MASSACHUSETTS
WORKERS' COMPENSATION ADVISORY COUNCIL

REPORT ON
THE ANALYSIS OF FRICTION COSTS
ASSOCIATED WITH THE MASSACHUSETTS
WORKERS' COMPENSATION SYSTEM

VOLUME II - JOHN LEWIS

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VOLUME II - JOHN LEWIS

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INTRODUCTION

This report was prepared by an interdisciplinary team consisting of John Lewis, an independent consultant, and Milliman & Robertson (M&R), an independent actuarial consulting firm. Due to the length of the report, we have divided it into three volumes.

John Lewis prepared the report which you are now reading (Volume II), which analyses the following issues:

Section VI - ASSESSMENT OF CONCILIATION PROCEDURES

Section VII - THE LUMP SUM PROCESS

Section VIII - ASSESSMENT OF ATTORNEY FEE STRUCTURE

Meanwhile, M&R prepared the report that appears in Volume III, which discusses the following issues:

Section IX - RESEARCH AND ANALYSIS OF YEARLY CLAIM FILINGS

Section X - DISTRIBUTION OF PREMIUM DOLLARS MASSACHUSETTS VS OTHER STATES

Section XI - OTHER AREAS OF ANALYSIS

Volume I, the Executive Summary, contains the following Sections:

Section I - BACKGROUND

Section II - SCOPE OF PROJECT

Section III - FINDINGS AND RECOMMENDATIONS

Section IV - SOURCES OF DATA AND INFORMATION

Section V - REPORT LIMITATIONS

Each Volume contains a brief introduction and a table of contents section. Although we have divided the report into three volumes, we would emphasize that Volume I which includes the Background, Scope of Project, Sources of Data and Information and Report Limitations sections should be read in conjunction with and be considered an integral part of Volumes II and III.

SECTION VI - ASSESSMENT OF CONCILIATION PROCEDURES

Overview

Although conciliation is new to the Massachusetts Workers' Compensation system, in one form or another it is not new to other states, or to other legal systems. It is simply one of many techniques, often with different names for the same process, which are intended to resolve real or imagined disputes without the need for a full-scale trial or hearing.

The techniques used to accomplish this goal in other states typically include one or more of the following:

1. Requirements that claims for benefits, or requests for hearings, describe with considerable specificity and detail the benefits claimed and not being provided voluntarily, or the grounds for seeking decreases in benefit payments.

2. A simple screening mechanism, used prior to the time that a claim is permitted entry to the litigation process, to insure that the requirements set forth above have been complied with, and/or to quickly and informally determine whether there are actually issues to be resolved, or simply

communication problems that can be dealt with through an exchange of information.

3. Voluntary or mandatory mediation, in which an informal proceeding is held before a neutral party, in an effort to both improve the exchange of information and encourage resolution of issues by providing opinion and advice.

4. The use of a pre-trial hearing, at which time issues and evidence are examined, issues narrowed, and agreement sought.

5. The use of pre-hearing stipulations, requiring the parties to describe and document the exchange of information, evidence and positions prior to the formal hearing.

6. The use of informal conferences, typically before the judge or hearing officer who will hear the case, for purposes such as determining whether resolution of some or all issues is possible.

There is a great deal of overlap among the techniques cited above, and actual practices may differ substantially from what is anticipated by rule or statute. In many respects, the details of the procedure may be of little relevance, since it is generally believed that in each instance the primary purpose of these

procedures is to simply create an event that forces the parties to deal with the case and its issues.

The Request For Proposals directs this study to assess the conciliation procedure in relation to its intended goals of achieving early case resolution, reducing litigation and identifying and narrowing issues. In addition, recommendations for enhancements to the process were requested.

The Massachusetts Conciliation Process

The conciliation process used in the Massachusetts Workers' Compensation system is intended to bring the parties to a claim together and either resolve controversies or narrow issues before the case moves on to actual litigation. It is more formal and requires more resources than many of the techniques used in other states listed above, in that:

1. It is mandatory,

2. It uses a different set of officials to conduct conciliations than will actually hear the case at its later stages,

3. It requires attendance by the parties' representatives, and

4. It involves more than a cursory look at the case and its possibilities for resolution.

Evaluating Conciliation in the Massachusetts Workers' Compensation System

In our evaluation of conciliation in the Massachusetts Workers' Compensation system, we principally relied on two data sources and one other information source:

1. Claim File Review

2. Surveys of Conciliations

3. Information from System Participants

These areas will be discussed below.

1. Claim File Review

There are serious problems inherent in attempting to rely on The Department of Industrial Accidents (DIA) statistics in evaluating the impact and results of the conciliation process. Although the aggregate data describing the number of cases that stop at conciliation as compared to those that go on to dispute resolution are relatively accurate, there are concerns among

people with extensive contact with the system and its statistics as to a lack of uniformity among conciliators in interpreting and reporting various events. As a result, the statistical breakdowns regarding successful conciliations are likely not to be as accurate as one might hope.

With that caveat in mind, the conciliation statistics developed by the DIA for cases finished during 1989 indicate the following:

1. 48.4% of the cases were closed at or before conciliation, and 51.6% were referred on to dispute resolution.

2. In 16.5% of the cases the employer or carrier agreed to pay without prejudice, or the issue involved was actually resolved.

3. 24% were withdrawn or resolved at or before conciliation.

4. In 5.5% of the cases there was a request for lump sum settlement or actual referral to lump sum counseling.

In an effort to provide an additional and more detailed data source, the DIA had, prior to the inception of this study, begun a review of the physical claim files that it maintains. This effort was expanded in conjunction with the friction costs study,

and eventually included 462 cases. The first set involved 198 cases with injury dates in the months of July, October and November of 1987 and February and March of 1989. The questions asked were the following:

1. What type of case (issue) was it?
2. Was the case resolved at or before conciliation?
3. Was the claimant represented by an attorney?
4. What did the Administrative Judge (AJ) find at conference?
5. Did the conciliation recommendation match the AJ's order?
6. Was the injury date prior to 11/1/86?

A second set of 195 cases, involving injury dates in the months of June and November 1988 and May 1989, had three questions added to those listed above:

1. What was the conciliator's recommendation?
2. What was the result of the full hearing?
3. Does the file or computer indicate that the case was lump sum settled?

Because none of these cases were found to have reached hearing and decision, an additional sample of 68 cases with varying

injury dates was reviewed, selected from among cases in which hearing decisions had recently been entered. They were reviewed with regard to all of the questions previously described.

The file review was not without its problems. Everyone who routinely deals with DIA files know that they are for the most part without any real structure. As a result, it is often necessary to look through literally hundreds of documents to find those relevant to conciliation. In many of the cases it was impossible to locate at least some of the information required to answer the questions.

Figure 1 shows the extent to which each type of issue was involved in these conciliations (excluding the 68 cases involving hearings), and for each issue the proportion that was resolved either at or before conciliation.

FIGURE 1

Distributions of the Issues Involved in Conciliations

	% Of All Conciliations	% Resolved
Initial liability	36.8	45.8
Continued or renewed disability	7.7	40.0
Medical bills	9.5	75.7
Permanent and total disability	1.3	20.0
Employer misconduct	0.8	33.3
Survivors' benefits	1.0	00.0
Loss of function/disfigurement	10.7	90.5
COLA's	0.3	00.0
Average weekly wage	0.8	100.0
Attorneys' fees	0.8	66.7
Waiting period	0.0	--
Illegal discontinuance	1.8	14.3
Rehabilitation	0.0	--
Penalties	0.8	66.7
Other	0.8	66.7
Present disability/earning capacity	26.6	25.0
Refusal to submit to medical exam	0.3	100.0
Fraud	0.3	100.0

2. Survey of Conciliations

The data in Figure 1 was supplemented through a survey of the issues and results from conciliations as they took place during one week in May, 1990. Conciliators were asked to fill in a form which identified the issue or issues, the prevailing party, whether the recommendation was accepted or the case referred to dispute resolution, and in some instances the dollar value of the

issues involved. Once again, the data obtained were not as reliable as anticipated. Some of the forms were left incomplete, with a particular lack of information concerning the dollar value of issues involved, such as the size of the medical bills being disputed. However, some responses were quite detailed, and provided not only the factual information requested, but also a considerable amount of valuable commentary. A total of 531 usable responses were obtained.

The findings developed from this survey were consistent with the claim file review. That is, while conciliation is effective in actually resolving a number of issues, such as medical bills, loss of function and disfigurement, there are a number of major issues, including initial liability and present disability, in which it is far less effective.

1. 45% of the cases involved issues of initial liability. 33% of these were conciliated, 49% referred to dispute resolution, and the remainder of the outcomes involved rescheduling, withdrawal, lump sum settlement or other activity.

2. 9.2% involved medical bills. 83% were conciliated, and 16.3% referred.

3. 11.2% involved loss of function or disfigurement. 63% were accepted, 28% withdrawn and 8.3% referred.

4. 26% involved questions of increased earning capacity. Only 5.7% of these were conciliated. 53.9% were referred, and 40.4% involved rescheduling, withdrawal, lump sum settlement or other activity.

