Report to the Legislature on the Mark-Up System For Case Scheduling

Massachusetts Workers' Compensation
Advisory Council

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INTRODUCTION

On a historical scale, Workers' Compensation is still relatively young, having been in existence for just over one hundred years. Prior to the enactment and implementation of compensation statutes, employees and employers were forced to resolve their differences over compensation for alleged work injuries in the courtroom. In order to be compensated for an injury, an employee had to establish and prove that the injury was a result of the employer's negligence. This process not only required a great deal of time and expense, but the application of the common law principles by the courts often created doubtful conclusions as to the respective parties chances in the litigation process. As industrial accidents increased, it was evident that demands for some sort of institutional change would have to be addressed in a meaningful manner.

In 1884, Chancellor Bismarck enacted the first modern workers' compensation act in Germany (Accident Insurance Act), which removed the civil law requirement of negligence and provided the injured employee with two-thirds of his or her pay while incapacitated. Unlike most subsequent laws, the German statute provided that employees contribute to the funding of the system.[1] Thirteen years later, the English passed the Workmen's Compensation Act of 1897 which, as a wage-loss statute, paid 50% of the average weekly earnings during incapacity. It subsequently became the model for a number of state statutes in this country.[2]

In the United States, workers' compensation had its beginnings with the various employer liability acts that were passed in a number of states. Georgia passed the first such act in 1855, which abrogated the fellow servant defense for employees of railroads only.[3] During the first decade of the twentieth century, as the number of industrial accidents increased, there was additional impetus to attack the problem.

In 1908, Congress passed an act which covered certain federal workers.[4] Numerous states investigated the problems associated with the issue. In Massachusetts, the General Court passed a resolve which stated that the public good required a change in the present system of determining the concept of workers' compensation, and a five member

commission was established to investigate the effect of prevailing laws relating to employer's liability for injuries received by employees in the course of employment.[5] By 1911, statutes were enacted in ten states, including Massachusetts.[6] Today, each of the fifty states has enacted a workers' compensation law, with Hawaii the last state to pass a statute in 1963.

The origins of compensation in Massachusetts go back to 1887, when the Commonwealth passed the Employers' Liability Act.[7] This act modified the existing common law system by providing an injured employee with the same rights for legal action against an employer as those held by any other person, and by restricting legal defenses available to an employer. These provisions nevertheless did nothing to resolve the problems of delay, expense, and hardship faced by an injured employee. A special commission on Compensation for Industrial Accidents was formed in 1910 in order to determine how the provision of compensation for injured workers might be improved. The Commission's analysis and recommendations provided the impetus for a "no fault" workers' compensation program. The Massachusetts Workmen's Compensation Act was subsequently passed in 1911 and took effect on July 1, 1912.[8]

In establishing workers' compensation laws, two major objectives were the removal of the dispute from the court system to an administrative agency and provision of appropriate compensation ir-respective of fault.[9] In principle, workers' compensation is a no fault system and employers are accordingly not liable for awards that would be generated under a "tort system", where proof of negligence would create liability for an injury. A finding of negligence in a tort suit would create liability for a much broader range of potential damages (e.g. pain and suffering) as well.

The purpose of any workers' compensation is to provide injured employees with income replacement in an equitable and expeditious fashion. The focus of the system should be to resolve the disputes for all parties concerned as quickly as possible, and to return the employee to work as an active, useful, and productive member of the workforce and society.

Chapter 572 of the Acts of 1985 recently included a directive from the legislature to the Massachusetts Workers' Compensation Advisory Council to complete a study concerning

the practicability of instituting a system by which parties to a workers' compensation dispute may schedule proceedings before the agency by the use of a "mark-up", so called or similar system.[10]

This report is submitted by the Workers' Compensation Advisory Council to meet that directive. The study's primary focus is to report on the efficacy of instituting a mark-up or similar system for scheduling disputed cases. The term "mark-up" refers to the manner or procedure by which a case is scheduled to be adjudicated. The term itself is defined in Blacks' Law Dictionary:

> The process wherein a legislative committee goes through a bill section by section revising its language and amending the bill as desired. Extensive revision may lead to the introduction of a clean bill under a new number. May also refer to procedure by which a case is placed on the trial calendar; e.g. "marking up for trial". (Emphasis ours.)

BACKGROUND

In order for the workers' compensation system to fulfill its goals, it is imperative that matters be resolved quickly. As an example, under the 1985 amendments an insurer could pay a claim for up to sixty days without prejudice.[11] The intent of this language is to encourage resolution of a matter within the sixty day period, either through the individual's return to work or the insurer's agreement that the claim has merit and will pay the required benefits. In the instances where there is a dispute as to the merits of a claim or complaint, one of the major problems that generated the need for reform was the delay in having a matter heard.[12] In order to assess the problems of delay in any workers' compensation system, it is important to review how the system has evolved to the point where it is today. Before a case can be scheduled, under both the old and the new system, there are a number of steps to be completed. These steps have been divided under the old and new system and are briefly described below.

OLD SYSTEM

Under the old law, an employer was required to file a first report of injury with the division (now department) within forty eight hours, not counting Sundays and legal holidays, after the occurrence of an injury.[13] If an agreement could not be reached by the parties, either party could notify the division, which was to assign the case for a conference by a member of the board.[14] Under Section 7 of the law a conference was to be scheduled within 28 days. If, after a conference order, a party was still dissatisfied, it could (within ten days) appeal for a hearing before another member. The hearing was to be scheduled no later than three months from the date the request was filed. A second conference, to narrow issues, was to be scheduled within sixty days of the request for a hearing.[15] A decision was to be rendered within forty five days of the close of the hearing.[16] A party could file a claim for review within thirty days of the filing of the decision with the Reviewing Board.[17] Subsequent appeals had to be brought to Superior Court.[18]

While this procedure provided an opportunity to have the matter resolved by the division within a minimum of days, the truth was that parties often experienced lengthy delays in having a matter adjudicated. These delays often caused severe economic hardship to claimants who were seeking benefits. It wasn't unusual for workers to resort to public assistance in order to get by. Insurers also were frustrated by the lengthy delays which resulted from their complaints to have compensation modified or terminated. Finally, employers were concerned because until cases were resolved, their experience modifications could include cases that were still disputed and their costs may have included reserves set on this basis as well. Since these matters were not resolved, it therefore forced higher premiums to fund reserves to pay for the case in the event of the worst case scenario emerging. In summation, there was widespread consensus that both substantive and procedural changes were necessary to enable the system to fulfill its mission.

