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

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December 16, 2011

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

Ladies and Gentlemen:

The Workers' Compensation Benefit and Insurance Oversight Committee respectfully submits a summary report of its 2011 interim activities. The committee met once during the interim (November 2) 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. The committee also welcomed a new member, Mr. Terry Fleming, a representative of a self-insured local government entity, as provided under Chapter 5 of 2011.

During the 2012 session, the committee may also conduct its annual review of workers' compensation related legislation and any outstanding issues raised during the interim.

The committee expresses its appreciation for the advice and assistance provided by governmental officials, members of the public, and legislative staff during the 2011 interim. The committee looks forward to the same spirit of cooperation and assistance during the 2012 legislative session.

Respectfully submitted,

Senator Katherine Klausmeier  
Senate Chair

Delegate Sally Jameson  
House Chair

KK:SJ/TDB/tas

cc: Mr. Karl Aro  
Mr. Warren Deschenaux  
Ms. Lynne Porter

**Maryland General Assembly**  
**Workers' Compensation Benefit and Insurance Oversight**  
**Committee**  
**2011 Membership Roster**

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Senator Katherine Klausmeier, **Co-Chair**  
Delegate Sally Jameson, **Co-Chair**  
Senator Allan H. Kittleman  
Delegate Joseph J. Minnick

*Representative of Maryland Business Community:*

Mary Anne Reuschling

*Representative of the Maryland Labor Organization:*

Jerry S. Lozupone

*Representative of MD Building and Construction Labor Organization:*

Roderick P. Easter

*Two Members of the Public:*

Michael G. Comeau  
Debora Fajer-Smith

*Member of Insurance Industry:*

H. Glenn Twigg, Jr.

*Member of a Workers' Compensation Rating Organization:*

Lori Lovgren, Esq.

*Member of Medical and Chirurgical Faculty of Maryland:*

Kenneth R. Lippman, M.D.

*Members of the Bar:*

Rudolph L. Rose, Defense Lawyer  
P. Matthew Darby, Plaintiff Lawyer

*Maryland Certified Rehabilitation Service Provider:*

Kathy M. Stone

*Self-insured Local Government Entity:*

Terry Fleming

*Workers' Compensation Commissioner - Ex-Officio:*

Maureen Quinn

**Committee Staff**

Tami Burt and Michael Vorgetts  
Department of Legislative Services

# **Workers' Compensation Benefit and Insurance Oversight Committee Interim Report**

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## **Workers' Compensation Commission Annual Report**

Mr. Karl Aumann, chairman, of the Workers' Compensation Commission (WCC), summarized WCC's annual report. The report states that the number of claims filed in fiscal 2011 increased by 1.6% over the prior year, which was the second consecutive annual increase (1.7% from 2009 to 2010) in claims filed. Mr. Aumann underscored that, although the increase is minimal, any increase in the number of filed claims is troubling since the last decade has been a trend of decreases. The report also stated that WCC is continuing its effort to reduce wage and hour violations, premium avoidance, and other issues that arise due to the misclassification of employees as independent contractors. In addition to involvement with various interagency measures, Mr. Aumann noted that WCC is designing a program that is intended to increase employer awareness of the workers' compensation laws and to bring employers into compliance with the requirements of those laws.

## **Workers' Compensation Insurance Premium Rates for 2012**

Ms. Lori Lovgren, State Relations Executive of the National Council on Compensation Insurance, Inc. (NCCI), stated that Maryland's workers' compensation insurance pure premium rates filed will increase by an overall 1.4% in 2012. Pure premium rates, one component of overall premium rates, are set at a level necessary to prefund projected claim loss payments to injured workers. Other components of overall premium rates charged by an insurer include the insurer's expense and profit factors. Ms. Lovgren stated that the increase in pure premium rates means employers in the State will pay slightly more in workers' compensation insurance premiums in 2012. Although pure premium rates have risen for three consecutive years (3.2% in 2010 and 5.7% in 2011), Ms. Lovgren advised that the increases are minor adjustments and overall the State's workers' compensation system is stable. Further, Ms. Lovgren noted that the three annual increases follow four consecutive decreases (-5.7% in 2006, -5.2% in 2007, -1.7% in 2008, and -5.4% in 2009) in pure premium rates. In a 2010 Oregon Workers' Compensation Premium Rate Ranking Summary Report, Maryland ranks twelfth among the states with the lowest premium costs as of January 1, 2010; as of January 1, 2012, that ranking is anticipated to increase to seventeenth among the states with the lowest premium costs.

