

**California Commission on
Health and Safety and Workers' Compensation**

MINUTES OF MEETING

Meeting Day and Date: Thursday, June 25, 1998

Meeting Location: San Diego Hilton
1775 East Mission Bay Drive
San Diego, California

Commission Members Present:

Chairman Tom Rankin
Commissioner James J. Hlawek
Commissioner Leonard C. McLeod
Commissioner Gerald O'Hara
Commissioner Kristen Schwenkmeyer
Commissioner Darrel "Shorty" Thacker
Commissioner Gregory Vach

Commission Members Absent

Commissioner Robert B. Steinberg

Commission staff:

Christine Baker, Executive Officer

I. Call to Order

The meeting was called to order by Chairman Tom Rankin at 10:00 am.

Adoption of Minutes

A motion to adopt the minutes from the April 16, 1998 Commission meeting was made by Commissioner Hlawek and seconded by Commissioner O'Hara. There were no objections and the minutes were adopted as submitted by Executive Officer Christine Baker.

**II. Report on Division of Workers' Compensation Activities
Casey L. Young, DWC Administrative Director**

DWC Information System

DWC Administrative Director Casey L. Young reported on the status of the workers' compensation information system.

He explained that the system was developed as part of the 1993 legislation that required the creation of a workers' compensation information system. Legislators wanted an information system that would generate sufficient information to allow them to make informed decisions about workers' compensation issues. DWC has been working on such a system for some time.

DWC created an advisory committee to help them determine the questions that the information system should be expected to answer, the data elements that would be required to answer those questions, and those data elements that most cost efficiently can be collected through electronic data interchange with claims administrators. The advisory committee also explored how to collect the information needed to answer what came to be called the benchmark questions.

During the advisory committee process some concerns were raised about the confidentiality of the information that DWC would collect. A sub committee of the advisory committee was put together and chaired by Joseph E. Markey. As required by legislation, this sub committee developed a confidentiality framework for the additional information that DWC would collect. Individually identifiable information will not be available to most people other than as expressed and provided by statute. The statute states that the entities that can access the information are DWC, DLSR, DOSH and the Department of Health Services. It is also available to bona fide researchers. These entities can only use the information for the expressed purposes specified in the legislation. With these parameters in place, Mr. Young reported that people became more comfortable with going forward with the information systems project.

SB 450, authored by Senator Peace, was another piece of legislation adopted last year concerning DWC's information system. In response to some of the concerns that the administration of the system would be contracted out, this legislation required that the system be administered by the DWC. It also required that the data elements to be collected will be specified in regulation ensuring that public hearings will establish the data elements and change them if necessary down the road. DWC currently has proposed regulations out for comment addressing both of these areas.

Mr. Young reported that the system was finally funded by the Legislature in October 1997 after approval of the design was received by the Department of Information Technology and approval was received from the Department of Finance.

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Thereafter, Logicon was retained as an oversight contractor to make sure that other information technology contractors hired for the development of the information system perform satisfactorily. Logicon was recommended by the Department of Technology based on their excellent reputation as an oversight contractor. An oversight contractor is normally required on state projects.

Logicon was used to flesh out the design from the conceptual stage to a detailed design and implementation plan. DWC has signed a contract with Logicon to do the implementation and signed a contract with Access Research Corporation as an oversight contractor for the implementation work. Contractors are still needed for the development of the system.

There are two phases to the implementation of the information system. The first phase will be completed in 6 to 8 months. After the first phase is completed, DWC will be capable of accepting any of the IAIABC electronic data interchange reports other than proof of coverage that isn't needed. The data elements will be input into DWC's Oracle database that will then be able to analyze the data using the tools in the information system. DWC will be able to start accepting pilot data in 4 months. When carriers begin sending electronic reports they can cease sending paper reports including employer's First Report of Injury, doctor's reports and benefit notices. Phase one will satisfy the statutory requirements that the system be implemented and capable of doing specified things.

Phase 2 adds some additional capabilities to the information system not required by statute. One of these capabilities is dynamic query availability. This permit claims administrators submitting data to the system to compare their data to the de-identified data submitted by others. They will be able to compare the experience of their claims and benchmark their experience with those of other claims administrators by geographic area, by diagnosis, by type of claim among other comparisons. This kind of benchmarking will permits carriers to improve their performance by identifying problem areas. The information system is the first system that allows them to do that.

Mr. Young stated that de-identified data would be provided to anybody so they can tap into it and see what is going on in the system.

Commissioner Vach asked if there would be a fee to access the de-identified data. Mr. Young replied that he wasn't certain. But his thoughts were that since claims administrators are providing the data, DWC could in turn provide the capability for benchmarking. However, if it is provided on a no fee basis then anyone from home or work can jump into the database and possibly overload it. Whether there is going to be a fee or some other kind of mechanism to make sure it doesn't crash all the time is still undecided. He explained that there are expense implications to build the system to a capacity where 10,000 people can access it at any time.

Mr. Young proceeded to review the basic architecture of the system. The information system will receive data from claims administrators through a number of ways such as value added

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networks, email, and web forms submitted directly to database. Data will also come from other sources such as DWC's legacy systems, EDD for SICs and denominator data, and the census bureau for demographic data.

Data will be input into an Oracle database with three levels. The first level is where the data is input, the second level is the transactional database that links all of the data, and the third level is an analytical database.

Certain reports will be automatically published on the web page. The frequency of the publication of these reports is still undetermined.

Mr. Young then focused on the draft regulations related to the information system. He advised that draft regulations had been drafted and released to the public. An advisory committee was held to discuss the regulations and members were asked to provide feedback. The feedback will be used to draft a final product to be submitted to OAL and opened to public hearings. This is expected to happen in approximately 3 to 4 weeks.

The regulations establish the data elements to be submitted by claims administrators as well as the timing of submission. One set of data is the First Report data elements such as identities of the parties, information about the injury, diagnosis, and other information contained on the First Report of Injury. The first release is being used in approximately 14 other states already. So there are many claims administrators who are already set up to submit electronic data to California. In addition, there is a lot of vendor support such as software. So it is fairly easy to get up to that piece.

