

COMMONWEALTH OF MASSACHUSETTS

FISCAL YEAR 1990
ANNUAL REPORT

Workers' Compensation Advisory Council

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ACKNOWLEDGMENTS

A number of individuals both within and outside the Department of Industrial Accidents deserve thanks for their valuable assistance in the preparation of this report.

The staff and administrators of the DIA have made special efforts to meet the endless requests for information by Advisory Council staff. In addition, Joe Constantine and the staff of the Department's data processing unit have worked hard to provide the extensive statistical data used throughout this and other reports. Other DIA personnel who provided information and assistance are too numerous to mention, but their efforts are warmly appreciated. Agency personnel were also generous with their time in the course of the special studies conducted by the Advisory Council and its outside consultants during the past two years.

Thanks should also be expressed to the many outside parties who have shared their time and knowledge with us in the course of our work on our various reports. Special thanks go to Ms. Ann Rockwell from the Associated Industries of Massachusetts for providing the graphic work in Appendix D during the last two years.

The efforts of several members of the Advisory Council who left office during the year must also be acknowledged. Council members are not reimbursed for their duties, and Joseph Coffey, Ron Ferris and Dr. Ruth Jordan deserve thanks for their service on behalf of the Commonwealth and the workers' compensation system.

Thanks go to each of the ex-officio members of the Council, Secretary of Economic Affairs Alden Raine and Secretary of Labor Paul Eustace. The support of their offices is greatly appreciated. Paul Eustace, as Secretary for the Agency, and his staff have provided particular assistance in the Advisory Council's many projects.

Finally, special attention and thanks go to employer representatives Linda Ruthardt and Paul Meagher and labor representative Arthur Osborn. Each of these individuals worked diligently in the workers' compensation reform effort and subsequently brought their expertise to leadership positions on the Council. They provided invaluable contributions in forging the Advisory Council into a working body and their service will be greatly missed.

Stevens M. Day
Executive Director

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INTRODUCTION

This is the fourth annual report of the Workers' Compensation Advisory Council. As the report for fiscal year 1990, it reviews the period from July 1, 1989 through June 30, 1990.

A descriptive overview of the Advisory Council and some of its major activities during the fiscal year is provided in the introduction. Included here are brief descriptions of several reports prepared by the Council or produced under its auspices during the fiscal year.

The opening section of the report focuses upon the offices and activities of the Department of Industrial Accidents. This section begins with a review of some of the activities and accomplishments of the agency during the fiscal year, including the promulgation of new rules, the publication of Review Board decisions, and the assessment of fines and penalties. This is followed by a discussion of the budget process and a review of the funds established by Section 65 of the workers' compensation statute. The remainder of the department overview is primarily devoted to reviewing the operation and activities of the various departmental offices during the year. These updates should provide a picture of the various activities in which the agency is engaged, as well as a sense of the volume of departmental activity. The section concludes with an update on delays experienced in the dispute resolution process and a discussion of the state auditor's report on the agency.

The second section turns its attention to the state of the workers' compensation system. The focus here is on developments arising during the past fiscal year in the larger workers' compensation environment. Topics discussed here

include judicial decisions which impact the workers' compensation system, pertinent legislation enacted by the General Court, a premium rate filing for workers' compensation insurance, and medical reimbursement rates.

The third section of the report highlights several critical issues that pose problems for the general stability of the workers' compensation system and which are of some concern to the Advisory Council. While some of these issues are mentioned in the body of the report, they are singled out for further attention because of the potential seriousness of their influence. Issues identified here include increases in the number of judicial requests, workers' compensation costs, delays in the DIA, uninsured employers, and workers' compensation insurance rates.

The report concludes with a review of Advisory Council concerns with various aspects of the workers' compensation system.

The Workers' Compensation Advisory Council

The Massachusetts Workers' Compensation Advisory Council was established under the 1985 reform law to monitor the workers' compensation system and make recommendations for its continued improvement. In continuing 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.

There are ten voting members who 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 of the

Council.

The Advisory Council meets on a monthly basis to review various aspects of the Department of Industrial Accidents and the workers' compensation system. During the 1990 fiscal year, the Council held ten regular meetings and two subcommittee meetings. Since its inception in 1985, the full Council has met forty-five times.

