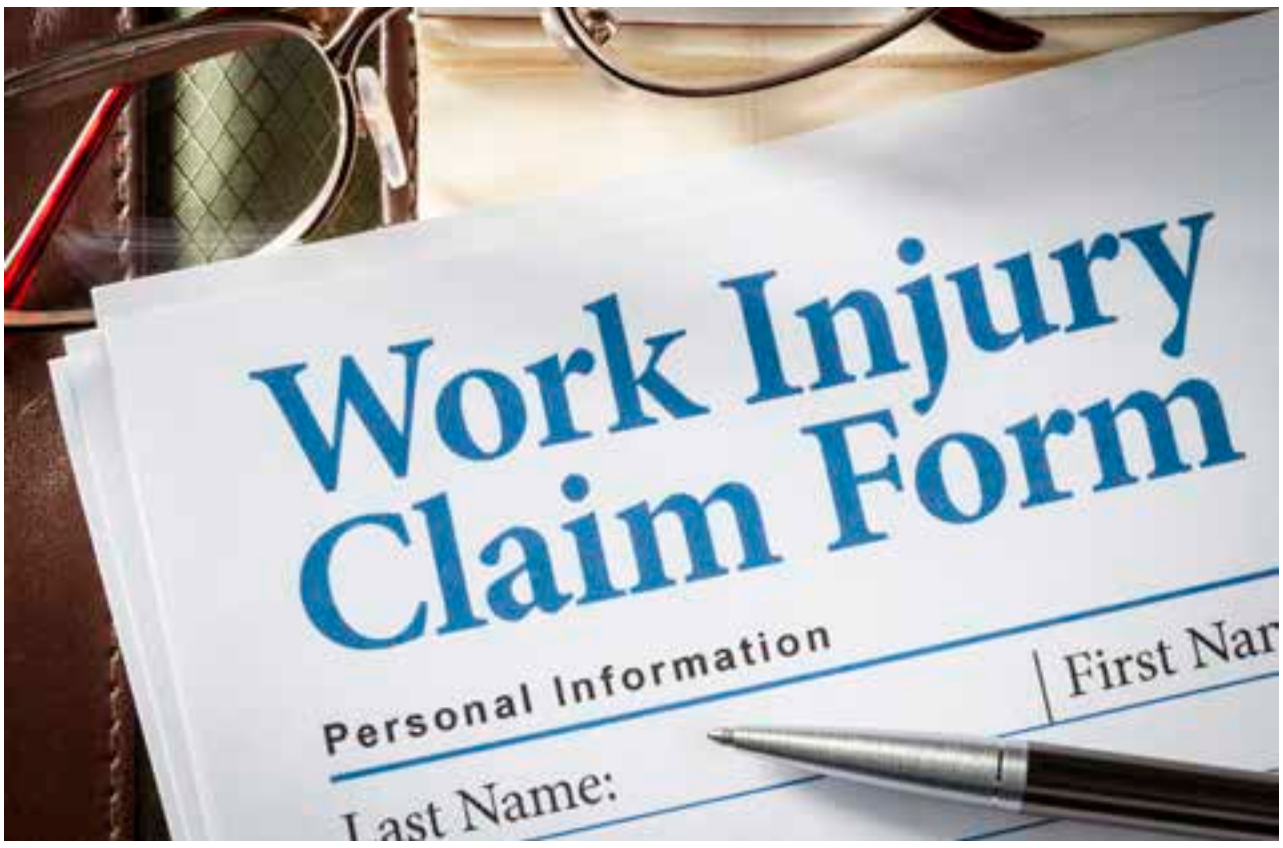
SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Workers' Compensation

Workers' compensation 1991 to date: 25 years in review

BY JAMES EDWARD RAMSEY



Where did all the cases go?

For all those unfamiliar with workers' compensation in Massachusetts, our field has experienced a significant transformation over the past 25 years.

This article will provide some insight into those changes, including statistics, analysis and commentary.

Massachusetts has one of the oldest workers' compensation systems in the country. We in Massachusetts like to say it is the oldest, having been created in 1911.[1] We celebrated our 100-year anniversary on July 28, 2011.[2]

Historically the Massachusetts economy has included many industries, such as a combination of industrial, manufacturing, agricultural, construction, service and high-tech. As with many states, construction in Massachusetts has seen many cycles of expansion and contraction. Like most states following the 1990 recession, many jobs were lost to the economy and several sectors changed significantly.[3] It appears that the precipitous decline in manufacturing has been partially offset by a significant growth in the service sector industry.[4] Unfortunately, on average, service sector jobs tend to be less well paid and of a shorter duration. At the same time Massachusetts was experiencing the recession, it was also undergoing legislative reforms.

