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WORKERS' COMPENSATION BOARD
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January 29, 2020

Senator Shenna Bellows, Chair
Representative Michael Sylvester, Chair
Joint Standing Committee on Labor and Housing
100 State House Station
Augusta, ME 04333-0100

Re: Report of the Working Group Established by the Board Pursuant to LD 756, § 17.

Dear Senator Bellows and Representative Sylvester:

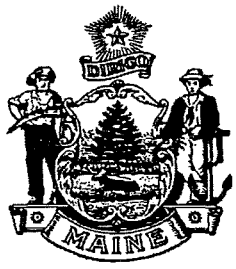
Attached to this letter is the Workers' Compensation Board's report on behalf of the working group established by the Board pursuant to LD 756, § 17.

I am available to answer any questions you may have regarding this report.

Sincerely,

John C. Rohde
Executive Director
Workers' Compensation Board

Cc: Senator Stacey Guerin
Senator Mark Lawrence
Representative Susan Austin
Representative Dick Bradstreet
Representative Anne Carney
Representative Scott Cuddy
Representative Donna Doore
Representative Lawrence Lockman
Representative Joshua Morris
Representative Deane Rykerson
Representative Ralph Tucker
Coleen McCarthyReid, Legislative Analyst
Deirdre Schneider, Legislative Analyst
Rachel Tremblay, OFPR Analyst
Danielle Lane, Committee Clerk



Report of the Working Group Established by the Board Pursuant to LD 756, § 17

Submitted to the 129th Maine Legislature
January 30, 2020

John C. Rohde
Executive Director
Workers' Compensation Board

I. INTRODUCTION

Pursuant to P.L. 2019, c. 344, § 17 (L.D. 756), the Workers' Compensation Board (the "Board") was tasked with convening a "working group of stakeholders to evaluate issues related to work search and vocational rehabilitation requirements for injured workers and protections for injured workers whose employers have wrongfully not secured workers' compensation payments." As directed in § 17, the Board, on behalf of the working group, is submitting this report to the Joint Standing Committee on Labor and Housing.

The work was divided into two groups. One focused on work search and vocational rehabilitation and the other on issues related to employees injured while working for uninsured employers. The work search/vocational rehabilitation group met three times and the uninsured employer group met four times.

In addition to Board staff, the following individuals attended at least one committee meeting: Elizabeth Brogan, Esq. (Workers' Compensation Coordinating Council and Maine Council of Self-Insurers); Glenn Burroughs (Bath Iron Works, Local S6, labor member of the Workers' Compensation Board); John Cronan, Esq. (Preti, Flaherty); Matt Cunio, Amanda Pelletier and Shari Peppard (Maine Employers Mutual Insurance Company); Karen Fraser and Libby Stone-Sterling (Maine Department of Labor Division of Vocational Rehabilitation); Peter Gore (Maine State Chamber of Commerce); Ben Grant, Esq. (McTeague Higbee); Joan Henson (MHCA Workers' Compensation Fund); Nathan Jury, Esq. (MacAdam & Jury); Matt Marks (Associated General Contractors); Brian Parke (Maine Motor Transport Association); Hope Pollard (Associated Builders and Contractors); Cheryl Russell (Northern Light Health); Carolyn Russo, Esq. (Policy and Legal Director, Office of the Senate President); and, Amy Webber (Cianbro).

Ultimately, no agreement was reached on any of the issues with respect to recommendations or draft implementing legislation.[1] This report sets forth the matters that were discussed by the working groups and summarizes why there was no agreement regarding these issues.[2]

II. WORK SEARCH

A. Purpose

[1] The Administration supports participation in task forces and commissions and, when possible, offers information and technical assistance. For recommendations from task forces and commissions, agencies follow a formal administrative process to evaluate proposals, provide views on legislation, and engage on policies with budget implications. As a result, the Board does not take a position on the report of this working group.

[2] A draft of this report was forwarded to attendees who were invited to review and comment upon it. Elizabeth Brogan, Esq. (Workers' Compensation Coordinating Council and Maine Council of Self-Insurers) responded and her comments have been included in § II (D), below.

The purpose of the work search rule has been explained in decisions issued by Maine's Law Court.

> . . . a partially incapacitated employee may be entitled to "100 % partial" incapacity benefits pursuant to [39-A M.R.S.A.] § 213 based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury. . . . In order to obtain the 100 % benefit, it must be established, pursuant to the "work search rule" that work is unavailable within the employee's local community because of the work injury.

Monaghan v. Jordan's Meats, 2007 ME 100, ¶13.

The work-search rule is not defined in the Workers' Compensation Act (the "Act"). Rather, it is

> . . . a judicially created doctrine designed to allocate the burdens of proof in cases when a partially incapacitated employee is seeking total incapacity benefits. The purpose of the rule is to aid in the calculation of a partially incapacitated employee's "ability to earn."

Bureau v. Staffing Network, 678 A.2d 583, 587, (Me. 1996) (citation omitted).

B. Operation

The Law Court has explained the operation of the rule as follows:

> Work search evidence should disclose that the employee made a reasonable exploration of the labor market in their community for the kind of work he has regained some ability to perform and that he was unable to obtain such work for remuneration either because no stable market for it existed or, if there was such a market, the work was not available to him by reason of the continuing limitations, caused by his work-related injury, upon his ability to perform it.

Monaghan, 2007 ME 100, ¶17 (quoting *Ibbitson v. Sheridan Corp.*, 422 A.2d 1005, 1009 (Me. 1980).

Application of the work search rule in an individual case "is a mixed question of fact and law. Findings regarding the actual efforts made by the employee to obtain work are factual." *Monaghan,* 2007 ME 100, ¶18. An administrative law judge's ("ALJ's") application of the rule "must go deeper than a mere examination of the number of contacts that the employee makes with employers." *Monaghan,* 2007 ME 100, ¶21. In reviewing an ALJ's decision regarding the adequacy of a work search, the Law Court considers factors including, but not limited to:

(1) The number of inquiries made or applications submitted by an employee. *Bowen v. Maplewood Packing Co.*, 366 A.2d 1116, 1119 (Me. 1976).
(2) Whether the search was undertaken in good faith. *McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, P7, 743 A.2d 744, 747.
(3) Whether the search was too restrictive. *See Cote v. Osteopathic Hosp. of Me., Inc.*, 432 A.2d 1301, 1305 (Me. 1981).
(4) Whether the search was limited solely to employers who were not advertising available positions, or whether the employee also made appropriate use of classified ads or other employment resources in the search. *See Ibbitson*, 422 A.2d at 1011-12; *Bowen*, 366 A.2d at 1117-18.
(5) Whether the search was targeted to work that the employee is capable of performing. *See Cote*, 432 A.2d at 1305.
(6) Whether the employee over-emphasized work restrictions when applying for jobs. *Pelchat v. Portland Box Co., Inc.*, 155 Me. 226, 231, 153 A.2d 615, 618 (1959).
(7) Whether the employee engaged in other efforts to find employment or increase prospects for employment. *McIntyre*, 2000 ME 6, P7, 743 A.2d at 747.
(8) The employee's personal characteristics such as age, training, education, and work history. *Johnson v. Shaw's Distrib. Ctr.*, 2000 ME 191, P12, 760 A.2d 1057, 1060.
(9) The size of the job market in the employee's geographic area. *See Bolduc v. Pioneer Plastics Corp.*, 302 A.2d 577, 581 (Me. 1973).

Monaghan, 2007 ME 100, ¶21.

Ultimately, the Law Court stated an ALJ's

> task is not to focus on any single aspect of the employee's efforts, but to view the evidence through a broad lens to determine whether the employee's efforts demonstrate that she was unable to find work because (1) no stable market for the kind of work she is able to perform exists in the local community; or (2) if there is such a market, that work is unavailable to the employee due to the persisting effects of the work-related injury.

Monaghan, 2007 ME 100, ¶22.

The Law Court, in *Monaghan*, also rejected an argument that it should establish a bright line test "beyond which a particular number of contacts would constitute an adequate work search as a matter of law." *Monaghan,* 2007 ME 100, ¶22.

C. Longshore and Harbor Workers' Compensation Act Approach

There was discussion of adopting an approach similar to the one used in the Longshore and Harbor Workers' Compensation Act ("LHWCA") system. The LHWCA does not have a statutory work search provision. In anticipation of a discussion of this issue, LHWCA case law was used to create the factors (paragraphs (1), (2) and (3)) below. Ultimately, because there was disagreement as to whether the work search rule should be modified in any manner, no discussion of the factors took place.

(1) If an employee has been incapacitated for 60 consecutive calendar days because of medical restrictions related to the employee's injury, the employer shall, on or before that 60th day, extend a bona fide offer of reasonable employment that is within the most recent restrictions approved by a physician that has treated the employee's work injury. If the employer does not make a job available to the employee by that 60th day, then the employer shall provide the employee a list of specific jobs available within a reasonable distance from employee's residence that are within the most recent medical restrictions referenced above, together with contact information that will allow the employee to contact prospective employers about the available jobs. The employee shall contact all of the prospective employers on the job list within 14 calendar days and inquire about employment.

(2) If the employee does not contact all of the prospective employers on the job list within 14 calendar days and make inquiry about employment, then the employee shall not be entitled to ongoing incapacity benefits unless by agreement between the parties or by decision of an administrative law judge.

(3) If, after the employee contacts each of the employers on the job list and makes inquiry for employment, the employee finds there are no available jobs, then there shall be a rebuttable presumption that work within the restrictions is unavailable and the employer shall begin paying 100% ongoing partial incapacity benefits to the employee. If the employee obtains employment and earns average weekly wages that are less than those the employee received before the date of injury, the employee is entitled to receive weekly benefits under this Act equal to 2/3 of the difference, due to the injury, between the average gross weekly wages, earnings or salary before the injury and the average gross weekly wages, earnings or salary that the employee earns from the new employment but not more the maximum weekly rate of compensation as determined under section 211.

D. Working group summary

The work search discussion revolved around two basic questions: One, would changing the work search standard impact whether and/or when an injured employee returns to work after an injury; and two, whether the current work search standard can be amended so that it will be easier to interpret and apply.

By the end of the third meeting, it was clear there were diverging opinions as to both issues. Proponents of clarifying the standard argued that requiring the insurer to produce a list of available jobs (which is similar to the process used in the LHWCA system), as opposed to the employee having the burden of undertaking a search for work, would result in more employees returning to work sooner.

Opponents countered that: The burden should not be on insurers; shifting the burden to insurers will disincentivize employees from searching for work; labor market surveys will potentially be stale, if used in the proposed way, in a dynamic labor market; there would be significant added cost associated with obtaining a labor market survey in every single case in which an employee is released to work but cannot return to the employer; employees have better knowledge of his or her own interests, skills, transportation preferences and community; there are significant differences between the federal Longshore and Harbor Workers' Compensation Act and the state law; and, the ALJ being in the best position to determine whether there was a good faith work search, after hearing all the evidence, determining the facts and applying the law.

With respect to the current standard, there was discussion as to whether certain factors (for instance, whether an employee over-emphasized his/her injury) are difficult to explain and apply consistently. There was a difference of opinion as to whether a better, more consistently applied standard can be developed; with opponents expressing support for the "*Monaghan* Court's rejection of a 'bright line' standard, in favor of allowing the fact-finder to consider a range of relevant factors."

The group did not reach agreement on recommendations or draft implementing legislation.