A second set of data is benefit payments, which includes first and last benefit payments by type. During the advisory committee process it was expressed that more time was needed for data processing resources to compile this type of data. Therefore, the time period for submission of this data has been put off until July of 2000. Trading partner agreements will be required with each claims administrator with built in flexibility to allow DWC to work with carriers who cannot make the deadlines in the regulations and put something into the agreement allows some delay that accommodates their circumstances.

Mr. Young emphasized that the effort is to get this system operating without crushing people in the process. Once carriers begin submitting electronic reports, they can stop sending paper. There will be cost savings but it may require a little bit of investment up front. On a national level there is interest by claims administrators of a single standard to submit information to state agencies and rating bureaus and anybody else who wants it.

Mr. Young stated that he expects that once the information system is running that it will be the data source for analyzing for what is going on in California workers' compensation.

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The purposes for which the entities will use individually identifiable information are set forth by regulations as follows:

- DWC will use the identifiable information to put together and maintain the information system, to select audit subjects, to publish reports on the promptness of benefit payments, and to eventually import the names and addresses into the adjudication system in order to save duplicate key entering of data.
- OSHA will use it to select employers for inspection and consultation.
- The Division of Labor Statistics and Research will use the data to fulfill their reporting responsibilities.
- The Department of Health Services will use the data to fulfill their statutory responsibilities with respect to occupational health and disease prevention.
- Researchers who want data must describe their research and state how the individually identifiable information will be used. In addition, they must demonstrate approval by an institutional review board set up under federal law for doing research on human subjects.

Mr. Young asserted that each agreement that is entered into with any of these must specify how the individually identifiable information will be protected. In addition, each requesting agency will be warned that it is unlawful to transfer identifiable information to anyone who is not entitled to it.

Also in the regulations will be the continuation of the DWC Information System Advisory Committee process. The primary responsibility of the advisory committee will be to look at survey plans beyond the electronic data that is being submitted. Due to the limited amount of research resources, the advisory committee will discuss planned research projects in order to reach a consensus before moving forward.

Commissioner Vach expressed concern that some of the data elements to be collected are not currently collected by a lot of claims administrators' systems such as 'permanent and stationary' (P & S) dates. He is concerned that when the system is used for the first time, the data may not be "wonderful".

Mr. Young agreed that there would need to be a phase-in period. But he argued that P & S is a date that is needed in the claims administration process. It is not something foreign that claims examiners are being asked to collect for the sole purpose of submitting it to the DWC. He emphasized that DWC is trying to only include data elements that are normally collected during the claims process so as not to place added burdens on claims examiners.

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There are some data elements, such as the UI number that is required on the first report, which DWC was not initially planning to collect. However, EDD requires the UI number in order to link to the information system and provide the SIC code. There have been instances such as that where decisions have been made to provide additional data. The public process will ferret out any additional areas that might have been missed.

Commissioner Vach replied that some data elements are not as black and white as they seem. As for P & S dates, whose date would be reported? Mr. Young acknowledged that would probably be an issue. He replied that he anticipated that definitions would have to be developed to help people submit consistent data. His sense was that the first P & S date would be the one collected since that is the one claims examiners act on.

Chairman Rankin questioned the Commission's access to DWC's data. Mr. Young replied that statutory authority is needed to access the data. Researchers employed by the Commission to do the research will need the data and will have access to it under the research provision. However, he concluded, the Commission itself probably doesn't need individually identifiable data.

DWC Reorganization Plan

Casey Young then discussed the DWC reorganization plan. He said that the reorganization was expected to be completed by summer but DWC ran into a couple of delays. Some personnel issues have taken longer than expected and will not be resolved until August or September at the next meeting of the State Personnel Board.

Another delay occurred due to a state requirement that the purchase of the proposed telephone system must be reviewed by the Department of Information Technology. That process is currently being conducted.

Mr. Young stated that other than those delays, the reorganization was on track. In anticipation of the comments of Michael Stolzberg of the Association of Retired Workers' Compensation Judges, he said that the reorganization plan was not a conspiracy against unrepresented injured workers and is not the kind of change that requires a regulatory hearing.

Audit Project

Mr. Young complimented Commission staff for completion of the audit report in such a short period of time. They were asked to review a complicated and controversial program in a short period of time and develop recommendations.

He said that he has reviewed the draft statute and believes that everyone will have suggestions about it including the DWC. Mr. Young encouraged the Commission to stay on track with their

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recommendations and not be distracted by little arguments about what is and is not included in the report. The real point is that an audit system is needed that reviews all carriers. In addition, there is a need for a penalty structure that is more rationally related to the size and the seriousness of the offenses. He said that the draft audit report begins to go in those directions in a rational way and again encouraged the Commission to continue down that road.

Chairman Rankin asked Mr. Young about his view on the possibility of audit legislation passed this year. Mr. Young replied that he hoped legislation could be passed although it will be difficult with so little time left in the legislative session.

Mr. Young added that some pending audit regulations contained a controversial self-audit provision. The self-audit was included because the penalty structure was inadequate and it would provide more incentive to look at the unpaid compensation issue. However, he is removing that provision because the Commission approach of extrapolated penalties is a better solution. Mr. Young said that he will let the legislation run its course on that issue.

III. Comments on DWC Reorganization Plan

Michael M. Stolzberg, President, Association of Retired WC Judges

Michael M. Stolzberg, President of the Association of Retired Workers' Compensation Judges, addressed the Commission on the issue of the reorganization of the Division of Workers' Compensation.

He stated that the Association's goals are both to serve its constituent's interests and to do what it believes would improve the workers' compensation process from the adjudicative point of view. In pursuit of that later goal, the association has frequently offered itself as a resource to both the administrative director and to the appeals board as well as this Commission. To the present time, those invitations have not been accepted.

He said that until now, the Commission and the DWC Administrative Director have relied largely on academics for its resources. These individuals, although certainly qualified in a sense, have not had the kinds of hands on experience that are available to the Association of Retired Workers' Compensation Judges whose members have been trying cases over many years and have insights that would benefit the process.

Mr. Stolzberg offered his own experience as an example. He has been a member of the bar for 62 years, 50 of which have been spent in workers' compensation. During his service as a workers' compensation judge, he was Chairman of a forms committee that radically changed the form of Board paper production. He also served as President of the Conference of Workers' Compensation Referees. After leaving the Board, Mr. Stolzberg served for a period of time as a

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defense attorney and for a much longer period of time as an applicants' attorney. At the present time he is still active in that he is called upon as an adjunct to attorneys both on the defense and applicant side to meet ad hoc needs.

