



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Assessment and Collection of Selected Penalties

Workers' Compensation Board



Report 2011-S-3

September 2013

Executive Summary

Purpose

To determine whether the Workers' Compensation Board (WCB) is properly billing, collecting and promptly depositing, in appropriate accounts, selected legislatively mandated penalties.

Background

The Workers' Compensation Law allows health care providers, which have provided services to WCB claimants, to notify WCB in writing when the claimant's insurance carrier fails to pay or notify them within 45 days that payment is not being made for a bill that has been submitted. WCB staff review the notification, and if it is determined that payment should have been made by the carrier, the law requires WCB to impose a \$50 penalty (HP-1 penalty) on the carrier. The proceeds of these penalties are to be deposited in the State's general fund.

Key Findings

- While WCB properly bills for the HP-1 penalties, it has not been making sufficient efforts to collect all of the penalties owed. WCB does not take any enforcement actions against carriers who do not pay; instead WCB routinely sends quarterly billing statements to the carriers without any follow-up collection efforts.
- As of October 18, 2011, there were 26,981 HP-1 penalties outstanding, totaling about \$1.4 million. However, a significant amount of these posted receivables were due from entities which WCB subsequently determined it should not have been assessing penalties on, or collecting penalties from.

Key Recommendations

- Take enforcement actions against carriers who have not paid their outstanding penalties, including referral to the Attorney General and State Insurance Department.
- Adjust accounts receivable and other WCB accounting records for the penalties it has inappropriately assessed on ineligible entities.

Other Related Audits/Reports of Interest

[Workers' Compensation Board: Workers' Compensation Program: Statement of Assessable Expenses for the Three Fiscal Years Ended March 31, 2011 \(2012-S-71\)](#)

[Workers' Compensation Board: Workers' Compensation Program Assessable Expenses for the Two Fiscal Years Ended March 31, 2008 \(2009-S-45\)](#)

**State of New York
Office of the State Comptroller**

Division of State Government Accountability

Mr. Robert Beloten
Chairman
Workers' Compensation Board
328 State Street
Schenectady, NY 12305-2318

Dear Mr. Beloten:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit of the Workers' Compensation Board entitled *Assessment and Collection of Selected Penalties*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*

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This report is also available on our website at: www.osc.state.ny.us

Background

The Workers' Compensation Board's (WCB) mission is to protect the rights of employees and employers by ensuring the proper delivery of benefits, such as health care coverage, to those who are injured or ill. WCB is composed of 13 commissioners, appointed by the governor and confirmed by the State Senate each for a term of seven years. WCB is not tax payer-funded. It obtains funding through an assessment levied on the State's insurance carriers. WCB is responsible for imposing and administering 41 penalties and fees. Of these, 13 are deposited into the State's general fund. For fiscal year 2010-2011, WCB collected a total of \$5.8 million in penalties and fees, of which \$3.9 million was deposited into the general fund and \$1.9 million was deposited into WCB's administrative account to offset the costs to administer the assessments. The highest fees collected were for Non-Payment of Medical Bills (HP-1 penalties) which totaled \$2.4 million.

HP-1 penalties are assessed against insurance carriers (carrier) which do not make timely payments to health care providers. Workers' Compensation Law allows health care providers to request WCB to make an award for payment of a specified bill(s), when the carrier fails to make satisfactory payment or notify the provider within 45 days that payment is not being made. Notification is to be made to WCB on an HP-1 request form. Upon receipt of an HP-1 request form, WCB staff review it to ensure it has been properly filed, is complete with the bill attached, is not a duplicate submission, and there are no objections related to the HP-1. If WCB determines that the provider was due payment from the carrier, an administrative award is found in favor of the provider, and the carrier is required to pay a \$50 penalty to WCB, as well as the provider's bill with interest. WCB deposits HP-1 penalties into the State's general fund.

Audit Findings and Recommendations

WCB does not take enforcement actions against carriers which do not pay penalties or pay health care providers on a timely basis. As of September 17, 2011, there were 26,981 HP-1 penalties outstanding, totaling approximately \$1.4 million. However, WCB has not imposed interest, late payment penalty charges, or collection fees against the carriers for their failure to make payments. In addition, a significant amount of the posted accounts receivables were assessed on entities WCB subsequently determined it should not have been assessing penalties on, or collecting penalties from. Nevertheless, WCB may be losing thousands of dollars in potential revenues for the general fund by not pursuing collections from the remaining entities.