Similarly, Mr. Dennis Carroll, General Counsel and Ms. Carmine D'Alessandro, Assistant Vice President of Claims, of the Injured Workers' Insurance Fund (IWIF) stated that IWIF's base rate will increase by a modest 2.9% in 2012. Mr. Carroll explained that the IWIF base rate differs from the NCCI pure premium rate as the pure premium rate represents that cost of claims expenses only; IWIF's base rate consists of IWIF's loss costs with the expense load and investment income added.

## **Workers' Compensation Issues**

### **Proposed Legislation Related to Cancellation of Insurance for Nonpayment**

Although IWIF is a quasi-governmental agency created by the State, the General Assembly has taken steps in recent years to regulate IWIF in a manner similar to that of a private insurance company. Nonetheless, State law specifies different standards for IWIF and private workers' compensation insurers regarding the cancellation of workers' compensation insurance policies. In particular, provisions governing private insurers and IWIF differ regarding the cancellation of a policy based on a failure to pay a premium. In such cases, current law allows an insurer to cancel with 10 days notice by "certificate of mail." (A certificate of mailing is a receipt that evidences the date a parcel was presented to the U.S. Postal Service.) IWIF is required to prove, prior to cancellation, that the policy holder received the notice of cancellation, which may only be accomplished by certified mail or personal service.

Mr. Carroll and Ms. D'Alessandro stated that cancellation requirements for nonpayment of an IWIF premium are more onerous and costly than those governing private insurance carriers. Further, Mr. Carroll stated that there is no justification for treating IWIF differently from the rest of the industry and that IWIF would support a proposal intended to make its cancellation provisions identical to those applicable to all other workers' compensation insurers.

**The committee anticipates that legislation regarding cancellation of workers' compensation insurance policies will be introduced in the 2012 session.**

### **Proposed Legislation on the Assessment on Workers' Compensation Settlements**

WCC imposes assessments paid to the Subsequent Injury Fund (SIF) and the Uninsured Employers' Fund (UEF) on certain workers' compensation awards and settlements. The assessments, set in statute, are 6.5% for SIF and 2% for UEF. Unlike non-settlement awards determined by WCC, when a case is subject to a settlement WCC includes not only indemnity benefits but also future medical benefits in SIF and UEF assessment calculations. In recent years, settlement totals have increased significantly due to large future medical benefits (known as medical set-asides) required by the Center for Medicare and Medicaid Services (CMS). The increased set-asides have driven up SIF and UEF assessments paid by employers and insurers.

Several interested parties spoke at the meeting to address the implications of altering the workers' compensation benefits subject to the SIF and UEF assessments so that medical set-aside agreements would be excluded from the assessment under certain circumstances. Mr. Carroll and Ms. D'Alessandro indicated that, until recently, basing the assessments on the total settlement – including future medical benefits – was not a major issue for insurers. They noted, however, that CMS has dictated increasingly large and more complicated medical set-asides over the last several years, and the additional amounts included in IWIF assessments increased from \$61,350 in 2007 to an estimated \$1.4 million in 2011 (\$1.1 million in 2009 and \$1.2 million in 2010).

Mr. James Himes, Director, of UEF, and Mr. Jack Ulrich, Director, Ms. Ellen Dunn-Jones, Assistant Attorney General, and Mr. Edward Goldsmith, Assistant Attorney General, of SIF, each stated their concerns related to any proposal that would “carve out” medical set-asides from the assessment calculation. Mr. Himes stated that such a change may result in a combined loss of over \$6 million in revenue to the two funds (a decrease of \$1.4 million to UEF and \$4.6 million to SIF) based on 2011 assessment estimates (plus a total of \$4 million in 2009 and \$5 million in 2010). Mr. Himes and Mr. Ulrich each indicated that such a decrease in funds may result in each fund seeking to increase its statutory maximum assessment rate to mitigate the lost revenue associated with excluding medical set-asides from the assessment calculation. Mr. Ulrich suggested a solution may be to take the medicare settlement out of the hands of the claimant, requiring a third party to administer the set-aside funds. Mr. Robert Erlandson, representative of the Maryland Self-Insured and Employers Compensation Association, also expressed concern with the new CMS rules. The parties agreed to work together toward a solution.

