

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MARCH 26, 2009

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, March 26, 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
Dan Marshall
Kent Hartsog
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 on the previous meeting. Has everyone had a chance to look at the minutes? Is there a motion to approve?

Dan Marshall made the motion to approve the minutes from the February 19, 2009, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

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

Judge Rebecca Roush: Good afternoon, Mr. Chairman, members of the Council. For my report today I would like to tender the customary statistical summary of the Office of Judges, the work that's being performed, and also give you an update on some recent activities of our office.

I will be brief with the statistical summary. The trends continue to remain the same. Overall we're still in a pattern of decline. I think we are at an all time low with regard to the number of protests pending, and that is 4,209. We acknowledged 554 protests in the month of February, which is down from 568 in January of 2009. And,

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again, we are seeing the anticipated trends that the number of Old Fund protests is declining while private carrier protests are increasing.

March has been a very busy month for us and I wanted to give you an update on some pertinent things going on in our office. Some of you may or may not have heard about the Fairmont Office of Judges' location. On February 20, the West Virginia Department of Administration announced that it would immediately close the building that housed our Office of Judges' location in Fairmont, and that was essentially done without notice. Our workers were there on Thursday. On Friday they immediately shut down the building. There were 170 State workers displaced, seven of which were OIC employees, three with the Office of Judges, and four with the OIG. Needless to say, it was a hectic time for our office – trying to accommodate the work that was going on in the Fairmont office with no location for our employees to go to.

To give you a little background about what happened, it's my understanding that a private engineering firm found severe deficiencies in the building and condemned it immediately. It will be demolished. That was somewhat of a traumatic event for us within our office. The good news is that we have new office space for our employees and it is located just down the road in the Veteran's Square Building. The address is 320 Adams Street in downtown Fairmont. I am happy to report that it is an upgrade from the old facility. It's a modern office and our employees are in the process of moving in and establishing connectivity with their phones and computers. As of today, we finally put it all under wraps, and they are just now getting back to work. I would like to publicly acknowledge all the hard work of our employees during this difficult time, and particularly the work of Assistant Commissioner, Tom Barton; as well as Judge Alan Drescher who organized all the efforts from Charleston in getting these people back to work; Judge Joe Mancuso; Judge Frank Haas; as well as their secretary, Darlene Hartley. They really went above and beyond what they normally would do to facilitate this smooth transition to our new office space. If you get a chance go by and visit. We definitely have a new better space despite all the trauma of that event. So that's taken up a significant amount of our time.

In March we had a medical training with Dr. James Becker. I reported to you last month that we were going to start a series of medical training seminars for our adjudicators, and we did have the first session here in this room with Dr. Becker. The room was full. There were about 50 adjudicators here along with Board members and staff from the Board of Review, and the topic was carpal tunnel syndrome. I am pleased to report that the training was very well received. It was purely a medical discussion. Dr. Becker went into great detail about the anatomical overview of carpal tunnel – what occurs in the wrist when there is a diagnosis of carpal tunnel syndrome. It

was a very good seminar, and everyone was pleased with the graphic photos and slides that Dr. Becker provided. That was probably the more fascinating part of it all. It went well and we continue to plan to host similar training sessions on other workplace injuries and diseases.

Also in March I attended mediation training in Pittsburgh, which was hosted by the International Association of Industrial Accident Boards and Commissions, that is the IAIABC. This training basically gave a practicum in realistic sessions on "How to Conduct a Mediation." As you well know, alternative dispute resolution is a growing area in litigation, and it helps to reduce overall cost in litigation time and expense. To that end we are looking to strengthen our mediation program, and over the next couple of months we'll be refining our internal processes and actually selecting claims for mediation. We have received some positive feedback from our industry about the desire to actually have a full mediation program because settlement is one of the bigger initiatives in our privatized market. We're happy to offer this service at the Office of Judges and think that it will be more successful than it was in the past. Our marketplace has evolved enough to where mediation will become a more important role in the settlement process. So, we're hopeful that it will have a positive impact. All ALJ's are mediators qualified by the West Virginia State Bar. While I don't anticipate that all of our judges will be serving as mediators, there may come a time where we have developed our program to have more of them participating. Initially I anticipate myself, Judge Drescher and Judge Rodak will be the ones performing the mediations at the outset.

I wanted to give you an update on some of the transition issues. Quality Assurance continues to be our primary goal. The Executive Office has been spending a significant amount of time reviewing the decisions of our adjudicators and ensuring that they are consistent with our current laws, which is a great goal, but we're doing well.

We are conducting research on the issues that are remanded, and we are looking at all the Supreme Court memorandum orders to see if we can pinpoint the areas that we need to make improvements in our decision making process.

Practitioners in our system may see a greater presence of administrative law judges at Evidentiary Hearings, which we have received some positive feedback. We are hopeful that they will continue to take a more active role. And the reason they were not conducting hearings is really a holdover from the time when we had too much litigation going on and didn't have the resources to expend in sending them to all of our 25 venues around the State.