Enforcement

Settlement Deal

The amount of HP-1 penalties imposed by WCB but not paid by the carriers has been growing for years, due in large part to a lack of collection efforts by WCB. As a result, WCB officials decided to make an offer to carriers that would allow them to satisfy unpaid balances at a reduced amount. The offer covered penalties imposed for the period 2003 through 2009, and required the carrier to pay only 60 percent of their unpaid penalties. Under this offer, carriers received a bill with a disclaimer stating some of the penalties could be erroneous due to a programming error. Carriers could choose to take the offer or they could go through the penalties listed on the bill line by line to determine what they believed was their actual liability. All reduced payments were due by December 31, 2009. Carriers that did not pay by this date would be required to pay the full amount posted on WCB's books. In total, WCB reports that it received \$3,580,969 from 646 carriers in response to its offer. Some of the larger payments came from the State Insurance Fund (\$413,000), Zurich American Insurance Company (\$172,000), and the Hereford Insurance Company (\$126,000).

To assess the propriety of the 60 percent offer, we requested the support for how WCB officials arrived at that percentage. In response, we were provided with an internal memo suggesting several potential compromises ranging from 50 percent to 75 percent of the outstanding amounts due. The memo cites an internal analysis reportedly performed by the State Insurance Fund stating they actually owed WCB about 64 percent of their total outstanding assessment. It appears that based on this internal, unverified State Insurance Fund analysis, the 60 percent figure was adopted and applied to all carriers. We then attempted to apply the 60 percent compromise against the total amounts outstanding for the carriers which took advantage of the offer, but WCB officials said they could not provide us with those figures.

Subsequent to the offer in January 2010, WCB implemented a new system, FMIS, to track penalty assessments and payments. Using the new system, WCB officials have been issuing quarterly billing statements that they are confident correctly reflect any penalties that have been imposed after January 1, 2010. However, even with this renewed confidence in the validity of the new penalties imposed, WCB has not stepped up its collection activities.

We believe WCB officials should not have allowed their systems to deteriorate to the point that they could not be relied on, and a settlement offer needed to be offered. Going forward, WCB should take all necessary steps to avoid having to negotiate with the carriers again for their unpaid penalties.

Current Amounts Owed

According to a WCB Bulletin dated April 14, 2010 that was sent to carriers, employers, attorneys and licensed representatives appearing before WCB, delinquent balances will be subject to interest charges, and WCB will initiate collection actions that can include a 22 percent collection fee as allowed under the State Finance Law. WCB also developed a policy on past due debt that includes referring carriers who are delinquent in making penalty payments to WCB to the Department of Financial Services, the Attorney General's Office and debt collection agencies. State Finance Law allows for the imposition of the greater of: (a) interest on the outstanding balance of the debt owed the State or (b) a late payment charge of ten dollars. In addition, a debtor that fails to make payment within 90 days of receipt of the first billing invoice/notice may be assessed an additional collection fee charge to cover the agency's cost of processing, handling and collecting such debt, not to exceed 22 percent of the outstanding debt. The collection fee shall be added to and payable in the same manner as the outstanding debt. Nevertheless, even after the compromise offer, WCB still did not take enforcement actions against those carriers who did not pay their assessed penalties. Carriers continue to receive quarterly billing statements that show all unpaid procedural penalties, listed by dispute number, until they pay. According to WCB officials this process can go on indefinitely.

For the 26,981 penalties outstanding, the amount owed approximated \$1.4 million and pertained to 367 carriers. Twenty one of these carriers, each with an outstanding balance of \$10,000 or higher, account for almost \$1.1 million of the \$1.4 million owed. The largest individual balance (\$597,900) pertains to the Special Fund for Reopened Cases (see page 7). We calculated the total interest, late payment charges and collection fees as outlined in the State Finance Law that WCB could have imposed on these delinquent carriers. Our calculations show billable interest and late payment charges to be \$306,276, and potential collection fees to be as much as \$270,435.

We wrote letters to the five carriers with the highest recorded outstanding HP-1 penalty balances to verify the accuracy of WCB's records, and for an explanation as to why the carrier maintained such a significant outstanding penalty balance without making payments. These carriers were as follows:

Carrier	Quarterly Statement Date	Outstanding Balance	Number of HP-1 Penalties
Special Fund for Reopened Cases *	August 5, 2011	\$567,600	11,352
Hereford Insurance Company	July 15, 2011	97,100	1,942
Legion Insurance Company	July 15, 2011	92,900	1,858
Reliance Insurance Company	July 15, 2011	62,850	1,257
Reliance National Indemnity Company	July 15, 2011	42,950	859
Total		\$863,400	17,268

* See report section below.

In response to our letter, Hereford Insurance Company submitted a \$96,200 payment (the total balance of their April 2011 billing statement). The last three carriers listed did not respond to our letters as these carriers were in bankruptcy proceedings administered by the NYS Department of Financial Services' Liquidation Bureau.