In 1991, then Gov. William Weld signed into law a comprehensive reform of the workers' compensation system. It was the third change in a relatively short period of time. The reform was designed to address many perceived faults within the system primarily by employers/insurers. Prior to this last reform there was a perception that the laws were anti-employer/insurer. The 1991 reforms swung the proverbial pendulum in the opposite direction — some would say too far.

As we look back now almost 25 years later, the year 1991 was the pinnacle of claims filed and corresponding litigation. Below is a snapshot comparing 1991 to 2014 at the Department of Industrial Accidents (DIA).[5]

	Cases Filed	Claims	Complaints	Conciliations	Conferences	Hearings	FROI[6]
1991	49725	27158[7]	11450	39080	17572	7689	54158
2014	12535	10036	1873	12620	6896	3580	31384
-% change	75%	63%	84%	68%	61%	53%	42%

The combination of the then ongoing recession, changing workforce and new legislative reforms shifted the landscape of workers' compensation, leaving fewer cases filed and drastically reducing the amount of litigation. The changes to the economy and loss of jobs have been dealt with in other articles by other authors.[8] The focus here is on workers' compensation.

A summary of the relevant 1991 reforms to M.G.L. Chapter 152 included the following changes:

	Pre-1991	Post-1991 & Current
§34 temporary total benefits:	5 years / 260 weeks	3 years / 156 weeks
Calculated at % of AWW:	2/3 AWW	60% of AWW
§35 temporary partial benefits	11 plus years / 600 weeks	5 years / 260 weeks
Calculated at % of AWW:	No cap, 2/3 difference but varied based on earnings	75% of 34 rate is cap, 60% difference based on earnings
Pay Without Prejudice Period:	60 days / up to 120 days	180 days / up to 365 days
Denial/Payment decision:	14 days	14 days
§11A Impartial Examiner:	Did not exist – dueling doctors	Created – *prima facie* weight

As for the legislative changes, the data suggest a correlation. In a review of the 1991 changes, the most significant legislative change was the increase of the pay without prejudice period (PWOP) expanding from 60 days/120 days to 180 days/365 days. This simple change has permitted insurers greater flexibility in evaluating and paying claims. The increased decision-making timeframe has allowed many insurers to pay claims that would previously been denied and thrust into litigation. Further, by lengthening the PWOP period, minor injuries had sufficient time to resolve and workers return to work who may have otherwise still been recovering at the 60-day mark.

Are the lack of claims filed and decline in litigation solely a result of the insurers paying more claims and injuries healing or a result of fewer injuries? Could there be a corresponding factor of workplace safety or other factors afoot?

An employer must notify the DIA of any injury that removes the employee from the workplace for five or more days.[9] This is done on a Form 101 (FROI, First Report of Injury). In 1991, there were 54,158 injuries reported. In 2014, there were 31,384 reported. This translates to a 42-percent reduction in the number of injuries reported between 1991 and 2014. This could be a result of work place safety, a changing work force or other causes. The data shows a net loss of 22,774 injuries being reported. Less injuries reported loosely translates to less available claims for possible litigation.

The impact of the legislation, however, becomes apparent when we cross reference the litigation/claims filed with the FROI data. If we were to assume a direct correlation between the two (FROI and cases filed), then 91 percent percent of all reported injuries on the Form 101 resulted in some type of litigation in 1991. Again, if we assume the same direct correlation, as of 2014, only 40 percent of all reported injuries resulted in litigation.[10] This is an oversimplification. Under further analysis, as of 2014 the amount of claims by the employee represented 80 percent of the litigation (10336 out of 12535 total cases) and the Form 108 complaints only 15 percent (1873 out of 12535).[11] In 1991, the amount of claims by the employee represented only 55 percent of the litigation (27158 out of 49725 total cases) and the Form 108[12] complaints were 23 percent of the litigation (11450 out of 49725 total cases).[13] Using the figures from the chart above the ratio in 2014 between claims and complaints is significantly different at 5.36. Contrast that to the 1991 ratio of 2.37.[14] Following the 1991 reforms, litigation initiated by the insurer has been significantly reduced, whereas there has been a corresponding increase in the employee-initiated litigation.

