STATE OF WEST VIRGINIA

FULL PERFORMANCE EVALUATION OF THE WORKERS' COMPENSATION DIVISION

Occupational Pneumoconiosis Board

Excessive Compensation

Board Vacancy

OFFICE OF LEGISLATIVE AUDITOR
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PE98-17-109

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November 1998

WEST VIRGINIA LEGISLATURE

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November 15, 1998

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Vicki Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Full Performance Evaluation of the *Workers' Compensation Division - Occupational Pneumoconiosis Board*, which will be reported to the Joint Committee on Government Operations on Sunday, November 15, 1998. The issues covered herein are *"Excessive Compensation and Board Vacancy."*

We conducted an exit conference with Workers' Compensation on October 29, 1998 and the Agency did not respond in writing by November 9, 1998 printing deadline as requested in the transmittal letter on page 23 of this report.

Should you have any questions, let me know.

Sincerely,

Antonio E. Jones

AEJ/wsc

TABLE OF CONTENTS

Executive Summary 7

Background, Objective, Scope and Methodology 11

Issue Area 1: Compensation to the Workers' Compensation Occupational Pneumoconiosis Board is excessive 15

Issue Area 2: The Workers' Compensation Occupational Pneumoconiosis Board currently has a vacancy for a roentgenologist 29

Appendix A: Occupational Pneumoconiosis Standard Exam 31

Appendix B: OP Board Exam Hours Survey Response 35

Appendix C: OP Board Earnings Detail and Estimated Hours 39

Appendix D: Transmittal Letter to Agency 43

Appendix E: Agency Response 49

TABLE OF TABLES

Table A: OP Board Pay and National Benchmarks, Part-time 8

Table 1: Member Self-Reported Estimates of Time Per Week Spent on Evaluations 17

Table 2: Total Compensation for OP Board Members 18

Table 3: Other OP Board Expenses 19

Table 4: 1995 Net Income After Expenses, Before Taxes, Per Physician 20

Table 5: Unadjusted Income of Physicians: 1995 Total, Income Per Hour and Income Per Visit 21

Table 6: OP Board Physician Income: Listed by Individual Board Members 21

Table 7: Total Hours Worked by OP Board Members: As a Percentage of a Full-Time Workweek 23

Table 8: OP Board Pay and National Benchmarks, Part-time 25

Table 9: Comparable Full-time OP Board Pay and National Benchmarks 25

Table 10: OP Board Pay and National Benchmarks, Part-time 26

Executive Summary

When a workers' compensation claimant applies for compensation for occupational pneumoconiosis, the Commissioner of the Bureau of Employment Programs may order a claimant to appear before the Occupational Pneumoconiosis Board. The function of the Board is to determine all medical questions relating to cases of compensation for occupational pneumoconiosis under the direction and supervision of the Commissioner. The Board is comprised of five physicians, two of which shall be roentgenologists. A roentgenologist is a radiologist specially certified in the diagnosis of occupational pneumoconiosis. Any three members of the Board constitute a quorum, provided that one of the members present is a roentgenologist. The Board meets on Tuesday and Thursday mornings for the purpose of examining 70 claimants (65 live claimants and 5 files of records of deceased claimants each meeting).

According to §23-4-8a of the West Virginia Code, the Commissioner shall fix the per diem salary for Board members, computed on the basis of actual time devoted to the discharge of their duties. Board members may also receive reasonable and necessary travel and other expenses incurred while actually engaged in the performance of their duties. In addition to receiving compensation for examination sessions, members are also compensated $300 per hour for medical testimony given on Mondays, Wednesdays, and Fridays, before the Office of Judges. This testimony is related to exams they previously administered. In 1983, the Workers' Compensation Commissioner established a rate of $120 per hour for members of the OP Board which was capped at $960 per diem. This rate was based on the assumption that each exam would require 30 minutes to complete, which this report shows to be incorrect. **The current per diem rate structure has taken the form of piece rate compensation and pays each Board member $60 per claimant examined by the Board each meeting. This totals to $4,200 per meeting, per physician, assuming that all scheduled claimants show up at the clinic.**[1] Frequently, 5-7 live claimants fail to attend a typical examination session. There is no longer a cap on the amount paid. Calculating compensation in this manner does not meet the definition of a per diem rate. A per diem rate is not an hourly rate or a piece rate, but a fixed rate for each day of service.

Using survey data collected by the American Medical Association's Center for Health Policy and Research, it is clear that the OP Board physicians receive levels of compensation that far exceed those of other physicians in the same specialty of practice (see Tables A and B below). Members of the OP Board only work part-time. Three of the Board's four members also maintain private practices in addition to receiving compensation for their participation on the OP Board. The Board is comprised of a pulmonary specialist, two internal medicine specialists, and a roentgenologist. In 1995, radiologists in the 75th percentile, arranged according to income, earned $310,000 per annum. Their counterpart on the OP Board earned $315,287 and only worked 40% of the typical physician's

[1]On average, 10% or 5-7 live claimants either cancel or otherwise fail to attend their scheduled exam session.

56-hour workweek.[2] Likewise, when comparing the typical internal medicine specialist in the 75th percentile with OP Board members in the same specialty, we find similar results. While the typical income for a full-time internal medicine specialist was $214,000 in 1995, one of the internal medicine specialists on the OP Board earned $174,621 and worked 25% of the time.[3] The tables below show that members were paid up to 226% in excess of national 75th percentile level of pay and indicates nearly $600,000 in excessive payments for 1995 alone.

Table A
OP Board Pay and National Benchmarks, Part-time

Member	1995 WC Earnings	1996 WC Earnings	1997 WC Earnings	1998 WC Earnings	1995 Comparable National Pay at 75th Percentile*
Radiologist (% full-time)	$315,287 (40%)	$551,759 (42%)	$407,813 (44%)	$352,802 (41%)	$310,000 (100%)
Pulmonary Specialist (% full-time)	$335,274 (53% full-time)	$520,828 (54%)	$388,909 (56%)	$359,376 (53%)	$264,340 (100%)
General Practitioner former member (% full-time)	$140,961 (25%)	$227,040 (26%)	$168,091 (26%)	$78,624 (23%)	$214,000 (100%)
General Practitioner former member (% full-time)	$174,621 (25%)	$307,723 (25%)	$102,158 (23%)	$290 (21%)	$214,000 (100%)
Internist (% full-time)	$0 (0%)	$0 (0%)	$0 (0%)	$113,495 (23%)	$214,000 (100%)
Internist (% full-time)	$0 (0%)	$0 (0%)	$121,792 (24%)	$176,995 (25%)	$214,000 (100%)

* American Medical Association data used except for pulmonary specialist. No AMA data was readily available for pulmonary specialist, thus WVU hospital data was used to project what, in relationship to internists and radiologists, a pulmonary specialist would earn. This projected to $264,340 annually, at the 75th percentile. AMA physician income data does not include residents and physicians employed by the federal government.

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[2]Based on self-reported work time estimates by the current Board and actual testimony hours.

[3]Based on self-reported work time estimates by the current Board and actual testimony hours.

Table A shows that the two Board members who attend every exam session, the pulmonologist and the radiologist, consistently earn more than many others in their same specialties of practice. By comparing their incomes with other physicians in the 75th percentile of income levels, it is possible to see that Board members earn more than many of the higher paid members of their profession. The two internists, though they have not served on the Board for very long and only serve bi-monthly, receive high rates of compensation for their services. Considering that each of them attends half of the meetings that take place, they too would receive compensation that exceeds the 75th percentile, or approximately double their current income, if they attended every meeting.

It is clear that the compensation received by the members of the OP Board is excessive given the number of hours worked. The Commissioner should promptly establish a new pay structure for OP Board members. It is also recommended that the Workers' Compensation Division maintain accurate records of time Board members spend in the discharge of their duties.

In addition to the Board's excessive compensation, the Workers' Compensation Division's management information system erroneously switched payments due to one vendor and sent them to another. As a result, a hospital received $4,980 in examination fees due to the OP Board physicians, and facility use fees totaling $86,195 were paid to the OP Board's physicians. The data provided by the Workers' Compensation Division for this review indicates that a full recovery of the amounts incorrectly paid has not been made by the Division. The Division should investigate and fully recover payments that have been made to vendors in error. The Division claimed that a full recovery of facility fees accidentally paid to OP Board members had already been made. As of November 4, 1998 the Division had not yet produced sufficient documentation to verify this.

The OP Board currently has a vacancy for a roentgenologist. This vacancy has existed for the last 15 to 20 years. It originally occurred when one of the Board's two roentgenologists retired and the remaining one assumed the duties of both. No attempt has been made to fill the vacancy because it was felt that since the remaining roentgenologist ceased his private practice, his availability would be adequate for the Board's needs. If the remaining roentgenologist is unable to attend an examination meeting, a quorum will not exist since no other member can take his place. The requirements that the Board must include two roentgenologists and that one roentgenologist be present to have a quorum are matters of statute. Should the roentgenologist become unable to attend, OP claims could not be evaluated, causing work flow disruption, delay and frustration. The Commissioner should appoint an additional roentgenologist as soon as a qualified specialist can be identified.

Background, Objective, Scope and Methodology

This full performance evaluation of the West Virginia Workers' Compensation Division was conducted in accordance with the West Virginia Sunset Law, Chapter 4, Article 10 of the *West Virginia Code.* A full performance evaluation is a means to determine whether or not an agency is operating in an efficient and effective manner and to determine whether or not there is a demonstrable need for the continuation of the agency. The evaluation will help the Joint Committee on Government Operations determine the following:

- if the agency was created to resolve a problem or provide a service;
- if the problem has been solved or the service has been provided;
- the extent to which past agency activities and accomplishments, current projects and operations and planned activities and goals are or have been effective;
- if the agency is operating efficiently and effectively in performing its tasks;
- the extent to which there would be significant and discernable adverse effects on the public health, safety or welfare if the agency were abolished;
- if the conditions that led to the creation of the agency have changed;
- the extent to which the agency operates in the public interest;
- whether or not the operation of the agency is impeded or enhanced by existing statutes, rules, procedures, practices or any other circumstances bearing upon the agency's capacity or authority to operate in the public interest, including budgetary, resource and personnel matters;
- the extent to which administrative and/or statutory changes are necessary to improve agency operations or to enhance the public interest;
- whether or not the benefits derived from the activities of the agency outweigh the costs;
- whether or not the activities of the agency duplicate or overlap with those of other agencies, and if so, how the activities could be consolidated;
- whether or not the agency causes an unnecessary burden on any citizen by its decisions and activities; and,
- what the impact will be in terms of federal intervention or loss of federal funds if the agency is abolished.

