

# MASSACHUSETTS WORKERS' COMPENSATION ADVISORY COUNCIL MINUTES

November 9, 2016

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

*Council Members Present:* Steve Joyce; Steve Falvey; Bernie Mulholland; Michael Kelley; Todd Johnson; Teri McHugh; Frank Ruel.

*Also Present:* Linda Edmonds Turner, Director; Kevin O'Leary, Deputy Director/General Counsel; Omar Hernandez, Senior Judge; Bill Taupier, Director of Administration; Marc Joyce, Senior Regional Services Manager; Alan Green, Deputy Director Investigation; Aaron D'Elia, CFO; Jessica Muradian, Legislative Director EOLWD; Virginia McCarthy, Workers' Compensation Rating and Inspection Bureau (WCRIB); John P. Murphy, Massachusetts Insurance Federation.

*Advisory Council Staff:* Evelyn Flanagan.

*Absent:* John Pulgini; Mickey Long; James Steenbruggen; John Regan; Executive Office of Housing and Economic Development.

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## *Agenda:*

Chairman's Welcome

DIA Update

- Judicial Update – Omar Hernandez, Senior Judge
- Vital Statistics – Bill Taupier, Director of Administration
- Director's Update

Communications

Selection Subcommittee

Action Items

- Minutes – September 14, 2016
- Minutes – October 12, 2016

Executive Director Update

Miscellaneous

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## **CHAIRMAN'S WELCOME**

Chairman Steve Joyce began the meeting at 9:00 A.M. Chairman Joyce introduced Kevin O'Leary the new Deputy Director and General Counsel and welcomed him to the DIA. The Chairman asked Senior Judge Omar Hernandez to provide his judicial update.

## **DIA UPDATE**

### Judicial Update

Senior Judge Omar Hernandez stated that the time between conciliation and conference is in good shape with Boston at 2.5 months; Fall River, Lawrence and Springfield are at 3 months and Worcester is at two months. He stated that they have reappointments scheduled to meet with the Governor's Council for the next couple of Wednesdays and hopefully after that they will begin appointments. The Senior Judge

stated that they are still working on the impartial roster and noted that they are having some issues with contracts. The Senior Judge stated that with respect to the hearing decisions the DIA is now down to 16 pending decisions. He explained that he has spoken to the judges and hopefully by the end of the year they will have no pending decisions. Senior Judge Hernandez informed the Council that with respect to the Opioid Pathway Treatment Program a press conference has been scheduled with Governor Baker on December 8, 2016 at 10:00 a.m. The Senior Judge informed the Council members that there was an MCLE conference coming up on November 18, 2016.

The Senior Judge presented a timeline from conciliation to hearing decisions. The Senior Judge noted that the case is filed on day one and then scheduled for conciliation 14 days later. He stated that if the case is referred to conference it will take place approximately six weeks later. The final step is the hearing which is scheduled between six to nine months after conference.

### Vital Statistics

Director of Administration Bill Taupier updated Council members on the information contained within the DIA's vital statistics report for November 2016. He offered the following statistics: Conference Queue: 543; Hearing Queue: 749; Reviewing Board Inventory: 62; Impartial Exams for FY'17 (to date): 1,193 (26 waivers); Exam Fees Collected for FY'17 (to date): \$686,549; Impartial Medical Examinations in FY'16: 4,128 (71 waivers); and Exam Fees Collected in FY'16: \$2,128,638.

Mr. Taupier updated the Council on the Stop Work Order (SWO) and Caseload Statistics, including the following: SWOs issued in October: 168 (12 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY'17 (to date): 695; fine collection for October: \$93,616; total fines in FY'17 (to date): \$393,863; SWOs issued in FY'16: 2,185; total fines collected in FY'16: \$1,107,030; compliance checks for September: 7,583; estimated number of workers now covered by workers' compensation insurance as the result of a SWO: 2,221 in FY'17 (to date).

Mr. Taupier continued the update of the monthly vital statistics offering the following: total cases filed in October: 888; total cases filed in FY'17 (to date): 3,828; total cases filed in FY'16: 12,263; total First Report of Injury Forms (FRI) filed in October: 2,748 (2,429 filed electronically: 88%); total FRIs filed in FY'17: 11,555; total FRIs filed in FY'16: 34,660 (30,559 online). In October the number of employee claims filed: 749; number of employee claims filed in FY'17 (to date): 3,240; number of discontinuances filed: 135; the total number of discontinuances filed in FY'17 (to date): 576; the number of third party claims filed: 4; total number of third party claims filed in FY'17 (to date): 12.

