

**Workers' Compensation Benefit and Insurance
Oversight Committee**

**Joint Committee on Workers' Compensation Benefit
and Insurance Oversight
2017 Membership Roster**

Senator Katherine Klausmeier, Co-chair
Delegate Kriselda Valderrama, Co-chair
Senator Brian J. Feldman
Delegate Cheryl D. Glenn
Delegate Sally Y. Jameson (monitor)

Representative of Maryland Business Community:
Mary Anne Reuschling

Representative of the Maryland Labor Organization:
Vacant

Representative of Maryland Building and Construction Labor Organization:
Tom P. Hayes

Two Members of the Public:
Michael G. Comeau
Debora Fajer-Smith

Member of Insurance Industry:
Thomas J. Phelan

Member of a Workers' Compensation Rating Organization:
David Benedict

Member of Medical and Chirurgical Faculty of Maryland:
Gary W. Pushkin, M.D.

Members of the Bar:
Rudolph L. Rose, Defense Lawyer
P. Matthew Darby, Plaintiff Lawyer

Maryland Certified Rehabilitation Service Provider:
Jody Malcolm

Self-insured Local Government Entity:
Ronald J. Travers

Workers' Compensation Commissioner – Ex-officio:
Maureen Quinn

Committee Staff

Tami Burt, Laura Atas, and Ricky Duncan

JOINT COMMITTEE ON WORKERS' COMPENSATION BENEFIT AND INSURANCE
OVERSIGHT

December 18, 2017

The Honorable Thomas V. Mike Miller, Jr., Co-chair
The Honorable Michael E. Busch, Co-chair
Members of the Legislative Policy Committee

Ladies and Gentlemen:

The Joint Committee on Workers' Compensation Benefit and Insurance Oversight respectfully submits the summary report of its 2017 interim activities. The committee met once during the interim (December 4) to consider a number of issues that affect the State's workers' compensation insurance market. Attached is a summary of the issues that the committee considered.

During the 2018 session, the joint committee plans to conduct its annual review of workers' compensation related legislation and discuss any outstanding issues raised during the interim.

The joint committee is appreciative of the advice and assistance provided by governmental officials, members of the public, and legislative staff during the 2017 interim and looks forward to the same spirit of cooperation and assistance during the 2018 session.

Respectfully submitted,



Senator Katherine Klausmeier
Senate Chair



Delegate Kriselda Valderrama
House Chair

KK:KV/LHA/nac

cc: Ms. Carol L. Swan
Mr. Ryan Bishop

Joint Committee on Workers' Compensation Insurance and Benefit Oversight 2017 Interim Report

At the committee's interim meeting on December 4, 2017, the committee observed a moment of silence for Robert Zarbin who passed in July 2017. As a member of the Maryland Association for Justice (MAJ), Bob participated over many years in numerous committee meetings where lively discussions on workers' compensation legislative issues took place among the interested parties. Subsequently, the members considered a number of issues, including an annual update on the Workers' Compensation Commission's operations (WCC), an update on the status of Chesapeake Employers' Insurance Company (Chesapeake) complying with the National Council on Compensation Insurance Holding, Inc. (NCCI) rating policies, a discussion of workers' compensation rates for 2018, and a review of anticipated legislation. Below is a summary of the issues that the committee considered.

Workers' Compensation Commission Annual Report

Mr. Karl Aumann, Chair of WCC, began his comments by indicating that the workers' compensation market is stable. WCC's annual report states that the number of claims filed in fiscal 2017 decreased by 1.5% over the prior year, continuing a downward trend from recent prior fiscal years. In fiscal 2017, 23,336 claims were filed, compared to 23,683 claims filed in fiscal 2016. Commensurate with the decrease in the number of claims filed, WCC experienced a 5.6% decrease in the number of hearings scheduled. WCC scheduled 41,414 hearings in fiscal 2017, compared to 43,891 hearings in fiscal 2016.

Beyond the WCC's duties to adjudicate claims, WCC has followed through with a systems modernization initiative. While WCC has been paperless for 20 years, the computer system infrastructure needs updating from optical imaging to magnetic medium, which would provide a more efficient and reliable system. WCC is working with the Department of Information Technology to prepare a request for proposals to solicit bids for this initiative.