III. VOCATIONAL REHABILITATION

A. Purpose

The value of vocational rehabilitation in workers' compensation is widely recognized, as explained in the following excerpt from the leading workers' compensation treatise:

> Until comparatively recently, the industrial accident problem had two major phases: prevention and cure. The spotlight is now on a third: rehabilitation. The

> conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the person to the maximum usefulness that he or she can attain given the physical impairment.
>
> As a matter of underlying philosophy, it is not difficult to demonstrate that rehabilitation is properly an inherent part of the workers' compensation system's function, and this is now universally accepted in principle by all interested groups. Even as a purely legal concept, one could put the matter this way: Restitution is the proper remedy when money damages will not restore something that is unique. How much clearer is it that, when the loss is the loss of use of a limb rather than of mere chattels, restitution is the most appropriate remedy.

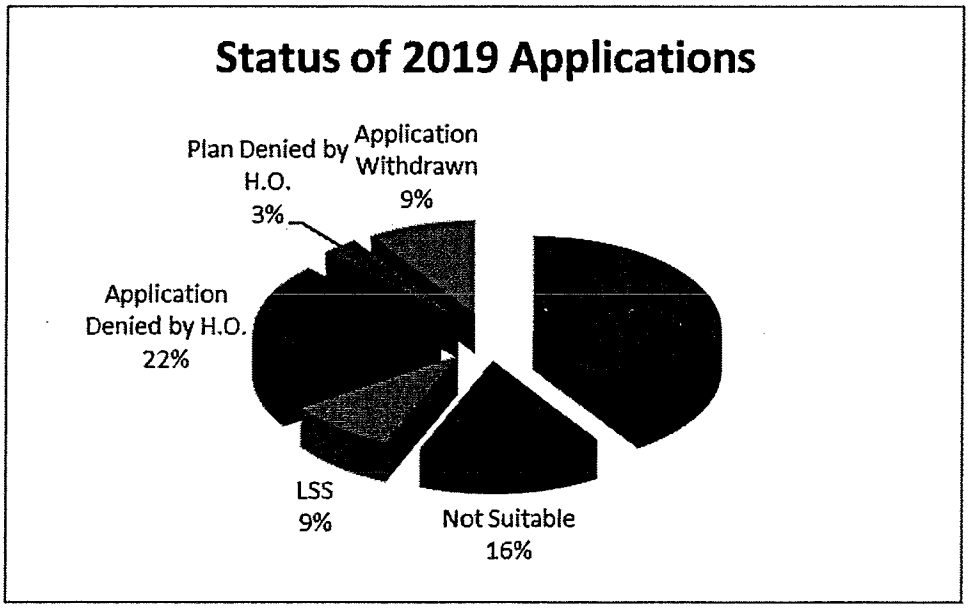
8 Larson's Workers' Compensation Law § 95.01.

B. Data

To provide context for the vocational rehabilitation discussion, the working group examined the number of vocational rehabilitation requests received by the Board and the number of lost time claims received each year.

1. Number of vocational rehabilitation requests from 2015 to 2019.

The following charts show the status of vocational rehabilitation requests from 2015 to 2019.



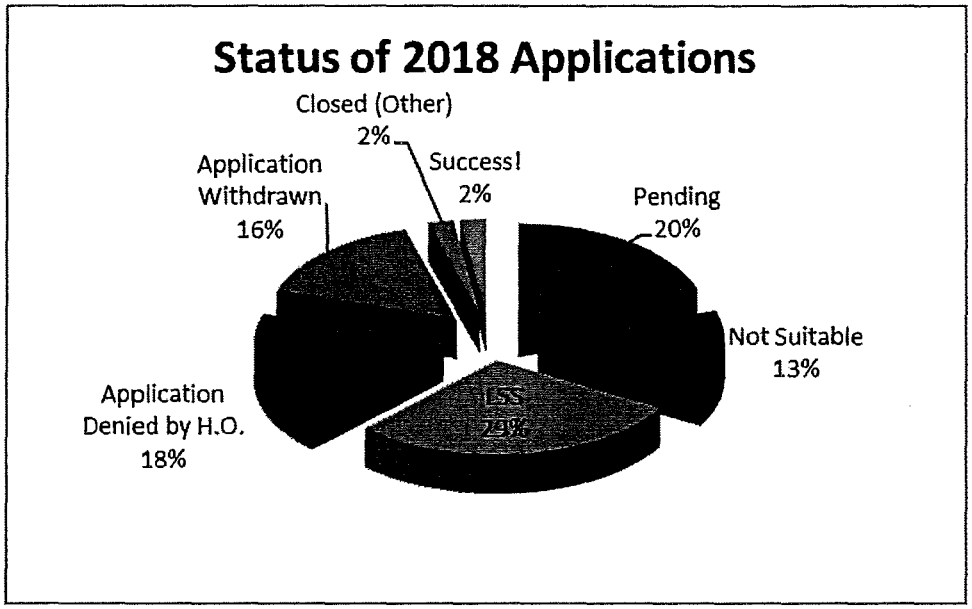
2019:

32 Applications Total

26 by EE

3 by ER/IR

3 by ALJ



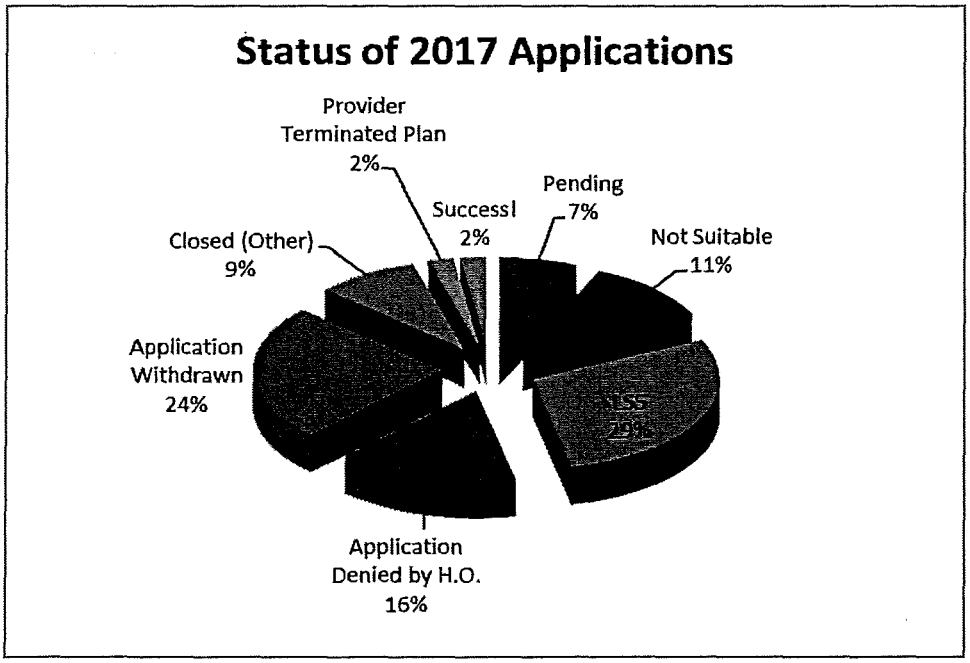
2018:

45 Applications Total

36 by EE

8 by ER/IR

1 by ALJ



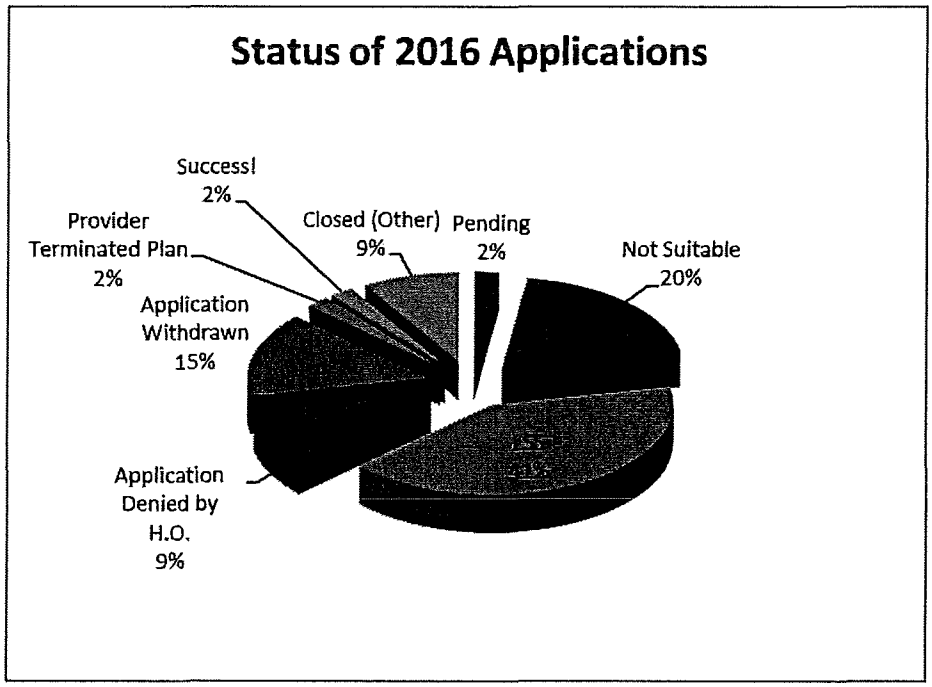
2017

45 Applications Total

41 by EE

0 by ER/IR

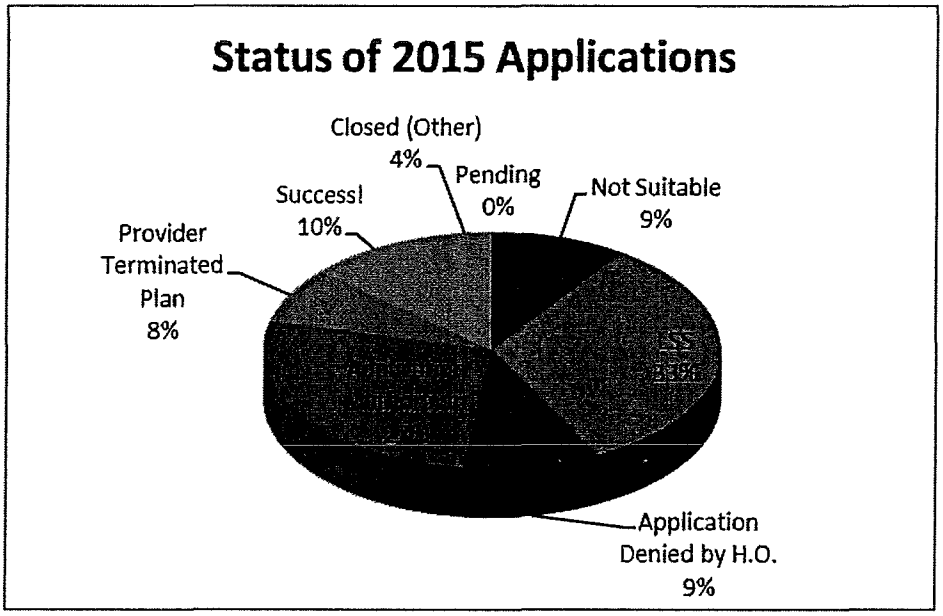
4 by ALJ



2016:

47 Applications Total

39	by EE
6	by ER/IR
2	by ALJ



2015:

53 Applications Total

53	by EE
0	by ER/IR
0	by ALJ

2. Number of lost time claims per year

The following chart - produced by the Department of Labor Bureau of Labor Standards – for the Board's 2019 Annual Compliance Report, shows the number of lost time claims reported from 2013 to 2017.