3. Information from System Participants

The findings discussed above and their significance were reinforced by the interviews conducted during the study. There was general agreement that conciliation was of little value in dealing with some issues, such as those involving present disability and significant medical and factual disputes. While these are individual opinions, they are supported by the data that were obtained. However, the extent to which the same proportion of issues would be resolved without the existence of conciliation creating an event or threat that forced the parties to do something is not known, nor is it known whether a less-formal event could have attained the same result. On a subjective basis, many of the practitioners interviewed felt that the existence of an event, rather than its precise nature, is what leads to resolution of most of those issues that are resolved at conciliation.

Findings

Based on our review of claim files, survey of conciliators, and our interviews, we have developed the following findings:

1. Conciliation does not appear to narrow issues.

2. Important Conditions for Conciliation to be Successful are Lacking in Massachusetts.

These will be discussed in more detail below.

1. Conciliation does not appear to narrow issues.

The failure to obtain resolution of issues does not necessarily indicate a failure of the conciliation process, since one of its stated goals is to narrow issues, thereby encouraging resolution later, or making conferences before the administrative judges more efficient. Obviously an assessment of this goal is substantially subjective, because of its very nature. However, simply stated we were able to find very little support among the people interviewed for the proposition that conciliation leads to significant narrowing of issues.

One factor that may have a significant impact on the value of conciliation in narrowing issues is the time delay between conciliation and conference. Many of the serious issues that go forward to conference and perhaps hearing involve significant factual questions which are subject to change. When it take six or seven months to get from conciliation to conference, the parties are in many respects dealing with a different case, and their incentives to develop evidence, provide full disclosure and cooperate in narrowing issues at conciliation are limited.

There have been a number of alternative scenarios offered by various individuals and groups within Massachusetts with regard to improving the effectiveness of conciliation and the pre-trial process. They range all the way from eliminating conciliation to granting conciliators authority to order the payment or termination of benefits. Less extreme positions include limiting conciliation to those issues that appear to be most easily resolved at that level, using telephone calls in lieu of actual appearance, teaming conciliators with administrative judges, and many other variations on the same themes.

All of these positions have supporters and detractors. What they each lack is the ability to prove that they will work and deliver the desired results until they are tried. While pressures for change usually make it quite difficult to proceed cautiously, there is an alternative that may provide a greater opportunity

for success than the customary single-track approach to change. That is to insure legislatively that the DIA has sufficient latitude to try different alternatives, and instruct it to implement several alternative programs on an experimental basis. Given the ability to experiment and to modify programs based upon the data that are routinely developed, subject to direction and oversight from the legislature and the compensation community, the DIA is likely to have a greater chance for success than if it is required to adopt one statutorily-restricted approach to conciliation and the dispute resolution process.

Before moving on to specific alternatives that should be considered for implementation, there are a number of observations of the Massachusetts system that should be related, because of the effect that the circumstances they involve will have on decisions regarding the conciliation system.

2. Important Conditions for Conciliation to be Successful are Lacking in Massachusetts.

There is virtual agreement among administrators in other states who have utilized conciliation-like techniques to reduce litigation and speed the delivery of benefits as to the environment necessary for the success of this type of program.

a. Delay Between Conciliation and Formal Dispute Resolution - There must be little or no delay between the conciliation or similar activity and the more formal dispute resolution activities. If not, the conciliation effort will have little meaningful impact on many serious issues.

b. Working Relationship Among System Participants - A good working relationship must exist among the attorneys, conciliators and judges, with timely, complete and consistent communication.

These are discussed below.

a. Delay Between Conciliation and Formal Dispute Resolution

There is no question that the first condition does not exist in Massachusetts. There is general agreement among practitioners that as a result, whatever potential value the conciliation concept may have in dealing with major issues is lost due to the delays that are incurred in moving from conciliation to conference. This is particularly true with regard to medical questions. In cases in which there is a likelihood of formal dispute resolution, there is little incentive to spend money to obtain medical opinion which will lose its relevance by the time the case gets to conference. It is of more than passing interest that one of the leading claimants' attorneys in Massachusetts

volunteered during an interview that the system never worked better than during the first months of the new, post-1985 system, until delays started to tear the system apart. Others commented that in fact the system has not been given a fair opportunity to prove its merit, due to the delays which developed.

b. Working Relationship Among System Participants

With regard to the second condition, while it is subject only to subjective evaluation, it is difficult to avoid the conclusion that at the present time the various players involved in the conciliation and dispute resolution processes in Massachusetts do not enjoy the level of cooperation that is necessary for the program to achieve its potential. Certainly there exist in every system differences of opinion concerning individual abilities and the value of different types of administrative and adjudicatory functions. However, the interviews which were conducted during this study indicate an extremely high level of dissension, lack of trust, frustration and a level of concern over status and "turf" that far exceeds that observed in most other jurisdictions.

To the extent that most alternatives require cooperation to succeed, their value in Massachusetts is limited. We can offer little in the way of suggestions as to how to improve this situation. It involves attitudes that appear to have existed in

Massachusetts for many years, and personal conflicts that are not easily resolved. But without some change, whatever system is put in place is likely to operate at less than optimum.

Recommendations

Subject to the concerns noted above, there are a number of changes in the existing conciliation process which should be seriously considered. Once again, they may be used individually or in combination.

1. Allow Conciliators the Flexibility to use the Telephone as well as Conferences. - Provide for initial conciliation efforts by telephone, with personal appearances limited to instances in which there is reason to believe that they are both necessary and would likely lead to resolution or substantial narrowing of issues. This would give conciliators the flexibility to use their time more effectively, and might have the advantage of permitting more efficient scheduling since parties appear to be more available for telephone conferences than for personal appearances.

2. Sanctions to be Applied in Certain Cases - Impose sanctions against lawyers, insurance carriers, employers

and self-insurers that do not provide full disclosure of relevant information at or prior to conciliation, attorneys that file claims prematurely, and self-insurers and carriers that are not prepared to respond to conciliation recommendations at the time that they are made. The most consistent complaint heard regarding conciliation, including written comments provided during the conciliation survey, was that too many people were, either intentionally or through lack of proper attention, ignoring the clear intent of the conciliation process, and that these failures significantly interfered with the ability of conciliation to function correctly.

3. Limit the Issues Subject to Conciliation - Limit conciliation to those issues for which there is a significant chance of success, such as initial liability questions that do not involve major medical and technical issues, medical bills, average weekly wage and loss of function/disfigurement. Let other issues, particularly increased earning capacity, go directly to dispute resolution, with the conference being used as a pre-trial tool to narrow issues and evidentiary requirements, as well as for temporary determination of benefit entitlement.

4. Educational Support for Conciliators - Provide increased educational support for conciliators, attorneys and claims personnel, to improve conciliation skills, develop greater consistency in methodology and statistical reporting and obtain increased cooperation from the parties. Quality legal systems recognize the need for substantial continuing educational efforts for everyone, up to and including judges, in order to obtain continued improvement in their operations. Massachusetts has not yet provided this support to the Workers' Compensation system.

Finally, there must be recognition of the impact of most of the proposed conciliation changes on the dispute resolution process. Many of the proposed changes would bring greater numbers of cases directly to dispute resolution, thereby increasing the existing conference and hearing backlogs. Unless dispute resolution becomes capable of handling increased numbers of cases, through a combination of increased resources and more effective operation, changes in conciliation could well have a negative impact on the overall disposition of claims.

Possible Alternatives That are Not Recommended

Several options that have been discussed in Massachusetts are not being recommended because of concerns over the willingness and ability of the system to support them.

1. Give Conciliators the Power to Order Changes in Benefit Status

Giving conciliators the power to order changes in benefit status in effect eliminates conciliation and replaces it with another level of litigation. Conciliation, with its emphasis on open, informal discussion and cooperative efforts to seek resolution, is by definition inconsistent with the power to order benefits to be paid or terminated. Furthermore, it is likely that the conciliation position would have to be upgraded in terms of salary and selection process if they were to be accepted by the community as adjudicators.

2. Pair Conciliators with Administrative Judges

There are related concerns as to the possibility of pairing conciliators with administrative judges. While there are already situations in some of the regional offices in which there is evidence of successful cooperation between AJ's and conciliators, this has arisen on what can best described as a voluntary basis. When the question of pairing is discussed, judges express serious

concerns over the potential problems of establishing the appropriate working relationship, and conciliators worry about becoming "glorified clerks." While these problems and concerns are not insurmountable, they should raise major questions about the potential for success in the context of a system that has not yet been able to develop a satisfactory cooperative working environment, and in which there is little control over individual work habits.

SECTION VII - THE LUMP SUM PROCESS

Overview.

Concern over the use of lump sum settlements is not unique to Massachusetts. Every state in which the Workers' Compensation system has become a major issue has spent a considerable amount of time debating the use of lump sum settlements and their impact. In some instances the debate has gone on for years, with statutory changes moving the system first in one direction and then back again. The views of experienced members of the Workers' Compensation community vary greatly on this issue, with competent and experienced people at opposite ends of the spectrum in their beliefs regarding the use of lump sum settlements, but with no clear-cut statistical support or basis to demonstrate who is correct.

