



STATE OF MAINE  
WORKERS' COMPENSATION BOARD  
Board of Directors' Business Meeting

**February 11, 2020**

A business meeting of the Maine Workers' Compensation Board of Directors was held on Tuesday, February 11, 2020, at the Augusta Central Office in Augusta, Maine.

**PRESENT:** John Rohde (*Executive Director/Chair*), Ron Green, Glenn Burroughs, Richelle Wallace, Tom Davis, Gary Koocher, and Emery Deabay, and Richard Hewes (*General Counsel*)

**I. CALL TO ORDER**

Executive Director Rohde called the meeting to order at 10:00 a.m.

**II. APPROVAL OF MINUTES**

**1. Draft Minutes of 1/14/2020**

Director Koocher MOVED TO ACCEPT THE MINUTES OF 1/14/2020; Director Green seconded. **MOTION PASSED 7-0.**

**III. SUBCOMMITTEE REPORTS**

There were no subcommittee meetings this morning.

**IV. EXECUTIVE DIRECTOR REPORT**

**1. Department of Labor**

Deputy General Counsel Seanna Crasnick met with the Department of Labor again regarding access to coverage information. The Board previously had access to the coverage information that was used to help identify employers that do not have workers compensation coverage. We anticipate entering into an agreement with DOL whereby some information will be shared.

**2. Proof of Coverage**

As discussed at the January meeting, IAIABC has updated its proof of coverage filing requirements. There may be some difficulties incorporating the IAIABC data dictionary into the board's rules. We have sent follow-up inquiries to IAIABC about this. Revisions to this rule are in progress.

### **3. IAIABC Conference & NCCI Forum**

An IAIABC Committee Conference will be held in April. EDI topics will be discussed, and Deputy Director Lindsay Lizzotte is planning to attend the conference to become better acquainted with EDI issues. The next NCCI Regulatory Forum will take place on February 26<sup>th</sup> in Portland if anyone from the Board is interested in attending.

### **4. Budget**

The Appropriations Committee is taking up the supplemental budget. The Board has one item for this budget-reclassifying a legal secretary position to a paralegal position for the Advocate Division. This is scheduled for February 26<sup>th</sup> at 10:00 a.m.

### **5. Medical Fee Schedule**

The Maine Health Data Organization has provided the files needed for the comprehensive review of the board's Medical Fee Schedule.

### **6. Comp Summit**

Executive Director Rohde will meet with Bud Bernstein this week about the 2020 Comp Summit. Mr. Bernstein is lining up speakers and presenters. The September Board meeting will be held at Comp Summit.

### **7. LD 1639**

LD 1639 is scheduled for a work session at the Labor and Housing Committee tomorrow. The Board has previously testified neither for nor against this bill. Part B of the bill has additional stop work authorization for the Board. Part B will broaden the scope of the bill.

### **8. PTSD Report**

There will be a meeting later today to go over the information being collected for the PTSD Report that is due in 2022. The bill, passed in 2017, creates a presumption for first responders. A report will be submitted to the legislature on January 1, 2022 to track the cost and claims impact of the bill.

### **9. Bangor Regional Office**

Board staff, with Bureau of General Services staff, will be visiting potential new spaces for the Bangor Regional Office later this week.

## **V. GENERAL COUNSEL REPORT**

### **1. Law Court**

General Counsel Richard Hewes reported that the Law Court granted the petition for appellate review in the case of *Potter v. Cooke Aquaculture*. This case involves a claim for benefits that might be barred because the employee might be a seaman covered under the *Jones Act*. Claims covered by the Jones Act, a federal injury compensation act that provides damages under admiralty law, are not compensable under Maine's Workers' Compensation Act. More information will be provided as the case proceeds.

### **2. Waiver**

MEMIC requested a waiver for EDI filings from 02/03/2020 to 02/21/2020. A computer malfunction has caused forms to be incorrect or incomplete and will cause inaccurate data to be transmitted to the board. MEMIC has asked to be exempted during this time

from submitting electronic forms as it works to correct the problem. The waiver request was received yesterday.

Director Koocher MOVED TO APPROVE THE WAIVER; Director Green seconded.  
**MOTION PASSED 7-0.**

## **VI. OLD BUSINESS**

### **1. LD 756 (PL 2019, C. 344) Studies**

Executive Director Rohde reported that the LD 756 report has been submitted to the Legislature. The working group was not able to reach consensus on the issues.