			Year of First Report			
Claim Status	2013	2014	2015	2016	2017	Total
Lost Time (LT) Claims	5,152	5,134	4,940	4,561	4,779	24,566
Open LT Claims	241	295	416	512	663	2,127
% Open	4.7%	5.7%	8.4%	11.2%	13.9%	8.8%
Closed LT Claims	4,911	4,839	4,524	4,049	4,116	22,439
Resumed Work	3,120	3,200	3,093	3,205	3,096	15,714
% Resumed Work	60.6%	62.3%	62.6%	70.3%	64.8%	64.1%

2019 Annual Report on the Status of the Maine Workers' Compensation System, p. C-28.

3. Comparison

A comparison of the number of lost time claims to the number of vocational rehabilitation applications shows the Act's vocational rehabilitation process is infrequently used. In contrast, the Department of Labor's Division of Vocational Rehabilitation reported that it received 107 applications in fiscal year 2018-2019 from individuals who were receiving workers' compensation benefits.

C. Streamline process

Over the years, the Board has received feedback that the procedures associated with requesting vocational rehabilitation services is cumbersome and unclear. In 2018, the Board adopted a rule designed to ameliorate some of these concerns. The working group discussed whether or not it would be worthwhile to incorporate the rule changes into the Workers' Compensation Act (the "Act"). The following draft language, which merges 39-A M.R.S.A. §217 with the changes adopted by the Board in 2018, was presented to the working group.

§217. EMPLOYMENT REHABILITATION

When as a result of injury the employee is unable to perform work for which the employee has previous training or experience, the employee is entitled to such employment rehabilitation services, including retraining and job placement, as reasonably necessary to restore the employee to suitable employment.

1. Services. If employment rehabilitation services are not voluntarily offered and accepted, the board on its own motion or upon application of the employee, carrier or employer, after affording the parties an opportunity to be heard, may refer the employee to a board-approved facility for evaluation of the need for and kind of service, treatment or training necessary and appropriate to return the employee to suitable employment. The

board's determination under this subsection is final. Neither party may appeal the determination of the board under this subsection.

2. Plan ordered. Upon receipt of an evaluation report pursuant to subsection 1, if the board finds that the proposed plan complies with this Act and that the implementation of the proposed plan is likely to return the injured employee to suitable employment at a reasonable cost, it may order the implementation of the plan. Implementation costs of a plan ordered under this subsection must be paid from the Employment Rehabilitation Fund as provided in section 355, subsection 7. The board's determination under this subsection is final. Neither party may appeal the determination of the board under this subsection.

3. Order of implementation costs recovery. If an injured employee returns to suitable employment after completing a rehabilitation plan ordered under subsection 2, the board shall order the employer who refused to agree to implement the plan to pay reimbursement to the Employment Rehabilitation Fund as provided in section 355, subsection 7.

The employer/insurer shall, no later than 30 days after the Board issues an order pursuant to section 355, subsection 7, either pay the amount ordered by the Board or file a petition objecting to the order.

If a timely petition is received, the matter shall be referred to mediation.

If the matter is not resolved during mediation, the matter will be referred for hearing.

The employer/insurer may raise all issues and defenses that were, or could have been raised, in any prior proceeding conducted under this section.

The board's decision under this subsection is subject to appeal as set forth in section 321-B.

4. Additional payments. The board may order that any employee participating in employment rehabilitation receive additional payments for transportation or any extra and necessary expenses during the period and arising out of the employee's program of employment rehabilitation.

5. Limitation. Employment rehabilitation training, treatment or service may not extend for a period of more than 52 weeks except in cases when, by special order, the board extends the period up to an additional 52 weeks.

6. Loss of or reduction in benefits. If an employee unjustifiably refuses to accept rehabilitation pursuant to an order of the board, the board shall order a loss or reduction of compensation in an amount determined by the board for each week of the period of refusal, except for specific compensation payable under section 212, subsection 3.

7. Hearing. ~~If a dispute arises between the parties concerning application of any of the provisions of subsections 1 to 6, any of the parties may apply for a hearing before the board.~~ The board shall adopt rules establishing procedures to resolve disputes between parties concerning the application of any of the provisions of subsections 1, 2, 4, 5 and 6.

8. Presumption.

9. Reduction of benefits. If an employee is actively participating in a rehabilitation plan ordered pursuant to subsection 2, benefits may not be reduced except:

A. Under section 205, subsection 9, paragraph A, upon the employee's return to work with or an increase in pay from an employer who is paying the employee compensation under this Act;

B. Under section 205, subsection 9, paragraph B, based on the amount of actual documented earnings paid to the employee; or

C. When the employee reaches the durational limit of benefits paid under section 213.

D. Summary of working group activity

In calendar year 2019, the Board received 32 applications for employment rehabilitation – down from approximately 45 in prior years. In Fiscal Year 2018-19 the Department of Labor's Division of Vocational Rehabilitation received 107 applications from employees who were receiving workers compensation benefits and had not been referred by the Board. The group discussed whether it is appropriate/desirable for these costs to be shifted to DOL instead of being absorbed by the workers' compensation system.

It is not clear why fewer applications were received this year, nor is it entirely clear why employees go directly to DOL as opposed to exercising their rights under the Act. With respect to the latter point, it is possible the procedures in place at the Board encourage litigation. Additional litigation slows down the vocational rehabilitation process and may make the Board's process less attractive to injured workers.

That said, there was general agreement that it is premature to decide that the recently adopted rule changes will not alleviate the concerns related to vocational rehabilitation procedures. Also, given the small number of applications in 2019, there is agreement that further study is warranted as to why the Board's vocational rehabilitation process is not used more frequently before considering any substantive changes.

IV. PROTECTIONS FOR INJURED WORKERS WHOSE EMPLOYERS HAVE WRONGFULLY NOT SECURED WORKERS'COMPENSATION PAYMENTS

A. Background

With few exceptions, all employers in Maine are required to secure the payment of workers' compensation benefits for their employees. This can be done by purchasing a workers' compensation policy from an approved insurer or by self-insuring. An employee who sustains a work-related injury while working for an employer with the required coverage will have the benefits they are entitled to paid by the responsible insurer or self-insurer.

If, during the course of an injured worker's claim, the responsible insurer is declared insolvent, that employee will continue to receive the benefits to which they are entitled. Instead of being paid by the now insolvent insurer, they will be paid by the Maine Insurance Guaranty Association ("MIGA"). Similarly, if a self-insured entity becomes insolvent, the Maine Self Insurance Guarantee Association ("MSIGA") will assume responsibility for payment of benefits.

An employee injured while working for an employer that wrongfully fails to secure payment of benefits, however, can only look to their employer for payment of benefits. If the uninsured employer has insufficient assets or declares bankruptcy, the injured worker is left without a remedy. Maine does not have an entity – like MIGA or MSIGA – to step in and pay benefits in these situations.

The lack of a remedy in these cases has long been recognized as a problem that should be remedied. The following excerpt is from a letter submitted by the Board to the then Joint Standing Committee on Labor, Commerce, Research and Economic Development on January 16, 2014. (The letter is included as Attachment A at the end of this report.)

> After receiving this information [about the prevalence of the issue], I [former Executive Director Paul Sighinolfi] created a small, but very knowledgeable task force to work on the project. Kevin Gillis, an attorney with Norman, Hanson and DeTroy, and Administrator of the Maine Self-Insurance Guarantee Association, Peter Gore, Vice President of Government Relations for the Maine State Chamber of Commerce and Benjamin K. Grant, an attorney with McTeague Higbee worked on this project. These individuals are known to represent both labor and management interests. The information I gathered from the private attorneys and Board staff was shared. The first question the group addressed was: "Is this a problem of significant enough magnitude to justify a legislative solution?" There was uniform agreement the problem is not major in terms of size, but if there is a single worker injured while working for an uninsured employer, the problem is huge for that person. Based on this unequivocal task force opinion, the problem merits a legislative remedy beyond what is presently available.

As that report went on to note, most states have addressed this issue by enacting laws requiring contractors to pay benefits to injured employees of uninsured

subcontractors and by creating funds that will step in and pay benefits, like MIGA and MSIGA, if the injured worker would otherwise have no remedy. In this report, these concepts are referred to as "contractor-under" and "uninsured employer fund" laws.

The LD 756 working group discussed both ideas. To facilitate the discussion, the working group requested, and the Board drafted, legislation that incorporated these ideas. (The discussion draft is included as Attachment B at the end of this report.)

B. Contractor-under laws

1. Purpose

Contractor-under laws, which have been enacted in all but a few states, protect employees who work for uninsured employers. They also protect employers by discouraging misclassification of employees as independent contractors. The leading workers' compensation treatise explains the rationale for such laws in the following manner:

> The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers.
>
> The statute also aims to forestall evasion of the act by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers and relegating them for compensation protection to small contractors who fail to carry * * * * compensation insurance.

Thorsheim v. State, 469 P.2d 383, 386-387 (Alaska, 1970) (quoting 1A A. Larson, *The Law of Workmen's Compensation* § 49.11, p. 855-856, 858 (1967)).

2. Provisions

Since virtually all jurisdictions have enacted some form of contractor-under language, the working group had a number of examples available to help frame the discussion.

For example,

i. Scope

With respect to scope, Minnesota's statutes provide:

> Subdivision 1. *Liability for payment of compensation.* — Where a subcontractor fails to comply with this chapter, the general contractor, or intermediate contractor, or subcontractor is liable for payment of all compensation due an employee of a subsequent subcontractor who is engaged in work upon the subject matter of the contract.

Minn. Stat. § 176.215.

ii. Exemptions

Virtually all states have exemptions of some sort in their statutes.

a. Residential property owners.

Many states have an exemption for residential property owners. For example, the following language is used in Utah:

> Any person who is engaged in constructing, improving, repairing, or remodeling a residence that the person owns or is in the process of acquiring as the person's personal residence may not be considered an employee or employer solely by operation of Subsection (7)(a).

Utah Code Ann. § 34A-2-103(7)(b)

b. Individuals exempt from the Act.

Often, sole proprietors, partners and members of limited liability corporations are exempt from operation of contractor-under statutes. Maryland addresses the subject this way:

> (1) A principal contractor is not liable to pay compensation to an individual under this title if the individual:
> (i) is a corporate officer, or a member of a limited liability company, who elects to be exempt from coverage under Section 9-206 of this title;
> (ii) is a partner in a partnership and the partnership does not elect to make the individual a covered employee under Section 9-219 of this title; or
> (iii) is a sole proprietor who:
> 1. does not notify the principal contractor, on a form approved by the Commission, of the individual's status as a covered employee; and
> 2. does not elect to be a covered employee under Section 9-227 of this title.
> (2) An individual is presumed to be a sole proprietor who is not a covered employee under this section if:
> (i) a substantial part of the individual's income is derived from the trade or business for which a principal contractor engages the individual and from which the individual has attempted to earn taxable income; and
> (ii)

1. the individual notifies the principal contractor on a form approved by the Commission that the individual has not elected to become a covered employee under Section 9-227 under this title; or

2. the individual has filed the appropriate Internal Revenue Form 1040, Schedule C or F, for the previous taxable year.