Mr. Stolzberg stated that DWC's restructuring raises two areas of the association's concern. By offering multiple inducements to the injured worker to utilize ADR or Alternate Dispute Resolution, the association feels that there may not be adequate oversight to assure the existence of a level playing field for the injured worker. It is to be remembered that the unrepresented injured worker is pitted against the professional claims representative whose certain objective is to close claims on a most economical basis.

Mr. Stolzberg believes that in the event the DWC restructuring plan goes through -- with the emphasis it places on ADR -- that there will be a large push to induce the injured worker in the belief that the DWC will stand behind him and provide the oversight and that he should not pursue representation.

Mr. Stolzberg stated that when Mr. Young charged Peat Marwick to prepare its study, he made it very explicit that the purpose was to bring the process to one in which judicial resolution was kept to as small in volume as would be possible. That is, he was talking about keeping lawyers and judges out of the process.

Mr. Stolzberg said that the DWC plan does have, and they have studied it carefully, a large number of clearly beneficial organizational changes. ADR in workers' compensation does afford the employers and carriers significant benefits. With ADR, the injured worker will learn at an early date where he stands on his claim. It does give him the opportunity to put the injury behind him and get on with his life.

But the association is concerned that the injured worker who essentially must be ignorant of all of rights conferred upon him by law and the multiple technicalities that now exist in the world and that they will be no match for the professional claims administration. And, they have substantial doubt that the DWC will provide the kind of oversight that will assure the injured worker that he will get all that is his due. It is an open question in the association's mind whether the role to be played by DWC can provide that oversight.

In other areas of the law, the ADR process almost invariably does utilize representation on both sides. That's so in the 'hire a judge' process, in the mediation process, and in the arbitration process. Mr. Stolzberg said he is personally called upon on a frequent basis by both the superior court and municipal court to serve as an arbitrator in the mandatory arbitration process. In his experience over a period of 3 or 4 years as an arbitrator, he has yet to find a situation in which the parties come before him as an arbitrator without legal representation. In this respect, he quoted from the California Workers' Compensation Reporter, the editor of which says "the Reporter has repeatedly presented the view that claimants fare poorly in any social insurance system that

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discourages, restricts or prohibits legal representation. The nature of workers' compensation is such that injured workers would fare even worse than other claimants".

Mr. Stolzberg said he does have experience in the carve out programs; that is, he serves as the arbitrator in one of them. He said that in this program there is an ombudsman and "supposedly there is a labor union that supposedly stands behind the injured worker to see that his rights are fully accorded to him". In spite of that kind of oversight, his experience is that many of those who have come before him as an arbitrator in the carve out program are unrepresented. He has an opportunity to assess the fact that they frequently do not get all of the rights to which they are entitled.

Mr. Stolzberg described a case recently in which an individual injured on the job held work of a heavy character. He went to the QME and the QME gave him a 'no heavy lifting' restriction which calls for a 15% standard permanent disability rating. The QME at the same time said that he was no longer qualified or able to do the work in his usual occupation that was heavy work. Mr. Stolzberg pointed out that if this doctor had utilized the semantics saying that not only is he not able to do heavy lifting but he cannot engage in heavy work, instead of a 15% permanent disability rating, the injured worker would be entitled to a 30% PD rating. The role of the arbitrator is not that of the advocate and the arbitrator does exercise some element of review. And in his experience of carve outs, Mr. Stolzberg said that he has influenced the improvement, but he's not sure the complete improvement, of what the injured worker was entitled to in cases that have come before him.

Another case was one in which the employer had denied compensability in a situation in which there was very little justification for the employer to do so. The claimant was due to receive a raise under the union contract. In the matter that came before Mr. Stolzberg, neither of these issues was raised until long after his decision issued. In the event that they had been raised, the injured worker would have received a much more substantial award.

The association feels that there is a basis for the belief and concern that the Information and Assistance office of the Division of Workers' Compensation will not be able to avoid benefit losses of the character just described. Mr. Stolzberg said that is not in their competency to express an opinion whether the speediness of resolution in the ADR process compensates for the lesser and smaller awards which he thinks inevitably will result in the event ADR becomes something that is touted by the employer and by the DWC.

Mr. Stolzberg stated that the association also has a concern as to whether the proposed DWC reorganization is one with sufficient impact to require a public hearing. He outlined a short summary of the provisions of the Labor Code that deal with the need for public hearing. Section 124 of the code provides that the Administrative Director should protect the interest of the injured worker. Section 5307.3 imposes the requirement of public hearings in connection with the adoption, amendment, or appeal of the Administrative Director's administrative regulation.

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In Section 5307.4, there is a waiver of the hearing requirement if the regulation is limited to matters of management, personnel, public property, grants, benefits, and contracts or other agency organizations. However, it is made a part of that section that if the proposed regulation otherwise involving waiver of public hearing has a significant impact upon the public, a public hearing on it is required and mandatory.

The association believes that if the designs of the Administrative Director are achieved in that a much larger proportion of the cases of injured workers goes to ADR rather than to judicial resolution with representation, that the employer and carrier classes will derive substantial benefit and the benefit to the worker will be questionable. Society in general would be affected.

So since the Association of Retired Workers' Compensation Judges believes that the proposed DWC restructuring does have a significant impact upon the public, it believes that a public hearing on the implementation of the DWC restructuring plan is required. The association has asked the Administrative Director to schedule those public hearings and they haven't yet heard but they trust that the request will be granted.

Mr. Stolzberg concluded by saying that they recognize the desirable reorganizational benefits of the restructuring of the DWC. But the association deplores the fact that if achieved, there will be a larger number of unrepresented claims that will be resolved through ADR. They do not know whether the benefits of speedy resolution will compensate for the lesser awards to the injured worker. Those are the concerns that the association wanted to bring to the Commission's attention. Mr. Stolzberg thanked the Commission.

Chairman Rankin thanked Mr. Stolzberg. He expressed appreciation for Mr. Stolzberg's concern about the effect of the reorganization on the injured worker, and particularly the unrepresented injured worker. Chairman Rankin indicated that was not quite clear as to how this reorganization is going to provide new inducements to use the ADR system, which is in statute.

