

# **Interim Committee to Study Issues Related to Pinnacol Assurance**

## **2009 Report to Legislative Council**

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# Interim Committee to Study Issues Related to Pinnacol Assurance

## Committee Charge

The Interim Committee to Study Issues Related to Pinnacol Assurance was created in Senate Bill 09-281. The act requires the committee to study, make recommendations, and report findings on all matters relating to the operation of Pinnacol Assurance including, but not limited to:

- the feasibility of the continued operation and the public policy implications of Pinnacol Assurance as a division of state government; or
- the feasibility and public policy implications of selling Pinnacol Assurance to a willing third-party buyer.

The committee continues until July 1, 2011.

## Committee Activities

The Interim Committee to Study Issues Related to Pinnacol Assurance met six times during the 2009 interim. Each meeting focused on a variety of workers' compensation-related topics. The interim committee heard testimony from injured workers, workers' compensation insurance carriers, health care providers, policyholders, and state regulators. It also received and considered thousands of pages of documents related to Pinnacol's financial situation and business operations. Members of the public were invited to testify at each of the committee's six meetings.

***Workers' compensation and residual market overview.*** At its early meetings, the committee received testimony from a variety of witnesses about the workers' compensation system in Colorado. The Department of Labor and Employment, Division of Workers' Compensation, described the system, including its history, the department's role, the role of physicians, types of claims paid through the system, and the appeals process. The committee also heard from the Department of Regulatory Agencies, Division of Insurance, about how rates are set in Colorado. In addition to the departments, the committee was given an overview of the workers' compensation process from a claimant attorney, a defense attorney, the Workers' Compensation Coalition, and the Workers' Compensation Education Association.

The National Council of Compensation Insurance (NCCI) testified about the various types of residual market mechanisms used by other states. A residual market mechanism is the insurance market of last resort established in each state to ensure that all eligible employers have some means of complying with their statutory obligations to hold workers' compensation insurance. NCCI talked about state funds, joint underwriting associations, and assigned risk plans and pools.

In response to testimony about the failure of some employers to provide workers' compensation coverage, the committee recommends Bill E to increase the maximum penalty for violating workers' compensation laws.

***Pinnacol Assurance.*** The committee considered virtually all aspects of Pinnacol Assurance including its statutory authority, history, business practices, and finances. Under state law, Pinnacol is a political subdivision of the state that must provide workers compensation insurance coverage to companies that can not otherwise obtain such coverage. It is governed by a nine-member board appointed by the Governor and confirmed by the Colorado State Senate.

Pinnacol is not subject to federal, state, or local government taxes or fees and its employees are members of the Public Employees' Retirement Association. State law requires that Pinnacol operate like a mutual insurance company. Any debts or liabilities it incurs are obligations of Pinnacol and not the state.

In 2008, Pinnacol earned \$521 million in premiums from its 58,000 policyholders and paid \$274 million in claims to injured workers. It reported \$2.2 billion in assets and \$1.4 billion in liabilities, with net assets totaling \$773 million. Its board paid \$55 million in general dividends to policyholders. By some measures, Pinnacol represents almost 60 percent of the workers' compensation insurance market, excluding self-insured entities like the state and certain other large employers.

Responding to concerns about Pinnacol retaining more in surplus funds than necessary, the committee recommends Bill B to require that Pinnacol return to policyholders any funds in excess of a certain amount. The committee also recommends Bill D to modify and expand Pinnacol's board of directors.

**Injured workers.** The committee heard testimony from a number of individuals about their experiences dealing with workplace injuries and the handling of claims through the workers' compensation system. Most of the individuals who had been injured on the job worked for employers insured by Pinnacol Assurance or by Pinnacol's predecessor, the Colorado Compensation Insurance Authority. Others worked for self-insured employers or employers insured by a company other than Pinnacol, and still others were uninsured. Most appeared at the August 31 hearing, but the committee also heard from injured workers during public testimony at other meetings.

Some injured workers and their families raised concerns about the delay and denial of medical care after their injuries as well as the quality of care received. Several noted that they were placed under surveillance during the adjustment of their claims. Some raised issues with the physicians who conducted the independent medical exams stating they felt the physicians were not independent of the insurer, or not qualified to judge a particular type of injury. A number of the injured workers testified that they had hired lawyers to assist them in resolving their claims. Other injured workers and their families testified about their positive experiences with Pinnacol and the assistance of the Pinnacol Foundation in providing scholarships for their children.

The committee recommends four bills to address the concerns raised through testimony from injured workers: Bill A requires workers' compensation insurance carriers to survey injured workers; Bill C limits the use of surveillance of employees who have submitted a workers' compensation claim; Bill F addresses conflicts of interest in the workers' compensation system; and Bill G expands the availability of information that must be made available to workers injured on the job.