There can be several explanations for the shift in claims:

1. **The 1991 legislative reforms.** I suggest there is a clear correlation with the extension of the PWOP period. The data can be interpreted as showing that the Legislature's equipping insurers with the ability to timely adjust more claims has directly resulted in less litigation solely by the insurer. Of the remaining claims, the employee has overwhelmingly been forced to litigate to seek additional benefits when the insurer has terminated.
2. **Implementation of the impartial examiner.** This reform removed the "dueling-doctors" and provided both parties with a medical opinion from a doctor assigned by the DIA that had *prima facie* impact. The additional medical certainty may have led to more cases being resolved.
3. **Implementation of conciliations.** The assignment of conciliators at the start of the dispute resolution process has resulted in a substantial number of litigated claims being resolved, and staying resolved, early on in the process. The DIA administration has made a concerted effort to streamline and expedite the process and to a great degree has been successful as compared to pre-1991 dispute resolution.
4. **Shift away from dangerous industries.** The fewer injuries lasting five or more days could suggest that the economy's shift away from manufacturing and construction accounts for some of this difference.
5. **Workplace safety.** It is possible increased workplace safety has reduced injuries resulting in a loss for more than five days (thus not triggering the reporting requirement).
6. **Fear.** I would be remiss in not noting that with fewer available jobs, an employee's reluctance to report an injury or working injured likely plays a role in the reduction.

The ultimate answer to these questions will vary based on the role you play in the system, employee, insurer, employer, industry or labor, to name a few. There has been very little change in Chapter 152 in the past 25 years, other than regulatory reform and minor adjustments. In 2015, and again in 2016, there is a move to significantly alter the current system. The ➤ 23

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Civil Litigation

The transformation of civil litigation

BY STACEY L. PIETROWICZ

Civil litigation in Massachusetts has recently undergone a transformation. Several longstanding initiatives and pilot programs resulted in formal rule changes and new legislation, and a number of new proposals are in the works. While the right to attorney-conducted voir dire and the amended *ad damnum* statute have been extensively discussed, other changes have received a smaller spotlight. The following is a snapshot of recent efforts by the bench and bar to improve the efficacy of our civil justice system.

In April 2015, Rule 45 of the Massachusetts Rules of Civil Procedure was altered to eliminate an ineffective, convoluted procedure for obtaining documents from a non-party in a civil case. What was previously done by noticing a live deposition and waiving the appearance requirement if and when a certified copy of the requested materials was received, was replaced by a streamlined rule allowing attorneys to serve "document only" subpoenas. The rule also allows attorneys to request electronic discovery to be produced in a certain format, and prohibits attorneys from abusing the process by imposing undue burden or expense on non-parties. While the day-to-day outcome is minimally different, the process clarifies the intentions of the parties and is more cost-effective.

In July 2015, the SJC adopted changes to the Massachusetts Rules of Professional Conduct. Clarification and guidance in the rules regarding limited representation will encourage attorneys to take on limited matters, providing broader access to the courts for would-be litigants. Other changes include additional language on obtaining informed consent from a client and when it is required, and parameters for engaging outside counsel to assist in a case. The changes are substantive and extensive. A before and after version is available online.

For those who practice in federal court, as of Dec. 1, 2015, the scope of civil discovery was narrowed from information "reasonably calculated to lead to admissible evidence," to information that is "relevant" to the claim or defense and "proportional to the needs of the case," the effects of which are still playing out. While there has been some discussion as to whether Massachusetts would adopt similar changes within Mass. R. Civ. P. 26, it is unclear whether any changes made to the Massachusetts rule will be as narrowing as the Federal rule.

Effective Jan. 1, 2016, the Superior Court amended a number of Rules and Standing Orders, and adopted four new rules. Now when filing a motion under Superior Court Rule 9A, the moving party is no longer required to get the court's permission to file a reply brief, a welcome change to many, but one that should not be abused. What was once Standing Order 1-09 dealing with written discovery in civil actions, has been repealed and replaced by Superior Court Rule 30A (with the former Rule 30A moving to Rule 9C(b)). The new Superior Court Rule 33 addresses the specific notice and filing requirements of parties requesting a continuation of trial.

While we acclimate to changes both big and small, several procedural concepts are in the vetting stages. One Superior Court initiative, posted for comment earlier this year, proposes a "Menu of Options" for individualized case management and tracking orders. The amendment to Superior Court Standing Order 1-88 would allow parties to stipulate to (or obtain a court order for) an individualized tracking order, provided that the proposed deadlines occur no later than the would-be deadlines for that case type. The suggested Superior Court Rule 20 would permit parties to stipulate to any number of altered procedures, including attendance at a non-binding judicial assessment of the case, immediate scheduling of a prompt and firm trial date, waiver of the summary judgment process or agreement to a reduced number of jurors, to name a few. Theoretically, the flexibility will foster early resolution and reduce expenses in less complex cases where parties can agree on the necessary and unnecessary facets of litigation. For example, in a motor vehicle personal injury case with clear liability but contested damages, the parties may stipulate to a shortened discovery period, an immediate trial date and a waiver of the summary judgment process, which would move the case along much faster than if it were placed on the typical fast track in Superior Court.

