

**Massachusetts Workers' Compensation
Advisory Council Minutes**

December 8, 2010

Department of Industrial Accidents

1 Congress Street, Suite 100

Boston, MA 02114-2017

Present: Chairman Mickey Long; Vice-Chairman Edmund C. Corcoran, Jr.

CM: Bernard Mulholland; Stephen Joyce; Stephen Falvey; John Regan; Antonio Frias (Ines Leonardo); Teri McHugh; David Powell (Kevin Herstak); George Noel, Dept. of Labor.

Also Present: Commissioner Paul Buckley; Senior Judge William McCarthy; Reuben Kantor, Director of Operations; William Tattan, Deputy Commissioner and Chief Legal Counsel; William Taupier, First Deputy Director of Administration; Ray Marchand, Director of Investigations; Jack Defina, CFO; Ellen Keefe, Workers' Compensation Rating & Inspection Bureau of Massachusetts (WCRIB); Paul Meagher, Workers' Compensation Rating & Inspection Bureau of Massachusetts; Tara O'Donnell, Donoghue Barrett & Singal; Michael Kelley, AIM Mutual Insurance Company.

Advisory Council Staff: Andrew Burton; Evelyn Flanagan.

Absent: CM: John Pulgini; William Corley; Dennis Hines; Peter A. Cook, Sr.; Department of Business Development.

Agenda:

Chairman's Welcome

DIA Update

- Judicial Update - Senior Judge William McCarthy
- Vital Statistics - William Taupier, Deputy Director of Administration

Action Items

- Minutes - September 8, 2010
- Minutes - November 10, 2010

PEO/POC Subcommittee Recommendations

Legislative Subcommittee Recommendations

FY'10 Annual Report - Discussion and Vote

Miscellaneous

CHAIRMAN'S WELCOME

Chairman Mickey Long began today's meeting at 9:00 a.m. The Chairman asked Senior Judge William McCarthy to provide the Advisory Council members with the Judicial Update.

DIA UPDATE

Judicial Update

Senior Judge McCarthy provided an update on the judicial appointment process. He stated that there had been no further action taken by the Governor in regards to the judicial vacancies. The Senior Judge informed the Council Members that the two newly appointed judges were adjusting well and were working side-by-side with their colleagues. He noted that Judge Christine Poulter would be located in the Springfield office, while Judge Kalina Vendetti would be residing in the Boston Office.

Senior Judge McCarthy updated Advisory Council members on the information contained within the DIA's vital statistic report for December 2010 (see attached). Conference Queue: 396; Hearing Queue: 462; Reviewing Board Inventory: 98; Impartial Exams for FY'11 (to date): 1,511 (32 waivers); Exam Fees Collected for FY'11: \$568,550. In fiscal year 2010 there were 5,069 Impartial Medical Examinations (64 waivers); Exam Fees Collected in FY'10: \$1,792,626.

Vital Statistics

Mr. Bill Taupier updated Advisory Council members on the Stop Work Order (SWO) and Caseload Statistics (see attached). The DIA issued 235 SWOs in November (35 SWOs were reissued as the result of defaults of previous orders); total SWOs issued in FY'11 (to date): 1,209. Fine collection for November 2010: \$107,300; total fines in FY'11 (to date): \$463,615; SWOs issued in FY'10: 3,421; total fines collected in FY'10: \$1,110,125; compliance checks for November 2010: 4,250; estimated number of workers now covered by workers' compensation insurance as the result of a SWO: 2,596 (FY'11). SWO fines from Civil Litigation in FY'11: \$57,568 / FY'10: 93,535; Value of SWO Pay Agreements in FY'11: \$56,800 / FY'10: \$77,610; Amount paid via SWO Agreements FY'11: \$43,415 / FY'10: \$57,140.

Mr. Taupier continued the update of the monthly vital statistics. Total number of cases filed in November 2010: 950; total number of cases filed in FY'11 (to date): 5,059; total number of cases filed in FY'10: 12,940; total number of First Report of Injury Forms (FRI) filed in November 2010: 2,111; total number of FRI filed online in November 2010: 685 (32%); total number of FRI filed in FY'11 (to date): 12,214 (3,663 online); total number of FRI filed in FY'10: 30,443 (8,934 online).

Mr. Taupier proceeded with his update on uninsured claims (§65). Total number of §65 claims reported in FY'11 (to date): 40; total amount of §65 claims paid by the Trust Fund in FY'11 (to date): \$2,376,621; total number of §65 claims filed in FY'10: 137; total amount of §65 claims paid by the Trust Fund in FY'10: \$6,508,487. Recovery Efforts: Total Liability FY'11: \$3,277,492; Paid by WCTF FY'11: \$2,376,621; Paid by Others FY'11: \$900,871; Total Liability FY'10: \$7,781,028; Paid by WCTF FY'10: \$6,226,155; Paid by Others FY'10: \$1,192,809.

