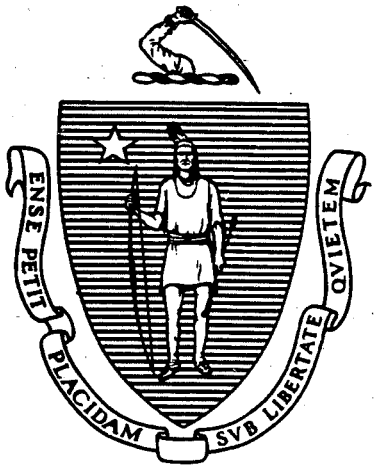

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL

STATE OF THE WORKERS' COMPENSATION SYSTEM

FISCAL YEAR 1994

THE STATE OF THE MASSACHUSETTS WORKERS' COMPENSATION SYSTEM

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL
FISCAL YEAR 1994 ANNUAL REPORT

February 8, 1995

ANNUAL REPORT

FISCAL YEAR 1994

Massachusetts Workers' Compensation
Advisory Council

Current Advisory Members and Staff:

Edward T. Sullivan, Jr., *Chair (Service Employees International Union, Local 254);* Jeanne-Marie Boylan, *Vice-Chair (Boston Sand & Gravel Company);* William H. Carnes *(International Brotherhood of Teamsters, Local 25);* J. Bruce Cochrane *(Cochrane and Porter Insurance Agency);* Edmund C. Corcoran *(Raytheon);* James L. Farmer (*Glaziers & Glass Workers' Union, AFL-CIO, Local 1044);* Antonio Frias, Jr. *(S & F Concrete Company);* John Gould *(Associated Industries of Massachusetts);* Robert L. Jones *(Surety Insurance Agency);* Gloria Larson *(Secretary of Economic Affairs);* Christine Morris *(Secretary of Labor);* John J. Perry *(International Brotherhood of Teamsters, Local 82);* Amy Vercillo *(Rehab Re-employment, Inc.)*

Matthew A. Chafe *(Executive Director);* Jeremy A. Teres, Ann M. Helgran *(Research Analysts)*

THE STATE OF THE MASSACHUSETTS WORKERS' COMPENSATION SYSTEM

SECTION I: OVERVIEW OF THE DEPARTMENT OF INDUSTRIAL ACCIDENTS

SECTION II: THE WORKERS' COMPENSATION SYSTEM

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FISCAL YEAR 1994 IN REVIEW

Fiscal year 1994 (July 30, 1993 to July 1, 1994) has been a very positive one for both the Department of Industrial Accidents and the workers' compensation system in general. Insurance rates (effective January 1, 1994) were reduced by an average of 10.2% from 1993 levels, the first rate reduction in over twenty years. This represents an improved workers' compensation system with fewer claims being filed and costs under control.

While the total number of cases filed at the DIA has continued to decline, there was a slight increase (3%) in employee claims (request for litigation) from 19,196 to 19,734 after two years of decreases. Fewer insurer's request for discontinuances and a reduction in requests for lump sum conferences have accounted for much of the reduction in the FY'94 case load. The total number of cases at the DIA has decreased by 36% since FY'91. The number of claims paid by insurance companies has gone down for the fourth year in a row. *see - workers' compensation case demographics*

The dispute resolution system at the DIA now has a manageable level of cases at both the conference and hearing stages. The Reviewing Board meanwhile has a large backlog of cases awaiting review on appeal. *see DIA - dispute resolution*

The reduction of fraud in the workers' compensation system was a major component of the 1991 reforms, and the Insurance Fraud Bureau (IFB) and the Attorney General's office have taken proactive steps to curtail this abuse of the system. In FY'94 a record number of groundbreaking investigations and prosecutions were pursued and successfully litigated. *see section II - Insurance Fraud Bureau of Massachusetts.*

Fees and fines were collected aggressively by the DIA in the year, and the mandate that all employers carry workers' compensation insurance was enforced with vigorous efforts by the investigations office. *see DIA - Office of Investigations*

Medical protocols required by the 1991 reform act were implemented this year with the release of 25 treatment guidelines developed by medical consultants working with the DIA. The utilization review program also went into effect during the year. *see DIA - Office of Health Policy*

While the workers' compensation system has improved markedly in the last two years, it is still in a period of transition. Continued effort is necessary to ensure that improvements made to the system are institutionalized and that new areas for improvement are addressed. The dispute resolution system is still a lengthy and complicated process and the system is far from becoming the no fault system it was originally intended to be, as each year a large portion of claims are disputed. Insurance issues continue to improve, but the volatile assigned risk pool still comprises a large portion of the insurance market.