Mr. Stolzberg replied that it would depend upon the extent to which an injured worker is invited to use the Information and Assistance service of the DWC. And in utilizing that information service, he believes it will be suggested to the injured worker that his rights will be totally protected. Mr. Stolzberg believes that employers and carriers will make efforts to point the injured worker in the direction of ADR. And with all of these elements, he believes that ultimately ADR may be in the injured worker's benefit from the point of a speedy resolution but may be to his detriment in connection with the amount of benefits that are accorded to him.

Chairman Rankin suggested that Mr. Young respond to Mr. Stolzberg's concerns. Mr. Young said that he thought Mr. Stolzberg was "seeing some ghosts". He said that nothing new is going to be happening other than they are going to be doing things more consistently than they have done in the past.

Mr. Young said that the bottom line is they are not doing anything differently. What they are trying to do is answer the calls from injured workers about something's going wrong with their claim and figure out if the claims adjuster missed a check or something or if there is an issue such as entitlement to workers' compensation. I&A figures out if there is dispute and if there is, send it off to the Board. Ironically, DWC has been accused of being too free with sending people off to attorneys. Mr. Young said that DWC was trying to respond as they should when a problem is brought to their attention by injured workers.

Commissioner Vach observed that the current routine practice of claims administrators when an employee has a problem is to make a referral to I & A, is it not? Mr. Young replied that was often the case and that if there is an issue, it ultimately has to be resolved by the Board.

Mr. Young said that he also found it ironic that given the restructure, that there's concern about I & A taking over the world and governing how we operate things when in fact the supervisors of the offices are going to be the presiding judges. So it is really the presiding judges that are going to have the managerial responsibility at the local level.

Chairman Rankin thanked Mr. Young for his remarks and called upon the representatives from the Division of Occupational Safety and Health to give their presentation.

IV. Report on Division of Occupational Safety and Health Activities Targeted Inspection Program; Loss Control Program

John Howard, M.D., Chief
Frank Ciofalo, Deputy Chief
Bob McDowell, Manager, Loss Control Program

DOSH Chief John Howard thanked CHSWC for inviting them and announced that Frank Ciofalo and Bob McDowell would discuss the Loss Control Program.

Targeted Inspection Program

Dr. Howard brought a document about the Targeted Inspection and Consultation Programs (TIP) for the Commission's information. The TIP document is a compilation of their experience from 1993 when the program was created by legislation to date. The executive summary provides a history of what has happened with the programs.

Approximately 8500 employers have participated in the consultation and inspection programs. Injury and illness data has been collected on those employers and it has been noted that they have experienced an approximately 325% greater reduction in their lost work day incidence rates than a similar set of California employers at large.

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Although the data wasn't collected using a good case control methodology of selecting a set of employers and providing targeted inspection assistance, the results are positive according to Dr. Howard. However, he added that these results are preliminary. Although the program was established in 1993, it wasn't up and running until 1995; therefore, there is only about two full years of data collection.

Dr. Howard expressed hope that if the Legislature deems the program worthwhile then DOSH will produce a similar report each year and update the results. There is still a lot of interesting data that should be collected and examined.

Commissioner Vach asked if the comparisons made between the targeted and controls were made by matching SIC codes. Dr. Howard answered that there was no matching, and that it was a very preliminary and rudimentary type of analysis. However, there is a need to do a more sophisticated analysis. In the beginning of the program, Dr. Howard said he decided not to put a lot of the resources into data analysis. But if the program is continued, a detailed analysis will be necessary including specific case control type methodology or two comparable groups of experience. A lot of firm conclusions cannot be made from the data they currently have but the program does look promising and it is worthwhile to determine if they continue to see that promise.

Dr. Howard continued by saying that one of the problems with looking at the cost savings is that it isn't known how much a particular employer spent to achieve those cost savings. So on an individual level, they would need to calculate a true cost benefit ratio. What was done was more of an aggregate. \$5 to \$6 million has been collected per year through the funding mechanism. Cost savings seem to be about five to ten times that amount. But it isn't known what an employer has spent and that is an important issue for additional study.

Commissioner Vach suggested that Dr. Howard include in his analysis what types of assistance or remediation within the employer was most effective. An analysis that includes particular efforts by both OSHA and the employer that were most effective would allow employers to make decisions about where to concentrate their own efforts in order to get the most bang for their buck.

Dr. Howard replied that based on their aggregate experience with this program as well as Cal-OSHA in general, employers should use a programmatic emphasis, specifically management commitment and employee involvement. These singular items result in the most positive change in terms of injuries and illnesses in the work place.

Commissioner Vach agreed but commented that mechanical changes are easier to accomplish than the overhaul required by those items. An employer can hire a new management team that has no desire to be involved in loss control but is willing to spend a few dollars on mechanical

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things rather than overhauling the existing employee/employer relationship. He commented that if there were a magic bullet then most employers would rather use it then try to deal with the problem in a systemic way and it was worth looking into. Dr. Howard agreed.

Chairman Rankin commented that labor and employers are working with OSHA to transfer the funding source of the targeted inspection program to the General Fund. The program is currently funded by assessments and the funding sunsets at the end of this year.

Loss Control Program

Frank Ciofalo, Deputy Chief of the Division of Occupational Safety and Health, then addressed the Commission. He stated that the establishment of the Loss Control Program was part of the 1993 workers' compensation reform. Legislation requires the unit to certify the loss control programs of workers' compensation carriers so that those carriers will provide loss control services at least to those employers with the greatest losses.

Bob McDowell, Manager of the Loss Control Unit also addressed the Commission on the subject of Loss Control. He reported that the unit was established in 1993 but it wasn't until 1996 that it began evaluating insurance carriers for compliance with the regulations and it wasn't until April of 1997 that permanent staff positions were created. So the data is very green.

Mr. McDowell stated that from the beginning, the Loss Control Program has been a participative program with the insurance community. The loss control professionals in the workers' compensation community were involved in establishing the regulations and continue their involvement through an ongoing working group that meets regularly to discuss issues of concern.

By 1995, the Loss Control Unit certified all of the workers' compensation carriers authorized to write workers' compensation in California. As part of this certification, all carriers submitted their annual plans containing the selection methodology used to identify employers who require loss control services. As carriers are entering their 4th or 5th cycle of recertification, they have refined their selection methodologies and are finding it easier to identify employers in need of loss control services. There are now approximately 104 workers' compensation carriers and carrier groups in California and about 270 total workers' compensation carrier companies that are certified.