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Finally, we are examining our entire organization to ensure the proper use of our resources. We can't predict what kind of volume we will have in the future, but we're finding that the current "assembly line process" that we have does need to be refined and modified to reflect the needs of our industry. We are looking at making our internal processes more efficient. That's the Office of Judges coming and going for the month of March. I would be happy to take any questions.

Chairman Dean: Did you send this report out?

Judge Roush: We had a power outage. I have not been able to send that out yet, but I would be happy to send it to you when I get back to the office.

Chairman Dean: That's fine, but if you could send Mr. Pellish a copy.

Judge Roush: Absolutely.

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

Kent Hartsog: Just one. I was curious. . .in the last three, four or six months regarding protests that have been filed, is there any specific area where you are seeing an increase, or a specific problem area come up through trending, or looking at specific types or reasons for protests?

Judge Roush: I think that one of the more significant areas is in the area of medical treatment – denial of medical treatment specifically. There has been an increase in that. But other than that I couldn't really tell you. It's just kind of all over the board.

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

Mr. Marshall: No. But I appreciate your presentation.

Judge Roush: Thank you.

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

Walter Pellish: No questions.

Chairman Dean: Thank you.

4. General Public Comments

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

Lesly Messina (ACT Foundation): For those of you who don't know me, I'm Lesly Messina, Research Director, at the Affiliated Construction Trades Foundation in Charleston. And what we are is the research and public relations arm of the State Building Trades. We represent approximately 20,000 union construction workers in the State. In addition to dealing with issues that are of importance to our union members, what I also do with part of my time is monitor public works projects to ensure that the contractors are in compliance. I've come today to bring to the Board's attention an issue that we think is important.

Recently I discovered that there was a contractor that was bidding on a large maintenance contract for the State. Steve [White], the director that I work with, and I recognized this contractor as being a former workers' comp debtor. The individual in question had two companies in the past. They racked up a substantial workers' compensation debt, and also unemployment compensation debt. It was Commissioner Vieweg that was Commissioner of Workers' Compensation at the time. Because the debt was so substantial he aggressively pursued it in litigation. But in 2005 the Supreme Court ruled that the successor company did not take over "substantially all" of the assets. Even though the majority of the assets were obtained by the successor company, they narrowed the definition of "substantially all" virtually to mean "all." So, the \$2 million dollars that was owed was written off and the Commissioner was not able to pursue that. However, there was a small portion of the debt that was not bound by that decision. It was approximately \$62,000.00. And in my research I discovered that a lien had been placed against the previous company and the individual in question who was bidding on the new contract. I got the lien, and I provided it to the Division of Purchasing to illustrate to them that we do not feel they were the lowest responsible bidder for the job. They wanted to hear from the Insurance Commissioner on it, which I understood, so I contacted the Insurance Commissioner and they were kind enough to provide us with a letter that substantiated: "Yes, that was still an active debt." I also found out that the previous company owed about \$20,000.00 in unpaid premiums to Unemployment Compensation. I contacted Unemployment. They also were kind enough to give me a letter to provide to the Division of Purchasing. It became a problem when we were trying to work this out. It was over a two or three week period that I tried to obtain documentation from different agencies. So Steve and I feel that that's an issue because it seems that there's not good communication between the agencies and with the Division of Purchasing on these types of issues.

What we would like to see happen is a more uniform way for us – especially when monitoring these types of things – to be able to get access to the information, or a more streamlined way for the Division of Purchasing to be told of these debts. As you are probably aware, there is a statute that states if you owe more than \$1,000.00 in aggregate to County, State or other public entity, you're barred from bidding on a State contract and the contractors have to sign an affidavit to that effect. One of the problems becomes there is a loophole, and this individual has taken advantage of that loophole. He has retained counsel, and he is contending that he has been contesting the debt since at least May of 2008. Now there's not been a resolution on it. In his counsel's mind he is not barred from bidding, and technically that is probably true. What we are bringing to the Board is the concern that it's just not an effective way to do business. There are contractors out there that are playing by the rules, doing what they need to do, and signing the affidavits honestly that they don't have outstanding debt, and they are getting sidelined when issues like this come up. Basically a contractor could contest it and it could stay in limbo for some time.

So, what we're asking the Board to consider is a way to fix this loophole, or at a minimum streamline the process so that it's not an absorbent amount of time that elapses; that these issues are in limbo, so to speak. That a contractor be given a reasonable amount of time to prove that they don't owe the debt. But not to just be able to contest the debt and say, "Okay, I'm not really moving forward to prove that I don't owe the debt. I simply contested it and not moving it forward." We think that a year is a long time to have to prove that the debt is not valid. That's the one issue we have.

