

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

FEBRUARY 16, 2012

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, February 16, 2012, at 1:00 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

1. Call to Order

Chairman Bill Dean called the meeting to order at 1:00 p.m.

2. Approval of Minutes

Chairman Bill Dean: The minutes have been distributed. Is there a motion to approve the minutes as stated?

Dan Marshall made the motion to approve the minutes from the December 7, 2011, meeting. The motion was seconded by James Dissen and passed unanimously.

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

Judge Rebecca Roush: Good afternoon. You should have a copy of our report. I wanted to give you an update on some changes going on in our office that impact this report. In the month of January we started using a new Case Management Program which was custom built by the OIC's IT Department specifically for our needs.

On January 13th we began implementing a data conversion from our database to our new database. That data conversion took about ten days. During those ten days our office was essentially non-operational with regard to processing incoming documents. The only employees that were able to work were our judges. They continued to work on decisions, but no incoming mail could be processed. Following

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that ten days there were some issues with the data conversion. We continue to work through a number of glitches and bugs in our system. As we speak, they are still cleaning up residual issues with our data conversion. But we are working through them at a much faster pace than we were when the conversion started.

What are the benefits of this new program? Obviously it is a modern computer program on an updated computer platform. The last time our program was updated was in the year 2000. So obviously a lot has changed in 12 years. Technology has changed quite a bit. And this gives us more flexibility to actually tailor our litigation to our specific needs. It will also allow us to make any changes we need rather quickly because it's on a more modern updated computer platform.

As we implement this change with our Case Management Program this finalizes one of the most important parts of what we've been doing within the Office of Judges. It completely reorganizes the way that we work. As you are aware, prior to me taking over as the Chief Judge, our work was done on an assembly line format and none of the pieces of our office really worked together, and the judge did not get involved in the case until it was submitted for a final decision. They [judges] were never really involved in the discovery process at all, and were just decision writers. Those protests were randomly assigned in our office. So technically you could have a claimant with multiple protests and litigation before our office and could be decided by every single judge that we have. This new redesign allows us to get a case to the judge at the outset of litigation. The cases are assigned by Social Security number so one judge will be familiar with one claimant throughout the life of all the claims that they have in litigation at the Office of Judges. We think this will help us establish better continuity and also give you better final written decisions at the end of the litigation process. Right now our ALJ's have approximately 200 claims in their assigned inventory that they are working on.

One other benefit that is helpful to practitioners is we offer a filtered version of AIMS to them over the Internet. You will now be able to see the documents that are submitted in the litigation from that application that links into our AIMS or our Case Management Program. We think that this will provide a lot of benefits to our practitioners, and hope to see it working well although we continue to work through the glitches in our system. We want to make sure we spread the word to all of our litigants. If you have a claim and you are experiencing some issues you might want to report it to our office ASAP so we can help get it on the right track because our conversion, as we just stated, is not without its faults. We are doing our best to make certain that we dot every "i" and cross every "t." But if you are seeing an issue, definitely report it to us quickly.

That takes care of that, which impacts this report that I've given to you today. This report is for the month of January. It essentially covers January 1 through January 13. So you will see for the month of January we've acknowledged only 273 protests – that's because we were non-operational. In the February report those numbers will pick up and will be reflected in that report.

The statistical analysis – the numbers are essentially what you expect them to be. We have about 60% of all our protests coming from the private carrier market.

Turn to page four – for the year 2011 we acknowledged 5,045 protests, and we project that we'll be around the same number of protests for calendar year 2012.

On page five you will see our pending caseload. As of February 14, there were 3,444 protests in litigation before our office. With regard to acknowledging protests and our timeliness, we are relatively current although you'll see that we have 7.3% protests greater than 30 days. We remind the Council that that is not necessarily an issue reflective of an error on our part. We still experience a number of claims where the claim itself – even though it has a decision entered in it – it was never reported to the Claims Index and a jurisdictional claim number was never established. In those cases we cannot acknowledge it in our system without that jurisdictional claim number [to be established by the OIC]. We work with the carriers and their claims administrators on getting that set up and processed. But that's what that number is reflective of.

Final Decision Timeliness for the month of January – You will see that no decision went out greater than 60 days. We are finally on track to get everything done within 60 days. I will put a word of caution out there. We could see some differences in those numbers next month due to the computer Case Management Program.

Turn to page 14, Petition for Attorney Fees for Unreasonable Denials – That number is still relatively low. For a seven year period we only acknowledged 86 petitions for attorney fees.