**Structural options for Pinnacol Assurance.** Several witnesses testified to the committee about restructuring Pinnacol Assurance. Through the committee's discussion, three main structural options became apparent. The first option was to restore Pinnacol Assurance as a state agency. The second option was to maintain the current status as a quasi-governmental entity. The third option was to make Pinnacol Assurance a completely private enterprise. Representatives of the Employers Insurance Company of Nevada testified about the experience of privatizing Nevada's state workers' compensation insurance fund. The committee also heard testimony from various industry representatives and consumers about the potential impacts of each option. In particular, the committee heard from the American Insurance Association, the Property Casualty Insurers of

America, the Colorado Insurance Guaranty Association, and the National Conference of Insurance Guaranty Funds. The committee also heard about potential impacts to employers from the Workers' Compensation Coalition, and potential impacts to employees from the Workers' Compensation Education Association.

## **Committee Recommendations**

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As a result of the interim committee's discussion and deliberation, the committee recommends seven bills for consideration in the 2010 legislative session.

**Bill A — Accountability for Workers' Compensation Insurers.** Bill A requires all workers' compensation insurers to conduct a satisfaction survey of injured workers at the close of each claim. Only injured workers whose claims are reported to the Division of Workers' Compensation are required to be surveyed. The bill includes protections against retaliation for responding to the survey. Insurers will submit survey results to the Division of Workers' Compensation to be posted on the agency's website. The division will also post the procedure for an injured worker to follow to file a complaint. Bill A reenacts a section of statute that was repealed in 1997 requiring Pinnacol Assurance to submit an annual report to the Governor and the General Assembly on specified statistics including claims, policies, losses, income, and expenses.

**Bill B — Workers' Compensation Policyholder Protection Act of 2010.** Bill B establishes a limit of 800 percent on Pinnacol Assurance's risk-based capital percentage. If the limit is exceeded, Pinnacol Assurance must distribute any excess surplus funds to its policyholders. Bill B also directs the Commissioner of Insurance to select the lowest rate recommended when setting the pure premium rates for workers' compensation insurance. The commissioner is to post rate recommendations and supporting materials on the Division of Insurance website prior to a public rate hearing.

**Bill C — Limitations on the Use of Surveillance of Employees Who Have Submitted a Workers' Compensation Claim.** Bill C requires that surveillance can only be conducted when the insurer or employer has a reasonable basis to suspect an employee has committed fraud or made a material misstatement concerning a claim. The bill allows for an injured worker who discovers he or she is under surveillance to request an expedited hearing before a prehearing administrative law judge who may issue an injunction against the surveillance. The insurer or employer is required to provide all materials collected during surveillance to the injured worker, and to destroy all materials collected after the applicable statute of limitations has expired. A person conducting surveillance must answer truthfully if asked on whose behalf the person is acting by the person under surveillance. Bill C allows the identity of a witness or whistleblower who provides evidence in good faith to be withheld or limited to an in camera review. Violations of Bill C are subject to a fine of \$1,000 per day of unauthorized surveillance.

**Bill D — Change to Pinnacol Board of Directors.** Bill D increases the size of the board of directors of Pinnacol Assurance from 9 to 11. The bill adds the Executive Director of the Department of Labor and Employment (or a designee) and a previously injured worker to the board. It also requires that at least two of the three employee members be non-management level employees. The bill increases the per diem for board members from \$140 to \$250. Bill D requires that the date, time, and location of each board meeting be posted on the Pinnacol Assurance website at least seven calendar days prior to the meeting and that each board meeting include time for public comment.

**Bill E — Workers' Compensation Penalties.** Bill E increases the maximum penalty for violating workers' compensation laws from \$500 to \$1,000 per day of violation. Bill E changes the mental state from "willfully" to "knowingly" in the statute that penalizes the wrongful withholding of benefits. Penalties are to be apportioned at the discretion of the Director of the Division of Workers' Compensation or an administrative law judge among the aggrieved party, the medical services provider, and the Workers' Compensation Cash Fund.

**Bill F — Reducing Conflicts of Interest in Workers' Compensation Cases.** Bill F includes a number of changes to workers' compensation law. The bill requires physicians who provide independent medical examinations to disclose any business, financial, employment, or advisory relationships with an insurer or self-insured employer upon request. Bill F prohibits the payment or receipt of remuneration to encourage the delay or denial of a workers' compensation claim. The bill prohibits third-party communications between a treating physician and the employer or insurer of an injured worker. The communication may only occur if the injured worker is present, or it must be conducted in writing and provided to the injured worker. Finally, Bill F prohibits the inclusion of reversionary interests in indemnity benefits in a workers' compensation insurance contract. Such a provision, including in an existing contract, is void and unenforceable as against public policy.

**Bill G — Workers' Compensation Claims Process Brochure.** Bill G requires a self-insured employer or an employer's insurer to provide a claimant with a brochure describing the claims process and explaining the rights under workers' compensation laws and rules. The bill lists the minimum information to be contained in the brochure which includes: contact information, the claimant's right to medical care and indemnity benefits, and the claimant's right to address disputes with the claimant's employer or employer's insurer. The form of the brochure must be approved by the Director of the Division of Workers' Compensation. The brochure is in addition to any other notice currently required.