

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

NOVEMBER 19, 2009

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, November 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
James Dissen
Kent Hartsog
Dan Marshall
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: We need approval of the minutes from the October 15, 2009, meeting. Is there a motion to approve?

Dan Marshall made the motion to approve the minutes from the October 15, 2009, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

Chairman Dean: We have follow-up on the NCCI Loss Cost Comparison. Mr. Kokulak is on the phone with us today.

3. Follow-up on NCCI Loss Cost Comparison – Dennis Kokulak (via telephone)

Dennis Kokulak (State Relations Executive, NCCI, Boca Raton, Florida): For a quick recap, if you recall, we were asked to provide some information as to where West Virginia stood with respect to all 37 NCCI states as far as the loss costs – the average loss costs in the state. And that original number was 1.55, which placed West Virginia 13th lowest among the 37 states. What we did at that point. . .that number didn't reflect underground or surface coal because [inaudible, phone cut out]...operations and we didn't want to skew the number. What we did last time, we included that same

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comparison but we included underground and surface coal. The current loss cost is 1.92, which is 13th lowest among the 37 NCCI states. When I was at the last meeting there was a request to reflect the surcharges – the debt reduction and the regulatory surcharge. And we had not done that because those are unique to West Virginia. I can do it from a standpoint with the numbers, but we're moving away from kind of an apples-to-apples comparison with the loss costs. The bottom line – when you do apply the debt recovery of regulatory surcharge amounts to the average loss costs in West Virginia it moves it from 1.9 to 2.20. That would be 24th lowest of the 37 states. Depending on whether you're half full or glass half empty guy – 24th lowest – you are also 13th highest is another way to look at that.

Again, average loss costs – and I understand the reason that you wanted it because you want it to reflect what the true cost is to the employer. So the true cost would put it at an average loss cost of \$2.20, which is if you ranked NCCI states from lowest to highest would put it in at number 24. You would be at the same loss cost level as Connecticut for instance, which also has a \$2.20 average loss cost, and again without those surcharges. That's all I have because I think that's all you were asking.

Chairman Dean: Any questions for Mr. Kokulak? Mr. Dissen?

James Dissen: None, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: Would it be possible for you to send us a one-pager that gives us the information that you just mentioned?

Mr. Kokulak: Yes. I can prepare a written summary. Mary Jane, should I forward it to you?

Mary Jane Pickens (General Counsel, OIC): Yes. That would be fine.

Mr. Kokulak: Okay. I'll get that to you by early next week.

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

Mr. Marshall: No questions.

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

Walter Pellish: No questions.

Chairman Dean: Mr. Kokulak, thank you, sir.

Mr. Kokulak: Thank you.

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

Judge Rebecca Roush: Good afternoon. We've been very busy at the Office of Judges. I want to go over the Industrial Council report. We've been receiving a lot of requests for information on our litigation numbers, in light of the fact that the Legislature had a committee meeting which discussed workers' compensation issues. I don't know if you can see this that well on this slide [power point presentation]. With regard to the number of protests acknowledged for the month of October, we had 424, which brings our year-to-date total to 5,310 protests acknowledged by our office; 24% of those are Old Fund protests; 49% of those are from private carriers; and 26% of those are from self-insured employers. Again, these trends remain the same as we've discussed in the past months. We see them leveling out. This number is actually going to be a little higher. We think we will have around 5,800 protests acknowledged by our office for calendar year 2009.

The pending caseload – at the end of October we had 4,021 cases pending; compared to 12 months prior we had 4,600 cases. It looks like this chart is skewed a little. When we transferred it over it may have thrown the numbers off a little bit. The remainder is our compliance numbers which are well within the rules.

Final decision timeliness – we have 90 days once a claimant submitted for final decision to decide that protest. We reach that 98.8% of the time, well within the Procedural Rule.

Our time standard compliance for year 2009 is 89.3% which is well within the rule, but there is room for improvement. It will improve. This is reflective of some of the changes that are going on in our office with regard to improving the quality of our work. And we've switched some job responsibilities which I think has resulted in this number being a little lower, but still well within our rule compliance requirements. That is our report for the month of October. Do you have any questions about the numbers with regard to litigation?

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

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Mr. Dissen: No, I don't.

Chairman Dean: Mr. Hartsog? Mr. Marshall?

Mr. Hartsog: No.

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Pellish, do you have a copy of this report?

Mr. Pellish: Yes. I have no questions.

