

There are a number of important differences that a defense practitioner must be aware of in representing a client in MA and RI. As I have found is usually the case, there are nuances of each Act that must be understood in order to defend cases in each jurisdiction. These differences can make a difference in the value of a case depending on the jurisdiction.

**I. Benefits:**

**Higher in RI than MA?**

**Total:**

MA calculates 60% of AWW v. RI calculation of 75% of SE (calculated by RI Div. of Workers' Compensation.

Ex. Married employee with spouse and 2 children.

In MA, he receives a weekly TTD rate of \$360.00.

In RI, he receives a weekly TTD rate of \$434.00 (\$433.57 rounded off to the higher dollar). This is based on a spendable earnings (SE) figure of \$518.09, a base TTD rate of \$388.57 and an additional \$45.00 for three dependents (unemployed and dependent spouse and two children).

In MA, ee is entitled to 3 years of this benefits, unless found to be partially disabled. In RI, after one year, ee will start to receive a COLA until found partially disabled.

**Partial:**

In MA, \$35 is based on actual earnings or no more than 75% of TTD rate. There is no COLA on partial benefits in MA. Up to 260 weeks in partial.

TTD and partial can be no more than 7 years of benefits.

In RI, partial is 75% of the difference between SE and SE thereafter, but no more than the maximum he could receive in TTD. No dependency benefits.

Partial paid based on :

a return to actual wages less than the AWW at time of injury yields a reduction in weekly benefits as follows: 75% of the difference between pre-injury and post-injury SE.

weekly disability benefits can be reduced by 30% by order of the Court or agreement when an injured worker reaches a point of MMI [§28-33-18(b)].

Weekly disability benefits can be reduced by assignment of an earning capacity. does not happen very often. However, can be established by refusal of SAE (suitable alternative employment) or following a rehabilitation program (extremely rare).

*at least 220 (minimum) w/o vocational testimony  
5 weeks = could not*

**Dependency:**

In MA, this is almost never applicable, since the C/R must be under \$150.00 and, then, the dependency can only be paid up to that \$150.00 figure.

In RI, \$15.00 per dependent. However, in case of spouse, must not be working.

**Statutory Maximum Compensation Rate:**

In MA, the statutory maximum weekly compensation rate presently is \$884.46.

In RI, the statutory maximum weekly compensation rate presently is \$726.00.

So, while the same employee would receive a higher rate in RI if he earned an AWW that did not give the employee the statutory maximum compensation rate in either state, MA compensation rates would be higher for the higher wage earner.

## II. Termination of Compensation:

MA – Can terminate for any reason during first 6 months up to a year.

RI – Can terminate for any reason if ee paid on a non-prejudicial agreement. Then can terminate during first 13 weeks.

In MA, can also terminate if job offer of ee's regular job or light duty work is made by the employer; the job description is reviewed by ee's doctor and the doctor states that the ee can resume the duties in the job description and the job is available. Benefits must be reinstated if ee leaves within 28 days and notifies the employer and insurer in writing, certified mail, that the reason for his absence is the work-related injury.

In RI, the Court can set an earning capacity based on the wage of the SAE (Suitable Alternative Employment) job offer. Court also notes that job offer must be made in writing and not cause ee to lose seniority... monetary benefit, or other substantial benefit. If job is terminated, ee can be placed back on WC. Also, employer cannot force ee back from SAE to his regular job, even with medical that says a return to regular work is indicated.

## III. Specific Compensation:

MA – specific guidelines for both loss of function and disfigurement. Percentage of L/F in accordance with AMA guidelines.

Disfigurement is compensable only for "purely scar based" disfigurement on face, neck and hands. Disfigurement is capped in MA at \$15,000.00.

RI – specific guidelines for L/F. Less than MA, as the multiplier is the one-half of the AWW, but no more than \$90.00 per week.

Disfigurement is paid by the award of a number of weeks times the same \$90.00 per week rate.

Unlike MA, there is no chart. There is a maximum of 500 weeks and, therefore, equal to \$45,000.00 in most cases.

## IV. Litigation:

In MA, a claim is filed and a conciliation is scheduled within 3-4 weeks. No filing fee. Claim cannot be filed with another issue on same case pending before the DIA. However, in such cases, issues routinely joined at conference by judge upon request of party. Thereafter, a conference is scheduled in 5-8 weeks.

From a defense perspective, two chances to see what the claim is about, have investigation and medical examination performed. No real discovery. Can request medical and wage information. All other discovery must be authorized by DIA.

