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JORDANNA THIGPEN, EXECUTIVE DIRECTOR

MEMORANDUM

TO: Honorable Rules Subcommittee Members
FROM: Jordanna Thigpen
RE: Agenda for 10.14.08
DATE: 10.14.08

The Taxi Commission attempted to invite a guest from the California State Department of Industrial Relations, Division of Workers' Compensation to come and speak at this hearing, but was unable to obtain anyone.

History and Background of Workers' Compensation

Workers' compensation evolved as American society became increasingly industrialized in the late 19th and early 20th centuries. As people began working around machines and factory production grew, injuries on the job increased. Workers' compensation was created for two reasons: protection for injured workers and protection for companies from expensive lawsuits. California passed the Compensation Act in 1911, which made participation merely voluntary. In 1913, the Workers' Compensation, Insurance and Safety Act was passed, requiring employers to provide benefits for all employees and prohibiting employees from directly suing their employers for injuries, recovering money for pain and suffering or seeking punitive damages.

Although this Act remains the foundation for today's system of workers' compensation, the state has struggled over nearly a century to handle this complicated problem, especially in an era of rising health care costs and, now, bizarre economic conditions.

Agencies Regulating Workers' Compensation

There are several agencies involved in workers' compensation regulation.

The Division of Workers' Compensation performs audits of companies and ensures they procure and provide workers' compensation. The seven-member Workers' Compensation Appeals Board has certain judicial powers vested in it by Labor Code § 111 et seq.. Its major functions include review of petitions for reconsideration of decisions by workers' compensation administrative law judges of the Division of Workers' Compensation, and regulation of the adjudication process by adopting rules of practice and procedure. The Workers' Compensation Insurance Ratings Bureau sets rates for classes of employees.

What is Workers' Compensation?

Division Four of the California Labor Code governs the provision of workers' compensation insurance and requires it for all employees. The insurance provides five types of workers' compensation benefits - medical care, temporary disability benefits, permanent disability benefits, vocational rehabilitation services, and death benefits.

Insurance can be procured through individual insurance companies, through State Fund, or through the process of self-insuring. In San Francisco, Yellow Cab is currently self-insured, while all others that are insured, procure insurance from individual companies. State Fund is a provider in its own right, but is also known as "the insurer of last resort" and will provide coverage to employers that are otherwise uninsurable.

Who is Covered: Employees are covered, while employers and independent contractors are not. Labor Code § 3300 defines "employer" as follows:

"[E]mployer" means:

- (a) The State and every State agency.
- (b) Each county, city, district, and all public and quasi public corporations and public agencies therein.
- (c) Every person including any public service corporation, which has any natural person in service.
- (d) The legal representative of any deceased employer.

Labor Code § 3351 defines "employees" as follows:

"Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes: [extensive categories of individuals]

Labor Code § 3353 defines "independent contractors" as follows:

"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

Labor Code § 3357 provides that "any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

These definitions have been the subject of volumes of litigation in every industry in California.

Rates for Workers' Compensation: Insurance premiums are calculated for workers' compensation in a very specific way. The WCIRB develops and assigns classifications to employees based on their specific job duties and other factors (such as rate of injury, types of injury, etc.) Once employees are classified, then ratings for each employee are assessed and the premium is calculated.

California workers' compensation insurers operate under an "open" rating system. Individual companies set their rates based on their ability to adequately cover losses and expenses in each classification. All workers' compensation insurers must file their rates and other information with the California Department of Insurance. Rates must be adequate to maintain the solvency of an insurance company in case of claims. The rate itself is expressed in dollars and cents and is multiplied by each \$100 of payroll per classification.

How Coverage Works: If a covered individual is injured, he files a claim. If there is a dispute, the Division of Workers' Compensation's Information and Assistance Unit tries to resolve the dispute. If it is unable to do so, a claim may be filed with the WCAB. From there it may proceed to Superior Court and beyond.