The reported inquiry relates to the statutory compliance and efficiency issues of the Workers' Compensation Occupational Pneumoconiosis Board. This report covers the period of July 1, 1994 to June 30, 1998 (FY95-FY98). This report is the second of several anticipated installments of the 1998 Full Performance Evaluation of the Workers' Compensation Division. The first report of the 1998 Full Performance Evaluation was reported in September 1998 and related to the Workers' Compensation Division elimination of a permanent total disability backlog and compliance with the Anderson v. Vieweg writ of mandamus. This evaluation included a planning process and the development of audit steps necessary to collect competent, sufficient and relevant evidence to answer the audit objectives. Physical, documentary, testimonial and analytical evidence used in the

evaluation was collected through interviews, review of agency records, outside research and site visitations.[4] The evaluation was conducted in accordance with Generally Accepted Government Auditing Standards (GAGAS) issued by the Comptroller General of the United States.

Mission of the Workers' Compensation Division
...to accurately, efficiently, fairly and promptly administer quality workers' compensation services through the collection of premiums from employers and the payment of benefits to injured workers and to the dependents of fatally injured workers, with the intent of hastening the worker's return to work.

The Workers' Compensation Division (WCD), codified in Chapter 23 of the *West Virginia Code,* was created in 1913 for the purpose of offering workers' compensation insurance. Initially an optional plan, the program became compulsory in 1974. The purpose of the program is "to provide workers with a simple method of securing immediate relief from the physical and economic effects of job related injury and disease." Further, the State is the sole provider of workers' compensation insurance. However, those employers that are eligible may opt to self-insure their workers' compensation risk. ***Although the Division is a public entity, it operates like a private insurance company, collecting premiums, investing the funds, and paying benefits to injured workers making compensable claims.*** The Division administers several funds including the Workers' Compensation Fund, the Coal Workers' Pneumoconiosis Fund, Employers' Excess Liability Fund, the Disabled Workers' Relief Fund and a Surplus Fund which is made up of a Catastrophe Reserve, a Second Injury Reserve, and a Supersedeas Reserve.

The financial condition of the Division has eroded over many years. For FY 1989 the Division was believed to have a $404 million to $504 million deficit.[5] In 1990, the Division transferred $210 million declared to be an actuarially determined surplus from the Coal Workers' Pneumoconiosis Fund to the Workers' Compensation Fund. While the assets transferred cannot be used to satisfy the debts of the Workers' Compensation Fund until all other assets of the Fund have been expended, the interest earnings may be used for this purpose. By FY 1996, the deficit was believed to be $2.224 billion. ***By June 30, 1997 the deficit had been reduced to $2.139 billion, a reduction of $86 million from the previous year.***

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[4]*Documentary evidence is created information such as letters, contracts and records. Physical evidence is the direct observation of the activities of people, property or events. Testimonial evidence consists of statements received in response to inquiries or from interviews, and analytical evidence includes the separation of information into components such as computations, comparisons and reasoning.*

[5]*Financial audits indicate the reliability of financial information pre-dating FY 1995 is highly suspect. In addition, a change in the methodology of calculating the estimated liability for unpaid claims beginning FY 1993 was made as required by GAAP. This new methodology increased the deficit, as reported, by over $565 million.*

In 1991, Ernst and Young (E & Y) was engaged in a $45,000 contract by the Bureau of Employment Programs to audit the Workers' Compensation Division's financial statements for fiscal year 1991. In lieu of issuing financial statements for the Division, ***E & Y issued a draft management letter on March 16, 1992 that found the Workers' Compensation Division to have "an overall lack of internal controls resulting in what we [Ernst and Young] consider to be a pervasive material weakness situation..."*** E & Y defined a material weakness as

> a reportable condition in which the design or operation of one or more of the specific internal control structure elements does not reduce to a relatively low level the risk that errors or irregularities in amounts that would be material in relation to the financial statements being audited may occur and may not be detected within a timely period by employees in the normal course of performing their assigned functions.

The final draft management letter detailed the material weaknesses of the Division, which rendered the Division impossible to audit. In subsequent financial audits for FY 1993 and FY 1994, Ernst and Young continued to find the Division's records to be

> generally inadequate to produce reliable financial information with respect to premiums receivable from subscribers and self-insurers; premium advance deposits; and the estimated liability for unpaid claims and claim adjustment expenses, including contingent liabilities for self-insured employers who have defaulted or who may reasonably be expected to default. Additionally, weaknesses in the internal control structure are of an extent that cannot be overcome by auditing procedures.

Generally, the purpose of a financial audit is to provide the users of the resulting financial statements assurance that the financial statements do accurately represent the financial status of the auditee (an "unqualified opinion"). Because of the pervasive material weakness situation, E & Y was unable to express an opinion on the Division's financial statements. The 1993 and 1994 reports of E & Y also stated "the Division's recurring losses and deficit raise substantial doubt about its ability to continue as a going concern in its present form," meaning the Workers' Compensation Division would not be able to meet its obligations to claimants in the foreseeable future if problems were not corrected.

During the 1995 Legislative Session, the West Virginia Legislature passed S.B. 250 which made many reforms to the workers' compensation system. As a result of the legislation, the efforts of the management and employees of the Bureau and Division, and several consulting firms involved in the Division's Total Quality Initiative (TQI), the Workers' Compensation Division received its first unqualified audit opinion from Ernst and Young for fiscal year 1995. More importantly, the 1995 financial audit also marked the end of the "going concern" paragraph. The Division has received unqualified opinions in all financial audits completed since that time.

Issue Area 1: Compensation to the Workers' Compensation Occupational Pneumoconiosis Board is excessive.

Members of the Workers' Compensation Occupational Pneumoconiosis (OP) Board earn $4,200 per meeting, which occur every Tuesday and Thursday, making the OP Board perhaps the highest paid board in State government.[6] In addition to these meetings, the Board is paid $300 per hour for medical testimony which is provided at the Office of Judges. With total individual OP Board related earnings as high as $551,000 per year, for what amounts to 42% of the time the average physician works in a given year, the Office of the Legislative Auditor has concluded that compensation paid to these officials is excessive and corrective action must be taken.

Background of the Occupational Pneumoconiosis Board

When a workers' compensation claimant applies for compensation for occupational pneumoconiosis, the Commissioner for the Bureau of Employment Programs may order a claimant to appear for examination before the Occupational Pneumoconiosis Board, which was formerly known as the Silicosis Medical Board. If a claimant cannot appear before the Board, the Board may appoint a qualified specialist in the field of respiratory disease to examine the claimant. In the case of death, an autopsy is performed to determine the cause of the claimant's death and a pathology report is forwarded to the Board. The function of the Board is to determine all medical questions relating to cases of compensation for occupational pneumoconiosis under the direction and supervision of the Commissioner. The Board evaluates the percentage of impairment of occupational pneumoconiosis claimants, living and deceased, based on the results of tests and x-rays administered by technicians at the Board's clinic and supplemental information (see Appendix A for a complete list of tests performed by the Board's clinic). The provisions of the statute relating to occupational pneumoconiosis, rules adopted in accordance with the statute, and policies and procedures adopted by the OP Board guide the determination of the degree of impairment suffered by a claimant. The Board makes a written report to the Commissioner after completing its investigation, which discusses its findings and conclusions on every medical question in controversy. The Commissioner sends a copy of the report to the claimant and to the employer.

The Board consists of five physicians appointed by the Commissioner who must have specialized knowledge of pulmonary diseases. Two of the physicians shall be roentgenologists. Each member of the Board is appointed to a six-year term and may serve for any number of terms. The Commissioner appoints one member as Chairman each year. Any three Board members constitute a quorum for the transaction of business, if one of the members present is a roentgenologist. Statute also requires that the Commissioner fix a *per diem* salary, computed on the basis of actual time devoted to the discharge of the members' duties. Board members may receive reasonable and necessary traveling and other expenses incurred while actually engaged in the performance of their duties.

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[6]On average, 10% or 5-7 live claimants either cancel or otherwise fail to attend their scheduled exam session.

On Tuesday and Thursday mornings, the OP Board's technicians examine claimants at the Charleston Area Medical Center's Occupational Lung Center. The Board began meeting at this location in April 1998. Previously, it met at St. Francis Hospital's Occupational Lung Disease Clinic. Each Board member is paid $60 per claimant examined by the Board each meeting. This is equivalent to **$4,200 per meeting, per physician,** given 70 examinations and assuming that all scheduled claimants show up for the exam session. Two of the Board's physicians attend meetings on alternate months, therefore, only three of the Board's four members are present at any given meeting. Currently, the Board only has four members, with a vacancy for a roentgenologist. Prior to examinations, patients' files are reviewed to support evidence of other procedures which are duplicated by the Occupational Lung Center for comparison.

Board members are also compensated on an hourly basis for time spent testifying on cases before the Office of Judges. On Mondays, Wednesdays and Fridays, physicians from the OP Board are available for testimony. Forty claims are scheduled to be heard each session. The fee schedule for testimony is equal to that paid by the Workers' Compensation Division to Independent Medical Examiners for other types of disability exams, $300 per hour. The Office of Judges schedules two hearing sessions per day. The morning session lasts from 9:15 to 11:30 and the afternoon session lasts from 1:15 to 4:30. If a physician was present for both sessions, he would be paid for 5 ½ hours, or $1,650 for the day's work. Prior to hearings, each member of the Board reviews all of the materials in most fatal and total permanent disability claims in litigation without additional compensation.

While the same $300 per hour rate is paid to Independent Medical Examiners for other types of disability exams, these amounts paid to OP Board members represent gross income. Participation on the OP Board requires no overhead costs; the clinic is paid directly by the Division. Unlike most fee-for-service activities, the member physicians have no personal liability for their regular duties on the Board, and no responsibility for medical billing, office support and expenses.