Judge Roush: I wanted to also share with you the information that we passed out to the attendees at our workshops, which were very successful. We had two workshops – one in Morgantown and one in Charleston at the beginning of month. We had 139 attendees at the Charleston workshop and 53 attendees in Morgantown. We went over a number of issues, including an update on the legislative and rule amendments. We discussed the §23-5-1 disputes between carriers' process. We discussed the grievance process. We also discussed the expedited adjudication and timely act process. We gave some practice pointers, particularly to the practitioners who were in our audience. It seemed to be well received. At that workshop we also gave an update on the two cases that were recently decided by the Supreme Court. I gave you a copy of those decisions – the *Williby* case and the *Bowers* case. The one that is probably the most controversial is the *Bowers* case, which the Supreme Court made some comments upon their provision of Rule 20 related to adding psychiatric components to a claim. If you have questions after you review the cases, please let me know and we'll be happy to help.

At the last meeting you asked for information on the expedited adjudication process, and we prepared a short presentation on that for you. Judge Rodak, who is here today, actually gave a presentation to the attendees at the workshops. This is a modification of her presentation.

The statutory authority for the expedited adjudication process is found in West Virginia Code §23-4-1c(a)(3). It states that any party can object to an order of the Insurance Commissioner, a private carrier, or self-insured employer, whichever is applicable, and obtain an evidentiary hearing as provided in West Virginia Code §23-5-1. Our three specific types of issues that can be put in an expedited process: If the successor to the Commissioner, other private carriers, self-insured employer fails to

timely issue a ruling upon any application or motion as provided by law or if the claimant fails to timely protest the ruling of a self-insured employer, private carrier, or other issuing entity denying the compensability of the claim, denying temporary total disability benefits, or denying medical authorization, then the Office of Judges can provide a hearing on an expedited basis as determined by our rule. What that means essentially is if a claimant files a timely protest to a ruling in one of these types of categories, they can ask for an expedited hearing. It has to be related to denying the compensability of the claim, denying TTD, or denying medical treatment. Senate Bill 537, which was effective July 10, 2009, deleted the word "initial," so all temporary total disability benefit issues can go through the expedited process.

Just a little background. . .these are our traditional evidentiary time frames. For a compensability issue, traditionally it takes 90 days for the parties to develop evidence on that issue. We have a rule which requires us to complete the litigation of the issue within six months from the time it is filed. For temporary total disability benefits, traditionally that is also a 90-day evidentiary time frame issue for the parties, so there's a 90-day discovery period, and treatment is a 45-day evidentiary timeline. When the Legislature put the expedited process into place, Judge Leach at the time said, "Well, it needs to be quicker than these that are already established." So they put in place a rule following the amendment to §23-4-1, and there's been subsequent amendments to this provision.

In 2003 this was a process that was exclusive for self-insured employers related to the issue of compensability only. In 2005 the statute was amended to include all carriers and the three specific issues that we discussed. Then in 2009, of course, it was amended to reflect that it would include all TTD denials, not just initial TTD denials.

This is our rule found in 93CSR1. The claimant has to elect an expedited hearing within 15 days of the acknowledgement and time frame order. This does not include OP cases, hearing loss, or any issue identified by the Office of Judges to be complex. The hearings are set within 45 days either in Charleston, Beckley or Fairmont. Each party will be able to present testimony or evidence, but it is limited to 30 minutes per side. The judge has some discretion, and whether to extend the scheduling to allow additional evidence.

The time frame for receipt of evidence will expire on the date of the hearing. The evidence must be submitted prior to or at the hearing itself. Closing arguments are accepted, and they can be submitted ahead of time. These hearings are rarely continued. And if they are continued we generally want the agreement [of the parties] to take it out of the expedited adjudication process, and these are only granted for the

most compelling of good cause. Following the hearing the judge submits it for a final decision, and the decision will be issued within 30 days of the hearing. The Failure to Prosecute Rule applies to the expedited adjudication process.

The number of expedited hearings that we've had since this statute was created – in 2005 there were 159, but that also includes the self-insured period where it was exclusively done for self-insured employers. In 2006 there were 52; in 2007 there were 68; in 2008 there were 65; and to date this year there have been 76.

This is how it breaks down – the most litigated issue is compensability. Initially when Mr. Hartsog asked why we had a “bump, an increase” in the expedited adjudication we thought it might have been the amendment to the statute that changed it from “initial TTD” to “all TTD,” but of course you could see we've not had any TTD issues go through the expedited process. Most typically it's a compensability issue that gets litigated this way. And we've had 22 claimants who were pro se navigating this system on their own.