NEW SYSTEM

One of the primary aspects of the 1985 and 1987 amendments of the workers' compensation system was to provide parties with an opportunity to have their case heard and decided as quickly as possible. An employer must file a first report of injury within five days after the employee has lost five scheduled work days. This report is sent to the Department of Industrial Accidents, the employer and the insurer.[19] After the first report is filed, the employee is sent a booklet which describes his/her rights and responsibilities under the law.[20] Within fourteen days of receipt of the employers notice of injury the insurer is either to begin payments of total or partial incapacity compensation or to notify the parties of its intent to contest the claim, should one be filed.[21] An insurer may pay benefits for a period of sixty days from the onset of disability without affecting their right to contest any issue concerning the case.[22]

A claim may be filed after thirty days from the alleged onset of disability.[23] Once a claim is filed the division of administration may attempt to resolve the case through a conciliation process with fifteen (15) business days of

receipt of a claim/complaint, unless the moving party fails to appear.[24] While a party who chooses to be represented must provide written authority for such representation, the procedure itself is informal. Any case which is referred by a Conciliator shall contain a written recommendation setting forth the issues in dispute and whether the case should or should not be paid.[25]

If the parties are unable to resolve the issue at the conciliation, the case is sent to the Division of Dispute Resolution within fifteen days of the receipt of the claim or complaint.[26] The case is assigned to an Administrative Judge in the division who shall require the parties to appear for a Conference within twenty eight days of receipt of the case.[27] The Administrative Judge will usually issue a conference order within seven days of the conference's conclusion. If either party is dissatisfied with the conference order, they may appeal within fourteen days of the filing of the order. A hearing before the same judge is to be held within seventy-seven days of receipt of the case in the division.[28]

A judge's decision is to be issued within twenty eight days of the hearing's conclusion.[29] Any party to the case can then appeal to the Reviewing Board within thirty days of the date of the hearing decision and the board is to issue its decision, absent an extension within thirty days of filing.[30] Any subsequent appeals are taken directly to the Appeals Court.[31]

As outlined, the reform legislation intended cases to move through the system as quickly as possible. The administration takes over to attempt to resolve the matter informally within ten days. If conciliation is unsuccessful, a matter is referred to the Division of Dispute Resolution for adjudication. If all parties are prepared and the matters can be heard in one day, a party can go through the entire administrative litigation process within a maximum of seventy-seven days. In addition to the imposition of strict statutory time frames, the new law sets forth a graduated schedule of attorney fees, and filing fees to be paid into the Department's Special Fund (§65) for the administration of the law. Both of these amendments serve to create an atmosphere where parties to the case will seriously consider methods of resolving the matter rather than "trying" the case.

CHAPTER 691 OF THE ACTS OF 1987

The statute was recently amended once again in order to address, among other concerns, the reduction of backlog cases which are still pending before the department.[32] The backlog consists of cases awaiting resolution from before the 1985 changes as well as those filed with pre 11/1/86 injury dates before June 22, 1988. This amendment added some new procedural elements which could alter the statutory timeframes.

While the number of cases awaiting adjudication in the backlog has been steadily decreasing over the last few years, a sustained ability to address the backlog diminishes as the number of post-reform cases grows. During the five month period from January to May of 1988 the backlog of pre-November 1, 1986 cases grew by 500 cases, or 4%, a scenario predicted by the department in 1987. In addition, delays were experienced in the scheduling of post reform cases so that for the first time since the reform bill was effective, delays of up to seven weeks were being experienced with the new "fast track" system. The bill, which was the subject of a great deal of discussion, provides for a number of changes from the amendment enacted in 1985, as well as additional temporary personnel to deal with the cases awaiting hearings.

The 1987 changes established a waiting period from the onset of disability for the filing of a claim which will hopefully provide a better opportunity for the "pay without prejudice" provision of the law to work effectively. The "pay without prejudice" period may also be extended to 120 days by written agreement of the parties.[33] In addition, the DIA does not have to attempt to resolve each case with a conciliation. In this way if verifiable statistical evidence can substantiate that certain matters are not amenable to conciliation, they can be referred to dispute at the outset. The new amendments also empower conciliators to provide a recommendation on the case which it is hoped will strengthen the conciliation process so that the parties will be encouraged to resolve the matter without litigation.

The referral fee for insurers has been increased when there is a failure to appear at a scheduled conciliation and such failure was not beyond the control of the insurer.[34] In addition, the fee for a claimant's attorney may be reduced by

an amount equal to the state's average weekly wage (currently $474.47) for a similar occurrence.[35]

Once the case has been referred to the Division of Dispute Resolution there are a number of changes incorporated by the new law which will hopefully improve the efficiency of case flow. The amendment eliminates the "double-dating" (so called) of cases for conferences and hearings upon referral to Dispute Resolution. This procedure was challenged on constitutional grounds. The Reviewing Board held, in Pedro's Case, Board Number 152213-87 issued 2/28/89, that there was no constitutional due process or equal protection impairment with the administrative procedure.

The amendment also requires an affirmative appeal of any conference order issued.[36] As a result, the potential time frames may be increased. However, the department intended to implement guidelines which will keep the hearing process within a forty-nine day period. This prognostication was predicated upon the hope that the additional personnel and resources would be available during the spring of 1988 in order to begin the elimination of the backlog of both new and old law cases. Unfortunately, neither the resources nor the personnel were forthcoming, despite the fact that the funding for the department is passed along as part of an assessment process upon the law abiding private employers in the state. It would be reasonable to assume that the intent to meet the previous timeframes will be delayed as a result of administrative delays in meeting the timeframes.

Other changes that may theoretically impact the adjudication of cases arise in the area of attorney fees. Fees for attorneys, to be paid by insurers, have been introduced for conciliations, while being decreased at a conference level.[37] Another change affecting the adjudication functions of the agency is the provision of the Commissioner with the discretion to permit appeals, for limited reasons, if justice and equity require it when the deadline has been missed.[38] Since these changes have been implemented, it is unclear as to what impact they have had on the adjudication of cases before the department.

All of these changes must also be interpreted in light of the current problems concerning the large number of "old" law (pre 11/1/86 filed prior to 6/22/88) cases in the backlog and the increasing number of the new law (post 11/1/86) cases which are awaiting adjudication.[39] As of the close of fiscal year 1989, there were 5,410 cases awaiting scheduling in the backlog and there was a 14-16 week delay for new law cases. As of September 30, 1989, the backlog had dropped to 4,039 awaiting scheduling, while delays between conciliation and conference were on average as follows: Boston 16.5 weeks, Fall River 28 weeks, Lawrence 25 weeks, Springfield 24 weeks, and Worcester 25 weeks. These delays are unacceptable under any administrative format, but particularly one promising to remedy prior backlogs.

LITIGATION OF WORKERS COMPENSATION CASES:

In light of the basic intent of workers' compensation it is ironic that often one of the primary problems associated with it concerns the litigation of cases. Since the quid pro quo for employees to relinquish their rights to sue their employers at common law was to receive indemnity and medical benefits in a judicious and expeditious fashion, the fact that the administrative process has developed many of the problems associated with the congestion and delays in the court system means that some solution must be explored in order to fulfill the original focus of the acts themselves.

Exploring the causes and the reasons behind litigation have been discussed at great lengths both nationally and here in Massachusetts. As workers await benefits and employers see the impact of increased premium rates, each side rightfully complains about the delays. To explain the problem based upon the premise that our society is overly litigious is a simplistic approach. The fact that civil cases that are currently being brought in many instances often come to trial five years after filing may buttress this point. The legislature has tried to address these areas of concern by providing additional resources and personnel through an assessment upon employers.

Many courts have implemented case management systems in order to alleviate the strain created by backlogged litigation. A similiar focus is evident in the administration of workers' compensation acts as well, although the process has become increasingly technical over time. This is despite the early recommendations from the agency administrators to keep it simple so as to not be bound by either the common law or the formal rules of evidence.[40] This is also despite the statutory mandate in section 11B of chapter 152 that procedures be as simple and summary as possible. An entire body of law has developed in the areas of workers' compensation, not just in Massachusetts but nationally as well. It is clear that the goal of a simple process has yet to be achieved.