Formal action by the Council requires an affirmative vote of seven voting members, and seven voting members are required for a quorum. A list of the Council members and their respective affiliations is set forth in Appendix A. A list of the Council's agendas for the past fiscal year is set forth in Appendix B.

The Council has operated over the past 15 months with nine voting positions. During the past year, Edmund Corcoran, Assistant Director of Workers' Compensation and Medical Services for the MBTA, was appointed to the self-insurance slot. Dr. Edwin Wyman, Jr., from the Ambulatory Care Center at Massachusetts General Hospital, was appointed to the Council as a representative of the medical providers in the Commonwealth.

In June of 1990, the Governor named a new Chair and Vice-chair of the Advisory Council. These positions rotate every two years between employee and employer representatives. Arthur Osborn was appointed to serve as Chair and Paul Meagher was appointed to serve as the Vice-chair. In September of 1990, Doug Mure was appointed Vice-chair to replace Paul Meagher and in December Joseph Faherty was appointed Chair to replace Arthur Osborn.

Council Studies

One of the initial charges to the Advisory Council set forth by the Legislature directed the Council to undertake studies on several aspects of workers' compensation that were not directly addressed by the 1985 reform. Several of these studies were published during the past fiscal year.

Report on Competitive Rating

A study of competitive rating for establishing insurance premiums investigated the advantages and disadvantages of this system in relation to other forms of insurance pricing. One aspect of the study focused on experiences in states which utilize some form of competitive rating and compared premium levels before and after the system's adoption. Comparison was also made between the Massachusetts system and the various competitive rating states on a number of important indicators.

The report concludes that in light of the inconclusive experiences of competitive rating jurisdictions and the current state of the insurance market in the Commonwealth, competitive rating does not appear to be a viable alternative to the current system. In any case, further study is necessary before considering the advisability of introducing the system in Massachusetts.

Report on Occupational Disease

The Council completed a study of occupational diseases and their relationship to the workers' compensation system. This report focused on some of the general and systemic problems presented by such injuries for any workers' compensation system.

The report emphasizes that workers' compensation statutes should cover occupational diseases, and that legislative bodies should eliminate language mandating that a disease be peculiar to a trade or require a specific exposure period in order to be compensable. While the Massachusetts statute does not contain any of these restrictions, they do operate in some jurisdictions.

The report also stresses that greater attention should be devoted to diagnosis, treatment, surveillance, education, and training. Changes in any state system must recognize the long latency periods for many of the diseases and

attempt to eliminate the reliance on the court system to remedy these injuries.

Report on Markup Case Scheduling

A third report investigated whether a markup system of case scheduling would improve the existing scheduling system used by the Department of Industrial Accidents. The "markup" system is one in which the parties to a dispute decide when they wish the case to be heard, and the moving party assumes the primary responsibility for getting the case scheduled. In theory, the moving party's interest in resolving a case as quickly as possible should result in a more rapid movement of cases through the system.

While the recommendation regarding the markup system recognizes that the existing system has a built-in legislative mechanism for scheduling, it also suggests that other avenues may expedite some cases and matters before the agency. In particular, one suggestion was to explore whether sending certain matters to a "motion session" might alleviate scheduling problems.

System Wide Audit: Phase II

The Advisory Council contracted for studies of the workers' compensation system during the latter half of the 1990 fiscal year. These studies, which separately reviewed medical access for injured workers and friction costs in the workers' compensation system, represent a complementary phase of a comprehensive study of the workers' compensation system introduced by section 60 of Chapter 572 of the Acts of 1985.

The first phase of the study was completed at the close of the 1989 fiscal year and was summarized in the Advisory Council's Fiscal Year 1990 Annual Report. While this phase offered a broad review of the workers' compensation system, the later studies sought to complement and narrow that focus.

The Advisory Council contracted with Milliman and Robertson, Inc. to conduct the study of friction costs. For the study of medical access, the Council hired Lynch Ryan and Associates, Inc.. In sponsoring this research, the Advisory Council identified the research issues and scope of services for each study, but the contractors independently designed and conducted the studies and formulated their own conclusions and recommendations.

Report on Medical Access

Lynch Ryan & Associates conducted this study in conjunction with the Boylston Group. The study sought to determine the accessibility and quality of medical services to injured employees. This focus included the identification of barriers to prompt and quality medical treatment and the formulation of solutions to any existing problems.