Discontinuance or modification in MA - again, no filing fee. Cannot get any relief until you get before judge in 10-12 weeks.

Conciliation - Conciliator is lay person, who attempts to get the parties to resolve their differences on a claim/complaint. Rarely occurs with the exception to the rule being cases involving specific loss of function and disfigurement, closed periods of indemnity benefits and medical expenses. One reason is that judges historically have not wanted to deal with these issues and almost exclusively depend on the recommendation of the conciliator when ordering benefits. In almost all other cases, a conciliator "sends the case forward" for a conference. *Also A has to pay 600 fee to refer to conference*

Conference - Now about 5 to 8 weeks post-conciliation. Get four to five weeks notice. Informal presentation of claim and defenses before Administrative Judge. Present evidence in the form of medical reports and other information, including labor market surveys, job descriptions, witness statements, videotapes, etc. for the insurer. Now must have two sets of exhibits, one set including medical and non-medical information for the judge and opposing counsel and a second set of exhibits consisting of purely medical exhibits for the impartial medical examiner, who is appointed by statute in almost all cases involving a medical dispute. Specialty of impartial medical examiner determined at the conference. Determination of the specific medical examiner is done either by agreement of the parties from a list of impartial medical examiners approved by the DIA, by the judge or by the DIA Impartial Unit. Exhibits must be indexed and tabbed. Only medical exhibits are sent to the impartial medical examiner by the DIA. Attorneys can also submit hypothetical questions to the impartial examiner for responses. Attorneys present oral argument to judge, who generally takes the matter under advisement and issues an order within one to two weeks.

Attorney Fee at Conference - Governed by §13A of the Chapter 152. At the conference, the claimant's attorney, if successful, is awarded a fee set by the Department of Industrial Accidents each year on October 1<sup>st</sup>. The fee increase is tied to the increase of the CPI for the year. The fee differs based on whether liability has been established or not. There are instances where the claimant could be awarded benefits and the attorney may not be awarded a fee. This is true where a "Last Best Offer" is made to the judge by the parties at the time of the conference. In addition to the fee, the attorney will be reimbursed for necessary expenses incurred in the preparation of the claim (i.e., expenses for medical reports, hospital records).

Appeal period is 14 days from date conference order is filed. Appeal fee of \$450.00 is required. This is to pay for impartial examination.

Impartial examination is scheduled between conference and hearing and hearing cannot be scheduled until the report of the impartial medical examiner is filed with the DIA Impartial Unit, which sends the report out to all parties. *UK*

Hearing - Rules of evidence apply. Usually scheduled within two to three months after the impartial medical report is received by the DIA Impartial Unit. No pre-trial conferences generally. Judges frown on surprise witnesses. If witness is not known at conference, attorney should make the other party aware of the witness, the testimony and any reports prior to the hearing. (Vocational experts, private detectives).

*can submit  
witness within  
10 days of  
conference*

*closed period = no impartial makes + breaks wa*

**Post-hearing** - Either party has the right to cross-examine the impartial doctor at a deposition. No other medical information allowed unless the judge finds that the impartial report and/or testimony is inadequate relative to the issues that the doctor is being asked to address or the medical issue is one of such complexity to require, in the judge's opinion, additional medical opinions. (We could devote an entire seminar to issues concerning §11A.)

Decisions are routinely not filed for at least two to three months after the close of evidence. In some cases, this is longer.

**Attorney Fee at Hearing** - At hearing, the attorney fee is again set by the DIA. As with the conference, the hearing fee includes necessary expenses incurred by the attorney. Presently, the fee is \$4,466.95.

**No Attorney's Fee is due unless the claimant prevails.**

Appeal period after a decision is 30 days from the date the decision is filed and is an appeal to the DIA Reviewing Board, which will be a three-member panel of Administrative Law Judges. A fee of 30% of the State Average Weekly Wage (SAWW) is required.

**Reviewing Board** - Pre-Transcript conference held to determine whether case can be resolved and, if not, to narrow the issues and order a copy of the transcript of the hearing. Unless the judges request it, oral arguments are not held. Decision is usually within 30-60 days of the closing of the record.

Appeal can be taken within 30 days of receipt of final decision to the Massachusetts Appeals Court. No appeal fee is required.

In RI, a pre-trial conference is scheduled within 21 days of a petition being filed. There is a \$20 filing fee associated with each petition filed. Also, unlike Massachusetts, where only one claim will be allowed in the computer system, in RI, a number of petitions can be in the system at once.

