

**MASSACHUSETTS WORKERS' COMPENSATION
ADVISORY COUNCIL MINUTES**

December 10, 2003
Department of Industrial Accidents
600 Washington Street, 7th Floor
Boston, MA 02111

Present: Chairman Thomas M. Jones. CM: Edmund C. Corcoran, Jr.; Alan S. Pierce; Carol Falcone; Richard Weitzel (Department of Economic Development); Joan Lenihan, (Department of Labor and Workforce Development).

Also Present: DIA: Senior Judge Daniel O'Shea; Deputy Commissioner John Chapman; Jack Tynan, Director of Administration; Richard Morris, First Deputy Director of Administration; Gregory White, General Counsel; Yvonne Vieira-Cardoza, Deputy General Counsel; Karen Gibbons (WCRIBM); Ken Owens; Marlene McGarry; Joe Pacheco (Commerce and Labor Committee Staff).

Advisory Council Staff: Andrew Burton; Evelyn Flanagan; Ann Helgran.

Absent: CM: Robert Banks; Fran Fanning; Antonio Frias; Jeanne-Marie Boylan; Bruce Cochrane; Stephen Sampson; John Perry.

Agenda:

DIA Update

Second Injury Fund (§37 and §37A) Process and Procedure

Yvonne Vieira-Cardoza, Deputy General Counsel

Action Items

- Minutes - October 8, 2003
- Minutes - November 12, 2003

Executive Director Update

Miscellaneous

Chairman's Welcome

Chairman Jones conducted today's meeting.

DIA UPDATE

Senior Judge O'Shea updated Council Members on the information contained within the DIA's vital statistic report (see attached). Conference Queue: 1,074; Hearing Queue: 2,216; Reviewing Board Inventory: 104; Impartial Exams: 1,977 (41 waivers). [Please note the attached vital statistic report reflects preliminary figures for Impartial Exams: 1,668].

The Senior Judge informed Council Members that during a recent MCLE seminar the Governor's Chief Legal Counsel, Daniel B. Winslow, gave an overview of the newly drafted Executive Order outlining the DIA's judicial appointment process. The Executive Order is designed to raise the quality of the candidates applying for judgeship at the DIA.

The Senior Judge explained that the DIA's website will offer a downloadable application with instructions to help judicial applicants navigate the new process. The DIA expects the submission of applications to occur around late December or early January. If the process remains on schedule, the Nominating Panel will commence shortly after. Senior Judge O'Shea indicated that the Advisory Council can expect to begin interviewing candidates for judgeships sometime in March. The Senior Judge noted that he does not expect to take any judge off-line during this process.

The Senior Judge informed Council Members that there are now 254 impartial doctors under contract. The DIA continues to have difficulty enlisting physicians in particular specialties within certain regions within the Commonwealth.

Stop Work Orders/Caseload Statistics

Mr. Richard Morris updated Council Members on the Stop Work Order and Caseload Statistics. Stop Work Orders issued for November: 49; Fines Collected: \$26,772; Fines Billed: \$8,300.

General Counsel Greg White explained to Council Members that the DIA is attempting to have both the criminal and civil courts support the DIA's mission to ensure that all employers are carrying workers' compensation insurance. He noted that a press release had been placed in newspapers informing employers that they would not be able to operate in Massachusetts without an insurance policy. General Counsel White stated that the agency currently has a 95% compliance rate. The General Counsel explained that the remaining 5% are referred to the legal department who will be seeking criminal complaints in District Courts.

Deputy Commissioner John Chapman added that Director Jane Edmonds (DLWD) had recently met with Governor Romney regarding the Stop Work Order process at the DIA.

The Deputy Commissioner explained that the compliance rate has reached 95% as opposed to 40% this time last year. Mr. Chapman explained that compliance investigations have increased by almost 500% from last year. The Deputy Commissioner noted that the collection rate is at 84% in this year's third quarter (last year's third quarter: 7.4%). The Deputy Commissioner and the Advisory Council applauded the efforts by the DIA on a job well done.

Mr. Morris continued his update on the monthly vital statistics. Total number of cases filed for November 2003: 1,289. Total number of cases filed for November 2002: 1,375. Total number of cases filed (to date) in fiscal year 2004: 7,032. Mr. Morris stated that if this figure were to be annualized, he would expect a 5% reduction in cases filed for all of fiscal year 2004.

Uninsured claims (§65) filed for fiscal year 2004 (to date): 94 (annualized number: 226). Uninsured claims paid by the Trust Fund for fiscal year 2004 (to date): \$1,769,361 (annualized amount: \$4.2 million). Number of §37/§37A petitions filed in fiscal year 2003: 284. Number of §37/§37A petitions paid in fiscal year 2003: 257. The amount paid on these claims in fiscal year 2003: \$19.8 million. Number of §37/§37A petitions filed in fiscal year 2004 (to date): 150. Number of §37/§37A petitions paid in fiscal year 2004 (to date): 339. The amount paid on these claims in fiscal year 2004 (to date): \$9,564,588 (\$22.9 million annualized).