Beginning in 1996 the Loss Control Unit began conducting performance evaluations of insurance carriers' 1995 plans. The early performance evaluations were very problematic because there was general confusion over what the regulations required and what the carriers' responsibilities were. But overall, the community is making an effort to comply and service their employers.

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As the Loss Control Unit gets into evaluating carriers' 1996 plans, Mr. McDowell indicated they are finding much improved performance. Carriers now have a better understanding of the law and have refined their selection methodology so that they are targeting and utilizing their resources much more efficiently. Carriers have been responding relatively positively during visits by the loss control auditors and have provided required information upon request.

Mr. McDowell cited open rating as having a tremendous effect of loss control departments. In many carriers, loss control departments are considered an expense rather than a value added. Consequently, many insurance carriers are reducing their loss control staff at the same time that the Loss Control Unit is asking them to provide services to their employers.

According to Mr. McDowell, the Loss Control Unit was established primarily to protect the small employer. The primary responsibility of the loss control departments within insurance carriers is to protect the profitability of the insurance carrier. They do that by ensuring that the employers they insure have reduced losses and therefore the carrier gets to keep more of the premium. Under this philosophy, the small employer suffers because it is not profitable to provide them with loss control services. There have been plans submitted to the Loss Control Unit where carriers have said that they have no intention of servicing small employers. The Loss Control Unit does not approve those plans and returns them to the carrier until they can identify small employers for loss control services in their book of business.

Commissioner Vach asked Mr. McDowell to define what he meant by 'small employer'. Mr. McDowell replied that it varies by carrier. Each carrier defines its own market. Some carriers submitted plans that said they would not service any policyholder that pays less than \$50,000 in premium. And yet, 30 or 40% of their book of business falls under that category. They say that it is not profitable and that there isn't enough premium in the individual policy to provide service to those employers. There are other carriers out there who specialize in nothing but what large carriers call a small business. Their main premium is below \$25,000 a year and yet they are providing quality services to their employers.

Mr. McDowell noted that the market is really up and down and that the Loss Control Unit has now evaluated about 50% of the carriers. However, some of the carriers that were evaluated early on are no longer in business, while at the same time other carriers are entering the market in California. So the numbers keep going up and down and some of the players keep changing.

Open rating has had other effects such as reductions in staff. One of the large carriers completely eliminated their internal loss control staff and out-sourced all of their loss control services. One or two carriers increased staff.

Mr. McDowell presented some preliminary observations from the early results. The Loss Control Unit believes that the community is trying to comply with the law and provide loss

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control services. They have been, for the most part, very cooperative in the auditing and evaluation process.

Of concern to the Loss Control Unit is the fact that carriers have not, in many instances, trained their loss control consultants on what their plans contain. Consequently, the loss control consultant who is out providing the service to the policyholder does not understand what he is supposed to be providing. One of the mandatory corrective actions that is written most frequently during Loss Control evaluations instructs loss control management to train their consultants in what their plan is. Additionally, Loss Control staff almost consistently has to tell the carriers to inform their loss control consultants what the regulations require. The regulations and carrier plans are two separate issues. The regulations list very specific activities that carriers must do. The carriers' plan indicates what additional services the carrier will provide above the minimum services required by regulation.

Mr. McDowell continued by saying that there is a tremendous problem in some areas with documentation. The regulation and the intent of the statute are to see that service and communication is provided to the employer. The Loss Control Units' position is that it only cares about what carriers tell their employers, what hazards and losses have been identified, what analysis has been performed, and what recommendations have been made to help the employer reduce losses, accidents and injuries. As long as the carriers do this then the documentation required by the Loss Control Program will be satisfied.

Another issue is selection methodology and how carriers identify problem employers. The regulation provides some guidance. It suggests the combined use of a number of identifiers. Some carriers have tried to use individual identifiers without combining them with other identifiers. For example, some carriers used experience modifications or hazard grades as the sole identifier of problem employers. Alone, these indicators are not meaningful and many carriers were wasting resources. The plan certifiers within the Loss Control Unit have been working with carriers to ensure that they do not waste resources. Mr. McDowell acknowledged that the program is an additional expense to the insurance community and emphasized that that Loss Control Unit is trying not to burden them unnecessarily. They are providing as much assistance to the carriers as possible.

Mr. McDowell concluded his presentation with an invitation to the Commission to attend future meetings between Loss Control staff and the insurance community. He said that the meetings have been a positive experience for the Division of Occupational Safety and Health and helpful for the carrier community.

Commissioner Vach asked Mr. McDowell if he has seen any shift of resources from the underwriting side of loss control to the loss prevention side. Mr. McDowell replied that it has occurred particularly in a number of small carriers. There are a number of carriers that had no

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loss control at all and never provided it. Loss control was not a major function of theirs. The Loss Control Unit has seen a number of instances where this is an entire new effort for carriers.

Commissioner Vach opined that perhaps open rating may actually have helped loss control by making carriers more focused on what they really need to do. Mr. McDowell replied that he has had reports from carriers that the program has helped them to focus and made them more efficient.

An unidentified member of the public asked Mr. McDowell if the Loss Control Unit accepted copies of correspondence from insurance carriers to their insureds reiterating the loss control suggestions made by the loss control representatives as sufficient documentation that the insurance company is following its plan. Mr. McDowell answered that the Loss Control Unit does accept that as sufficient documentation.

The same member of the public asked if he was correct in his understanding from Mr. McDowell's testimony that the Loss Control audits have found that correspondence to employers following visits by loss control is not happening. Mr. McDowell replied that in some instances it is true. There are carriers who have attempted to go paperless and adopted policies to report verbally to the employer and eliminate written correspondence. However regulation require a written report. Very few carriers have attempted to do this and those that have been identified have been issued corrective actions.

The member of the public then asked if it were possible for brokers to receive information from the Loss Control Unit as to which insurance companies are complying with requirements and which ones are not. Mr. McDowell replied that the only thing that the Unit can report to someone who is properly identified is which carriers are certified and which are not. They are developing a web site that will contain public information.