Current Worker's Compensation Law as Applicable to the San Francisco Taxicab Industry

(1) Drivers

The state judicial system has affirmed that California taxi drivers are employees for purposes of workers' compensation in certain employment situations. These employment situations have included "gas and gates" drivers. Local cases making this finding include Tracy v. Yellow Cab Co-Operative, Inc. (San Francisco Superior Court No. 938786) and Yellow Cab Cooperative, Inc. v. Workers' Compensation Appeals Board (1991) 226 Cal.App.3d 1288. Another case on point is Santa Cruz Transportation, Inc. v. Unemployment Insurance Appeals Board (1991) 235 Cal.App.3d 1363.

(2) Medallion Holders

There are two types of leasing arrangements for medallion holders: affiliates and gas and gates. Under **gas and gates**, it's difficult to see how the medallion holder has any responsibility to provide worker's compensation. He is showing up for his shifts along with other drivers who may use the vehicle when he is off work. He has no control over who those drivers are or how their shifts are conducted – that responsibility rests with the color scheme. The medallion holder himself would also be covered as a driver – even though he is the holder of the permit, in this case, he stands in the same shoes as a driver employee of the color scheme.

However, the responsibility shifts with medallion holders who "affiliate" with a color scheme and hire their own drivers. These most likely constitute "employers" for purposes of workers' compensation. Some insurance companies are still insuring these medallion holders nonetheless.

If the medallion holder meets the control tests outlined in case law, he will constitute an employer and would be required to procure workers' compensation and meet other state laws applicable to employers (such as payroll deductions for unemployment insurance.)

As far as procuring coverage, medallion holders may elect to pay the taxicab company to procure workers' compensation for drivers under that color scheme. The drivers would be eligible should it be necessary to file a claim. Or, affiliate medallion holders may procure their own policy as

“employers.” Either way, all drivers under each medallion must be covered – regardless of who pays for it.

(3) Administrative Personnel

San Francisco color schemes must procure workers’ compensation coverage for any administrative, clerical, or management personnel in accordance with California law.

It does not appear that medallion holders who are affiliates can purchase coverage for themselves since employers cannot purchase coverage.

How Coverage is Assured in San Francisco: In practice, some insurers, including State Fund, grant coverage for a particular company. In other cases, coverage is procured for a particular *vehicle*. Recently, some local policies were updated so that coverage is procured per *medallion*.

Current San Francisco Law and Taxi Commission Rules Addressing Workers’ Compensation in the Taxicab Industry

The Commission has repeatedly held in various administrative decisions that San Francisco taxicab companies, including Bay Cab and Regents Cab, are required by State law to purchase and maintain workers’ compensation coverage for individual taxi drivers. Because all permit holders awarded permits under the Commission’s jurisdiction are required to comply with state law, including laws pertaining to worker’s compensation (Rule 5.A.1), the Commission has authority to make decisions regarding the suspension or revocation of a permit.

Municipal Police Code § 1147.4 provides:

All persons, firms or corporations holding taxicab color scheme permits pursuant to Section 1125(b) of this Article shall comply with all applicable state statutes concerning worker’s compensation and any applicable regulations adopted pursuant to those statutes. Taxicab color scheme permit holders must include a sworn statement attesting to compliance with such applicable statutes and regulations as part of the annual filing required by Section 1095 of this Article.

Rule 5.H.16 requires that “the color scheme holder must have a copy of Certificate of Worker’s Compensation Insurance prominently displayed at the place of business so that it is visible to drivers.” This is based on California Labor Code § 3550 which requires the same posting. Notably, Labor Code § 3550 administers a civil penalty of up to \$7,000 for failure to post the certificate. The Commission also assesses a fine of \$75 for the first offense of failure to post a current certificate.

Each year, the Commission requires that color schemes produce a sworn statement attesting that they have workers’ compensation in compliance with the law.

The Commission requires evidence of workers’ compensation coverage for all drivers when a medallion holder changes color schemes, annually during the filing of the Form 1095 process for all color schemes, and when a color scheme applies for a permit.