Compensation to Board Members

The method for compensating the four physicians who comprise the OP Board has changed over time. In 1983 the Workers' Compensation Commissioner established a rate of $120 per hour for members of the OP Board. This rate was based upon an assumption that each exam would require 30 minutes to complete (the time estimate was provided by the Board members). At that time compensation was capped at $960 per diem (based on an 8 hour day). Over time, the hourly rate of $120 and assumption that each exam would require 30 minutes to complete took the form of a piece rate compensation plan, with members being paid $60 per claimant with no cap. This is the current compensation program for the Board. At the time the $120 per hour fee was established, the meeting docket included 40 examinations. Now 70 claimants are examined during each Board meeting (65 live and 5 deceased claimants). As of the date of this report, October 1998, the Board's members are compensated according to the number of claimants examined during each meeting, or $4,200 per meeting.

Clearly, the rate of compensation for these sessions is not based on the amount of time required to perform the work. If each examination required 30 minutes to complete, it would take 35 hours to evaluate the records of the 70 claimants which are physically shuttled through the assembly line exam in less than 2 ½ hours. The Board meets every Tuesday and Thursday to evaluate 70 claimants per meeting ($8,400 per week for exams alone). If each exam required 30 minutes, the Board members would be required to work 70 hours per week just to complete exams. Keep in mind that 3 of the 4 members of the Board maintain private practices and also spend time testifying before the Office of Judges. Even if only 40 claimants were reviewed per meeting, as when the compensation rate was set, it would still require 20 hours to review them all.

West Virginia Code §23-4-8a provides that "...The commissioner, from time to time, shall fix the per diem salary, computed on the basis of actual time devoted to the discharge of their duties..." Despite this requirement that compensation be based upon actual work time, the Bureau of Employment Programs is unable to provide actual data on time devoted to the discharge of the Board's duties. Three of the four members are engaged in private practice. In addition, the clinic employs technicians to administer the tests, leaving the Board members to interpret the test results and x-ray slides. Given the absence of data to determine how much time physicians spend evaluating test results, the Office of the Legislative Auditor surveyed Board members to gain insight. Survey results are summarized in Table 1 below (also see Appendix B for official survey response). Members estimations of time required to perform weekly evaluations ranged from 18 to 28 hours per week. This is in sharp contrast with the 70 hours per member per week that would be required if these exams did indeed require 30 minutes each. **Thus, even using the Board's own estimates of time spent on weekly exams, the 30 minutes per claimant basis on which the current compensation plan is based is incorrect.**

Table 1
Member Self-Reported Estimates of Time Per Week Spent on Evaluations

Member	Time Per Week
Member 1 (alternating member)*	24 hours
Member 2 (Roentgenologist, attends all evaluations)†	18-20 hours
Member 3 (Chairman, attends all evaluations)†	24-28 hours
Member 4 (alternating member)*	24 hours

**Alternating members rotate one month on, one month off. The estimate is for weeks in which they work. Thus, these members would average 12 hours per week over the entire year.*

†For analytical purposes, the midpoint of the range has been used as these members' average hours per week dedicated to examination activities. For Member 2, 19 hours per week has been used, 26 hours for Member 3.

Source: Occupational Pneumoconiosis Board Member survey, (Appendix B)

As stated above, West Virginia *Code* §23-4-8a requires the *per diem* rate for Board members to be calculated on the basis of actual time devoted to the discharge of their duties. The current pay structure does not reflect the amount of time required to complete an examination session. **In addition, statute requires a *per diem* rate to be established by the Commissioner. A per diem rate is not an hourly rate or a piece rate, but a fixed rate for each day of service.** A per diem rate is not variable and should be based on real data and reasonable assumptions. Black's Law Dictionary defines "per diem" as follows:

> *Bt the day; an allowance or amount of so much per day. Webster.*
>
> *Generally, as used in connection with compensation, wages or salary, means pay for a day's service. Scroggle v. Scarborough, 162 S.C. 218, 160 S.E. 596, 599.*

Table 2
Total Compensation for OP Board Members

Fiscal Year	Board Examinations	OOJ Medical Testimony	Other Exams & Testing	Facility Rent Paid in Error to Physicians (unrecovered)
FY 1995	$800,400	$163,718	$2,241	$0
FY 1996	$1,404,298*	$200,825	$2,101	$0
FY 1997	$865,092*	$238,620	$1,915	$86,195
FY 1998	$914,977	$171,791	$1,721	$0
Total	**$3,984,767**	**$774,954**	**$7,978**	**$86,195**

Table 2 illustrates that the Board's physicians are collectively paid approximately $1.2 million per year for examination meetings and testimony before the Office of Judges ($3,984,767 + $774,954) ÷ 2 = 1,189,930). Some of the Board's physicians also perform other services for the Workers' Compensation Division besides those associated with the OP Board. They may perform disability exams unrelated to the activities of the OP Board if they are on the list of Independent Medical Examiners.

Table 3
Other OP Board Expenses

Fiscal Year	Facility Fee	Medical Testing Fees Paid to Facility	Exam Fees Paid to Hospital in Error	Claimants' Travel Expenses	Claimants' Motel Expenses
FY 1995	$222,109	$284	$0	$547,242	$78,372
FY 1996	$1,259,027	$5,307	$0	$620,428	$143,228
FY 1997	$1,194,077	$2,896	$4,980	$640,025	$121,134
FY 1998	$1,174,813	$6,672	$0	$635,257	$122,715
Total	**$3,850,026**	**$15,159**	**$4,980**	**$2,442,952**	**$465,449**

Table 3 illustrates other expenses associated with the operation of the OP Board. The hospitals which provide facilities for examination sessions are paid for the use of the facility as well as for conducting certain medical tests. Other Board-related expenses include travel reimbursements paid to claimants who travel to Charleston for an exam. Lodging for claimants is also provided by the Workers' Compensation Division.

Payments Made to the Wrong Vendors

As Tables 2 and 3 illustrate, the Workers' Compensation Division accidentally sent some payments to the wrong vendors. In April 1996, the Workers' Compensation Insurance System (WCIS) became operational. This data system paid members of the Board at an incorrect rate. The first payment made by WCIS inaccurately paid each physician $1,000 each. Those payments were credited and the system was modified to make the correct payment amounts. Later, in 1997, WCIS switched vendor payments during one of the payment cycles. As a result, St. Francis Hospital received $60 and examination fees due to the OP Board physicians and facility fee payments of $250 were made to the physicians. The data provided by the Workers' Compensation Division for this review indicates that a full recovery of the amounts incorrectly paid has not been made by the Division. That explains facility payments listed in Table 3 totaling $86,195 that were accidentally sent to the Board's physicians. The Legislative Auditor's Office has become aware of other overpayments that have been made to vendors because of difficulties in the conversion to WCIS. This issue is being investigated and will be discussed more fully in future reports on the Workers' Compensation Division.

Comparison of OP Board Physicians' Earnings with that of Other Physicians

Using survey data collected by the American Medical Association's Center for Health Policy Research, it is easy to see that the compensation received by members of the Board exceeds that of other physicians in the same specialties of practice (see Tables 4, 5 and 6). According to the American Medical Association, the average physician works approximately 56 hours per week. Upon examination of the compensation received by each member of the Board, it is clear that the members receive much higher levels of income than the amount of time they spend in the course of their duties justify. **Our calculations, which are based on Board member self-reported time estimates, indicate that the Board members work less than half-time, on average, but earn well in excess of full-time wages.**

The OP Board is comprised of one pulmonary specialist, two internal medicine specialists, and one radiologist. According to the American Medical Association, the median income of all radiologists for 1995 was $230,000. Radiologists in the 75th percentile earned $310,000. Median incomes for internal medicine specialists were much lower at $150,000 and $214,000 for the 75th percentile.

Table 4
1995 Net Income After Expenses, Before Taxes, Per Physician

Specialty of Practice	25th Percentile	Median	75th Percentile
Radiology	$160,000	$230,000	$310,000
Surgery	$160,000	$225,000	$316,000
Anesthesiology	$150,000	$203,000	$262,000
Ob-gyn	$150,000	$200,000	$296,000
Pathology	$130,000	$185,000	$230,000
Internal Medicine	$110,000	$150,000	$214,000
Pediatrics	$95,000	$129,000	$175,000
Psychiatry	$95,000	$124,000	$160,000
General/Family	$90,000	$124,000	$159,000
All Physicians	$115,000	$160,000	$238,000

Source: American Medical Association's Center for Health Policy Research. Income data does not include residents and physicians employed by the federal government.

Table 5
Unadjusted Income of Physicians: 1995
Total, Income Per Hour and Income Per Visit

Years of Practice	Average Total		Income Per Hour		Income Per Visit	
	Males	Females	Males	Females	Males	Females
1-4	$ 161,700	$ 113,100	$ 59.00	$ 47.80	$ 34.30	$ 31.30
5-9	$ 220,900	$ 158,400	$ 76.70	$ 61.50	$ 41.80	$ 34.10
10-19	$ 233,600	$ 167,800	$ 83.60	$ 70.70	$ 41.90	$ 36.80
20+	$ 185,700	$ 133,100	$ 72.90	$ 55.70	$ 37.00	$ 30.30

In private practice, the hourly value of physicians' time varies considerably with their years of experience. As Table 5 illustrates, male physicians with 10-19 years of experience are at the peak of the earnings scale. In comparison with the hourly pay of the members of the OP Board, national medians are much smaller. As was stated earlier, Board physicians earn $300 per hour for testimony before the Office of Judges. This is the same rate paid by the Workers' Compensation Division to Independent Medical Examiners for other types of disability examinations. This rate exceeds the median hourly value of the typical physician's time.

Table 6
OP Board Physician Income: Listed by Individual Board Members

FY	Member 1	Member 2	Member 3	Member 4	Member 5	Member 6
1995	$0	$315,287	$335,274	$0	$140,961	$174,621
1996	$0	$551,759	$520,828	$0	$227,040	$307,723
1997	$0	$407,813	$388,909	$121,792	$168,091	$102,158
1998	$113,495	$352,802	$359,376	$176,995	$78,624	$290
Total	**$113,495**	**$ 1,627,661**	**$1,604,387**	**$298,787**	**$614,716**	**$584,792**

Table 6 lists the total compensation paid to each OP Board member by the Workers' Compensation Division since Fiscal Year 1995. Although the Board only has four members, six are listed because, during the time period covered, two of the members were replaced. With earnings well in excess of $300,000 annually ($551,759 being the high), the two members who attend every examination session have earned considerably more than the other members, who alternate months of participation on the Board. **It is important to note that the incomes of Board members routinely meet or exceed the typical annual income of other physicians in their specialty of practice, while OP Board physicians work part-time.** Three of the four present Board members

maintain private practices and, therefore, earn additional income besides their compensation for membership on the OP Board. Table 4 shows that radiologists in the 75th percentile, arranged according to income levels, made $310,000 in 1995. His/her counterpart on the OP Board earned $315,287 in fiscal year 1995, yet worked a fraction of the number of hours, 40% of a typical physician's 56-hour week (see Table 7).[7] Likewise, when comparing the internal medicine specialists in the 75th percentile with OP Board members in the same specialty, we find similar results. While the 75th percentile income for a full-time internal medicine specialist was $214,000 in 1995, one of the internal medicine specialists on the OP Board earned $174,621 and worked 25% of the time (see Table 7).