V. Status Report on CHSWC Review of DWC Audit Function
Christine Baker, Executive Officer

Executive Officer Christine Baker provided a status of the Commission's project to review the DWC audit function. She began by thanking the team that worked on the audit report, the DWC Audit Unit, the Department of Insurance, the advisory group and the Division of Workers' Compensation. Their cooperation made it possible to accomplish the audit report in a short period of time. Everyone was willing to work with the Commission in trying to develop a report that is workable for the community.

Ms. Baker provided a brief background of the development of the audit report. She said that the report was developed in response to an April 1998 Senate Industrial Relations Committee and Assembly Insurance Committee joint request for the Commission to undertake an evaluation of

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the effectiveness of the audit function of the Division of Workers' Compensation. The Legislature requested that the Commission work to develop recommendations to make the DWC audit program more effective, to determine whether or not the program is adequately staffed, to determine whether or not the penalty levels are adequate and/or appropriate to deter violations, to make the \$100,000 civil penalty for a pattern and practice of poor claims administration more effective and to consider whether or not unfair claims settlement practice act, insurance code 790.03, should apply to workers' compensation.

Ms. Baker reported to the Commission that the research team and staff developed a draft report for their review and approval prior to submission to the Legislature. In addition, the research team developed and sent the Commissioners draft proposed legislation to improve the audit function. She said that although all audit study advisory committee members received the draft proposed legislation, there has not been adequate time for feedback. Commission staff is only now receiving feedback and it appears that a consensus round table is needed to refine the issues.

In the draft audit report, commission staff drafted the following recommendations:

- The selection process for targeted audits should be improved to require that all insurers, self-insured employers, and third party administrators be audited every five years on a simplified audit basis.
- No penalty should be assessed if certain thresholds are met and penalties should be extrapolated relative to the number of claims at the worst locations.
- Labor code section 129.5 (d) should be changed to facilitate application of the \$100,000 penalty and correspond to the insurance code 790.03 (h).
- Labor code section 129.5(d) should be changed to require another entity within DIR to conduct the \$100,000 penalty hearing. For example, the WCAB, not the DWC AD.
- There should be a streamlined benefit calculation by establishing a single weekly benefit rate to be paid to an injured worker for all species of benefit, TTD, PPD, and VRMA.
- The benefit notice program should be simplified and streamlined.
- There should be a change in the mechanism for the Commission funding and it should be taken off the audit unit function.
- There should be a complaint processing procedures in the DWC I&A and Audit Units.
- Additional staff appear to be needed in the DWC audit unit whether or not the current audit process continues or a revised plan is adopted.
- The DWC Administrative Director should take more assertive action on identifying entities and assessing the applicable \$100,000 penalties per labor code 129.5(d).
- The DWC AD should establish a system by which referrals are made to DOI pursuant to the provision of Labor Code section 129.5(d) and Insurance Code section 790.

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The report also recommended that working committees should be developed to respond to some of the recommendations. One of those working committees would look at streamlining the audit process, developing indicators for a simplified audit process, and developing a penalty structure. A legal review committee would review the proposed labor code revision.

Finally, the report recommended that the Division of Workers' Compensation report back to the Commission regarding the work that is being done to improve targeting and complaint tracking.

CHSWC Vote

Chairman Rankin asked Commission members if a motion was needed to adopt the audit report.

Commissioner Vach expressed support for adopting the report with the understanding that some of the recommendations need to be fleshed out substantially. He is concerned that some of the recommendations are not fully detailed and expressed discomfort about adopting the entire recommendations until the details are worked out. The draft legislation, however, is superb.

Chairman Rankin asked Commissioner Vach if it was his recommendation that the Commission go forward with the proposed legislation and hold off on the report until the details are worked out. Commissioner Vach stated that he agreed with the framework of the report but was concerned about the message that the Commission would send by adopting the report without some detailed work.

Ms. Baker commented that there are some revisions yet to be made to the report. Some comments were recently received by Mark Johnson, Audit Unit Manager, which had not yet been incorporated into the report. She suggested that the revised report could be submitted to the legislature with the advisement that the Commission is still fleshing out the details of the recommendations.

Neil Burraston of the Senate Industrial Relations Committee addressed the Commission on the audit report issue. He said that the audit report wasn't urgent. It is desirable and would be nice to get in legislation in this year, but there are real time constraints. He recommended that the Commission take the necessary time to complete the work rather than try to meet legislative deadlines that may be impossible to meet anyway.

Commissioner Rankin asked to entertain a motion to continue developing the proposed legislation whether or not it can be done accomplished this year and delay adoption of the report until it is further refined. Commissioner O'Hara so moved, Commissioner Vach seconded and the motion was adopted by unanimous vote.

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Discussion of CHSWC Audit Project

Mark Webb of the American Insurance Association pledged that his organization would work closely with Commission staff on the audit project. However, he said that he would be remiss if he did not put on record that AIA has concerns with the statutory language and significant omissions in the Commission's report relating to Labor Code §5814. He said that he will bring all of the concerns to whatever forum is established for airing them, but to date the opportunity has not been made available. He said that he wanted to take the opportunity to make the Commission aware that these issues will be raised in the process and perhaps again in the legislative process. But he reiterated that AIA is committed to working with the Commission on this important issue.

Commissioner Vach asked what Labor Code Section §5814 states. Mr. Webb answered that Labor Code §5814 allows the appeals board to assess a 10% penalty on the entire species of compensation that has been unreasonable delayed or refused. He said that because of judicial interpretations and impositions of this penalty, AIA is concerned that it has as great if not a greater impact on the behavior of the claims paying community than does the audit program. Since one of the objectives of the audit report is simplification of the system and of the audit program, it will provide more certainty for the claims paying community on what their obligations are in the labor code. Mr. Webb said that AIA feels that Labor Code §5814 should be discussed in relevance to the audit program. He stated that AIA is not suggesting that the issues be joined. But they do feel that this is an appropriate forum to raise this issue as it relates to the obligations of the claims community.

Chairman Rankin suggested that if the community were interested in submitting legislation this year then entangling it with the issue of Labor Code §5814 would probably make it a very futile effort.

Mr. Webb again asserted that AIA is not suggesting that these issues be joined. However, since one of the stated objectives of this process is to give the claims payers direction on what is acceptable behavior, then AIA would be remiss if it did not point out that whatever line is drawn in the audit program will be blurred by Section 5814. If the stake holders in the system can agree to what the audit program should look like and if legislation can be accomplished this year, AIA would not use Labor Code §5814 to thwart that process.