The final section of the report discusses concerns of the Advisory Council and recommendations for improvement.

ADVISORY COUNCIL

The Massachusetts Workers' Compensation Advisory Council was created by the Massachusetts General Court on December 10, 1985 with passage of chapter 572 of the Acts of 1985. Its function is to monitor, recommend, give testimony, and report on all aspects of the workers' compensation system, except the adjudication of particular claims or complaints. The council also periodically conducts studies on various aspects of the workers' compensation system.

The Advisory Council is required to issue an annual report evaluating the operations of the Department of Industrial Accidents and the Massachusetts workers' compensation system. In addition, members are required to review the annual operating budget of the Department of Industrial Accidents, and, when necessary, submit its own recommendation.

The Advisory Council is comprised of leaders from labor, business, the medical profession, the legal profession, the insurance industry and government. Its sixteen members are appointed by the governor for five year terms and include: five employee representatives (each of whom is a member of a duly recognized and independent employee organization); five employer representatives (representing manufacturing classifications, small businesses, contracting classifications, and self-insured businesses); one representative of the workers' compensation claimant's bar; one representative of the insurance industry; one representative of the commonwealth's medical providers; and one representative of vocational rehabilitation providers.

The employee and employer representatives comprise the voting members of the council, and the council cannot take action without the affirmative vote of at least seven voting members. The council's chairperson and vice-chairperson rotate between an employee representative and an employer representative.

The Advisory Council is required by law to meet when the chairperson calls for a meeting or upon the petition of a majority of members. It usually meets on the second Wednesday of each month at 9:00 a.m. at 600 Washington Street, 7th Floor Conference Room, Boston, Massachusetts.

Meetings are open to the general public pursuant to the Open Meeting Laws. (M.G.L., ch. 30A, sec. 11A)

Studies

The Advisory Council over the years has conducted a number of studies on workers' compensation in Massachusetts. Some of these studies were performed at the request of the legislature, and others council members chose to conduct.

The following are studies conducted by the council:

The Analysis of Friction Costs Associated with the Massachusetts' Workers' Compensation System, Milliman & Robertson, John Lewis, (1989).

Analysis of the Massachusetts Department of Industrial Accidents' Dispute Resolution System, Endispute, Inc., B.D.O. Seidman, (1991).

Assessment of the Department of Industrial Accidents & Workers' Compensation System, Peat Marwick Main, (1989).

Medical Access Study, Lynch-Ryan, The Boylston Group (1990).

Report on Competitive Rating, Tillinghast, (1989).

Report to the Legislature on Competitive Rating, Massachusetts Workers' Compensation Advisory Council, (1989).

Report to the Legislature on the Mark-up System for Case Scheduling, Massachusetts Workers' Compensation Advisory Council, (1990).

Report to the Legislature on Occupational Disease, Massachusetts Workers' Compensation Advisory Council, (1990).

Report to the Legislature on Public Employees, Massachusetts Workers' Compensation Advisory Council, (1989).

The Advisory Council's studies are available for review Monday through Friday, 9:00 a.m. - 5:00 p.m. at the Massachusetts State Library, State House, Room 341, Boston, Massachusetts, 02133 or by appointment at the offices of the Advisory Council, 600 Washington Street, 2nd Floor, Boston, Massachusetts (617) 727-4900 ext. 378.

The Advisory Council has recently conducted two studies mandated by the legislature as part of the chapter 398 reform act in 1991.

Study of Workers' Compensation Wage Replacement Rates, Tillinghast; Professor Peter Kozel, (1994).