The study was primarily based upon surveys and interviews with work-injured individuals, medical providers, employers, and attorneys.

The study found that while there appears to be little problem with access to immediate care resulting from an injury, access difficulties increase as a patient seeks specialist care and rehabilitation therapy services.

Additionally, the study found that the medical specialist community identifies work-related injuries as more difficult and less desirable to treat than other cases. This orientation apparently stems from the involvement of non-medical interests in treatment, perceptions of patient motivation, reimbursement levels, and the amount of paperwork. The study concludes that access problems will not be resolved solely through fee increases.

A number of recommendations were made for improving not only access problems and quality of care, but also for improving provider perceptions of injured workers. These include: developing a prototype coordinated care initiative, streamlining

provider reimbursement procedures, promoting education on available networks, encouraging the development and use of standard protocols, developing a database of workers' compensation medical practice, and establishing a greater recognition of the research showing the direct application of stress management techniques to workplace injuries. These recommendations are being analyzed further by the Advisory Council for potential future action.

Report on Friction Costs

Milliman & Robertson, Inc. collaborated on this study with John Lewis, an independent consultant. The study examined a number of specific areas which entail costs for all parties in the system.

The study assessed the relative cost and benefit of several procedures introduced into the DIA by the 1985 amendments, examined the attorney fee structure and the lump sum process, analyzed the distribution of insurance premium dollars, and attempted to determine the impact of external economic factors upon the cost of workers' compensation.

The study relied upon interviews, DIA data, and economic surveys in conducting the research. Among its conclusions, it found that the conciliation and lump sum counseling procedures could be more effective, and suggested that consideration be given to refining them. The study also found that a large increase in claims since 1988 may be due to a change in attorney fees and an economic downturn in that same year, as well as changes in attitudes of injured workers, attorneys and other parties. The Advisory Council is in the process of reviewing all recommendations for potential further action.

These studies are on file at the State House Library.

SECTION 1
Overview of the
Department of Industrial Accidents _____

_____ Departmental Activities _____

During the past fiscal year the Department of Industrial Accidents has issued twelve circular letters. While these administrative bulletins are not necessarily legally binding as precedent in any formal context, they do provide background and guidance for parties and practitioners. The Department has issued over 250 circular letters dating back to 1934.

The letters issued during the past year with their corresponding topics are:

- #242 7/1/89 Cost of Living Adjustment
- #243 8/30/89 Provision of Claims Services to Self-Insurers by Insurance Companies
- #244 10/89 Requests for Proceedings under section 37 of 37A of M.G.L. c.152
- #245 10/4/89 New Format for Preparation of Petitions for Approval of Third Party Settlements under M.G.L. c. 152, s.15
- #246A 11/18/89 Cost of Living Adjustments and New State Average Weekly Wage and Minimum Weekly Compensation Rate
- #247 11/27/89 Medical Records
- #248 12/89 Filing Appeal of Decisions to Reviewing Board
- #249 12/8/89 Adjustments to Compensation Pursuant to M.G.L. c.152, s34B(c) (Cases involving injuries that occurred after 10/1/86)

- #249A 4/90 Corrected version of #249
- #250 2/90 Notification Requirements on Lump Sum Requests when §37 and §37A are pending issues¹
- #251 2/90 Requirements for filings under section 36
- #252 5/25/90 Lump Sum Procedure
- #253 6/12/90 Certification List of Vocational Rehabilitation Providers under 452 CMR 4.03 by the Office of Education and Vocational Rehabilitation

Publication of Reviewing Board Decisions/
Annual Statistics

The publication of reviewing board decisions has been finalized. These volumes include both digests of the cases and subject indexes, as well as official citations for decisions issued. The initial volume begins in April 1987 and covers the period to March 1988. Subsequent volumes should include cases through the end of each respective calendar year. It is hoped that the full dissemination of the information will not only improve the practice at the DIA, but will also lessen the dramatic backlog of reviewing board appeals.

The DIA has published statistical findings, which, pursuant to §12 of M.G.L. c 23E, are to be prepared each year and submitted to the Advisory Council and the legislature. This information covers the fiscal years 1985-1989 and is published in a report entitled "Reforming the System". In addition to outlining the progress achieved in administering the 1985 changes, the report notes the changes in workload from 1984-1989. It also incorporates information, as set forth in §11(3) of M.G.L. c.23E, which is intended to indicate the promptness of the first payment of compensation by each insurer and self-insuring employer. This report should provide a barometer in future years for assessing the effectiveness of the new law.