Chairman Aumann indicated that a serious concern is the number of employers who are uninsured, as seen in Uninsured Employers' Fund (EUF) hearing dockets. WCC is working diligently to identify uninsured employers and penalize them based on recent legislation that increased fines. Chairman Aumann also indicated that the volume of doctor dispensing of opioids and the cost of prescription drugs have decreased. He cited that this may be the result of collective efforts from the collection of data by NCCI, the implementation of the prescription drug monitoring program (PDMP), the nationwide attention on opioid abuse, and recent Centers for Disease Control and Prevention (CDC) guidelines. WCC Commissioner Maureen Quinn noted that there is still opioid abuse in the State, especially in rural areas where there are not enough pain treatment doctors.

Update on the Status of Chesapeake Employers' Insurance Company Complying with NCCI Rating Policies

David E. Benedict, State Relations Executive, Regulatory Division, NCCI, indicated that the transition of Chesapeake complying with NCCI rating policies is going smoothly. Carmine D'Alessandro, Chief Legal Officer, Chesapeake, concurred. Legislation enacted in 2012 privatized the Injured Workers' Insurance Fund (IWIF), the State's state-administered workers' compensation carrier, through a conversion to Chesapeake effective October 1, 2013. Legislation enacted in 2015 facilitated the full affiliation of Chesapeake with NCCI, through a 7-year transition period to be fully effective January 1, 2023. A long transition period is needed since Chesapeake has a large market share in the workers' compensation market in Maryland. Chesapeake and NCCI have developed transition milestones for each year of the transition period.

Workers' Compensation Rates for 2018

David E. Benedict, State Relations Executive, Regulatory Division, NCCI, indicated that its workers' compensation loss costs rates filing was approved by the Maryland Insurance Administration (MIA) during the summer of 2017. Effective January 1, 2018, the overall loss costs rate decreased by 13% (there are 5 employment categories), making it the fourth consecutive year with a decrease (an overall 28% decrease over the four-year period). Loss costs rates are used by insurers to develop their premium rates to ensure that the insurers are collecting adequate premiums to cover claims. The decrease in loss costs is the result of a lower frequency of claims and less severity of claims than in recent years. A similar trend is occurring nationwide.

Proposed 2018 Legislation

Enhanced Benefits for Correctional Officers

Jim Lanier and Jim MacAlister, representing MAJ, indicated that MAJ's primary legislative initiative is providing enhanced benefits for State correctional officers. House Bill 1101/Senate Bill 576 of 2017, which did not pass, would have altered the definition of "public safety employee" to include State correctional officers, thereby making these officers eligible for enhanced workers' compensation benefits. Normally, an employee who is awarded compensation for a permanent partial disability for a period of less than 75 weeks is eligible to receive weekly benefits of one-third of his or her average weekly wage, but that amount may not exceed 16.7% of the State average weekly wage. However, a public safety employee is eligible for enhanced workers' compensation benefits if awarded compensation for less than 75 weeks. In such a case, the employer or its insurer must pay the public safety employee at a compensation rate set for an award period of greater than 75 weeks but less than 250 weeks. Thus, a public safety employee is eligible to receive approximately double the weekly benefits – two-thirds of his or her average weekly wage, but that amount may not exceed one-third of the State average weekly wage. The State average weekly wage for 2017 is \$1,052.

According to the Department of Public Safety and Correctional Services, there are approximately 7,000 State correctional officers. Mr. Lanier and Mr. MacAlister stressed that police officers have this benefit and that correctional officers have risky professions compared to other occupations, due primarily to confrontations with inmates.

Temporary Total Disability Benefits and Concurrent Employment

Debora Fajer-Smith, who represents claimants, explained an issue that was identified in *Clifford Buckler v. Willett Construction Company* (No. 11 Sept. Term 1996, Decided by the Court of Appeals of Maryland April 14, 1997). According to the decision, the appeal arose out of a workers' compensation claim for temporary total disability (TTD) benefits. The claimant sustained a compensable accidental injury arising out of and in the course of his employment. The issue the court decided was whether the claimant was entitled to receive TTD benefits as a result of the accidental injury he suffered while working for one employer, which rendered him unable to perform that job, but allowed him to continue to work at his second job. The court held that under the workers' compensation law, an employee cannot recover TTD benefits when the employee maintains the non-injury employment while injured. The decision indicated that the statute does not define the terms "temporary partial disability" and "temporary total disability". Temporary partial disability benefits (TPD) are those paid to an injured worker who has rejoined the workforce but has not yet reached maximum medical improvement from the effects of the injury. On the other hand, TTD benefits are those paid to an injured worker who is wholly disabled and unable to work because of the injury.