REASONS FOR THE CONTROVERSION OF CASES

The fact of the matter is that most industrial accidents do not result in any claim being filed under the various statutes enacted to provide compensation. It is obvious, however, that in reviewing the effect of impact of any system used to schedule cases, it may be helpful to look at what are the types of cases being litigated. By reviewing the type of issues to be litigated by insurers, self-insurers and claimants, it may be possible to explore the options inherent in the procedure for scheduling cases in a more complete fashion. Some cases, as a result of the issues presented or the defenses to be plead, may be more amenable to a "mark-up" system than others.

The removal of work related injuries from the courts into the administrative process was envisioned as having a number of salutary effects. At the current time, forty-six of the states employ an administrative agency to resolve disputes while four jurisdictions continue to operate court administered systems.[41] In each state the statutes vary with respect to definitions of almost every element of the system. These differences make it difficult to assess and analyze data that is available from the various sources, but general observations are often of use.

The administrative system was envisioned as being a private system, evidenced by its individualistic elements.[42] Even in its inception one noted observer, Professor Francis Bohlen, in analyzing a limited schedule for benefits, believed that by rendering the amount of compensation definite, litigation would be prevented and certainty attained because any injury listed on the schedule would raise no questions as to the extent of disability.[43] The same commentator as early as 1912, stated that workers' compensation statutes should be drafted to prevent rather than encourage litigation and that the term "arising out of and in the course of employment", (which is the basis of many laws) was not calculated to secure the necessary certainty to eliminate fault and prevent the controversion of claims.[44] Supreme Court Justice Murphy, in an often quoted case, wrote that the term "arising out of and in the course of employment" is deceptively simple and litigiously prolific.[45] Nevertheless, this definition has been widely adopted, and consequently, widely litigated throughout the country.

In the Commonwealth, the intent of the law itself can be seen not only by the litany of Supreme Judicial Court decisions interpreting the law, but also by administrators of the act. The Industrial Accident Board stated, in its Second Annual Report, that the law be kept simple so as to not be bound by the common law or the technical rules of evidence.[46] The Board's research also indicated that in 1914 the estimated dollar savings to the court system was $150,000 with the use of the administrative system and a decrease of about 545 cases that would have been tried if the law was not in effect.[47] Also, the Board computed figures to support the conclusion that the enactment of the law brought about a decrease in the number of cases being filed from 1913-1914 of about 4.3%.[48] At least at the outset, the law can be seen to have provided a quick and less expensive alternative to the litigation of a civil action for negligence or under the Employers Liability Law. Both in this country, and in Canada, recourse to the courts has been traditionally rejected as being too slow and too expensive.[49]

The report of the National Commission on State Workmen's Compensation published in 1972 made a number of recommendations that were designed to improve workers' compensation nationwide. One recommendation by the Commission was that each state should use an administrative agency to fulfill the obligations of the law.[50] This particular recommendation is an integral part of what the report finds as one of the few objectives for a modern system, which is an effective agency for the delivery of the benefits and services. In order to fulfill that goal any agency should assist in the voluntary and informal resolution of issues and adjudicate those claims which cannot be resolved.[51] It was stated, however, that adjudication should be a secondary task and if all of the agency's obligations are fulfilled, that there will be little need for it at all.

One possible concern for the high amount of controversion of claims may be reflected in a report published by the United States Department of Labor in 1979. The report notes that workers' compensation insurance evolved from liability exposure and labels liability claims adjustment as the true forebearer of workers' compensation claims adjustment.[52] This document found that fifty-five percent of workers' compensation claims were adjusted by personnel at insurance companies whose primary business is

property and casualty liability and that liability claims adjustment is part of the adversary process.[53] Some of the more difficult claims that must be handled by the administrative process had the highest rate of deferral of acceptance of the claim. The report states that 70.9% of all occupational disease cases in a closed survey were initially not accepted by the insurer.[54] Part of the reason for this may rest with the difficulties in diagnosis, long latency periods, multi-causational factors, and etiological problems in occupational disease claims. The response rate for such cases has been shown to be six times as long then for injury cases.[55]

Additional debate exists as to whether the controversion of claims adds to or detracts from a system that was intended to be accessible to all relevant participants. The report noted above explores the clear dichotomy between those who see increased litigation as an indication that the self administering concept of a system has failed versus those who hold that litigation is a necessary portion that protects the rights of parties in determining their rights.[56] In analyzing litigation, the concern over increased litigation and attorney involvement, in what is represented as a system that minimizes the need for such activities, must be weighed against the constitutional commitment to due process.[57] It would appear from the research conducted in this area that the more severe cases involved a higher percentage of litigation. While this may not be surprising, it does lead to the possibility that the process has been successful in resolving the high number of low cost cases that are part of the system.[58]

VARIATIONS BETWEEN COURT ADMINISTERED AND AGENCY STATES

Analysis of the impact of a mark-up system can perhaps be best reviewed when addressing the efficiency of court administered states with jurisdictions which process claims with an administrative agency. This problem was researched in 1979 by the Interdepartmental Workers' Compensation Task Force which was established by the President to investigate problems in state programs. It has also been subjected to indirect scrutiny over the last decade by studies seeking to address the severe problem of overcrowded court dockets.

As part of this analysis, many jurisdictions have prepared Case Flow Management programs which are geared to increase the responsiveness of the court system to the inordinate delays and expense of bringing a matter to trial. One of the fundamental aspects of case flow management is maintaining responsibility for the control over the length of time necessary for litigation to be completed. This concept has been viewed as novel and unorthodox, while at the same time it has frequently been viewed as unpopular with attorneys and judges, since opposing counsels have traditionally controlled the movement of cases through the jurisprudence system.[59] In this format, based upon the English Common Law tradition, the judge plays a passive role while the advocates move cases based upon availability according to clients' needs.[60] There is an opinion that the administration of justice should not be left to special interests or the convenience of advocates.[61]

Court Systems

Wyoming

Under the Wyoming statute [62] an employee should notify his/her employer within seventy-two hours of an accident, and notify the Clerk of the District Court, which has jurisdiction over where the accident occurred, within ten days. The report itself may be obtained from the employer, the district court or the state division of Workers' Compensation, which is part of the Office of the State Treasurer.

All applications for disability benefits must be filed with the state office. If the matter is contested by the employer, the state division, or the court, an employee has the right to request a hearing before the Office of Independent Hearing Officers and have the Hearing Officer appoint an attorney to represent the employee. These hearing officers are members of the bar and appointed by the Governor to review and resolve contested matters. The issues dealt with by the hearing officers are questions of compensability, the amounts of disability awards and claims billed by health care providers, disapprovals by the state division or the employer of the change of health care provider, and the assignment of classifications and rates under the state fund. The Office is completely independent of the division and appeals are taken to the district court. Within ten days of notification that an accident has occurred the employer must submit an Employer's Accident Report to the District Court, which is responsible for forwarding it to the claims section of the state division. The clerk of the district court and the state division are responsible for keeping employers advised and up-to-date on the benefits paid. In any of the cases in which it is involved the Division is represented by a legal prosecutor and an Assistant Attorney General.