Labor and Employment Art § 9-508(f)

c. Specific industries.

In some states, specific industries are exempt from operation of contractor-under laws. The last draft considered by the working group, instead of exempting certain industries, limited its application to the construction industry.

d. Order of Liability.

In some states, all contractors and intermediate subcontractors are potentially liable in the event of an injury. Others specify that liability moves up the contracting chain. For example, in Missouri:

> In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

§ 287.040(3) RSMo.

e. Remedy for losing bidders.

The Board, over the years, has heard complaints from employers that lose out on jobs because their competition misclassifies employees as independent contractors and, therefore, can submit a lower bid. Florida's law contains a remedy for an unsuccessful bidder in these circumstances:

> (1) Any person engaged in the construction industry, as provided in s. 440.02, who loses a competitive bid for a contract shall have a cause of action for damages against the person awarded the contract for which the bid was made, if the person making the losing bid establishes that the winning bidder knew or should have

known that he or she was in violation of s. 440.10, s. 440.105, or s. 440.38 while performing the work under the contract.

(2) To recover in an action brought under this section, a party must establish a violation of s. 440.10, s. 440.105, or s. 440.38 by a preponderance of the evidence.

(3) Upon establishing that the winning bidder knew or should have known of the violation, the person shall recover as liquidated damages 30 percent of the total amount bid on the contract by the person bringing the action, or $15,000, whichever is greater.

(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney's fees.

(5) An action under this section must be commenced within 2 years after the performance of activities involving any building, clearing, filling, or execution contract, or the substantial improvement in the size or use of any structure, or the appearance of any land.

(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:

(a) Was in violation of s. 440.10, s. 440.105, or s. 440.38 at the time of making the bid on the contract; or

(b) Was in violation of s. 440.10, s. 440.105, or s. 440.38 with respect to any contract performed by the plaintiff within 1 year before making the bid on the contract.

(7)

(a) Any person who loses a competitive bid may petition the court to join in a suit brought under this section by another person against the winning bidder on the same contract and shall be joined in such suit. If more than one person is joined against the winning bidder and such persons prevail in the suit, the court must enter judgment dividing damages recoverable under this section between the parties equally.

(b) Any person who receives notice of a suit filed under this section and fails, within 20 days after receipt of such notice, to petition the court to join as a party to the suit is barred from bringing a cause of action under this section against the winning bidder on the contract at issue. For purposes of this subsection, publication in accordance with s. 49.10 constitutes sufficient notice.

§ 440.104 Fla.Stat.

f. Measures to encourage compliance.

States have a variety of provisions to encourage compliance or, at least, make it more difficult to escape liability. New Jersey has language which prevents entities from escaping liability by, for example, closing one business and reopening under a different name:

> A rebuttable presumption that an employer has established a successor firm, corporation or partnership shall arise if the two share at least three of the following capacities or characteristics: (1) perform similar work; (2) occupy the same premises; (3) have the same telephone or fax number; (4) have the same email address or Internet website; (5) perform work in the same geographical area; (6) employ substantially the same work force; (7) utilize the same tools and equipment; (8) employ or engage the services of any person or persons involved in the direction or control of the other; or (9) list substantially the same work experience. If it is determined that an employer has established a successor firm, corporation or partnership, the "uninsured employer's fund" shall have a subrogation right against the successor firm, corporation or partnership for any benefits paid pursuant to R.S.34:15-1 et seq. by the "uninsured employer's fund," the injured worker may seek benefits not otherwise paid or payable by the "uninsured employer's fund" from the successor firm, corporation or partnership, and the successor firm, corporation or partnership shall have all of the same responsibilities regarding workers' compensation required pursuant to R.S.34:15-1 et seq. as the original employer.

N.J. Stat. Ann. § 34:15-79 (b).

Along the same lines, Wisconsin imposes personal liability, for benefits and penalties, on individuals who are responsible for, and fail to, obtain required coverage:

> Any officer or director of an uninsured employer that is a corporation and any member or manager of an uninsured employer that is a limited liability company may be found individually and jointly and severally liable for the payments, interest, costs and other fees specified in a warrant under this section if after proper proceedings for the collection of those amounts from the corporation or limited liability company, as provided in this section, the corporation or limited liability company is unable to pay those amounts to the department. The personal liability of the officers and directors of a corporation or of the members and managers of a limited liability company as provided in this subsection is an independent obligation, survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation or limited liability company, and shall be set forth in a determination or decision issued under s. 102.82.

Wis. Stat. § 102.83(8).

g. Safe Harbor.

A few states have provisions that allow an employer to insulate itself from liability in the event a subcontractor does not have coverage in place when a worker is injured. Generally, some form of due diligence is required before the "safe harbor" applies. The following provision is from North Carolina:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without obtaining from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 for a specified term, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at any time before subletting such contract to the subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article and within the term specified by the certificate.
> Notwithstanding the provisions of this section, any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of work shall not be held liable to any employee of such subcontractor if either (i) the subcontractor has a workers' compensation insurance policy in compliance with G.S. 97-93 in effect on the date of injury regardless of whether the principal contractor, intermediate contractor, or subcontractor failed to timely obtain a certificate from the subcontractor; or (ii) the policy expired or was cancelled prior to the date of injury provided the principal contractor, intermediate contractor, or subcontractor obtained a certificate at any time before subletting such contract to the subcontractor and was unaware of the expiration or cancellation.

N.C. Gen. Stat. § 97-19

h. Premium Calculation.

Nevada has adopted language that controls how premiums can be charged in cases where a principal contractor is, or may be, liable for injuries sustained by employees of a subcontractor:

> 2. If a subcontractor or independent contractor does not have an active policy with a private carrier, the principal contractor must be assessed premiums based on:

(a) The payroll for the period of the contract with the subcontractor or independent contractor;

(b) The appropriate classification for the work performed by the subcontractor or independent

contractor; and

(c) The experience modification factor of the principal contractor.

3. A principal contractor may provide the complete payroll records of the employees of each uninsured subcontractor and independent contractor. Except as otherwise provided in this subsection, if the principal contractor does not provide the complete payroll records of the uninsured subcontractors and independent contractors, the full contract price shall be deemed to be the payroll for the employees of the subcontractors and independent contractors. If the contract is for labor and materials or labor and equipment and evidence is provided to the private carrier which indicates the portion of the contract price that is for labor, that amount may be deemed the payroll for the employees of the subcontractor or independent contractor. If such an amount is not indicated in the contract, the private carrier shall determine what portion of the contract price will be deemed the payroll for the employees of the subcontractor or independent contractor. In no case may the payroll used to calculate the premiums of the principal contractor be less than the portion of the contract price that is for labor.

Nevada (Regs) – NAC 616B.780

B. Uninsured Employer Fund

1. Purpose

The underlying rationale for an uninsured employer fund is to protect workers injured while working for "irresponsible and uninsured" employers and is similar to the principals that led to the adoption of workers' compensation systems in the early 1900s.

> President Roosevelt stated in his Sixth Annual Message to Congress: In spite of all precautions exercised by employers there are unavoidable accidents and even deaths involved in nearly every line of business connected with the mechanic arts. This inevitable sacrifice of life may be reduced to a minimum, but it can not [sic] be completely eliminated. It is a great social injustice to compel the employee, or rather the family of the killed or disabled victim, to bear the entire burden of such an inevitable sacrifice. In other words, society shirks its duty by laying the whole cost on the victim, whereas the injury comes from what may be called the legitimate risks of the trade. Theodore Roosevelt, President of the United States,

Sixth Annual Message (Dec. 3, 1906),
http://www.presidency.ucsb.edulws/?pid=29547.

Emily A. Spieler, (Re)assessing The Grand Bargain: Compensation For Work Injuries In The United States, 1900-2017, *Rutgers University Law Review*, Vol. 69:891, 903, n. 43 (2017).

States that have uninsured employer funds (as they are often named) usually have contractor-under provisions as well. Contractor-under provisions both encourage compliance and reduce the number of injured workers who, if injured, will be without a remedy. Inevitably, even with these provisions in place, there will be some employees who are injured while working for uninsured employers that cannot, or will not, pay what is owed and for whom the contractor-under law will not provide a remedy.

Many states address this problem through programs often referred to as uninsured employer funds. These funds exist to pay the claims of injured workers who would otherwise have no recourse. In its discussion of this subject, the working group looked at how other states have handled this issue and also looked at language developed in 2014-2015 by a previous stakeholder group assembled by the Board.

As was the case with the contractor-under provisions, to facilitate discussion, the working group requested, and the Board drafted, legislation that incorporated these ideas.

2. Provisions

a. Operation

With respect to how such a fund would operate, the working group discussed language previously developed by a Board-convened stakeholder group in 2015 (included as Attachment C at the end of this report) along with language from other states.

i. From LD 1833 draft (October 14, 2015)

5. Liability of Employment Rehabilitation Fund. The provisions of this subsection apply when there is no other prime contractor or subcontractor responsible for the payment of compensation pursuant to this section.

A. The fund must be used to pay the claim of an injured employee of an uninsured employer for whom there is no other prime contractor or subcontractor responsible for the payment of compensation pursuant to this section.

B. The fund must pay the same benefits the employee would have received if the employer had secured coverage as required by this Act.

C. To promote the prompt payment of benefits legally due, if a prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier pays

benefits to an injured employee and it is later determined that the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier is not responsible for the payment of compensation pursuant to this section, the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier is entitled to reimbursement from the fund for all benefits it has paid.

D. The fund must be used to pay the costs of adjusting and representing the fund in any actions relating to claims for benefits made by employees working for uninsured employers.

E. The board is entitled to recover from the uninsured employer:

1. the amount of the compensation paid under this section;

2. interest;

3. all other costs associated with the claim, including, but not limited to, adjusting and representing the fund; and

4. if an uninsured employer fails to reimburse the board as set forth in this section, the uninsured employer shall also pay the costs of recovering the amounts due, including reasonable attorney's fees.

F. A claim for recovery under this section is enforceable by the Superior Court under section 323.

G. The board, by contract, may delegate day-to-day administration and adjusting of claims against the fund to a service agent. A service agent may subcontract with attorneys approved by the board to advise or represent the fund in actions under this section as necessary. Expenses of the service agent and attorneys retained by the service agent, upon approval by the board, are paid from the fund.

ii. From Alaska

(a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.
(b) Every three months, the Department of Revenue shall provide the division with a statement of the activities of, balances in, interest earned on, and interest returned to the fund.

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.
(d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.
(e) If the money deposited in the fund is insufficient at a given time to satisfy a duly authorized claim against the fund, the fund shall, when sufficient money has been deposited in the fund and appropriated, satisfy unpaid claims in the order in which the claims were originally filed, without interest.
(f) The division may contract under AS 36.30 (State Procurement Code) with a person for the person to adjust claims against the fund. The contract may cover one or more claims.
(g) In this section, "fund" means the workers' compensation benefits guaranty fund.