Department Rules

The Department of Industrial Accidents has worked extensively during the past year on redrafting its rules and regulations. In order to best use the experience of the various parties which are part of the system, a rules committee has been in place over the last few years to meet and discuss the various changes. This process solicits input from various perspectives in order to address outstanding concerns.

During the past year, the Department revised a number of regulations. The rules pertaining to self-insurance were amended as of November 9, 1989, pursuant to emergency requirements. A hearing was held on January 12, 1990 for the proposed changes in 452 CMR 5.00, which were ultimately promulgated by the Secretary of State on February 16, 1990 and were effective as of February 2, 1990.

Additional changes were proposed by the Department in early June of 1990. These rules were the product of extensive discussions by the Rules Committee. At its meeting of June 13, 1990, the Council voted to support the draft of the proposed rules.²

The Department held a hearing on June 15, 1990 in order to solicit public comments on the proposed rules. A reopened hearing was then scheduled for July 16, 1990. This hearing was scheduled to solicit public comment on certain revisions of the rules that were the subject of the first hearing, including: 1) a proposed deletion of the suggested new definition of "file" or "filed" in 452 CMR 1.02, as well as the proposed amendments to 1.11(1) and 1.15(2); and 2) addition of certain language in 452 CMR 1.03 regarding reporting of injuries involving death. These revisions to the rules were adopted and became effective as of August 17, 1990.

Penalties/Fees

In FY'90, forty-eight \$7 penalties totaling \$94,139 and eleven \$8 penalties totaling \$17,089 were

assessed for matters referred to DDR. There were sixty \$7 awards for a total of \$76,789 and eleven \$8 awards for a total of \$5,800. These figures are based upon voluntary compliance of the filing of agreement, pay, or resume payment forms. A total of one hundred and eight \$7 awards and twenty-two \$8 awards were levied, amounting to \$170,928 and \$22,889, respectively.

This year's numbers for matters in DDR indicate a large increase over FY'89. While the \$7 and \$8 penalties in FY'89 are similar (41 and 8, respectively), the amounts of the penalties were \$36,868 and \$4,612, only 37% of this year's amount.

The converse was true for the Office of Claims Administration. In FY'89, ninety-seven \$7 awards were made, totaling \$109,548, and four \$8 penalties were levied which totaled \$1,807. A total of one hundred thirty-eight \$7 penalties were made this year, amounting to \$146,416, with twelve \$8 penalties for \$6,419.

The issue of attorney fees generated by the law has been a topic of constant discussion since the 1985 changes. In cases in DDR with disposition dates during the last fiscal year, a total of \$74,990,649 for 19,863 awards was recorded, an average of \$3,777 per award. Thirty awards, totaling \$49,241 were made, which may not be utilized in the establishment of premium rates, pursuant to §7F. The percentage is only .06% of the total and would have virtually no impact on a premium rate filing.

The data clearly indicates that issues in DDR concerning penalties do not appear to be based on seeking fees for prosecuting penalties. Last fiscal year, there were 13,939 fee awards, for a total of \$50,712,048 in attorney fees.

The average award of \$3,638 for FY'89 was only 4% less than the average award in FY'90. A total of 35 fees (.25% of the total number), which amounted to \$37,918, was to be excluded from premium rates.

In terms of the fees generated by the filing of agreements, pay forms or resume forms in Claims Administration, the voluntary nature of compliance appears to have resulted in serious under-reporting. A total of 1,309 fees, for \$1,070,343, was collected for FY'89. In contrast, the conciliation statistics for scheduled dates in FY'89 indicates that 7,066 cases were adjusted. If only 50% of these cases were claims, there should have been 3,533 pays from conciliation alone that would have indicated a possible fee. The published information understates the amount. A total of 82 fees (6%) were for penalties, and \$67,755 was precluded from inclusion in premium rates.

In FY'90, 1,493 fees were assessed, totaling \$1,371,981. Of these, forty-three (3%) dealt with penalties, and \$35,343 could not be included in premium filings. The Department's records indicate total fees of \$51,782,391 in FY'89 and \$76,362,530 in FY'90, not including the underreporting. There was a 47% increase from FY'89 to FY'90. A total of \$190,257 of the \$128 million is to be excluded from the rates in the last two years. This information may be used by the Commissioner of Insurance, for comparison purposes, to check against the separate annual reporting procedure mandated by §53A(11). We have been unable to verify if such procedure exists.

