

The California Commission on Health and Safety and Workers' Compensation



CHSWC Background Paper Uninsured Employers Benefits Trust Fund

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CHSWC Background Paper: Uninsured Employers Benefits Trust Fund

Introduction

All employers in California except the State are required to provide workers' compensation coverage for their employees through the purchase of workers' compensation insurance or by being certified by the State as permissibly self-insured. However, not all employers comply with the law to obtain workers' compensation coverage for their employees.

The Uninsured Employers Benefits Trust Fund (UEBTF) was established to provide for the payment of workers' compensation benefits to injured employees of illegally uninsured employers. Labor Code Sections 3710 through 3732 describe the operation of the Fund, and Labor Code Section 62.5 describes the funding mechanism for UEBTF.

The workers' compensation community has been expressing concern with several aspects of the UEBTF. In response, the Commission on Health and Safety and Workers' Compensation (CHSWC) has requested that CHSWC staff prepare this background paper addressing some of the emerging issues regarding UEBTF, including:

- UEBTF access by injured workers.
- Contributions to the UEBTF by self-insured and insured employers.

History of the Uninsured Employer Fund

In 1971, the Legislature created an Uninsured Employers Fund (UEF) with an initial appropriation of \$50,000 to pay workers' compensation awards to injured workers when their employer has failed to secure the payment of compensation and does not pay the award or furnish a bond within 10 days after the award is made.

The initial amount appropriated to the UEF was based on the testimony of a representative of the Division of Industrial Accidents that the fund would be self-sustaining. It was expected that the State would be able to recover sufficient monies from illegally uninsured employers. Unfortunately, this conclusion was based on the experience in Ohio, which, unlike California, had a monopoly State Fund.

In August 1973, the California Workers' Compensation *Reporter* reported that the UEF did not have adequate funds to pay the established claims against it. The Legislature subsequently appropriated funds to pay the claims.

In 1991, it was provided that penalties assessed against uninsured employers would be deposited in the Fund. In April of 1992, however, the Fund was again exhausted and again replenished by an urgency appropriation on June 22.

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In 1997, Coopers & Lybrand was contracted to prepare a report reviewing the UEF claims management program. Recommendations to reduce payouts, augment training, supervision and staffing, and improve documentation were made, many of which were implemented to the benefit of the UEF program.

A study by CHSWC in 1998 reported that recoveries and penalties from uninsured employers averaged only \$2.3 million per year, while payment of claims on behalf of uninsured employers resulted in a net loss to the State's General Fund of over \$100 million during the five-year period.

In 2003, the name of the Fund was changed to the Uninsured Employers Benefits Trust Fund.

As of 2004, Fund losses previously incurred by the General Fund are now incurred by the UEBTF and are now funded by a surcharge on all insured employers and self-insured employers, by penalties to non-compliant employers, and by recoveries from uninsured employers for actual worker injuries.

Administration of the UEBTF Program

The UEBTF is administered by the Director of the Department of Industrial Relations (DIR). Claims are adjusted for the DIR Director by the Special Funds Unit in the Division of Workers' Compensation (DWC). The UEBTF pursues reimbursement of expenditures from the responsible employers through all available avenues, including filing liens against their property. Litigation for the UEBTF is conducted in the name of the Director of the DIR represented by the Office of the Director of the Legal Unit.

Over the years, the DIR Director has been successful in obtaining legislation to ease the burden on the DIR legal staff (OD-Legal). For example, Labor Code Section 3714 was amended to provide that cases involving the Fund may only be heard by the Workers' Compensation Appeals Board (WCAB) of San Francisco, Los Angeles, Van Nuys, Anaheim, Sacramento, or San Diego in the absence of good cause and the consent of the director. The UEBTF, moreover, cannot be joined in a proceeding unless the alleged uninsured employer has come under the jurisdiction of the WCAB, either by making a general appearance or by being served with the application and a notice of lawsuit per Labor Code Section 3716.¹

Current Funding Liabilities and Collections

UEBTF Funding Mechanisms

The total program budget for UEBTF in fiscal year 2006-2007 is \$37.6 million. Funding comes from assessments on all insured and self-insured employers annually, from fines and penalties imposed on illegally uninsured employers when they get caught, and from recoveries from

¹ For further information on jurisdiction, see McGinty, Steven and Anthony Mischel, "How to Properly Obtain Jurisdiction Over an Uninsured Employer in Workers' Compensation Cases," Workers' Compensation Quarterly, Vol. 12, No. 2, Summer 1999.