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[7]Based on self-reported work time estimates by the current Board and actual testimony hours.

Table 7
Total Hours Worked by OP Board Members: As a Percentage of a Full-Time Work Week

Board Member	FY	Avg. Weekly Testimony Hours	Self-Reported Exam Hours Per Week	Estimated Total Hours Per Week	% Full-Time	Total OP Board-Related Earnings
Member 1	**95**	0.0	0.0	0.0	0%	$0
	96	0.0	0.0	0.0	0%	$0
	97	0.0	0.0	0.0	0%	$0
	98	0.8	12.0	12.8	Less than 23%†	$113,331
Member 2	**95**	3.5	19.0	22.5	40%	$315,287
	96	4.5	19.0	23.5	42%	$551,602
	97	5.4	19.0	24.4	44%	$370,603
	98	3.8	19.0	22.8	41%	$356,595
Member 3	**95**	3.8	26.0	29.8	53%	$333,087
	96	4.5	26.0	30.5	54%	$518,783
	97	5.3	26.0	31.3	56%	$369,701
	98	3.9	26.0	29.9	53%	$357,993
Member 4	**95**	0.0	0.0	0.0	0%	$0
	96	0.0	0.0	0.0	0%	$0
	97	1.7	12.0	13.7	Less than 24%†	$121,766
	98	2.1	12.0	14.1	25%	$176,995
Member 5*	**95**	1.8	12.0	13.8	25%	$141,123
	96	2.4	12.0	14.4	26%	$226,999
	97	2.4	12.0	14.4	26%	$155,152
	98	0.9	12.0	12.9	Less than 23%†	$78,624
Member 6*	**95**	1.8	12.0	13.8	25%	$174,621
	96	2.1	12.0	14.1	25%	$307,739
	97	1.1	12.0	13.1	23%	$86,491
	98	0.0	12.0	12.0	Less than 21%†	$3,230

* Time estimates for current alternating members used as proxy for past alternating members.
† First and last years for Board members in which only part of the year was worked. Because of nature of self-reported time estimates, percentage of full-time is based on average hours per workweek and has not been calculated on annual basis.

Table 7 illustrates the amount of time spent by OP Board physicians in the execution of their duties. It presents the total amount of time worked by Board members as a percentage of the average physician's workweek of 56 hours. **No member of the Board worked over 56% of the average physician's workweek during any year.** Table 7 also shows the amount of compensation received by Board members solely for activities related to the OP Board. This includes attendance at examination sessions and testimony. Appendix C contains a more comprehensive table of time estimates and earnings.

Tables 8 and 9, on the next page, compare 1995 Board earnings with physician earnings as reported by AMA for 1995. The analysis shows that members were paid up to 339% in excess of national 75th percentile level of pay and indicates nearly $623,000 in excessive payments for 1995 alone. Table 9 shows the annual compensation these members would have received for full-time employment at the same rate of pay. The analysis discussed in Tables 8 and 9 is relevant to 1995. This year was chosen because it was the only year of the four examined in which the Board membership was constant for the entire period, and because the AMA benchmark data is relevant to 1995 and requires no inflationary/deflationary adjustments. During 1995, two of the Board's members were general practitioners who are among the lowest paid categories of physicians. The reader should note that 1995 was the lowest income year for the OP Board members. For example, in 1996, the Board's radiologist earned $551,638 for what amounts to 42% of the time the average physician works in a given year.

Table 8
OP Board Pay and National Benchmarks, Part-time

Member	1995 WC Earnings	1995 Comparable National Pay at 75th Percentile*	Difference	% Over National 75th Percentile
Radiologist	$315,287 (40% full-time)	$124,000	$191,287	154%
Pulmonary Specialist	$335,274 (53% full-time)	$140,100	$195,174	139%
General Practitioner	$140,961 (25% full-time)	$39,750	$101,211	254%
General Practitioner	$174,621 (25% full-time)	$39,750	$134,871	339%

* American Medical Association data used except for pulmonary specialist. No AMA data was readily available for pulmonary specialist, thus WVU hospital data was used to project what, in relationship to internists and radiologists, a pulmonary specialist would earn. This projected to $264,340 annually, at the 75th percentile.

Table 9
Comparable Full-time OP Board Pay and National Benchmarks

Member	1995 Full-time Equivalent Annual Pay to OP Board	1995 Comparable National Pay at 75th Percentile*	Difference
Radiologist	$788,218	$310,000	$478,218
Pulmonary Specialist	$632,592	$264,340	$368,252
General Practitioner	$563,844	$159,000	$404,844
General Practitioner	$698,484	$159,000	$539,484

* American Medical Association data used except for pulmonary specialist. No AMA data was readily available for pulmonary specialist, thus WVU hospital data was used to project what, in relationship to internists and radiologists, a pulmonary specialist would earn. This projected to $264,340 annually, at the 75th percentile.

Table 10
OP Board Pay and National Benchmarks, Part-time

Member	1995 WC Earnings	1996 WC Earnings	1997 WC Earnings	1998 WC Earnings	1995 Comparable National Pay at 75th Percentile*
Radiologist (% full-time)	$315,287 (40%)	$551,759 (42%)	$407,813 (44%)	$352,802 (41%)	$310,000 (100%)
Pulmonary Specialist (% full-time)	$335,274 (53% full-time)	$520,828 (54%)	$388,909 (56%)	$359,376 (53%)	$264,340 (100%)
General Practitioner former member (% full-time)	$140,961 (25%)	$227,040 (26%)	$168,091 (26%)	$78,624 (23%)	$214,000 (100%)
General Practitioner former member (% full-time)	$174,621 (25%)	$307,723 (25%)	$102,158 (23%)	$290 (21%)	$214,000 (100%)
Internist (% full-time)	$0 (0%)	$0 (0%)	$0 (0%)	$113,495 (23%)	$214,000 (100%)
Internist (% full-time)	$0 (0%)	$0 (0%)	$121,792 (24%)	$176,995 (25%)	$214,000 (100%)

* American Medical Association data used except for pulmonary specialist. No AMA data was readily available for pulmonary specialist, thus WVU hospital data was used to project what, in relationship to internists and radiologists, a pulmonary specialist would earn. This projected to $264,340 annually, at the 75th percentile. AMA physician income data does not include residents and physicians employed by the federal government.

Table 10 shows that the two Board members who attend every exam session, the pulmonologist and the radiologist, consistently earn more than many others in their same specialties of practice. By comparing their incomes with other physicians in the 75th percentile of income levels, it is possible to see that Board members earn more than many of the higher paid members of their profession. The two internists, though they have not served on the Board for very long and only serve bi-monthly, receive high rates of compensation for their services. Considering that each of them attends half of the meetings that take place, they too would receive compensation that exceeds the 75th percentile, or approximately double their current income, if they attended every meeting.

Conclusion

The Occupational Pneumoconiosis Board is compensated to an extent which is out of proportion to both the amount of time it spends in the execution of its duties and the earnings of physicians in comparable specialties of practice. In any case, by statute the compensation rate should be a fixed per diem, and based on actual time spent in the discharge of the Board's duties. Collectively, the members of the OP Board are paid approximately $1.2 million annually, with individual earnings as high as $551,759 for just 42% of the average physician's work year. The number of hours that Board members spend in the execution of their duties do not justify compensating them in excess of the typical full-time physician's annual income.

Recommendation 1: ***The Commissioner should promptly establish a new pay structure for OP Board members. Compensation should be in the form of a per diem rate and based on actual time required to discharge their duties, as required by West Virginia Code §23-4-8a. Such rates should also be commensurate with the earnings of similarly qualified physicians.***

Recommendation 2: ***Given the Commissioner's charge to set a per diem rate which is based on actual time required for the Board to discharge its duties and the high rates of compensation involved, the Workers' Compensation Division should maintain accurate records of time OP Board members spend on official tasks.***

Recommendation 3: ***The Workers' Compensation Division should investigate and fully recover facility payments paid to members of the Occupational Pneumoconiosis Board which were paid in error. Likewise, any physician payments which were paid in error to health care facilities should be recovered.***

Issue Area 2: The Worker's Compensation Occupational Pneumoconiosis Board currently has a vacancy for a roentgenologist.

According to West Virginia Code §23-4-8a, the Board should have five members, two of which should be roentgenologists. Roentgenology is a branch of radiology that deals with the use of x-rays for the diagnosis or treatment of disease. Roentgenologists are specially certified in the diagnosis of Occupational Pneumoconiosis. At present, the Board only has four members. Two members have been replaced since October 1996. One member retired and one is deceased. Two physicians were appointed to replace these members. Both of the new physicians are internal medicine specialists. Prior to the departure of the two members from the Board, the Board only had four members. According to the Division's staff, there have only been four members for the last 15 to 20 years. Prior to that, there were two roentgenologists on the Board, until one retired. The remaining roentgenologist took over the duties of the other and discontinued his private practice. It was determined that one roentgenologist would be adequate for the Board's needs if he was not also engaged in private practice. The presence of a roentgenologist is required in order to have a quorum for an examination session. If the current roentgenologist is unable to attend a session, there is no member who could replace him, therefore the meeting could not take place and no recommended decisions could be made that day.

Conclusion

The OP Board has maintained a vacancy for a roentgenologist for the last 15-20 years. If the remaining roentgenologist finds himself unable to attend a meeting, a quorum will not exist and no claimants can be examined. This would be to the detriment of claimants whose claims would be delayed because the Board could not meet as required. In addition, staff work flows could be disrupted by such an occurrence, causing further delay and frustration.