The second recently-announced initiative involves early case management for real estate, construction, products liability, and employment discrimination cases. For each of these case types, the court would convene a status conference with counsel within 90 days of service, (with the possibility of also shortening the period to make service of process). The parties would attend the conference having discussed an agenda, exchanged written settlement proposals and having submitted materials to the court. The procedure would fall under an amended Superior Court Standing Order 1-88, which would establish guidelines for the conferences and the court submissions. Once again, this proposal looks to streamline cases or otherwise keep them firmly on track.

A third proposition would set a concrete deadline for the exchange of expert disclosures, to occur no later than the final pretrial conference, within the joint memorandum. While parties sometimes defer disclosures until after the pretrial conference, under the new Superior Court rule the final pretrial conference would be the end of the line (subject, of course, to judicial discretion). No party could "reserve the right" to disclose an expert opinion after the conference, and would be prohibited from calling the expert to testify at trial, a significant repercussion for failing to make a timely disclosure.

Another noteworthy initiative arose amidst concerns raised last year when a proposal surfaced to increase the jurisdictional limit for Superior Court cases from $25,000 to $50,000. Since that time, the District Courts have added more dedicated civil sessions, so that fewer civil cases fall in priority behind criminal and domestic abuse cases. Once the District Court civil sessions are running the new sessions efficiently, the proposal to increase the procedural amount will be revisited, which will undoubtedly revive the push-back from those who want to see the benefits of attorney-conducted voir dire and other Superior Court procedures in the District Court.

Finally, the Superior Court recently established a working group consisting of judges, clerks, practitioners and members of medical organizations and insurers to address the problems plaguing the medical malpractice tribunal system. Those who handle malpractice actions have increasingly encountered delayed tribunals due to the difficulty of getting panel members. The delayed tribunals result in discovery disputes and prolong the case. The working group looks to generate proposals to resolve these issues, which may include rule changes, new legislation or tribunal alternatives. This is likely to be a growing topic of debate and discussion over the coming months.

Practitioners, clerks, judges and staff have put a tremendous amount of time and effort into replacing and revising inefficient and outdated rules and procedures, with the laudable goal of making litigation more cost-effective and less time-consuming. These recent changes, current initiatives and ongoing developments have the potential to truly relieve some of the burdens on our court system and to shorten to months a process that currently takes years, improving access to the civil justice system. ■

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Legislature is in the process of reviewing proposed changes. A few proposed reforms will significantly increase the employee's benefits with few benefiting the employer/insurer. Could it be that the pendulum is about to swing the other way?

As a defense attorney with 20 years of experience, I suggest restraint to our legislative leaders. Based on the above statistics from the Workers' Compensation Advisory Council, it is argued that the Legislature should remain cautious with the entreaties toward any radical changes. Massachusetts need not abandon its place as the founder and leader in worker's compensation solely to be able to claim it is "doing more" or "provides the most benefits." As with all things, a balanced compromise is the best solution. ■

1. The Board by Joseph F. Agnelli, Jr. Esquire, page 1.
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3. See Job Creation and Destruction in Massachusetts: Gross Flows Among Industries, Katharine L. Bradbury, New England Economic Review September/October 1999.
4. See Job Creation and Destruction in Massachusetts: Gross Flows Among Industries, Katharine L. Bradbury, New England Economic Review September/October 1999, page 37.
5. Workers' Compensation Advisory Council – FY'14 Annual Report, page 30.
6. Department of Industrial Accidents chart prepared January 2016 (FRI filed with DIA 1990 – 2016).
7. This statistic is slightly higher then the WCAC statistic. I have combined the §36 claims (3918) with the employee claims (23240) because the 2014 data combined the two.
8. See Job Creation and Destruction in Massachusetts: Gross Flows Among Industries, Katharine L. Bradbury, New England Economic Review September/October 1999.
9. M.G.L. Chapter 152 §6.
10. These numbers have to be viewed in the context that an employee may file a claim due to a work injury almost any time after the injury but generally within four years and an insurer file a complaint on a rolling timeframe post injury whereas the FROI is generally filed within the same year as the injury. Although not directly comparable, for the purpose of this analysis I presume the litigation of a claim on a yearly basis is comparable to the amount of injuries reported.
11. Workers' Compensation Advisory Council – FY'14 Annual Report, page 30.
12. The Form 108 is the complaint filed by an insurer to modify or terminate an employee's weekly benefits.
13. The figures between 1991 and 2014 are slightly skewed due to a difference in reporting of data. Some assumptions within the data had to be made to complete the analysis.
14. The WCAC noted in its 1991 Annual Report that the ratio of employee claims (including Section 36) to discontinuances was 54.6/23 = 2.37. These figures differ slightly from mine due to reporting differences between the years. Workers' Compensation Advisory Council – FY'91 Annual Report, page 25.

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