

Issue Brief

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Second Injury Fund Assessment Error Flaws Positive Indiana Workers Compensation Legislation

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“Indiana continued improvement of benefits with a four-year increase, but equally as important, it overturned a state Supreme Court decision to protect the structure of the act.”

Ed Roberts, Vice President
Indiana Manufacturers Association

Introduction

For decades, Indiana has had one of the most competitive workers compensation insurance markets in the country. Additionally, the state’s worker benefits rank in the middle nationally while the cost to business consistently ranks second from the bottom. These facts combine to give Indiana one of the most efficient workers compensation systems in the United States.

Part of the state’s success is due to the long-established legislative practice of enacting omnibus bills that incorporate multi-year benefit increases, coupled with provisions addressing court decisions that erode the structure of Indiana’s workers compensation statute. The 2006 General Assembly followed this historical precedence by passing House Enrolled Act 1307 before adjourning in mid-March.

Unfortunately, as sometimes occurs with legislation, there are practical issues with a section of HEA 1307 that changes the second injury fund assessment methodology. Language incorporated into the bill by another national trade, modifying the assessment process from one based on benefits paid to one based on premiums written, is flawed. Due to the use of an incorrect term, this section of the new law is not workable.

NAMIC supported changing the assessment method during the legislative session, but questioned the specifics of the language. Following the session, NAMIC contacted the Worker’s Compensation Board of Indiana and Indiana Compensation Rating Bureau (ICRB) for clarification on the new assessment process. This sparked the realization of the problem.

NAMIC, in conjunction with the Insurance Institute of Indiana, is working with the Board and the ICRB to find an answer to the second injury assessment dilemma created by HEA 1307. Until a solution is finalized, there are a number of elements to outline under HEA 1307, which become effective July 1, 2006. Once the second injury assessment quandary is unraveled by the Board, NAMIC will notify members of the resolution.

Components of HEA 1307

HEA 1307 contains key changes that impact Board members, attorney fees, worker benefits, a negative court decision, and the statute of limitations for the modification of awards. The bill also caps the period for filing a claim under the Asbestos Residual Injury Fund. Plus, as introduced in the House of Representatives, the bill eliminated the Asbestos Residual Injury Fund, transferring the fund's remaining monies to the state's Second Injury Fund. By the time the bill reached the Senate, it was discovered there was still a claim pending in the fund and the provision was stricken.

Requirements for Board Members Altered: Under HEA 1307, members of the Worker's Compensation Board will not longer be required to work full time as judges. The Board has never been a full-time board, and questions over the issue have led to several lawsuits. The restriction that the Board members hold no "other position of trust or profit or engage in any occupation or business interfering with or inconsistent with the discharge of the members' duties" remains intact.

Attorney Fee Schedule Updated: Until 2001, attorney fees were restricted by a fee schedule in Indiana's administrative code. The section was scheduled to sunset that year unless readopted through the appropriate administrative code process. At the time, the Board staff attempted to increase attorney fees through a procedure ruled as improper by the Indiana Attorney General and, therefore, the rule sunset.

For the last five years, there has been no official fee schedule. The fee schedule, now set in the statute, is as follows for an attorney who represents a claimant before the Board when the claim for compensation results in a recovery:

- A minimum of \$200;
- Twenty percent of the first \$50,000 of recovery;
- Fifteen percent of the recovery in excess of \$50,000;
- Ten percent of the value of unpaid medical expenses, out-of-pocket medical expenses or future medical expenses.

Attorney involvement in the Indiana workers' compensation system is lower than the national rate,

according to the National Council on Compensation Insurance (NCCI). As passed, NCCI has estimated HEA 1307 will "increase the extent of attorney involvement in Indiana and put upward pressure on medical and indemnity costs" with a cost impact on the system of 0.1 percent to 0.7 percent.

Benefits Increased on Four-Year Schedule: The new law increases the maximum average weekly wage used in calculating weekly benefits and the maximum aggregate amount of the permanent partial disability award dollars for degree of impairment. The NCCI, contracted by the Indiana Compensation Rating Bureau, estimated an increase in indemnity costs of about 5.1 percent and overall system costs of about 1.4 percent over the four-year period.

The four-year increase in the values of degrees of impairment begins July 1, 2007 with the last increase effective July 1, 2010. The increases average about 7 percent over four years for the lower impairment ratings to about 16 percent over four years for the most serious impairments. The increases in the maximum average weekly wage used to compute the average weekly benefit begin July 1, 2006 with the last one phasing in on July 1, 2009. Over the four years, the increase in the resulting maximum benefits from \$588 to \$650 is 10.54 percent.

See ICRB chart (page 3) outlining the benefit increases in HEA 1307 and their impact.

Onerous Supreme Court Decision Addressed: A 2003 Indiana Supreme Court decision, *Milledge v. The Oaks*, held that an unexplained accident (a risk that is neither distinctly personal to the claimant nor associated with the employee's employment) must be based on a "positional risk" doctrine, thereby, shifting the burden of proof to the employer.

Language in HEA 1307 returns the burden of proof to the employee and restates the four fundamental elements governing Indiana's workers' compensation statute: Injury (1) by accident (2) arising out of (3) in the course of the employment (4).

Statute of Limitations for Modification of Awards Clarified: Indiana's statute contained a confusing set of rules ranging from one to two years regarding the statute of limitations for modifications of workers compensation awards. HEA 1307 changes the statute in all cases to two years from the last date for which compensation was paid.

Conclusion

The enactment of HEA 1307 is a positive step for all Hoosiers and follows a long legislative tradition of passing workers compensation legislation that sets a clear direction for benefits and the courts in the future.

NAMIC is confident that by working with the Insurance Institute of Indiana, Indiana Compensation

Rating Bureau and Worker's Compensation Board of Indiana the error on the second injury fund assessment will be successfully resolved soon. After all, Indiana is recognized for its efficient system that works well for workers, employers and insurers alike.

Benefit Increases in HEA 1307 and Their Impact

Award Per Degrees of Impairment	Current	July 1, 2006	July 1, 2007	July 1, 2008	July 1, 2009	July 1, 2010	Total
1-10 degrees	\$1,300	\$1,300	\$1,340	\$1,365	\$1,380	\$1,400	
11-35 degrees	\$1,500	\$1,500	\$1,545	\$1,570	\$1,585	\$1,600	
36-50 degrees	\$2,400	\$2,400	\$2,475	\$2,525	\$2,600	\$2,700	
51-100 degrees	\$3,000	\$3,000	\$3,150	\$3,200	\$3,300	\$3,500	
Estimated Impact on Indemnity – Subtotal			1.3%	0.8%	0.6%	0.7%	3.4%
Estimated Impact on Total Costs – Subtotal			0.4%	0.2%	0.2%	0.2%	1.0%
Minimum Average Weekly Wage	\$75	\$75	\$75	\$75	\$75	\$75	\$75
Maximum Average Weekly Wage	\$882	\$900	\$903	\$954	\$975	\$975	
Maximum Compensation	\$294,000	\$300,000	\$310,000	\$318,000	\$325,000	\$325,000	
Estimated Impact on Indemnity – Subtotal		+0.4%	+0.5%	+0.4%	+0.4%	0.0%	+1.7%
Estimated Impact on total Costs – Subtotal		+0.1%	+0.1%	+0.1%	+0.1%	0.0%	+0.4%
Estimated Overall Impact		+0.1%	+0.5%	+0.3%	+0.3%	+0.2%	+1.4%

Source: National Council on Compensation Insurance, Inc.