We also contacted officials from the Attorney General's Office and the Department of Financial Services to determine whether they would be willing to work with WCB to facilitate collection of unpaid penalties from the carriers, as contemplated in WCB's policy. These agencies stated they would be happy to work with WCB to take various enforcement actions against carriers who have not paid their outstanding penalties to WCB.

We recommend WCB implement its policy on past due debt, and take appropriate enforcement actions against carriers who have not paid their outstanding penalties. We recommend that WCB identify those carriers with the highest outstanding balances, and contact them to attempt to obtain payment, and refer those carriers who do not pay to the Attorney General's Office so independent collection efforts can take place. For those carriers with small outstanding balances, we recommend WCB charge interest and late payment charges as outlined in the State Finance Law to deter these from becoming large balances. After discussing these issues with WCB officials, their Legal Counsel rendered an opinion that, based on governing statutes; WCB should not have been assessing penalties on, or collecting penalty payments from, any carrier once it was under the control of the Department of Financial Services' Liquidation Bureau. As such, they would no longer be assessing penalties or attempting to collect payment from the aforementioned carriers.

We recommend WCB officials adjust their accounts receivable records accordingly in compliance with generally accepted accounting principles as they apply to State government. We also recommend WCB officials determine what other carriers listed in its accounts receivable are in liquidation, if any, and further adjust their records and assessment practices.

Special Fund for Reopened Cases/Conservation Committee

The Special Fund for Reopened Cases (Fund) is a special revenue fund of the State held in the sole custody of the Commissioner of Taxation and Finance and controlled and administered by WCB. The Fund was established to collect assessments from carriers and make payments to claimants

and providers with claims made after seven years from the date of injury or death, and three years from the date of the last compensation payment. The Fund's Conservation Committee (Conservation Committee), a non-profit industry association, makes determinations concerning claims against the Fund and submits payable claims to the WCB for processing and payment. Just like all insurance carriers that cover individuals receiving Workers Compensation, the Fund has been expected to make timely payments to providers, and has been subject to the imposition of a penalty by WCB where payments were not made to the carrier within 45 days after receiving notification from WCB – even though WCB itself may have been responsible in whole or part for the delay.

In January 2010, the Conservation Committee received a statement from WCB showing the Fund had a total outstanding balance of \$498,920, dating back to 2003. They also received a letter stating they could pay \$299,352 (60 percent of \$498,920) that would be considered a full settlement of the amount owed. While the Committee authorized WCB to make this payment in April 2010, it was never processed by WCB, and the liability has remained on WCB's system. As a result of receiving WCB's January 2010 settlement proposal, the Committee developed its own tracking system to track the length of time it takes them and WCB to process each bill. The Committee uses this information to file objections in those instances where they believe they processed a bill in a timely manner, and it was WCB that caused the payment to be late.

The Committee asserts that most of the carrier bills subject to penalty for late payment are due to processing and payment delays at WCB. According to WCB Finance Unit officials they do not have a tracking system for bill processing, and with the significant backlog of bills, carrier bills submitted by the Committee are not reviewed or processed timely, and therefore subject to a penalty being imposed. WCB officials stated that no matter how long it took WCB to process a Fund payment, if payment is not made within 45 days the penalty is imposed and billed to the Fund.

As with carriers in Liquidation, WCB officials subsequently determined that the Fund, which based on recently enacted legislation is scheduled to close for new claims effective January 1, 2014, is also not liable for HP-1 penalties. Here too WCB officials must revise their accounts receivable records and assessment practices accordingly.

Recommendations

1. Enforce the WCB policy on past due debt, and assess interest and late payment charges on noncompliant carriers as outlined in the State Finance Law.
2. Take enforcement actions, including referral to the State Attorney General's Office and collection agencies, for those carriers who do not pay their outstanding penalties.
3. Develop periodic reports for the WCB Chairman, showing the number of penalties imposed by carrier, amounts collected and amounts outstanding.
4. Adjust WCB's accounts receivable records and assessment practices to exclude the carriers

which it is not authorized to assess penalties on or collect penalties from.

Audit Scope and Methodology

We audited WCB to determine whether selected legislatively mandated penalties are properly billed and collected. We audited WCB billing and collection practices for the period August 15, 2002 through February 22, 2012, with specific focus on fiscal years 2009-2010 and 2010-2011.

To accomplish our objective we reviewed applicable laws, regulations, policies and procedures. We interviewed officials from WCB, the Conservation Committee, the Attorney General's Office and the Department of Financial Services. From the outstanding HP-1 penalties listed by WCB, we performed tests to confirm this list's completeness. We also contacted the five carriers with the highest outstanding balances through April 2011 to determine whether these balances were accurate and to inquire as to why balances are being maintained. We also calculated the applicable fees for late payment, the interest that should have been charged, late payment charges and/or an additional collection fee charge to cover the cost of processing, handling and collecting such debt. To determine the cause of delays in the payment of bills submitted by the Committee, we reviewed a random sample of 122 bills submitted to the Fund for payment by providers.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our audits to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

Reporting Requirements

We provided a draft copy of this report to WCB officials for their review and comment. Their

comments were considered in preparing this final report and are included in their entirety at the end of the report.