### **2. MOP and DISC Forms**

The Board has received feedback regarding the proposed changes to the WCB-3 Memorandum of Payment (MOP) form, and the WCB-4M Modification (MOD) and WCB-4D Discontinuance (DISC) forms, especially regarding the wording in some boxes. The proposed changes will be incorporated into the forms and they will be circulated again to stakeholders for additional comments. The forms will be reviewed by the board at the March meeting. July 1, 2020 is the targeted implementation date for the new forms.

### **3. IME Application**

Frank Graf, M. D., has applied to the Board to be on the § 312 list of the Independent Medical Examiners. At the January meeting, his application was brought to the board meeting for consideration. It was tabled at Director Koocher's request so additional information could be provided.

Director Green MOVED TO TAKE THE ITEM OFF THE TABLE FOR CONSIDERATION AT THE FEBRUARY BOARD MEETING; Director Burroughs SECONDED. **MOTION PASSED 7-0.**

Additional materials about Dr. Graff were provided to Executive Director Rohde by Elizabeth Brogan, Esq., in advance of the February meeting as agreed at the January meeting. The materials were distributed to the directors for review.

Director Burroughs MOVED TO APPROVE THE APPLICATION OF DR. GRAF AS AN INDEPENDENT MEDICAL EXAMINER; Director Green SECONDED.

Director Wallace asked if the Executive Director felt the material provided by Attorney Brogan raised concerns. Executive Director Rohde said he reviewed the materials carefully in light of the statute, the board's rules and relevant case law. He welcomed opinions from others with the hope that the directors would be able to vote on this with the benefit of a discussion about Dr. Graf. Director Wallace asked for his thoughts.

Executive Director Rohde felt Dr. Graf met the threshold criteria that the board has previously applied to §312 applicants. The materials supplied by management stakeholders were far more extensive than information provided for past applicants. The information confirms that Dr. Graf is board certified in orthopaedic surgery, that he is licensed to practice medicine in the State of Maine, that he is directly involved in the evaluation, diagnosis and treatment of patients on a frequent and regular basis in this specialty, that he is highly experienced and competent in the field of orthopaedics given his varied and extensive surgical practice over several decades, that he is experienced and competent in the treatment of work injuries and that he practices in a specialty most commonly used by injured employees.

Executive Director Rhode stated the Board has not asked any other examiners to provide proof of what constitutes an active treating practice. He recommended the IME Subcommittee may want to develop standards to define what an active treating practice means and how to substantiate how much of a doctor's practice applies to our requirements.

Director Wallace questioned what quantity of his practice devoted to treating patients based on the 2019 deposition provided in the additional materials. Director Koocher asked if we should have contacted the doctor to clarify these numbers. Executive Director Rohde pointed out that the Board has not done this in the past, and if we want to pursue this, we would have to do so to all of the IME doctors without making the process so burdensome that doctors will not participate in the IME program.

Director Burroughs pointed out that Dr. Graf was previously on the list. If the Board wants to make changes, those need to be made prospectively not retrospectively. Dr. Graf should be approved.

Director Wallace disagreed and sensed a pattern of bias for employees in Dr. Graf's reports. Director Burroughs felt there is no pattern of unfairness and pointed out that Dr. Graf has only done 5 examinations recently as opposed to more exams by other doctors, which could skew the results.

Director Burroughs **MOVED THE QUESTION**; Director Green **SECONDED**.  
**MOTION FAILED 3-4.** (*Directors Burroughs, Deabay, and Green were in favor of the motion.*)

Discussion continued about whether Dr. Graf's application meets the criteria set forth in board rules. Executive Director Rohde reminded the board that there is no prescribed process for review of examiners. Historically, the Board has avoided the "scorecard" approach to reviewing doctors' opinions. The Board has not adopted a process to define what is evidence of bias on the part of the examiner. Executive Director Rohde pointed out that the materials submitted about Dr. Graf contained motions filed by defense counsel challenging Dr. Graf's 312 appointment in individual cases, but none were ultimately granted in favor of the moving party.

Elizabeth Brogan pointed out that the previous Executive Director had removed Dr. Graf from the IME rotation. It was noted that Dr. Graf never contacted the Board to ask why he was not receiving referrals from the Board unless he was told unofficially. Executive Director Rohde said this was done by unilateral administrative action and Dr. Graf was never removed by an affirmative vote of the Workers' Compensation Board as required by WCB Ch. 4 § 1 (4). Further, the previous Executive Director had issued a letter praising Dr. Graf's qualifications.