The Request For Proposals that controls the scope of this report raises two specific and distinct issues related to the use of lump sum settlements. They are:

1. The utilization of personnel and institution of procedures to facilitate efficient and equitable lump sum settlements, and

2. The economic impact of lump sum settlements on workers, employers and insurers.

In order to evaluate the issues surrounding the use and control of lump sum settlements, it is important to understand:

1. The context in which they exist.

2. The type of settlement that is being discussed.

1. Understanding the context in which lump sum settlements exist. - In the tort system which Workers' Compensation is intended to replace, virtually all cases are resolved with a single lump sum payment made a considerable period of time after injury occurs, with the size of the payment determined either by settlement or trial. Workers' compensation is designed to provide benefits as soon as they are needed, usually at the time the injury occurs, and are paid on a periodic basis for as long as they are needed, subject to whatever limitations are contained in the law. Payments may start, stop, start again, be modified, or in other ways change numerous times during the life of a claim, as the injured workers' physical and employment circumstances change.

In the absence of a settlement, a claim may remain open for many years, in some instances for as long as the injured worker lives, and even longer.

In addition to its use of periodic benefit payments, Workers' Compensation differs from tort with regard to the parties' legal ability to resolve claims. While the parties to a tort claim are basically free to settle at any time and in any manner they wish, this is seldom true in Workers' Compensation. Since their inception, most Workers' Compensation systems have limited the settlement of claims, and in fact some states simply do not permit settlements which foreclose the right to claim additional benefits if the need arises.

2. Understanding the type of settlement that is being discussed. - We are dealing with settlements that put an end to a claim with finality, and which involve the waiver of the claimant's right to obtain additional benefits, should circumstances change.

There are other types of settlements used in many Workers' Compensation systems, most of which involve the settlement of issues rather than cases. As an example, if there is a dispute as to the extent of a claimant's earning capacity, it is possible for the parties to enter into an agreement or stipulation that the capacity is $200 per week, and for that agreement to be given the force of a contested case decision. The statutory benefits

due would then be paid, but the claim would remain open. If future circumstances warranted the payment of additional benefits, usually based upon a change in condition, they could be obtained, since this type of agreement does not involve the waiver of rights to future benefits.

Conversely, it should be noted that a final or "lump sum" settlement is not the only way in which a claim can come to an end. Many Workers' Compensation laws provide for case closure and an end to benefit entitlement if the claimant goes without benefits for an extended period of time, usually at least one year but often more. Under this type of system, the case automatically comes to an end one year (or whatever the statutory limitation may be) after the last receipt of benefits. This type of limitation can bar a claim for additional benefits, even when the claimant's condition deteriorates substantially, if the change occurs after the expiration of the statutory time limitation.

A. Assessment of the Lump Sum Approval Process

The lump sum approval process is for all intents and purposes expected to meet one goal. That is, to protect the claimant from a "bad" settlement. Although a few states refer to the concept of insuring that settlements are fair to "all parties," in actual

practice it is the claimant that the system is attempting to protect. In Massachusetts, the statute itself make this quite clear, through its specific reference to "the best interest of the claimant." Providing this protection means that the system must concern itself with a number of aspects of each settlement. One is the various benefit entitlements contained in the law. Have all the medical bills been paid? Was the claimant paid for all periods of temporary total disability? Was the compensation rate calculated correctly, etc.? Another is the question of whether the settlement amount is "fair" or "adequate," when all of the circumstances surrounding the case are considered. Finally, the settlement process should insure that the claimant is aware of his or her rights, and that the settlement is entered into of their own free will.

Thus, the Workers' Compensation system is expected to achieve certain objectives in the lump sum settlement process such as:

1. Benefits are to be paid in accordance with the law.

2. Benefits are to be paid in a fair and reasonable manner on a timely basis.

3. The settlements should be entered into freely.

4. The claimant should be aware of his or her rights under the law.

In order to evaluate the approval process that is currently used in Massachusetts in terms of how well it meets these objectives, several information sources were utilized.

1. Telephone survey of claimants.
2. Interviews with members of the Massachusetts Workers' Compensation Community.
3. Interviews with representatives of other state Workers' Compensation systems.

While the inherent subjectivity of the lump sum approval issue itself makes it impossible to demonstrate whether the Massachusetts system, or any other, is the most appropriate and effective method to facilitate efficient and equitable lump sum settlements, the data and information obtained do provide assistance for anyone considering this issue.

Before discussing our findings, it will be useful to compare the Massachusetts system of regulating lump sum settlements with those found in other states.

How other States Deal with Lump Sum Settlements.

As previously noted, virtually every state imposes at least some restrictions on lump sum settlements, and several bar them completely. The specific restrictions vary considerably. In most states, the parties must at least wait until active medical treatment is over. In some, settlement may not be permitted if the claimant has not yet returned to work, or may not include benefit entitlements for medical or vocational rehabilitation services. These restrictions are often imposed by statute, but may also flow from the Workers' Compensation agency which, in exercising its discretion to approve or disapprove settlements, may impose restrictions not specifically provided for by statute.

In virtually every instance, the settlement must be approved by the Workers' Compensation agency. Approval may require an actual hearing, with the claimant present, or only the filing of signed and perhaps sworn documents indicating the terms of the settlement and the claimant's understanding and approval of them. The level of scrutiny that the agency actually applies in the approval process also varies, depending upon the state. For example, in some states it is well known that when the claimant is represented by an attorney, the approval process is perfunctory, and more of a rubber stamp than a real investigation

as to whether the settlement is appropriate and in the claimant's best interests.

The Massachusetts Approach to Lump Sum Settlements.

The Massachusetts approach is in some respects tougher than in many of the other states that permit the use of lump sum final settlements.

a. Massachusetts Two-Step Approval Process.

The Massachusetts lump sum approval process itself is significantly different from those used in other states. While others simply require that someone within the agency (usually a hearing officer) review the settlement papers or hold a settlement hearing, Massachusetts requires a two-step procedure. The first step, once the settlement terms have been agreed to, is a meeting between the claimant and a disability analyst from the Department of Industrial Accidents, to discuss the settlement, its ramifications, the claimant's financial and other circumstances, and his or her options. The second step is a conference before an Administrative Law Judge (ALJ) of the reviewing board, for actual approval or rejection of the settlement. The ALJ's are a higher level of authority than is

usually utilized for settlement approval in other states. Does this two-step process provide enough additional protection for claimants to warrant the expenditure of the time and resources that are involved? As previously noted, there is a great deal of subjectivity involved in resolving this question.

b. Future medical and vocational rehabilitation benefits cannot be lump summed.

Future medical and vocational rehabilitation benefits cannot be included in the settlement, which is also true in some other states by statute or practice. This is extremely important in the context of claimant protection. One of the major concerns over final settlements is the fact that it is extremely difficult to predict future medical needs. As a result, there is a real possibility that in some cases those needs will not be met through the settlement, and will become someone else's responsibility, or will not be dealt with at all. Even when sufficient funds are included in the settlement to deal with future medical needs, it is possible if not likely that the money will be gone by the time the treatment is required. Since Massachusetts no longer permits this to happen, one of the major concerns regarding lump sum settlements has been dealt with.

Findings

Based on information obtained from the telephone survey and interviews, we compiled the following findings as to how the lump sum approval process is achieving the objective noted above.

1. Two Step Approval Process is Not Justified - Although there is considerable respect for individual disability analysts' efforts, there is a widely-held belief among those involved with the system that given the various time and resource pressures on the system and its participants, the two-step process is not of sufficient value to justify its continued use, and that comparable protection could be accomplished through some other type of approval process. With the exception of the disability analysts themselves, virtually every one of the members of the compensation community, including the DIA, who were interviewed regarding this issue indicated that in most instances there was little or no value to the two-step approval process.

2. Counseling Session of Questionable Value - Although 60% of the respondents to the telephone interview indicated that the counseling sessions were "very helpful" or "somewhat

helpful," only 34% obtained information from the counseling sessions that had not been received elsewhere.

3. Reviewing Board Spends too Much Time on the Lump Sum Approval Process - Lump sum approval takes a considerable portion of the reviewing board's time, time which could be better spent on activities directly related to the review of case decisions.

4. Counseling Activities Are Costly - The counseling activity costs the DIA approximately $348,000 per year, at least a portion of which could be utilized elsewhere if a less intensive process was adopted.

5. Counseling Appears to Have no Impact on the Use of Lump Sum Settlements - There is no evidence that counseling has resulted in claimants reducing their reliance on lump sum settlements, one of the goals of the process when it was adopted in 1985. For example, in a sample of 100 cases provided by the office of education and vocational rehabilitation, only 4 did not go on to settlement, and few of those had anything to do with the claimant changing his or her mind. In fact, lump sum utilization has increased substantially since the inception of the new approval process.

6. Counseling Can Catch Benefit Errors - While the disability analysts report instances in which claimants benefited financially from the conference, such as through the correction of average weekly wage, or the discovery of unpaid medical bills, this occurs in other systems as well, despite their lower level of scrutiny and counseling.

7. Other Jurisdictions Use a Less Intensive Approval Process with Success - Jurisdictions utilizing less intensive approval processes, including approval by affidavit, report that when such systems are used properly, the level of protection that is provided is very satisfactory. While there are states in which there are legitimate concerns over the approval process, as was the case in Massachusetts prior to the law change, in virtually every instance the problems flow from a failure of those involved to take their responsibilities seriously, rather than an inherent weakness in the system.

