WORKERS' COMPENSATION INDUSTRIAL COUNCIL

FEBRUARY 7, 2013

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, February 7, 2013, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
James Dissen
Dan Marshall
Senator Brooks McCabe

1. Call to Order

Chairman Bill Dean called the meeting to order at 3:00 p.m.

2. Approval of Minutes

Chairman Bill Dean: The minutes of the previous meeting were sent out. Did everybody get a chance to look them over? Is there a motion for approval?

James Dissen made the motion to approve the minutes from the January 11, 2013 meeting. The motion was seconded by Dan Marshall and passed unanimously.

3. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge

Judge Rebecca Roush: Good afternoon everyone. It's a pleasure to be here today. I tendered to you earlier today by e-mail the Office of Judges Report for the month of February. I'll go over that briefly and hit the high points. For the month of January we acknowledged 437 protests. I think one interesting fact [on page one] is that you can see we are now moving toward the bulk of the protests in our office. Coming from the private carrier market was 73.23% of the protests being related to orders issued by private carriers.

Kent Hartsog: Judge Roush, may I ask a question?

Judge Roush: Yes.

Mr. Hartsog: How would you characterize the split if you were looking at how much in the market was related to private carriers and how much would be like self-insured within the workers' comp market? Is it roughly approximate these percentages?

Judge Roush: You mean with regard to the number of claims that are filed?

Mr. Hartsog: Maybe with regard to wages or injuries. . .or some metric that could like get you where to say. . .well. . .

Judge Roush: What percentages of these. . .

Mr. Hartsog: To see if these percentages are weighted more heavily towards. . .well, if the private carrier market has 80% or 90% of the market and the self-insureds are like 10%, 20% of the market. How does that measure up with the number of protests?

Judge Roush: I think that's a very good question, and unfortunately I do not have the answer to it today. I'm happy to work with the General Counsel and the Commissioner to get that data for you. We do not have those statistics in our office. We, of course, just retain statistics related to our internal protests. But I do recall at one point in time over the last few years of actually looking at that. So, it may be something we could pull out fairly easily and get back to you next month.

Mr. Hartsog: That's fine. I was just curious what the percentage of the market was. . .either by payroll dollars or head counts or whatever metric. . .

Andrew Pauley, General Counsel, OIC: We tried to do that. . .

Michael Riley, Commissioner, OIC: We tried to do that in the past. My recollection, it wasn't too far a skewed. It wasn't anything alarming.

Judge Roush: On page six, with regard to our final decision compliance. We are still doing fairly well with regard to getting our decisions out on an expedited basis – most of them going out within 60 days of the protest being submitted. Our number with regard to 60 to 90 days is 3.1%, which is about 12 decisions Alan [Drescher] and I worked up earlier. It's still a relatively good number based on the volume that we have.

I will take any questions that you may have about the report, or if there are any sections that you would like for me to discuss, I'm happy to do that.

Chairman Dean: Mr. Dissen, do you have any questions?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Judge Roush: Just two more things. I wanted to let the Council know that we are presently interviewing for another ALJ position. We hope to have that process completed within the next few weeks. This is to replace a Judge that resigned last summer. We also have been informed by one of our Judges that he intends to retire by the end of this coming year, 2013. So we will be posting another position to fill that vacancy.

I brought a flier for our workers' compensation CLE/seminar that I will be speaking at on April 18, along with Henry Bowen. If you are interested, I can offer you a 20% discount. So let me know. Thank you.

4. General Public Comments

Chairman Dean: Does anybody from the general public have a comment?

Henry Bowen, Executive Secretary, West Virginia Self-Insurers' Association: I have been asked by my Executive Committee to make a brief comment publicly with respect to the recent Security Fund assessments. We assume that you are well aware of the assessments and the reasons for those assessments. As each year passes from the old workers' compensation system to our new system, from time to time there is a worry about institutional knowledge. There are a handful of people who are always in this room who will remember self-insurance issues as they confronted the former Workers' Compensation Commission, and as they are currently a part of this agency's regulation.

First, with regard to the good news, our Board wanted you to know how much we appreciated the way in which Commissioner Riley handled the communications associated with this assessment. No one likes to be assessed for any security to fund a deficiency. And certainly the communications from the Commissioner and his willingness to have his general counsel discuss some legal issues with us was very much appreciated. We wanted to publicly acknowledge that.