**Section 65 -
Employees Of Uninsured Employers**

The incidence of uninsured employers continues to be a problem. It appears that as insurance premiums increase, more employers are willing to run the risk of criminal and civil sanctions.

At the state level, a standardized process has been instituted to ensure that potential vendors are in compliance with the insurance mandate of the law. This procedure requires documented evidence of insurance coverage from all contracting parties subject to the law. It is unclear how strictly the provision is enforced at the local level. Unverified reports suggest that uninsured

construction contractors have circumvented the law by asking homeowners to request building permits. If this happens, the scrutiny of the law is bypassed as a result of the party's implicit, or explicit, violation of the law.

In 1990, the Advisory Council was informed that fines for failure to file first reports by uninsured employers would be attached to other fines levied. The DIA is working on a method of billing uninsured employers for reporting violations of first reports of injury. The law requires all employers, regardless of insurance status, to file first reports. A mechanism is being developed to integrate these fines with all others and thereby maintain consistency in the system for computing fines.

At the onset of calendar year 1990, there were 601 cases for employees of uninsured employers in the department's caselog. During the past fiscal year, claims were filed on 348 new incidents. As of the latter part of August of 1990, 151 of these cases have required at least one proceeding to be scheduled in DDR and 16 of the cases have already been settled by an approved lump sum agreement.

During the FY'90 period, 391 claims against uninsured employers were referred to the DIA legal staff. This represents a 15% increase over FY'89. By way of comparison, during the first 2 1/2 years a total of 398 claims were filed.³ The chart below summarizes the filing and disposition status of claims filed against the workers' compensation trust fund §65(2)(e) during FY'90 and FY'89.

TABLE 1

| Uninsured Employer Cases 7/1/89 - 6/30/90 | | |
|---|---------|---------|
| | FY'89 | FY'90 |
| Initial cases referred to DIA attys. | 340 | 391 |
| Cases not yet reaching disposition | 145 | 185 |
| Cases reaching disposition | 185 | 206 |
| - Fund prevailed indemnity | 77(42%) | 78(38%) |
| - Employee paid (closed) | 71(38%) | 94(46%) |
| - Employee paid (open) | 37(20%) | 34(16%) |

Of the 391 cases initially filed in the past fiscal year, nearly half (185) have not reached

disposition as of this writing. The trust fund prevailed in 78 of the 206 cases for which disposition was reached. In the remaining cases, the employee was paid and the case was closed in 94 cases, while the employee was paid and the case remained open in 34 cases.

The average weekly wage for §65 employees was \$235.00 in FY'90, \$219 in FY'89, and \$192 in FY'88. There were 94 employees receiving weekly payments in FY'90. In FY'89, there were 75 such employees and in FY'88, there were 50. While the 22% increase in the last two years in the average weekly payments would appear to be related to the increase in the average weekly wage, the 88% increase in the number of weekly claimants is disturbing.

Administration of the Section 65 Funds and Special Fund

The trust funds which provide the benefits set forth by §65 of Chapter 152 were intended, through the assessment process on the employer community, to pass on the various costs of the system to its most frequent users.

The funds socialize certain benefit costs and spread them amongst all employers. The potential exists, however, for public employers choosing to pay the benefits required by the law without the use of any form of insurance to be assessed without receiving reimbursements. At the same time, certain public employers might pay far less in assessments than they receive in reimbursements. This difference could become increasingly important due to the tenuous status of local aid.

Reports on the funds are listed in Appendix C. This is the only accounting information on funds available this year. Even though the assessment process allocates the operating expenses of the agency to private employers (through the Special Fund), the expenditures this year were more than \$250,000 (2%) less than the previous year. The fact that employees must pay a larger portion of their health insurance premium contributed to this situation.

Expenditures for the private trust increased 93% over FY'89, while the public trust increased 210%. Fluctuation in this area, evidenced by a decrease in expenditures in FY'89, makes it difficult to draw any conclusions, particularly since second injury reimbursements have not yet been paid.

