

11-1-2001

Workers' Compensation Board Government Evaluation Act Program Evaluation Report. 2001

Maine Workers' Compensation Board

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STATE OF MAINE
WORKERS' COMPENSATION BOARD
DEERING BUILDING AMHI COMPLEX
27 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0027

ANGUS S. KING, JR.
GOVERNOR

November 1, 2001

PAUL R. DIONNE
EXECUTIVE DIRECTOR

The Honorable Betheda G. Edmonds, Chair
The Honorable George H. Bunker, Jr., Chair
Members, Joint Standing Committee on Labor
115 State House Station
Augusta, Maine 04333-0115

Dear Senator Edmonds and Representative Bunker:

As required under the Government Evaluation Act, 3 M.R.S.A. §951 et seq. (the "Act"), enclosed please find the Program Evaluation Report for the Workers' Compensation Board. As you know, the Act provides a mechanism for the orderly review of our department to ensure that its future existence, based on past performance, is justified.

The Report gives a broad overview of our mission and programs. Consistent with the Act, the Report provides a retrospective view of the Board over the past nine years, including information on our funding sources and expenses. The Board has witnessed changes in both form and substance during this period as it has taken on new programs and has implemented changes resulting from new State laws. We have designed the Report to highlight the primary areas in which you may have an interest.

A Resolve Authorizing a Study of the Governance and Administrative Structure of the Workers Compensation System was approved by the Legislature on June 8, 2001. The Resolve directs the Department of Administrative and Financial Services to report its findings to the Legislature and the Workers' Compensation Board by December 15, 2001. The contract for the study was awarded to the firm of Berry, Dunn, McNeil & Parker. The Berry, Dunn, McNeil & Parker Report, taken in tandem with the Government Evaluation Act Report, should provide the policymakers with the necessary information to direct the future of workers' compensation in Maine.

We stand ready to provide the Labor Committee with any additional information it may require and look forward to presenting the Report to the Labor Committee at the assigned date.

Sincerely,

Paul R. Dionne
Executive Director

PRD/amp

cc: The Honorable Angus S. King, Jr., Governor



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WORKERS' COMPENSATION
BOARD

GOVERNMENT EVALUATION ACT
PROGRAM EVALUATION REPORT

November 1, 2001

WORKERS' COMPENSATION BOARD

GOVERNMENT EVALUATION ACT PROGRAM EVALUATION REPORT

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1. Executive Summary

Introduction

The State Government Evaluation Act “provides for a system of periodic review of agencies and independent agencies of State Government in order to evaluate their efficiency and performance. The financial and programmatic review must include, but is not limited to, a review of agency management and organization, program delivery, agency goals and objectives, statutory mandates and fiscal accountability.”

Section 1: Executive Summary

Section 2-A: Enabling Legislation and History of Maine Workers’ Compensation

This section includes the history of workers’ compensation and the statutory citations to enabling legislation for the Maine Workers’ Compensation Board.

Section 2-B: Regulatory Agenda and Summary of Rules

This section sets forth the Board’s regulatory agenda filed on October 1, 2001 and a summary of the Board’s rules as well as a copy of the Board’s rules.

Section 2-C: Organizational Structure, Position Count, Job Classification

The Board has 118½ authorized positions as reflected in the Table of Organization. The Board is an independent state agency, directed by an eight-member board with four employee and four employer representatives. The agency is administered by its Executive Director. The job classifications cover a wide spectrum from clerks to hearing officers as reflected on the job classification chart.