This study examines the impact of the 1991 legislative changes in wage replacement rates for partial and temporary total benefits under the workers' compensation law. Under chapter 398 of the Acts of 1991, temporary total workers' compensation benefits were reduced from 66 2/3% of a claimant's average weekly wage to 60%, while the maximum duration for collecting benefits was reduced from 260 weeks to 156 weeks. Partial incapacity benefits were reduced from 66 2/3% of the difference between the pre-injury average weekly wage and the average weekly wage the claimant is capable of earning after the injury, to 60% of that difference. The eligibility period was reduced from a maximum of 600 weeks to, under certain conditions, a maximum of 520 weeks.

The determination of optimal wage replacement rates is central to workers' compensation systems. Until the recent legislative initiative, Massachusetts utilized the standard recommended by the National Commission on Workers' Compensation Laws in 1972, which suggested that benefit levels be set at two-thirds of the injured employee's average weekly wage. However, concern with the increasing cost of workers' compensation insurance and the number of workers' compensation claims filed led to the reduction of certain benefits under the new law.

While research has shown that utilization rates increase as benefit levels rise, there are few equivalent studies that explore the impact of decreases in benefit levels. Since the change in wage replacement benefits under chapter 398 is intended to reduce costs and induce cost-saving behaviors, and because the maintenance of adequate benefit levels is of paramount importance to the

Commonwealth's workers' compensation system, this study provides policy-makers with data on the new law in order to assess its impact.

Study of Workers' Compensation Insurance Rate Methodology, The Wyatt Company, (1994).

This study evaluates the advantages and disadvantages of adopting hours worked as a methodology for establishing workers' compensation insurance premiums.

Massachusetts and most other states utilize employer payroll in establishing manual rates for employers in various industry categories. Some have argued that the payroll method of rate determination provides low wage employers with a competitive advantage in the marketplace. It is suggested that substituting the number of hours worked by an employer's work force will provide a more equitable policy and will result in a more competitive marketplace. This is seen to be particularly pertinent to the construction industry, where payroll disparities vary widely.

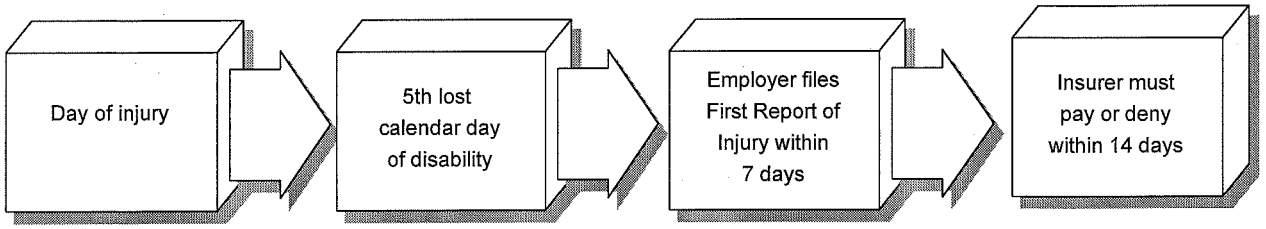
This study provides the quantitative data needed to assess the potential implications of adopting the hours worked methodology in determining premiums for Massachusetts construction employers, as well as other key employer classes.

STATUTORY PROVISIONS TO RESOLVE DISPUTED CLAIMS

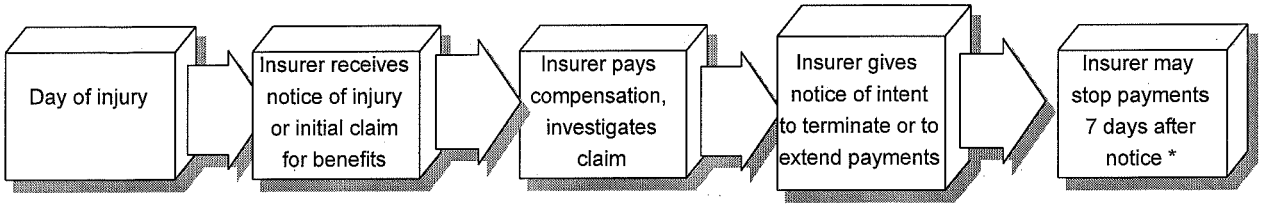
Claims Administration

When an employee is disabled or incapable of earning full wages for five or more calendar days due to an injury, occupational disease, or death, the employer must file a First Report of Injury with the office of claims administration at the DIA, the insurer and the employee within seven days of notice of injury. If the employer does not file the required First Report of Injury with the DIA, they may be subject to a fine.