At the same time we recognize that there is not in the rule making process any opportunity in West Virginia to capture legislative history the way it is easily findable in the federal system where there is seemingly endless amounts of federal registers that reflect committee meetings and so forth. You may remember that your predecessors were created statutorily in 2003, and were known as the Workers' Compensation Board of Managers. In the Workers' Compensation first Board of Managers followed the compensation programs Performance Council which was created in 1993. In 1995, the Legislature enacted Senate Bill 250, and that was the legislation in which §23-2-9, the statutory section that dealt with self-insurance, was amended to provide the opportunity for the former worker's comp agency to create pools or funds as an alternative way of dealing with the question of self-insurance security. And, obviously, as I'm sure you've heard from Angie [Shepherd] and Melinda [Kiss] and other professionals here, self-insurance has always been a statutory privilege, and inherent in the right to maintain self-insurance was a requirement that full security be provided, as that term was defined by the agency having that regulatory authority.

As we, as a group, encountered nationally there were at times in the 1990's and the early 2000's a great deal of difficulty in commercial surety instruments – both the cost and the availability of them became less attractive. Therefore we urged the prior Executive Director of the former Workers' Compensation Commission to move forward with creation of the statutory pools. And actually the Guaranty Fund and the Security Fund, about which you've heard I'm sure as much as you probably want to hear, were created first by Rule in 2004, and subsequently codified within the 2005 legislation that was encompassed within Senate Bill 1004. The important thing, I think, as I recall from the agency's perspective, is that members of the Board of Managers wanted to have a clear division of responsibility between self-insured default and other employers who were then called "subscribers" to the Workers' Compensation Fund. Because this was still about 18 months before the authority to privatize our workers' compensation system was granted by the Legislature.

There had always been in §23-4-9 a category of four items in which the self-insured community were "taxed," if you will, on a bankruptcy priority basis on an annual basis, the things that reflected items that it paid into the former agency – administrative

cost, dwarf fund, second injury, that was subsequently mandated, things of that nature; as well as the obligation to secure those liabilities.

I am delighted to see Senator McCabe because he sat in on a great many of those meetings where there were discussions about self-insurance, what to do about some of those risks that were substantial.

There was a large steel company and it had in excess of $70 million dollars of unsecured liability that was an employee ESOP that government allowed to self-insure when it was created after it was spun off from its prior owner. As I recollect, they had less than a million dollars of real security, $3 million dollars of security from an insurance company that went under. So, it was a tremendous issue, not only for the government who had the regulatory responsibility, but for the self-insured community. As we move forward with the full push and insistence of the former Board of Managers to deal with this issue of self-insurance obligation being solely borne by the self-insured community. So the statutory changes were made in the 2005 election that basically transferred into the Old Fund certain liabilities, including the liability I just alluded to.

The former agency – and I hope Mrs. Kiss agrees – my recollection as being a participant was that we had expectation that the Security Fund, when that fund was created and became effective for all dates of injuries of self-insured claims on June 30, 2004 and back in time – would be fully secured. As we move forward, the former agency even implemented a plan to increase security from those who could financially afford it, and even within that plan there were cash contributions when other forms of surety was unavailable. But the goal was clearly enunciated by that prior group of Board of Managers that the Security Fund would be fully secured. When the Guaranty Fund then became responsible as a cash pool for all obligations on or after July 1, 2004 going forward, we would go forward with high confidence that we had a fully funded – as that term can be defined – fully funded Security Fund. And that we would not anticipate unanticipated liabilities being identified later, as unfortunately has happened in this case.