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illegally uninsured employers when the UEBTF has paid benefits and is able to obtain reimbursement from responsible employers.

The funding for the UEBTF comes primarily from assessments on both insured and self-insured employers. According to Labor Code Section 62.5(e), the “total amount of the assessment is allocated between the employers in proportion to the payroll paid in the most recent year for which payroll information is available.”²

The assessment for the insured employers is based on a percentage of the premium, while the percentage for self-insured employers is based on a percentage of indemnity paid during the most recent year. The total assessment for Fiscal Year 2006-07 is \$33,818,877. The actual amount to be collected this year is reduced to \$9,276,968 as a result of a one-time balance carryover. An explanation of the assessment and the calculations may be found at <http://www.dir.ca.gov/dwc/06UFund.pdf>

Apart from the assessments on employers required by Labor Code Section 62.5, UEBTF is funded by two other sources:

- Fines and penalties collected by the DIR. These include both the Division of Labor Standards and Enforcement (DLSE) penalties as well as Labor Code Section 3701.7 penalties on self-insured employers.
- Recoveries from illegally uninsured employers per Labor Code Section 3717.

Table 1 shows monies collected by the source of the revenue.

Table 1: UEBTF Revenues: Fiscal Years 2003-04 to 2005-06

Source of Revenue	FY 2003-04	FY 2004-05	FY 2005-06
Assessments Collected Pursuant to Labor Code Section 62.5	\$32,420,274	\$21,445,206	\$32,250,790
Fines and Penalties Collected	\$3,365,105	\$3,302,956	\$3,931,198
Revenue Collected Pursuant to Labor Code Section 3717	\$5,079,900	\$4,790,639	\$5,448,238
Total Revenue	\$40,865,279	\$29,538,801	\$41,630,226

UEBTF Payment Procedures

- If an illegally uninsured employer does not pay an award against it within 10 days or post bond to secure the payment, the injured worker can make a written demand on the

² Prior to the workers' compensation reforms of 2004, the funding for the UEBTF came from the General Fund.

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UEBTF for payment of the award. Detailed instructions for injured workers are provided at <http://www.dir.ca.gov/dwc/IWguides.html>.

- A valid demand on the UEBTF cannot be made unless the illegally uninsured employer either appeared or was served with the application and a notice of lawsuit before the regular hearing.
- On receipt of the demand and a copy of the findings and award, the UEBTF is mandated to begin payment of the award.
- To facilitate prompt delivery of benefits, the DIR Director has the discretion to pay compensation and provide medical treatment before the WCAB makes an award.
- The UEBTF can make payments before the award issues if the injury, disability, and lack of insurance are not seriously in dispute.
- If the uninsured employer has filed for bankruptcy, the injured worker must show that he or she filed a proof of claim in the bankruptcy proceeding and requested relief from the automatic stay of proceedings issued by the bankruptcy court. [*Ortiz v. WCAB* (1992) 4 CA4th 392, 57 CCC 172.]

UEBTF Liability and Collections

- The UEBTF is not liable for any penalties or for the payment of interest on awards. [Labor Code Section 3716.2.]
- The UEBTF is not liable for contributions to insurance carriers or self-insured employers; it is liable in occupational disease or cumulative-injury cases only when there is no other employer with liability. The UEBTF is also not liable for treatment that is the liability of Medi-Cal. [Labor Code Section 3716(c)]
- The UEBTF is relieved from the obligation to pay further compensation up to the entire amount of any satisfied judgment that the injured worker obtains in a civil action against the uninsured employer. [Labor Code Section 3709.5]
- The DIR Director, as administrator of the UEBTF, may institute a civil action against the employer for the collection of the award or may obtain a judgment against the employer pursuant to Section 5806. [Labor Code Section 3717]
- The DIR Director may also file a certificate of lien in any county where the employer is likely to have property. The lien continues until the employer pays the award, prevails in the litigation before the WCAB, or posts a bond. [Labor Code Section 3721]
- The DIR Director may also enforce any judgment against an uninsured employer by non-judicial foreclosure of the judgment debtor's real property. [Labor Code Section 3716.3(a)]

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- The UEBTF is also authorized to bring an action against a third party that caused the injury. [Labor Code Section 3732]

Costs of the Uninsured Employers Benefits Trust Fund

Within the past three years, the number of uninsured claims paid increased 64% from 1,348 in Fiscal Year 2003-04 to 2,205 in Fiscal Year 2005-06. The cost of claims increased 57% from \$18.6 million to \$29.2 million per year over the same period. Administrative costs associated with the claim-payment activities have increased 27% from \$6.8 million to \$8.6 million per year over the same period. Details are provided in *Table 2*.