Notification of injury



Voluntary payment



* The insurer may only stop payments unilaterally (with seven days notice) if the case remains within the 180 day "pay without prejudice period", and the insurer has not been assigned or accepted liability for the case. Otherwise, the insurer must file a "complaint" and go through the dispute resolution process.

The insurer then has 14 days upon receipt of an employer's first injury report to either pay the claim or to notify the DIA, the employer, and the employee of refusal to pay.[1]

When the insurer pays a claim, they may do so without accepting liability for a period of 180 days.[2] This is the "pay without prejudice period" that establishes a window where the insurer may refuse a claim and stop payments at their will. Up to 180 days, the insurer can unilaterally terminate or modify any claim as long as they specify the grounds and factual basis for so doing. The purpose of the

[1] If there is no notification or payment has not begun, the insurer is subject to a fine of $200 after 14 days, $2,000 after 60 days, and $10,000 after 90 days.

[2] The pay without prejudice period may be extended up to one year under special circumstances. The DIA must be notified seven days in advance.

pay without prejudice period is to encourage the insurer to begin payments to the employee instead of outright denying the claim.[3]

After a conference order or the expiration of this 180 day period, the insurer may no longer unilaterally stop payments. The insurer must request a modification or termination of benefits based on an impartial medical exam and other statutory requirements. A discontinuance or modification of benefits may take place no sooner than 60 days following referral to the division of dispute resolution.

Dispute Resolution Process

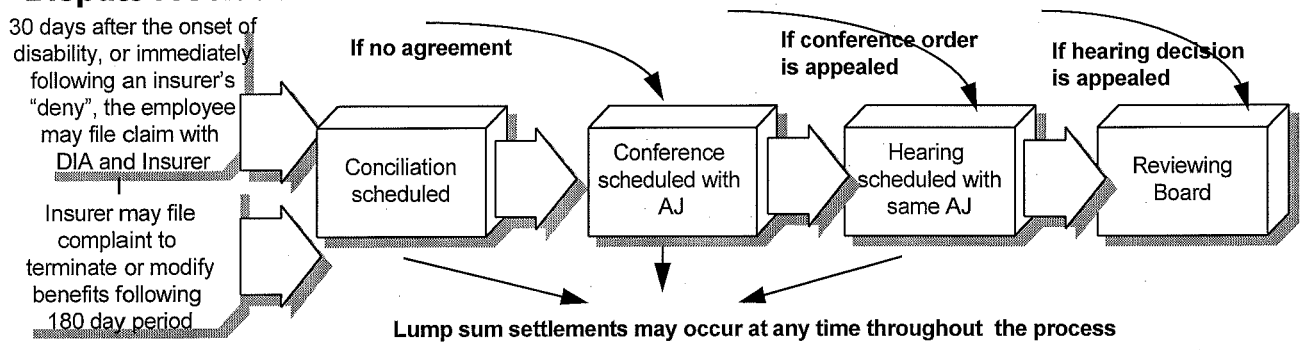
Requests for adjudication may be filed by either an employee seeking benefits, or an insurer seeking a modification or discontinuance of benefits following the payment without prejudice period. A case can be resolved at any point during the DIA's three step dispute resolution period either by voluntary means (which may include a lump sum settlement) or by the decision of an administrative judge or administrative law judge.

Conciliators may "review and approve as complete" lump sum settlements, a standard that only allows the conciliator to review a completed lump sum settlement. Conciliators or the parties at conciliation may also refer a case to a separate lump sum conference where an administrative law judge will decide if a lump sum settlement is in the best interest of the parties.

Administrative judges at the conference and hearing may approve lump sum settlements in the same manner that an ALJ approves a settlement at the separate lump sum conference. AJs and the ALJs must determine whether a settlement is in the best interest of the employee, and a judge may reject a settlement offer if it appears to be inadequate.

Dispute resolution begins at conciliation, where a conciliator will attempt to resolve a dispute by informal means. Disputes should go to conciliation within 15 days of receipt of the case from the division of administration.