The Failure to Timely Act Process – That is rather steady at this point. In a seven year period we had 308 filed, and we regularly receive Failure to Timely Act petitions in our office.

On the next page, Expedited Hearings Scheduled – We did 14 in the month of January. I know the Council is also interested in the number of pro se claimants with

litigation before our office. In the middle of February we had 526 pro se claimants with litigation in our in our office.

The final page – when you were discussing treatment issues – we have never taken this off of our report. This is with regard to treatment. Between January of 2011 and January of 2012 the numbers are essentially the same, around 784 treatment protests in litigation. If you have any questions, I'll take them.

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

James Dissen: Yes. Last year we talked about you trying to fill some of the positions. How are you doing on that?

Judge Roush: We did fill one position with Judge Scott Nuckles. I think Judge Drescher filled you in on that hire in December [2011]. We continue to look for an additional judge to add to our roster. As we've settled down and reorganized our work flow, it actually has increased our efficiency. We don't think we need the total number that we have requested. We have three positions that we have the authority to hire. We think we only need one of those, and right now we are in the process of doing interviews for that position. We also requested permission to post for a Deputy Chief position.

Mr. Dissen: Thank you.

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

Kent Hartsog: On page one where we were talking about protests, I was wondering if maybe you or maybe somebody from the OIC. . .the self-insureds have 10% of the market and the fully insureds, private carriers have 90%. Is there some way that that's looked at as far as who has what percentage of the market in West Virginia?

Judge Roush: I would have to defer to Commissioner Michael Riley and General Counsel Andrew Pauley with regard to how this is reflective of the entire marketplace. This statistical analysis is only used in litigation. So I'm not certain how having 67 protests in January making up 24% of all protests compares to the total marketplace. I'm happy to work with them in trying to get you some information for next month.

Mr. Hartsog: I am just curious if there is some way that you all look at that comparison to see who has what pieces of the market in West Virginia.

Commissioner Michael Riley: When we do our market conduct which we do an analysis of all the companies and all of the writers – not only the writers but also the self-insureds – we monitor the complaints and this data here. So we do have that available. I don't have the answer to your question other than we do look at it, and we can get you something next month.

Mr. Hartsog: In West Virginia. . .just to throw a number out, let's say there is a billion dollars of workers' comp business. Maybe it's \$500 million or whatever it is, and self-insureds are like \$200 million of that piece of business, and fully insureds are like \$800 million or something like that. . .just kind of get a feel. I was just trying to get a picture as to how much business kind of falls within each one of these buckets.

Commissioner Riley: We'll have that at the next meeting.

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

Dan Marshall: No, Mr. Chairman.

Judge Roush: Thank you.

4. Workers' Compensation Safety Study – Ryan Sims

Ryan Sims, Associate Counsel, OIC: Good afternoon Chairman Dean and members of the Industrial Council. I am here to discuss the Safety Study which is required of the Industrial Council every two years. As you probably recall from two years ago, every two years the Industrial Council is required by statute to form an analysis of safety initiatives among the workers' compensation community, private carriers, self-insured employers and analyze it. If you recall, two years ago we performed a basic survey of the top ten carriers and all the self-insured employers as a starting point. We prepared a report out of that for baseline results of what's out there right now.

This year our idea that we are presenting to you is to collaborate with the West Virginia University Safety and Health Extension, which is a program out of WVU. It is basically a unit that is designed to work with both public and private sector employers to improve their occupational safety and health status [work with them on improving their employees' safety and health].

The unit at WVU has 13 safety and health professionals, including five Certified Safety and Health Professionals; eight faculty with Master's Degrees; and two professors with doctoral degrees.

They also have a history with working the former Workers' Compensation Commission. Under the former statutory scheme there was a similar reporting requirement. Through the relationship that our Medical Director, Dr. James Becker, has with Dr. Mark Fullen at the WVU Safety and Health Extension, we were able to contact them and see if they would be interested in working on this year's study on our behalf, given their specialized knowledge, and obviously they have a lot more resources in that area than we do. We approached them about it and they seemed willing. I included in this packet an abstract of their idea of what they want to do this year. It essentially involves taking the same basic survey we did two years ago, maybe tweaking it a little bit; asking similar questions to compare what the answers were two years ago to now; doing some analysis; then sort of turning that into a report; and every two years us partnering with them so we can continue to build from one report to another. Again, they do go through every step that they are proposing for this year. They do things like this for other employers and other groups so they already have an automated survey system. Last year we did the survey on paper. We would send it out to carriers and self-insured employers via an automated system so the appropriate person can answer it and it can be compiled in a more automated fashion.