Table 2: UEBTF Claims and Costs

	FY 2003-04	FY 2004-05	FY 2005-06
<i>Number of UEBTF Claims Paid</i>	<i>1348</i>	<i>2166</i>	<i>2205</i>
Costs of UEBTF Claims	\$18,585,681	\$29,871,617	\$29,251,234
Administrative Costs of UEBTF Claim Payments	\$6,771,602	\$7,382,111	\$8,634,933
Total UEBTF Administrative and Claim Costs	\$25,357,283	\$37,253,728	\$37,886,167

The projected UEBTF annual program cost for the most recent fiscal year 2006-07 is \$37.6 million.³ This cost includes the administrative costs associated with claims payment activities as well as the payout on claims filed by injured workers of illegally uninsured employers.

As shown in *Table 3*, the number of new UEBTF claims is increasing each year.

Table 3: UEBTF New and Closed Claims

	FY 2001-02	FY 2002-03	FY 2003-04	FY 2004-05	FY 2005-06
Number of New UEBTF Claims	1,001	1,083	1,263	1,451	1,794
Number of Closed UEBTF Claims	553	661	823	550	820

³ Division of Workers' Compensation, "Report of the Uninsured Employers Benefit Trust Fund in Compliance with Labor Code Section 3716.1(c) for Fiscal Year 2005-06."

Table 4 provides data on the ratio of money paid out by employers and insurers compared to that paid out by UEBTF in claims where UEBTF was joined in a WCAB case. The table demonstrates that in these cases more money is paid to injured workers from employers and insurers than from the UEBTF.⁴

Table 4: UEBTF Cases Closed by OD-Legal

	FY 2004-05	FY 2005-06
Amount Paid by UEBTF	\$2,990,720	\$2,453,915
Amount Paid by Employers/Insurers	\$6,246,701	\$5,824,741

Stakeholder Concerns

Concerns have been raised about the UEBTF (still commonly called the UEF) from both employers and workers. Employers are concerned about the cost of the UEBTF and the distribution of that cost among law-abiding employers. Workers are concerned about the difficulties in obtaining benefits from the UEBTF.

UEBTF Costs and Cost-Shifting

UEBTF costs are driven primarily by the frequency of claims, which are a result of the prevalence of uninsured employers. In the CHSWC 1998 study on Illegally Uninsured Employers, the rate of uninsured employers was found to be 9% of the system as a whole. For new employers and in the targeted industry of auto/truck repair, 15% and 20%, respectively, were uninsured. CHSWC is planning to update that study this year.

A small contribution to the cost may be the cases where a worker obtains disability benefits based on improbably high earnings claimed, and the UEBTF is unable to refute the claim because the employer is unavailable or uncooperative. In some cases, substantial indemnity costs for temporary disability or vocational rehabilitation maintenance allowance may accrue before the UEBTF ever gets notice of a claim.

Whatever the ultimate costs of the UEBTF program, those costs are shifted to law-abiding employers because some employers will be illegally uninsured. The costs are shifted to all insured and self-insured employers (including the State, although it is technically not “self-insured”) through assessments. Any one segment of the employer population could argue that it should be exempt from sharing in this cost because it does not generate uninsured claims. Any proposal to redistribute the cost shifting should be evaluated for the impact on those who will continue to bear the burden and for compatibility with sound public policy.

⁴ Data provided by OD-Legal on cases closed for fiscal years ‘04/’05 and ‘05/’06.

Access to UEBTF

Employee concerns with the UEBTF involve the difficulty in obtaining benefits when an employer is uninsured. Representatives of injured workers have suggested that it should be possible to make a claim to the UEBTF as simply as making a claim to an insurer. They complain that the additional procedural steps are complicated, difficult to understand and time consuming, and that benefits are seldom paid voluntarily prior to a WCAB award.

