

## **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**FEBRUARY 19, 2009**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, February 19, 2009, 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  
Dan Marshall (via telephone)  
Walter Pellish (via telephone)

### **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 were sent out. Has everyone had a chance to look at the minutes from the previous meeting? Is there a motion to approve?

Kent Hartsog made the motion to approve the minutes from the January 15, 2009, 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: Members of the Council and OIC staff, for my report today I would like to tender our customary statistical summary as well as give you an update on some recent initiatives of our office. Before you is the statistical summary of the work being performed at the Office of Judges. We are continuing to see a decline in the number of protests pending before our office. For the month of January 2009 we've acknowledged 568 protests. This is a sharp decline over the monthly protests received in the past few years, with the average monthly protests received being around the 1,500 mark.

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The statistical analysis on the front page of the report also reveals the anticipated trends with our recently privatized workers' compensation market. As expected, we are seeing an overall decrease in the number of protests from the Old Fund while we're seeing an increase in the protests coming from the private industry.

On the second page, protests per calendar year reflect drastic changes in the overall number of protests received in any given year. For 2009 we anticipate receiving around 5,000 protests. As of the end of January, we have 4,285 protests pending.

I would like to put this report in context and give you some reason as to why the Office of Judges reports this statistical information to you on a month after month, year after year basis. Being new to the Office of Judges, we've had the opportunity to reflect on our history over the last 17 years. Our history does reflect a positive impact of a structured and organized appellate body, and I think it's worth emphasizing. For those of you practitioners in the room who have been around long enough to witness the evolution of the Office of Judges you know that it was created in June of 1990 to remedy concerns over the Workers' Compensation Division's alternative dispute resolution process – and largely because there was a high amount of time in turning around contested cases that were pending there. And while we had a workers' compensation system in place since 1913, apparently the early 90's were likened to the "wild, wild west" of our workers' compensation system. Thousands of cases lingered unresolved for years and years, and there were no timeframes for submission of evidence. In fact, there were no procedural rules at all whatsoever. And practitioners more or less litigated by a gentleman's agreement – and I see some of you guys back there laughing about that. So you practiced by a gentleman's agreement, so to speak. To that end the Legislature created the Office of Judges, which began independent review of worker's compensation claims on July 1, 1991. Thereafter the Office of Judges introduced procedural schedules for evidentiary development. They developed an automated case management system, and also developed time standards for governing how a case would evolve from beginning to end – from start to finish. That's the birth of the procedural rules found in 93CSR1 and 93CSR2. And the mandates found in the rule are the foundation for the statistical analysis that you have before you today, and is the reason the Office of Judges reports this information to you on a month-to-month basis.

For the remainder of the report, you can see the numbers with regard to the Acknowledgement Timeliness and the Final Decision Timeliness. You can tell, as of this date, that there really is not a problem with resolving protests before the Office of Judges on a timely basis. So, much credit is given to those individuals who developed and implemented the system that is currently in place at the Office of Judges. However,

with that in mind it's apparent that the needs of our market are evolving, and that once again the Office of Judges is committed to adapting to our industry needs.

The process in place there – as I discussed last month – really is an assembly line process. The original thought behind the process that we have in place was that you get as many decisions going out the door as quickly as possible. Early on in our history the peak litigation was about 30,000 claims at its height in one year being processed in our office. That's a stark contrast to the 4,000 claims that are currently pending there. So with fewer protests pending, the Office of Judges has renewed its commitment to providing quality review of the claims pending before us.

With recent changes in the law in 2003 and 2005, the cases are becoming more complex and are requiring a more sophisticated review of the claim. Over the course of the last two months I've asked the judges to renew their commitment on focusing on "improving the quality" of the decisions coming out of our office, and have overwhelmingly received a good response.

With regard to staffing issues – over the past few weeks we've made some positive changes to our internal process to promote efficiency. And we've made some improvements in the areas of file preparation and hearing process as well as assignments to our adjudicators. We've also been working closely with our IT Department to address some technological issues that are impacting our efficiency. And I'm happy to report that we are making progress on that front. Also, we've been working on providing some education and training initiatives for our adjudicators. Most recently all of our employees had the opportunity to visit the Occupational Lung Center and were given a brief overview of the process that all claimants [who apply for OP benefits] go through when they visit the lung center, and they were given a tour of the facility.

We are also in the process of coordinating a series of medical trainings to be held jointly with the Board of Review on common workplace injuries and medical issues. We anticipate we'll have seven or eight of those medical trainings. And following each of those trainings we anticipate holding roundtable discussions with our adjudicators on substantive legal issues that center around those injuries.

