

MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL MINUTES

March 9, 2016

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

Council Members Present: Steve Joyce; Steve Falvey; Bernie Mulholland; John Pulgini; Michael Kelley; Todd Johnson; Bill Corley, John Regan; Mickey Long.

Also Present: Omar Hernandez, Senior Judge; Bill Taupier, Director of Administration; Karen Fabiszewski, Acting General Counsel; Marc Joyce, Senior Regional Services Manager; Alan Green, Deputy Director of Investigations; Bob Ford, CFO; Virginia McCarthy, Workers' Compensation Rating and Inspection Bureau (WCRIB); Pasqua Scibelli, Civil Litigation Manager.

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

Absent: Teri McHugh; Frank Ruel; Executive Office of Labor and Workforce Development; Executive Office of Housing and Economic Development.

Agenda:

Chairman's Welcome

DIA Update

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

Communications

Action Items

- Minutes – February 10, 2016

Discussion of House Bill 3972

Executive Director Update – William Monnin-Browder

Miscellaneous

CHAIRMAN'S WELCOME

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

DIA UPDATE

Judicial Update

Senior Judge Omar Hernandez stated that the average wait times between conciliation and conference for Lawrence and Springfield are approximately two and a half months and Boston, Fall River and Worcester are approximately three months. The Senior Judge stated that the impartial list is trending in a good direction and that the DIA is currently in the process of getting contracts out to the impartial physicians.

Senior Judge Hernandez noted that a Reviewing Board decision in the *Mancini* case was recently released

that was critical of a long delay in issuing a hearing decision. He stated that a three year plus delay, as in *Mancini*, between the record close date and the date of the hearing decision is absolutely unacceptable. He asked, however, that people not discount the Administrative Judge's 26 years of fine service at the Board.

The Senior Judge stated that he did not want to address the specific facts of the case, but did want to address the decision's concurring opinion and the suggestion that there is a systemic problem at DIA with respect to hearing issuance timeframes. He stated that the DIA does not have a systemic problem. He explained that in 1997, the number of late¹ decisions averaged 8 per judge. He explained that in 2001, that number increased to 9.7 decisions per judge. He explained that there are currently 2.2 late decisions per judge. Senior Judge Hernandez noted that in 2007 the list of late cases was above 100 cases and today there are 40 cases.

The Senior Judge noted that he has made a conscious effort to drive the number of late decisions down. He noted that every month he is provided a report from the Scheduling Unit that shows judges with outstanding cases of over six months. He indicated that every other month, his staff send a request to the judges with outstanding late decisions asking for an explanation as to why the late decision is outstanding. The Senior Judge stated that he would like to bring the number of late decisions down to zero, but also noted that there are legitimate reasons why some cases go over six months.

Chairman Steve Joyce requested that the Senior Judge provide a monthly report of how many cases are beyond six months old and how many of those cases are sitting with a particular judge. The Chairman stated that his goal is not for the Advisory Council to manage the DIA's Dispute Resolution division, but instead to ensure that the Advisory Council can exercise appropriate oversight.

Council member Steve Falvey said that the list of late decisions should be considered during the reappointment process.

Vice Chairman John Regan stated that there is a great expression in business: "what gets measured gets done." He stated that he believes regular reporting will shine a light on the issue of late decisions. Mr. Regan stated that he thinks it would be helpful to look at the raw number of cases that are in the delinquency pile and make a distinction between good cause and discipline issues. He explained that doing so would help the Advisory Council figure out how to help.

Council member Mickey Long expressed concerns about the issue raised in the *Mancini* decision that lawyers might be reluctant to reach out to the judge when a decision is delayed, out of concern that doing so might adversely affect their case. Mr. Long stated that the concern is real and that he has experienced it in other venues outside of the DIA. He stated that a lawyer should be able to be hated by the judge, but not have that sentiment influence the judge's job of applying the law to the facts of the case. Additionally, Mr. Long asked if it is possible to breakdown the delinquent case list between cases where the employee is not getting benefits and cases where the insurer believes an employee should not be getting paid.

Council member Bernie Mulholland stated that the vast majority of the DIA judges are doing a fantastic job and that there are some cases that are much more complicated than others. He also explained that in some cases, there are extenuating circumstances where it would not be in everyone's best interest to rush the decision out. Mr. Mulholland explained that he suspects that there are also some cases where time goes by and it is a difficult case, so the judge decides to write an easier decision to get it out, rather than finalize the difficult case. He suggested that in these situations, mentoring by another AJ or even an ALJ

¹ Late decisions are decisions that are outstanding six months after the close date of the record.

might be helpful. He explained that when delays are long, it becomes harder and harder to remember the specific facts of the case and that reading the transcript is not going to bring everything back to the judge. He indicated that working with the judges that are having problems, rather than castigating them, could be a useful approach.

Council member Long noted that there is a removal mechanism for judges in the statute, rather than having to wait until it is time for reappointment to consider performance.

Vital Statistics

Director of Administration Bill Taupier updated Council members on the information contained within the DIA's vital statistics report for March 2016. He offered the following statistics: Conference Queue: 629; Hearing Queue: 754; Reviewing Board Inventory: 89; Impartial Exams for FY'16 (to date): 2,724 (57 waivers); Exam Fees Collected for FY'16 (to date): \$1,429,096; Impartial Medical Examinations in FY'15: 4,146 (94 waivers); and Exam Fees Collected in FY'15: \$1,967,550.