A memo from the Watsonville Law Center's Agricultural Workers' Access to Healthcare Project discussing some of the barriers that injured workers experience is included as *Attachment A*.

UEBTF is Not Intended to Act Like an Insurer

There are reasons for the additional safeguards to obtaining benefits from the UEBTF. First and foremost, the UEBTF is not an insurer. An insurer usually knows the identity of its insured employers, an insurer pays claims which are reasonably certain without waiting for WCAB awards, and an insurer submits itself to the jurisdiction of the WCAB upon notice by mail if a dispute arises. By contrast, the UEBTF must ascertain that the employer is indeed uninsured before it even considers making payments. Frequently, employers do business under fictitious names that may or may not be formally recorded, and an insurance policy may be found once the correct identity of the employer is revealed. Correctly identifying the employer is vital not only to rule out the possibility of finding coverage, but also to establish civil jurisdiction over that employer to enforce any subsequent judgment.

Proof of Coverage Verification and Delays

Once the employer is correctly identified, the employee may need to investigate whether the employer is actually insured. This requires submitting a written request to the Workers' Compensation Insurance Rating Bureau (WCIRB), which receives data on all insurance policies written for workers' compensation coverage in California. The WCIRB will reply by mail or email if requested, either identifying the insurer or advising that there is no record of coverage. Sometimes, this step must be repeated with additional identifying information on the employer. According to WCIRB, their Customer Service is typically able to complete coverage research within three days of receipt of the request. However, to the extent that the employer's name provided by the injured worker cannot be identified or matched to WCIRB coverage record information, additional delays may occur (Attachment B).

Serving Legal Documents for UEBTF by an Injured Worker or Attorney

Once it appears that the employer is illegally uninsured, the injured worker begins the steps toward seeking benefits from the UEBTF. Before the UEBTF can be joined in a WCAB case, however, the injured worker usually needs to have papers personally served on the employer by a process server in the same manner as service of a civil summons. Often injured workers do not serve the employer in the name of the correct business entity. Currently, every case that is

opened by UEBTF goes over to the investigators for investigation of the employer and they serve the employer if it has not been done correctly. The turnaround time is approximately two to three weeks. It may be necessary to repeat the coverage investigation with the WCIRB after the UEBTF helps the worker find the correct name for the employer.

Serving the employer is routine in the civil arena, but it is unfamiliar to some workers' compensation practitioners because it is rarely necessary in routine workers' compensation cases. Once the employer is served, the administration of UEBTF benefits is still more difficult than the administration of insured benefits, for several reasons. Often, the uninsured employer is not cooperative in confirming the facts of employment, injury, or earnings.

An insurer has the contractual right to administer the claim in its discretion (to some extent), while the UEBTF has no such right. For the UEBTF to secure its right to recover from the employer any benefits it pays to the injured worker, the UEBTF must clearly establish the employer's liability for those benefits. With few exceptions, that fact is established only by a WCAB award. Even in a case that the UEBTF has no reason to contest, it must assure that the employer has notice of the intended award and an opportunity to object before it can pay a benefit to the worker.

The service of process and formal joinder does have a very positive effect on inducing payments of claims by the parties to a claim. Employers are more willing to pay what is owed once they are shown what will happen to them in collection, penalties, and the problems in avoiding these liabilities once in bankruptcy. The solvent employers would rather pay one claimant (and medical provider) than two attorneys and the State. Insurers who have denied the claim because the employer was incorrectly identified by the applicant are also more willing to pay a claim once the correct policy holder is identified. Likewise, insurers who denied a claim because they canceled coverage on the correct employer, but should not have, agree to payment once their error is documented.

Statistics from DIR's OD-Legal (*Table 4* above) indicate that in claims where UEBTF is joined, more money is paid to injured workers by employers and insurers than by the UEBTF. Generally speaking, litigators representing UEBTF report experiencing a payout ratio close to two-to-one, or better, from employers and insurers vs. the UEBTF. Further, during the process of investigating and litigating claims, OD-Legal reports often being able to find parties who are responsible and/or persuade parties to take responsibility for payment of these claims.