Alabama

The act[63] is administered by the Workmen's Compensation Division, which is in the Department of Industrial Relations. An employee is required to give notice of an accident within five days of its occurrence, unless prevented from doing so by specific reasons, and then must give notice within ninety days after the occurrence. The employer is to file a report of the accident within fifteen days to the department. If a dispute exists between the parties, a complaint must be filed within two years in the circuit court for the county which would have jurisdiction if the case was a tort action. The court complaint contains much of the same information required on a claim/complaint form under the Massachusetts act.

Once filed, the clerk issues a summons which requires an answer within thirty days of service. After filing, a matter proceeds through the court system as any other action, except that actions under the law are to be given preference and set

down and tried as expeditiously as possible. The court may hear and determine such controversies in a summary manner and decisions are binding on the parties, subject to their right of appeal. An appeal must be made within forty-two days to the court of civil appeals and the review is the same as cases reviewed by certiorari.

A jury trial may be demanded by an employer if the defense of employee misconduct is raised and if not raised, the employee may demand a jury trial for such issues within five days of the employer's appearance in the case. In cases arising under the law, the circuit court is always deemed to be in session. The court must also approve a lump sum settlement, if it is satisfied that the settlement is in the best interests of the claimant. Costs may be awarded by the court as in other civil cases, but where the employer has made a written offer which is in accord with the law prior to the suit, no costs will be levied. The statute states that no part of the compensation under the act shall be paid to an attorney unless the circuit court approves of the attorney's employment, in which case the court will determine the fee and payment mechanism. Any attorney who solicits employment to collect or defend a claim shall be guilty of a misdemeanor and may be subject to imprisonment or a fine.

Louisiana

The Louisiana statute[64] is administered by the office of workers' compensation, which is part of the state's Department of Labor. One of the specific statutory mandates of the agency is to attempt to resolve disagreements on claims and to avoid litigation. Within thirty days of receipt of a claim, the agency will evaluate it and issue an advisory recommendation which may be admissible in subsequent legal proceedings. If the recommendation is rejected a party is entitled to bring an action in the appropriate district court within sixty days. The petition to the court shall include a copy of the agency's certificate that a claim had been submitted, attempts to informally resolve the matter were unsuccessful, and that the agency's recommendation had been rejected. Any attempt to bypass the agency will be deemed to be premature unless the petition contains allegations that the claim had been presented to the agency and was not successfully resolved.

A hearing in court should be held within three to six weeks after the filing of the petition. Employees of the agency cannot be subpoenaed to testify and if the court determines that any proceeding has been brought without reasonable grounds, it can assess costs for the matter on the moving party. The clerk of court reports the disposition of the case to the agency within ten days of final judgement.

Attorney fees are not enforceable unless reviewed and approved by the assistant secretary of the Office of Workers' Compensation Administration or the court. Fees are capped at an amount not to exceed 20% of the first $10,000 of an award and 10% thereafter of any amount in excess of $10,000. The rules provide that approved fees will be based upon an hourly rate of $75 per hour for the attorney's time and $20 per hour of staff time.[65] If the case is removed to United States District Court by an employer or insurer, and the employee prevails, the employee shall be entitled to reasonable fees, not in excess of the maximum set forth by state law. The director of the office of workers' compensation can approve lump sum agreements. If the director refuses, the agreement can be brought to the district court for approval.

As of the writing of this report the system was as described above. This system has experienced a tremendous growth in costs in the last few years. However, due to the high level of litigation the legislature adopted an administrative system designed to resolve matters without court involvement. A constitutional challenge delayed implementation of the new system until early this year, so as of the present there is no information as to its effectiveness.

Tennessee

The statute[66] allows a party to file a petition in an unresolved case with the County Court, where it can be resolved by a judge or the chairman. The division of workers' compensation maintains files on cases, including those paid voluntarily. Employees are notified of their rights upon the filing of a first report of injury and the agency reviews court decisions in order to ensure that the mechanics of permanent partial disability are paid properly. The summons in the case, as in any civil action, is to be

served on the defendant at least ten days before it is scheduled to be heard. Unless good cause is shown, the claim should be set for a hearing within fifteen days after it is filed. Priority is given to workers' compensation cases over other civil actions.

An appeal of the decision in the County Court for a trial de novo in the circuit court is allowed. However, there is no right to a jury. The common law rule requiring strict constriction of statutes is not applicable to workers' compensation cases since it is considered a remedial statute to be given an equitable construction by the courts so that the objects of the law can be obtained. All reasonable doubts as to whether the injury arose in or out of employment are to be construed in favor of the employee.[67]

Appeal can ultimately be taken to the Supreme Court. After approval, the papers are sent to the Division of Workers' Compensation in the Department of Labor. County judges are paid a $5.00 fee by the unsuccessful party and a $2.00 fee by both parties if the case is not litigated. Settlements must be approved by a Circuit, Chancery or Criminal Court with the costs paid by the employer. There is a one year statute of limitations and claims are not assignable to creditors.

In assessing the differences between administrative systems and court administered systems, a number of factors outside the scope of workers' compensation must be explored. The administrative system only deals with cases allegedly under the respective act, while a court system handles many other legal issues. The size of the state and the level of industrialization will also impact the relative choices made by the local legislature. The structure of the law itself is also a factor. Each state has its own procedure and format and it is therefore difficult to make comparison except in the broad generalized categories.

COMPARISIONS AND CONSIDERATIONS IN OTHER JURISDICTIONS

It is difficult to assess with accuracy any interstate comparisons between jurisdictions at almost all levels of the workers' compensation system. Studies have shown that the degree of controversion ranged from a high of 50.6% (in New Jersey) to a low of 1.5% in two western states one of which was Wyoming, a court administered system.[68] Massachusetts had a percentage rate of controversion of 9.3%, which was greater than all but one of the court administered states. These court administered jurisdictions appeared to pay both contested and uncontested cases more quickly, and the average level of controversion was 7%, compared to the national average of 20%.[69]

This closed case survey is over ten years old. Recent available statistics from Louisiana (1986) show a dispute level of almost 21% (See Appendix A). The most recent annual figures from Massachusetts (calendar year 1988) show 28% of cases to be contested.[70] Since these Massachusetts figures include other filings other than disputed cases for a portion of the year in question, it may be that these percentages are not far apart. In each jurisdiction, however, the rate of litigation has increased. Current projections for the Commonwealth indicate that for calendar year 1989 the number of reported incidents may remain about the same as 1987 and 1988, while the number of claims referred to conciliation will increase about 20%.

A recent study by the Workers' Compensation Research Institute (WCRI) examined evidence from the state of Wisconsin on the reduction of litigation.[71] This system has both an earning capacity and functional impairment resolution process. One comment by the author noted that the earning capacity system doesn't share some of the structural incentives of the functional impairment system that encourage nonadversary evaluation and initial payment of permanent disability benefits.[72] Those incentives are minimal ratings for applicants with back surgery, substantial oversight by the state agency, a reliance on treating physicians' evaluations and final offer adjudication.[73] In Massachusetts there is a far greater resolution at conciliation of functional impairment/disfigurement claims (about 85%) versus benefit claims (about 50%) in what is primarily an earning capacity jurisdiction. Reducing litigation may eliminate

much of the incentive of parties to control the caseflow, particularly if the expeditious statutory timeframes are met.

