

# Advisory Council on Workers' Compensation and Occupational Disease Disablement Annual Report – 2014



Presented to:  
The Honorable Susana Martinez  
Governor

The Honorable John. G. Franchini  
Superintendent of Insurance

and  
Senate President Pro – Tempore  
Speaker of the House  
Senate Majority Floor Leader  
House Majority Floor Leader  
Senate Minority Floor Leader  
House Minority Floor Leader  
Chair, Senate Finance Committee  
Chair, Senate Corporations and  
Transportations Committee  
Chair, House Appropriations and  
Finance Committee  
Chair, House Business and Industry Committee  
Chair, House Labor and Human  
Resources Committee

Submitted by:  
Kevin J. McGinley, Chair  
James Magoffe, Vice Chair  
Scott LeFevre, Member  
Melinda Joy Pattison, Member  
Dain Symes, Member  
Tom Willis, Member

# Annual Report of the Advisory Council on Workers' Compensation and Occupational Disease Disablement - 2014

The Advisory Council on Workers' Compensation and Occupational Disease Disablement is a statutory body created by the Workers' Compensation Law of New Mexico, whose members are appointed by the Governor to represent employers and workers. Our duty is to report annually to the Governor and Legislature concerning the state of the workers' compensation system and to make recommendations regarding rules and legislation.

## **Mission**

The mission of the Advisory Council on Workers' Compensation and Occupational Disease Disablement is:

- to monitor the performance of the workers' compensation and occupational disease and disablement system; and
- to make recommendations to the Governor, Legislature, regulatory agencies and participating industries, related to the adoption of rules and legislation and the method and form of statistical data collections

to ensure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to employers.

A part of the major legislative reform of the workers' compensation system was to create the Advisory Council to review potential amendments to the Act. The Council listens to all parties, obtains available data, and seeks to determine the cost and benefit to the system that may occur by any amendment. The Council endeavors to build a consensus among business and labor, and any other affected stakeholders, on any change to the Act before making any recommendation to the Governor and Legislature.

The success of our system is based on the law itself. The challenge is to sustain a system that balances the needs of workers and employers fairly. The Advisory Council is one of the mechanisms created by the Legislature to accomplish this objective.

The Council has six appointed members, and the Director of the Workers' Compensation Administration serves as an ex officio, non-voting member. The Council is made up of three representatives from labor and three representatives from the business community.

## **Recommendations for the 2015 Legislative Session**

The Advisory Council has several major recommendations for the 2015 legislative session. The workers' compensation community spent much of 2014 pushing for clarity in the law so that implementation of workers' compensation runs more smoothly. A lack of clarity in the law has come about as a result of several appellate court cases.

The Advisory Council's mission is to make recommendations to the Governor and Legislature regarding some of the current challenges facing the system:

- Lack of clarity in the law

The WCA system needs a consistent interpretation of the law in order to pay claims predictably, consistently and without adjudication

- An eroded incentive for return to work

To fulfill its mission, the committee will recommend bills be introduced in the 2015 Legislative Session to address clarification on the following:

#### *Temporary Disability Payments*

A recent New Mexico Supreme Court case held that temporary disability payments are not subject to the 700 week limitation in §52-1-47 of the Workers' Compensation Act. (*See Fowler v. Vista Care*). This was a dramatic change to the historic understanding of both the Administration and the workers' compensation community. The workers' compensation laws are geared toward getting the worker back to work with minimal dependence on compensation awards. *See* § 52-1-26(A). They aren't generally designed to provide a lifetime benefit. The legislature should clarify the period in which temporary disability payments are owed and clearly set forth the maximum potential duration. This would serve at least two purposes: First, it would promote balance in the workers' compensation system. Second, it would restore clarity and predictability to a system that desperately needs both. Without predictability in the limitation, insurers will have difficulty setting premium rates. Reserves may be difficult to set, especially for self-insured employers.