Sections 3-7: Description of Programs

The Board is charged with “serving the employees and employers of the state fairly and expeditiously by ensuring compliance with the workers’ compensation laws, ensuring the prompt delivery of benefits legally due, promoting the prevention of disputes, utilizing dispute resolution to reduce litigation and facilitating labor-management cooperation.” The major programs of the Board fall into five categories: (1) Dispute Resolution; (2) Compliance – Monitoring, Auditing, and Enforcement (MAE) Program; (3) Worker Advocate Program; (4) Independent Medical Examinations/Medical Fee Schedule; and (5) Technology. A specific description of each program is provided in this section of the report. The Board’s Long Term Business Plan assigns priorities, goals, objectives, and performance criteria (Appendix A). The *Annual Report on the Status of the Maine Workers’ Compensation System* (delivered to the Governor and the Legislature at the beginning of each year) provides a description of the Board’s programs and

progress. The Board's Annual Compliance Report provides a status report on the improved compliance of carriers, self-insureds, and third-party administrators (delivered to the Governor and the Legislature at the end of each year).

Section 8: Ten-year Financial Summary

The Board received an appropriation from the General Fund for Fiscal Year ("FY") 93. However, the Legislature and the Governor decided that the Board should have an independent source of funding. Thus, the Board is considered an independent agency and receives no General Fund money. Instead, the Legislature and the Governor created an assessment on Maine's employers that is used to fund the Board's operations. The Board receives virtually all its revenue from this assessment. The maximum amount that the Board can assess each year is set by statute. In 1993, the maximum assessment was set at \$6,000,000. The maximum assessment has been increased twice: by \$600,000 beginning in FY97 and by an additional \$135,000 in FY00.

The Board's assessment cap was adequate to fund the Board's operations until FY97. In 1997, the Legislature enacted, and the Board implemented, legislation that expanded the Worker Advocate program and created the MAE Program. The Board's assessment was increased by \$600,000 in FY97 and again by \$135,000 in FY00 to pay for these programs. The cost to the Board has been far in excess of the \$735,000 allocated for the task. These two programs cost the Board approximately \$1,500,000 in FY01, more than twice as much as was allocated. The cost of these programs, in addition to increases in employee salaries, the cost of benefits, and general inflation created, in light of the maximum assessment set by law, major budgetary problems for the Board. (Accompanying charts in Section 8 track the Board's allocations and expenditures over the past ten years; they include: Actual and Projected Expenditures; Personnel Changes; and Administrative Fund.)

The Legislature recognized the urgency of the Board's situation. It took two steps: first, the Legislature authorized the use of \$700,000 from the Board's reserve account in FY02, and second, the Legislature authorized a one-time increase in the maximum assessment of \$300,000 to provide temporary assistance to the Worker Advocate Program.

These efforts solved the Board's funding problem for FY02 but the Board, in FY03 and beyond, is facing further budgetary problems stemming from the assessment cap. Possible solutions to the problem include: indexing, which would provide automatic increases in the assessment cap; raising the assessment cap; or a funding scheme requiring an allocation from the Legislature followed by an assessment to raise the approved funding, to include a separate funding mechanism for the Worker Advocate Program and a self-sustaining MAE Program.

If no changes are made to the Board's funding formula, the Board will be forced to make deep cuts in FY03. These cuts will total approximately \$1,100,000. The major part of these cuts will come from the Personal Services budget.

Section 9-A: Constituency Served by Agency

The Board's Mission Statement clearly identifies the constituency of the Board as the "employees" and "employers" of the State.

The projected changes to enhance its service to these constituents rest largely in the expansion of the MAE Program which has led to greater compliance by insurers, self-insureds, and third-party administrators and which will ultimately lead to fewer disputes, providing greater benefits to both employees and employers of the State. This section references the Board's Annual Compliance Report reflecting the improvement of compliance due to the efforts of the MAE Program.

Section 9-B: Compliance with Federal and State Safety and Health Laws Including the American with Disabilities Act

The Board has established a Safety and Health Committee and has developed many policies designed to ensure compliance with health and safety laws and the Americans with Disabilities Act.

Section 10-A: Areas Where Efforts Have Been Coordinated with Other Agencies

The Board has had varying degrees of success in its efforts to coordinate its work with other state and federal agencies. This section sets forth information on the Board's successes and failures in these areas.