8. Some Claimants May not Understand Their Rights - Despite all of the efforts to provide claimants with accurate information, 27% of the telephone survey respondents indicated that at least one reason for settlement was that they were told that they had to settle. Since one of the goals of the approval process is to assure claimants that

they do not have to settle their claims, this raises real questions as to whether the system is doing its job.

Recommendations

The real issue is not whether the analysts and the counseling process are of any value. Clearly they are. If relied upon by the ALJ's, they provide a level of inquiry and assistance that does not usually exist in an approval process, offer the claimant an additional source of information and assistance, provide somewhat of a "cooling off" period between the counseling session and the actual approval hearing, and should decrease the amount of time spent by ALJ's on individual approvals. The question is whether the incremental value of the services provided and the results obtained justify the expenditure of $348,000 per year.

Based upon the Massachusetts experience, and those of other states, there is reason to believe that a combination of more specific paperwork, elimination of hearings in certain cases, and a single approval hearing when one is necessary would provide an acceptable level of protection, at a reduced cost to the DIA, and with somewhat less inconvenience to the claimants involved. These alternatives can be used either alone or in various combinations, as desired.

We recommend that the following proposals be considered:

1. One Step Process - Use a single counseling and approval session, rather than the two that are now required.

2. Eliminate the Use of ALJ's in the Lump Sum Approval Process - Vest approval authority in officials other than the ALJ's. A specific position could be created within the DIA for this purpose, or administrative judges or conciliators could be assigned the responsibility.

3. Settlement by Affidavit - Permit settlement by affidavit in specific circumstances, such as when the claimant has returned to work, or is represented by counsel, or both. Based upon the information developed through the telephone survey, this would reduce the need for counseling and settlement hearings by approximately 25%.

4. Availability of Counseling Advice - Permit the approving authority to refer individual cases to a disability analyst for counseling if deemed necessary.

5. Increase Settlement Agreement Information - Increase the detail provided in settlement papers. Require that they include accurate reporting of information such as the basis for calculating average weekly wage, the period of time for

which temporary disability benefits were or will be paid, the claimant's employment status, costs and fees to be paid, the results of the claimant's final or most recent medical examination, and whatever other information is normally obtained through the counseling process. This will enable the approving authority to more quickly and effectively evaluate the proposed settlement, ask additional questions and reach a decision concerning approval.

6. Description of Claimant's Rights with Settlement Papers - Include in the settlement papers a detailed description of the claimant's rights, and the impact of the settlement on those rights, and insure that claimants have read these statements or had them read to them.

7. Certification as to the Accuracy of Settlement Information - Require that the claimant's attorney and the carrier or self-insurer certify to the accuracy of the information upon which the settlement is based. This does not mean that they should be required to vouch for all of the claimant's statements, but rather that reasonable efforts be made to insure that the factual information upon which the settlement is based is accurate.

8. Limited Random In-Depth Settlement Hearings - Provide for limited random use of in-depth settlement hearings, with

detailed review of settlement papers, terms and conditions, to encourage those involved with settlements to comply with the information and disclosure requirements described above.

9. Cooling Off Period After Approval - Permit a cooling-off period after approval, so that claimants will not feel that they must make an irrevocable decision within the few minutes allotted to them before the approving authority.

We have not performed an analysis of the potential cost savings to the system of these recommendations, but it is clear that some of these items (Specifically 1 and 3) will reduce both the process time and costs.

In the final analysis there is no way to prove that a modified approval process will be as safe as the existing one. And even in the face of evidence that the counseling sessions have little demonstrable impact on settlements, it can be argued that their mere existence prevents abuses, by discouraging those who would otherwise attempt to manipulate or somehow abuse the lump sum settlement. However, there are two major factors that must be considered when determining whether the additional resources utilized in Massachusetts are of sufficient incremental value to warrant continuation.

As previously noted, many of the claimants interviewed were operating on incorrect assumptions about their settlement rights. In addition, several of the people interviewed during the study, including attorneys, described incidents in which claimants were directly or indirectly told to lie or mislead during the counseling sessions, in order to secure approval of their settlement. Despite the system's best efforts, it does not provide 100% protection in terms of claimants dealing with settlement.

Secondly, claimants' attorneys are paid to do much of the work that is being assigned to the disability analysts and the counseling process. If they are doing their job, they already must obtain all of the information that is required for settlement approval purposes. They have a professional relationship with their clients, are bound by ethical and legal considerations to deal properly with their clients, and most importantly are trusted by their clients. Over 60% of the represented claimants in the telephone survey were very satisfied with their attorneys, and another 25% were somewhat satisfied, a satisfaction level far greater than for any other aspect of their contact with the worker's compensation system.

If more responsibility were specifically given to claimants' attorneys, in terms of both the information they must provide to the claimant and the information they must provide to the

approving authority, subject to review and sanctions, far less resources should have to be allocated to the approval process. If the system cannot or will not trust these attorneys, even when they are subject to supervision by the approving authority, or cannot control them, that reality should raise some very serious questions about the operation of a Workers' Compensation system that relies to such a great extent on the ability, honesty and good faith of the attorneys involved.

B. The Economic Impact of Lump Sum Settlements on Workers, Employers, and Insurers.

We have divided our discussion of the economic impact of lump sum settlements on the parties to the agreement as follows:

1. The Economic Impact on Workers

2. The Economic Impact on Employers and Insurers.

1. The Economic Impact on Workers

There are a number of serious issues that can be raised concerning the financial impact of lump sum settlements on injured workers. They include:

a. Possibility of Forced Settlements - The possibility that settlements are forced on workers either through the deliberate withholding of benefits or the delays which exist in the delivery and dispute resolutions processes.

b. Post-Settlement Return to Work - Concerns as to whether claimants are able to obtain work after their settlements. If they cannot, in most instances the lump sum will disappear very quickly.

c. Lure of Lump Sum Settlement Amounts - The possibility that claimants are unduly influenced by the lure of what appear to be large settlements which in fact do not deal adequately with post-settlement economic needs.

d. Economic Impact After Lump Sum Settlement is Spent - The possibility that lump sum settlement proceeds will be quickly squandered, leaving the claimant and family with unmet economic needs.

We will address each of these issues below.

a. Possibility of Forced Settlements

With regard to the first issue, if there are economic pressures to settle, they do not result from the existence of the lump sum

settlement itself. The possibility of the withholding of weekly benefits to pressure a settlement is of course a concern, but not one limited to situations involving lump sum settlements. It can just as easily occur in systems that do not use lump sum settlements.

In these instances, it is the delivery system and the litigation process, not the existence of settlement opportunities, that are at fault. There is little doubt that there are instances in which claimants may feel pressure to settle cases which would not otherwise be settled, or would be legitimately settled for greater amounts. However, it is the delay which currently exists in the Massachusetts system, (with the first opportunity to force benefit payments to begin or be reinstated occurring five to seven months after a problem arises,) that is responsible, and not the fact that the system utilizes lump sum settlements as a method of terminating cases.

The telephone survey indicates that for about one-third of the claimants, need for money was at least one reason for settlement. While this may provide some support for the proposition that claimants are forced to settle for economic reasons, the relationship between that conclusion, even assuming that it is true, and the use of lump sum settlements is somewhat more tenuous. The claimants' attorneys who were interviewed were quite clear in indicating that use of economic leverage by

insurance carriers to force settlements was not a significant problem in Massachusetts. When there are economic pressures, they are most often the result of the delays which occur in the system, before a case can get to conference, and benefit payments ordered. This occurs in all systems in which there are such delays, and could be virtually eliminated if the backlog was itself eliminated or at least substantially reduced.

b. Post-Settlement Return to Work

The true economic impact of lump sum settlements on claimants appears to occur after the settlement is consummated. Only sixty percent of those interviewed in the telephone survey had returned to work at the time of the interview (approximately six months after case settlement), and for about half of those at less than they were earning at the time of injury. Twenty-five percent were unemployed and looking for work at the time of the interview. The average gross settlement before deduction of attorneys' fees and costs for these claimants was approximately $17,000, money which will not last long if it is required for support during such a lengthy period of unemployment.

The cure is simple, but perhaps not acceptable. That is, to bar lump sum settlements for those who have not returned to work. There are a number of problems associated with this approach which will be discussed later, but it is feasible. At least one

state, Minnesota, specifically imposes this requirement by statute, and incorporates it into its benefit structure. Benefits for a given level of disability are higher for those who have not returned to suitable gainful employment than for those who have, but claims cannot be settled until the claimant returns to work. Until the claimant returns to work, benefits are paid on a periodic basis. Despite the benefit differential, over 90% of permanent partial disability benefit recipients in Minnesota return to employment and settle their claims.

c. Lure of Lump Sum Settlement Amounts

One of the major problems that claimants may face in dealing with a lump sum settlement is that it may look far more attractive than it actually is, particularly if the economic reality is that there will be little employment after settlement. In such cases, a claimant may quickly find that $20,000 doesn't go very far, and that a continuing entitlement to periodic benefits reflecting economic reality might have been far more attractive. However, this is a risk that is undertaken in many aspects of life. Short of eliminating or severely restricting settlements, it is unlikely that it can be avoided, only minimized through giving the claimant adequate counseling and warning as to the possible dangers involved.

d. Economic Impact After Lump Sum Settlement is Spent

Finally, if there are overriding concerns over the ability of claimants to manage their money, lump sums, or lump sums over a stipulated amount, can be required to be paid on a structured basis, over time, so that there will at least be some guarantee that the money will not be immediately dissipated. However, once again there are a number of reasons why this approach may not be acceptable, which will be discussed later.