Finally, we anticipate working on strengthening our mediation program which is required by statute. In a nutshell, that's what has been going on at the Office of Judges. More or less it's business as usual – that we are making every effort to create and improve upon our process where we are able to. I would be happy to take any questions that you might have.

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

Kent Hartsog: Just one. When you look at the protests, the volume has gone down tremendously over the last three or four years. Has the staffing stayed fairly consistent, or has it kind of adjusted as people retired and went to other jobs, etc.

Judge Roush: That's a great question. Through the process of attrition the staffing has adjusted to accommodate the amount of protests that we have. At its peak the Office of Judges had about 150 employees processing those 30,000 claims. Currently, including myself, there are 59 employees.

Mr. Hartsog: Excellent answer. Thank you.

Judge Roush: You're welcome.

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

Dan Marshall: No.

Chairman Dean: Mr. Pellish?

Walter Pellish: No questions.

#### **4. Review Anticipated Legislation – Mary Jane Pickens**

Mary Jane Pickens (General Counsel OIC): Good afternoon. I don't have a handout on what we're calling this year's version of the "workers' comp cleanup bill" because it has not yet officially been approved by Revenue. We haven't given anyone a physical copy of it yet. But we've been out and about in the community talking to people about the concepts in the Bill for a number of weeks now. We have met with some labor representatives, some attorneys, some people from the business community and the Chamber, and we've talked about all of these concepts. What we're thinking is not a surprise. And I apologize for those of you in the room who have actually heard this multiple times already. It's probably getting kind of old, but we do have a Bill. I don't consider anything in it to be dramatic or sweeping. Every year we come across issues that just need to be cleaned up, and there's still so much cleanup needed in Chapter 23. But it's almost so much that it would really take a real concerted

effort to do it. So we're just kind of chipping away at it, and this is another effort to chip away at some things that we think need to be addressed.

One of the issues that we wanted to address is the provisions in §23-2-1d, the primary contractor and subcontractor liability. That provision is still in the Code, but it has a subsection that was added to the end of it in the 2005 privatization Bill that said, "Effective upon termination of the Commission [the old Workers' Compensation Commission], this section shall be applicable only to unpaid premiums due the Commission or the Old Fund. . ."

The education that has been provided to us shows that West Virginia is only one of about seven states that do not have some kind of a provision whereby prime contractors who invite subcontractors onto their property don't have any exposure for the employees of an uninsured subcontractor. We've tried to give this a lot of thought. The way we're proposing this is going to be that it will be contingent upon promulgation of a rule so that there is still going to be more opportunity to talk about how it will actually be implemented. But the provision would say, "If a rule is adopted and made effective, then a subcontractor's employees will for the purpose of statutory Chapter 23 workers' comp benefits only be deemed employees of the prime contractor unless the subcontractor has workers' compensation coverage on its employees." And, again, from talking to people in the community I think that your responsible contractors are already on the right side of this and they are already taking the steps necessary to make sure that they don't run into these problems. But we were just concerned by the fact that so many states do have these types of protections. And, of course, we have the Uninsured Employer Fund that we constantly want to make sure remains solvent. We don't want that to be another unfunded State liability, nor is it appealing to assess employers to fund that fund, which would be what would have to happen. Again, more information to come, but that's the general provision and it would be contingent upon going through the rule making process.

The next section is the subrogation section, which is in Article 2A of Chapter 23. Our only concerns there. . .first of all, we thought it was drafted in a way that it was rather confusing about the date on which subrogation could be sought on indemnity as well as medical benefits. What we're doing here is some cleanup. We are cleaning it up in a way that we believe reflects how it has been interpreted. So we are not suggesting any different interpretation of it. The most significant thing in this section for our purposes is that it seemed to contemplate Old Fund subrogation only. It didn't suggest that the Insurance Commissioner had any authority to subrogate with regard to claims in the Uninsured Employer Fund. Again, that's a major concern of ours. We

have addressed and made it clear that the Insurance Commissioner – when it's an Uninsured Fund claim – has subrogation rights.

The next section does relate to the Uninsured Employer Fund, §23-2C-8. The focus there is internal. It's an internal administrative issue that we've dealt with. It's never been entirely clear in that section how a claim procedurally gets into that Fund. And what we've done before is have a bifurcated process in order to get into the Fund. We've done an administrative review and we've made an administrative decision and entered an Order, but that would be an administrative decision outside of the jurisdiction of the Office of Judges. So you could end up theoretically with a situation where that decision could be appealed to the Circuit Court, and it's just problematic. So we have clarified that the Office of Judges has jurisdiction to hear protests to the initial decision to take the claim into the Fund. And that analysis is only, "Was this employer uninsured and was this an employer that should have been insured? Were they required to have workers' comp insurance and did they?" That gets into coverage issues a little. This is sort of a new thing for the Office of Judges, but it will make it so much easier I think for everybody – one place to go to litigate everything and that's the Office of Judges. Again, that's an internal thing that matters a lot to us.