Findings

- The identification and location of uninsured employers along with proper enforcement would reduce the costs to the stakeholders of the workers' compensation system.
- The surest way to reduce the long-term cost of the UEBTF is to reduce the prevalence of illegally uninsured employers. In the CHSWC 1998 study on Illegally Uninsured Employers, the rate of uninsured employers was found to be 9% of the system as a whole. For new employers and in the targeted industry of auto/truck repair, 15% and 20%, respectively, were uninsured.

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- Labor Code Section 90.3 provided for a program to identify illegally uninsured employers. Due to lack of resources, this program was never implemented.
- There is a lack of knowledge of UEBTF and civil procedure.
- Unrepresented applicants lack easy access to the UEBTF. Of some 1800 claims filed during the last fiscal year, only four or five were filed by unrepresented applicants according to the UEBTF. Injured workers will probably continue to require attorneys if they wish to pursue any of the additional remedies available against illegally uninsured employers.
- Applicants' attorneys have consistently complained about the many technicalities and formalities with which they must comply to file a valid claim. The process cannot be greatly streamlined because it is necessary to build a case that can ultimately lead to a civil judgment against the illegally uninsured employer.
- Medical providers incur increased losses on liens while waiting to get paid:
 - The UEBTF does not get involved early enough in the claims.
 - According to UEBTF, it learns of a claim an average of 10 months after the injury.
 - Frequently, the claim is not promptly pursued by the injured worker because the employer pays bills directly for a while.
 - Other times, the injured worker goes without treatment until a critical situation arises or he or she initially receives treatment from Medi-Cal or another program.

Recommendations

- **Publicize and Enforce the Workers' Compensation Coverage Requirement**
 - Continue and expand efforts to ensure that all employers comply with the requirement to provide workers' compensation coverage.
 - Conduct outreach to workers, employers, medical providers, clinics, and social service programs regarding workers' compensation coverage requirements and reporting or uninsured employers.
 - Establish and fund a systematic enforcement of coverage program.
- **Provide Workers' Compensation Coverage Information**
 - Continue the effort to provide convenient and rapid public access to workers' compensation insurance coverage information. Currently, 26 states provide proof of coverage verification online.⁵

⁵ Public access via website may still require WCIRB Customer Service intervention in cases where no match for the employer is readily found in the WCIRB's coverage records.

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- Ensure that proof of coverage data are presented in a standardized, uniform format so as to be easily utilized.
- Provide rapid access to coverage information without processing written requests to the WCIRB.
- Ensure that non-confidential information on Division of Labor Standards Enforcement investigations is publicly available and accessible online.
- **Improve Methods to Help Workers Access Benefits from the UEBTF**
 - Develop a simplified guide on the UEBTF claims process for injured workers.
 - Educate Information and Assistance Officers on UEBTF procedures to improve access for injured workers.
- **Encourage Reporting of Suspected Illegally-Uninsured Employers**
 - Facilitate prompt referral of uninsured employers to appropriate enforcement agencies through mechanisms such as mandatory reporting. For example, require medical providers to report suspected uninsured employers to the California Department of Insurance (CDI) on the FD-1 fraud form.
 - Require UEBTF to report suspected uninsured employers to CDI and other enforcement agencies.
 - Establish a “hotline” number for employees, employers and others to report uninsured employers and trigger an investigation of coverage by the Division of Labor Standards Enforcement.
- **Protect and Improve the UEBTF**
 - Improve UEBTF procedure while preserving the authority of UEBTF to recover funds from the illegally uninsured employers.
 - Create a presumption of earnings, not to exceed the average wage of the occupation, so that UEBTF is protected from workers’ uncorroborated claims of weekly wages that were not reported by the employer.
 - Research ideas to measure performance, identify double billing, and identify opportunities for earlier identification of likely UEBTF claimants.
- **Further Educate the Workers’ Compensation Community**
 - Although the DWC provides ample information online on the UEBTF guidelines, the process is still complicated. Information and Assistance Officers may benefit from additional training on advising workers on how to handle the UEBTF claim process.
 - Education for practitioners would facilitate their handling of basic civil procedures.

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- Information and Assistance officers, attorneys and the community would benefit from briefings regarding the UEBTF process. While the UEBTF process is necessarily different from the process of submitting an insured claim, it can be manageable if the participants understand the requirements.

Next Steps

- Develop legislative language as determined.
- Create a roundtable for discussion on UEBTF issues.

Resources

CHSWC. 1998. "CHSWC Recommendations to Identify Illegally Uninsured Employers and Bring them into Compliance."