Mr. Taupier proceeded with the vital statistics for the Second Injury Fund (§37/37A). Total amount of §37/37A petitions paid in FY'11 (to date): \$6,220,536; total amount paid on these claims in FY'10: \$22,877,653; total monies recovered by the Trust Fund in FY'11 (to date): \$939,366; total monies recovered in FY'10: \$709,946; Section 37 total amount demanded FY'11: \$11,448,312; Trust Fund payment FY'11: \$6,220,526; total liability reduced FY'11: \$5,227,786; Section 37 total amount demanded FY'10: \$32,124,496; Trust Fund payment FY'10: \$22,696,126; total liability reduced FY'10: \$9,428,370; total COLA reimbursements to insurers in FY'11 (to date): \$2,103,036; total COLA reimbursements to insurers in FY'10: \$11,767,228.

Mr. Taupier reported that as of November 2010, the number of employees whose salary is paid by either the Special Fund or the Trust Fund was 266 (216 DIA employees, 50 WCTF employees). The DIA is authorized to have 283.2 payroll positions (including all full and part-time positions).

Mr. Taupier presented the accounting and finance statistics. Total referral fees collected in FY'11 (to date): \$1,501,781; total referral fees collected in FY'10: \$3,863,852; total first report fines in FY'11 (to date): \$9,817; total first report fines in FY'10: \$109,700; total assessment collections in FY'11 (to date): \$37,501,320; total assessment collections in FY'10: \$75,002,051; total SWO fines in FY'11 (to date): \$729,600; total SWO fines in FY'10: \$1,597,919.

ACTION ITEMS

Chairman Long asked for a motion to approve the September and November minutes.

Motion made to approve the minutes for September 8, 2010 and November 10, 2010. Motion Seconded and Passed.

PEO/POC SUBCOMMITTEE RECOMMENDATIONS

Executive Director Andrew Burton explained that a vote had been "tabled" at the last Advisory Council meeting in regards to the PEO/POC Subcommittee recommendations. Mr. Burton stated that the subcommittee was formed to address a concern brought to the attention of the DIA by Genesis Consolidated Services. Mr. Burton explained that when a user entered the name of a Professional Employer Organization (PEO) into the Proof of Coverage (POC) tool, the names of every client company were listed within the search results.

Mr. Burton read aloud the following three-part recommendation developed by the subcommittee for the Advisory Council's consideration:

- 1) Presently, the subcommittee recommends no opposition to the revision made to the POC tool which prevents the disclosure of a PEO's client-company addresses when the "name of PEO" is entered with a "city or town." The subcommittee further recommends that the Advisory Council and the DIA continue to reserve their right to both reconsider and propose future changes to the POC tool when deemed necessary.
- 2) The subcommittee recommends that the DIA, in partnership with the WCRIB, remove the "city or town" requirement from the POC search fields. The subcommittee believes that removing this requirement (as is the case in other states with POC tools) will greatly improve the accuracy of the search results when the location of an employer is unknown.
- 3) Finally, the subcommittee is recommending that the DIA's Office of Investigations conduct testing on the POC tool to determine whether client-companies are consistently being named on policies secured by PEOs. The subcommittee recommends that the results of such testing be shared with Advisory Council members at a future meeting.

Chairman Long asked for a motion to approve the subcommittee's recommendations.

Motion made to approve the three-part PEO/POC Subcommittee recommendation. Motion Seconded and Passed.

Executive Director Burton stated that he would send a letter to the Commissioner of the DIA asking for consideration of these recommendations.

LEGISLATIVE SUBCOMMITTEE RECOMMENDATIONS

Executive Director Andrew Burton provided Council members with a summary of the Legislative Subcommittee meeting that took place on December 1, 2010. Mr. Burton explained that the subcommittee reviewed all workers' compensation legislation that had been previously endorsed by the Advisory Council during the 2009-2010

Legislative Session. The purpose of the subcommittee was to identify bills that should be filed or re-filed in the 2011-2012 Legislative Session and to provide the legislature with any necessary revisions.

The Executive Director reported that the subcommittee also examined newly proposed legislation clarifying the agency's debarment procedures. The proposed legislation, which had been drafted by the DIA, would provide employers with an opportunity for a debarment hearing upon request. The bill was drafted in response to several recent court cases where the DIA's debarment procedures had been challenged under due process grounds.