The next section – we consider this cleanup. We're just doing this out of an abundance of caution. Section 23-2C-21 is the Code section that was enacted in the 2005 legislation that says there is no private cause of action that can be maintained by a third party to the insurance contract against the insurance carrier itself. In subsection (b) of that section it says, "Any administrative fines or remedies provided in this chapter – being chapter twenty-three – or rules promulgated by the Workers' Compensation Commission or the Insurance Commissioner are the exclusive civil remedies. . ." We want to make sure that there is no confusion and where it says, "in this chapter," we would like to insert "or chapter thirty-three of this code." Again, just to make it very clear that the Insurance Commissioner has all of her regulatory authority that rests in chapter thirty-three and that this wasn't intended to limit that in any way. We think if you look all around the Code there are all the other provisions about chapter thirty-three applying to workers' comp carriers. We didn't think that this really should be an issue. But because we do not want it to come up in the future we think it's appropriate to make that abundantly clear.

The next section that we're considering is the hearing loss section. It is Article 4, §23-4-6b. There is some cleanup in there – taking out references to the old Workers' Comp Commission and that kind of thing. The only real substantive change would be when it comes to allocation of hearing loss among employers that it says "may" instead of "shall." Right now with occupational diseases and OP the language in the Code is

that the old Workers' Compensation Commission "may" allocate. With hearing loss it says "shall." This would make those two match. As everybody in this room probably knows, the Insurance Commissioner in the beginning of 2006 sent out a notice that allocation wouldn't be done in this State. Our research shows that there are a lot of states where allocation doesn't happen – allocation of claims liability. Our discussions with the insurance industry indicate that they're perfectly happy for there not to be allocation. It generates a lot of litigation. And we feel like this is appropriate to do, and it is consistent with the approach that we've taken for the last three years.

The next section that we would propose to address is §23-5-1, Review. This is the section that was amended last year, and the amendment this year would be to go back in and further change something that we worked on last year. As everyone will recall, last year the Legislature amended that section to address the situation, which is a new situation in our State, where you could have a claimant who has had a previous injury to a body part has perhaps suffered a new injury. It's a little unclear. We have had actual situations between the Old Fund and BrickStreet where it has been difficult to sort all of that out. The Insurance Commissioner's primary concern is making sure that the claimant gets the treatment that he or she needs in a prompt fashion. Last year the Legislature put in a provision that says: "If that is the only issue relating to compensability, then the carrier who received the claim needs to notify the Office of Judges and needs to start making conditional payments on the claim, and then the Office of Judges has jurisdiction to sort out who the liable party is." There can be some evening up of the monies later on and that type of thing, but the claimant would receive the treatment that he or she needs.

The amendment this year would take that to more than just when the only issue related to compensability is whether it's a new injury or an aggravation of an old injury. We don't think that it needs to be limited to when that's the "only issue." This is going to cause carriers to have to really think about that issue, which I think is appropriate, and decide whether they want to bring that up again or whether it's just better off for everybody if they accept the claim and go ahead and handle it. There are a few other things in that particular section, but those are just cleanup only, and it's addressing some of those old "30-day protests" that we still hear – you didn't get them all. We're trying to make it clear that last year when we extended the protest period from 30 days to 60 days that we meant that everywhere, and not just in a few different places in the Code.

The last section in our proposed Bill would give the Insurance Commissioner the ability to compromise Old Fund premium tax liability. Right now I think it's pretty clear that the Insurance Commissioner doesn't have that authority. She can waive or

compromise penalties and interest. That's clear. I don't think she really has any authority to settle or compromise old premium tax claims. We've had some situations that have been unfortunate where we haven't been able to work something out with someone who is willing to pay us a reasonable amount of money. We are convinced that that's probably all they could pay. We've had people who had estates that they wanted to settle up. When people want to hand you money it's hard not to be able to take it. So we would propose giving the Insurance Commissioner authority to settle or compromise those Old Fund premium tax claims because the Old Fund is in a runoff mode. We are taking care of the claims that we have, and we need to reduce the claims – the claims that we have against other people need to be paid. This would give her more flexibility. Are there any questions?

Chairman Dean: Mr. Hartsog, do you have a question?

Mr. Hartsog: On the first one you went through with regard to subcontractors. . . two-part question. What has given rise specifically to make this change? And can you walk me through [an example] where that has been an issue, maybe with a little more detail so I can understand it?