Interview with Shirley James, Manager, Uninsured Employers Benefit Trust Fund.

Interview with Steve McNighty, Office of Director, Legal.

McGinty, Steven and Anthony Mischel, "How to Properly Obtain Jurisdiction Over an Uninsured Employer in Workers' Compensation Cases," Workers' Compensation Quarterly, Vol. 12, No. 2, Summer 1999.

Review and feedback from John Rea, Acting Director, Department of Industrial Relations.

Watsonville Law Center. "Memo on AWAHP experience with low-wage injured workers and the Uninsured Employers Fund Cases." January 2007.

Memo from Watsonville Law Center

To: The Commission on Health and Safety and Workers' Compensation
From: The Watsonville Law Center's Agricultural Workers' Access to Healthcare Project
Re: Memo on AWAHP experience with low-wage injured workers and the Uninsured Employers Fund cases

Uninsured employer cases account for 25% of all injured workers served through the Agricultural Workers' Access to Healthcare Project (2003—2006). Nearly all injured workers whose employers lack workers' compensation insurance coverage are Spanish-speaking low-wage immigrant workers. These clients are often unaware of or afraid to exercise their right to workers' compensation benefits because they fear retaliation in the form of termination of employment and/or deportation. Injured workers come to The Watsonville Law Center (WLC) usually because they have not been able to access medical treatment or legal assistance.

Barriers to Accessing the Uninsured Employers Fund

In our experience, the following are the most challenging barriers that face low-wage immigrant workers when attempting to join the Uninsured Employers Fund (UEF):

1. Identifying the employer and meeting the employee definition
2. Finding and serving the employer
3. Determining the employer is uninsured
4. Obtaining legal assistance to serve the employer
5. Obtaining medical treatment while attempting to join UEF
6. Obtaining medical assessment to provide evidence of injury
7. Workers billed directly for medical treatment

Case Scenario

Working as a day-laborer for a landscape business, Mr. B fell from a tree he was pruning and fractured his spine. He informed his employer who drove him to a medical clinic. The clinic referred Mr. B to the local hospital. The hospital provided treatment, recommended surgery and billed Mr. B \$5,000.00 in services. Mr. B informed his employer of the bill and his need for surgery. The employer refused to pay for the medical bill or surgery.

Unfamiliar with his right to workers' compensation benefits, Mr. B applied for State Disability Insurance (SDI) but was denied because his prior employer failed to pay into his SDI

account. He sought medical treatment on his own but was refused and instructed to seek treatment through his employer's Medical Provider Network (MPN).

The WLC assisted Mr. B to identify and locate his employer. It was determined his employer was uninsured and WLC assisted Mr. B to take the steps required to join the UEF. It was difficult to serve the employer because he had closed his business and left the country. Ultimately, service was completed and after eighteen months from the date of injury Mr. B joined the UEF. However, Mr. B was unable to obtain the recommended medical treatment or to settle his claim for the amount required to obtain the surgery because it was unlikely he would meet the employee definition under the labor code for purposes of obtaining workers' compensation benefits.⁶

Summary

Not until an injured worker has served the employer can s/he join the UEF and obtain medical treatment and payments.⁷ The injured worker has the responsibility for identifying "a legal person or entity as the employer named in the Special Notice of Law Suit." The case scenario above describes how difficult this process can be. In that case scenario eighteen months lapsed from the date of the worker's injury before UEF was joined. The employer was uninsured and no MPN existed; therefore, the worker was unable to access medical treatment for his injury except through the local community clinic. If that clinic did not provide services under workers' compensation the injured worker would have gone without medical treatment. As a result of a medical consultation with the community clinic, the worker obtained a medical report necessary to provide evidence in support of his Application for Adjudication of Claim and he was able to join the UEF.

Barriers to Accessing the Uninsured Employers Fund

1. Identifying the employer and meeting the employee definition

Mr. B had to meet two threshold standard definitions of employee. First, he had to demonstrate he was not a sub-contractor. Second, he had to demonstrate he met the labor code definition of employee for purposes of obtaining workers' compensation benefits. Labor Code § 3352 (h). Demonstrating Mr. B was not a sub-contractor was not difficult since he had none of his own equipment and worked entirely under the supervision of the employer. Demonstrating he met the employee definition under the labor code was difficult since he worked sporadically and had been paid in cash.