Each of the funds had greater balances at the end of the year. Some of the issues outlined in our last report concerning the administration of the funds were raised in FY'90. In addition, during the past year the Council has asked for clarification from the DIA as to why there have been different balances and totals listed by the Auditor and the Treasurer's offices for the respective funds for identical time periods.

Comparison of this year's balances with the previous year's disbursements, pursuant to §65(4)(c), establishes that the balance of each of the funds has exceeded the 35% level.⁴ Application of the statutory formula indicates that \$477,617 in the public trust fund, \$14,594 in the private trust fund, and \$409,219 in the special fund are in excess of the level set forth in the law. The law requires that the budget for those funds, for the purpose of calculating the fund assessment rate, be reduced by those amounts over 35%.

The private trust fund's overall payments increased 93% in the last fiscal year. Much of this increase is due to large growth in COLA payments, which rose 158%. However, this year's amount is only 55% above that of FY'88. This fluctuation makes it difficult to draw any conclusions from this year's totals. In the last three years, over \$22 million has been expended for cost of living adjustments.

The ratio of public trust fund COLA reimbursements to private trust fund COLA reimbursements continues to grow. The ratio of payouts was 19% in FY'88, 21% in FY'89 and 26% in FY'90. This data appears to support the premise outlined in the FY'90 assessment calculation analysis that there is a greater utilization of COLA requests in the public sector than in the private sector.

Total payments under §65 for employees of uninsured employers grew 9% in FY'90. Most of this increase is for indemnity payments, since both medical expenditures and §36 payments dropped significantly. A 77% increase in reimbursements, while not approaching the amount of the payout, indicates a more aggressive posture on behalf of the fund. In addition, over \$530,000 was earned in interest, and the fine amounts for stop work orders more than doubled, another indication of stricter enforcement of the law.

The agency has collected far more revenues generated by the statute in the past year than previously. First report fines grew more than five and a half times the amount of the previous year. Stop work order fines more than doubled, while reimbursements for §65 cases increased 77%. The reimbursement amount, as a percentage of payments, rose from 3.9% last year to 6.4% this year. Filing fees also increased 77%, an indication of rising litigation.

The revenue produced by the fines and fees totaled \$2,397,689 this year, up from \$1,002,765 in FY'89. In light of the difficult economic climate this year, this ability to generate revenues is beneficial for the DIA. It limits reliance on assessments and attempts to place the cost of the system on the parties which use it.

In the special fund alone, \$2,894,482 was generated in fines, fees and interest in FY'90, which was equal to 20% of the assessment collections. For the private trust fund, a total of \$767,352 was produced through fines, reimbursements and interest, which was equal to 14% of the assessment collected. These ratios can change as a result of adjustments to the succeeding assessment based upon ending balances, but they are nonetheless an indication that the statutory mechanisms provide the DIA with sources of revenue apart from the assessment and appropriation process.

As noted in our previous report, the State Auditor conducted a biennial audit of the DIA, as required by §65(10) of the law. A subsequent audit

should be conducted again in the upcoming year to cover years 1989 and 1990.

Budgetary Process

The final amount appropriated by the Legislature for fiscal year 1990 was \$3,465,629 as an appropriation line item and \$9,685,150 in a retained revenue line item. The Department of Industrial Accidents requested \$13,377,645 for fiscal year 1991, which included \$859,879 to be used for the Department's backlog project.

The Department submitted an expansion request for 40 positions that would require an additional \$832,743 (without fringe benefits) in funding. The Council reviewed the DIA's budget at its January 10, 1990 meeting. The Council voted to support the maintenance request as presented, but in accordance with its authority as set forth in Massachusetts General Law Chapter 23E, section 17, the Council also prepared an alternative expansion request.

The Council proposed an expansion budget that totaled \$803,611 without fringe benefits. The proposal called for an additional 38 positions, many of which replicated the Department's personnel request. It also included funds to hire interns for dispute resolution. The Council's proposal differed in seeking an additional four pro-log administrative judges, rather than six as proposed by the agency.

The Council also sought the addition of an administrative law judge. This request was intended to assist in the elimination of the backlog of cases awaiting decision at the reviewing board. It was made in light of the fact that the Reviewing Board's capacity to decide appeals is constrained by its additional responsibility for approving lump sums. This situation worsens when administrative judges are added, since the number of possible appeals is then also likely to increase.

The Council also suggested additional positions in the investigative unit to track insurance coverages, additional legal positions for