Dispute resolution



[3] According to M.G.L. 152 8, "An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the insurer's intention to contest any issue and shall state that in order to secure ad-dittoing benefits the employee shall file a claim with the department and insurer within any time limits provided by this chapter."

A dispute not resolved at conciliation will then be referred to a conference where it will be assigned to an administrative judge who must retain the case throughout the process if possible. The insurer will pay an appeal fee of 65% of the state average weekly wage (SAWW), or 130% of the SAWW if the insurer fails to appear at conciliation. The statute requires the conference to take place within 28 days of the receipt of the case by the division of dispute resolution. The purpose of the conference is to compile the evidence and to identify the issues in dispute and the administrative judge may require injury and hospital records. The administrative judge is required to make a decision within seven days of the conclusion of the conference. This order may be appealed to a hearing within 14 days (which, by statute, is to take place 28 days after the appeal is received).

At the hearing, the administrative judge reviews the dispute according to oral and written documentation. The procedure at a hearing is formal and a verbatim transcript of the proceedings is recorded by a stenographer. Witnesses are examined and cross-examined according to the Massachusetts Rules of Evidence. According to the statute, a decision should be filed within 28 days of the conclusion of the close of the hearing record. The administrative judge may grant a continuance for reasons beyond the control of any party. Either party may appeal a hearing decision within 30 days.

This time limit for appeals may be extended up to one year for reasonable cause. A fee of 30% of the state average weekly wage must accompany the appeal. The claim will then proceed to the reviewing board where a panel of administrative law judges will hear the case.

At the reviewing board, a panel of three administrative law judges will review the evidence presented at the hearing and may ask for oral arguments from both sides. They can reverse the administrative judge's decision only if they determine that the decision was beyond the scope of authority, arbitrary or capricious, or contrary to law. The panel is not a fact finding body, although it may recommit a case back to an administrative judge for further findings of fact.

All orders from the dispute resolution process may be enforced by the Superior Court of the Commonwealth. Reviewing board cases may also be appealed to the Appeals Court. The cost of appeals are reimbursed to the claimant (in addition to the award of the judgment) if the claimant prevails.

Alternative Dispute Resolution Measures

Arbitration & Mediation

At any time prior to five days before a conference, a case may be referred to an independent arbitrator. The arbitrator must make a decision whether to vacate or modify the compensation pursuant to §12 and §13 of M.G.L. chapter 251.

The parties involved may agree to bring the matter before an independent mediator at any stage of the proceeding. Mediation shall in no way disrupt the dispute resolution process and any party may proceed with the process at the DIA if they decide to do so.

Collective bargaining

An employer and a recognized representative of its employees may engage in collective bargaining to establish certain binding obligations and procedures related to workers' compensation. Agreements are limited to the following topics: supplemental benefits under §§34, 34A, 35, 36; alternative dispute resolution (arbitration, mediation, conciliation); limited list of medical providers; limited list of impartial physicians; modified light duty return to work program; adoption of a 24 hour coverage plan; establishing safety committees and safety procedures; establishing vocational rehabilitation or retraining programs.

SUMMARY OF BENEFITS UNDER CHAPTER 152

An employee who is injured during the course of employment, or suffers from work related mental or emotional disabilities, as well as occupational diseases, is eligible for workers' compensation benefits. The largest expense for benefits is the weekly indemnity payments which provide compensation for lost income during the period the employee cannot work. Indemnity payments vary, depending on the average weekly wage of the employee (AWW) and the degree of incapacitation.

In addition to direct indemnity payments, the insurer is required to furnish the worker with adequate and reasonable medical and hospital services, and medicines if needed. The insurer must also pay for vocational rehabilitation services if the employee is determined to be suitable by the DIA.

The following are the various forms of indemnity and supplemental benefits employees may receive, depending on their average weekly wage and their degree of disability:

Temporary Total Disability (§34): Compensation will be 60% of the employee's average weekly wage (AWW) before injury while remaining above the minimum and below the maximum payments that are set for each form of compensation. The maximum weekly compensation rate is 100% of the state average weekly wage (SAWW), while the minimum is 20% of the SAWW. The limit for temporary benefits is 156 weeks.