One system that appears to have had a adjudication procedure similar to a mark-up system was California. While there are no known statistics as to its effectiveness in comparison to other states, the California system may provide insight as to how a similar process could operate.[74] This system has also been the subject of much discussion in recent years as to its' problems and at present it is our understanding that revisions are being discussed.

A party had to file a Declaration of Readiness to Proceed with the agency with an application for benefits or else the application was placed on inactive status.[75] The case is then set on a calendar for a hearing before a judge of the agency. No application or petition would be placed on a calendar unless one of the parties had filed and served the declaration.[76] The hearing could be a pre-trial conference or a trial itself and the declaration must state under the penalties of perjury that the party is ready to proceed to hearing on the issues. An answer was to be filed and served within ten days[77] and the statute states that the hearing be held no less than ten days nor more than thirty after the filing of the declaration.[78] While we have no evidence to assess the effectiveness of this procedure, in the past it appears that the agency expended a good deal of its time and resources in issuing orders to remove cases from the calendar.[79]

California has undergone a massive reform recently, chapters 892 and 893 of the Statutes of 1989, which adds a new focus to this prior procedure. While these changes impacted premium rates, benefit levels, vocational rehabilitation, and staffing levels there were a number of changes geared to improve the administrative mechanisms that control the flow of disputed cases.

One change was to direct that workers' compensation judges employed by the state come from a list of attorneys who meet the requisite requirement and who are licensed to practice in the state.[80] Membership in the bar must be maintained during the judges tenure.[81] The same amendment also provides that a judge may not receive his/her salary while any cause before them remains pending and undetermined for ninety days after it has been submitted for a decision.[82]

Other changes impacted by the legislature concern the use of arbitration for resolving workers' compensation cases only where a claimant is represented by an attorney. Arbitrators are selected from lists of attorneys who have workers' compensation experience.[83] The parties may select the arbitrator or selection may be made by a workers' compensation judge from a randomly selected panel of five from the eligible list.[84] The arbitrator has basically the same authority as a judge, with limited exceptions and in matters between an employee and employer, the employer assumes the cost.[85]

The disputes sent to mandatory arbitration are limited to insurance coverage, right of contributions and certain permanent disability matters and the use of arbitration for the disability cases lasts until January 1, 1994.[86] Unless otherwise agreed upon, the hearing should begin between 30 and 60 days after selection of the arbitrator.[87] The findings and award should be issued within 30 days after submission for decision. The fee is forfeited unless the parties agree to a longer period of time.[88]

Where an application for adjudication of a claim is filed with the agency a hearing is to be held not less than ten nor more than 60 days after filing.[89] However, the agency must establish a priority calendar for a hearing and decision to be completed within 30 days for certain issues.[90] In each matter where a claimant has legal representation a mandatory settlement conference is held with a referee who has the authority to resolve the dispute within 30 days, and if the case is not resolved, a hearing is held within 75 days after the application for adjudication is filed.[91] Similarly, where the claimant is unrepresented, a workers' compensation judge will conduct a conference with the same timeframes being applied.[92]

These changes are clearly intended to expedite the dispute resolution process. This reform attacked many of the areas of concern dealt with by the Massachusetts legislature in 1985. Time will determine if it is effective.

New Mexico has recently passed a constitutional amendment that ends the court administered system and establishes a agency administered system. It became effective on December 1, 1986 so as of the present long term

analysis as to its impact is not available. The change sought to both relieve the courts' workload and assure the delivery of benefits in a timely and efficient fashion at a reasonable costs to the business community and employees. While the Court of Appeals under the prior law was created for the sole purpose of hearing workers' compensation matters, it was felt that the intent in the spirit of that law did not fulfill its mandate.

The rules under the new law require that disputed cases shall be scheduled in sixty days and docketed for an informal hearing within that time. A hearing officer can issue a recommendation for resolution which can be accepted or rejected in whole or in part by either side in the sixty day period. When not resolved a party is afforded twenty days in which to file an answer to the matter and a hearing is to be conducted within sixty days of the filing. After the hearing, recourse is still available to the Court of Appeals. This period, using the longest possible timeframes, could extend for 270 days.

Information on the initial period for the new law mirrors some of the issues faced here in Massachusetts. Comparative statistics and results from the old system were not available since the new law ushered in a focus on data collection that had not previously existed. As a result, it was considered too early to make any finite assessments. In addition, claims increased during the year which led to the hiring of additional staff and adjustments in timeframes in order to cope with the workload. Enforcement concerns with respect to the coverage requirements were also raised, although the agency's access to employers registered with its unemployment division would hopefully minimize this problem in the future.

The agency has been structured into five bureaus which oversee the administrative and adjudicative function. It appears that a strong emphasis has been placed not only on education, but also on statistical compilation in order to analyze the laws effectiveness. While one clear intent in removing the cases from the courts was to eliminate both high costs and inconsistent results, the new law does attempt to limit litigation. In that regard, initial results indicated that 64% of the cases were successfully resolved at the informal level. Information in the next year or two should indicate if this process has improved the delivery of benefits in accordance with the legislature's intent.

INTERSTATE COMPARISIONS

RECENT TRENDS IN THE COURTS

Caseflow management has received a good deal of discussion in the court systems throughout the country in recent years as a result of the sizeable backlog of suits that are awaiting trial in many jurisdictions, both state and federal. A case flow management project has been utilized in the Commonwealth in order to address the delays in trial litigation. Steps to establish standards for the monitoring of case management have been proposed.[93] Even within the executive branch, the intent to reduce issues and consolidate pleadings has been established.[94]

Part of the conflict in controlling the pace of litigation rests within the English system of jurisprudence adopted in the United States. This leaves the adversaries with more control of the process. As backlogs have increased nationally new trends have emerged. Some policy analysts are beginning to advocate that the court should be responsible for controlling the pace of litigation,[95] despite the unpopularity of this procedure. This concept eliminates the traditional passive role of the adjudicator and requires a new perception that the judicial process not be left to the convenience of the parties.[96]

Some jurisdictions have experimented with caseflow management. Vermont instituted a backlog reduction and currency program (in certain county courts) that utilized the judges in setting the court's calendar, placing more control in the hands of the courts'.[97] Prior to the program, attorneys were virtually able to dictate the pace of litigation and in fact trials could be postponed for up to two years from the date of filing.[98] Under the new format, postponements were to be granted only for another court date or sudden illness.[99] In addition, a caseflow management system was implemented to provide early and continuous control, short scheduling, reasonable accommodations for counsel and a calendar that does not purposely over-schedule so that expectations are met about cases occurring on time.[100]

The results showed a drop in the percentage of pending cases from 59% to 12%, dispositions nine months earlier, and a discovery process shortened by five months.[101] Procedural activity increased slightly on average per case. Also, a

settled at a later point in the procedural process, although this appears to be a result of the quicker schedule forcing the parties to complete discovery before considering settlement.[102]