**The committee anticipates that legislation regarding statutory changes to SIF and UEF assessments will be introduced in the 2012 session.**

### **Jurisdiction of Workers’ Compensation Commission Pending Appeal**

One section of the Maryland Workers Compensation Act (*see* Labor and Employment § 9-742(a)) states that WCC retains jurisdiction only to consider three types of requests regarding a case that is pending appeal. Under current law, WCC retains jurisdiction pending an appeal to consider a request for (1) additional medical treatment; and (2) temporary total disability benefits, provided the benefits were grants in the order on appeal and were terminated by the insurer or self-insurer pending adjudication or resolution of the appeal. Chapters 45 and 46 of 2011 specified the third type of request – WCC may retain jurisdiction pending an appeal to consider a proposed settlement of a claim. However, a ruling by the Maryland Court of Special Appeals, *Sanchez v. Potomac Abatement, Inc., et al.*, 417 Md. 76 (2010), found that this is not an exhaustive list of issues over which WCC retains jurisdiction while a matter is on appeal. The ruling cited a different section of the Act (*see* Labor and Employment § 9-736 (b)) specifying that “the commission has continuing powers and jurisdiction over each claim.”

Mr. Michael Levin, an attorney representing the Chamber of Commerce, indicated that prior to the ruling, WCC only retained jurisdiction to consider the types of requests enumerated in statute and that the ruling changes this standard and allows WCC to retain jurisdiction to address any issue that is not the subject of the appeal. Mr. Levin believes that expanding the jurisdiction may create confusion during WCC hearings because it can be difficult to determine from appellate pleadings which part of an award is being appealed. Thus, Mr. Levin argues that the legislature should take action to clarify the Act’s conflicting provisions in order to avoid further confusion surrounding jurisdictional issues when cases are appealed from WCC.

Mr. Robert Zarbin, a claimant attorney representing the Maryland Association for Justice, stated that the *Sanchez* case has been appealed to the Maryland Court of Appeals. Mr. Zarbin disagrees with Mr. Levin’s contention that immediate legislative action is necessary to clarify the statute. Mr. Zarbin stated that the General Assembly should await the decision of the Court of

Appeals before determining if legislative action is necessary. Mr. Erlandson, representative of the Maryland Self-Insured and Employers Compensation Association, expressed concern that if the case is not reversed there will be filings of separate issues in a case that could result in separate appeals.

**Depending when the *Sanchez* case is decided by the Maryland Court of Appeals, legislation regarding WCC jurisdiction while a case is on appeal may be introduced in the 2012 session.**

## **Proposed Regulations**

### **Prescription Drug Cost Management**

Many physicians in Maryland repackage and dispense medications normally dispensed by retail pharmacies. Repackaging and dispensing of drugs by physicians increases medical costs for the workers' compensation system because physicians are not bound by state fee schedules and pharmacy cost controls, and they inflate the average wholesale price of commonly dispensed drugs. Mr. Aumann stated that WCC is in the process of promulgating regulations that would establish a uniform fee or pricing schedule for reimbursing prescription drugs required to treat injured workers, regardless of the identity of the individual dispensing the drugs. Mr. Aumann cited data from NCCI indicating that the cost per claim in cases where physicians dispensed prescriptions drugs increased in Maryland from about \$70 per claim in 2007 to over \$200 per claim in 2009. Ms. Lovgren mentioned that most repackaging drug costs come from physicians. Similar trends have been seen in most states. California and Oregon have reformed their statutes. Some states are considering banning physician repackaging, while the majority of states are considering a pharmacy fee guide.

### **Death Benefits**

Chapters 435 and 436 of 2011 changed the calculation of benefits paid by employers or insurers to surviving spouses, children, and other dependents to replace income lost when a person dies due to a work-related accident or occupational disease. Mr. Aumann advised that, although the law became effective October 1, 2011, WCC is still in the process of adopting regulations to implement the laws. He noted that of particular interest to WCC and various other stakeholders is how the local government "opt-in" provisions will be handled. Mr. Aumann indicated that he is confident the proposed regulations clearly specify how the statutory changes will affect local governments and their public safety employees. Mr. Todd Schuler, an attorney with the Maryland Association for Fair Justice, mentioned that the new law may need clarification with regard to the calculation of a death benefit for presumption cases. Ms. Lovgren indicated that the cost impact of the death benefit bill is negligible on pure premium rates for workers' compensation insurance.