Recommendation 4: ***The Commissioner of the Bureau of Employment Programs should appoint an additional roentgenologist to the Occupational Pneumoconiosis Board, as required by Code §23-4-8a, as soon as a qualified specialist can be identified.***

APPENDIX A

Occupational Pneumoconiosis Standard Exam

Occupational Lung Center
600 Morris Street Suite 100
Charleston, WV 25301

Criteria for Testing

OPB Testing (Tuesday and Thursday)

All Patients unless otherwise noted received the following:

Chest X-Ray – 1 View (PA)
Spirometry – FVC and MVV
Airway Resistance – Raw (2.5 or above considered abnormal)
Oximetry – Resting
Blood Pressure – Resting
Pulse and Respirations

Other tests if the following conditions exist:

DLCO/COHb if:

Exposure to asbestos or previous abnormal DLCO test
(COHb of 3.1 or higher invalidates DLCO)

ABG with tHb and COHb if:

Resting Oximetry level less than 85% or previous abnormal ABG test

Steady State Exercise testing with oximetry if:

If having no heart problems, past or present,
and is not on Beta Blockers. Blood Pressure must be less than 180 systolic
and 110 diastolic. Exercise stopped immediately if patients develop arrhythmias
or related symptoms.

Lung Volumes – TGV (N2 Washout not a part of OP protocol)

Previous lung volume testing or if FVC is less than 75% (valid tests only)

N2 washout will be performed only on special order.

Pre and Post Bronchodilator spirometry testing if:

Previous abnormal spirometry on file (based on criteria below)
Airway Resistance (Raw) 2.5 or greater
FVC less than 73%
FEV1/FVC of 68% or below
FEV1 of 68% of predicted or below

APPENDIX B

OP Board Exam Hours Survey Response

DR. J. H. WALKER & ASSOCIATES, INC.
SUITE 101
600 MORRIS STREET
CHARLESTON, WEST VIRGINIA 25301
AREA CODE 304 388-7120
FAX 388-7124

JAMES H. WALKER, M.D.

THORACIC AND
CARDIOVASCULAR

October 6, 1998

Mr. Aaron Allred, Legislative Manager
Legislative Manager's Office
Building 1, Room E-132
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Mr. Allred:

This is in response to your letter of October 1, 1998. The members of the Occupational Pneumoconiosis Board and staff were pleased to have Mr. Kitchen visit the Occupational Lung Center on September 29th to gain a better understanding of the Occupational Pneumoconiosis claim determination process. We are hopeful that you recognize the quality of the newly acquired space to house our clinic and the new equipment associated with the facility.

I have recently met with the members of the Occupational Pneumoconiosis Board and am providing you with the following estimates of the average amount of time each physician spends in the course of the Board examination related tasks. I personally estimate spending twenty four to twenty eight hours per week on Board related activities. Doctor Hayes estimates his time at eighteen to twenty hours per week. Doctors Henry and Kinder estimate their time at twenty four hours per week during the month they attend Board related examinations.

As you indicated in your letter these estimates do not include time spent in protest hearings or in reviewing in advance of protest hearings the volumes of medical records and reports filed by both parties.

If I can be of any further help, please let me know

Very truly yours,

James H. Walker, M. D.

JHW/js

CC: Thomas Hayes, M. D.
Bradley Henry, M. D.
Jack Kinder, M. D.

RECEIVED
OCT 06 1998
Legislative Manager

APPENDIX C

OP Board Earnings Detail and Estimated Hours

Occupational Pneumoconiosis Board

Earnings Detail and Estimated Hours

Member 1	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total WC Earn	testimony hrs./wk	self-reported exam hrs./wk	estimated total hours per week	% full time
fy 98	$101,460.00	1784	$11,871.16	424	39.57	$113,331.16	$164.08	$113,495.24	0.79	12.00	12.79	0.23
fy 97	$0.00	0	$0.00	0	0.00	$0.00	$0.00	$0.00	0.00	0.00	0.00	0.00
fy 96	$0.00	0	$0.00	0	0.00	$0.00	$0.00	$0.00	0.00	0.00	0.00	0.00
fy 95	$0.00	0	$0.00	0	0.00	$0.00	$0.00	$0.00	0.00	0.00	0.00	0.00
								$113,495.24				
Member 2	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total				
fy 98	$299,966.53	6022	$56,628.54	2041	188.76	$356,595.07	($3,793.55)	$352,801.52	3.78	19.00	22.78	0.41
fy 97	$289,552.26	6316	$81,050.69	3569	270.17	$370,602.95	$37,209.60	$407,812.55	5.40	19.00	24.40	0.44
fy 96	$484,865.12	6066	$66,737.26	4004	222.46	$551,602.38	$156.74	$551,759.12	4.45	19.00	23.45	0.42
fy 95	$262,200.00	5812	$53,087.20	2412	176.96	$315,287.20	$0.00	$315,287.20	3.54	19.00	22.54	0.40
								$1,627,660.39				
Member 3	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total				
fy 98	$299,766.53	6014	$58,226 18	2093	194.09	$357,992.71	$1,383.76	$359,376.47	3.88	26.00	29.88	0.53
fy 97	$290,182.26	6348	$79,518.60	4027	265.06	$369,700.86	$19,208.40	$388,909.26	5.30	26.00	31.30	0.56
fy 96	$451,479.74	5721	$67,303.07	4031	224.34	$518,782.81	$2,045.49	$520,828.30	4.49	26.00	30.49	0.54
fy 95	$276,780.00	6197	$56,307.49	2528	187.69	$333,087.49	$2,186.36	$335,273.85	3.75	26.00	29.75	0.53
								$1,604,387.88				
Member 4	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total				
fy 98	$145,239.32	2959	$31,755.34	1170	105.85	$176,994.66	$0.00	$176,994.66	2.12	12.00	14.12	0.25
fy 97	$96,480.00	2337	$25,285.68	1173	84.29	$121,765.68	$25.87	$121,791.55	1.69	12.00	13.69	0.24
fy 96	$0.00	0	$0.00	0	0.00	$0.00	$0.00	$0.00	0.00	0.00	0.00	0.00
fy 95	$0.00	0	$0.00	0	0.00	$0.00	$0.00	$0.00	0.00	0.00	0.00	0.00
								$298,786.21				
Member 5	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total				
fy 98	$65,364.21	1555	$13,260.16	464	44.20	$78,624.37	$0.00	$78,624.37	0.88	12.00	12.88	0.23
fy 97	$118,492.26	2598	$36,659.61	1620	122.20	$155,151.87	$12,939.40	$168,091.27	2.44	12.00	14.44	0.26
fy 96	$190,940.00	3136	$36,058.57	2249	120.20	$226,998.57	$41.39	$227,039.96	2.40	12.00	14.40	0.26
fy 95	$114,060.00	2450	$27,063.23	1316	90.21	$141,123.23	($161.81)	$140,961.42	1.80	12.00	13.80	0.25
								$614,717.02				
Member 6	OP exam $	# of exams	testimony $	test. # claims	test. hrs	total OP earnings	Other++	Total				
fy 98	$3,180.00	69	$50.00	5	0.17	$3,230.00	($2,940.00)	$290.00	0.00	12.00	12.00	0.21
fy 97	$70,385.12	1310	$16,105.52	654	53.69	$86,490.64	$15,667.20	$102,157.84	1.07	12.00	13.07	0.23
fy 96	$277,012.67	2953	$30,726.06	1884	102.42	$307,738.73	($15.45)	$307,723.28	2.05	12.00	14.05	0.25
fy 95	$147,360.00	3367	$27,260.92	1348	90.87	$174,620.92	$0.00	$174,620.92	1.82	12.00	13.82	0.25
								$584,792.04				

++ Other payments and adjustments

APPENDIX D

Transmittal Letters to Agency

WEST VIRGINIA LEGISLATURE

Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

Antonio E. Jones, Ph.D.
Director

October 13, 1998

William F. Vieweg, Commissioner
Bureau of Employment Programs
Building 4, Room 610
112 California Avenue
Charleston, West Virginia 25305-0112

Dr. James H. Walker, Chairman
600 Morris Street
Suite 101
Charleston, West Virginia 25301

Dear Commissioner Vieweg and Chairman Walker:

This letter is to transmit a copy of the second installment of the *Full Performance Evaluation of the Workers' Compensation Division* which discusses matters relating to the *Occupational Pneumoconiosis Board.* The report will be presented to the Joint Committee on Government Operations on Sunday, October 18, 1998 in the House Government Organization Committee Room at 12:00 p.m.

The agency's response to the report may be printed with the report if you desire. To have the response printed with the report, please submit it to the Performance Evaluation and Research Division by 3:00 p.m. Thursday, October 15.

Should you have any questions, please contact Fred Lewis or Russell Kitchen.

Sincerely,

Antonio E. Jones

Enclosure

Joint Committee on Government and Finance

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

Antonio E. Jones, Ph.D.
Director

October 29, 1998

William F. Vieweg, Commissioner
Bureau of Employment Programs
Building 4, Room 610
112 California Avenue
Charleston, West Virginia 25305-0112

Dear Commissioner Vieweg:

This is to transmit a revised draft of the Performance Review of the Occupational Pneumoconiosis Board and a draft of an additional audit report concerning duplicate vendor payments made by Workers' Compensation in 1996. We would appreciate your response by November 9, 1998. It would be helpful if your response is organized according to the issue presented.

If there are any questions related to factual errors that need clarification please let me know. Thank you for your cooperation.

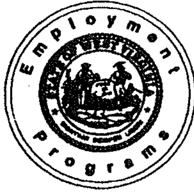
Sincerely,

Antonio E. Jones

Joint Committee on Government and Finance

APPENDIX E

Agency Response



West Virginia Bureau of Employment Programs
112 California Avenue, Charleston, West Virginia 25305-0112
Telephone 304/558-2630 • Facsimile 304/558-2992
Internet home page www.state.wv.us/bep

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner

November 9, 1998

Antonio Jones, Ph.D., Director
Performance Evaluation & Research Division
West Virginia Legislature
Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610

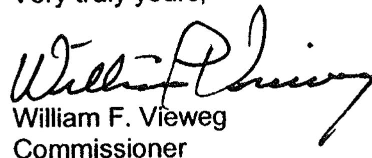
RECEIVED
NOV 1 0 1998
RESEARCH AND PERFORMANCE
EVALUATION DIVISION

Ref: Draft Occupational Pneumoconiosis Report

Dear Dr. Jones:

I regret that the commissioner's response to the referenced report is not complete at this time, however it is my intention to fully respond to this report. My response, in written form, will be delivered to the co-chairs and members of the committee not later than the end of this week. I will be happy to provide a copy to you at that time.