The vast majority of parties surveyed indicated that the scheduling of an early conference assisted in focusing attention on pertinent, rather than superfluous, issues and that the ability to prepare for trial was not impeded.[103] Parties did not feel forced to settle, and while the currency program did reduce delay, it appears that the format did not appear to reduce costs.[104] While additional research by the same authors called into question the premise that defense lawyers manipulate the process to encourage settlement, it also suggested that the lawyers, and not the court, were the principal instrument of delay.[105] Despite the fact that traditionally parties have controlled caseflow, a reliance on this premise by the court may be misplaced as judges and lawyers share a view that the court should control litigation.[106]

Kentucky has also experimented with caseflow management in an attempt to reduce delays. Under special rules, the trial judge became a case manager establishing flexible time frames but retaining the discretion to deviate from the format for more complex matters. It involved a dramatic reduction in the average period allowed for discovery (from 346 days to 56).[107] One specific objective was to reduce the average time for the completion of a case to occur to six months or less. The special rules did reduce the time by eleven months (sixteen to five) for completion as well as advancing case closures at earlier points in the process.[108] In addition, the vast majority of the attorneys (83%) reported that the special rules did not impede obtaining the necessary information, nor did the special rules (according to 90%) impair the final settlement amount.[109] Overall, although differences may exist as to the definition of the quality of justice, there was evidence that it was not thwarted.

The move to expedite litigation has been a problem addressed at the federal level as well. Much of the delay has been attributed to "manipulation of the discovery process" and the perception that some judges have let attorneys run the courts by surrendering control over

discovery deadlines and trial schedules.[110] While each of the district divisions handles its docket in a manner designed to meet its own needs, the end result is that the district consistently is faster than all other federal jurisdictions between the filing of paper and the start of a civil trial.[111] While the national median is fourteen months, here it is only five.[112]

The docket is reviewed monthly by the clerk's office and where an answer or response has been filed, it is referred to the chief judge's office for a scheduling order. This sets forth the time table for the case and a pre-trial hearing is usually scheduled six to eight weeks later. Trial dates are usually scheduled within a similar timeframe after the conference. A motion session, presided over by a magistrate, are usually one day per week. This tight time schedule, while not unanimously favored, has decreased delays and equalized the judicial process for parties with less resources.

RECOMMENDATIONS

The scheduling process, as it exists at present in the Massachusetts workers' compensation system, includes elements of a markup system. The statutory time frames set out in chapter 152 delineate the amount of time that the legislature had in mind for a disputed case to wend its way through the administrative system. It is evident that, for a variety of possible reasons, the delays in getting matters adjudicated before the Department of Industrial Accidents have not been eliminated. However, many of those factors go beyond the extent of this report and require the thought and input of all the respective parties. To the extent that the statutory mechanisms for scheduling have possibly contributed to those delays we will attempt to address them.

The system now has elements of a markup system through the filing of a claim/complaint. Once a claim/complaint is filed, the party must be ready to go forward. The party is aware that the case will go through the conciliation process and be referred to the Division of Dispute Resolution within fifteen business days of filing. In theory, if you wish to get in front of an administrative judge, the filing of a claim or complaint should accomplish that goal within a month and one half.

Despite the existence of delays, the initiation of a matter before the DIA does put the parties on notice that the claim should be dealt with in a specific time frame. If the delays were eliminated, the principle would still apply. It is imperative, however, that the parties be ready and prepared to go forward on the day when the matter is scheduled.

The fact that the system has a built in mechanism, does not obviate the need to explore other avenues that may expedite cases and matters before the agency. Rules for practice in the Massachusetts Superior Court (Rule 35) allows a Certificate of Readiness to be filed, and causing a case to be placed on a list is a representation that a party is ready and intends to go to trial (Rule 33). Rule 40 of the Mass Rules of Civil Procedure provides the court to place a case on trial list by its order. In the Commonwealth courts have the inherent power to place cases on a trial list even without the request of the parties.[113] While a lawyer can

"mark up" cases for trial in some of the other divisions of the trial court (e.g. Land, Probate), the docket and sitting schedule of the court may control.[114] In District Court (Rule 108) a party desiring to place a case on the trial list files with the court clerk, and this represents a readiness and intention to go to trial. Control by the court is also exercised in Superior Court (Rule 9A (b)(1)) over motions in that the party is not to mark any motion for a hearing, but instead it is left to the court. Even though the court does control its motion process, discussions between interested parties over the last year have generated an interest that may deserve serious consideration.

Motion Session

The motion session would allow either side the opportunity to request a ruling from an administrative judge on a matter of concern in the case at hand. The party filing the motion would request that it be scheduled and should be responsible for providing notice and service on all other parties. The motion session could be presided over by an administrative judge who is not scheduled to hear cases that day. The cases could be called by the Department of Industrial Accidents beginning as early as possible in the morning.

Motion sessions could eliminate discovery problems that either party is encountering in obtaining the necessary documentation for its case. Resolving the dispute over whether information is discoverable, prior to the scheduled date, permits each advocate to be aware of the elements of his/her cases as well as their opposition's case. A ruling will provide litigants with the necessary certainty to protect their clients in the case. The process is not intended to prolong matters or allow dilatory tactics to become commonplace.

The problem can be summarized in 1978 quote from W. Spann Jr., then President of the American Bar Association, when he stated, "the reasons for court congestion are many and varied, but one of them is the prolonging of litigation because of the abuse of discovery procedures. It is ironic that discovery has contributed to court congestion because

when it was adopted in the 1930's, it was conceived of as a way of expediting litigation.[115] In these hearings it should be clear as to who has the burden of proof. Any motion should be marked up with plenty of advance warning and only in matters of extreme emergency should any scheduled event be postponed pending a ruling on the motion.

Another facet of a motion session could be to allow attorneys to withdraw from cases. Placing the issue before an administrative judge who will not be deciding the case would be easier than waiting until the day of the hearing. For example, if an attorney had knowledge that his/her client would perjure themselves, allowing a judge to rule on their withdrawal request with enough time before the hearing, would permit the employee to obtain another attorney in a timely fashion. This would eliminate possible delays and also allow the issue to be determined by a judge who will not hear and decide the case.

The motion session might also be used in cases where there may have been an illegal discontinuance or the insurer has evidence of possible fraud. These aspects take on greater significance when the time periods between the referral to the division of dispute resolution increase. The motion session would also create the possibility that parties might comply with the law if they were aware that significant sanctions could be imposed. If the parties knew that filing/ attorney fees, in addition to those already set forth in the law could be levied, they might think twice prior to taking any inopportune action.

The motion session should not be used for judge shopping. The assignment of an administrative judge to the case creates a relationship between the judge and the case until it is finalized. A motion session should not supersede that process from taking shape. Nor should it create an impression that parties can obtain an advantage by the perceived or imagined predilection of the trier of fact.

One issue that must be addressed in some manner is how to handle and administer attorney fees for these sessions. If an attorney prevails, then the employee's attorney should be allowed to recoup fees. A question remains as to how much and at what amount. This should be left to the discretion of the administrative judge, with perhaps a cap of one time the

average weekly wage. A minimum should also be considered, such as one-half of the average weekly wage if the party prevails and the judge should have the authority to allow a greater amount if the complexity of the case and the time necessary to prepare warrant it. Whether the holding of the judge in the motion session should have any precedential value in any subsequent matter before the agency or in the courts is a matter for the legislature to decide.