Mr. Taupier updated the Council on the Stop Work Order (SWO) and Caseload Statistics, including the following: SWOs issued in February: 152 (12 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY'16 (to date): 1,426; fine collection for February: \$96,750; total fines in FY'16 (to date): \$709,724; SWOs issued in FY'15: 1,938; total fines collected in FY'15: \$1,188,541; compliance checks for February: 6,542; estimated number of workers now covered by workers' compensation insurance as the result of a SWO: 3,730 in FY'16 (to date).

Mr. Taupier continued the update of the monthly vital statistics offering the following: total cases filed in February: 891; total cases filed in FY'16 (to date): 7,921; total cases filed in FY'15: 11,837; total First Report of Injury Forms (FRI) filed in February: 2,778 (2,473 filed electronically: 89%); total FRIs filed in FY'16: 22,673; total FRIs filed in FY'15: 33,353 (29,290 online). In February the number of employee claims filed: 743; number of employee claims filed in FY'16 (to date): 6,664; number of discontinuances filed: 148; the total number of discontinuances filed in FY'16 (to date): 1,231; the number of third party claims filed: 0; total number of third party claims filed in FY'16 (to date): 26.

Mr. Taupier proceeded with his update on uninsured claims (§65), offering the following: total §65 claims reported in FY'16 (to date): 90; total amount of §65 claims paid by the Trust Fund in FY'16 (to date): \$4,359,718; total §65 claims filed in FY'15: 99; total amount of §65 claims paid by the Trust Fund in FY'15: \$7,620,855; total recovery efforts against uninsured employers FY'16 (to date): \$809,428; total recovery efforts against uninsured employers FY'15: \$1,556,069.

Mr. Taupier proceeded with the vital statistics for the Second Injury Fund (§37/37A), stating the following: total amount of §37/37A petitions paid in FY'16 (to date): \$10,964,002; total amount paid on these claims in FY'15: \$30,682,389; total COLA reimbursements to insurers in FY'16 (to date): \$3,835,240; total COLA reimbursements to insurers in FY'15: \$14,344,261.

Mr. Taupier reported that as of February 2016, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 232 (179 DIA employees, 53 WCTF employees).

Mr. Taupier presented the following accounting and finance statistics: total referral fees collected in FY'16 (to date): \$2,614,416; total referral fees collected in FY'15: \$3,888,246; total assessment collections in FY'16 (to date): \$60,254,805; total assessment collections in FY'15: \$70,934,257.

Regulatory Review Update

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

Circular Letter #348

Ms. Fabiszewski stated that with respect to Circular Letter #348, the working group is currently reviewing a set of proposed revisions to the letter to make sure that the changes accurately captured the discussions of the working group. She noted that the DIA is also reviewing those revisions internally.

ACTION ITEMS

A motion was made to approve the February 10, 2016 minutes.

Motion seconded and carried.

House Bill 3972

Executive Director Monnin-Browder explained that House Bill 3972 has moved to the House Committee on Third Reading. He explained that the bill would add §34A permanent and total disability to M.G.L. c. 152, §35E. He stated that the bill would allow insurers to deny workers' compensation benefits to a worker who is 65 years or older and out of the workforce two years, unless a presumption that the individual would be out of the workforce could be overcome.

Chairman Joyce noted that this bill was brought up during the Council's legislative discussion at the July 8, 2015 meeting, but that no position was taken at the time. He explained that a motion to oppose the bill had failed.

Mr. Pulgini stated that he understood that the intent of the bill is to address a situation where a public employee over 65 is receiving both a pension and 34A benefits. He stated his concern that the legislation would impose an unfair and undue burden on an injured worker who is totally and permanently disabled. Mr. Pulgini asked Council members if they would consider opposing the bill.

Mr. Mulholland noted a distinction between pensions and workers' compensation benefits. He explained that a pension is earned over the course of a person's career and workers' compensation is wage replacement for work you cannot do going forward because of the injury. He explained that a permanently and totally disabled injured worker cannot do what other retirees have the opportunity to do—to go out and find a job to make a little bit of extra money. Additionally, he noted the impact that the bill would impose on a worker who did not make significant contributions to the social security system. For example, he noted that a person's social security retirement might be \$340 a month and for that, pursuant to this bill, he could lose his \$750 a week in §34A benefits.

Mr. Mulholland explained that the better solution to the issue raised by proponents of the bill would be to cap what an employee can receive between workers' compensation and a pension at what you earned at the time you were injured. He noted that under §35E, a judge cannot take the word of the employee or his immediate family as to whether he would have retired or not retired so instead they have to prove they could not have afforded to retire. He stated that this is a dangerous bill that would be a disservice to people receiving §34A benefits.

Mr. Joyce stated, that at this point, using age 65 as the marker of retirement is arbitrary. He explained that many people work beyond the age of 65. He explained that he attended the hearing on the bill and, in his other professional capacity, opposed the legislation, because he does not believe it would help the system.

Mr. Long moved to oppose House Bill 3972 and communicate said opposition to the House Committee on Third Reading.

Motion seconded and carried.

Meeting Schedule

Mr. Monnin-Browder explained that a member had suggested moving the monthly meeting from the morning to the afternoon of the second Wednesday of the month. He indicated that he would check with members about their availability in the afternoons. He said he would send out an email confirming April's meeting time.

Meeting adjourned.

The next meeting of the Advisory Council is scheduled for Wednesday, April 13, 2016, at 2:00 P.M., at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017.