#### *Return to Work*

The 1990 legislative reforms on workers' compensation were meant to encourage a return to work and to discourage reliance on compensation benefits. The WCA's mission is to assure that every person who suffers a compensable injury with a resulting disability should be provided the opportunity to return to work. Worker outcomes are much better when they return to work with the at-injury employer as quickly as possible. Recent appellate court cases challenge these goals. In *Hawkins v. McDonald's*, the court required an employer to continue to pay total disability benefits to an employee after the injured employee returned to work and was subsequently terminated for violation of the company's sexual harassment policy. The court ruled that without further legislative guidance, disability benefits cannot be taken away even after an employee has been terminated for cause. In *Cordova v. KSL Union*, the courts required the employer to pay full disability benefits to the injured worker even after the employee elected to retire rather than return to his job. The Advisory Council recommends that the legislature clarify the circumstances under which injured workers should receive benefits when they opt not to return to work or when they are terminated for cause unrelated to their injury.

The decision in the case of *Hansen v. Churches Chicken* restricts ex parte communication between the health care provider and the employer or insurer. This restriction effectively slows the claim process. Communication is necessary to address questions regarding return to work status, medical causation and treatment plan. Slowing the process is contrary to the goals of the workers' compensation system.

### *Intoxication*

A third area of clarification for the legislature lies in the area of intoxication. The WCA system would benefit from clear parameters of the law on what happens when drugs or alcohol cause an on the job injury. New Mexico's appellate courts have ruled that the current statutory provisions are neither workable nor clear (*Villa v. City of Las Cruces*).

Two intoxication bills were introduced in the 2014 legislative session, neither of which made it out of committee.

### *Cases on Appeal*

The workers' compensation system continues to await guidance from New Mexico appellate courts on the status of the farm and ranch exemption in the Workers' Compensation Act. In 2012, a district court judge in Bernalillo County ruled that the exemption violated the equal protection clause of the Constitution. Further guidance is necessary from the courts or the legislature on how that ruling will apply to farm and ranch employers statewide.

### **The Advisory Council submitted the following endorsements to the 2014 Legislature:**

- The concept of clarifying the Alcohol and Drug policy for determining workers' compensation benefits and to consolidate three parts of the Workers' Compensation Act that created ambiguity in determining benefits when alcohol and drugs may be a factor in a workers' injury. The New Mexico Court of Appeals has declared these sections of the Act are ambiguous and have requested a legislative fix. The Council supported Governor Martinez' House Executive Message No. 16, dated January 23, 2014, to open discussion to attempt to resolve this important issue.
- The Workers' Compensation Administration Fund is supported by a quarterly fee that is assessed against each employer and worker in New Mexico who is required or elects to have coverage to fund the operations for the Workers' Compensation Administration. From FY 2007 to FY 2014, \$18,758,000 has been removed from the fund to support other agency's programs. The Advisory Council stands firm in its belief the fund should be exclusively reserved for the use of the Administration and not diverted from its intended purpose to support the workers and employers of New Mexico through the Workers' Compensation Administration.

### **A few bills were signed into law earlier this year that will potentially have an impact on New Mexico Workers' Compensation law:**

**House Memorial 40** requests the WCA conduct a study on the effect of Post-Traumatic Stress Disorder (PTSD) on first responders. The WCA was also asked to review the current presumptions in the Occupational Disease and Disablement Law (ODDL) via a task force and public participation. The WCA will prepare a report to the legislature with its findings.

**Senate Bill 9** requires the WCA to participate in the creation of an on-line One Stop Business Portal where businesses will have access to workers' compensation information and the ability to pay their

workers' compensation assessment. Electronic filing and access to information will streamline information and data entry.

**Premiums**

There is a filing increase of lost cost levels for the voluntary market that has been approved for +2.3 percent that is effective January 1, 2015. The increase continues in large part due to experience and trends over the past few years and an increase in benefits and medical costs. The annual filing adjustment is the base rate insurance carriers use in their formulas to determine premiums.

The Assigned Risk Pool continues to experience an increase for the second time in two years. The 2015 filing shows an increase for 2015 of +3.3 percent. The increase is due to an increase in experience, trend, benefits and medical costs. The Assigned Risk Pool Rates are actual or "pure premium" rates. These rates have all "items included for expenses."

According to the National Council on Compensation Insurance (NCCI), a plus or minus of 5 percent is considered actuarially stable.

