the fee awards. This information is maintained not just to calculate penalties awarded, but also to provide data to verify that their costs are not utilized in the establishment of premium rates. The information is provided to both the Council and to the Commissioner of Insurance (see §7F of c. 152). No amounts paid as a result of failure to comply with the pay or deny process under §7 of the law or penalties awarded when an insurer terminates, reduces, or fails to make payments required under the law and additional compensation is later ordered may be used in any formula to set premium rates (see §7(2) and §8(5)). Additionally, §13A (a) precludes the inclusion of attorney fees payable for proceedings at which a \$7 penalty is awarded to be utilized in the rate-making process.

A total of \$107,606 in penalties were awarded in the last fiscal year, down from \$193,817 in FY'90.

Penalties of \$454,257 are indicated for the last three fiscal years. Attorney fees awarded in penalty matters also have dropped. In cases prior to referral to a judge, 33 awards (1.4% of the total attorney fees) consisting of \$26,664 (1.4% of the total) are to be excluded from the rates. The figures were even lower for cases referred to DDR, where 25 (.1% of the total) for \$33,092 (.04% of the total) cannot be utilized in the rate-making process. The two reports for FY'91 show a total of 58 attorney fees (.2% of the total) in penalty cases, which resulted in a total of \$59,756 (.06% of the total of \$90,752,515) to be excluded.

The total amount for exclusion in the last three fiscal years is \$250,013 (.1%) of the total fees of \$218,897,535. The low number of fees awarded and the small total amounts are evidence that parties are not raising penalty issues in an attempt to generate fees. This may result from voluntary resolution of the issue and the system not capturing the information or from a reluctance to pursue both a fee and a penalty before a judge. During the last half of FY'91, totals ranged from 52% to 93% of the yearly figures. It is too early to determine whether this is a trend towards increasing involvement of these issues in the dispute resolution process, but it may bear watching.

The Commissioner of Insurance is to establish a procedure for the identification and separate annual reporting by each insurer of the various amounts to be excluded from the rate making formula [see §53A (11)]. The DIA reports are intended to provide verification for the accuracy of such reports. We have been unsuccessful in verifying if such a procedure at DOI exists.

#### Section 65 -

##### Employees Of Uninsured Employers

As noted in previous Annual Reports, there has been a steady increase in the number of claims filed against the private employer trust by employees of companies which violate the law by failing to carry insurance.

Although the Council was informed in 1990 that statutory fines would be levied for failure to file a first report by uninsured employers, such fines had not been imposed as of the close of FY'91. The Council is concerned about the potential consequences of the reluctance to follow the letter and the logic of the law. The fact

that an employer has not complied with legal requirements regarding insurance coverage should not insulate it from the fine, and it is inequitable to enforce the law against those who are insured while ignoring those who are not. Although there may be little possibility of recouping fines against uninsured employers, the differential administration of the statute is a policy issue that the DIA should consider addressing.

The Council has suggested a number of times over the last few years that the agency send a circular letter to the various municipalities to remind them of the obligations set forth in §25C (6) and (7). These sections require acceptable evidence of compliance with insurance coverage provisions prior to authorizing permits, licenses and contracts. This has recently been done and, according to the DIA, has generated a significant response.

The Council has also suggested for the last few years that the DIA consider issuing press releases that highlight the enforcement of the law. Not only would this provide a positive image to the public of DIA activity, but it might also induce violators of the law to obtain coverage and avoid unfavorable publicity.

TABLE II

UNINSURED EMPLOYER CASES 7/1/88-6/30/91			
	<u>FY'89</u>	<u>FY'90</u>	<u>FY'91</u>
Initial cases referred	330	391(+18%)	474(+21%)
Cases not yet reaching disposition	145(44%)	185(47%)	209(44%)
Cases reaching disposition	185(56%)	206(53%)	265(56%)
- employee not receiving benefit	77(42%)	78(38%)	119(45%)
- employee receiving benefits (closed)	71(38%)	94(46%)	100(38%)
(open)	37(20%)	34(16%)	46(17%)

The average weekly wage for \$65 employees was \$244 in FY'91, entailing the smallest jump in the average weekly rate since the figures were available in FY'88. The rate was \$235 in FY'90, \$219 in FY'89, and \$192 in FY'88. While last year 94 employees received compensation from the trust fund, this year the total rose 50% to 141. The increase in the number of weekly

claims has risen 182% since FY'88 and initial referrals have increased 44% since FY'89. This continued growth is a constant drain on employer assessments.

It is difficult for the DIA to defend the private employer trust fund since the customary contractual relationship between insurer and employer does not exist. To bolster DIA efforts, the Council requested and strongly supported the filing of legislation which would empower the department to utilize the fund itself to pay the expenses of defending the trust fund.