Mark Gerlach addressed the Commission speaking on behalf of the California Applicants Attorneys' Association. He offered the support of CAAA in the audit review process. He said that CAAA believes that the audit review a very valuable process that directly affect both employers and employees. Employees are affected by the delays and problems in the audit process. Employers are also affected because when there are delays the workers don't return to work as fast which raises costs for employers. Improving the audit process is something that both the employer and employee community should get behind. Mr. Gerlach said that CAAA is

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very happy to see the Commission working in this regard. They would like to continue to work with Commission staff in flushing out some of these ideas in the future.

Although CAAA is supportive of the report, they believe that the issue of additional staff for the audit unit needs to be addressed immediately. Mr. Gerlach reported that the budget sub committees of both the assembly and the senate have adopted an augmentation for the audit staff. That augmentation is currently in the budget but the budget process doesn't guarantee that it will be approved by the Governor. Mr. Gerlach suggested that it would be very valuable for the Commission to look at the recommendation for additional staff. If there is a valid need as pointed out in the draft report, the Commission should take action to let the Governor know that the Commission would like the augmentation to be approved in the budget.

Chairman Rankin asked the Commission if there were any comment on the suggestion that CHSWC support the notion of added audit staff. Commissioner Vach replied that he believed it would be putting the cart before the horse to add staff until it is known what the new program will look like. He suggested that the staff issue be held off until the new program is developed. Chairman Rankin disagreed saying that the proposal involved more audits. Therefore, a need for more staff is a natural conclusion. Hearing no motion, the item was dropped.

VI. Update and Discussion Regarding Commission Studies and Projects
Christine Baker, Executive Officer

Current Projects

Permanent Disability

Ms. Baker reported that the permanent disability project is ongoing. The next meeting of the Commission's permanent disability policy advisory committee was rescheduled for August 14, 1998 and a revised notice of the meeting will be issued. [*Special Note:* The PD Policy Advisory committee meeting was rescheduled again for Wednesday, September 2, 1998.]

The research on self-insured employers is underway and new study information on the impact of local area economic conditions will soon be available. Preliminary information indicates a high response rate from the self-insured employers participating in the study.

Workers' Compensation Prototype Material

The workers' compensation prototype information project has been completed. A sample set of factsheets and instructions for ordering and customizing the factsheets and/or video was mailed

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to approximately 225 individuals and organizations. This mass mailing list included public libraries, employers, unions, insurers, injured worker associations, medical associations, and attorney associations. The factsheets are available on an individual basis at Information and Assistance Offices throughout the state and are also available on the Commission's web page along with ordering and customizing instructions.

Upon request, the factsheets have been mailed to many states that have expressed interest in this project. The materials were recently presented at several events including a meeting of the workplace violence task force on March 31, 1998, a meeting with the president of the Hotel Employer Restaurant Employees Union Local 2 on April 10, 1998, and a class that was held to discuss workers' compensation at the Oakland Chinese Community Council Welfare to Work. Future presentations include a meeting with the disability management employers' coalition and a meeting with the California Applicants Attorneys Association.

California Study Group on Young Worker Health and Safety

Ms. Baker reported that the California Study Group on young worker health and safety is an ongoing project. The group has prepared a draft report and recommendations. They have identified potential strategies to reduce work-related injuries and illnesses among youth in the California work force. They also want to foster awareness and skills in safety and health that will remain with youth throughout their working lives and allow them to take an active role in shaping state working environments as well as promote positive, healthy employment for youth. The youth task force met on June 5, 1998 and, based on recommendations contained in the report developed by the study group, is developing implementation plans for recommendations in the following three areas:

- Establishment of a Resource Center on health and safety for young workers
- Improving the work permit system
- Developing a statewide public awareness campaign.

At its June meeting, the subgroups reported on their initial findings and asked for group feedback and recommendations. The subgroups will continue to meet to further explore these three implementation plans. The next meeting of the youth task force is scheduled for September 24, 1998.

Tracking Illegally Uninsured Employers

The project on tracking illegally uninsured employers is ongoing. The Department of Industrial Relations embraced the Commission's project on illegally uninsured employers and is carrying forward its "operation insure". The uninsured employer pilots have been proceeding rapidly with

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the assistance of the WCIRB and with the Division of Labor Standards Enforcement. The results to date suggest that the percentage of employers that are operating without compensation coverage is likely to exceed earlier expectations. However, the identification of employers through matching EDD and WCIRB records has been more successful than anticipated. Consequently, expectations are high for being able to identify and bring into compliance, uninsured employers.

Very preliminary estimates based on current information for the portion of employers who are uncovered reveal that 16% of the experience rated employers without current coverage on file are illegally uninsured; 20% of the two targeted industry groups, restaurant and auto repair, are uninsured; 15% of all other industry groups are illegally uninsured; and 25% of the new employers, perhaps because they are not aware, are being identified as uninsured.

Commissioner Vach asked about the next phase of the project. Ms. Baker replied that Commission staff will evaluate about what should be done and possibly make a recommendation to continue this effort on a sample basis throughout the California system, matching records for all the employers.

Commissioner Vach asked if it was Ms. Baker's impression that there is a need to work with DIR on improving the matching and if there were any funds issues. Ms. Baker replied that there would be funds issues if the program were expanded. In answer to his other question, she replied that the current identification method was the most efficient way of identifying uninsured employers for the Division of Labor Standards Enforcement. Additional resources can be targeted at going forward with those employers.

Frank Neuhauser commented that, at the recommendation of the Commission, the WCIRB has gone forward with establishing the FEIN number on policy information. This project, if successful, would encourage the Division to use that matching to track uninsured employer using the FEIN number and EDD data. It would also help understand whether or not the Commission should use the targeted industries or concentrate on new employers.

Commissioner Vach asked if there was a need for legislation to accomplish the goals of the program. Ms. Baker replied that it can be accomplished with existing legislation.

Carve Out Project

Ms. Baker reported that the carve out project is expected to be completed in August of 1998. Some final data analysis from WCIRB is being completed.