AS 23.30.082

iii. From Wisconsin

(1)
(a) If an employee of an uninsured employer, other than an employee who is eligible to receive alternative benefits under s. 102.28 (3), suffers an injury for which the uninsured employer is liable under s. 102.03, the department or the department's reinsurer shall pay to or on behalf of the injured employee or to the employee's dependents an amount equal to the compensation owed them by the uninsured employer under this chapter except penalties and interest due under ss. 102.16 (3), 102.18 (1) (b) 3. and (bp), 102.22 (1), 102.35 (3), 102.57, and 102.60.
(b) The department shall make the payments required under par. (a) from the uninsured employers fund, except that if the department has obtained reinsurance under sub. (2) and is unable to make those payments from the uninsured employers fund, the department's reinsurer shall make those payments according to the terms of the contract of reinsurance.
(c)
1. The department shall pay a claim under par. (a) in excess of $1,000,000 from the uninsured employers fund in the first instance. If the claim is not covered by excess or stop-loss reinsurance under sub. (2), the secretary of administration shall transfer from the appropriation account under s. 20.445 (1) (ra) to the uninsured employers fund as provided in subds. 2. and 3. an amount equal to the

amount by which payments from the uninsured employers fund on the claim are in excess of $1,000,000.
2. Each calendar year the department shall file with the secretary of administration a certificate setting forth the number of claims in excess of $1,000,000 in the preceding year paid from the uninsured employers fund, the payments made from the uninsured employers fund on each such claim in the preceding year, and the total payments made from the uninsured employers fund on all such claims and, based on that information, the secretary of administration shall determine the amount to be transferred under subd. 1. in that calendar year.
3. The maximum amount that the secretary of administration may transfer under subd. 1. in a calendar year is $500,000. If the amount determined under subd. 2. is $500,000 or less, the secretary of administration shall transfer the amount determined under subd. 2. If the amount determined under subd. 2. exceeds $500,000, the secretary of administration shall transfer $500,000 in the calendar year in which the determination is made and, subject to the maximum transfer amount of $500,000 per calendar year, shall transfer that excess in the next calendar year or in subsequent calendar years until that excess is transferred in full.
(2) The department may retain an insurance carrier or insurance service organization to process, investigate and pay claims under this section and may obtain excess or stop-loss reinsurance with an insurance carrier authorized to do business in this state in an amount that the secretary determines is necessary for the sound operation of the uninsured employers fund. In cases involving disputed claims, the department may retain an attorney to represent the interests of the uninsured employers fund and to make appearances on behalf of the uninsured employers fund in proceedings under ss. 102.16 to 102.29.Section 20.930and all provisions of subch. IV of ch. 16, excepts. 16.753, do not apply to an attorney hired under this subsection. The charges for the services retained under this subsection shall be paid from the appropriation under s. 20.445 (1) (rp). The cost of any reinsurance obtained under this subsection shall be paid from the appropriation under s. 20.445 (1) (sm).
(3) An injured employee of an uninsured employer or his or her dependents may attempt to recover from the uninsured employer, or a 3rd party under s. 102.29, while receiving or attempting to receive payment under sub. (1).
(4) An injured employee, or the dependent of an injured employee, who received one or more payments under sub. (1) shall do all of the following:
(a) If the employee or dependent begins an action to recover compensation from the employee's employer or a 3rd party liable under s. 102.29, provide to the department a copy of all papers filed by any party in the action.
(b) If the employee or dependent receives compensation from the employee's employer or a 3rd party liable under s. 102.29, pay to the department the lesser of the following:
1. The amount after attorney fees and costs that the employee or dependent received under sub. (1).
2. The amount after attorney fees and costs that the employee or dependent received from the employer or 3rd party.

(5) The department of justice may bring an action to collect the payment under sub. (4).
(6)
(a) Subject to par. (b), an employee, a dependent of an employee, an uninsured employer, a 3rd party who is liable under s. 102.29 or the department may enter into an agreement to settle liabilities under this chapter.
(b) A settlement under par. (a) is void without the department's written approval.
(7) This section first applies to injuries occurring on the first day of the first July beginning after the day that the secretary files a certificate under s. 102.80 (3) (a), except that if the secretary files a certificate under s. 102.80 (3) (ag) this section does not apply to claims filed on or after the date specified in that certificate.

Wis. Stat. § 102.81

b. Funding and safeguards.

Many states fund their uninsured employer funds through a combination of penalties and assessments. In others, Alaska and Wisconsin, for example, uninsured employer fund revenue is limited to penalties imposed against employers that have not obtained required coverage. In the draft discussed by the LD 756 working group, revenue was limited to fines assessed against uninsured employers.

Some members also raised concerns about the financial viability of an uninsured employer fund. For this reason, the draft included a couple of safeguards. One was a 3-year sunset provision. The other established that claims would only be paid if there was money available in the uninsured employer fund. If the fund's balance were to be exhausted prior to the sunset date, the uninsured employer fund would not be liable for payment of benefits and it would not have the authority to issue an assessment to replenish its balance.

3. Summary of working group activity

All members of the L.D. 756 working group agreed at the first meeting that uninsured employers present a variety of problems for the State of Maine. But when the dust settled, stakeholders representing insurers and employers opposed putting contractor-under liability and an uninsured benefit fund into statute. The stakeholders representing injured workers and labor supported it.

When asked for feedback, opponents said enactment of contractor-under liability will "make[] the law-abiding responsible for the law-breaking, whether that is policing those contractors or paying their claims, all in a very complex system which will be particularly burdensome for smaller contractors."

Proponents contend this is not about law-abiding and non-law-abiding parties and it is not burdensome – it is about injured workers who do not have a remedy and is similar to other areas of insurance, such as uninsured motorist coverage, in that it allows construction contractors to spread the risk of a financial loss among a large number of other insured parties. Supporters feel strongly that such a solution would not be complex or unworkable as it is already settled law in the vast majority of states.

V. CONCLUSION

While many issues and areas of concern were discussed by the working groups, ultimately, no agreement was reached with respect to recommendations or draft implementing legislation. The Board, to the extent possible, will gather relevant information and is willing to continue considering/discussing these issues.

ATTACHMENT A

STATE OF MAINE
WORKERS' COMPENSATION BOARD
OFFICE OF EXECUTIVE DIRECTOR/CHAIR
DEERING BUILDING, AMHI COMPLEX
27 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0027

PAUL R. LEPAGE
GOVERNOR

PAUL H. SIGHINOLFI, ESQ.
EXECUTIVE DIRECTOR/CHAIR

January 16, 2014

John L. Patrick, Senate Chair
Erin D. Herbig, House Chair
Committee on Labor, Commerce, Research and Economic Development
c/o Legislative Information
100 State House Station
Augusta, ME 04333

RE: LD 444, Resolve, Directing the Workers' Compensation Board To Study Improving Protections for Injured Workers Whose Employers Have Wrongfully Not Secured Workers' Compensation Payments

Dear Representative Herbig and Senator Patrick:

At the end of the last legislative session, the Joint Standing Committee on Labor, Commerce, Research and Economic Development, in a resolve, asked the Workers' Compensation Board to consider, investigate, and address the issue of workers injured in Maine while working for uninsured employers. We were requested to determine the scope of the problem and, if the problem merited a solution, proposing one.

Wrapping our arms around the scope of this problem was no easy task. Letters were sent to all of the lawyers and law firms in the state that most frequently represent injured workers. In addition, inquiry was made to the Advocate Division of the Workers' Compensation Board, a branch of our agency that has as its sole responsibility the representation of injured workers. Contact was also made with the Board's claims resolution specialists (troubleshooters). In these inquiries, the private attorneys, advocates and troubleshooters were asked about contacts and the number of contacts made with injured workers who found themselves in the unfortunate situation of working for employers who did not have insurance. Responses were received, most provided a number and commented there were likely more employees who simply did nothing because they knew, or believed, there was no chance of a recovery from their employers. My sense from this very unscientific fact-finding effort is that there is a problem, the specifics of which we are not going to be able to quantify, but it appears, based on the responses, there are about six to 10 claims per year.

After receiving this information, I created a small, but very knowledgeable task force to work on the project. Kevin Gillis, an attorney with Norman, Hanson and DeTroy, and Administrator of the Maine Self-Insurance Guarantee Association, Peter Gore, Vice President of Government Relations for the Maine State Chamber of Commerce and Benjamin K. Grant, an attorney with McTeague Higbee worked on this project. These individuals are known to represent both labor and management interests. The information I gathered from the private attorneys and Board staff was shared. The first question the group addressed

was: "Is this a problem of significant enough magnitude to justify a legislative solution?" There was uniform agreement the problem is not major in terms of size, but if there is a single worker injured while working for an uninsured employer, the problem is huge for that person. Based on this unequivocal task force opinion, the problem merits a legislative remedy beyond what is presently available.

What Remedies Presently Exist?

An uninsured injured worker has the right to file and prosecute a workers' compensation claim against a non-compliant uninsured employer. In doing so, the employee can secure an order for all the benefits available under the Workers' Compensation Act. In these circumstances, having a Board order does not always mean an employee will receive benefits. The employer may have no assets. It is believed many injured workers do not file claims. The reasons for not doing so are both obvious and at times obscure. There is some reason to believe the injured worker is intimidated. In other cases, the injured worker might think a claim is an exercise in futility because there would be no chance of a monetary recovery even with a decree ordering benefits.

An injured worker who works for an uninsured employer has the right to file a civil suit if the injury results from the negligent action of the employer or a coworker. The remedies available would be more expansive than those proscribed under our Workers' Compensation Act, and the "immunity from suit" provision of the Act does not extend to uninsured employers. As we all know, filing a lawsuit takes time, resources, and requires proof of negligence. In some instances, injured employees could benefit from such a suit, but in many, they would, once again be pursuing an employer without resources.

An employer that is required to have workers' compensation insurance and does not can be criminally prosecuted.[3] "Failure to maintain coverage" prosecutions are exceedingly rare. Perhaps more active prosecution would reduce the frequency of uninsured claims. Literature on this topic suggests uninsured employers usually fall into two groups. The first is made of the careless and uninformed and the second is made up of the arrogant and brazen. Uninsured employers in the first group are usually not aware of their obligations to have workers' compensation insurance either through ignorance or poor advice. The second group tends to view themselves as above the law. They are frequently aware of their insurance obligations, but either callously disregard the obligations hoping employees will not be injured, or, if injured, will not file claims. In the alternative, they try to structure their businesses so their employees are led to believe they are independent contractors, not employees.

What should be done to Protect Injured Employees Who Work for Uninsured Employers?

Most states have statutory "contract-under" provisions in their Workers' Compensation Acts. Maine is in the distinct minority of states who do not have such a provision. These laws operate fairly simply. If an injured worker is an employee of an uninsured subcontractor, the general contractor's workers' compensation carrier is obligated to pay benefits to the injured worker even though that worker is not an employee of the general contractor. The injured worker must still prove the basic elements of a claim, that is, the injury arose "out of" and "occurred in the course of" his employment. He must also prove any incapacity is caused by the injury and there is a causal connection to the medical care and bills. These provisions encourage and incentivize general contractors to only contract with subcontractors who comply with their Workers' Compensation Act obligations. In short, they contract with those who obey the law. These provisions do not impact true independent contractors or others who are exempt from having workers' compensation coverage.

[3] 39-A M.R.S.A. §324(3)(A) Failure to secure payment... The employer "is guilty of a Class D crime."

In the jurisdictions that have had "contract-under" statutes for any period of time, there is generally a mature body of case law that informs us we need to consider: 1) how far up the employment hierarchy this concept extends; and 2) does the concept extend to all subcontractors with whom the general contracts? These questions are generally answered that the claim can extend to the next in line contractor who is insured. Once an insurance policy is discovered, a further search is unnecessary. In addition, the chain of responsibility does not extend to the party that retains the services of a general contractor. The general rule from other jurisdictions also seems to be the owners are not liable, but "principal" or "general" contractors are.