A total of \$900,000 was included in the FY'91 trust fund budget to be utilized in defending the fund. Areas in which the agency proposed spending private and public employer assessments included about \$250,000 on private investigators and \$80,000 for outside legal counsel to assist in recovering payments for uninsured matters. However, the DIA estimated it would spend a maximum of \$191,712 of this money and none on private investigators. Since FY'91 uninsured payments exceeded the assessment budget of \$5.5 million, and \$8 million has been budgeted for FY'92, this is one area where the administration should consider spending the employer assessments it has already collected. One positive note, as outlined in the next section, is the continuing increase in receipts of reimbursements for \$65 costs. If outside counsel is utilized in this aspect, this amount should increase even more.

#### **Administration of the Section 65 Funds and Special Fund**

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In addition to the administrative and adjudicatory functions set forth in the law, the DIA has statutory and fiduciary responsibility for administering the special fund and the two trust funds. The special fund is used to pay for the operating expenses of the DIA, while the trust funds provide reimbursements and payments for certain benefits set forth in chapter 152. The revenue for these funds is primarily generated by assessments on employers.

Funding for the operating expenses of the agency is initially appropriated through the legislative process, with reimbursement made to the State for all funds expended. Private employers are also assessed for fringe benefit costs which are collected and deposited directly into the special fund. Additional revenues are generated by the various fines, fees, and penalties set



forth in the law, if they are applied by the Department. In accordance with §65, the various funds are maintained separately under the statutory responsibility of the Commissioner.

While the staffing level fluctuates, at the end of FY'91 there were 28 vacant positions allocated to the special fund and 15 vacant positions allocated to the trust funds. Initial personnel expansion requests by the agency for FY'91, which were not approved, were projected at \$489,292 for 23 positions. In the 2 previous years, personnel expansion requests were for 24 positions/\$505,241 (FY'90) and 23 positions/\$485,340 (FY'89). Examples of expenditures other than salaries, fringes, and rent are \$203,000 for postage and about \$10,000 for the 800 phone line in FY'91. The Council requested information on the amount of chargebacks for OMIS and workers' compensation (12 employees in the agency collected in 1991), as well as the amount of interest credited to the General Fund on fringe benefits, but has not received a response.

The two trust funds are funded by assessments on both public and private employers and have grown extensively in the past few years, partially because eligibility for certain elements did not become effective until after the law was passed in 1985. The assessment process socializes certain benefit costs and spreads them among private employers who have complied with the insurance mandates of the act and public employers which have opted to accept the provisions of the law. Private and public assessments are required by statute to be completely segregated.

Financial figures on the funds are listed in Appendix E. Assessment receipts for the special fund were down \$5,724,481 from FY'90 figures provided by the DIA and were \$7,234,384 less than the budget assessed for FY'91. This 39% drop in assessments may be partially related to lower premium collections, which would decrease assessments collected. Since lower premium collections are related to the overall economy, it is imperative that all other sources of revenue be judiciously pursued in order to avoid possible shortfalls.

Filing fees rose 48% and have increased 495% since FY'88, a further indication of the contentiousness of the system. Total receipts for late first report fines dropped 2%, although this may be a result of waivers

granted administratively (over \$118,000) and briefly discussed later in this report. Interest receipts increased by over 36%, which is one example of the ongoing efforts of the administration to maximize private employer assessments even as investment rates have fallen. As of October 1991, the DIA has over \$15 million in short term investments paying 5.35% in interest. Through 12/31/91, the interest earned by the respective funds was: \$210,391 - Special; \$324,154 - Private Trust; and \$37,506 - Public Trust. The Council has been unable to ascertain from the DIA the amount of interest credited to the General Fund for revenues from assessments for fringe benefits and indirect costs pursuant to §65(6).

Referral fees paid by insurers after conciliation are 30% of the SAWW in most instances and are 130% of the SAWW when the insurer fails to attend a conciliation. These fees are paid into the special fund, which is also funded by assessments on private sector employers. The additional referral fees for not attending a conciliation cannot be included in calculations for premium rates (see § 10(5) of chapter 152).

Over the period 2/15/89 - 2/7/92, 4,030 fees totalling \$2,416,444 were levied. The vast majority (71%) of these fees have been paid, although 1,025 remain due.<sup>1</sup> Since the initial billing in FY'89, there has been a marked decrease in penalty referral fees. The balances for the last 5-6 months have been somewhat higher, but this may reflect the overall economy as well as the billing cycle.

Expenditures rose \$878,685 in FY'91, part of which was a one time \$93,748 payment to satisfy the judgement in the Daly Case. The difference in expenditures would have been greater, but the furlough statute lessened the agency's payment obligation in this fiscal year. However, the relationship between receipts and expenditures in FY'91 is a cause of concern. Only 55% of the budgeted special fund assessments was collected. If not for the large balance at the start of the year and the increased interest and fees, total expenditures would have caused serious problems for the fund. Total special fund actual expenditures exceeded total receipts by over \$2 million in FY'91. Total collections exceeded expenditures by \$3,709,258 in FY'90. As it is, the employer-assessed balance was decreased significantly, which obviously severely lessens the chance for lower