2. The Economic Impact of Lump Sum Settlements on Employers and Insurers.

The question of whether there is a price being paid by employers or insurance carriers because of the routine use of lump sum settlements in Massachusetts cannot be answered directly. It is virtually impossible to determine what actual costs would have been in an individual claim, had there not been a lump sum settlement, and what the aggregate impact of such cases would be on system benefit costs and on premiums. While it might be possible to compare claims costs in settled versus non-settled cases, it would be difficult to provide statistically-valid groups of cases with which the comparison could be made, and it would be equally difficult to determine what many of the

incidental costs, other than actual benefit costs, were in each of the cases.

The question is made even more complicated by the relationship between claims costs and insurance costs, both in the aggregate and in individual cases.

Despite the lack of hard evidence, there are indications of how lump sum settlements actually affect costs, or least how they can theoretically affect costs. For example, one unpublished study (which the sponsors will not permit to be cited at the present time) attempted to do this. After the expenditure of considerable time and resources, the study determined that it was likely that lump sum settlements actually saved some money.

Recent developments in Oregon should also be of interest regarding this question. After years of not permitting settlements at all, the law has been changed, primarily at the urging of the state fund that writes the majority of Workers' Compensation insurance coverage in Oregon. The fund's representatives helped convince the community and the legislature that costs would decrease if settlements were permitted. And two states, Michigan and Florida, which attempted to move away from lump sum settlements (and which use benefit systems somewhat similar to Massachusetts) quickly reinstated their use, at the urging of both employers and insurance carriers.

At this point it would be instructive to review the procedure that insurance companies follow, at least theoretically, in assigning a value at which to agree to lump sum a claim.

Insurance companies first must assign a loss reserve value to a claim. This is based on the claim handler's expectation of future liability on the claim. This should reflect all forces impacting on the claim including:

a. Past benefits due and not yet paid,
b. Additional Healing period benefits likely to be paid,
c. Likelihood of Return to Work,
d. Potential earning capacity if claimant returns to work,
e. Likely duration of benefits,
f. Disfigurement or impairment, if any,
g. Strength of the Insurer's case should the issues go to dispute resolution.

(Of course future medical benefits would also be estimated by the claim handler, but they are not being considered here.)

Finally, the insurer would consider the time value of money in settling cases with the potential for long periods of duration. That is, a dollar paid today is worth more than a dollar paid next year. In many companies, the claim department is assisted by the finance department or the actuarial department in either

evaluating individual claims, or in designing procedures and forms to help measure the economic cost of a claim to the insurance company.

If the insurer can settle the case for less than or close to its present value, then it would be in the best interest of the insurer to do so. When an insurer agrees to a lump sum settlement, the insurer essentially believes that the amount to be paid in the lump sum will be less than the total amount to be paid over the life of the claim discounted for interest or other considerations. Although a particular case may violate this rule for many reasons, (for example the claimant may die from an unrelated cause, or may return to work early,) an insurer does attempt to accomplish this objective. In the aggregate, when all lump sums are considered together, it should be attainable.

Discussion of Arguments Presented in Support of the Position that Lump Sums Increase Costs.

Arguments presented by various parties in support of the concept that lump sums add increased cost to the system include:

a. "Unnecessary" benefits, or higher settlement values are paid.

b. "Unnecessary" benefits are reflected in higher experience modifications, allowing carriers to realize higher premiums.

c. Carriers are risk averse, preferring to settle at a premium rather than risk a higher settlement later.

d. The lure of lump sums is an inducement to unjustified or inflated claims.

e. Attorney involvement is encouraged, which adds cost to the system.

f. Once the lump sum is spent, there is a possibility of a "new injury," if the condition causing the original claim still exists.

g. Increased volume of claims or possibly inflated claims

All of these arguments will be reviewed below.

a. "Unnecessary" benefits, or higher settlement values are paid.

One of the primary arguments presented in support of the proposition that the use of lump sum settlements increases costs is that the carrier pays "unnecessary" benefits as an inducement to settle, and any "unnecessary" benefits that are paid can be passed on to policyholders through increased rates, or decreased

dividends, or both. However, this position ignores short-run economic incentives. Unless the claim administrative costs saved by closing the case early are greater than the "excess" benefits paid, the carrier's immediate net income will be reduced. And of course there is no guarantee that increased benefit payments will bring about increased premium rates, particularly if other carriers do not have the same attitude and experience.

It should also be noted that the "quick settlement" theory runs counter to the argument that carriers always delay benefit payments, in order to earn more investment income. Since lump-sum settlements accelerate payments, rather than delay them, these two arguments are at least somewhat at odds with each other, although they are often advanced by the same people.

b. "Unnecessary" benefits are reflected in higher experience modifications, allowing carriers to realize higher premiums.
A second argument suggests that claim costs, if quickly incurred, are more likely to show up in the employer's experience modification, and thus permit the carrier to obtain additional premiums with which to help pay for the settlement. However, the experience modification, in the absence of a lump sum, will reflect the full incurred cost of the loss reserve on the claim. As mentioned previously, the full incurred cost of the claim should be higher than the lump sum amount in that it ignores any interest considerations. Secondly, the experience rating plan

contains a loss limitation, which truncates the impact of claims above a certain size. In addition, this approach would only have value if the employer is experience-rated, and is with the same carrier at the time the experience modifier increases. Finally, there is no guarantee that an increased experience modifier will generate enough increased premium to fully pay the settlement costs.

c. Carriers are risk averse, preferring to settle at a premium rather than risk a higher settlement later.

There are other, more esoteric arguments regarding carrier willingness to pay an unjustifiable (from the standpoint of employers) premium to settle cases. The major one is risk aversion. In order to avoid uncertainty, the argument goes, carriers pay larger settlements than are somehow justified by the facts. If avoiding risk means avoiding the financial impact of cases that eventually cost more than anticipated, paying what appears to be a reasonable premium is economically justified, as long as aggregate payments do not exceed what would have been paid in a more adverse scenario, had cases not been settled.

d. The lure of lump sums is an inducement to unjustified or inflated claims.

In the previous section we discussed how the lure of a seemingly large sum of money may induce claimants to seek a lump sum

settlement. However, the secondary question of whether they will inflate their claims was not discussed. For serious claims, this is probably not a significant issue, since insurers should be well aware of the potential costs of the injury, and as in any negotiation process, they will be aware that the claimant may attempt to overstate the extent of damages. The issue is more relevant to smaller claims, and this issue is discussed in item g., below.

e. Attorney involvement is encouraged, which adds cost to the system.

Lump sum settlements may also encourage attorney involvement (or attorney involvement may increase lump sum settlements!) when fees are generated by settlements to a greater extent than by other methods of claims resolution. When the customary method of paying attorneys' fees does not involve lump sum settlements, attorneys will have little economic incentive to encourage their use. An example can be found in the recent Oregon legislative activity which was previously mentioned. Since the system had never permitted lump sum settlements, attorneys' fees were determined and paid in a manner different than that used in settlement states. As a result, claimants' attorneys were not very supportive of efforts to permit settlements, and in fact opposed the concept.

f. Once the lump sum is spent, there is a possibility of a "new injury," if the condition causing the original claim still exists.

Another realistic cost driver resulting from the use of lump sum settlements is the possibility that in those cases in which there is economic impact and/or the need for medical treatment after the settlement, the settlement funds will be insufficient, or no longer available when the need for them arises. The remedy may be for the claimant to suffer a "new" injury and file a new claim, receiving benefits that may be duplicative of those already provided. This phenomenon can also result in cost shifting, since the employer and carrier involved in the second incident may well be paying for disability and medical needs that are in reality the responsibility of the first employer and carrier. To the extent that medical benefits are excluded from settlements in Massachusetts, at least a portion of this potential problem is eliminated.

g. Increased volume of claims or possibly inflated claims.

There are also possibilities that extensive use of lump sum settlements may bring about an increased volume of claims and increased costs in individual claims, especially as respects minor injuries. Unjustified or inflated claims may be brought by workers who see the possibility of an easy few thousand dollars, through a "nuisance" settlement. This in turn may be encouraged by carrier actions based upon the belief, if not the reality,

that a small settlement is cheaper than defending a claim through the system and possibly losing it in the end. This position is reinforced when it is believed that the system will in fact reward even questionable or unworthy claims, thus making the settlement, from the carrier's standpoint, an economically rational thing to do in an individual case, even though in the aggregate such activity may encourage the filing of unwarranted claims. There may be similar impact on individual claims costs when claimants begin to view lump sum settlements as some type of "reward," independent of economic needs or specific statutory entitlements, and change their return to work behavior or attitudes towards benefit entitlement.