Very truly yours,



William F. Vieweg
Commissioner

WFV:cgr

cc: Senator Edwin Bowman
Delegate Vicki Douglas
Dr. James Walker

Job Service/Job Training Programs • Labor Market Information • Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

Cecil H. Underwood
Governor

William F. Vieweg
Commissioner

West Virginia Bureau of Employment Programs
• Job Service/Job Training Programs • Labor Market Information
• Unemployment Compensation • Workers' Compensation
an equal opportunity/affirmative action employer

November 12, 1998

The Honorable Edwin J. Bowman, Co-Chair
West Virginia Senate
Building 1, Room 231 W
State Capitol
Charleston, West Virginia 25305

	INITIALS	DATE	REFERENCE
PREPARED BY	KK	11/13/98	WC L-58
CHECKED BY			
APPROVED BY	FSC	11/13/98	

The Honorable Vicki V. Douglas, Co-Chair
West Virginia House of Delegates
Building 1, Room 213 E
State Capitol
Charleston, West Virginia 25305

RECEIVED
NOV 12 1998
RESEARCH AND PERFORMANCE
EVALUATION DIVISION

Members of the Joint Interim Committee on Government Operations

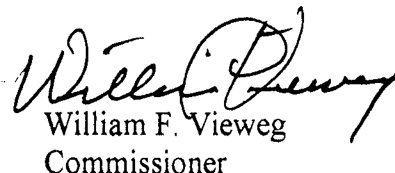
Re: Occupational Pneumoconiosis Board

Dear Senator Bowman, Delegate Douglas, and Distinguished Members of the Committee:

Attached hereto is the formal response of the Commissioner of the Bureau of Employment Programs to the report entitled *Occupational Pneumoconiosis Board*, prepared by the Performance and Evaluation and Research Division of the Office of Legislative Auditor. It is my understanding that the referenced report is to be presented to the Committee for consideration at its meeting on November 15, at 12:00 p.m. I would welcome the opportunity to provide oral remarks at the meeting and, of course, expect to be available for questions.

This response is being transmitted by overnight mail to all members for review prior to the meeting with a copy delivered to the Office of Legislative Auditor.

Respectfully submitted,



William F. Vieweg
Commissioner

Attachment

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NOV 1 2 1998
RESEARCH AND PERFORMANCE EVALUATION DIVISION

I. INTRODUCTION

This report is submitted in response to the report entitled *Occupational Pneumoconiosis Board* prepared by the Performance Evaluation and Research Division of the Office of Legislative Auditor, West Virginia Legislature ["the Audit Report"]. The Audit Report was transmitted to the Commissioner of the Bureau of Employment Programs ["Commissioner"] on October 13, 1998. The Audit Report makes the following recommendations: (1) that the Commissioner should establish a new pay structure for the members of the West Virginia Occupational Pneumoconiosis Board ["OP Board"]; (2) that the Workers' Compensation Division ["Division"] should maintain accurate records of the time spent by OP Board members in the discharge of their duties, and the Division should investigate and recover any erroneous payments made to health care providers and OP Board members; and (3) that the Commissioner should appoint to the OP Board an additional roentgenologist (*i.e.*, radiologist) as soon as a specialist can be identified. Each of these recommendations is addressed below.

II. OP BOARD COMPENSATION

A. Introduction.

The members of the OP Board are compensated for their services in two ways. First, the members receive $60 for each case they evaluate for the purpose of issuing findings regarding the presence or absence of occupational pneumoconiosis ["OP"] and whether the claimant has a permanent impairment due to OP, or whether OP caused death or was a material factor contributing to the cause of death. These cases are reviewed and findings issued during OP Board meeting dockets (*i.e.*, examination dockets) every Tuesday and

Thursday. A panel of three of the four OP Board members spend between 20 and 24 hours every week working to fulfill their meeting docket obligations. The compensation rate of $60 per case reviewed was set by Workers' Compensation Commissioner Gretchen Lewis in 1980 and has been approved by every Commissioner since 1980.

Findings are issued at the OP Board meeting dockets in living claims after an actual examination of the claimant by OP Board members or, in instances where the claimant is unable to travel to Charleston for examination and testing, Board members issue their findings after they review the records of an examination of the claimant conducted by an out-of-town physician. In both instances, OP Board members review all available medical records in addition to chest x-rays and the results of objective medical tests measuring lung function before the OP Board findings are dictated. In claims for dependent's benefits based on an allegation that OP caused or contributed to the cause of death in some material way, OP Board members review all available x-rays, medical records and reports before issuing their findings.

The second method of compensating OP Board members is for the official duties performed during OP Board hearing dockets scheduled by the Workers' Compensation Office of Judges in litigated claims. A panel of three OP Board members appear at every hearing docket to testify regarding the initial findings issued during the meeting docket and the medical evidence subsequently submitted by the parties to each claim. OP Board hearing dockets are scheduled for all day every Wednesday, and for one-half day every Friday; there are three hearing dockets each week. Approximately forty cases are set on each docket.

Board members have received $300 per hour for their work at OP Board hearing dockets since 1989. This rate was set by Workers' Compensation Commissioner

Emily Spieler effective February 1, 1989, and has been approved by every Commissioner since 1989.

The Audit Report is very critical of the first method of compensation, which pertains to OP Board *meeting* dockets. Most of the Audit Report is devoted to criticizing the $60 per claim compensation formula impermissible and excessive. The report also suggests that the $300 per hour compensation for OP Board *hearing* dockets is excessive because Board members allegedly do not have any overhead associated with their OP Board duties. Most of the criticisms of the compensation system stated in the Audit Report are unfounded because they are based on incorrect or incomplete information and inappropriate comparisons. The problems with the Audit Report's criticisms of the compensation methods are discussed separately below.

B. Meeting Docket Compensation--$60 Per Case Reviewed.

Currently, the OP Board actually reviews an average of 54 living cases and five fatal claims during each OP Board meeting docket. The Audit Report incorrectly states that 70 cases are reviewed during each meeting docket. While 65 living cases and five fatal claims are listed for each meeting, last minute cancellations and no-shows reduce the actual number of living cases reviewed from 65 to an average of 54 per docket, which means that an average of 59 cases are reviewed during each meeting. Consequently, the compensation levels cited in the Audit Report are overstated by an average of $660 per meeting docket (*i.e.*, 70 cases set minus 59 cases actually reviewed = 11 cases not reviewed times $60 per case = $660). In reality, the average fee paid to each OP Board member for each meeting docket is $3,540, not $4,200 as stated in the Audit Report.

As noted above, OP Board members have been paid $60 per case reviewed for meeting docket work since 1980. The total compensation received by OP Board members for the work performed at meeting dockets has increased since 1980 because the number of cases assigned to each docket has increased from 40 to 70, with a resultant increase in the average number of cases actually reviewed from 32 to 59. This is an 84 percent increase in the number of cases reviewed per docket over the past several years.

The Audit Report correctly states that the Workers' Compensation Commissioner established in 1983 a rate of $120 per hour to compensate OP Board members for each meeting docket, with a per diem cap of $960. (This compensation formula was based on the assumption that each examination and fatal claim review took approximately 30 minutes to complete.) The discussion of the 1983 compensation formula in the Audit Report implies that Board members were paid $960 for each OP Board meeting docket. This implication is incorrect.

In 1983, each OP Board meeting docket lasted two days--each exam was a two-day affair. Over the course of these two eight-hour days, an average of 32 of the 40 scheduled cases were reviewed by the OP Board. The $120 per hour fee and the $960 per diem cap was adopted by Commissioner Gretchen Lewis after OP Board members kept detailed records of the actual time spent reviewing cases during each two-day meeting docket. These records were kept for several weeks. Commissioner Lewis asked the OP Board members to record the actual time spent reviewing each claim so that she could adopt a compensation formula that would compensate Board members at an hourly rate equivalent to $60 per examination or case reviewed, which was the rate of compensation that had been paid since 1980. The Audit Report fails to provide this very important historical perspective.

The Audit Report also fails to point out that while Board members were paid for 16 hours of work for each meeting docket under Commissioner Lewis's compensation formula, the Board now works between 10 and 12 hours each meeting docket and reviews more cases than it did in 1983. As noted above, the OP Board now reviews an average of 59 cases per docket, which requires Board members to work between 10 and 12 hours for each meeting docket that is scheduled. This productivity must be compared to the average of 32 cases that were reviewed during the 16 hours that constituted the two-day meeting dockets during the mid-1980's.

This historical perspective of how OP Board members have been compensated for meeting docket work over the past 18 years is important because it proves that every Commissioner since 1980 has approved the current compensation system, which pays $60 per claim reviewed during each meeting docket. The Audit Report criticizes this method of compensation as "piece rate compensation," which does not meet the definition of a per diem rate. (Legislative Audit Report at 9.) According to the Audit Report, this method of compensation violates § 23-4-8a of the West Virginia Code, which is the enabling statute that authorizes the Commissioner to set the salary for OP Board members. This claim in the Audit Report is incorrect.

The enabling statute in question does not state that OP Board members shall be paid on a strictly per diem basis, as suggested by the Audit Report. Instead, the statute provides the following:

> The Commissioner, from time-to-time, shall fix the per diem salary, ***computed on the basis of actual time devoted to the discharge of their duties***, to be paid each member of such Board, and they shall also be entitled to reasonable and

> necessary traveling and other expenses incurred while actually engaged in the performance of their duties.

W. VA. CODE § 23-4-8a (1994). The West Virginia Workers' Compensation Act does not define what is meant by the directive that the per diem salary paid to OP Board members shall be "computed on the basis of actual time devoted to the discharge of their duties . . . ." Historically, every workers' compensation commissioner since 1980 has interpreted this statute as authorizing compensation on a per case reviewed basis for meeting dockets.

Every commissioner since 1980 has recognized that compensating OP Board members for their meeting docket work based on the actual work performed as measured by the number of cases reviewed is the best way to calculate members' compensation because (i) this is the typical method of compensating physicians in private practice, where practitioners typically charge per examination instead of per hour; and (ii) because a per case compensation system encourages Board members to be as efficient as possible in conducting their examinations and case reviews. Moreover, calculating compensation based on the number of actual cases reviewed makes it very simple to keep track of the productivity of the OP Board and compensate its members based on this productivity. All that has to be monitored for meeting docket compensation purposes is the number of findings actually issued after each meeting docket.