Section 10-B: Efforts at Alternative Delivery Systems Including Privatization

The Board is committed to increasing the electronic transfer of information which would lead to greater efficiencies and more reliable data. The Board is cooperating with the International Association of Industrial Accident Boards and Commissions (IAIABC) to implement its most recent program referred to as Combined Claims Product. The Board might privatize some functions in this endeavor.

Section 11: Emerging Issues for the Board

The Board's budget is an issue of paramount importance. Without a change in its funding mechanism, the Board will be forced to make drastic cuts to its Personal Services budget. This will undo virtually all of the progress that the Board has made in recent years in terms of the dispute resolution process, the Worker Advocate Program, and the MAE Program.

An effective MAE Program is a key component of the Board's effort to reduce the number of claims that must be resolved by the Board. Additional resources **must** be shifted to this program.

The Board has a number of technology and programming initiatives which must be completed. Resources must be found to devote to this effort.

Section 12-A: Summary of Coopers & Lybrand Report

This section provides a status report on the recommendations submitted to the Board by Coopers & Lybrand on December 15, 1997. Attached to this section are “Scorecards” marking the Board’s progress in these areas.

Section 12-B: Berry, Dunn, McNeil & Parker Study

This study was commissioned by the Legislature and is being conducted by the firm of Berry, Dunn, McNeil & Parker. The final report is due on December 15, 2001, with a presentation scheduled for the Advisory Committee on December 3, 2001. **The Berry, Dunn, McNeil & Parker Report, taken in tandem with this Government Evaluation Act Report, should provide policymakers with the necessary information required to determine the efficiency of both the governance and administrative structure of the Workers’ Compensation Board.**

2-A. Enabling Legislation and History of Maine Workers' Compensation

1. Enabling Legislation Maine Workers' Compensation Board.

39 M.R.S.A. §101, et. seq. (Maine Workers' Compensation Act of 1992)

On January 1, 1993, Title 39, which contained the Workers' Compensation Act of 1991 and all prior workers' compensation acts, was repealed and replaced with Title 39-A, the Workers' Compensation Act of 1992.

2. State Agency History.

State Agency History

I. State Agency History.

The original agency, the Industrial Accident Board, began operations on January 1, 1916. In 1978, it became the Workers' Compensation Commission. In 1993, it became the Workers' Compensation Board.

II. The Early Years of Workers' Compensation.

A transition from common law into the statutory system we know today occurred during the late teens and early 1920's. Earlier, an injured worker had to sue his employer and prove fault to obtain compensation.

Workers' compensation was conceived as an alternative to tort. Instead of litigating fault, injured workers would receive a statutorily determined compensation for lost wages and medical treatment.

Employers gave up legal defenses such as assumption of risk or contributory negligence. Injured workers gave up the possibility of damages, beyond lost wages and medical treatment, such as pain and suffering and punitive damages.

This historic bargain, as it is sometimes called, remains a fundamental feature of workers' compensation. Perhaps because of the time period, financing and administration of benefit payments remained in the private sector, either through insurance policies or self-insurance.

Although the law sets the benefit levels, disputes about entitlement to benefits are between the employer or its insurance carrier and the injured worker.

Workers' compensation disputes still occur in a no fault system. For example, disputes arise as to whether the disability is related to work; how much money is due the injured worker; and, how much earning capacity has been permanently lost. Maine, like other states, established an agency to process these disputes and perform other administrative duties.

Early law required that hearings be held in the town where the worker resided. Early Commissioners, insurance company lawyers, and agency clerical staff, traveled in a caravan of cars from town to town, holding hearings in whatever meeting rooms could be secured, including fire stations and other informal locations.

Disputes were simpler. Injured workers rarely had lawyers. Expensive, long term, medically complicated claims, such as carpal tunnel syndrome or back strain, were decades away.