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DWC Lien Project

Ms. Baker reported that the Commission is studying the lien backlogs of the Division of Workers' Compensation. She said that the data collection instrument designed to derive information regarding the sources and reasons for the liens filed on workers' compensation cases is currently being piloted by the Division of Workers' Comp. DWC Assistant Chief, Richard W. Younkin, has been working with Frank Neuhauser and Ms. Baker at refining the data collection instrument and piloting this project.

Proposed Projects

Ms. Baker then described the proposed project on the Commission's agenda for fiscal year 1998/99. After some discussion, the Commission members agreed to hear all project descriptions before making a motion to adopt all or part of the proposals.

Continuation of the Permanent Disability Study

Ms. Baker reported that the continuation of the RAND study of permanent disability is contingent upon the receipt of a \$1.2 million augmentation requested for the Commission budget. She proposing the continuation of the RAND study which would require the augmentation money as well an additional \$82,000 from existing Commission funds. She requested the authority, once approved, to pull together the \$1.2 million and \$82,000 into one contract.

Ms Baker stated that the \$1.2 million and \$82,000 would address phases 1 and 2 of the RAND continuation, a return to work analysis and a proposed revision to the PD schedule. Phase 3 of the project continuation, an analysis of wage loss and return to work in other states, would require approximately \$85,000 per year for two years and about \$101,000 for the third year from Commission funds.

In addition, Ms. Baker reported that the Commission might be able to obtain \$250,000 per year for research on other states from NIOSH, the National Institute for Occupational Safety and Health. NIOSH was established by the Occupational Safety and Health Act of 1970 and is part of the Center for Disease Control and Prevention and is the only federal institute responsible for conducting research and making recommendations for the prevention of work related illnesses and injuries. The institute's responsibilities include investigating potentially hazardous working conditions as requested by employers or employees, evaluating hazards in the work place, creating and disseminating methods for preventing disease, injury and disability; conducting research and providing scientifically valid recommendations for protecting workers; and providing education and training to individuals preparing for or actively working in the field of occupational safety and health. The \$250,000 would be used to look at other states. No

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California money would be used for the study of other states. This additional money would help fund the other state component over the same three-year period.

Augmentation of Prototype Materials

The proposed augmentation of the prototype information materials project would develop a return to work fact sheet, improve formats, update information, and inform employers how to use the materials to fulfill legal obligations to inform workers. Commission staff will work very closely with the Division of Workers' Compensation in making recommendations to how the prototype materials can be used to fulfill legal requirements. Ms. Baker recommended approval of the project which would cost about \$63,000 over two years.

Commissioner Vach asked Ms. Baker if there was any feedback from DWC as to whether or not they are going to be flexible about the labor code requirements. Ms. Baker replied that the DWC is willing to work with Commission staff and LOHP to try and find the best way to make those materials work.

Mr. Young inquired if Commissioner Vach were asking whether the regulations will be amended to require less information. Commissioner Vach replied that wasn't his intention. His point is that the prototype materials were developed and then the Commission got the opinion from DWC and CWCI that they did not meet Labor Code Section 9882 requirements although they come close in a lot of respects. He said that if the Commission votes to proceed with the return to work fact sheet, DWC and the Commission will have to work closely together to make sure it meets requirements while retaining its usability.

Mr. Young replied that DWC is taking the factsheets developed by the Commission and adding a few things to create a new one that will meet regulations. He said that the return to work fact sheet is not required by regulation and doesn't require any flexibility from the Division.

Commissioner Vach restated his position. The factsheets were developed to meet employees and employers needs and hopefully meet regulatory needs. The factsheets have been cited as superior to the accepted pamphlets. Commissioner Vach asked Mr. Young to be more flexible with the Commission and step back from his regulation to say it's okay to use the factsheets. After all, they have already been developed. Mr. Young assured the Commission that they will work it out.

Continuation of Medical/Legal Study

Ms. Baker reported that continuation of the medical legal study will cost under \$12,000. The Commission is only billed for services rendered, but she recommends encumbering \$12,000 to ensure that there is sufficient funding to continue that project.

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Benefit Notice Simplification

Ms. Baker described the proposed project to simplify benefit notices. This project would be coordinated with the audit report findings and would identify notice problems that contribute to problems with claims, develop criteria to improve notices, identify requirements that cause the greatest problems with the notices, identify steps to examine and address these requirements as well as prepare better language for workers that is clear and understandable. The project would run one year and cost about \$90,000.

California Resource Center on Young Worker Health and Safety

Ms. Baker reported that the California Study Group is proposing that funding resources be explored to establish a resource center for the collection and dissemination of information and material on young worker health and safety. She recommended that seed money be granted for the Study Group to explore ways of getting funding for a resource center. The project would last for six months and cost \$5,000.

Public Awareness Campaign

Ms. Baker recommended approval of a project to explore possible funding sources for a public awareness campaign on young workers' rights, protections and responsibilities. It is a six-month project that will cost \$5,000.

Meetings of Enforcement Agency

Another proposed project would convene and facilitate a series of two to four meetings for various law enforcement agencies that protect young workers. These meetings would explore the strategies developed by the California study group on young worker health and safety. Ms. Baker recommended approval of this project, which will last six months and cost \$5,000.

Ergonomics Proposal

A proposal was made to research and report on the best practices in ergonomics training. The two-year project would cost \$154,000 -- \$30,000 in the first year and \$124,000 in the second. Ms. Baker recommended that the Commission place this under review until the September meeting pending the state budget outcome and other priorities.

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CHSWC Vote

Upon completion of Ms. Baker's review of the proposed projects, Commission O'Hara made a motion to adopt all of the projects. Commissioner Schwenkmeyer seconded the motion, which was carried by unanimous vote of the Commission members.

VII. Other Business/Public Questions/Comments

There were no additional public comments.

VIII. Adjournment

Chairman Rankin asked for a motion for adjournment. Commissioner O'Hara so moved, Commissioner Vach seconded the motion and the meeting was adjourned.

Future Meetings

The next meeting of the Commission will be held Thursday, September 10, 1998 at 10 a.m. in the Auditorium in the State Building at 107 South Broadway Street in Los Angeles.

The following meeting is scheduled for Thursday, November 12, 1998 in Sacramento.

Approved:

Respectfully submitted,

Tom Rankin
Gerald O'Hara 9/10/98

Tom Rankin, Chairman Date

Christine Baker

Christine Baker, Executive Officer