Partial Disability (§35): Compensation is 60% of the difference between the employee's AWW before the injury and the weekly wage earning capacity after the injury. This amount cannot exceed 75% of temporary benefits under §34 if they were to receive those benefits. The maximum benefits period is 260 weeks for partial disability, but may be extended to 520 weeks.

Permanent and Total Incapacity (§34A): Payments will equal 2/3 of AWW before the injury following temporary (§34) and partial (§35) payments. The payments must be adjusted each year for cost of living allowances (COLA benefits).

Death Benefits for Dependents (§31): The widow or widower that remains unmarried shall receive 2/3 of the worker's AWW, but not more than the state's AWW or less than $110 per week. They shall also receive $6 per week for each child, as is the case for the other forms of compensation (this is not to exceed $150 in addition to normal compensation). There are also benefits for other dependents. The limit on benefits paid to all dependents cannot exceed 250 times the state AWW plus any cost of living increases (COLA). Children under

18 may, however, continue to receive payments even if the maximum has been reached.

Burial expenses may not exceed $4000.

Subsequent Injury (§35B): An employee who has been receiving compensation, has returned to work for two months or more, and is subsequently re- injured, will receive compensation at the rate in effect at the time of the new injury (unless the old injury was paid in lump sum). If the old injury was settled with a lump sum, then the employee will be compensated only if the new claim can be determined to be a new injury.

WORKERS' COMPENSATION CASE DEMOGRAPHICS

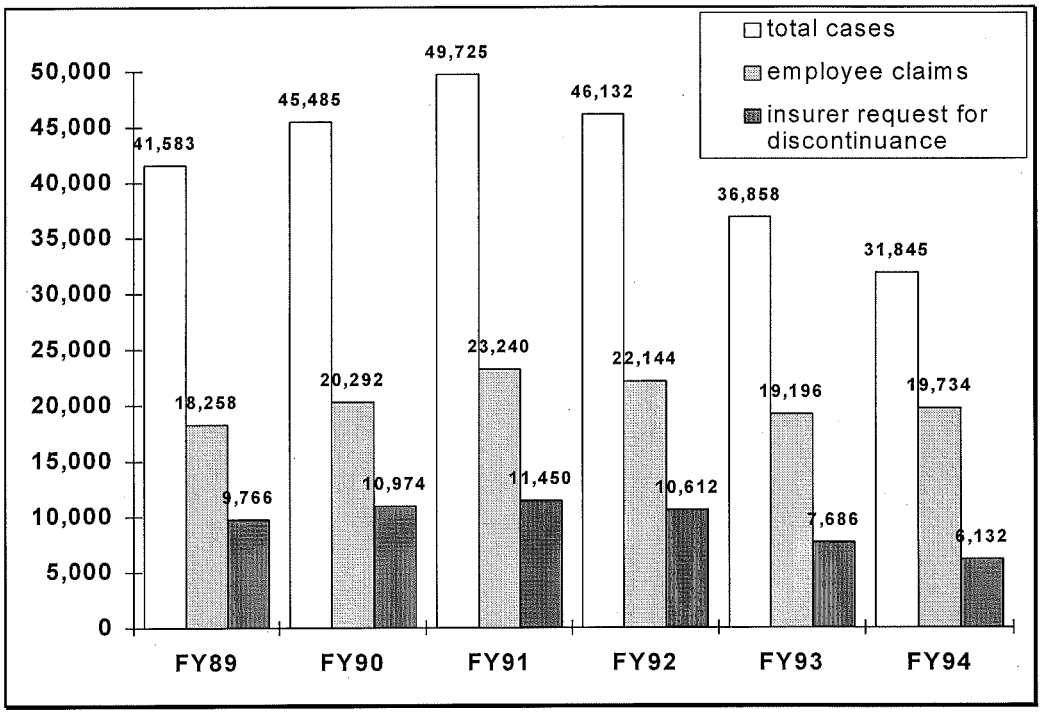
This section of the report presents data on characteristics and trends of cases at the DIA and for workers' compensation cases in general as reported by the insurance industry.

Cases at the DIA

Cases originate at the DIA through an employee's "claim" for benefits, an insurer's request to have an employee's benefits reduced or modified, lump sum requests, third party claims, and section 37/37A claim (second injury benefits). All these cases indicate a request for review by the DIA.