III. Adjudicators as Fact Finders.

In 1929, the Maine Federation of Labor and an early employer group listed as "Associated Industries" opposed Commissioner William Hall's re-nomination. Testimony from both groups referred to reversals of his decisions by the Maine Supreme Court.

This early feature of Maine's system, direct review of decisions by the Supreme Court, still exists today. The Supreme Court decides issues regarding legal interpretation, and does not conduct a whole new trial. In Maine, the state agency adjudicator has historically been the final factfinder.

A review of the U.S. Chamber of Commerce Publication, *2000 Analysis of Workers' Compensation Laws*, indicates that in 35 states the decision of the first fact finder is subject to an appeal of factual findings. Sixteen states have an appeal to district or circuit court.

This diversity complicates state to state comparisons because significant elements of the litigation process may occur outside the state agency.

Except for appeals to the Law Court, Maine's workers' compensation litigation takes place entirely within the state agency. This is a significant historical and contemporary feature.

Until 1993, Commissioners were gubernatorial appointments, subject to confirmation by the legislative committee on judiciary. The need for independence of its quasi-judicial function was one of the reasons why it was established as an independent agency, rather than as a part of a larger administrative department within the executive branch. The smaller scale of state government in 1916 no doubt also played a role.

IV. Transition to the Modern Era.

In 1965, an article appeared in the *Bangor Daily News*. It foreshadowed the contentious, political issue that workers' compensation became in the 1980's.

The lead paragraph contained the following statement: "There is an agency housed in the State Office Building that was responsible for paying Maine workers an easy \$10 million last year, but you couldn't guess its name if you tried all day . . . It's the Industrial Accident Board headed by Chairman Harold Towle"

The article described the hearing process and expanding workload. Towle cited the need for more staff and Commissioners. Also, Towle was quoted as describing recent changes to the statute as "radical . . . they're a lot more liberal than they ever were." He cited such things as employee rather than employer choice of treating physician and benefits for total incapacity being increased from \$42 a week to \$57 a week with a limit of 500 weeks.

In 1974, workers' compensation coverage became mandatory. This and other significant changes to the statute were passed without an appropriation for the Industrial Accident Commission. In 1974, the agency had approximately the same staff and budget as in 1964.

In 1964 insurance carriers reported about \$3 million in direct losses paid. By 1974 that had grown to about \$14 million of direct losses paid. By 1979, direct losses paid by carriers totaled a little over \$55 million. By 1984, it had grown to almost 128 million. These figures don't reflect benefits paid through self-insurance.

This exponential growth of the system reflected legislative changes during the 1970's and set the stage for a series of workers compensation crises that occurred throughout the 1980's and into the early 1990's.

V. The 1970's.

During the early 1970's time limits were removed for both total and partial wage loss benefits. Inflation adjustments were added. The maximum benefit was set at 200% of the state average weekly wage.

Also, laws were passed making it easier for injured workers to secure the services of an attorney. The availability of legal representation greatly enhanced an injured worker's likelihood of receiving benefits, especially in a complex case.

Lastly, statutory changes and evolving medical knowledge brought a new type of claim into the system. The law no longer required a specific accident. Doctors began to connect injuries such as carpal tunnel syndrome and back problems to work and thus brought these injuries within the coverage of workers' compensation.

Such injuries required benefit payments for longer periods than most accidental injuries. These claims were more likely to involve litigation.

The recommendations of a national study of workers' compensation, known as The Report of the National Commission on State Workers' Compensation Laws, were issued in 1972. The report recommended benefit increases and had bipartisan support. The report made an effort to estimate the cost effect of the proposed changes, but it was dramatically underestimated.

Over the course of a decade, rising costs quickly transformed workers compensation into a difficult political issue that would come close to paralyzing state government in the late 1980's and early 1990's.

This larger political environment was, of course, reflected in the circumstances facing the state agency.

