

# **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**JUNE 25, 2009**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, June 25, 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)  
Senator Brooks McCabe  
Walter Pellish

### **1. Call to Order**

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

### **2. Approval of Minutes**

Chairman Bill Dean: We need the approval of the previous meeting minutes. Has everyone had a chance to look them over? Is there a motion to approve?

Kent Hartsog made the motion to approve the minutes from the April 30, 2009, meeting. The motion was seconded by Walter Pellish and passed unanimously.

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

Judge Rebecca Roush: Good afternoon, Mr. Chairman, Commissioner Cline, and members of the Council. I have given you the statistical summary of the work being performed in the Office of Judges. The trend remained the same. For the month of May 2009, we acknowledged 486 protests and resolved 310 protests. As of the end of May, we had 4,134 protests pending. I've also included in this report statistics on some processes that were added by the Legislature in 2005. In the very back you will see some information regarding "Petition for Attorney Fees for Unreasonable Denial," "Failure to Timely Act Petitions," as well as "Expedited Hearings." For the "Attorney Fees for Unreasonable Denials," we've only had 31 of those from 2005 to 2009. For

"Failure to Timely Act," only 94 of those have been filed since 2005. With regard to "Expedited Hearings," since the process was enacted we've conducted 388 expedited hearings. That information is usually not included in this report, and I wanted to call it to your attention because we often have questions about it.

I also wanted to give you an update on some of the recent initiatives that's been going on in our office. Two months ago we discussed hearing venues and reducing the number from 22 to six at that time. We have since added another venue back due to some concern about the Parkersburg area not being covered. We now have seven venues, and the OIC has offices in all of those locations with the exception of Elkins, and that seems to be going fairly well. In general, we do get a lot of requests for hearings. However, most of them are continued at the last minute. For instance, in Charleston within the last month, we had one particular docket that had 14 hearings scheduled, and only two actually went through. A lot of the practitioners are really making use of the deposition, and of course those fees are covered by the OIC if it is submitted into the record as a part of the litigation process. We're not seeing our hearing venues utilized as much as they were in the past.

I wanted to give you an update on the organizational structure that we have in place. As you know, which I've discussed over the last few months, the non-attorney Adjudication Unit has been disbanded, and all of those employees were assigned to Administrative Law Judges to perform more traditional responsibilities. That seems to be going well. I've actually met with all of those employees and judges individually and got updates on how that's working, and it seems to be going just fine. And now all issues are being resolved by Administrative Law Judges. All final decisions are being written by ALJ's, which is a great thing.

Additionally, we still plan to make some changes in our assignment process. Right now the judges receive the claim once it's ready for submission for final decision, which is at the end of the litigation process. We want to change it to the beginning so that the judge has some familiarity with the claim so that they actually rule on the motions, receive the evidence, and conduct the hearings. I think it will actually result in a better more balanced written work product – better decisions coming out of our office. We can't actually make that change due to some programming issues. Our IT Department is going to have to upgrade our database, which is estimated to take 10 months. So, we're in the process now of deciding whether we can actually make those assignment changes manually, which I think would result in some human error, rather than waiting on the automated process. Maybe the IT Department can get it done a little quicker. I'm not certain. We're on hold with regard to changing our assignment process with the judges.

Now that we've moved away from the writing team and the non-attorney Adjudication Unit, we are in the process of establishing some criteria for evaluating the judges' decisions in a role of quality assurance. So, we're going to spend some time establishing some criteria and setting some perimeters to evaluate whether our judges are actually doing a good job in reaching the final conclusion that they've reached in their decisions – making sure that their analysis is accurate under the law.

Also, we are in the process of organizing our annual meeting, which is scheduled to take place in late summer. This will give us an opportunity to educate our judges on "substance of legal issues" and also address issues relating to the *ALJ Code of Conduct and Ethics*, and issues such as bias, which are important to not have in our system. We're planning that for late summer, and I've extended invitations to several speakers. I've asked the Supreme Court of Appeals to send a Justice to speak to our ALJ's. Hopefully, they will be receptive to coming to speak to us at our annual meeting. That's all I have for today. I would be happy to take any questions.

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

Walter Pellish: No questions.

Kent Hartsog: No.

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

Dan Marshall: No, Mr. Chairman.

**4. Initial Presentation of Amendments to Rules 1, 9 and 32 – Ryan Sims To File for Public Comment/Public Hearing**

**Title 85, Series 1, "Claims Management and Administration"**

**Title 85, Series 9, "Workers' Compensation Uninsured Employers' Fund"**

**Title 85, Series 32, "State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business to or with an Employing Unit in Default of its Workers' Compensation Obligations."**

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Ryan Sims (Associate Counsel, OIC): Chairman Dean and members of the Industrial Council, good afternoon. We're presenting to you today three Title 85 rules and requesting permission to initially file them with the Secretary of State for public comment for 30 days. The first rule is Title 85, Series 1, Claims Management and Administration. This is probably a rule that you are familiar with. It's been here a couple of times. As a result of Senate Bill 537, and the changes specifically pertaining to travel reimbursement for claimants, we have to make a change to one section in the rule – just a change to the section of that rule that pertains to travel reimbursement, and have this be a limited amendment for that purpose.