It is also a general rule that the contracts in question must be part of the regular business of the contractor and not for something unrelated to the contractor's business.

"Contract-under" provisions usually result in higher compliance with the employer's obligation to secure workers' compensation coverage. General contractors do not want exposure for uninsured subcontractors and do not want to be liable for premium properly chargeable to someone else.

A general contractor insulates itself from this problem by requiring certificates of insurance from subcontractors obligated to have insurance and cancellation notices from carriers who provide coverage to the subcontractor. The following language would provide this coverage:

> If an employer is a subcontractor and fails to secure workers' compensation coverage for its employees, the hiring contractor or general contractor is liable for and shall secure payment of benefits to the injured employees of a subcontractor.

Any contractor who becomes liable for the payment of compensation under these provisions may also recover the amount of compensation paid and the expenses necessary for the collection from the uninsured, contracting employer.

There will be any number of employment relationships where there is no general contractor or subcontractors. In those situations, an alternative solution is necessary. Workers injured under these circumstances need protection and I propose we establish a fund to provide coverage for this group. We could call it "The Uninsured Employees Benefit Fund." This is not a particularly creative name, but is descriptive. It would be available to individuals who worked for an uninsured employer and were injured. It would not extend to true independent contractors and employees who have an equity interest in a business and waived coverage. Employees making claims against the fund must prove all of the elements of an insured claim.

Funding

Funding this benefit pool is an issue. Because it is difficult to predict the number of claimants, the payroll and medical exposure, and the occupational codes, all the traditional rating methods would not apply. Ensuring we have sufficient assets to satisfy claims will be a challenge.

There are a number of provisions of the Workers' Compensation Act that assess penalties for failure to meet obligations under the Act. Some of the penalty money is placed in the employment rehabilitation fund, a fund used to pay for vocational rehabilitation of injured workers. Some is paid to the general fund and some is paid directly to claimants. I propose, because this is a unique need, the vocational rehabilitation fund be made available to satisfy claims by uninsured injured workers. I propose further all penalty money be put into the fund to pay both for vocational rehabilitation and benefits for uninsured injured workers. This would require amending multiple penalty provisions of the Workers' Compensation Act. I do not think the employers and carriers who are meeting their statutory obligations should pay for those who are not. The forgoing is attractive because it has penalty money paying for employer bad behavior.

Any uninsured fund should also include the following:

1. A statutory subrogation right extended to the state allowing for the collection of all sums paid to injured employees working for uninsured employers. This right would be against the employer and would include the cost of all benefits plus the reasonable cost of the collection. A member of the Attorney General's staff could be designated as the workers' compensation subrogation specialist.
2. The Workers' Compensation Board should be allowed to contract with another state agency, an insurance company, or a third party administrator to oversee the day-to-day administration and adjusting of claims against the fund. Having the Board "staff up" for this work is not realistic without knowing the size and scope of the problem.
3. The statutory proposal should have a three year sunset provision. That is, this proposal will be applicable to an ill-defined problem. It would make sense to allow this change in the statute to be monitored for a few years and then be brought back to the Legislature for reenactment, modification, or elimination.

I trust the foregoing thoughts are helpful to the Committee. The ideas contained in this report were developed in large part from research into the topic and a review of Workers' Compensation Acts from a number of other jurisdictions. I also spoke with my Executive Director counterparts from other jurisdictions. If the ideas contained in the foregoing are acceptable to the Committee, the Board staff and I are prepared to put together legislation as a Committee-sponsored bill to address this important gap in our workers' compensation coverage in this state.

I look forward to hearing from you on this.

Very truly yours,

Paul H. Sighinolfi, Esq.
Executive Director/Chair

PHS/ldl

cc: Senator John J. Cleveland
Senator Andre E. Cushing III
Representative Paul E. Gilbert
Representative Scott M. Hamann
Representative Andrew T. Mason
Representative Anne-Marie Mastraccio
Representative Amy Fern Volk
Representative Brian M. Duprey
Representative Lawrence E. Lockman
Representative Ellen A. Winchenbach
Representative James J. Campbell
Henry Fouts, Policy Analyst
Rhonda Miller, Committee Clerk
Kevin Gillis, Esq., Norman, Hanson & DeTroy
Peter Gore, Maine State Chamber of Commerce
Benjamin K. Grant, Esq., McTeague Higbee

ATTACHMENT B

§ 102. Definitions

11. Employee. The term "employee" is defined as follows.

A. "Employee" includes officials of the State and officials of counties, cities, towns, water districts and all other quasi-public corporations of a similar character, every duly elected or appointed executive officer of a private corporation other than a charitable, religious, educational or other nonprofit corporation, and every person in the service of another under any contract of hire, express or implied, oral or written, except:

(8) Except as otherwise provided in sections 105-A, 105-B and 401, if a person employs an independent contractor, any employee of the independent contractor is not considered an employee of that person for the purposes of this Act. The person who employs an independent contractor is not responsible for providing workers' compensation insurance covering the payment of compensation and benefits to the employees of the independent contractor. An insurance company may not charge a premium to any person for any employee excluded by this subparagraph; or

§102. Definitions

12. Employer. The term "employer" includes:

A. Private employers;

B. The State;

C. Counties;

D. Cities;

E. Towns;

F. Water districts and all other quasi-public corporations of a similar nature;

G. Municipal school committees; and

H. [2011, c. 678, Pt. C, §10 (RP).]

I. Design professionals.

If the employer is insured, "employer" includes the insurer, self-insurer or group self-insurer unless the contrary intent is apparent from the context or is inconsistent with the purposes of this Act.

The term "employer" also includes a general contractor or subcontractor that is liable for benefits by operation of section 105-B.

§ 105. Predetermination of independent contractor and construction subcontractor status

1. Predetermination permitted. A worker, an employer or a workers' compensation insurance carrier, or any together, may apply to the board for a predetermination of whether the status of an individual worker, group of workers or a job classification associated with the employer is that of an employee or an independent contractor.

C. A predetermination issued pursuant to this subsection may not be used to verify coverage pursuant to section 105-B(3)(C).

1-A. Predetermination permitted for construction subcontractors. A person, as defined in section 105-A, subsection 1, paragraph E, may apply to the board for a predetermination that the person performs construction work in a manner that would not make the person an employee of a hiring agent, as defined in section 105-A, subsection 1, paragraph D.

C. A predetermination issued pursuant to this subsection may not be used to verify coverage pursuant to section 105-B(3)(C).

§ 105-B. Liability for uninsured employers engaged in construction work

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Construction work" means any part of the construction, alteration or remodeling of a structure, including related landscaping and other site work performed in connection with the performance of such work, but not including surveying, engineering, examination or inspection of a construction site or the delivery of materials to a construction site.

B. "General contractor" means a person who undertakes to procure the performance of construction work, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term.

C. "Subcontractor" means a person who contracts with a general contractor or other subcontractor to perform all or part of the work that the general contractor or other subcontractor has undertaken to perform.

2. Liability for payment of compensation. Except as otherwise provided in this section, any general contractor or subcontractor engaged in construction work that sublets any part or parts of the contract work to a subcontractor or subcontractors is liable for payment of all compensation due under this Act to an employee of a subcontractor who is engaged in work upon the subject matter of the contract unless the subcontractor or subsequent subcontractor has secured the payment of compensation in conformity with this Act.

The liabilities of the direct employer of an employee who suffers a work injury shall be primary and that of the others secondary in their order. An employer secondarily liable who satisfies a liability under this Act shall be entitled to indemnity as set forth in subsection 4 of this section.

3. Exceptions. This section shall not apply to:

A. Individuals excluded from the definition of employee.

B. Residential property owners. Any person who is engaged in constructing, improving, repairing, or remodeling a residence that the person owns or is in the process of acquiring as the person's personal residence may not be considered an employee or employer solely by operation of this section.

C. Verification of coverage. A general contractor or subcontractor shall not be liable for compensation under this Act to the employees of the subcontractor if:

1. The general contractor or subcontractor requests and receives

(a) a certificate of insurance, issued by the subcontractor's insurance company, or for individual self-insured employers, the Bureau of Insurance, certifying that the subcontractor has obtained the required coverage and indicating the effective dates of the policy or authority to self-insure; and,

(b) the general contractor or subcontractor expressly states in its contract with the subcontractor that the subcontractor shall add a cancellation and non-renewal endorsement to its workers' compensation policy identifying the general contractor or subcontractor as an entity that must be notified in the event of cancellation or non-renewal of the subcontractors' workers' compensation policy; and,

(c) the general contractor or subcontractor does not have actual knowledge or receive notice that the policy or authority to self-insure expired or was cancelled during the term of the contract.

(2) The general contractor or subcontractor requests and receives

(a) an affidavit of exemption from a sole proprietor, partner or member of a limited liability company; and,

(b) the contract with the sole proprietor, partner or member of a limited liability company expressly states that the sole proprietor, partner or member of a limited liability company will not hire or use any employees to assist in the performance of the work without first providing the required certificate of insurance to the general contractor or subcontractor; and,

(c) the general contractor or subcontractor does not have actual knowledge or receive notice that the sole proprietor, partner or member of a limited liability company is using employees to assist in the performance of the work;

(d) an affidavit of exemption cannot be presented to a general contractor or subcontractor who does not have workers' compensation coverage;

(e) furthermore, any prime contractor who compels a sole proprietor, partner or member of a limited liability company to obtain a certification of noncoverage when the sole proprietor, partner or member of a limited liability company does not desire to do so is guilty of a Class D crime.

(3) Upon completion of the contracted work, the general contractor or subcontractor may request the subcontractor's insurer to certify that each subcontractor or independent contractor who was previously reported by the insurer as having coverage for industrial insurance has maintained it by paying all premiums due throughout the entire course of the contracted work. The insurer shall, within 60 days after receiving such a request, issue:

A. A final certificate which states that each such subcontractor has paid in full all premiums due for the project and that the general contractor or subcontractor is relieved of all liability for payment of any additional premiums related to the contracted work; or

B. A letter denying the issuance of a final certificate related to the project. Such a letter may be issued if a subcontractor:

(1) Is delinquent in the payment of premiums due on the project;
(2) Has left the state;
(3) Is uncooperative in a required audit of his or her records;
(4) Is principally located out of state and an audit is required;
(5) Is delinquent in submitting his or her records relating to his or her payroll;
(6) Has closed his or her account with the insurer and premiums are due;
(7) Has failed to submit required information to the insurer;
(8) Is protesting the results of a required audit;
(9) Elected not to insure himself or herself; or

(10) Has committed any other action which, in the opinion of the insurer, may result in his or her failure to pay all premiums due.

C. If the insurer does not issue a final certificate or letter denying the issuance of the certificate within 60 days after receiving a request therefor, a final certificate shall be deemed to have been issued.

4. Indemnification. This subsection governs indemnification for contractors and subcontractors.

A. A general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier that becomes liable under this section for the payment of compensation on account of injury to or death of an employee of a subcontractor is entitled to recover from the uninsured employer:

1. the amount of the compensation paid under this section;

2. interest;

3. all other costs associated with the claim, including, reasonable attorney's fees and expenses; and

4. if an uninsured employer fails to reimburse the general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier as set forth in this subsection, the uninsured employer shall also pay the costs of recovering the amounts due, including reasonable attorney's fees and expenses.