Ms. Fajer-Smith suggested legislation that defines the TPD and TTD terms. Further, the legislation would allow a covered employee who is receiving TTD benefits as a result of an accidental personal injury to earn wages from concurrent employment that the covered employee engaged in at the time of the accidental personal injury if (1) the covered employee is unable to perform at the employment where the injury occurred but is able to perform at the concurrent employment; (2) the type and duties of employment at the concurrent employer are not similar to the type and duties of employment at the employer where the injury occurred; and (3) the covered employee's physician certifies that the type and duties of the employment at the concurrent employer will not impede the healing process of the covered employee. Ms. Fajer-Smith indicated, as one of the reasons to support the legislation that studies show that employees who continue to work will return to full capacity quicker. Rudy Rose, defense attorney for employers, responded that TTD benefits are based on wage earning capacity and that injured workers need to concentrate on their healing process in order to get back to work quickly.

The co-chairs suggested that the interested parties meet to determine if a compromise proposal may be worked out.

Multiple Claims for Similar Injuries

Bob Erlandson, representing the Maryland Self-Insurers' & Employers' Compensation Association (MSIECA), explained an issue that was identified in *Charles C. Reger v. Washington County Board of Education et al* (No. 68 Sept. Term 2016, Decided by the Court of Appeals of Maryland August 4, 2017). According to the decision, the appeal arose out of a workers' compensation claim involving the payment of both ordinary disability benefits and TTD benefits for the same injury. The issue the court decided was whether WCC correctly applied the law to find that the employer/insurer were entitled to offset the ordinary disability benefits already paid by the State Retirement Agency to the claimant against the TTD benefits paid to him by the employer (or its insurer). The court affirmed WCC's finding. Because both sets of benefits were awarded to compensate the claimant for the same injuries, according to the law, the benefits were legally "similar benefits," and the statutory offset was properly applied to prevent a double recovery for the same injury. Indicating that the court's rationale was wrong, Mr. Erlandson suggested legislation to clarify that the injured worker should be compensated for loss of earnings, and should not be able to file for multiple benefits. This is similar to language in House Bill 344/Senate Bill 751 of 2017, which did not pass. There was discussion among committee members and interested parties about the costs to public employers of providing multiple benefits, other offsets that are allowed, the responsibility of the Subsequent Injury Fund (SIF), and future credits.

The co-chairs suggested that interested parties meet to determine if a compromise proposal may be worked out.

MIA Fraud Investigation Authority for Claimants Against Self-Insured Employers

Bob Erlandson, represents MSIECA, explained that, through correspondence with MIA, he learned that MIA does not have authority to investigate or prosecute any fraud claims involving claims against self-insured employers for workers' compensation benefits (includes all self-insureds – private and government). Currently, fraud cases would need to be investigated and prosecuted through the local district attorney's office. Mr. Erlandson suggests legislation that would allow MIA to investigate fraud claims against self-insured private and public employers.

The co-chairs suggested that interested parties meet to determine if a compromise proposal may be worked out.

Recovery of Damages in an Action Filed Against a Third Party

Ilene Ticer, defense attorney for employers, suggested that a change is needed to the workers' compensation law that relates to an action against a third party after compensation is awarded or paid for a claim. Under current law, if a claim is filed and compensation is awarded or paid, a self-insured employer, an insurer, SIF, or UEF may bring an action for damages against the third party who is liable for the injury or death of the covered employee. If any of these entities recovers damages exceeding the amount of compensation paid or awarded, the entity must deduct

from the excess amount its costs and expenses for the action and pay the balance of the excess amount to the covered employer. Ms. Ticer recommends striking SIF from the list of entities that may recover third party damages since the action against a third party relates to the injury and does not relate to a preexisting condition. SIF is responsible for paying the portion of the claim dealing with the preexisting condition.

Further discussion is needed with SIF to determine the impacts of this proposal.

Temporary Total Disability – Credit if Medical Treatment is Delayed/Suspended Due to an Unrelated Medical Condition

Ilene Ticer, defense attorney for employers, suggested that the TTD provision of the workers' compensation law be amended to provide that an employer (or its insurer) may be entitled to a TTD benefit credit if the medical treatment of the employee is delayed or suspended solely because of an unrelated medical condition. The credit should only be allowed for compensation paid during the period that medical treatment was delayed or suspended. This language is similar to House Bill 943/Senate Bill 257 of 2016, which did not pass. There was discussion among committee members and interested parties about whether an employer (or its insurer) should pay TTD when the delay or suspension is not the fault of the employer and the fact that the employee is not working and therefore has no income.

The co-chairs suggested that interested parties meet to determine if a compromise proposal may be worked out.