Figure 1 shows a slight increase (3%) in employee claims from 19,196 to 19,734 after two year of decreases, while the total number of cases has continued to go down. Fewer insurer's request for discontinuances and a reduction in requests for lump sum conferences have accounted for much of the reduction in the FY'94 case load. The total number of cases at the DIA has decreased by 36% since FY'91.[4]

Figure 1: Total cases, employee claims, and insurer requests for discontinuance; fiscal year 1989 - fiscal year 1994. NOTE: Total cases include employee claims, insurer request for discontinuance, lump sum requests, third party claims, and section 37/37A requests.



Source: DIA report 28

[4] DIA report 28: Statistics for sections of the law being claimed (indicates cases that are received at the DIA for litigation)

Claim Characteristics

The workers' compensation system comprises a diversity of claimants and on the job injuries/ illnesses. Within this cohort of claimants, there exists some common injury types and claimant characteristics.[5]

- 55% of claimants are male, while nearly 30% are female (Gender is not specified for 15% of claimants)
- Average claimant age is 41
- The average for the employee's average weekly wage is $443.20
- The majority of injuries are strains and sprains (52%), while contusions, crushing, and bruises represent over 10% of injuries.

Table 1: Most common body part injured

Body Part	*Percentage of Injuries*
Back	30%
Knees	6%
Shoulders	6%
Neck/Cervical Vertebrae	5%
Wrists	4%
Hands	4%

Source: Analysis of Wage Replacement Rates, Tillinghast (1992/1993 claims).

Case characteristics from insurance carriers

The following tables and statistics originate from the Massachusetts Rating and Inspection Bureau (WCRB). The WCRB is a licensed rating organization for workers' compensation funded by the insurance industry. It is also the statistical agent for workers' compensation for the Commissioner of Insurance.

The data reported to the WCRB comprises all claims paid by the commercial insurers writing policies in the state, and does not include data from self insured employers or self insurance groups (SIGs). Each year of the data is developed to the fifth report so the years can be compared equally. In other words, each year of the data is at a comparable maturity.[6]

[5] The actuarial consulting firm Tillinghast included a demographic analysis as part of its wage replacement study that it conducted for the Workers' Compensation Advisory Council. This data is derived from First Reports of Injury filed between 1992 and 1993.

[6] A "claim" from the WCRB data does not correspond to a DIA "claim". A claim on the following tables is a claim for benefits that was paid by an insurance company. A DIA claim is a request for litigation originating from the employee.

Insurance data is not considered reliable until several years from the policy year in which the claims occurred. For this reason, the most recent year to which we may look for reliable data is the 1991/1992 policy year. Since that time, however, many changes have occurred in the nature of the workers' compensation system that are not reflected by insurance data.

These tables demonstrate trends, by injury type, on the number of claims, average claim cost, distribution of losses, and frequency for the five most recent years.

Some conspicuous trends can be derived from this data. The number of claims for all injury types have been declining for the last four years. This is congruent with data from the DIA that has seen a major decline in case load.

The average claim cost is down for most injury types from the last year, but on a five year trend the average claim cost has been rising.

The major change in costs relates to a shift in the distribution of losses. In the 1987/88 policy year, almost 80% of the losses were paid out in indemnity (wage replacement) benefits, while the other 20% paid for medical benefits. In the 91/92 policy year, this distribution was 70% indemnity benefits versus 30% medical. While the portion of benefits that are paid for medical benefits is still low on a national scale, this represents a major shift in distribution of costs.

NOTE: The WCRB claim categories do not necessarily correspond to specific sections of M.G.L. chapter 152. (For example, the permanent total category includes predominantly section 34A benefits, but it may also include benefits under section 30 and section 36).

Case Data By Injury Type

Table 2: Claim Counts

Composite Policy Year	*Fatal*	*Permanent Total*	*Permanent Partial*	*Temporary Total*	*Medical Only*
1987/88	73	50	13,876	54,990	123,875
1988/89	67	53	14,796	51,612	115,267
1989/90	77	37	13,855	44,510	100,127
1990/91	64	21	10,011	39,036	88,805
1991/92	57	28	5,897	31,899	82,462

Source: WCRB, schedule z data by injury type (developed to 5th report)