Mr. Burton stated that the subcommittee members were concerned that the proposed legislation could weaken the present debarment statute. The subcommittee was troubled by subsection (d) allowing for the reduction or removal of a debarment under various circumstances including, "the elimination of the cause for which the debarment was imposed." The subcommittee was concerned that the language was too vague and could be interpreted as simply securing coverage. Mr. Burton stated that the subcommittee was also troubled that the proposed legislation did not create penalties or fines for employers who disregard debarment altogether.

Deputy Commissioner and Chief Legal Counsel Bill Tattan briefly reviewed an ongoing Supreme Judicial Court case regarding the issue of due process. Attorney Tattan stressed that all employers who face debarment must be given the opportunity to have an administrative remedy. He noted that the current law has been interpreted by others as only providing a hearing for the stop work order appeal. The Chief Legal Counsel explained that the proposed legislation would ensure that employers who are issued a stop work order would have the ability to appeal both the stop work order and the proposed debarment. He noted that such appeals would be heard at a consolidated hearing for both issues.

Chairman Mickey Long expressed opposition to the proposed debarment language stating that it would weaken the present debarment statute. Chairman Long suggested that the DIA could promulgate rules or regulations to address this problem in lieu of the legislative route.

Council Member Stephen Joyce stated that the present statute already provides due process when an employer appeals a stop work order. Council member Joyce noted that debarment penalty is clearly written on every stop work order issued. He expressed concern for subsection (d) of the proposed legislation, which could potentially eliminate or reduce the debarment penalty placed on an uninsured employer.

Council members requested that the DIA report back to the Advisory Council on the feasibility of promulgating a regulation to address the courts due process concerns.

Executive Director Andrew Burton briefly reviewed the subcommittee discussions on House Bill 17 in regards to strengthening stop work order fines and expanding DIA investigative powers. Mr. Burton explained that House Bill 17, filed by the Executive Office of Labor and Workforce Development, would increase the civil penalties

associated with stop work orders to \$250 per day, starting the day the stop work order is issued, and continuing until coverage is secured and payment of the fines are made.

The Executive Director stated that the subcommittee reviewed the various fine structures being used in other states. As an alternative to a flat-fine, Mr. Burton stated that 15 other states are now basing their fines on a multiplier of premium that an uninsured employer previously avoided. The Executive Director explained that because premium-avoidance fines are able to capture both the size and risk of an employer, the size of the penalties will better reflect the actual exposure to the trust fund. Mr. Burton stated that in 1997, former State Senator Stephen Lynch had filed a premium-evasion penalty bill on behalf of the Advisory Council that would have penalized an uninsured employer three-times the premium they had avoided.

Council Member Mickey Long asked whether there was motion to recommend that House Bill 17 be amended with a premium avoidance fine language.

Motion made to recommend that House Bill 17 be amended with premium avoidance fine language. Motion Seconded and Passed.

The Executive Director stated he would send a letter to Secretary Joanne Goldstein on behalf of the Advisory Council recommending the consideration of this amended language to House Bill 17.

FY'10 ANNUAL REPORT - DISCUSSION AND VOTE

Executive Director Burton stated that a draft of the Annual Report had been mailed to all Council members for final review. He noted that there had been one proposed change on page 13 of the Concerns and Recommendations and that several additional FY'11 Safety Grant recipients were added to Appendix K.

Chairman Long asked for a motion to accept the Annual Report with the proposed revisions.

Motion made to accept the Fiscal Year 2010 Annual Report with the proposed revisions. Motion Seconded and Passed.

Executive Director Burton informed the Council that he would have the report printed and ready for distribution by the next Advisory Council meeting on January 12, 2011.

MISCELLANEOUS

Council Member Bernie Mulholland stated that members of the Massachusetts Bar Association (MBA) had recently expressed interest in continuing the statewide survey that measures the approval ratings of DIA Judges. The survey, which is completed by workers' compensation attorneys in Massachusetts, attempts to evaluate DIA Judges on

various factors. Council Member Mulholland stated that in order to continue the survey, the MBA would have to explore new funding sources. Attorney Mulholland noted that past funding for the survey had been done through grants. Council Member Mulholland requested that this issue be placed on next month's agenda.

Chairman Long agreed to add this to next month's agenda.

Chairman Long thanked everyone for attending today's meeting and wished everyone a happy holiday.

Motion made to adjourn the meeting. Motion Seconded and Passed.

The next meeting of the Advisory Council is scheduled for Wednesday, January 12, 2011, at 9:00 AM, at the Department of Industrial Accidents, 1 Congress Street, Suite 100, Conference Room #10-140, Boston, MA 02114-2017