Budget/Personnel Issues

Mr. Morris explained that the DIA will be tracking personnel statistics in a new format. The total number of positions filled by full-time employees at the DIA (including the WCTF) as of November 2003: 265 (253 DIA employees, 12 WCTF employees). This represents a decrease of 34 employees from November of 2002 when the DIA employed 299 full-time employees.

Mr. Jack Tynan stated that he anticipates an increase in the number of full-time employees as many positions need to be filled from the early retirement program. Currently, the DIA has no contract employees on staff and has hired seven temporary employees, with two temporary employees slated to be released at the end of December.

Chairman Jones thanked the members of the Department for their update.

SECOND INJURY FUND (§37/§37A) - PROCESS & PROCEDURE

The Chairman recognized Yvonne Vieira-Cardoza, Deputy General Counsel and Trust Fund Manager, who agreed to give a brief overview of the Second Injury Fund and the process in which these claims are handled.

Attorney Vieira-Cardoza presented the history behind the Second Injury Fund. She also discussed the DIA's prior attempt to place a specific deadline for the filing of Second Injury claims. On August 24, 1998, the previous Commissioner, James J. Campbell, issued Circular Letter No. 294, which stated that all "mid-act" (11/1/86 - 12/23/91) second injury petitions must be filed by a specific date. However, an administrative judge asserted that the second injury fund was not governed by the statute of limitations.

When appealed by the Trust Fund, the Reviewing Board summarily affirmed the judge's decision that there is no statute of limitations on second injury fund claims. Currently, this case is before the Appeals Court where the Trust Fund is attempting to overturn the Review Board's decision.

The Trust Fund is currently required to allow these cases to be submitted and must reimburse the insurance companies on these claims when ordered. Attorney Vieira-Cardoza stated that so far in fiscal year 2004, there have been approximately 150 second injury cases (68 are "mid-act" cases).

Attorney Vieira-Cardoza remarked that she was aware of a trend among a small group of attorneys who specialize in Second Injury cases. She explained that the Trust Fund handles these cases by the date of the petition and does not prioritize by the volume of claims submitted by the petitioner.

Attorney Vieira-Cardoza explained to Council Members that the majority of second injury cases are negotiated. She stated that in 2001 the second injury settlement figures decreased significantly due to the reluctance of one firm to settle cases with the DIA.

This particular firm, which had a large volume of second injury cases, decided not to settle cases with the DIA because the Trust Fund took a firm stance on the statute of limitations. At this time, the Trust Fund created a standard whereby they would pay-out no more than 50% of 75% of benefits. However, in 2002, these settlements increased due to the Review Board's decision to overturn the statute of limitations.

Attorney Vieira-Cardoza described the process for filing a second injury claim. A claim is filed through the Office of Claims Administration with a copy sent to the Trust Fund.

The case is assigned to an attorney for review. Over half of the cases are settled at conciliation level of dispute resolution. In any given year, only a handful of cases make it to a hearing. Attorney Vieira-Cardoza explained that the typical second injury claim is the result from repeated back injuries. Council

members questioned why there has been a high volume of second injury cases since 1991 when the standard became more strict. Attorney Vieira-Cardoza noted that after the "Cosgrove" decision by the Reviewing Board, attorney's have become much savvier in wording the lump sum agreement to fit into a second injury permanent and total claim.

Chairman Jones referred to a paper that was written by Eric Oxfeld regarding the movement to do away with Second Injury Funds. He offered to make this paper available to members of the Department. In conclusion, Council Members agreed to work with members of the DIA and to arrange a sub-committee meeting to be held after the January Council Meeting to discuss the need for a second injury fund in Massachusetts.

MISCELLANEOUS

Chairman Jones recognized Marlene McGarry, Joe Pacheco, and Ken Owens who attended today's meeting on behalf of the Commerce and Labor Committee. Mr. Ken Owens stated that Commerce & Labor Committee would most likely be addressing workers' compensation legislation in January. He invited both the Chair and the Executive Director to attend these discussions.

Chairman Jones thanked the staff members for attending today's meeting. The Chairman asked the Executive Director to work with Mr. Owens on scheduling a meeting with Representative Michael Rodrigues. Chairman Jones mentioned that he had received feedback from members of AIM suggesting that there were still ongoing issues regarding the Utilization Review (UR) process.

Deputy Commissioner Chapman stated that a large percentage of UR agents are in compliance or almost there. He suspects the complaints are originating from on particular agent who is resisting change and challenging the DIA's authority in regards to its mandate.

ACTION ITEMS

No action was taken on the Minutes for October 2003 or November 2003. A vote will be taken on these minutes at the January meeting.

EXECUTIVE DIRECTOR UPDATE

Andrew Burton, Executive Director, informed Council Members that the draft of the Fiscal Year 2003 Annual Report had been included in today's packet. The Executive Director requested that Council Members review the draft and provide input prior to next month's Advisory Council meeting when a final report is slated to be approved. Chairman Jones adjourned today's meeting at 11:30 p.m.

The next regular meeting of the Advisory Council: January 14, 2004 at 9:00 AM, Division of Industrial Accidents, 7th Floor Conference Room, at 600 Washington Street, Boston, MA 02111.