The way the agency has handled this communication I think has been exemplary. But there is a great deal of angst in the self-insured community which remains and is active in our association now that there is uncertainty about what may lie ahead in this fund as we go forward. And, again, these are obligations for claims that were incurred on or before June 30, 2004. As we go forward, our association urges you in your opportunity to talk about these proprietary issues with the agency's leadership that you get full information. We understand that we can't be a party to that information, and that you and others will know about the financial capability of certain entities that are

currently self-insured. And we recognize there is no exit strategy. There's no good option for the agency to push someone out who isn't financially capable of not presenting a risk, and the very act of doing that could create a significant business challenge. At the same time, as a whole group, self-insurance is an option that you still have a number of major utilities, a number of major coal companies, a number of major manufacturers, a number of major retailers doing business in this state who have continued to directly pay their obligations and to secure those obligations. Even though the insurance market continues to offer alternatives to self-insurance that on any given day might be more attractive to some risk managers, the fact is there's a significant employment represented by those retailers. We're talking WalMart, Kroger, Lowe's, and others that are commonly known in every shopping center – Dow Chemical, the major coal companies, American Electric Power, First Energy. So, these are not employers that are insignificant to West Virginia. But as I said, no one is unprepared. The law was intended in a way so that unsecured risk, if it can't be helped, will be the responsibility of self-insurers on a going forward basis. The problem and angst associated with that is that you all know the information, and we don't. You know the risk that may be there, and we don't. It's not a comfortable position for some of these companies to be in as they evaluate whether or not they should remain self-insured in West Virginia.

It was always kind of one of the great ironies of life for me is the very member of the Board of Managers who pushed this the hardest was a member of an organization that had 20 companies in the United States, 19 of which were self-insured, but only in West Virginia where they are subscribing to the Old Fund. And he was the proponent of making sure there was a clear wall between the self-insured community and the non self-insured community. And each year as we go forward it is important for the self-insured community to have a high degree of confidence that there won't be any unsecured liability identified on those older claims in the need for that.

We know this issue isn't going to go away with respect to the present default. But we hope that this dialogue will continue. We are very concerned about the division of municipal and non-municipal obligations. We know that there will be opportunity for future discussion. I will end now by just saying that institutionally we are appreciative of how that was handled. We want you to know that. At that same time we hope that you will investigate this issue so that you are comfortable, that you know what's out there as well in terms of potential other unsecured security fund obligations. Thank you.

Chairman Dean: Mr. Dissen, do you have any questions for Mr. Bowen?

Mr. Dissen: Maybe at some point the Council could be briefed on this. Thank you.

Chairman Dean: Mr. Hartsog, do you have any questions?

Mr. Hartsog: No, I'm good. Thank you.

Chairman Dean: Mr. Marshall?

Mr. Marshall: I appreciate the remarks. I feel as though the Commissioner's staff has basically kept us well informed on a case-by-case basis. At some future meeting it might be worthwhile to us to hear a general overview and perhaps a longer term perspective. We generally dealt with specifics from time to time. And, again, I want to say I feel like we are kept well informed. But I think in connection with Henry's remarks, it would be appropriate if maybe we could take a longer lens look at this sometime in the near term.

Chairman Dean: Senator McCabe, welcome. Do you have anything today, sir?

Senator McCabe: No. I'm just glad I made it in time.

Chairman Dean: Does anybody else from the general public have a comment today?

5. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business?

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Senator McCabe, do you have anything you would like to bring up?

Senator McCabe: No, sir.

Chairman Dean: Commissioner Riley, do you have anything?

Commissioner Riley: No, sir.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

6. New Business

Chairman Dean: We'll move onto new business. Does anybody from the Industrial Council have anything they would like to bring up under new business?

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Senator McCabe?

Senator McCabe: No, sir.

Chairman Dean: Commissioner Riley?

Commissioner Riley: No, sir.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

7. Next Meeting

Chairman Dean: The next meeting will be Thursday, March 21, 2013 at 1:00 p.m. Does that meet everybody's schedule? Very good.

8. Executive Session

Chairman Dean: The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session. Is there a motion to go into Executive Session?

Mr. Marshall: So moved.

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded. Any question on the motion? All in favor, aye. All opposed, nay. The aye's have it. Motion passed.

[The Executive Session began at 3:18 p.m. and ended at 3.44 p.m.]

Chairman Dean: We have reconvened back to the regular session of the Industrial Council meeting. Is there anything else that needs to be discussed in regular session? Is there a motion to adjourn?

9. Adjourn

Mr. Hartsog moved to adjourn. The motion was seconded by Mr. Dissen and passed unanimously.

There being no further business the meeting adjourned at 3:45 p.m.