It is well-settled by the West Virginia Supreme Court of Appeals that the ***practical construction*** of a statute by the government officer charged with the execution of the statute is entitled to great weight in determining what the statute means. *See, e.g., Wilson v. Hix,* 136 W.Va. 59, 65 S.E.2d 717 (1951). Here, the Audit Report recommends that the construction of § 23-4-8a that has been consistently followed for nearly 20 years be

abandoned in favor of an undefined, new pay structure. The Audit Report does not describe how this new compensation system should be structured except to suggest that it must be a fixed rate of pay for each day of service. As shown above, however, the enabling statute does permit a fixed rate of pay. Instead, the statute requires that the per diem salary paid to OP Board members must be computed based on the actual work done by the Board. *See* W. VA. CODE § 23-4-8a.

The only reason cited in the Audit Report for abandoning the historical method of compensating OP Board members for meeting docket work is that the current method results in excessive compensation. This criticism, however, is based on inaccurate information, incomplete information, and unfair comparisons, all of which are discussed below in Section D.

C. Hearing Docket Compensation--$300 Per Hour.

The Audit Report states that the $300 per hour fee paid to OP Board members for their work at hearing dockets is excessive because Board members do not have any overhead associated with their OP Board duties. This statement is incorrect for several reasons. First, all OP Board members do maintain malpractice and liability insurance. Board members must insure against the risk of liability exposure should they breach the standard of care applicable to physicians conducting one time disability evaluations. The Audit Report is incorrect where it states that OP Board members have no personal liability for their regular duties on the Board. Members can be sued for medical malpractice if, for example, a serious condition is disclosed by a Board examination and the claimant is not properly advised and instructed to follow-up with his regular physician. Also, a malpractice

suit could be filed against a Board member in the event a claimant suffers a harmful complication (*e.g.*, a heart attack) as a result of one of the objective lung studies administered as part of a Board examination. OP Board members must also maintain an office staff to monitor payments received for OP Board duties.[1]

Secondly, OP Board members have additional overhead in the form of uncompensated time for the work they perform reviewing the medical evidence in litigated claims that are designated by the Office of Judges as "Board-to-review claims." These claims involve unusually complex issues, voluminous medical records, and/or deposition testimony that must be studied by OP Board members before they can testify at the final hearing. OP Board members are not compensated for the time they spend preparing to testify in the "Board-to-review claims" set on each hearing docket.

Three 40-case hearing dockets are scheduled each week: a docket is scheduled each Wednesday beginning at 9:15 a.m. and 1:15 p.m., and each Friday beginning at 9:15 a.m. Each Board member spends between three and five hours each week preparing to testify in Board-to-review claims. This work is done prior to the hearing docket on each member's own time. Unlike private practitioners and independent medical examiners involved in West Virginia workers' compensation claims, OP Board members are ***not*** compensated for the time they spend preparing to testify.

The typical rate of compensation paid to other physicians for preparing to testify is $300 per hour. Consequently, each member of the OP Board incurs between $900

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[1] *See infra* at page 17 and footnote 4 for a discussion that demonstrates the importance of monitoring what is due to each Board member for the services provided and what is received by each physician for his work as an OP Board member.

and $1,500 of "overhead" in the form of uncompensated time spent preparing to testify at each week's OP Board hearing dockets. Over the course of fifty weeks per year, this amounts to between $45,000 and $75,000 of uncompensated time for ***each*** of the three Board members that appear at each hearing docket. The grand total of this uncompensated overhead for all OP Board members is between $135,000 and $225,000 each year.

Finally, there is an incidental overhead cost of serving on the OP Board that is very real but incalculable. This "overhead" is the toll on a physician's private practice that is exacted by the time demands of serving as a member of the OP Board. It is impossible to maintain a typical private practice as an OP Board member because so much time is spent during the prime business hours fulfilling OP Board obligations. For the OP Board Chairman and radiologist, most of the prime business hours from 9:00 a.m. to 4:00 p.m. are devoted to OP Board work three and one-half days each and every week of the year. For the rotating internists, the toll exacted by OP Board service is less significant, but no less real. The alternating internists devote most of their time during the prime business hours from 9:00 a.m. to 4:00 p.m. to OP Board duties three and one-half days each week for six months of the year. The effect of spending so much time each week during prime business hours doing OP Board work is a dramatic reduction of the level of private practice that an OP Board member can maintain. In other words, OP Board members have a much smaller private practice than their peers. This translates to a very real but incalculable loss of private income that can never be recouped and cannot be easily replaced when a physician leaves the OP Board.

D. The Current Compensation Formula Is Reasonable.

The Audit Report's principal criticism against the method of compensating OP Board members involves the $60 per case fee paid for the work done during OP Board meeting dockets. The Audit Report states that this pay structure "does not meet the definition of a per diem rate. A per diem rate is not an hourly rate or a piece rate, but a fixed rate for each day of service." (Legislative Audit Report at 9.) As noted above, this criticism is unfounded because the applicable statute does not direct the Commissioner to compensate Board members on a strictly per diem basis. Instead, the statute directs the Commissioner to fix a per diem salary that is computed based on the actual work performed by Board members. The $60 per case compensation for meeting docket work satisfies this statutory directive. The Audit Report also states that the method of compensating OP Board members results in excessive compensation.

In order to make the case that OP Board members are over-compensated, the Audit Report compares the salary they have allegedly earned with the average salary earned by the top 25 percent of physicians practicing in the specialities of radiology and internal medicine. (*See* Legislative Audit Report at 21-23.) There are several problems with this comparison.

First, the salary allegedly earned by members of the OP Board that is used for comparison with the income earned by the top 25 percent of radiologists and internal medicine specialists is inaccurate and inflated. The report does not identify the source of the incomes listed in Tables 6 and 7. These amounts are incorrect. For example, the report states that the OP Board Chairman earned a total of $1,604,387 for Fiscal Years 1995, 1996, 1997, and 1998, for an average annual salary of $401,096.75. This is incorrect. For calendar

years 1994 through 1997, which include most of Fiscal Years 1995 through 1998, the OP Board Chairman earned a grand total of $1,449,892, for an annual average salary of $362,473. The compensation actually paid to the Chairman is nearly $40,000 *less* per year than the salary cited in the report. The fact that the Audit Report overstates the compensation paid to OP Board members means that much of the information reported in Tables A, B, 6, 7, 8, and 9 of the report is incorrect.

The Audit Report not only overstates the income earned by Board members, it also understates the amount of time Board members devote to their official duties. The report correctly states that there are two full days of OP Board meeting dockets each week--Tuesday and Thursday. There are also three hearing dockets each week (*i.e.,* two dockets on Wednesday and one docket on Friday). Board members must work between 10 and 12 hours to fulfill their duties for each OP Board meeting docket, which means that each OP Board member spends between 20 and 24 hours each week performing meeting docket work. Therefore, the "exam hours" information reported in Table 7 of the Audit Report is incorrect.

The report also suggests that all of the OP claimants are examined in less than two and one-half hours during meeting dockets. (Legislative Audit Report at 18.) This is also incorrect. It takes much more than two and one-half hours for OP Board members to review the medical records regarding each of the fifty-four living claimants that report for examinations and review the medical records in the five fatal claims routinely reviewed during each meeting docket. In addition to reviewing all of these medical records, OP Board members review chest x-rays for each living claimant and in most fatal claims. Plus, in the living claims reviewed, OP Board members examine claimants; they supervise the

administration of necessary objective lung function studies;[2] they interpret the results of the objective lung studies conducted in conjunction with claimant examinations; they analyze all of the information that has been gathered as a result of the examination or review process; and they dictate the OP Board findings and proofread the findings after they have been transcribed. All of this work is now done in an average of 54 living claims and five fatal claims during each of the two meeting dockets scheduled every week. This has been the workload carried by the OP Board for the past three years. As noted previously, this workload represents an 84 percent increase of the average 32 cases that the Board reviewed each meeting docket during the mid-1980's.

In addition to the 20 to 24 hours of work devoted to the meeting dockets each week, OP Board members spend an average of eight hours each week testifying at the hearing dockets. And, in addition to the eight hours spent testifying each week, OP Board members devote between three and five hours each week reviewing the Board-to-review cases[3] that are scheduled on each hearing docket. This hearing preparation is ***not*** compensated.

In summary, OP Board members spend between 31 and 37 hours each week working to fulfill their official duties. The Audit Report states, on the other hand, that Board members work between 19 and 26 hours each week to fulfill their official responsibilities. That Audit Report is incorrect. What this means is that the "testimony hours," "exam hours,"

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[2] **While it is correct that most objective tests are administered by trained technicians, OP Board members are present when the testing is administered and are frequently called on to determine whether certain tests can be performed, participate in the administration of the tests and provide emergency care if necessary, and they are responsible for supervising the technicians who administer the tests.**

[3] ***See supra*** **at page 8.**

and "estimated total hours" reported in Table 7 of the Audit Report are wrong, and the "earnings" and "annual pay" information reported in Tables 8 and 9 is also wrong. The comparison information provided in Table A and B is also incorrect.

According to the Audit Report, the typical physician works 56 hours each week. The 31 to 37 hours worked each week by OP Board members in fulfilling their official duties is 55 percent to 66 percent of the typical physician's work week. For the Chairman of the OP Board and the radiologist, the 55 percent to 66 percent is accurate on a weekly and annual basis. For the rotating internist, the ***annual*** percentage is one-half of that for the Chairman and the radiologist, or 27.5 percent to 33 percent. Thus, the comparison percentages reported in the Audit Report are wrong.

The Audit Report also fails to discuss the time and out-of-pocket investments made by OP Board members in an effort to ensure that they provide state-of-the-art pulmonary evaluations in all OP claims. The 31 to 37 hours per week discussed above does not include time spent by the Chairman of the OP Board dealing with personnel within the Division regarding meeting docket management and, more recently, reduction of the backlog of pending claims; nor does the 31 to 37 hours include the time spent dealing with personnel within the Office of Judges regarding hearing docket management and, during the past three years, reduction of the backlog of pending litigated claims. Efforts to reduce the backlog of claims pending before the Division and the Office of Judges have contributed to the increase from 40 to 70 of the number of cases scheduled on each meeting docket, and have resulted in a dramatic increase of the number of ***final*** hearings scheduled on each hearing docket, all of which has meant more work for the OP Board Chairman and OP Board members. The

The Division has already implemented procedures to identify and recover all erroneous payments made to other health care providers.