There is also a budget included in there, and the estimated cost for the proposed budget for the unit doing it. The graduate student time is in-kind. They are including costs for their professors and travel. And they are estimating, of course, which could be a little higher or lower at \$7,476.84, which we think is a very reasonable price for the services and the high level that we expect from them.

Again, from talking to Dr. Becker, he said they gave us very good product when we worked with them in the past, so we do have some experience several years back working with them. That being the case we believe it is appropriate to present this to you since it is your study as an action item. We do have one of the professors there available by phone if you would like to ask him questions. He said to call him if you have any additional questions. If there are additional questions that I would not be able to answer, you can certainly call him and ask him questions. Then I would recommend that the proposed study be put to vote.

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

Mr. Dissen: I don't have any questions.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: Does the OIC have any firsthand experience with these guys of putting something like this together?

Mr. Sims: No. This would be our agency's first time working with them. But we felt comfortable with it because of Dr. Becker, our Medical Director's experience. When he was the Medical Director for the Workers' Compensation Commission he worked with this group on similar types of studies. He was the one that recommended we team up with them. So we felt – based on his experience and him having a comfort zone particularly with Dr. Fullen, head of the program – that it would be appropriate to proceed in this fashion.

Mr. Hartsog: Are they going to provide a draft deliverable to us at some point to review before it gets finalized and given to the Legislature?

Mr. Sims: Yes, absolutely. We are working on a Memorandum of Understanding that would involve them producing a set of deliverables. They would produce us a copy of the proposed survey, then the results of the survey, or a draft report once they've received the data and prepared a draft of the survey. Unfortunately right now they have to run the MOU through their Legal Department. But in essence. . .yes, the time frame is. . .this is ballpark and Sarah might be able to help me with this, but I think their initial report to us is due some time in April. So that would give you time to review the initial report and then if you wanted to discuss with them how it might be adapted, things like that, we would have at least a couple of months before the final report is due.

Mr. Hartsog: I would assume they would be here to discuss the draft report with us.

Mr. Sims: They indicated to us that there would be faculty available from the unit to discuss it here in person, if that is your desire. They would certainly be willing to do so.

Chairman Dean: Mr. Marshall?

Mr. Marshall: I don't have any questions, Mr. Chairman. If it is appropriate I would like to move a resolution to engage West Virginia University Safety and Health Extension to do the Workers' Compensation Safety Study.

Mr. Dissen: Second.

Chairman Dean: A motion as been made and seconded. Any questions on the motion? All in favor, aye. All opposed? The aye's have it. [Motion passed.]

Mr. Sims: I should mention when we do finalize the Memorandum of Understanding I will certainly forward it to you. It is going to be between West Virginia University Safety and Health Extension and the Offices of the Insurance Commissioner. The budgeting is going to come out of the OIC, but it's the Industrial Council's piece of the budget [out of the OIC]. When it is finalized and signed, I will forward it to you.

5. Public Hearing on Title 85, Series 11, "Employer Default, Enforcement, Collections and Related Matters" – Ryan Sims

Ryan Sims, Associate Counsel, OIC: We are here with the Public Hearing for Title 85, Series 11. If you recall we originally presented it at the December meeting. It is a rule dealing with "Employer Default, Enforcement, Collections and Related Matters," essentially the employer portion piece.

We made multiple changes to it. A lot of it was technical cleanup. There are a couple of substantive pieces if you recall. We did receive comments from the Affiliated Construction Trades. We always value their comments on these matters. They have a pretty good familiarity with what is going on in the major sector of our economy. We are certainly reviewing their comments. The one thing I would say is they comment a lot on areas where we do have a lot of discretion in dealing with default employers and when to waive amounts owed or when to enter into payment agreements with employers. I've worked with them versus when to take a more aggressive stance in pursuing an injunction or something like that. It is our position that the Legislature gave us the discretion. So we have crafted this rule in a manner which allows us to address default employers on a case-by-case basis, rather than in a very strict manner and not allowing much malleability on how to address each default employer. That would be our general response because most of the comments of ACT were focused towards, you know, that we needed to draw more bright lines – never allow a second payment agreement or never allow a multiple payment agreement, that type of thing.

We will be providing full written responses to every comment received, and we will provide this to you in advance of the final meeting [by email]. Mr. Chairman, I don't believe anybody else signed up to give public comment today.

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Chairman Dean: We have one. Any questions, Mr. Dissen?

Mr. Dissen: No.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: None.

Chairman Dean: Mr. Marshall?

Mr. Marshall: Not at this time. Thank you.