2. Finding and serving the employer

If a worker is able to identify the name and address of his employer he is then left with the challenge of serving him. In Mr. B's case, the WLC made numerous attempts to serve the

⁶ Labor Code § 3352 (h) any person employed by the employer held liable for less than 52 hours during the 90 calendar days immediately preceding the date of the injury OR who earned less than one hundred dollars (\$100) in wages from the employer during the 90 calendar days immediately preceding the date of the injury **is excluded** from the employee definition for purposes of accessing workers' compensation benefits.

⁷ Labor Code § 3716 (d) precludes joinder and payment by the UEF until proper service on the employer of the Application for Adjudication of Claim and Special Notice of Lawsuit.

employer. Although he was finally served, Mr. B's employer made every attempt to avoid service of process. This perhaps is the ultimate obstacle in accessing the UEF.

3. Determining the employer is uninsured

The Workers' Compensation Insurance Rating Bureau (WCIRB) provides insurance coverage information for injured employees. The Coverage Research Request Form requires the requestor to properly identify the employer. The results may indicate "no evidence of coverage" if you misspell or misidentify the employer's contact information and may take up to a month. Although Mr. B was paid in cash and did not have a check stub that indicated the complete name of his employer and business to complete this form, we were able to identify the employer and submit this request. We received a "no evidence of coverage" two weeks after we submitted this request.

4. Obtaining legal assistance to serve the employer

Uninsured employer cases are unattractive for private attorneys to take. Private attorneys take cases based on the level of permanent disability. Without a medical record to estimate the level of disability, it can be difficult to obtain a private attorney in an uninsured employer case. Although service of process is required for any case that gets to the Workers' Compensation Appeals Board for adjudication, avoiding service is much more probable and problematic with uninsured employers than with insured employers. Additionally, the UEF self-help packet available through the Information and Assistance (I&A) office is complex and Spanish-speaking immigrant workers have a difficult time doing this on their own. In our experience, the I&A offices have not been very accessible or helpful with the UEF cases. The WLC was able to assist Mr. B to serve the employer, join the UEF and ultimately to refer this case to a private attorney.

5. Obtaining medical treatment while attempting to join UEF

The system assumes all employers are insured and have an MPN for injured workers to obtain treatment. Uninsured employers do not have an MPN. Mr. B was only able to obtain treatment through the local community clinic. Because few if any medical clinics provide medical services under workers' compensation, many injured workers of uninsured employers go without treatment.

6. Obtaining a medical assessment to provide evidence of injury in support of the Application for Adjudication

The Application for Adjudication of Claim asks for evidence of medical treatment received to support the injured workers claim for workers' compensation benefits. Once service has been completed and a case is ready for adjudication, it is difficult to support the workers' claim without a medical report. Coworkers and/or witnesses fear employer retaliation and are reluctant to be deposed, sign an affidavit or testify in court. Therefore, the medical report is essential evidence in uninsured cases.

7. Workers billed directly for medical treatment

Pursuant to Labor Code Section 3751(b), any charges for treatment of an industrial injury should be directed to an employer's workers' compensation insurance carrier. By wrongfully seeking payment from an injured worker, the medical facility violates Labor Code Section 3751(b), and may be subject to penalties, including treble damages, attorney's fees and costs.

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When there is no MPN available for a worker to obtain treatment, the worker will often seek treatment through the county hospital or other accessible medical facilities. Often these facilities are untrained in identifying work injuries and billing the insurance carrier. As a result, the worker often gets billed for treatment s/he receives. Mr. B received a \$5,000.00 medical bill from the local hospital that treated him. This discouraged him from seeking needed medical treatment for fear he would be billed for the treatment.

Thank you for your review of this memo and please do not hesitate to contact us if you have any additional questions regarding this information.

Dori Rose Inda
Attorney, Center Director

Rafael Albarran
Legal Assistant, Project Coordinator

Attachment B

WCIRB Public Comments on the Draft UEBTF Paper



March 30, 2007

By Facsimile and U.S. Mail

Christine Baker
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**RE: Comments to Draft CHSWC Background Paper on the
Uninsured Employers Benefit Trust Fund**

Dear Ms. Baker:

The Workers' Compensation Insurance Rating Bureau of California (WCIRB) submits the following information in response to the *Draft CHSWC Background Paper on the Uninsured Employers Benefit Trust Fund (Background Paper)* recently released for circulation and public comment by the Commission on Health and Safety and Workers' Compensation (CHSWC).