Executive Director Rohde reiterated that in order to say someone is not impartial, there has to be a set of standards that lead to that conclusion which we do not have at this time. Director Burroughs said that none of this information was brought to the IME Subcommittee, now or previously, and there are no rules in place today to prevent Dr. Graf from being appointed. New rules must be made going forward, not on this application.

Director Wallace stated that the board is obligated to serve both employees and employers fairly. The management representatives clearly feel Dr. Graf is unfairly biased. Director Burroughs stated it was clear that labor representatives clearly do not agree that the doctor is biased and that is why there must be a board vote. If rules need to be made for board review, then rules can be made or amended going forward.

Director Davis noted that a lot of the answers Dr. Graf gave in the 2019 deposition were vague and evasive. Executive Director Rohde stated that if the IME Subcommittee would like to create a set of standards or amend the current process, they can do that going forward, but there is not currently a clear set of defined standards. Director Koocher stated that this is the going forward moment and agreed with Director Davis that Dr. Graf was evasive in the deposition and this should be a cause for concern.

Peter Gore stated that there was plenty of guidance from the Legislature regarding the meaning of an active treating practice. Others present pointed out that the guidance to which Mr. Gore referred was addressed by the legislature in debates regarding examiners appointed under 39-A MRSA §207, not §312.

Elizabeth Brogan asked why a resume that hasn't been updated since 2010 isn't a red flag in itself? She feels that this is not a normal application and should be fully vetted.

Executive Director Rohde said what is being suggested would stop what the Board has been doing for 25 years and create a separate standard for this one applicant. Some stakeholders and directors have not treated this as a normal application as evidenced by the document submission and the extensive discussion around Dr. Graf's application. There is still work to be done in defining review standards to apply to the §312 examiners.

Peter Gore suggested that if there is still work to be done, why not stop and fix the process and then see if the person meets the standard. There is either a problem now or there isn't. Executive Director Rohde again reiterated that we do not have a set of standards, applied consistently, that would prevent the Board from approving Dr. Graf's application today. The Board is encouraged to review this and make changes, but those changes need to be applied consistently and prospectively.

Director Green MOVED THE QUESTION TO A VOTE; Director Burroughs seconded. **MOTION PASSED 4-3.** (*Directors Wallace, Koocher, and Davis opposed.*)

Director Koocher requested a caucus before the vote on the application. The record was paused at 11:03 a.m. and resumed at 11:17 a.m.

Director Burroughs MOVED TO APPROVE THE APPLICATION OF DR. GRAF AS AN INDEPENDENT MEDICAL EXAMINER; Director Green seconded. **MOTION PASSED 4-3.** (*Directors Wallace, Koocher, and Davis opposed.*)

Director Koocher made the following statement on the record:

This matter speaks to the very integrity of the IME program, we have three management members raising serious concerns about Dr. Graf and three labor members who vehemently object to our even vetting this candidate and tried to end discussion within five minutes. I have served on this board for most of the past 20 years and without exception, we have always given the causes at least a month to vet. This begs the question of why labor is so vehemently, their words, not mine, opposed to a proper vetting. It demonstrates beyond any doubt that Dr. Graf cannot be deemed independent. By the Executive Director, in his own words, there is a problem with the process. It is outrageous to us that you would move ahead on this controversial appointment without first addressing the problem and the rules. This speaks to the very integrity of the Board and how it serves the employees and employers.

Executive Director Rohde responded that his statement about the problem with the process is that there has been a practice in place for years and there is now a desire to apply a new standard to just one applicant. His review of the information provided was thorough and he did not find a clear indication that there is not an active treating practice or the inability to be impartial.

## **VII. NEW BUSINESS**

### **1. Annual Report**

Due to the inclement weather on Friday, deliveries from the Copy Center have been delayed. As such, Annual Report copies were not available at the meeting. The report will be submitted and distributed as required when it is received later today. It will also be posted on the Board's website.

## **VIII. ADJOURNMENT**

Director Green MOVED TO ADJOURN; Director Burroughs seconded. **MOTION PASSED 7-0.**

The meeting formally adjourned at 11:21 a.m.