Possibly the most realistic concern over increased costs associated with lump sum settlements in Massachusetts should not be with the settlement process itself, but with the litigation process. Once a carrier or self-insurer finds itself in the position of not being able to terminate or modify benefits without a hearing, it is likely to add six or seven months worth of benefits to a case's settlement value, since that is how long it will take to get to conference, and more to get to hearing. There is little disagreement in the compensation community that this is occurring right now, and that it will continue to have an effect on costs until such time as the conference and hearing backlog is dealt with.

The Massachusetts Benefit Structure as it Relates to the Use of Lump Sum Settlements

The wisdom of lump sum settlements and possible limitations on their use cannot be evaluated independently of other aspects of a state's Workers' Compensation environment. There is one particular aspect of the Massachusetts Workers' Compensation system that has a major impact on the value of lump sum settlements, and perhaps the necessity for their utilization.

Lump sum settlements are for the most part utilized in cases involving permanent injury. Massachusetts, to a greater extent than most states, ties benefits for permanent injury to actual post-injury earnings. This has several significant ramifications.

1. Under this type of system, it is difficult to predict benefit costs, more so than in a system utilizing more objective factors, such as physical impairment. Benefit entitlement is likely to vary over time, not only through changes in physical condition, but also through changes in economic conditions which are impossible to predict.

2. Some claimants may change their behavior regarding employment, either to maximize settlement value or because Workers' Compensation benefits make reduced levels of employment economically attractive.

3. Litigation to resolve critical issues such as extent of earning capacity does not provide any finality to a claim. The conditions which lead to an earning capacity decision can immediately change, and there is little to prevent a claim from re-entering the litigation process immediately after an adverse decision, perhaps with greater success the second or third time.

4. Since in these situations the parties and the system are dealing with a complex mix of physical and intellectual ability, motivation, economic conditions and other factors, and in many instances the claimant has not yet returned to work, determining what a realistic benefit cost exposure may be, and what an appropriate benefit payment is, becomes extremely subjective and difficult.

5. Without a settlement, a case may go on for years, and given an unmotivated claimant or an employer and carrier not willing to help return a claimant to full employment, may involve significant levels of both benefit costs and litigation.

All of these factors tend to make lump settlements more attractive and economically justifiable for both employers and insurance carriers. Even when a claimant has returned to employment subsequent to injury, the possibility that circumstances will change and bring about an increased entitlement to benefits provides an incentive to increase settlement value in many instances. As a result, what some may perceive as nuisance settlements because they involve minimal impairments or claimants who have returned to work may actually make good economic sense, since they provide protection against the possibility that circumstances may change, and significant claims costs incurred.

This should not be construed as a recommendation that Massachusetts immediately set about changing its benefit structure. Not only are there numerous other issues which should influence the choice of benefit structure, but a move to a more objective system does not automatically bring with it increased certainty or cause reliance on lump sum settlements to decrease.

For example, consider the Oklahoma Workers' Compensation system. Its permanent partial disability benefit system is intended to be extremely objective. It is based entirely upon extent of physical impairment, in many instances limited to the American

Medical Association's Guides to the Evaluation of Physical Impairment. Given the lack of litigation over impairment ratings in the Massachusetts system, one might assume an absence of litigation on this issue in Oklahoma. To the contrary, impairment ratings are routinely litigated, and lump sum settlements are the routine method of closing cases. This example, and others around the country, make it clear that when a system has a tradition of litigation and lump sum utilization, it is extremely difficult to break the pattern.

Finally, there is a very powerful philosophical concern that should not be ignored when considering the control of lump sum settlements. To what extent is the state responsible for protecting people from the consequences of their own decisions? Does it have the right to do so, and does it even have the capability? One of the primary reasons given for prohibiting, limiting or controlling final settlements is the protection of injured workers and their families. This assumes an obligation and right on the part of the state to provide that protection, an assumption that is not endorsed by everyone involved in the Massachusetts Workers' Compensation system.

During the interviews conducted as part of this study, experienced Workers' Compensation practitioners, judges and other members of the DIA expressed the belief that there is no valid reason to limit or control settlements, and that parties should

be free to do as they see fit, at any time, and in any manner. The argument in support of the unrestricted settlement position is simple. In a free society, it is no one else's business if a claimant who is not under any legal disability, such as minority or guardianship, wants to settle, and the state should not intervene or interfere with that decision.

The counter argument is that Workers' Compensation is at least in part a social program, intended to protect injured workers and their families from financial difficulties resulting from injury. Further, in the final analysis the cost of Workers' Compensation is borne by the public (it is argued) through increased prices for products and services, giving the public, through the state, a significant interest in how that money is spent. Finally, if claims are improperly settled, there is the potential for workers and their families to become "burdens on society," through their need for welfare and other types of public support.

No matter what arguments are raised pro and con, there is little likelihood of a "correct" answer. It is to a great extent a question of personal philosophy and perhaps expediency as to whether settlements should be permitted at all, or controlled, or permitted whenever the parties wish. If one believes that people should be free to do as they wish, including the opportunity to make their own mistakes, no approval or restrictions will be acceptable. If it is agreed that the compensation system has

some obligation to injured workers, their families and the public, then at least some types of restrictions are warranted.

Findings

Based on our analysis above, we will present a summary of our findings on the economic impact of lump sums.

1. The possibility of a forced settlement unduly influencing claimants is not a significant factor in Massachusetts.

2. The economic repercussion on claimants of post-settlement return to work are significant.

3. Most arguments that the use of lumps sum settlements consistently raise system costs are subject to considerable debate.

4. There are possibilities that extensive use of lump sum settlements may bring about an increased volume of claims and increased costs in individual claims, especially as respects minor injuries.

5. The current backlog in the litigation process is having an important effect on increasing the costs of lump sums.

SECTION VIII - ASSESSMENT OF ATTORNEY FEE STRUCTURE

Overview

In any discussion of attorneys' fees in the Massachusetts Workers' Compensation system, it is important to note that the fee structure established by statute serves two quite distinct purposes:

1. Penalize employers and insurance carriers when they do not pay benefits as intended by the law.

2. Compensate attorneys for their efforts in representing claimants.

The "penalty" occurs when the carrier or self-insurer is required to pay the claimant's attorney a fee equal to two times the statewide average weekly wage for benefits obtained during the pre-trial stages of the claim, and seven times the statewide average weekly wage when the issue is resolved in the later stages of the claim.

The source of the more traditional "compensatory" fee is the lump sum settlement process, the customary method of claim resolution in Massachusetts. This fee is at least theoretically paid by the

claimant, since it is deducted from the settlement. However, there are cases in which the fee is negotiated with the carrier as an "add-on" to the basic settlement amount. In this type of case it is difficult to say who really "paid" the fee.

In our discussion of attorney fees, we will review both areas:

A. The Attorney's Fee as a Penalty

B. The Attorney's Fee and Lump Sum Settlements

A. The Attorney's Fee as a Penalty

A great deal of attention has been focused on the penalty fee at the conciliation level, possibly because it is new to Massachusetts, and also because it sometimes produces situations in which the attorney's fee is far greater than the benefits in dispute. At the outset it should be noted that one of the avowed purposes of the conciliation fee is to change behavior, in two respects. In its role as a penalty, it is hoped that it will encourage self-insurers and insurance carriers to do a better job of providing benefits in the correct amount and in a timely fashion. By doing do, they can avoid paying the penalty fee. As a source of compensation for attorneys, the fee, since it is unrelated to the dollar value of the issue in controversy, is intended to encourage attorneys to take on small but perhaps

time-consuming questions which otherwise might go unresolved, to the claimant's detriment.

The attorneys' fee data that are collected by the DIA do not provide a reliable basis for statistically evaluating the relationship between attorneys' fees and the settlement of claims at various points in the claim flow process. While the DIA has accurate data regarding the payment of fees that are ordered by judges, the vast majority of fees are paid at other times and for other reasons. The validity of the data regarding these payments depends upon the accuracy with which they and the surrounding circumstances are reported, and there is little confidence that this reporting is complete and accurate.

The DIA data do provide a hint that a change in the law in 1988, providing attorneys' fees at conciliation for the first time, brought about increased filing of claims, since several months later there were some increases in monthly claim filings as compared to the previous year. However, once again these data do not provide statistically valid evidence of a causal connection between the two events.

The survey discussed in the section dealing with the conciliation process (Section VI.) attempted to gather some information concerning the relative financial significance of the issues that are generating the claims being brought to conciliation.

Unfortunately, in most instances responses were incomplete, so that no judgment could be reached as to whether there are large numbers of cases involving low-value issues generating attorneys' fees.

Furthermore, the existence of such cases should not necessarily lead to the conclusion that the system is not working. Since the penalty fees are paid only in instances in which benefits are obtained beyond those voluntarily and timely provided, there exists an element of fault in cases in which these fees are paid. (The possibility of fees being paid in cases involving no fault will be discussed later.) In fact, there is a great deal of agreement within the compensation community, including numerous insurance claims people, that there are many instances in which conciliation becomes necessary, and fees earned, because of a carrier's failure to assign enough competent and trained personnel to claims handling responsibilities. As a result, mistakes are made, benefits that are clearly due are not paid, and too often the conciliation process becomes the first time that the adjuster pays any real attention to claims. Many examples of such activity and inactivity were demonstrated during the study. These examples do not provide a statistical basis for making decisions as to the level of misfeasance and malfeasance, but it is clear that this is a problem with some carriers.