The second rule is Title 85, Series 9, Workers' Compensation Uninsured Employers' Fund, which is the rule that addresses the Uninsured Employer's Fund. Again, because of the changes in Senate Bill 537, specifically one change addressing subrogation issues and another change which addresses the process of initially accepting or denying the Uninsured Fund and switching that jurisdiction over to the Office of Judges, [previously was the Insurance Commissioner's Hearing Examiner]. We have to make a couple of changes to Title 85, Series 9.

The last rule we are presenting is Title 85, Series 32, which is a rule that has to do with cooperation between the Insurance Commission and other agencies for enforcement purposes, specifically working with other agencies to appropriately revoke licenses, permits or certificates, that type of thing, when an employer is in non-compliance with the workers' compensation obligation. Rule 32, this actually hasn't been worked on since 2005 before the duties transitioned over here. So, it's focused towards stylistic, technical and procedural cleanup, and there are no substantive changes in Rule 32. With that, I present to you these three rules and ask you for permission to initially file them with the Secretary of State's Office for a 30-day public comment period, concluding with the Public Hearing at the July 30, 2009, Industrial Council Meeting.

Chairman Dean: Is there a motion to approve Ryan's recommendation?

Mr. Hartsog: So moved.

Chairman Dean: Is there a second?

Mr. Pellish: Second.

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Chairman Dean: A motion has been made and seconded to file for public comment and public hearing. Any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The aye's have it. Motion passes.

[Title 85, Series 1, 9 and 32 to be filed with the Secretary of State's Office for public comment for 30 days, followed by a Public Hearing on July 30, 2009.]

Chairman Dean: We will move onto the Worker's Compensation Travel Reimbursement Memo. Are you going to handle that too, Ryan?

Mr. Sims: You have enclosed within your packet a memorandum pertaining to travel reimbursement, and specifically the fiscal effect that it will have on the workers' compensation system as a result of the Legislature's decision in Senate Bill 537, which will become effective on July 10, 2009 – to permit travel reimbursement at the State rate to all claimants for any type of travel, whether it be for treatment or for an ordered examination. Those figures are enclosed under the fifth tab [of your packet] for your review. There are some details in there regarding how it will affect workers' comp loss costs and how it will affect the Old Fund and that type of thing. Mary Jane [Pickens] prepared that memo. You can review it and if you have follow-up questions either at this meeting or the next meeting, feel free to ask.

Chairman Dean: Mr. Pellish, do you have questions?

Mr. Pellish: I do. I'm greatly concerned by this change. Let me say at the outset that I think anyone dealing with a workers' comp claim should be fully reimbursed and not suffer. I'm concerned as to whether or not there are some controls that are going to be used to administer against this to make sure there is not abuse. And I'd welcome any comment you would have.

Mr. Sims: I think if you look at the version we have in Title 85, Series 1, [that we just received permission to file], it is very clear from the legislation that the Legislature has mandated that claimants are paid for treatment. But we do attempt to tailor that rule such that. . .I don't know if "control" is the right word because it's pretty unambiguous. What the Legislature did, they made it very clear that claimants get the full rate. We do have some things geared towards efficiency, such as clarifying that there has to be a balance of at least \$100.00 before the claimant gets reimbursed, or at least three months past before the insurer has to cut a check. It also clarifies in there that it is based upon the shortest practicable route, and that's actually language taken from the

State travel rules. We just mirrored the State travel rules so there can't be abuse. For example, if the claimant decided to take a longer route to get more mileage reimbursement. To an extent – within the law – we're trying to make it as easy as possible for carriers to transition over to this. But aside from that, I think the only controls would be the normal controls that carriers, TPA's and self-insureds have. If what you're talking about is potential fraud, I think those controls are already in place. Not just with travel reimbursement, but more broadly with our Fraud Unit.

Mr. Pellish: I realize we just approved the filing of this. But I think you folks need to take a close look at this because I think there is a strong potential for fraud. You don't want to set up all kind of traffic lights, but I just want to make sure somebody is on top of it because Section 15 is a little bit vague. I want you to take another look.

Mr. Sims: Are you talking about as drafted in the new version or in the old version?

Mr. Pellish: Just to provide some assurances to everybody that we are exercising good fiduciary responsibility here.

Mr. Sims: Sure.