This is compared to our totals – how many claims potentially could have gone through the expedited process – and this is the number: 2,479 potentially could have went through; and 76 actually went through the process. This is how it breaks down. Judge Drescher put together these numbers for us. This is the actual number of expedited hearings that we've had. This is the potential for each month as they broke down. In the month of January we had one treatment issue go through the expedited process out of 116, which were potentially to go through it. As the totals break down, to date for this year, 15 protests went through this process related to treatment; and there were 1,103 treatment cases in litigation, so it's 1.3%. We've had no TTD issues; 61 compensability issues out of 840, so it was 7.2%; for a total of 76, or 3% of all protests litigated in our office. Are there any questions about the expedited adjudication process?

Mr. Hartsog: Well, did you come to any conclusions about the “bump?” Why? Or is it just one of those things?

Judge Roush: To me it doesn't seem all that high. I have no speculation as to why. Judge Drescher, Judge Rodak, any comments?

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

Mr. Dissen: No questions.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

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

Mr. Pellish: No questions.

5. Follow-up Discussion of Safety Overview – Ryan Sims

Ryan Sims (Associate Counsel, OIC): Good afternoon, members of the Industrial Council. This is a follow-up today. During the last meeting when we did our initial presentation regarding the report that is due July 2010 on workers' compensation safety initiatives, it was requested that we survey some other states to see if there's any study reports out there. We surveyed some field experts and surveyed other states' workers' compensation departments. I wrote a summary of what we received along with all the relevant data we received. It's normal with surveys like this where a lot of the states actually don't respond. We received seven responses. I should clarify. . . I only gave you five actual documents because two of the responses were sort of general, "Here's our website. No, we really don't have any studies or reports." I did not include those. The five responders were Colorado, Connecticut, Minnesota, Utah and Washington, and they responded with different studies/surveys. Most of them were not relevant. They were much too specific or not really directly on point to what we're looking at. Probably the most relevant thing we received was a general survey. In other words, the questions that were asked by a survey that Minnesota did were targeted to 120 employers which received safety grants and things like that. As far as you all looking through this information, I would take a look at the Minnesota report. It is about 10 pages of detailed questions. What kind of safety programs do you have? How they interact with OSHA; state safety programs, etc.

In the second to last bullet point, we prepared three areas that we think would be best as far as focusing on this report on gathering data: (1) from NCCI regarding scheduled debits and credits related to safety and loss. If you recall, Dennis Kokulak said it would be fairly easy for NCCI to put together data on how many employers in West Virginia received debits or credits related to safety aspects as part of the scheduled rating program that carriers in West Virginia have; (2) surveying West Virginia carriers who are writing business regarding the extent to which their insured employers utilize safety programs that are offered to them. I know during the last presentation that major carriers in West Virginia do offer safety initiatives to their

insureds free of charge. Again, we think a survey of how many of your insureds actually take advantage of those types of things; and, (3) a survey of self-insured employers regarding safety and loss programs currently in place. Currently when we approve a self-insured employer they have to have a safety and loss program in place, but we don't do a continual update of checking up on their safety programs. If you want, we can put together a request for data along these lines and then present them to you at the January meeting. And, of course, we would be open to any other options if you want to pursue them. I would be glad to take any questions.

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

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

Chairman Dean: Mr. Hartsog? Mr. Marshall?

Mr. Hartsog: No.

Mr. Marshall: No questions. That seems like a useful framework to proceed with.

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

Mr. Pellish: No, sir.

Chairman Dean: Very good. Thank you, Ryan.

6. General Public Comments

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

7. Old Business

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

Chairman Dean: Mr. Dissen? Mr. Hartsog? Mr. Marshall?

Mr. Dissen: I do not, sir.

Mr. Hartsog: No.

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Pellish, is there anything you would like to bring up?

Mr. Pellish: No, sir.

8. New Business

Chairman Dean: A schedule for next year's Industrial Council meetings was handed out. The three meeting dates scheduled so far are: Thursday, January 14, 2010; Thursday, February 18, 2010; and Thursday, March 25, 2010.

Ms. Pickens: One of the reasons why we only scheduled three months is because at the end of the Session they will do their interim schedule, and we didn't want to bump up against any problems there, which weren't a problem until they changed their interim schedule.

Chairman Dean: That's fine with us.

Ms. Pickens: That is a problem because it interferes with us being here, as well as the legislative members. If this much ahead works with you, then after we receive the Legislature's interim schedule for 2010, we'll start working with the rest of their dates.

Chairman Dean: Is that good with the Council?