The conciliation survey provides some data to support this conclusion. In 100% of those cases in which initial liability was the issue that led to conciliation, and in which the recommendation was that the claimant should prevail, the carrier accepted the recommendation. Unless the system is permitting large numbers of claimants' attorneys to withhold information until a fee is earned, this indicates that at least some carriers are not adjusting their claims until it is too late to avoid paying a fee. They may in fact be using conciliation as a substitute for the information-gathering activities that adjusters are supposed to undertake. It is also significant that every case in which the recommendation was against the claimant was referred to dispute resolution. The absence of an initial fee did not deter continued pursuit of the claim.

Some of the other evidence regarding the possible manipulation of conciliation to earn a fee is subjective but persuasive. It comes from the Workers' Compensation community itself, particularly from insurance carrier and self-insurer claims personnel. Although there is less than complete agreement on the issue, many of the representatives of large carriers and large self-insurers did not believe that the penalty fee was being abused, except by a very limited number of attorneys, and that there were many instances in which lawyers waived fees to which they were technically entitled, particularly when the benefits or efforts involved were small.

However, it is also felt that the system has discouraged the informal contact and information exchange that can lead to prompt resolution of issues. There are reliable reports of a few law firms that routinely and intentionally avoid contact, and others in which the same result occurs, through inattention to files rather than intent. In all of these situations, it is not the concept of the penalty fee that is changing behavior or leading to inappropriate results, but rather its implementation.

There is another side of the coin. If a penalty is to be levied for improper conduct, the party subject to a penalty should have the opportunity to act correctly before a penalty is imposed. In the Massachusetts Workers' Compensation system, this means being provided with an obligation that can reasonably be dealt with prior to conciliation, and for which complete information will be provided in a timely manner. For some issues, such as determining the appropriate amount of compensation to be provided for disfigurement, it is almost impossible to determine the "correct" payment without recourse to conciliation or some other process involving the DIA.

Findings

A summary of our findings appears below:

1. In general, the attorney fee structure is not being abused, but there may be some exceptions to this mode of behavior.

2. The presence of the current attorney fee structure may help serve to discourage the informal contact between parties that may lead to the prompt resolution of issues.

Recommendations

This range of problems can be dealt with in several ways.

. Attempt to Resolve Minor Issues Informally, Before the Reconciliation Procedure. - Require that the DIA attempt to deal with minor issues such as small medical bills informally before conciliation is invoked and a fee generated. A few telephone calls before conciliation begins should in many cases be at least as effective as the existing process.

2. Require Disclosure of Factual Information Before the Insurer is Required to Act. - Require full disclosure of medical reports and other relevant factual information before the carrier or self-insurer is required to act or, alternatively, permit a specific defense to the payment of fees, based upon failure to make complete disclosure. This will limit the ability to hide evidence in order to earn a fee.

3. Administrative Oversight of Insurers - Provide for active administrative oversight of carrier and self-insurer activity, with imposition of penalties for improper behavior. This is sometimes referred to as practices review. It requires the use of agency personnel to review claims files either randomly or in instances in which there is reason to believe that there has been improper performance. It supplements other penalty provisions, and is intended to discourage the kind of behavior that leads to otherwise unnecessary claims and conciliation activity.

4. Guidelines for Impairment and Disfigurement - Establish written guidelines for evaluating and compensating disfigurement and impairment, or provide DIA specialists to furnish informal evaluations. This would help provide consistency, and if implemented effectively would provide

a more objective basis upon which these benefits are to be paid, reducing the opportunity for dispute.

B. Attorney's Fees and Lump Sum Settlements

If there are legitimate concerns over attorneys' fees bringing about changes in attorney behavior, they might well focus on the lump sum settlement as well as the penalty fee. As previously mentioned, the fee structure in Massachusetts provides two sources of remuneration, penalty fees and lump sum settlement fees. As a result, an attorney may legitimately spend many hours representing the interests of a claimant, but unless there is a settlement or a penalty fee, will go without a fee. It can be argued that the fee structure takes this into consideration, since there are other cases in which substantial fees are paid without much effort. However, there is also a fairly strong financial incentive to encourage settlements. Other states provide methods for paying fees that provide some relief from this situation, and Massachusetts may find this to be an appropriate area for discussion.

Recommendations

1. Permit the payment of fees even in the absence of a lump sum settlement. - This option is somewhat more difficult in Massachusetts because of the open-ended nature of Section 35 benefits, which makes it more difficult to determine the value of the benefits obtained, to which a percentage fee can then be applied. This can be dealt

APPENDIX A

TELEPHONE SURVEY RESULTS

APPENDIX A

MASSACHUSETTS CLAIMANT TELEPHONE SURVEY

In order to obtain input from claimants regarding their experiences with the Workers' Compensation system and the settlement process, a telephone survey was undertaken. Six hundred claims were randomly selected through the DIA computer, from the population of cases which had lump sum settlements approximately six months ago. Each claimant was sent a letter from the Advisory Council informing him or her about the possibility of contact, and providing a telephone number to call if the claimant had any questions concerning the survey. Efforts were then made to contact as many of the 600 as possible. Interviews were conducted with 131 claimants. Most were extremely cooperative and anxious to discuss their experiences with the Workers' Compensation system.

The aggregate responses to each of the questions asked are shown in the compilation that follows. Small discrepancies in the total number of responses to some questions, as opposed to the number which would be expected, are found for some of the questions. This is the result of the elimination of a very small number of responses which were not clear or otherwise believed

not to be reliable. Not every question was applicable to every claimant. The percentages shown apply to the total number of responses to the question, and not to the total number of claimants interviewed.

001. Overall, how satisfied were you with the way the Workers' Compensation system handled your injury - were you very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied?

Very satisfied	38	29.0
Somewhat satisfied	60	45.8
Somewhat dissatisfied	22	16.8
Very dissatisfied	11	8.4
Don't know	0	0.0
Refused	0	0.0

002. How satisfied were you overall with the way your employer treated you after your injury - were you very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied?

Very satisfied	17	13.1
Somewhat satisfied	15	11.5
Somewhat dissatisfied	21	16.2
Very dissatisfied	65	50.0
Don't know	12	9.2
Refused	0	0.0

003. And how satisfied were you overall with the way the Workers' Compensation insurance company handled your claim?

Very satisfied	24	18.3
Somewhat satisfied	36	27.9
Somewhat dissatisfied	24	18.3
Very dissatisfied	32	24.4
My employer handled the claim itself	2	1.5
Don't know	13	9.9
Refused	0	0.0

004. Did you hire an attorney to help you with your claim?

Yes	123	93.9
No	8	6.1
Don't know	0	0.0
Refused	0	0.0

Q 5-7 Asked only if answer to Q 4 was YES

005. How soon after your injury did you hire an attorney?

Within 1 week	20	16.4
Within 1 month	27	22.1
Within 6 months	52	42.6
6 months to a year	14	11.5
1 year or more	8	6.6
Don't know	1	0.8
Refused	0	0.0

006. How satisfied were you with the way your attorney handled the claim - very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied?

Very satisfied	75	61.0
Somewhat satisfied	31	25.2
Somewhat dissatisfied	11	8.9
Very dissatisfied	6	4.9
Don't know	0	0.0
Refused	0	0.0

007. Why did you hire an attorney?

I wasn't getting my compensation check	30	23.4
I wasn't getting medical treatment	3	2.3
My medical bills weren't getting paid	14	10.9
I was told my weekly benefits were going to stop	13	10.2
I was advised to hire an attorney	36	28.1
I didn't understand the workers' compensation system	33	25.8
Other	38	29.7
Don't know	2	1.6
Refused	0	0.0

008. Would you recommend that everyone with a work-related injury use an attorney or not?

Yes	85	64.9
No	30	22.9
Don't know	16	12.2
Refused	0	0.0

009. Now I'd like to ask a few questions about your doctor. Who referred you to the first doctor you saw at the time of your injury? For this question, do not include the emergency treatment you might have received at a hospital or minor emergency clinic.

Went to HMO	9	6.9
Saw family doctor	44	33.8
Was referred by family doctor	2	1.5
Employer	11	8.5
Family member	9	6.9
Friend	8	6.2
Union	0	0.0
Insurance company	2	1.5
Referred by Hospital ER or minor emergency clinic	27	20.8
Other	21	16.2
Don't know	4	3.1
Refused	0	0.0

010. Did you receive all your treatment from the same doctor?

Yes	48	36.9
No	82	63.1
Don't know	0	0.0
Refused	0	0.0

Q 11 asked only if answer to Q 10 was NO

011. Why did you see other doctors:

Were you referred by your treating doctor?

Yes	48	58.0
No	34	42.0
Don't know	0	0.0
Refused	0	0.0

Were you dissatisfied with the treating doctor?

Yes	25	30.9
No	54	66.7
Don't know	0	0.0
Refused	1	1.2

Did the insurance company make you change?

Yes	34	41.3
No	47	57.3
Don't know	0	0.0
Refused	0	0.0

Did your employer make you change?