In response to our draft report, WCB officials stated that they would take our recommendations under advisement. However, they further noted that they had previously shared information with us negating WCB's responsibility to assess penalties on, or collect penalties from, certain carriers. That information, which is referenced in their formal response, is reflected in this final report.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Workers' Compensation Board shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

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To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments



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ROBERT E. BELOTEN
CHAIR

JEFFREY FENSTER
EXECUTIVE DIRECTOR

April 17, 2013

Frank Patone, CPA
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Division of State Government Accountability
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Dear Mr. Patone:

We have reviewed the draft report of your examination on the assessment and collection of selected penalties of the Workers' Compensation Board. Each of your recommendations will be taken under advisement regarding the enforcement of past due debt including the assessment of interest and late payment charges as well as referral to the appropriate control agencies.

However, in response to your recommendations and details outlined in your draft report, many of which we identified in our draft audit report response in April 2012, it is important to note the following:

- Your audit report notes that there are penalties outstanding which total roughly \$1.4 million. The "carrier" with the largest outstanding balance (\$567,600) is the Fund for Reopened Cases. As discussed with the auditors on sight during that audit process, our General Counsel has issued an opinion that the Fund is not liable for these penalties. It is also important to note that recent legislation closes the Fund for Reopened Cases to new claims effective 01/01/2014.
- The audit report lists five carriers with the highest outstanding HP-1 penalty balances. However, consideration should be given to the fact that three of those carriers are in liquidation. The priority for those carriers is to ensure that payments to claimants are met. In our response to your draft audit, we provided a copy of a legal opinion from WCB's Office of General Counsel which states that a carrier in liquidation is not subject to penalties pursuant to Section 13-g of the Workers Compensation Law. As such, the Board would not pursue these carriers for payment of penalties.
- Restating the outstanding balance amount in your audit to remove the three carriers in liquidation and the Fund for Reopened cases, the total as of yet uncollected amount is

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* See State Comptroller's Comments, page 14.

\$633,700. Even this number fails to account for outstanding balances attributable to other carriers in liquidation.

- The audit report fails to mention that the WCB collects assessments of more than \$1 billion annually with historical collection rates exceeding 99%. The penalties as of yet uncollected represent less than .07 % of the Board’s annual collections. \$633,700, while not immaterial in any fiscal environment, is a relatively minor amount and the Board believes that it deployed staffing resources dedicated to collections as efficiently as possible. Notwithstanding that, the WCB has established a unit dedicated to the litigation and collection of more than \$800 million in unmet group self-insured obligations which are a result of unprecedented defaults on the part of more than 20 group self-insurers. This confirms the WCB’s commitment to meaningful collection efforts and we will continue to pursue the most cost effective manner to collecting the HP-1 penalties.
- With regard to the statement that the “WCB can provide no support for how the 60 percent figure was arrived at or the total amount due when the deal was offered”. The Board provided a memo to the auditors which outlines the issues and options considered before the 60% settlement offer was provided to carriers. The 60% represents the WCB’s attempt to maximize penalty collections while acknowledging that it did not have the staff to conduct a line by line reconciliation of these bills and that in a sample of 4,668 penalties, only 64% were valid.
- With regard to late payments and processing backlog, these are directly related to high turnover in the unit and a lack of staffing. The Board has been filling items in this area and has implemented overtime projects to address the backlog which have had some success. In fact, it should be noted that 83% of the sample used in the audit is related to dates prior to the implementation of the overtime projects. The Board is also looking at more cost effective paperless solutions and holding regular meetings with the Special Funds Conservation Committee to determine other ways to improve the current process including the more timely payment of all special fund claims.

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Thank you for the opportunity to respond. Please let us know if you would like to discuss any of this further.

Sincerely,

Robert E. Beloten
Chair

* See State Comptroller’s Comments, page 14.

State Comptroller's Comments

1. The report has been revised to acknowledge the WCB's position on the Fund's liability for these penalties.
2. The report has been revised to acknowledge the Fund's position on carriers in liquidation.
3. The Table on page 7 of the report is an accurate reflection of the receivables posted on WCB's books at the time of the audit. No report revisions made.
4. Our audit focused on WCB's collection of fees and penalties. As such, we did not include any background information regarding WCB's general assessments on carriers.
5. We address WCB's available support for the 60 percent compromise offer on page 5 of the report.