Chairman Dean: Mr. Bowen, would you like to speak?

Henry Bowen: Good afternoon, Mr. Chairman and ladies and gentlemen. I'm Henry Bowen, Executive Secretary of The West Virginia Self-Insurers Association. We did not file a written comment because we had just planned to make oral comment today at the Public Hearing. I've often said to many people that I could write a book about the history of West Virginia workers' compensation. I'm reminded by Mr. Dissen and Mr. Hartsog that no one would read it if I would write it. So I won't write it. But this rule was first enacted by your predecessor council at a time when the State ran the monopoly system and had an enormous problem of collection. On the part of some employers they simply didn't pay their premiums as required by law. The enforcement was one of the first actions undertaken that modernized the old workers' comp agency before it was terminated, and strong remedial response was granted to the Commissioner, and in fact required of the Commissioner. The Commissioner's hands were tied. As Mr. Sims just said, the Legislature was asked to reconsider the difficulty that tying the hands of the regulator puts the regulator in, in trying to get resolution of these kinds of issues. The systems are so different today. The problems that this agency is regulating with employer accounts are not anywhere like the kind of preceding problems the old monopolistic agency had. And while there was plenty of understanding in the old system, while people had a right to be concerned about who was paying, who wasn't, and so forth, that system is well behind us now. This rule is a modernization and update of the enforcement responsibilities. This agency has enormous election among the remedial choices it makes on enforcement matters. I believe that that's done purposely to give them the flexibility to apply it as they see the application is needed in a given set of circumstances.

Our Association looked at these changes. We agree with these changes. We think that the rule that you have in front of you is a good example of what needs to be

done. Just bring this inline with the current kind of system we have in a fully competitive privatized market. And the kinds of concerns that some people used to have about employers not paying large premiums to the State, they simply aren't there now. Now we're talking about mandated coverage and cancellation of coverages of privatized insurance products that are mandated by law. But it's not the same as people who failed to pay hundreds and hundreds of thousands of dollars to the old Commission and then because of the lack of flexibility the old Commission had no way to reach a resolution. They had to compound interest and everything, and the bills were just astronomical. And maybe that was needed then. It is clearly not needed now. So we urge you accept the staff recommendations as they initially presented to you. And we don't think any additional changes are needed at all. Thank you very much. I'd be happy to take questions.

Chairman Dean: Any questions, Mr. Dissen?

Mr. Dissen? I do not have any.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Thank you, sir. Does anybody else from the public like to speak today on this matter? Is there any approval needed from the Council at this point?

Mr. Sims: No. The approval on the rule would come at the next meeting – for final approval. I'll get the responses to the comments out to you.

Mr. Hartsog: Mr. Sims, there wasn't any changes between the draft that we reviewed at the December meeting and what we have in front of us today, right? I think there was something I saw that said this was undergoing a review by somebody else or something. . .?

Mr. Sims: It was sort of held off so our parent agency could review it – just take a more careful look at it, and they did so. They said it was fine as is.

Mr. Hartsog: Thank you.

6. General Public Comments

Chairman Dean: We'll move onto general public comments. Does anybody from the general public like to comment on anything? [No comments.]

7. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything to bring up under old business? Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good.

8. New Business

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

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

9. Next Meeting

Chairman Dean: The next meeting is Thursday, March 22, 2012, at 1:00 p.m. Does this meet with everyone's approval? Very good.

10. Executive Session

Chairman Dean: The next order of business is Executive Session. 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. Dissen: So moved.

Mr. Marshall: Second.

Chairman Dean: A motion has been made and seconded to go into Executive Session. Any discussion on the motion? All in favor signify by saying "aye." All opposed? The aye's have it. [Motion passed.] We will go into Executive Session now.

[The Executive Session began at 1:33 p.m. and ended at 1:53 p.m.]

Chairman Dean: We are now back in regular session. We have a Resolution before us to approve the self-insured companies recommended for renewal of self-insured status for the 17 employers on Exhibit A. Is there a motion?

Mr. Marshall: So moved, Mr. Chairman.

Chairman Dean: Is there a second?

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded to approve the renewal of self-insured status of the 17 employers. Are there any questions on the motion? All in favor, "aye." All opposed? The aye's have it.

[Motion passed for renewal of self-insured status for the 17 employers.]

11. Adjourn

Chairman Dean: Is there any other business under regular session? Is there a motion for adjournment?

Mr. Hartsog: So moved.

Mr. Marshall: Second.

Chairman Dean: We are adjourned.

There being no further business the meeting adjourned at 1:57 p.m.