IV. ROENTGENOLOGIST RECOMMENDATION

There has been only one radiologist member of the OP Board since the Board's inception. The statute was amended in 1974 to authorize expansion of the Board from three physicians to five, including two roentgenologists (*i.e.*, radiologists). Every Commissioner since 1974 has interpreted the statute as directory as opposed to mandatory regarding the appointment of a second radiologist. Every Commissioner has interpreted the statute as directory regarding the appointment of a second radiologist because the statutory obligations of the Board have been and continue to be met with a single radiologist. Even though the current OP Board is reviewing nearly twice as many cases at every meeting and is giving final hearing testimony in more and more cases on every docket, the current Commissioner does not believe that it is necessary to appoint an additional radiologist in order for the Board to fulfill its statutory duties. Should the Legislature determine, however, that the statute mandates the appointment of an additional radiologist, the current Commissioner will be pleased to comply.

V. CONCLUSION

The current method of compensating OP Board members for meeting docket work is the same method of compensation that has been in place since 1980. The current method of compensating OP Board members for hearing docket work is the same method of compensation that has been in place since 1989. Workers' compensation commissioners under both Democratic and Republican administrations have approved of these compensation

Chairman of the OP Board estimates that he spends an average of two hours each week dealing with management issues and case-specific problems that develop.

Additionally, the Chairman of the OP Board has traditionally invested substantial amounts of time working to improve the methodologies employed by the OP Board to examine claimants and review cases. These efforts include trips to laboratories throughout the Eastern United States to conduct research for setting up the OP Board laboratory, modernizing the laboratory, and for drafting the Commissioner's standards for evaluating pulmonary impairment. The Chairman has not been compensated for the time devoted to these trips, and all of the expenses incident to these trips were paid by the Chairman. Trips have also been made by the Chairman to meet with national experts in pathology to obtain consulting assistance in the field of pulmonary pathology. The Chairman was not paid for the time and expenses involved in these trips.

All of the members of the OP Board have personally paid the expenses resulting from their attendance at continuing medical education training, including the National Institute of Occupational Safety & Health OP review course. Much of the specialized continuing medical training pursued by Board members would not be pursued if Board members were only private practitioners. These seminars are attended because of the specialized, highly technical nature of the medical issues facing the OP Board.

Finally, there are significant problems with the salary comparisons used in the Audit Report to make a case for the alleged over-compensation of OP Board members. The first problem is that the report bases its comparisons on the average salary of the top 25 percent of radiologists and internal medicine specialists. The Chairman of the OP Board, however, is a thoracic surgeon. Table 4 of the Audit Report reflects that the top 25 percent

of surgeons earn more than the top 25 percent of radiologists and internists. This oversight is irrelevant, however, because the comparison data cited in the Audit Report is fundamentally misleading.

The comparison data is fundamentally misleading because the net income for radiologists and internists cited in Table 4 of the Audit Report is generated by *every* aspect of a full-time practitioner's work. The different aspects of a physician's private practice generate different levels of income. For example, work covered by Medicare, Medicaid, and certain HMO's generates substantially *less* income than private-pay consultations, one-time disability evaluations, and expert testimony. A private physician who devotes his or her practice exclusively to one-time disability evaluations and expert testimony would earn substantially more than the average income of the top 25 percent of radiologists and internists who earn their living by performing *all* aspects of private practice. This fact, as well as the excellent value of what the Division receives from the OP Board, are easily demonstrated by comparing the private cost of a pulmonary evaluation to the cost of a pulmonary evaluation by the OP Board.

The total cost per claim of an OP Board evaluation in a living claim is between $450 and $540, depending on the objective lung function studies that are administered. This cost is less than one-half of the typical charge for a comparable evaluation by a pulmonary specialist in the open market. Evaluations by pulmonary specialists in West Virginia cost between $900 and $1,800, depending on what objective tests are performed and how many medical records must be reviewed by the examining physician. In the private sector, a disability evaluation is conducted by one physician. OP Board evaluations, on the other

hand, are conducted by three physicians, all of whom are well-trained and experienced in assessing disability due to pulmonary diseases.

Even though the OP Board has increased its meeting docket productivity by 84 percent, and there has been a substantial increase in the number of claims where members give final testimony during each OP Board hearing docket, the quality of OP Board evaluations and testimony has not suffered. The quality of OP Board work equates with the best evaluation reports and expert testimony obtained from any private physician in West Virginia. Despite the high volume demands on the OP Board during the last three years, OP claimants in West Virginia continue to receive a first-rate pulmonary evaluation at a cost to the Division that is much less than the cost for a comparable evaluation in the private sector.

In conclusion, it is very misleading to compare the compensation paid to OP Board members for the highly sophisticated services that they provide with the income generated by the full gambit of services provided by a physician in private practice. The services provided by OP Board members are among the most expensive, and hence most profitable services provided by private practitioners in the open market. The Audit Report, therefore, is based in large part on an "apples to oranges" comparison. This comparison, as discussed above, is further flawed by the inaccurate hours and income data cited in the Audit Report.

III. RECORD KEEPING AND ERRONEOUS PAYMENT RECOMMENDATIONS

A. Tracking The Time Spent On Official Duties By OP Board Members.

The Commissioner maintains accurate records of the time spent by OP Board members performing their official duties at OP Board hearing dockets. This time is recorded

by the presiding Administrative Law Judge and court reporter. Board members are compensated for the actual time spent fulfilling their duties at the hearing dockets. This method of compensation has been in place since it was implemented by Commissioner Emily Spieler effective February 1, 1989.

As explained above, compensation for work performed at OP Board meeting dockets since 1980 has been computed based on the actual work performed during each meeting docket. Computation of this compensation is based on the actual number of OP Board findings issued during each meeting docket. This information is accurately recorded by the Commissioner.

B. Recovery of Payments Made In Error.

Most of the erroneous payments made to members of the OP Board and to health care providers discussed in the Audit Report occurred when the Division converted from its old computer system to the Workers' Compensation Insurance System (WCIS) in April of 1996. The process of this conversion and the evolution of WCIS during the year after the conversion resulted in erroneous payments. The erroneous payments made to OP Board members were first discovered and reported by the Chairman of the OP Board, and all erroneous payments made to OP Board members were immediately returned to the Division.[4]

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[4] **These overpayments were identified by the Chairman of the OP Board upon receipt as a result of the Chairman's bookkeeping procedures, which constitute part of the overhead incurred by the Chairman in fulfilling his duties as a member of the OP Board.**

formulas. As such, these compensation formulas are the result of a practical construction of § 23-4-8a of the West Virginia Code by the government officials charged with the interpretation and enforcement of this statute. This longstanding, practical construction of the enabling statute should not be modified because it is consistent with the statutory language and because it results in reasonable compensation for the type of services provided by the OP Board and the demands of serving as a member of the OP Board.

The Audit Report criticisms of the current OP Board compensation system are unfounded because they are based on incorrect and incomplete information, as well as inappropriate comparisons of the salary earned by OP Board members to the income earned by private practitioners. The OP Board provides to the Division high quality pulmonary evaluations and expert medical testimony for less than what these services would cost in the private sector. The compensation paid to OP Board members for their professional services is much less than what a private practitioner would earn if his or her entire practice were devoted to one-time disability evaluations and expert testimony. (*See* attached Exhibit.)

Compensating OP Board members under the current formula is not only fair, but is essential in order to attract and maintain the high level of expertise that is necessary to ensure that West Virginia OP claimants receive a first-rate pulmonary evaluation at a cost to the Division that is less than the cost for a comparable evaluation obtained in the open market.

The record keeping employed by the Commissioner to compute the compensation paid to OP Board members is accurate. Problems did occur when the Division converted from its old computer system to WCIS. When this occurred, all of the erroneous

payments to OP Board members were immediately identified and returned by the members of the Board.

Finally, the current Commissioner believes that the OP Board as currently comprised is functioning effectively and efficiently in fulfilling its statutory duties, and is being compensated fairly--not excessively--in accordance with the applicable statute.

RECEIVED OCT 0 5 1998

October 2, 1998

Governor Cecil Underwood
State Capitol Complex
1900 Kanawha Blvd. East
Charleston, West Virginia 25305-0370

Dear Governor Underwood:

This letter is to advise you of a problem that has arisen in regards to specialty assessments, Independent Medical Evaluations and Permanent Impairment Ratings that are done through the West Virginia Bureau of Employment Programs, Workers' Compensation Division. In a unilateral move, the Workers' Compensation Division has imposed a limitation on reimbursements for Independent Medical Evaluations regardless of complexity or age of claim. The amount of reimbursement is already well below the typical commercial rate for Independent Medical Evaluations. There was no notice received of this and no ability to prepare to deal with such a limitation that stands to cause me a 25 to 30% loss in revenue.

I object most vehemently and strongly to such tactics, especially on no notice. I simply received an EOB and reimbursement check that had been cut for some unexplainable reason. It was not until I was able to get through to the Workers' Compensation Billing Division that I was able to find out what they had done. The bottom line is that many of these cases are very complicated. They may take anywhere from four to eight hours from beginning to end to be able to evaluate and review, especially patients with multiple injuries and with injuries that are sometimes ten and fifteen years old.

My average billing per IME is around $750 to $800 and this will markedly impair my ability to accommodate the needs of the Workers' Compensation Division when it comes to seeing complicated IME's. I had written a letter not too long ago to your office that had actually urged raising this level of reimbursement before this occurred. Does one get punished for even suggesting that reimbursement be improved for the State and brought a little closer to the standard? I typically get paid $425 per hour for non-Workers' Compensation IME's and permanent impairment ratings. I still fall in the below average range for what people typically bill per hour for this type of work.

EXHIBIT

I also believe that I produce a quality product and something that is useable by the Division. I think checking on the quality of my work will speak for itself. I also do my histories and my evaluations including the range of motion measurements on my own to ensure their accuracy to be able to defend them whenever I am deposed.

As a West Virginia based medical corporation I would respectfully request that you look into this matter and at least lift the limitation on the cap or raise it to a reasonable level. My prior letter had suggested raising each unit price from $75 to $100 per unit and I was not prepared for this. However, I think if they are looking for a number somewhere around $1500 would be reasonable to prompt a more thorough review of the claim or a request justification for increased cost. At least having a preauthorization procedure before you take the time to schedule a patient for a protracted period of time to bill more than this $600 cap would be reasonable. This does not even meet the litmus test for common sense and it is not fair to my patients and examinees.

I appreciate your prompt attention to this matter and would appreciate a favor of a reply.