Mr. Marshall: It's good with me.

Chairman Dean: Mr. Pellish, do those dates work with you?

Mr. Pellish: Makes sense to me.

Chairman Dean: Very good. The other thing under new business – we really haven't talked about this – we need to elect a Chairman amongst us since Chairman Bayless left. We have his replacement now so we need to have a Chairman, a Co-Chairman, and a Secretary, which we've never had.

Ms. Pickens: The rule contemplates a Secretary.

Mr. Marshall: Mr. Chairman, is that a matter that should be scheduled on the agenda for the next meeting, or is that something we could deal with here and be within the rules?

Ms. Pickens: I take responsibility for this because I've spoken with Mr. Dean at the last two meetings about putting it on the agenda, and it's my omission when Joy and Margaret dutifully send around the requests for agenda items. I apparently had forgotten once again to put it on the agenda. I don't know that I know absolutely the answer, but I guess I would tend to feel that it should be a "noticed" agenda item.

Chairman Dean: That's very good.

Mr. Marshall: I think so.

Ms. Pickens: I would be more comfortable that way.

Chairman Dean: I know that you and I have spoke about that for quite a few months, and we were waiting on Mr. Bayless' replacement, so I thought we better discuss it today.

Ms. Pickens: I do apologize. I promise you it will be on the next agenda.

Chairman Dean: Not a problem. Does the Industrial Council have anything else under new business?

Mr. Hartsog: I would like to ask Mary Jane if she could take a minute and brief us on the Joint Judiciary Committee hearing last Tuesday evening?

Ms. Pickens: Sure. I don't have notes or anything. I actually thought that I was going to be at the Joint Committee on Government and Finance. I didn't plan on being here, and then I just found out a short time ago that it was cancelled.

Mr. Hartsog: If you want to wait until next time, that's fine. . .whatever your preference.

Ms. Pickens: There were a number of speakers. It was a two-hour meeting and it went the whole two hours. Sue Howard, who is a claimant's attorney in the northern part of the State, was there. She had a number of specific recommendations, but she really wanted to focus on the attorney fee issue for claimant's lawyers, which was

addressed by the Legislature during the past Session. But there are a number of folks who think that it still needs to be addressed more, and that consideration needs to be given to a different method of paying claimant's attorneys so that they are more incentivized to represent claimants. She had a specific recommendation of the attorney fees being paid for litigating and prevailing at the Office of Judges' level, as I understood it, on medical treatment issues so that the attorney fees would be paid by the other side. Then she had a number of other specific recommendations, but her focus really was on attorney fees and medical treatment denials which she seemed to think was problematic in our system. One of her claimant clients – Jeffrey Billiter – was there, and he just basically talked about his claim and his own situation. It's a back claim, and his employer was there with him in a supportive role. He talked about his situation.

Tim Huffman was there to talk from an employer/business standpoint, and had obtained some information from the Office of Judges about medical treatment denial protests. He was responsive to a lot of the things that Sue Howard had talked about. Steve Roberts was there from the Chamber and gave a short presentation essentially supporting privatization – explaining that for business, privatization had actually been very successful and that rates were down significantly for business.

I was there to talk about settlements, so I was sort of the agenda oddball. I was talking about something a little bit different than everybody else. With our presentation I tried to go through the law to give a historical perspective about the changes in the law relating to settlements through the years. It started, so to speak, in 1990, but the settlement authority back then was very, very limited. And it wasn't until 1999, and a lot more so in 2003 and 2005, that the settlement authority really started to roll with the Legislature, and settlements as we know them today started to be thought about.

I tried to talk a little bit about what we're doing with the Old Fund, and how we're settling our claims, and what our philosophical approach has been, and the fact that we try to structure as many settlements as we can, and that we're very cognizant of the fact that a lot of our settlements are with pro se claimants. We try very carefully to set up our processes so that they are very well informed; we make sure that they're informed by having them sign certain documents; and the adjustor has to very carefully go through these documents with the claimant to make sure they understand what they are doing, and that it is voluntary.