Commissioner Jane Cline: I think that really what you will see from an insurance carrier's perspective, they will have fair checks and balances in place, much more than you would have had in the old Workers' Compensation Commission. And then, too, our third party administrators will as well. I think that's part of the issue. . .that you've heard the horror stories about someone driving to Myrtle Beach to get treatment, and I do believe those kind of things did occur from everything we've been told. I see some people familiar with that. We, as the fiduciary responsibility to the Old Fund, have that in place. Insurance carriers and third party administrators that are already in the business are much more accustomed to doing this.

Mr. Sims: If the concern is something specific like the Commissioner mentioned, I would emphasize in the rules very clear – it has to be “authorized treatment.” It is pretty rare that somebody is going to be authorized to travel very far from their home for a treatment appointment. So, I'll point that out. The rule is very clear that it has to be “authorized.”

Mr. Pellish: I just want to be comfortable that we stay on top of it.

Commissioner Cline: Right. And I think, too, that's also why the leeway of not cutting a check for a ten mile trip. . .being able to accumulate that before you would have to actually write a check, because you can't write a check for \$10.00 anymore. Some of those things are being considered in this as well.

Chairman Dean: Any other questions, Mr. Pellish? Mr. Hartsog?

Mr. Hartsog: With this increase. . .obviously it will lead to a slight increase in rates. I was wondering if we had anything that showed where West Virginia stacks up competitively amongst the other states with regards to insurance rates by category, classification?

Mr. Sims: By loss costs?

Mr. Hartsog: Well, no, particularly in total for the rates, classification, loss costs. . . detail as much as whatever is available. I've seen a couple of surveys that are out there. I don't know how much credence to put into those because you never know what is behind them. There is one out of Florida. There is one out of Oregon. And actually I think they show West Virginia at two different extremes with regard to workers' comp costs. Does the NCCI provide that? Could we get that and have some discussion or a presentation in that regard?

Commissioner Cline: Yes, we can do that. NCCI can provide us general information on where we compare to other jurisdictions. We have actually looked and had conversations with the people that did the Florida study and the Oregon study. I would suggest to you that the factors that they used were not all relevant because I think on the Florida study they were relying on some of the numbers that were reported by BrickStreet in their first year. If you look at their financials in the first year, it is skewed by the surplus note monies in trying to figure out how to report those monies. So that's skewed. . .the Florida study. . .and the Oregon study, too, has us on the very low end which is not correct either.

Mr. Hartsog: If we could see some more objective information with regard to other states and where we stack up because I think NCCI handles most other states.

Commissioner Cline: Right. They are the largest statistical agent. I think 36 or 37 states.

Mr. Sims: Well over half.

Commissioner Cline: They have done that for us from time to time. We've asked them to compare for us, but I don't want to give the wrong quote here without refreshing my memory on that. On the Florida and Oregon study. . .yes, I do recall the Florida study. On BrickStreet's first financial filing it was skewed by \$200 million dollars.

Mr. Hartsog: Is that a 30-day request or a 60-day request?

Commissioner Cline: I don't think it would be any more than 60 days. In fact, I think we can probably get it sooner than that. We'll have a conversation with Tonya Gillespie (Rates & Forms) as soon as we leave here.

Mr. Hartsog: Thank you very much. I appreciate that.

Chairman Dean: Anything else, Mr. Hartsog?

Mr. Hartsog: No, sir.

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

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Thank you, Ryan.

Mr. Sims: I do have one other thing. I would like to introduce Brandolyn Felton, Associate Counsel. Ms. Felton is an attorney we've hired recently, and she is going to be helping me out with some of these Title 85 rules, particularly the ones that are geared more toward claims. She is one of our claims and benefits experts. You will be seeing her up here in the near future. I just wanted to introduce her.

Chairman Dean: Very good. Welcome!

Brandolyn Felton: Thank you.

Commissioner Cline: She is primarily working totally on workers' compensation initiatives, settlement initiatives, and a number of those kind of things.

Mr. Sims: Ms. Felton recently worked for the Attorney General's Office, Claims Defense Division, which defends Old Fund claims.

Commissioner Cline: You didn't introduce your intern.

Mr. Sims: Ashley Young is our intern [law student]. She just completed her first year at West Virginia University College of Law, and she is working with our Legal Division.

Chairman Dean: Welcome!

Ashley Young: Thank you.

**5. General Public Comments**

Chairman Dean: Does the general public have any comments today?

(No public comments.)

**6. Old Business**

Chairman Dean: Does anyone on the Council have anything under old business to discuss today?

**7. New Business**

Chairman Dean: Does anybody have anything under new business from the Council today?

**8. Next Meeting**

Chairman Dean: The next meeting will be Thursday, July 30, 2009, at 3:00 p.m. at the same location.

**9. Executive Session**

Chairman Dean: The Executive Session has been cancelled for today. I'll take a motion for adjournment.

**10. Adjourn**

Mr. Hartsog made a motion to adjourn the meeting. The motion was seconded by Mr. Marshall and passed unanimously.

There being no further business the meeting adjourned at 3:26 p.m.