Yes	5	6.2
No	76	93.8
Don't know	0	0.0
Refused	0	0.0

Did your attorney have you change?

Yes	13	15.9
No	69	84.1
Don't know	0	0.0
Refused	0	0.0

Was there some other reason?

Yes	16	19.2
No	65	79.4
Don't know	1	1.2
Refused	0	0.0

012. Overall, how satisfied were you with the medical care you received? Were you very satisfied, somewhat satisfied, somewhat dissatisfied, or very dissatisfied?

Very satisfied	74	56.5
Somewhat satisfied	40	30.5
Somewhat Dissatisfied	12	9.2
Very Dissatisfied	5	3.6
Don't know	0	0.0
Refused	0	0.0

013. Did any members of your household have to go to work because you were injured?

Yes	25	19.1
No	99	75.6
No one else in household	7	5.3
Don't know	0	0.0
Refused	0	0.0

014. Did any members of your household have to give up a job or lose time from work to help you while you were recovering from your injury?

Yes	32	24.4
No	91	69.5
No one else in household	7	5.3
Don't know	1	0.9
Refused	0	0.0

015. As a result of your injury, did you:

Sell or lose your home?

Yes	2	1.6
No	124	98.4
Don't know	0	0.0
Refused	0	0.0

Sell or lose your car?

Yes	11	8.7
No	116	91.3
Don't know	0	0.0
Refused	0	0.0

Move in with relatives?

Yes	17	13.6
No	108	86.4
Don't know	0	0.0
Refused	0	0.0

Use your savings to keep up your standard of living?

Yes	108	84.4
No	20	15.6
Don't know	0	0.0
Refused	0	0.0

Borrow money to keep up your standard of living?

Yes	75	58.1
No	53	41.1
Don't know	1	0.8
Refused	0	0.0

016. Were you fired or let go from your job because of the injury?

Yes	50	38.5
No	70	53.8
Don't know	10	7.7
Refused	0	0.0

017. As a result of your injury, did you:

Lose any medical or health insurance?

Yes	42	32.6
No	76	58.9
Don't know	11	8.5
Refused	0	0.0

Lose any retirement plan?

Yes	26	20.2
No	86	66.7
Don't know	17	13.2
Refused	0	0.0

Lose any sick pay?

Yes	32	24.6
No	83	63.8
Don't know	15	11.5
Refused	0	0.0

Lose any vacation pay?

Yes	33	25.4
No	83	63.8
Don't know	14	10.8
Refused	0	0.0

018. How many weeks was it from the time of your injury until you first went back to work?

No time missed from work	0	0.0
Less than 1 week	1	0.8
1-4 weeks	6	4.7
1-3 months	6	4.7
3-6 months	12	9.4
6-12 months	20	15.5
12-24 months	20	15.5
24-36 months	7	5.5
Has not returned	52	40.3
Don't know	5	3.9

Q 19-27 not asked if answer to Q 18 was HAS NOT RETURNED

019. Was this before you settled your claim?

Yes	33	43.4
No	41	53.9
Don't know	1	1.3
Refused	0	0.0

020. Was it for the same employer you worked for at the time of your injury?

Yes	19	25.0
No	56	73.7
Don't know	0	0.0
Refused	0	0.0

021. Were your duties the same as they were at the time of your injury?

Yes	26	34.2
No	48	63.2
Don't know	1	1.8
Refused	0	0.0

022. Did you work for more hours, the same number of hours, or fewer hours than at the time of your injury?

More	9	11.8
Same	39	51.3
Fewer	25	32.9
Don't know	2	2.6
Refused	0	0.0

023. When you returned to work, was it at the same rate of pay as you were making at the time of your injury, about the same, or less?

More	12	16.0
Same	28	37.3
Less	32	42.7
Don't know	2	2.7
Refused	0	0.0

024. Are you still working at this job?

Yes	45	60.8
No	28	37.8
Don't know	0	0.0
Refused	0	0.0

Q 25-26 not asked if answer to Q 24 was YES

025. Do you have a job for pay at this time?

Yes	14	50.0
No	14	50.0
Don't know	0	0.0
Refused	0	0.0

Q 26-27 not asked if answer to Q 25 was NO

026. Do you consider this to be a regular job?

Yes	12	70.6
No	2	11.8
Don't know	3	17.6
Refused	0	0.0

Q 27 not asked if answer to Q 18 was HAS NOT RETURNED

or if the answer to Q 25 was NO

027. At the present time, is your weekly wage more than you were making at the time of your injury, about the same or less?

More	16	25.8
Same	14	22.6
Less	31	50.0
Don't know	0	0.0
Refused	0	0.0

Q 28 asked if answer to Q 18 was HAS NOT RETURNED

or if the answer to Q 25 was NO

028. Do you consider yourself to be:

Unemployed, not looking for work	3	4.5
Unemployed, looking for work	32	48.5
Retired	6	9.1
Disabled and unable to work	16	24.2
A student	3	4.5
A homemaker	3	4.5
Something else	3	4.5
Don't know	0	0.0
Refused	0	0.0

029. Did you meet with a counselor from the Department of Industrial Accidents to discuss the possible need for vocational rehabilitation and your right to this type of assistance?

Yes	63	49.1
No	58	44.3
Don't know	10	7.6
Refused	0	0.0

030. Did you require some type of assistance, such as job placement or training, in order to return to work?

Yes	23	17.7
No	101	77.7
Don't know	6	4.6
Refused	0	0.0

031. Excluding the initial meeting with a Department of Industrial Accidents counselor, did you receive any vocational rehabilitation services before you settled your claim, such as:

Vocational counseling	6	4.5
Job placement assistance	5	3.8
Work hardening	2	1.5
Retraining	3	2.3
Development of a rehabilitation program	5	3.8
Other	1	0.8
None	111	84.1
Don't know	4	3.0
Refused	1	0.8

032. Excluding the initial meeting with a Department of Industrial Accidents counselor, did you receive any vocational rehabilitation services after you settled your claim, such as:

Vocational counseling	3	2.3
Job placement assistance	2	1.5
Work hardening	0	0.0
Retraining	2	1.5
Development of a rehabilitation program	0	0.0
Other	0	0.0
None	118	0.0
Don't know	4	3.0
Refused	0	0.0

033. Did you refuse or interrupt vocational rehabilitation services because you were told or you believed any of the following to be true:

Your settlement would be reduced	1	0.8
You had to choose between rehabilitation and a lump sum settlement	2	1.5
You had to say that you had a job in order to get a settlement approved	4	3.0
You wanted retraining, rehabilitation would only return you to work without retraining	4	3.0
Other	17	12.9
Did not refuse or interrupt services	85	65.2
Don't know	14	10.6
Refused	0	0.0

034. Do you have any restrictions limiting your work because of this injury?

Yes	91	70.5
No	36	27.9
Don't know	2	1.6
Refused	0	0.0

035. Did you receive any types of government support such as unemployment, Medicare, or food stamps while you were disabled?

Yes	15	11.9
No	116	88.5
Don't know	0	0.0
Refused	0	0.0

Q 36-37 asked only if answer to Q 35 was YES

036. What types of support did you receive?

AFDC	1	6.7
Unemployment compensation	5	33.3
Medicare	2	13.3
Medicaid	2	13.3
Food stamps	4	26.7
Housing allowance	0	0.0
Other (specify)	2	13.3
Don't know	0	0.0
Refused	4	26.7

037. Did you receive any of those benefits within two years before you were disabled?

Yes	3	13.6
No	19	86.4
Don't know	0	0.0
Refused	0	0.0

038. Have you received any type of government support since you returned to work after your injury?

Yes	12	9.4
No	90	70.3
Have not returned to work	24	18.8
Don't know	0	0.0
Refused	0	0.0

Q 39 asked only if answer to Q 38 was YES

039. What types of support did you receive after you returned to work?

AFDC	1	8.3
Unemployment compensation	7	58.3
Medicare	1	8.3
Medicaid	1	8.3
Food stamps	1	9.3
Housing allowance	0	0.0
Other (specify)	0	0.0
Don't know	1	8.3
Refused	0	0.0

040. Did your employer at the time of your injury pay you any wages while you were not working?

Yes	14	10.7
No	116	88.5
Don't know	1	0.8
Refused	0	0.0

041. Did you meet with a lump sum counselor from the Department of Industrial Accidents who discussed your settlement with you?

Yes	109	83.2
No	17	13.0
Don't know	5	3.8
Refused	0	0.0

Q 42-43 asked only if answer to Q 41 was YES

042. Did the meeting provide you with information about your claim or about the settlement that you had not received elsewhere?

Yes	38	33.9
No	67	59.8
Don't know	7	6.3
Refused	0	0.0

043. Was this meeting:

Very helpful	17	15.3
Somewhat helpful	40	45.0
Not very helpful	25	22.5
Not helpful at all	14	12.6
Don't know	3	2.7
Refused	0	0.0

044. Why did you decide to settle your claim?

I needed the money	41	31.1
I was able to get more money this way	16	12.1
I wanted to put an end to the case	76	57.6
I was told that I had to settle	36	27.3
Other	22	16.7
Don't know	2	1.5
Refused	0	0.0