VI. The 1980's.

In 1978, the name of the agency was changed to the Workers' Compensation Commission. In 1980, Commissioners became full-time. In the early 1980's, an informal conference process was added to attempt to resolve disputes early in the claim cycle, before a formal hearing.

Additionally, regional offices were established in Portland, Lewiston, Bangor, and Caribou. In 1988, a regional office was established in Augusta, separate from the central administrative office. According to the Maine State Government Annual Report, the agency had 36 employees in 1983. The same report in 1986 shows 68 employees and in 1990 100 employees.

During the 1980's the agency made a transition into the format the public recognizes today: a multipurpose agency with a mixture of dispute resolution, record keeping, and regulatory operations. In Fiscal Year 2002, the agency has 118.5 employees. The additional positions primarily reflect the establishment of a Worker Advocate program in 1997.

In the early 1980's, long delays in the formal hearing process were a chronic source of legislative concern. In 1986, the state agency issued a study of delay. It chronicled the growth in litigation and recommended more Commissioners.

In 1987, three full-time Commissioners were added, bringing the total to 11, not including the Chair. Today, in 2002, the Board has eight Hearing Officers, not including the Chief Hearing Officer.

Parallel to controversy about delay at formal hearings was a second controversy concerning private adjustment, particularly cases in the assigned risk pool. At its heart this issue was about escalating claim costs more than adjustment. However, statutory changes began to call for increased monitoring of adjustment activity by the state agency.

During the mid 1980's, the state agency began to computerize. Its first system was installed in mid-1985. However, the early technology was not really adequate for the task at hand. It was not until approximately 1997, with the installation of a relational database, that the agency began to begin executing the operations envisioned nearly a decade earlier.

The workers' compensation environment of the 1980's and early 1990's was an extraordinary time in Maine's political history. Contentious legislative sessions regarding workers' compensation occurred in 1982, 1985, 1987, 1991, and 1992. In 1991, then Governor John McKernan tied his veto of the State Budget to changes in the workers' compensation statute. State Government was shut down for about three weeks.

This and other state budget problems, related to a national recession, made the late 1980's and early 1990's a challenging period to be either an elected official or a public administrator.

VII. The 1990's.

Finally, in 1992, a Blue Ribbon Commission made a series of recommendations which were ultimately enacted.

Inflation adjustments for both partial and total benefits were eliminated. The maximum benefit was set at 90% of state average weekly wage. A limit of 260 weeks of benefits was established for partial disability.

These changes represented substantial reductions in benefits for injured workers, particularly those with long term disabilities. To a significant degree, the comp issue was addressed by rolling benefits back to the levels of the late 1960's.

Additionally, the section of the statute concerning access to legal representation was changed in a way that made it more difficult for injured workers to secure the services of private attorneys.

Maine Employers' Mutual Insurance Company was established. It replaced the assigned risk pool and offered a permanent source of coverage. Despite differing views on the nature of the problems within the preceding and current system, virtually all observers agree that MEMIC has played a critical role in stabilizing the workers' compensation environment in Maine.

VIII. The Workers' Compensation Board.

Lastly, the state agency was renamed and significantly reorganized. At about this time, a labor-management group provided a successful forum for discussing comp issues.

Based on the recommendation of the Blue Ribbon Commission, the current Board was proposed as an experiment to help move the workers' compensation issue out of the political process by directly involving labor and management in the administration of the State agency.

The new agency was to be directed by a board of directors consisting of four members of labor and four members of management, appointed by the Governor based on nomination lists submitted by the Maine AFL-CIO and Maine Chamber of Commerce.

The Board would hire an executive director to run the agency. The Board, not the Governor, would appoint Hearing Officers to adjudicate Formal Hearings. A two step process replaced informal conferences: troubleshooting and then mediation.

In 1997, legislation was enacted which provided more structure to case monitoring operations of the Board. Also in 1997, a worker advocate program, begun by the Board, was expanded by the Legislature.