The Background Paper, in addressing stakeholder concerns, discusses employee concerns regarding the difficulty in obtaining benefits. The section entitled *Proof of Coverage Verification and Delays* on page 7, states the following:

Once the employer is correctly identified, the employee must investigate whether the employer is actually insured. This requires submitting a written request to the Workers' Compensation Insurance Rating Bureau (WCIRB), which receives data on all insurance policies written for workers' compensation coverage in California. The WCIRB will reply by mail, either identifying the insurer or advising that there is no record of coverage. Sometimes, this step must be repeated with additional identifying information on the employer. This delay of one to three weeks may occur even with an insured employer who is cooperative, but it is inherent in most UEBTF cases.

The WCIRB would like to provide the following additional information regarding access to the coverage information it maintains. Specifically, we would like to address the implication reflected in the foregoing statement that access to WCIRB records currently afforded injured workers is responsible for the one to three week delay.

The WCIRB is the repository for coverage information on all insured California employers. Requests for coverage information, including requests from injured workers, are generally submitted to the WCIRB on its Form 807, Coverage Research Service Request. Form 807 is readily available on the WCIRB website under the Products and Services, Product Ordering tab. Requests by letter are also honored if the letter provides the required information. Most requests for coverage are received by mail, but are also accepted via facsimile.

The coverage requests are handled by WCIRB Customer Service (Customer Service), at no fee to the injured worker. Most injured employee requests (approximately 60%) are for coverage information at the time of an injury, which usually occurred within the last few years. In most

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cases, Customer Service will mail the response to the injured worker. However, if requested, Customer Service will email the response to the injured worker thereby reducing the time within which to confirm coverage information. Currently, Customer Service is typically able to complete coverage research within three days of receipt of the request. As such, if an injured employee faxed the form to the WCIRB and requested a response by email, the injured worker could receive a response in as little as three days. To the extent, the employer's name provided by the injured worker cannot be identified or matched to WCIRB coverage record information, additional delays may occur; however, these delays arise due to the incomplete or inaccurate nature of the information submitted to the WCIRB and would remain regardless of the means of requesting information.

We would also like to clarify that the injured worker is not required to investigate whether the employer is actually insured because the UEBTF has direct and immediate online access to the WCIRB's coverage information through a dedicated modem line. The UEBTF is able to utilize this system to determine if the employer is insured as opposed to requiring the employee to conduct such an investigation by submitting a written request to the WCIRB. No fee is charged by the WCIRB for providing UEBTF access to this coverage information, and provides quicker access to the insurance status of the employer.

The Background Paper also makes the following recommendations, in pertinent part, with respect to Workers' Compensation Coverage Information on page 9:

- Continue the effort to provide convenient and rapid public access to workers' compensation insurance coverage information. Currently, 26 states provide proof of coverage verification online.
- Ensure that proof of coverage data are presented in a standardized, uniform format as to be easily utilized.
- Provide rapid access to coverage information without processing written requests to the WCIRB.

The Background Paper assumes that since most requests are currently processed by mail, access via a website would reduce the delay in verifying coverage information by providing instant feedback. In practice, however, this may not always be the case. Many requests would require WCIRB Customer Service intervention because no match for the employer is readily found in the WCIRB's coverage records for various reasons. Also, as noted above, access to the information and resolution of coverage issues could occur faster if research of coverage records were undertaken by the UEBTF rather than requiring the employee to determine if the employer is uninsured.

Unlike many other states, California case law provides that inception and expiration dates of insurance policies are considered to be proprietary information of the insurer, agent, or broker. Therefore, privacy and liability concerns exist with respect to providing coverage information to the public on-line. With a public website, appropriate security protocols would have to be developed to protect such proprietary information.

CHSWC Background Paper on the Uninsured Employers Benefits Trust Fund

WCIRBCalifornia®

Christine Baker
Health and Safety and Workers' Compensation
March 30, 2007

Thank you for the opportunity to provide this information and please feel free to call me with any questions.

Sincerely,



David M. Bellusci
Senior Vice President and Chief Actuary

cc: Robert Mike, WCIRB
Brenda J. Keys, WCIRB