**The Pre-Trial Conference is in front of a judge, who will issue an order.**

Unlike Massachusetts, there is no conciliation level, so that the parties receive a binding determination in 21 days from the petition being filed, as opposed to two to three months. Another difference between the Pre-Trial Conference in RI and MA is that the judge will issue the order from the bench in RI, whereas in MA, the judge usually takes the matter "under advisement" and issues the order at a later time, notifying the parties of the decision by mail.

Appeal of a pre-trial order must be done within five business days of the order. No appeal fee is necessary.

**Initial Hearing** - Unlike MA, it is customary that an initial hearing takes place prior to the actual hearing going forward. At this time, the parties are expected to advise the judge what to expect at the hearing, including witnesses, issues involved, stipulations that may be made and the estimated length of the hearing. As indicated above, this is customary, although not

all of the judges schedule this first hearing.

**Hearing** – Usually held within one to three months of the appeal. Similar to Massachusetts, with the exception of the impartial medical examination, which is mandated by statute in MA (M.G.L. c. 152, §11A). Like MA, rules of evidence apply. Many times the non-moving party does not present witnesses the first day of hearing, but seeks a continued hearing date a month or two later, at which time the opposing party's witnesses and evidence are presented.

**Post-Hearing** – Depositions of doctors are usually permitted. Some judges will appoint an impartial medical examiner in a case and, if so, the parties can also depose this doctor.

**Appeal** – Written decision must be appealed within five business days.

**Appellate Division** – Similar to MA, an appeal from a hearing decision is heard by a three-member panel of judges. In RI, these judges are trial judges. In Massachusetts, there is a six-member panel, three of which hear an appeal called the Reviewing Board. This board only hears appeals from decisions of DIA judges.

## V. SETTLEMENT:

In MA, cases can be settled by way of lump sum. Section 48 controls the settlement of cases. Cases can be settled on an accepted basis or an unaccepted basis. There are distinct differences between the two.

### Accepted:

- 1) Medical benefits causally related to the industrial accident stay open for life.
- 2) Vocational rehabilitation benefits stay open for two years from date of approval of settlement.
- 3) Attorney's fee is 20% of the settlement.

### Unaccepted:

- 1) Case can be settled either with payment of medical benefits up to the date of approval of the lump sum settlement or without the payment of any medical benefits.
- 2) No right to vocational rehabilitation benefits.
- 3) Attorney's fee is 15% of the settlement.

Settlement can be presented to an administrative judge, if the case is before the judge. If there is no proceeding ongoing at the DIA, then the settlement can be presented to a conciliator (employee must be represented by counsel) or an Administrative Law Judge (Reviewing Board)

Unlike RI, in MA, employee's counsel usually prepares the settlement papers.

In RI, settlements are always before a judge. A petition for Commutation must be filed. There is a filing fee for this. If the case involves a settlement amount in excess of 104 weeks

of compensation, the Chief Judge may decide to hear the commutation or delegate this function to another judge.

Unlike MA, the employee is sworn and testimony is presented from the employee relative to the employee's understanding of the settlement and other issues involved in the settlement can also be addressed at that time.

Unlike MA, settlements terminate an employee's right to medical benefits, as well as weekly indemnity benefits. Also, unlike MA, the maximum attorney's fee is 15%, as opposed to 20% in MA for an accepted case.

There is also a provision for settling disputed cases in RI, which is referred to as a "D&D". Unlike a commutation, a D&D does not provide for any medical payments. Also, the settlement payment is not treated as compensation, but is considered a payment in lieu of compensation and medical payments.

#### **VI. ALTERNATIVE CASE RESOLUTION:**

Unlike RI, in MA there are ways to resolve a case short of litigation or a formal settlement. Under §19 of the workers' compensation act, the parties can agree to almost anything and have this agreement approved by a judge. This agreement does not close the case out and serves as an alternative to resolve a specific issue, when the entire case cannot be lump sum settled.

The parties can also file an "Agreement to Compensation – Form 113" with either a judge or conciliator relative to a specific issue such as loss of function, the payment of medical bills or the payment of a closed period of compensation benefits, rather than litigate the case.

#### **VII. STATUTE OF LIMITATIONS:**

RI has a two-year statute of limitations on claims for compensation barring previous payment of benefits or filing of petitions.

MA has a four-year statute of limitations on compensation claims with the same provisos.

#### **VIII. SUMMARY:**

From a defense counsel's perspective, each system presents issues that must be understood in order to accomplish a successful resolution of a claim for benefits. While quicker action on a case probably occurs in RI, the better chance for a settlement may lie in MA.