B. A claim for recovery under paragraph A constitutes a lien against any money due or to become due to a subcontractor from the general contractor or another subcontractor.

C. A claim for recovery under paragraph A is enforceable by the Superior Court under section 323.

D. A claim for recovery under paragraph A does not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier.

E. Nothing in this section shall affect the right of the injured employee or the dependents of the deceased employee to pursue a civil action under section 107 or section 401(1) against a general contractor or subcontractor that does not become liable under this section for the payment of compensation.

5. Premiums. Premiums for uninsured subcontractors shall be calculated as set forth in this subsection.

A. A general contractor or subcontractor that hires a person to do construction work is presumed to have established an employer-employee relationship between himself or herself and the person performing the work.

B. If a subcontractor does not have an active policy with a private carrier, is not self-insured or has not filed an affidavit of exemption, the general contractor or subcontractor must be assessed premiums based on:

(1) The payroll for the period of the contract with the subcontractor;
(2) The appropriate classification for the work performed by the subcontractor; and
(3) The experience modification factor of the general contractor or subcontractor.

C. A general contractor or subcontractor may provide the complete payroll records of the employees of each uninsured subcontractor. Except as otherwise provided in this subsection, if the general contractor or subcontractor does not provide the complete payroll records of the uninsured subcontractors, the full contract price shall be deemed to be the payroll for the employees of the subcontractors. If the contract is for labor and materials or labor and equipment and evidence is provided to the private carrier which indicates the portion of the contract price that is for labor, that amount may be deemed the payroll for the employees of the subcontractor. If such an amount is not indicated in the contract, the private carrier shall determine what portion of the contract price will be deemed the payroll for the employees of the subcontractor. In no case may the payroll used to calculate the premiums of the general contractor or subcontractor be less than the portion of the contract price that is for labor.

D. If a subcontractor or independent contractor has a policy with a private carrier but fails to pay the proper premiums, the principal contractor is liable for the amount of any unpaid premiums based on the rate and modification factor for premiums of the subcontractor or independent contractor.

§ 105-C. Liability of Employment Rehabilitation Fund

The employment rehabilitation fund shall be considered a payor of last resort within the workers' compensation system. No employer, insurer or self-insured employer liable for payments under the Workers' Compensation Act shall have its liabilities affected or discharged by payments from the employment rehabilitation fund. Any payments to employees or employee's dependents paid by the fund shall be subject to subrogation and apportionment to the same extent as payments to an injured worker from a third-party tortfeasor.

1. Liability. The fund must be used to pay the claim of an injured employee, or the employee's dependents, who sustains an injury arising out of and in the course of employment while working for an employer that has failed to secure insurance coverage as required by this Act and for whom there is no other insurer or self-insured employer responsible for the payment of compensation. The fund shall have no liability for apportionment under section 354.

2. Benefits. The fund must pay the same benefits the employee would have received if the employer had secured coverage as required by this Act except for penalties and interest.

3. Prompt payment. To promote the prompt payment of benefits legally due, if a general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier pays benefits to an injured employee and it is later determined that the general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier is not responsible for the payment of compensation pursuant to this section, the general contractor or subcontractor or the general contractor's or subcontractor's insurance carrier is entitled to reimbursement from the fund for all benefits it has paid.

4. Expenses. The fund must be used to pay the costs of adjusting and representing the fund in any actions relating to claims for benefits made by employees working for uninsured employers. The board, by contract, may delegate day-to-day administration and adjusting of claims against the fund to a service agent. A service agent may subcontract with attorneys approved by the board to advise or represent the fund in actions under this section as necessary.

5. Recovery. The board is entitled to recover from the uninsured employer:

A. the amount of the compensation paid under this section;

B. interest;

C. all other costs associated with the claim, including, but not limited to, adjusting and representing the fund;

D. the costs of recovering the amounts due, including reasonable attorney's fees; and

E. the board shall assess a penalty in the amount of up to 65 percent of all compensation benefits ordered to be paid. The employer may request a hearing to seek review of the penalty.

F. A claim for recovery under this subsection is enforceable by the Superior Court under section 323.

6. Freedom from liability. The State is not liable for any claim against the fund that is in excess of the fund's current ability to pay. If any claim against the fund is denied due to an inadequate fund balance, that claim is entitled to priority over later claims when an adequate balance is restored.

7. Application. This section applies to dates of injury on and after July 1, 2020.

8. Repeal. This section is repealed January 1, 2023. Notwithstanding section 355 subsection 14, the board may not levy an assessment if the balance in the fund is insufficient to meet obligations of the fund under this section prior to January 1, 2023.

3. Failure to secure payment. If any employer who is required to secure the payment to that employer's employees of the compensation provided for by this Act fails to do so, the employer is subject to the penalties set out in paragraphs A, B and C. The failure of any employer to procure insurance coverage for the payment of compensation and other benefits to the employer's employees in compliance with sections 401 and 403 constitutes a failure to secure payment of compensation within the meaning of this subsection.

A. The employer is guilty of a Class D crime. This paragraph applies only to cases in which the employer has committed a knowing violation.

B. The employer is liable to pay a civil penalty of up to $10,000 or up to an amount equal to 108% of the premium, calculated using Maine Employers' Mutual Insurance Company's standard discounted standard premium, that should have been paid during the period the employer failed to secure coverage, whichever is larger, payable to the Employment Rehabilitation Fund. In determining the amount of the penalty to be assessed under this paragraph, the board shall take into consideration the employer's effort to comply with sections 401 and 403.

C. The employer, if organized as a corporation, is subject to administrative dissolution as provided in Title 13-C, section 1421 or revocation of its authority to do business in this State as provided in Title 13-C, section 1532. The employer, if organized as a limited liability company, is subject to administrative dissolution as provided in Title 31, section 1592. The employer, if licensed, certified, registered or regulated by any board authorized by Title 5, section 12004-A or whose license may be revoked or suspended by proceedings in the District Court or by the Secretary of State, is subject to revocation or suspension of the license, certification or registration. This paragraph applies only to cases in which the employer has committed a knowing violation, has failed to pay a penalty assessed pursuant to this subsection or continues to operate without required coverage after a penalty has been assessed pursuant to this subsection.

For purposes of this subsection, a violation is considered a knowing violation if the employer has previously obtained workers' compensation insurance and that insurance has been cancelled or that insurance has not been continued or renewed, unless the cancellation, failure to continue or nonrenewal is due to a substantial change in the employer's operations that is unrelated to the classification of individuals as employees or independent contractors; the employer has been notified in writing by the board of the need for workers' compensation insurance; the employer has had one or more previous violations of the requirement to secure the payment of the compensation provided for by this Act; or the employer misclassifies an employee as an independent contractor despite a contrary determination by the board.

Prosecution under paragraph A does not preclude action under paragraph B or C.

If the employer is a corporation, partnership, limited liability company, professional corporation or any other legal business entity recognized under the laws of the State, any agent of the corporation or legal business entity having primary responsibility for obtaining insurance coverage is liable for punishment under this section and for payment of all benefits due under this Act. Criminal liability must be determined in conformity with Title 17-A, sections 60 and 61.

Personal liability as provided in this section is an independent obligation, survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation, partnership, limited liability company, professional corporation or any other legal business entity recognized under the laws of the State.

If it is determined that an employer has established a successor corporation, partnership, limited liability company, professional corporation or any other legal business entity recognized under the laws of the State, the successor corporation, partnership, limited liability company, professional corporation or any other legal business entity recognized under the laws of the State is liable for punishment under this section and for payment of all benefits due under this Act. A rebuttable presumption that an employer has established a corporation, partnership, limited liability company, professional corporation or any other legal business entity recognized under the laws of the State shall arise if the two share at least three of the following capacities or characteristics: (1) perform similar work; (2) occupy the same premises; (3) have the same telephone or fax number; (4) have the same email address or Internet website; (5) perform work in the same geographical area; (6) employ substantially the same work force; (7) utilize the same tools and equipment; (8) employ or engage the services of any person or persons involved in the direction or control of the other; or (9) list substantially the same work experience.

§324-A. Remedy for losing bidders

1. Cause of action. Any person who loses a competitive bid for a contract for construction work as defined in section 105-B(1)(B) shall have a cause of action in Superior Court for damages against the person awarded the contract for which the bid was made, if the person making the losing bid establishes that the winning bidder knew or should have known that he or she was in violation of the requirement to secure the payment of compensation with respect to all employees by purchasing a workers' compensation policy or self-insuring while performing the work under the contract.

2. Burden of proof. To recover in an action brought under this section, a party must establish a violation of the requirement to secure the payment of compensation with respect to all employees by purchasing a workers' compensation policy or self-insuring by a preponderance of the evidence.

3. Damages. Upon establishing that the winning bidder knew or should have known of the violation, the person shall recover as liquidated damages 30 percent of the total amount bid on the contract by the person bringing the action, or $15,000, whichever is greater.

4. Attorney's fees and costs. In any action under this section, the prevailing party is entitled to an award of reasonable attorney's fees.

5. Statute of limitations. An action under this section must be commenced within 6 years after the contract was awarded.

6. Exceptions. A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:

A. Was in violation of the requirement to secure the payment of compensation with respect to all employees by purchasing a workers' compensation policy or self-insuring at the time of making the bid on the contract; or

B. Was in violation of the requirement to secure the payment of compensation with respect to all employees by purchasing a workers' compensation policy or self-insuring with respect to any contract performed by the plaintiff within 1 year before making the bid on the contract.

ATTACHMENT C

Draft language developed by a Workers' Compensation Board Stakeholder Group

October 14, 2015

Sec. 1. 39-A MRSA § 102, sub-§11, ¶ 8 is amended to read:

(8) Except as otherwise provided in sections 105-A, 105-B and 401, if a person employs an independent contractor, any employee of the independent contractor is not considered an employee of that person for the purposes of this Act. The person who employs an independent contractor is not responsible for providing workers' compensation insurance covering the payment of compensation and benefits to the employees of the independent contractor. An insurance company may not charge a premium to any person for any employee excluded by this subparagraph; or

Sec. 2. 39-A MRSA § 105, sub-§1, ¶ C is enacted to read:

C. A predetermination issued pursuant to this subsection may not be used to demonstrate that a prime contractor or intermediate subcontractor has reasonably and diligently taken steps to confirm that a subcontractor has secured compensation for its employees in conformity with this Act.

Sec. 3. 39-A MRSA § 105, sub-§1-A, ¶ C is enacted to read:

C. A predetermination issued pursuant to this subsection may not be used to demonstrate that a prime contractor or intermediate subcontractor has reasonably and diligently taken steps to confirm that a subcontractor has secured compensation for its employees in conformity with this Act.

Sec. 4. 39-A MRSA § 105-B is enacted to read:

§ 105-B. Contractor's liability for subcontractors

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Fund" means the Employment Rehabilitation Fund created pursuant to section 355 of this Act.

B. "Prime contractor" means a person or entity that contracts with a person or entity to perform work, but excludes an owner or occupant of real property who hires a prime

contractor or subcontractor to perform work on that real property.

C. "Subcontractor" means a person or entity who contracts with a prime contractor or another subcontractor to perform work.