In actuality, the system as it exists is a "markup" system. Parties should not file matters until they are ready and fully prepared to go forward. All documentation and medical reports should be brought to the conciliation, conference, or hearing. If problems exist in procuring the required information then the administrative mechanisms in place should be utilized to address the situation. Moving parties can request rescheduling of matters at the various stages of the process and in this way control, to a limited extent, the time involved in resolving the case. Should the existing process be inadequate, remedies exist either through rule making or administratively for the DIA to remedy the problem.

Workers' compensation, as it exists today, has not provided the panacea that its framers envisioned. It has not become a simple act with slot machine justice where litigation and representation would be limited and decisions based upon common sense, as expressed by Attorney Samuel Horovitz.[116] There is little doubt that among the prominent goals of workers' compensation has been to create certainty of relief without fault for injured employees and to save time and lower costs by eliminating the formalities of a court system. Unfortunately, while the initial legislative attempts to set up a simple procedure by throwing court technicalities out the front, the court system, through its definition of competent evidence and due process, has returned the technicalities through the back door.[117]

The need to expedite the process for all parties will presumably raise little debate. It is difficult to develop or find finite empirical evidence as to what creates litigation. In any judicial or administrative process disputes will exist. While observers will disagree as to what extent they should or should not exist, that aspect is beyond the purview of this paper.

RECOMMENDATIONS

What is worth noting, however, is that litigation will decrease not only with consistency in interpretation, but also with expeditious scheduling of matters and issuance of decisions.[118] In addition, while anecdotal perceptions as to the influence of the bar in generating litigation may be offered, the limited empirical data seems to support the contention that employees are less likely to seek legal assistance if the employer or insurer keep them informed about their claim.[119]

While perceptions may exist, they overlook certain professional safeguards. The Commentary to ABA Model Rule of Professional Conduct 1.3 appears to require that every lawyer seek a resolution of the controversy for the client's interest alone.[120] It is reasonable to assume this includes pressing the case to a speedy resolution.

It is not inconceivable that a mark-up system could create a greater incentive for a claimant to seek representation. At least under the current law, a claimant knows they must be ready to proceed by a certain date. If getting before an administrative judge requires knowing the proper time to get a case on a list for a conference or hearing, based upon readiness to go forward, it is probable that more claimants will not file their claims "pro-se". The current statute at least gives the individual person a timeframe in which to ensure they are prepared.

The courts have traditionally used a mark-up approach in many matters. Since we began researching this topic two of the five court administered states have decided to use an administrative system. This indicates a degree of dissatisfaction with a court structure and may be indicative of a need for the administrative structure to exercise greater control.

The changes introduced by the 1985 amendments envisioned a process that would both discourage claim disputes while quickly resolving those that exist. Thus far, the statutory change has not worked. However, there is no evidence that a mark-up system would itself decrease delays. We see no evidence that parties could receive justice any quicker with such a format at present. Until the system operates as initially envisioned, no specific reason exists to propose a change at this time.

RECOMMENDATIONS

APPENDIX A
LOUISIANA DEPARTMENT OF LABOR - OFFICE OF W/C ADMINISTRATION
ANNUAL REPORT 1985-1986 - PAGE 7

Reference Years 1985 & 1986

	1985	1986	Percentage Variant
Total compensable claims filed	34,543	39,094	13.2%
Disputed Claims Filed	6,950 (2,974)*	8,156 (3,991)*	17.4% (14.6%)
Recommendations issued:			
Ruled work related	5,658	7,143	26.3%
Ruled not work related	1,292	1,013	-27.5%
Recommendation Accepted	3,225 (1,720)	3,584 (2,372)	11.1% (37.9%)
Recommendation Rejected	3,725 (1,254)	4,572 (1,619)	22.7% (29.1%)
Attorney's fees penalties assessed	325	509	56.6%
12% penalties for untimely payments of weekly benefits or medical bills	805	1,197	48.6%
Number of disputed claims appealed to and adjudicated in district court	562	746	32.7%

*( ) claims involving attorneys

APPENDIX B

ADVISORY COUNCIL COMMENTS

The issuance of this report by the Advisory Council is intended to fulfill its obligation under M.G.L. Chapter 23E, §17. Its issuance does not imply complete agreement of its contents by each of the voting members of the Advisory Council. The following comments reflect individual responses by Advisory Council members to some of the contents of the report.

Comments by Chairman Linda Ruthardt - Management Representative

The document fulfills the legal obligations of the Council to produce a report on "Mark Up Systems", and notes that our current Workers' Compensation Act includes such a system on a de facto basis for certain procedures. The report's one concrete recommendation for change, a Motion Session, appears to be more of an attempt to "fiddle" with the current volume and subsequent delay problem, than to assist the reader in valuing a change to an adjudication system based on "Mark Up".

Generally, the reform in Massachusetts in 1986 tried to make the adjustment of claims that had controversy be controlled by process rather than personalities. While the study is correct in noting that there is a form of mark up in the current system; (i.e., filing a claim or a request for an adjudication must be taken as a signal one is ready to proceed if the system is working to the times given in the law), the thrust of the reform was to make the timing predictable. Mark up systems usually achieve the opposite in practice.

California has just revised its workers' compensation statute (January 1, 1990). The Massachusetts Reform was studied carefully in that process. It is instructing to note that California's revised law not only is based on using the adjudicatory agency to keep to the time frames in the law, (judges go without pay if they do not produce decisions on time!), but also allows the parties to go to outsiders to resolve disputes when the law's adjudication deadlines are not being met by the state agency. This is counter to the de facto mark up system California has had for years, and goes beyond the Massachusetts reform statute in getting to resolution in a timely manner.

The discussion of the use of a motion session contained in the report may be of use in trying to ferret out issues not worthy of being scheduled for a full proceeding. However, it should be noted that this concept is more a bandage than a cure. The report itself indicates there is a danger it will merely add to the amount of work, as there is a temptation to use a dispute system even when not necessary if fees or gratuitous awards may be gleaned. The reasons for the recommendation for a motion session are not compelling, especially the one regarding a chance to find another attorney by a potential perjurer!

Generally, one must concur with the conclusion of the report: Massachusetts' system already has strong elements of a "mark up" philosophy. The question is, is that part of the problem?

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FOOTNOTES

1. Larson Arthur, The Law of Workmen's Compensation, Matthew Bender,N.Y.,1986,§5.10,pg.35

2. Larson, vol.2, at §57.14(b), pg10-51: see also Locke, Laurence, Massachusetts Practice,Vol. 29, Workmen's 2nd Edition, West Publishing, St. Paul, Minn., §23, page 22, 1981.

3. id, vol.1, §4.50, page 30

4 id, vol.1, §5.20, page 38.

5. Chapter 120 of the Resolves of 1910.

6. Larson, ibid, vol.2,57.14(b), page 10-52/53 - The others were Washington, New Jersey, Wisconsin, Ohio, Kansas, California, Nevada, New Hampshire, and Illinois.
The significance of these enactments was their survival. The first important wage-loss act, passed in New York in 1910, was held unconstitutional on the grounds that liability without fault was a taking of property in violation of the due process clause of the State and Federal Constitutions. See Ives v South Buffalo Railway, 201 NY 271,294, 94 NE 431,439 (1911).