Mr. Taupier proceeded with his update on uninsured claims (§65), offering the following: total §65 claims reported in FY'17 (to date): 37; total amount of §65 claims paid by the Trust Fund in FY'17 (to date): \$3,058,964; total §65 claims filed in FY'16: 129; total amount of §65 claims paid by the Trust Fund in FY'16: \$7,913,457; total recovery efforts against uninsured employers FY'17 (to date): \$848,088; total recovery efforts against uninsured employers FY'16: \$1,746,315.

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'17 (to date): \$4,660,284; total amount paid on these claims in FY'16: \$28,019,870; total COLA reimbursements to insurers in FY'17 (to date): \$31,932; total COLA reimbursements to insurers in FY'16: \$11,018,308.

Council member Michael Kelley stated that the COLA reimbursements were an issue last month and he thought that the DIA was going to provide someone to come and explain this to the members. Mr. Kelley pointed out that according to the budget this number should be closer to \$3-\$4 million range instead of the \$31,932. He stated that it seems that there is a major issue and something is out of whack.

Mr. Aaron D'Elia stated that this may be a timing issue. He noted that the analyst that does this mentioned that the first quarter is skewed compared to the last three quarters and that they should be able to take a look at this. He noted that COLAs came in less than projected last year and the good news is that if these numbers hold, our assessment rates will probably decrease next year. He hopes in the future they can do a better job in forecasting. He stated that doing his due diligence as the new CFO he will be looking at the nuts and bolts of how we are budgeting and forecasting.

Mr. Kelley stated that the other question that was asked previously that when the budget was originally presented to the Council it showed the COLA figures budget going down but then when it was published it was actually higher than the prior year. Mr. Kelley noted that COLA cases are cases prior to 1985 so the common sense thought would be that as time goes on there would be fewer and fewer of them being paid since you are talking 31 years. He stated that he believed that someone was going to come in and explain why the budget actually increased instead of decreased.

Mr. D'Elia stated that he would be happy to check it and that what he was planning on doing anyway was putting together a presentation that showed trend lines for a three year period of time. He stated that we should rethink how this is put together as an organization. Mr. D'Elia explained that they work with Deloitte and Touche and though he is not 100% sure he thinks the process can be improved. He noted that if you don't spend out what you are forecasting then all of a sudden you have a huge balance and you want to avoid the rollercoaster projection rate and have a stable one. He noted that he would like to see how things happen throughout the year and give a mid-year review and do some quantitative analysis.

Mr. Taupier reported that as of September 2016, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 224 (169 DIA employees, 55 WCTF employees).

Mr. Taupier presented the following accounting and finance statistics: total referral fees collected in FY'17 (to date): \$1,286,999; total referral fees collected in FY'16: \$4,154,786; total assessment collections in FY'17 (to date): \$26,263,198; total assessment collections in FY'16: \$83,503,309.

#### Director Update

Director Turner stated that she would like to welcome the new General Counsel, Kevin O'Leary and she was glad to welcome him to the DIA.

Director Turner also congratulated the Senior Judge on his Opioid program moving forward. She stated that she was not sure when the press conference with Governor Baker would take place but she would provide the details if someone would like to attend. She noted that she would also like to compliment the Senior Judge on bringing down the pending hearing decisions. Director Turner stated that at this point she was going to turn over to Aaron D'Elia the subject of our Public Workers' Compensation Trust Fund.

Mr. D'Elia stated that the Public Trust Fund came from assessments on public entities and things like that. He noted that last June the state budget had significant challenges closing out the year so the Executive Office of Administration and Finance (A&F) reached out to all the Secretariats and reviewed all trust funds. He explained that the decision was made by them to sweep the Public Trust Fund as a budget solve for the state budget. He stated that his understanding is that it was going to be an opportunity for A&F to true-up versus what the actual budget gap for FY'16 was going to be. Mr. D'Elia stated that he was lobbying over the summer to return this money to us since a number of solutions and other items were reversed. Unfortunately, the Public Trust Fund money was not and it became clear in October when they reconciled the books that this money was going to be permanently swept.

Mr. Kelley asked Mr. D'Elia to explain what he meant by "permanently swept."

Mr. D'Elia stated that A&F has pretty broad powers and under chapter 29, §13A they can sweep trust funds with a notwithstanding provision which basically takes precedence and this broad power allows them to sweep trust funds in this kind of scenario. He noted that their point of view on this money was that it sat idle for a number of years without activity and since the DIA did not have the capability to move it to other places like the Private Trust Fund or the Special Fund, A&F swept it.