I ended up with what they really wanted to hear about – what other processes states have for reviewing settlements up front, as opposed to having a review possibility on the back end, which is what we have in West Virginia. Here a claimant has a period of six months following the settlement date to bring a settlement to the Insurance

Commissioner's Office for review, and we would review it to determine if it is "unconscionable." That was the word the Legislature gave us, and we've defined the factors that we would look at in a rule to determine whether it's "unconscionable." To date we have had none of those petitions presented to us. And that's for pro se claimants. What the Committee wanted to hear about was these processes in other states, and we did a survey. Sarah Chapman did a survey, and it's really a good piece of information, however I tried to make sure everybody understood that it was just a survey. If you really want to know what happens in these various states, you've got to talk to people in those states and find out not only what they do, but what's the result – what's good about it and what's bad. Because you know there is no system anywhere that everybody thinks is just wonderful. I urged them, if they wanted more information, to dig a little deeper than our survey. Roughly 43 states responded to it. All but maybe two have some kind of an approval process, so it is very common that you have approval processes out there. My feeling is that there is a pretty keen interest, at least for some folks in the Legislature, to explore that further to see if West Virginia should be like these other states and have some type of pre-settlement review process. And I think it could be done in a way that does not produce a lot of administrative expense or delay. But I think you've got to be really cautious about how you would do it. I said that I would be happy to continue to work with them towards whatever information they want to get. We're happy to help them gather their information.

Attorney Pat Maroney spoke, and he spoke primarily with regard to attorney fees, Rule 20, and a little bit about the rulemaking process, that it shouldn't be with you all. And that was it. I know that's a real general description of what happened. Does anybody have any questions?

Chairman Dean: Henry, do you have any questions?

Henry Bowen (West Virginia Self-Insurers Association): I don't have a question. I just want to make a comment since I was there. You should understand that the primary complaint that the legislators have heard with respect to treatment is that claimant's are unable to secure representation, and that the statute doesn't allow an attorney fee compensated. So while the emphasis of several speakers were on compensation, it was definitely tied to representation of people who had the issue in litigation without any other issues at all but medical treatment. And for that type of issue in the system, compensation for a claimant's attorney is not available. Obviously the proponents of that were suggesting that Rule 20 is too complex with unrepresented individual to look at. I think that went to the heart of the complaint with respect to that. With respect to settlements, we had also done some informal surveying through the Self-Insured Association. And the majority of our members informed us that virtually

everywhere they are actually doing settlements, they are subject to some type of administrative review to ensure that an unrepresented claimant is not entering into something akin to an unreasonable settlement as opposed to the legal part with an unconscionable settlement, which would be a much different standard.

Several of our Board members have suggested – and I just reiterate it for your thought because of the employer community concern always at that legislation – is to suggest that whether or not the settlement rule can be evaluated as being a sufficient format to allow you as a policy maker for this agency to determine whether or not unrepresented claimant settlements should be reviewed. Prior law, as the General Counsel alluded to, had an affirmative obligation that settlements be approved by the Workers' Compensation Division or Commission, and then filed with and approved by the Office of Judges. And that proved to be an unsatisfactory review process because it took a great deal of time to get the settlement out of the Commission. That's all been eliminated by privatization. We certainly. . . I mean I'm not speaking for all self-insureds, but I am speaking for those members who have communicated through our Board. We would not be concerned about a process that had something similar to the old process to ensure legislators and everyone else that unrepresented claimants can have a review for reasonableness of a settlement. I don't know if the legal colleagues within the agency would view the rule as being a viable alternative. But if it were, we would certainly urge you to consider that as opposed to going to the Legislature. I don't think it would be a conflict with the statute. I think it would be within your regulatory authority. And I don't really see how that authority could be challenged by someone outside of the agency because even if they felt it was an unnecessary process, I think public policy would support it. That may be something that you would wish to consider. Thank you for allowing me to make a public comment.

Chairman Dean: Very good. Does anybody from the Industrial Council have any questions for Mary Jane? Comments? Mr. Pellish, do you have any questions or comments?

Mr. Pellish: No comments. No questions.

9. Next Meeting

Chairman Dean: Our next meeting is Thursday, January 14, 2010. I would like to ask if we could move that one way or another. I don't mind running this meeting from a phone, but it's hard. I am going to be out of town that day. I thought we would have a new Chairman or Co-Chairman today. Either way would be fine.

Ms. Pickens: The day before or the day after?

Chairman Dean: The day before would be fine. I fly out January 14, in the morning. The Thursday before or the Thursday after. . .and if it's that day I'll participate by phone. It is not a problem.

Mr. Marshall: Could we do the 7th?

Ms. Pickens: I would think so.

Chairman Dean: Is the 7th a problem with anybody? Mr. Pellish, would the 7th work for you.

Mr. Pellish: Yes.

Chairman Dean: The next meeting will be Thursday, January 7, 2010.

10. Adjourn

Chairman Dean: I'll accept a motion for adjournment.

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

There being no further business the meeting adjourned at 3:42 p.m.