Ms. Pickens: First of all, we have a general concern that West Virginia is so different in this regard from other states. It's just a pretty common thing. I think it's probably good public policy and it certainly protects the Uninsured Fund, and we have had some specific instances with the Uninsured Fund. I don't necessarily remember them off the top of my head. But I know there are contractor/subcontractor issues that we've dealt with in the Uninsured Fund that perhaps could have been addressed if this had been the case.

Mr. Hartsog: If "Company A" contracts with "Company B" to do a job and he contracts with another company, "Company C," to do that job – to do a portion of that job – and "Company C" hasn't had workers' comp coverage, then how can they. . .they wouldn't be licensed in the State. I'm just trying to figure out the series. . .what triggers someone performing work in this State that doesn't have coverage.

Ms. Pickens: What triggers. . .? I'm sorry. Say that last part again.

Mr. Hartsog: How can a contractor be working and have a business license, be in business and doing work and not have coverage?

Ms. Pickens: I think it happens.

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Chairman Dean: A lot.

Ms. Pickens: I agree with you. It shouldn't. Hopefully this would address perhaps some of that.

Mr. Hartsog: It's just an individual, unlicensed, and doing business in the State and does some work for someone and he gets hurt. He has no workers' comp coverage, so he is filing a claim and that's going back against the Uninsured Fund. Is that what you're saying is happening?

Ms. Pickens: Right. The claim will eventually end up in the Uninsured Fund if the person was actually working for an uninsured employer. I think if everything worked perfectly and if the relationships with other State agencies were perfect, and everyone tries really hard to make sure that you're not licensing someone that doesn't have workers' comp coverage – but it's just not perfect. Again, this an effort to try to make more headway towards making sure that if you invite somebody on your property – if you're the prime contractor – you would make some effort to make sure that they do have workers' comp coverage.

Chairman Dean: Any other questions?

Mr. Hartsog: There's about a half dozen other workers' comp bills that have been introduced at the Legislature. You probably haven't had a chance to look any of those. But if you have looked at any of them, are there any of them that you consider to be ones that the Insurance Commissioner would support or thinks is a good idea?

Ms. Pickens: I've seen a few. So far the ones that I've seen I don't think are necessary. They may address . . . an effort to address something that has already been addressed in the Code.

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

Mr. Marshall: No, but I appreciate the presentation.

Chairman Dean: Mr. Pellish?

Mr. Pellish: I have no questions.

Chairman Dean: Today in the paper there was something. . . I believe Delegate Webster has a Bill out there. Did you see that one?

Ms. Pickens: Is it about the rule making authority?

Chairman Dean: Yes.

Ms. Pickens: I'm aware of it and I've seen the Bill. I didn't see the article in the paper.

Chairman Dean: Some people had asked about it. I wasn't sure what they were talking about it.

Ms. Pickens: It would dramatically affect perhaps what this Council does. We feel that this Council does a very good job in an extremely public manner of working through the rule making process. What the Bill would do is say that by July 1 of 2010 that would be taken away from this Council, and all of the workers' comp rules would go through the Legislature the way all of our insurance rules and most other State agency rules do. Our concern on that. . .the Legislature in 2005 enacted a process that takes many years to complete. At the beginning of 2006 when BrickStreet became into existence, that wasn't the end of it. And I think everybody understands that. There's still some trigger dates in the Legislation about things that are in the future. The market just opened a little over seven months ago, and we don't know what it's going to look like yet. And until you have more significant participation from carriers that are brand new to our system and to the environment in West Virginia and that kind of thing, we don't know what the needs are going to be. We don't know what we are going to have to do to protect injured workers. We don't know what we are going to have to do to make sure that employers' needs are met and that type of thing. The problem with the legislative rule making process. . .and its fine for many types of rules. We do it with our insurance rules all the time and it's no problem at all. But our concern with workers' comp is that we're still, for a few more years, going to need to react pretty quickly. Even though there is an emergency legislative rule making process, if your emergency happens during fall to winter, there are some technical timing issues that the emergency rule making process doesn't address. It sets you up for a situation where your emergency rule will expire before you can get a legislative rule in its place, and there is always a gap of not having a rule. So the emergency rule making process – while that sounds good – doesn't always fit all situations. What we have today we are very pleased with. We think it works very well. It's what the old Workers' Compensation Commission did, and did it very well with the former Board of Managers. We've basically adopted that process and truly and honestly feel like the rules that go through this Committee get a lot more attention and a lot more eyes looking at them than our insurance rules. There is legislative membership on this Committee for the very purpose of being a liaison with

the Legislature and keeping them informed, and we are reporting monthly to the Joint Committee on Government and Finance. If we have any rules' projects going on in this Committee, we talk to them about that. It is really a very open and accessible process here. We like it and we would like to keep it for a while longer.