**Workers' Compensation rate history over the last eight years:**

	2008	2009	2010	2011	2012	2013	2014	2015
<b>Voluntary Market:</b>	-4.9	-6.7	-4.5	+4.2	+7.4	+5.1	+4.0	+2.3
<b>Assigned Risk Pool:</b>	-11.1	-1.3	-0.9	0.0	-5.0	0.0	+2.2	+3.3

The State Average Weekly Wage (SAWW) for benefits increased 1 percent to \$764.18 from \$759.89 in 2014, effective January 1, 2015.

**Status of the Workers' Compensation Administration**

The New Mexico Workers' Compensation Administration (WCA) has been fully engaged to meet its primary goal of making a better workplace for New Mexico through responsive and effective services. The WCA's mission is:

"To assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers."

**Budgetary Consequences on the Agency**

The WCA budget remained flat at \$11.7 million in FY 2015.

In FY 2012-2013, the WCA was directed to transfer \$1 million dollars from its operational budget to the Department of Workforce Solutions (DWFS). In FY 2014, the transfer amount was \$900,000. The annual WCA operational budget was therefore somewhat reduced, though the UEF funding was slightly up. There was a request to the Legislature to end the practice of annual fund transfers.

**Some of the major initiatives the WCA accomplished are:**

- The agency made some significant new hires, to include Catherine Farrell, Human Resources Manager, Mark Plomer, Uninsured Employer Fund Manager, and new General Counsel Rachel Bayless. The current vacancy rate is around 7 percent. A mediation program manager and an ombudsman program manager will be hired shortly. The agency attempts to fill vacant positions quickly and without a loss of services to the public.
- Judge Leonard Padilla was reappointed to a five-year term as a workers' compensation judge.
- A survey on the use of the new Official Disability Guidelines was created and made available to participants in the WCA system.
- A survey about substance abuse in the workplace and possible contribution to workplace injuries was created and made available to WCA system participants.
- An Open House for providers was held so that providers could meet WCA staff and judges.
- At the annual All-Hands Meeting, each bureau presented its mission. The meeting's theme was "Going Above and Beyond."
- The WCA pushed forward its annual rulemaking in order to meet the *Michie's* publication deadline. The rules contained in the widely used workers' compensation statute book are now current rather than a year behind.
- The WCA held a third annual Settlement Week October 27<sup>th</sup> through October 31<sup>st</sup>. Of the 136 scheduled conferences, 75 were settled, for a 55 percent settlement rate.
- The annual budget was submitted to the Legislative Finance Committee with no questions or adjustments. Funds were requested to complete building renovations at the Albuquerque location, and enough funds to commission a study similar to a 1990 RAND study to look at return to work issues and other workers' comp issues. There was also a request to the Legislature to end the practice of funds transfer out of the WCA budget for the Department of Workforce Solutions.
- The proposed 2015 Medical Providers Fee Schedule was drafted and opened for public comment through November 19. The Fee Schedule is now published and will take effect January 1, 2015.
- WCA Director Darin Childers, Advisory Council Chair Kevin McGinley and/or Vice Chair James Magoffe have made presentations to several legislative committees, to include the Economic and Rural Development; Courts, Corrections and Justice; and the Jobs Council.

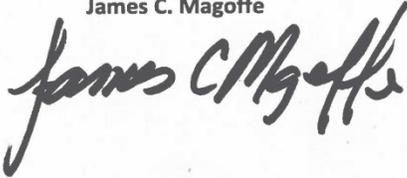
**Rule changes enacted:** The WCA made changes to the WCA Rules, effective October 1, 2014, including updates to Part 1, General Provisions; Part 4, Claims Resolution; and Part 5, Enforcement and Administrative Investigations. These changes streamline the dispute resolution process, set forth the process for production of WCA records to the public, clarify how the agency enforces the law, and define the offenses of *bad faith* and *unfair claims processing*.

**Conclusion:** The New Mexico Workers' Compensation Administration is stable and working on initiatives to remain responsive to the dynamic challenges of the overall system and the current economic environment.

This report was approved by the Advisory Council on Workers' Compensation and Occupational Disease Disablement during a regular session on December 11, 2014.

Respectfully submitted:

James C. Magoffe



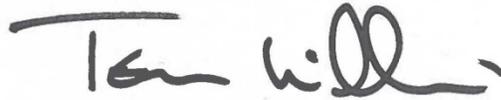
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