7. Massachusetts General Law Chapter 153, which is still in existence.

8. Chapter 751 of the Acts of 1911.

9. Somers and Somers, Workmen's Compensation: Unfulfilled Promise, Industrial and Labor Relations Review, V.7, #1,Oct. 1953 pg.39,

10. Chapter 572 of the Acts of 1985, Section 17.

11. M.G.L. 152 Section 8 (1)

12. 452 CMR 1.07, Claims and Complaints, states in part.
(1) A claim for compensation may be filed by any person, including an employee, dependent, physician, hospital or other health care provider, who believes that benefits are due under this chapter.
(2) A complaint from an insurer requesting modification or discontinuance of benefits shall be accompanied by a recent medical report of an examination of the employee or a statement of other reasons justifying such modification or discontinuance.

13. M.G.L. c 152, s.19 prior to repeal by Chapter 572 of the Acts of 1985.

14. M.G.L. c 152 s.7, repealed by Chapter 572 of the Acts of 1985

15. M.G.L. c 152 s.7C, repealed by Chapter 572 of the Acts of 1985

16. M.G.L. c 152 s.8, repealed by Chapter 572 of the Acts of 1985

17. M.G.L. c 152 s.10, repealed by Chapter 572 of the Acts of 1985

18. M.G.L. c 152 s.11, repealed by Chapter 572 of the Acts of 1985

19. Id s 6, effective 11/1/86

20. Id s 6A, effective 11/1/86

21. Id s 7, effective 11/1/87

22. Id s 8, effective 11/1/86

23. Id s 10, effective 4/5/88

24. Id s 10, effective 11/1/86

25. Id, s 4

26. M.G.L. s 10, effective 11/1/86

27. M.G.L. s 10 10A. At the present time there are currently sixteen Administrative Law Judges within the Division. Recent legislation has been passed to increase the total number of Administrative Judges to twenty one and also to provide seven temporary Administrative Judges to eliminate the backlog.

28. id.

29. M.G.L. c 152, 11 and 11B

30. M.G.L. c 152, 11C. There are currently four Administrative Law Judges in the department.

31. M.G.L. c 152, 312

32. Chapter 691 of the Acts of 1987 approved by the Governor on January 6, 1988. There was no emergency preamble to this bill so that it takes effect 90 days from the signing.

33. id, s 4, effective 4/5/88

34. Chapter 691 of the Acts of 1987, §5 amending § 10 of the M.G.L. c.152

35. id, s 8, amending s 13A (1) of M.G.L. c 152

36. id, s 6, amending s 10A of M.G.L c 152

37. id, s 8, amending s 13A of M.G.L 152

38. id, s 6, amending s 10A and s 7, amending 11C of M.G.L. c 152

39. The average number of claims and complaints entered during calendar year 1986 was 420 per week. The average number increased by 6% to 570 per week in calendar year 1987. This was the first full year of the new cuts operation. This number in the first third of the calendar year 1988 is 531 per week, which while showing a tendency to decrease, it is still a 26% increase over the pre-reform average.

40. Second Annual Report of the Industrial Accident Board, 1913-1914, Public Document Number 105, p 89.

41. The four remaining court systems are Alabama, Louisiana, Tennessee and Wyoming. Until last year New Mexico had a court administered system so in the near future it may well provide a useful and guide to the efficiency of the respective formats.

42. Larson, note 1 supra, s 3.10, p.15.

43. id, at §57.14(C) p. 10-55 citing Professor Francis Bohlen's, of the University of Pennsylvania Law School, 1912 address to the Law Association of Philadelphia.

44. Bohlen, Francis H. A Problem in the Drafting of Workmen's Compensation Acts. 25 Harvard Law Review, V25, #6 April 1917 p.517,546

45. Cardillo v Liberty Mutual Insurance Company, 330 US 469,479 67 S Ct. 801,807 (1947)

46. Second Annual Report of the Industrial Accident Board, Public Document 105, 1913-1914, p.89

47. Third Annual Report of the Industrial Accident Board, Public Document 105, 1914-1915, p.71

48. id, at 73

49. White Paper on the Workers' Compensation Act, Government of Ontario,Canada, 1981, p.33

50. Report of the National Commission on State Workers' Compensation Laws, US GPO 1972, pg 101, R 6.1

51. id, at 100

52. Research Report of the Intergovernmental Workers' Compensation Task Force, v.4, 1979, p.42

53. id

54. id, at 144

55. Barth, Peter, Workers' Compensation and Work Related Illnesses and Diseases, MIT Press, 1980, p. 168

56. Note 52 supra, at 63.

57. Lewis, John, An Analysis of State Workers' Compensation Agency Activities, Research Report of the Intergovernmental Task Force, v. 3, 118, 124 (1979).

58. Note 52 supra, at 63

59. Gazell, James, The Principles and Goals of Court Management:A Sketch,p.32, in Berkson, Larry,Hays, Steven W., and Carbon, Susan J., Managing the State Courts, West Publishing, St.Paul, Minn, 1977

60. id, at 39

61. id

62. Wyoming statutes 27-14-102 and 27-14-103

63. Code of Alabama ,Title 5, Chapter 5, as amended, 1985

64. Louisiana Revised Statute, Title 23, Chapter 10

65. Rules of the Louisiana Department of Labor, Office of Workers' Compensation chapter 5, 501(B), 5/20/87

66. Tennessee Code Annoted 50-6

67. Great American Indemmity Co. v Friddell, 198 Tenn 360, 280 SW 2d 906 (1955)

68. B. Samers and D. Kelly, Promptness of Payment in Workers' Compensation, Research Report of the Interdepartmental Workers' Compensation Task Force, v. 3, p.79, 1979

69. id, at 80

70. The percentage is a ratio of total claims referred to conciliation, which includes lump sum requests up until 6/21/88, divided by total incidents. Incidents is defined as filed first report of injury; insurers' filed forms to pay or deny and and claims where no first report has been filed. It also should be noted that while there is a penalty for not filing a denial of benefits, there is no penalty for not filing a pay form so that conceivably this number may be greater.

71. Boden, Leslie, Reducing Litigation: Evidence From Wisconsin, Workers' Compensation Research Institute, Cambridge, MA, (1988)

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73. id, at 11

74. For a comprehensive review of the workers' compensation system in California, please consult Warren L. Hanna's book, California Law of Employee Injuries and Workers' Compensation, vol. 1, Matthew Bender, New York, 1987.

75. W.C.A.B. Rule § 10582

76. W.C.A.B. Rule § 10415

77. W.C.A.B. Rule § 10414

78. Labor Code 5502, as amended by Statute 1971, Chapter 393

79. Report of the Workmen's Compensation Study Commission, State of California, 1965, p.86

80. Section 15 of Chapter 892, amending §123.5 of the California Labor Code.

81. id

82. id

83. Section 44 of Chapter 892, adding Part 3.5 to Division 4 of the California Labor Code, §5270.5

84. id, §5271

85. id, §5772 and §5273

86. id, §5275

87. id, §5276

88. id, §5277

89. Section 52 of chapter 892, adding §5502 to the California Labor Code.

90. id, These issues include medical treatment, temporary disability benefits, vocational rehabilitation, or multiple employer liability.

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