2. Liability. This section governs contractors' and subcontractors' liability for employees of subcontractors.

A. Notwithstanding section 102, subsection 11, paragraph A, subparagraph (8), when a subcontractor fails to secure the payment of compensation required by this Act, the prime contractor is liable for compensation under this Act to the employees of the subcontractor for injuries arising out of and in the course of the work performed within the scope of the subcontract, unless there is an intermediate subcontractor which has secured the payment of compensation in conformity with this Act, in which case the intermediate subcontractor is liable for compensation to the employees of the subcontractor for such injuries.

B. Notwithstanding the preceding subparagraph, a prime contractor or intermediate subcontractor is not liable for compensation under this Act to the employees of a subcontractor if the prime contractor or intermediate subcontractor demonstrates that it has reasonably and diligently taken steps to confirm that the subcontractor has secured compensation for its employees in conformity with this Act.

C. A prime contractor or intermediate subcontractor has reasonably and diligently taken steps to confirm that the subcontractor has secured compensation for its employees in conformity with this Act if the prime contractor or intermediate subcontractor:

1. (a) requests and receives a certificate of insurance, issued by the subcontractor's insurance company or self-insured group certifying that the subcontractor has obtained the required coverage and indicating the effective dates of the policy; or

(b) requests and receives an affidavit from the subcontractor stating under oath that the subcontractor is not required to obtain a workers' compensation policy by virtue of section 102 (11)(B) of this Title;

2. requests and receives at least annually similar certificates or affidavits during the performance of the work;

3. if the prime contractor or intermediate subcontractor received an affidavit pursuant to sub-paragraph 1(b) of this paragraph, the contract with the subcontractor must expressly state that the subcontractor will not hire any employees to assist in the performance of the work without first providing the required certificate of insurance to the prime contractor or intermediate subcontractor; and

4. expressly states in its contract with the subcontractor that the subcontractor shall add a cancellation and non-renewal endorsement to its workers' compensation policy identifying the prime contractor or intermediate subcontractor as an entity that must be notified in the event of cancellation or non-renewal of the subcontractors' workers' compensation policy.

D. If a subcontractor receives notice that its policy of insurance will lapse, be cancelled, will not be renewed, or the subcontractor ceases to qualify as a self-insured employer, the subcontractor shall, within 24 hours of receipt of such notice, notify any prime contractor or intermediate subcontractor to whom it provided a certificate pursuant to paragraph C of this subsection that it received the notice and shall also provide the date the insurance or self-insurance will expire.

3. Indemnification. This subsection governs indemnification for contractors and subcontractors.

A. A prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier who becomes liable under this section for the payment of compensation on account of injury to or death of an employee of a subcontractor is entitled to recover from the uninsured employer:

1. the amount of the compensation paid under this section;

2. interest;

3. all other costs associated with the claim, including, reasonable attorney's fees and expenses; and

4. if an uninsured employer fails to reimburse the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier as set forth in this subsection, the uninsured employer shall also pay the costs of recovering the amounts due, including reasonable attorney's fees and expenses.

B. A claim for recovery under paragraph A constitutes a lien against any money due or to become due to a subcontractor from the prime contractor or another subcontractor.

C. A claim for recovery under paragraph A is enforceable by the Superior Court under section 323.

D. A claim for recovery under paragraph A does not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier.

E. Nothing in this section shall affect the right of the injured employee or the dependents of the deceased employee to pursue a civil action under section 107 or section 401(1).

4. Exceptions. This section does not apply to:

A. A person who regularly operates a business or practices a trade, profession or occupation, whether individually or in partnership or association with other persons or as a member of a limited liability company, and who has not elected to be personally covered as provided in section 102, subsection 11, paragraph B;

B. A person who has waived all the benefits and privileges provided by the workers' compensation laws as provided in section 102, subsection 11, paragraph A, subparagraphs (4) and (5); or

C. An owner or occupant of real property who hires a prime contractor or subcontractor to perform work on that real property. The prime contractor or subcontractor hired by the owner or occupant is subject to this section.

5. Liability of Employment Rehabilitation Fund. The provisions of this subsection apply when there is no other prime contractor or subcontractor responsible for the payment of compensation pursuant to this section.

A. The fund must be used to pay the claim of an injured employee of an uninsured employer for whom there is no other prime contractor or subcontractor responsible for the payment of compensation pursuant to this section.

B. The fund must pay the same benefits the employee would have received if the employer had secured coverage as required by this Act.

C. To promote the prompt payment of benefits legally due, if a prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier pays benefits to an injured employee and it is later determined that the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier is not responsible for the payment of compensation pursuant to this section, the prime contractor or subcontractor or the prime contractor's or subcontractor's insurance carrier is entitled to reimbursement from the fund for all benefits it has paid.

D. The fund must be used to pay the costs of adjusting and representing the fund in any actions relating to claims for benefits made by employees working for uninsured employers.

E. The board is entitled to recover from the uninsured employer:

1. the amount of the compensation paid under this section;

2. interest;

3. all other costs associated with the claim, including, but not limited to, adjusting and representing the fund; and

4. if an uninsured employer fails to reimburse the board as set forth in this section, the uninsured employer shall also pay the costs of recovering the amounts due, including

reasonable attorney's fees.

F. A claim for recovery under this section is enforceable by the Superior Court under section 323.

G. The board, by contract, may delegate day-to-day administration and adjusting of claims against the fund to a service agent. A service agent may subcontract with attorneys approved by the board to advise or represent the fund in actions under this section as necessary. Expenses of the service agent and attorneys retained by the service agent, upon approval by the board, are paid from the fund.

6. Application. This section applies to dates of injury on and after July 1, 2016.

7. Repeal. This section is repealed January 1, 2019.

Sec. 5. 39-A MRSA § 205, sub-§ 4-A is enacted to read:

4-A. Payment of bills for medical or health care services prior to January 1, 2019. Notwithstanding subsection 4, prior to January 1, 2019, for claims arising under section 105-B, when there is not an ongoing dispute, if bills for medical or health care services are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, $50 or the amount of the bill due, whichever is less, must be added and paid to the provider of the medical or health care services or, if the bill was paid by the employee, to the Employment Rehabilitation Fund for each day over 30 days in which the bills for medical or health care services are not paid. Not more than $1,500 in total may be added pursuant to this subsection.

This subsection is repealed January 1, 2019.

Sec. 6. 39-A MRSA § 324, sub-§2, ¶A, as amended by PL 2007, c. 265, §1, is further amended to read:

A. Except as otherwise provided by section 205, if an employer or insurance carrier fails to pay compensation as provided in this section, the board may assess against the employer or insurance carrier a fine of up to $200 for each day of noncompliance. If the board finds that the employer or insurance carrier was prevented from complying with this section because of circumstances beyond its control, a fine may not be assessed.

(1) The fine for each day of noncompliance must be divided as follows: Of each day's fine amount, the first $50 is paid to the employee to whom compensation is due and the remainder must be paid to the board and be credited to the Workers' Compensation Board Administrative Fund.

(1-A) Notwithstanding subparagraph (1), prior to January 1, 2019, the fine for each day of noncompliance must be paid to the Employment Rehabilitation Fund.

This subparagraph is repealed January 1, 2019.

(2) If a fine is assessed against any employer or insurance carrier under this subsection on petition by an employee, the employer or insurance carrier shall pay reasonable costs and attorney's fees related to the fine, as determined by the board, to the employee.

(3) Fines assessed under this subsection may be enforced by the Superior Court in the same manner as provided in section 323.

Sec. 7. 39-A MRSA § 355 , sub-§ 11, ¶A is amended to read:

11. Freedom from liability. The State is not liable for any claim against the fund that is in excess of the fund's current ability to pay. If any claim against the fund is denied due to an inadequate fund balance, that claim is entitled to priority over later claims when an adequate balance is restored. Claims against the fund arising under section 105-B of this Act may be denied if paying the claims will render the fund balance inadequate to pay rehabilitation costs pursuant to section 17.

Sec. 8. 39-A MRSA § 355 , sub-§ 11, ¶A-1 is enacted to read:

14. Funding; assessments. This subsection governs funding of the Employment Rehabilitation Fund.

A. The board may levy an assessment when the balance in the fund is insufficient to meet obligations of the fund under this section. The assessment must be levied on each insurer based on its actual paid losses during the previous calendar year.

A-1. Notwithstanding paragraph A of this sub-section, the board may not levy an assessment to pay claims arising under section 105-B of this Act that have been denied due to an inadequate fund balance.

This paragraph is repealed January 1, 2019.

Sec. 9. 39-A MRSA § 359, sub-§2-A is enacted to read:

2-A. Penalty prior to January 1, 2019. Notwithstanding subsection 2, prior to January 1, 2019, in addition to any other penalty assessment permitted under this Act, the board may assess civil penalties not to exceed $25,000 upon finding, after hearing, that an employer, insurer or 3rd-party administrator for an employer has engaged in a pattern of questionable claims-handling techniques or repeated unreasonably contested claims. The board shall certify its findings to the Superintendent of Insurance, who shall take appropriate action so as to bring any such practices to a halt. This certification by the board is exempt from the provisions of the Maine Administrative Procedure Act. The amount of any penalty assessed pursuant to this

subsection must be directly related to the severity of the pattern of questionable claims-handling techniques or repeated unreasonably contested claims. All penalties collected pursuant to this subsection must be deposited in the Employment Rehabilitation Fund. An insurance carrier's payment of any penalty assessed under this section may not be considered an element of loss for the purpose of establishing rates for workers' compensation insurance.

This subsection is repealed January 1, 2019.

Sec. 10. 39-A MRSA § 360, sub-§4, ¶D is enacted to read:

D. Notwithstanding paragraph C, prior to July 1, 2018, all penalties assessed under this section are payable to the Employment Rehabilitation Fund.

This paragraph is repealed January 1, 2019.

Sec. 11. 39-A MRSA § 362 is enacted to read:

§ 362. Payment to the Employment Rehabilitation Fund; enforcement; prior to July 1, 2017

Notwithstanding section 361, prior to January 1, 2019, the following provisions apply to penalties assessed under this Act.

1. Payment. All penalties assessed under this Act are payable to the Employment Rehabilitation Fund, unless otherwise provided by law.

2. Enforcement and collection. All penalties assessed under this Act are enforceable by the Superior Court under section 323.

A. The Attorney General shall prosecute any action necessary to recover penalties payable to the Employment Rehabilitation Fund or the board may retain private counsel for that purpose.

B. If a person fails to pay a penalty assessed under this Act that is payable to the Employment Rehabilitation Fund and enforcement by the Superior Court is necessary:

(1) That person shall pay the costs of prosecuting the action in Superior Court, including reasonable attorney's fees; and

(2) If the failure to pay was without due cause, any penalty assessed on that person under this Act must be doubled.

3. Application; repeal. This section applies notwithstanding section 361 and is repealed January 1, 2019.

Sec. 12. Application. Notwithstanding Title 1, section 302, those sections of this Act that enact 39-A M.R.S.A. § 205, sub-§ 4-A; § 324, sub-§2, ¶A, sub-¶1-A; § 324, sub-§2, ¶A, sub-¶4; § 359, sub-§2-A; § 360, sub-§4, ¶D; and, § 362 are retroactive.

Sec. 13. Effective date. Those sections of this Act that enact the Maine Revised Statutes, Title 39-A, section 105, subsection 1, paragraph C; section 105-A, subsection 1, paragraph C; and, section 105-B take effect July 1, 2016.