



# MEMORANDUM

## PRIVILEGED AND CONFIDENTIAL

### ATTORNEY/CLIENT COMMUNICATION

**DATE:** November 8, 2007  
**TO:** William J. Lhota, Chairman, Board of Directors, Ohio Bureau of Workers' Compensation  
**FROM:** F. Ronald O'Keefe, Esq., Hahn Loeser & Parks LLP  
**SUBJECT:** Overview - Fiduciary Duties of the Actuarial Committee; Ratings Recommendation

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Background: The Board of Directors (the "Board") of the Ohio Bureau of Workers' Compensation ("BWC") has approved a recommendation to consider reducing the maximum allowable group-rating discount. In order to implement this recommendation, the Board has referred this matter to the Actuarial Committee (the "Committee") for a complete review of the BWC group-rating program and recommendation to the Board regarding the program (the "Group-Rating Program Recommendation").

Purpose: The Governance Committee has requested that this memorandum be prepared to provide guidance to the Committee with respect to its fiduciary responsibilities as it undertakes to formulate its Group-Rating Program Recommendation.

Fiduciary Responsibilities: A fiduciary has been defined as "a person having a duty, created by his undertaking, to act *primarily for the benefit of another* in matters connected with his undertaking."<sup>1</sup> The monies paid into the worker's compensation fund "constitute a trust fund for the benefit of employers and employees."<sup>2</sup> The members of the BWC Board each have the duties of a trustee with respect to the workers' compensation fund. A trustee must exercise "such care and skill as a man of ordinary prudence would exercise in dealing with his own property" and that, if a "trustee has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill."<sup>3</sup> Accordingly, the members of the BWC Board are obligated by law to adhere to the highest standards of judgment and care when making decisions or taking actions that may affect the financial integrity and soundness of the workers' compensation fund.<sup>4</sup>

Executive Summary: All of the members of the Committee – Messrs. Bryan, Hummel and Matesich – are also members of the Board. Accordingly, the members of the Committee are Directors first and representatives of the constituencies that brought them to the Board second. It is important that the members of the Committee, in discharging the responsibility delegated to the Committee by the Board, separate themselves from whatever relationships they may have to

the constituencies that brought them to the Board and focus solely on their fiduciary responsibilities, as Board members, to the BWC and the fund administered by the BWC.

In order to properly discharge their responsibilities on the Committee, the members of the Committee should be informed of their fiduciary duties as Directors and, accordingly, should be guided by three primary considerations in formulating and presenting to the Board the Group-Rating Program Recommendation:

- The provisions of Ohio law that directly impact the Committee’s activities.
- The duty of loyalty to protect the workers’ compensation fund and to act in the interests of all the stakeholders of the BWC, taken as a whole.
- The duty of care owed to review the BWC group-rating program, considering all relevant information in the context of actuarial soundness and statutory requirements.

Discussion and Analysis:

1. Ohio Law.

- Ohio law requires the Administrator to “fix and maintain, with the advice and consent of the Board, for each class of occupation or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus.”<sup>5</sup>
- Ohio law requires the Administrator to develop “fixed and equitable rules controlling the rating system, which rules shall conserve to each risk the basic principles of workers’ compensation insurance.”<sup>6</sup>
- Ohio law provides that “the Administrator may grant discounts on premium rates for employers” who meet certain requirements.<sup>7</sup>
- The Committee was created under Ohio law to, among others, “review calculations on rate schedules and performance” prepared by the actuarial consultants to the Board.<sup>8</sup>
- The Committee has determined that actuarially sound rates are consistent with the requirements of Ohio law for workers’ compensation rates.<sup>9</sup>

2. Duty of Loyalty.

- In the context of the Group-Rating Program Recommendation, the duty of loyalty is observed by keeping the interests of the workers’ compensation fund and all the stakeholders of the BWC, taken as a whole, in the forefront. The Group-Rating Program Recommendation should be based on what is in the best interests of the

workers' compensation fund. In carrying out his responsibilities, each Committee member must separate himself from whatever relationships he may have to the constituency that brought him to the Board and focus solely on his fiduciary responsibilities as a Board member to the BWC and the fund administered by the BWC.

### 3. Duty of Care.

- The Committee would discharge its duty of care by doing what is reasonably prudent to review information relevant to the matter at hand and examine in sufficient detail, and with the aid of the appropriate resources, the material relevant factors with respect to the Group-Rating Program Recommendation.
- With respect to the Group-Rating Program Recommendation, the Committee should consider the various duties imposed by law on the Administrator, which include evaluating the factors considered in the rating process and considering what is fair and equitable to all Ohio employers while assuring the preservation of the solvency of the BWC fund.<sup>10</sup>
- Specific activities that could be undertaken by the Committee would be soliciting the views of stakeholders regarding the ratings process and reviewing, to the extent it is available, information with respect to the group rating procedures of other states with a similar workers' compensation system.
- The duty of care requires that the Committee make recommendations regarding the actuarial soundness of the group-rating program and the discount rates.
- The duty of care requires that the Committee devote an appropriate amount of time for assimilation and deliberation among the Committee members regarding the information obtained with respect to relevant factors in connection with formulating its Group-Rating Program Recommendation to the Board. The appropriate amount of time for deliberation, however, will have to be balanced against the need for prompt action with respect to the Group-Rating Program Recommendation.

Please advise if you require any further information or clarification with respect to the items addressed in this memorandum. The advice set forth herein is provided with respect to the specific purpose set forth above, and is intended solely for the use of the Board and its Committees.

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<sup>1</sup> Haluka v. Baker, 66 Ohio App. 308, 312 (1941) [Emphasis in original.]

<sup>2</sup> Ohio Revised Code Section 4123.30.

<sup>3</sup> Restatement (Second) of Trusts, Section 174 (1959).

<sup>4</sup> Ohio Attorney General Opinion No. 89-033 (1989).

<sup>5</sup> Ohio Revised Code Section 4123.34 [preamble].

<sup>6</sup> Ohio Revised Code Section 4123.34 (C).

<sup>7</sup> Ohio Revised Code Section 4123.34 (E).

<sup>8</sup> Ohio Revised Code Section 4121.129 (B).

<sup>9</sup> See page 11 of “Duties of the Administrator – Rules and Classifications,” undated text of Power Point slides prepared by BWC staff in connection with public hearings on rates.

<sup>10</sup> Ohio Revised Code Section 4123.29 (A)(2).