Chairman Dean: Thank you.

Mr. Pellish: Mary Jane, if I might comment. Along the lines of what you just said, I think part of our purpose is to provide somewhat of an independent objective look at things. And I remember some situations over the past couple of years that that proved to be very beneficial. It seems to me that the thing is working the way it should work and will continue to work that way. That's the end of my comment. I have a question for you. Would it be possible for you to forward to each of us on the Council a copy of any proposed legislation that is introduced so that we can at least think the thing through? Would that be too much of a burden?

Ms. Pickens: Are you talking about any Bill we find or are you talking about ours?

Mr. Pellish: I'm talking about any Bill that relates to workers' compensation only.

Ms. Pickens: Okay. We can do that.

Mr. Pellish: Thank you.

Ms. Pickens: You made a good point, Mr. Pellish, and I just want to follow up on that too about independent or specialized kind of review and input on our rules. Some of the rules, like Rule 20, are so highly technical. And even though I wasn't involved, it's my understanding that that type of rule was developed over a period of years by the health care providers of West Virginia. We don't want to lose the valuable input of the independent medical experts and the specialists. We want to make sure that injured workers receive appropriate treatment. I have real serious concerns about a rule like that with that degree of technicality going through the Legislature. And it's not that it couldn't work, but I think it's hard to do a rule like that, as big and as complex as it is without having the medical specialists working very closely on it.

Chairman Dean: Very good. Thank you.

Ms. Pickens: The only other thing, under Tab 2, and I apologize for this. . .I was actually relying on Melinda [Kiss] to help me with the answer. Mr. Hartsog had a question about some of the information that we talked about at the last meeting. His

question was whether we could provide a little bit more detail about what appeared to be an increase of about \$11 million dollars for fiscal year 2008 to 2009, and the debt reduction surcharge remitted by insurers. Melinda Kiss and her folks looked at that and the answer appears to be that it was a timing issue. This actually was a 2007 change, not 2008, but it was in Senate Bill 595. There used to be a very short window for the administrative surcharges to be remitted to the Insurance Commissioner. It was changed in 2007, and that resulted in what appears to be the big difference. There is information attached that is like what you were asking about last month, but it's more updated. And I think it shows something that makes more sense.

Mr. Hartsog: One other question, if I may. When do you anticipate being able to circulate the draft of the Commissioner's Bill?

Ms. Pickens: Hopefully very soon. It's our fault, I guess. We had a lot of Bills and Tim Murphy, who is our main "bill drafter," is just working his fingers to the bone getting them all done. This one is being sent over to Revenue today with a final, final. . .we promise it's really final this time, so I would hope by next week.

Mr. Hartsog: Okay. And you'll circulate it amongst us as soon as it's available?

Ms. Pickens: Yes.

Mr. Hartsog: Thank you.

## **5. General Public Comments**

Chairman Dean: Does anyone in the general public have a comment today?

[No public comments.]

## **6. Old Business**

Chairman Dean: Does any member of the Industrial Council have anything under old business they would like to bring up? Mr. Pellish? Mr. Marshall? Mr. Hartsog?

Mr. Pellish: I do not.

Mr. Marshall: No.

Mr. Hartsog: No.

## **8. New Business**

Chairman Dean: Does any member of the Council have anything they would like to bring up under new business?

Mr. Hartsog: When does the OIC plan to bring rules up again and what rules do they plan on bringing up?

Ms. Pickens: The next rules would likely be "Return to Work," and if we have something on "Utilization Review," and possibly a "TPA" rule. We've been focused on other things right now leading up to the Session and it's going to be really busy for the next couple of months, as you guys might know. I can't promise that we'll have something next month, but it's possible that we might have at least one of those rules. And then, of course, after the Session if legislation does pass, we'll definitely have rules.

Chairman Dean: Mr. Pellish, do you have anything under new business? Mr. Marshall?

Mr. Pellish: I do not.

Mr. Marshall: No, Mr. Chairman.

## **8. Next Meeting**

Chairman Dean: The next meeting will be Thursday, March 26, 2009, at 3:00 p.m. here. Does that meet everybody's approval?

## **9. Adjourn**

Chairman Dean: I'll ask for a motion to adjourn. Mr. Hartsog made the motion to adjourn the meeting. The motion was seconded by Mr. Marshall and passed unanimously.

There being no further business the meeting adjourned at 3:46 p.m.