Few would argue that the Board's structure moved workers' compensation out of the political process. Bills concerning workers' compensation still appear regularly on the calendar of the Labor Committee.

In terms of both regulatory and dispute resolution operations the Board has experienced significant accomplishments. In terms of its traditional operation, dispute resolution, the Board can show an efficient informal process. Between troubleshooting and mediation, approximately 75% of initial disputes are resolved within 80 days from the date a denial is filed.

Remaining cases usually present difficult questions about facts and the law, the types of disputes that lend themselves to litigation as a mode of dispute resolution.

The no fault system works better than many people realize for routine injuries. Simple claims where there is a specific accident, a defined healing period, and a short period of missed work are paid and processed without incident.

Litigated cases tend to involve long-term disabilities involving back problems and other soft tissue injuries where there is substantial wage loss and expensive medical treatment at issue. The connection to employment is rarely crystal clear.

In an apples to apples comparison, matching the complexity of the dispute and the type of litigation, the Board's average time frame of seven to eight months for formal hearings is rapid, compared to other states, and especially if compared to court systems for comparable personal injury cases.

The agency was criticized for not doing more with its data gathering and regulatory operations during the late 1980's and early 1990's. Internally, the agency saw itself as doing its best in an environment of national recession, state budget problems, yearly contentious legislative sessions, and statutory revisions. However, minimal development of these operations occurred until approximately 1998.

With the benefit of a relational database installed in mid-1996 and 1997, and a modern programming language, the agency is making progress. Filings of first reports and first payment documents are systematically tracked. Significant administrative penalties have been pursued in several cases. The computer applications and the abuse unit are doing a better job of identifying employers, typically small employers, with no coverage. No coverage hearings are regularly scheduled.

2-B. Regulatory Agenda and Summary of Rules Adopted

Attachment A: Summary of Rules Adopted
Attachment B: Regulatory Agenda

The Government Evaluation Act requires submission of an agency's regulatory agenda, and a summary of the rules it has adopted. 5 M.R.S.A. §956(2)(F). A copy of the Board's most recent regulatory agenda (filed on October 1, 2001) is attached. For the sake of completeness, a copy of the Board's rules is enclosed; for the sake of ease, a summary of the rules follows.

Chapter 1 regulates the payment of benefits, and includes some form filing requirements. It also defines fringe benefits and requires that the Board be notified within 14 days after issuance, renewal, or endorsement of a workers' compensation policy.

Chapter 2 contains the threshold adjustment and 52-week extensions; it regulates the collection of permanent impairment data and establishes a procedure for seeking extended benefits due to financial hardship.

Chapter 3 regulates form filing.

Chapter 4 establishes the Independent Medical Examiner process.

Chapter 5 contains the Medical Fee Schedule which establishes maximum levels of reimbursement for medical services.

Chapter 6 defines the process for resolving disputes over entitlement to vocational rehabilitation.

Chapter 7 regulates the utilization review process, includes certain treatment guidelines and defines the method of determining permanent impairment.

Chapter 8 sets forth procedures for mailing payments (including some form filing requirements), establishes a table for calculating interest, and creates a Consent Between Employer and Employee form and procedure.

Chapter 9 requires insurers to report deductions in workers' compensation payments that result from a coordination of benefits.

Chapter 10 establishes the parameters for payment of attorney's fees.

Chapter 11 deals with the mediation process and provides for the confidentiality of mediation.

Chapter 12 governs the procedures involved in formal hearings. This chapter is a linchpin in the Board's effort to streamline dispute resolution.

Chapter 14 establishes the procedure for Board Review of Hearing Officer Decisions pursuant to 39-A M.R.S.A. §320.

Chapter 15 delegates authority to the Abuse Investigation Unit to assess certain penalties. It also sets forth the procedure to be used in penalty cases.

Chapter 16 provides for the confidentiality of Board files.

Chapter 13 and 17 are reserved for future use.