**Chairman Joyce stated legally this should be researched and he would like to get more information because if A&F can sweep the Public Trust Fund then they can sweep the Private Trust Fund. The Chairman stated that just grabbing money and putting it into the General Fund without the legislature saying you can do that is a great concern as a matter of general policy. He noted that if cities and towns paid assessments the funds should go back to the cities and towns just like we do in the Private Trust Fund.**

**Chairman Joyce explained he has a real concern with a budget item going to make up the gap here because the whole idea is that the money is in trust and it is in trust for a reason that is why the legislature created them. He stated that it would be helpful if the General Counsel could give the Advisory Council members information at the next meeting as to really where that falls in the law because when the cities and towns have paid the funds they should go back to the cities and towns and that there are ways to do it through the General Budget. He explained that from a legal perspective the Council's job is to oversee all things that are workers' compensation and this issue jumps out at him.**

Mr. Taupier stated that the entities that contribute to the Public Trust Fund have all opted-out in accordance with §65 and there has not been any collection of assessments in that fund for several years and have been no payments made since the opt-out for reimbursement.

Council member Steve Falvey asked if what Mr. Taupier was saying is that the Public Trust Fund is somewhat different from the Private Trust Fund.

Mr. Taupier stated it is somewhat different because part of the Private Trust Fund contributes to the DIA and part of it is for the §65 uninsured claims, the second injury fund and COLA but the Public Trust Fund does not contribute to the Special Fund through the operating budget of the DIA or uninsured claims, it was strictly for COLA and Section 37 reimbursements which is a pretty significant distinction between that and the Private Trust Fund. He stated that the money was just sitting there and there was no possibility that the DIA could do anything with it, although that it not a definite.

Chairman Joyce stated that he thinks about that and what if cities and towns default who is going to pay those claims and asked if it would fall to the Private Trust Fund if a city or town defaulted and somebody got injured.

Mr. Joyce stated that it just seems to him that the route should have been if funds are just sitting there that you would go to the legislature and say listen this money is just sitting there and we would like to move it out and have the legislature do that. He stated that he did not understand the authority.

Ms. Jessica Muridian stated that it didn't have to go to the legislature because the provision in the statute already allows them to sweep the trust.

**Mr. Joyce said that he would like a reading of that particular piece because if it allows A&F to do that it rings bells with him because if it allows them to touch the Public Trust Fund then it would also allow them to sweep the Private Trust Fund.**

Mr. D'Elia stated that A&F chose not to sweep the Private Trust Fund because they understand what it is for. He explained that the only reason that the Public Trust Fund was touched is that it sat there for six plus years with no outstanding liability.

Council member Falvey stated that he believed Mr. D'Elia just answered his next question which is if both trust funds are essentially similar then they are both susceptible to a sweep. Mr. Falvey stated that he was just interested in the authority to by-pass what appears to be a trust with a set of rules which is what trusts are. He stated that the Council was being asked to accept the fact that goodwill be enough to rely on. Mr. Falvey noted that there is a lot of money in the Trust Fund and asked if the DIA could conceive of a crisis which would require that to be swept? Assuming that it is highly possible considering what we are talking about today.

Mr. D'Elia stated that again he really could not say and as he mentioned earlier he would like to put together a power point presentation in February to give a full update, some trend lines and a quantitative analysis with three year trend lines. Mr. D'Elia stated that he wanted to mention a couple things since they are trending higher than the number they originally made in the budget last year for two reasons: (1) they have increased IT costs (in February he will break out) and (2) our back office administrative support for the administration wasn't fully picked up. He noted that they are trending about \$2 million or 6% higher than originally projected. He explained that they might see some mid-year if things hold since a lot of times you find that your gap is not as big as you think.

Mr. D'Elia stated that in February they will have six months-worth of analysis to present and he will be able to give a really clear picture. Mr. D'Elia noted that there are other things which he takes as good and bad news which are they significantly underspent in FY'16 and COLAs and as a result they have carried forward a bigger ending balance than we had projected so I want to put together a pretty comprehensive presentation.

Mr. Falvey stated that we are in the process of giving you some help in that with a new Executive Director to answer some of these questions that appear to be unanswerable at the moment like where the trust fund is.

#### SELECTION SUBCOMMITTEE REPORT

Council member Todd Johnson provided an update on the subcommittee actions. He noted that the subcommittee consisted of him, Bernie Mulholland and Steve Falvey. Mr. Johnson stated that the subcommittee reviewed the 22 resumes submitted and narrowed the potential pool down to eight candidates. Mr. Johnson stated that they have scheduled six of the eight candidates for in-person interviews after today's Advisory Council meeting. Mr. Johnson stated that all members were invited to stay and be part of the interview process. Mr. Johnson explained that once the subcommittee narrowed down the pool the subcommittee would bring the recommended candidates to the full council and set final interviews. Mr. Johnson stated that if any members wished to interview a specific candidate they should let the subcommittee know.

#### ACTING EXECUTIVE DIRECTOR UPDATE

Ms. Flanagan stated that she had placed a copy of the FY'16 Annual Report in each member's packets. She asked that they review the report and provide any edits a week before the next meeting so changes can be made.

Meeting adjourned.

**The next meeting of the Advisory Council is scheduled for Wednesday, December 14, 2016, at 9:00 A.M., at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017.**