What we would like to see happen – and I know this would be difficult – we can find out if someone is in default. This issue becomes knowing how much. As you see, it took me a couple of weeks to determine whether the liens were still active, what the actual debt was, what each agency considered to be "active debt" versus "not active debt." I recognize that posting debt amounts online would be difficult because you have to deal with interest accrued, and perhaps someone is making payments. You would have to have someone that would be constantly adjusting those numbers.

We bring this before you to see if you could come up with some sort of middle ground area that we could work on so the public has better access to this information, and to streamline things. This was kind of a "head banging against the wall" moment for me because I spent a lot of time trying to assert our contention that this individual should not be getting the contract, and it looks like he probably will anyway. We think that this is an area that would warrant your consideration and thought. If anybody has any questions about this in more detail, I would be happy to talk to them afterwards. I appreciate your time.

Chairman Dean: Ryan, do you have any thought on that?

Ryan Sims (Associate Counsel, OIC): I can tell you we are very, very well aware of this issue, especially with the particular case Lesly is talking about. The only thing I would say. . .that particular case is rather complex with some of the things she discussed, such as the Supreme Court case.

Ms. Messina: Yes it is.

Mr. Sims: It shouldn't be considered the typical case.

Ms. Messina: Yes. I should have stated that. It is not typical. It's very atypical.

Mr. Sims: There are a number of legal issues that we are taking a look at right now, and some of them would be the statute of limitations. There was a statute of limitations during the late nineties that applied on some debt and some of that debt was allowed to expire. One issue we're taking a look at right now is whether – if a statute is wrong – should we write it off because there is another statute saying we can never write off a debt? How do you reconcile those? But we are taking a look at all of that now. I do want to mention. . .on Purchasing, it is a little different than the other powers that other State agencies have to revoke permits, to revoke licenses. We work directly with all kinds of agencies on doing that. Purchasing is a little different because the section Lesly discussed. . .let me just back-track. I'm not at all saying that we are not going to work with Purchasing. The Code section that Lesly discussed is under the Division of Purchasing's purview, not ours. In other words, it's under "Purchasing's chapter" that they have regulatory purview. It's really up to their attorney to say, "Well, is it a debt to determine? Is this a debt they owe?" We answer them. When they call us we'll say, "Yes. They owe this much." That is really all we can tell them, and then it's up to Purchasing's General Counsel to say, "Well, how are we going to do this procedurally?" Ultimately it's the head of Purchasing, whether he should block the bid and all of that. That was one point. And I'm not saying we won't work with Purchasing as far as getting the amounts posted. That is something I'll bring to my leadership immediately, maybe not posting them out, but at least on the default list confirming they do owe money to us. I do want to say that working with the Division of Purchasing on maybe updating their process would help too. I wasn't aware that they give them a year to prove otherwise, or whatever amount of time.

Ms. Messina: I know it has been at least that amount of time.

Mr. Sims: That's Purchasing's decision. We have no regulatory purview over Purchasing. . .how you should do your process as far as deciding whether someone owes a debt or not. But generally speaking, this is a particular area of employer enforcement that we are taking an extremely close look at right now. I've talked to several people, other attorneys, and people that work on employer enforcement with the OIC just in the past two weeks about this particular issue, and this particular case.

Ms. Messina: I do want to clarify – this was a very unusual case to discuss. It is very complex and there are a lot of issues about retroactivity on some of the legislation, and then the Supreme Court decision muddied the waters further for a while. But in closing I just want to say the two issues that that foundation really has on this is – and it's not a criticism of the Insurance Commission – we do look out for the interests of our union members and that includes making sure that people that they work for get a fair shot at these contracts. So there's the first part. The second part is our concern that there is not a proactive mechanism for going after debtors. For example, the Unemployment Compensation Division is at the Legislature as we speak asking for legislation. They are becoming insolvent. They want the employers and the employees to kick in to help them get their house back in order. Now we recognize that outstanding debt to Unemployment Compensation is not the main problem. They needed to make adjustments for some time. But from our perspective, not trying to pursue debt that is owed from these companies adds to the problem. That's an overarching issue that we've had over time with the Old Fund, with Workers' Compensation, and now the situation with Unemployment Compensation – just to give you a broader view of why this issue is so important to us. And we're out there. We've got eyes everywhere. We've got people in the field that are monitoring these things. And we want to be of service. In addition to meeting our goals, we want to help you any way we can to collect these debts.

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

Mr. Hartsog: The amount that you're contending they owe, is it still for workers' comp? Is that to the Old Fund, and is that for \$68,000.00?

Ms. Messina: It was approximately \$62,000.00. I'm sorry. I don't have the exact amount. I don't have the lien with me.

Mr. Hartsog: It's \$62,000.00?

Ms. Messina: Yes.

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Mr. Hartsog: What would you recommend, or what can this Industrial Council do? I'm all for pursuing these guys. I am really annoyed if he got away with not paying a couple million dollars because that's a couple million that the rest of us are going to have to pay. . .to pay off that old debt. I am all for pursuing these guys to the ends of the earth to get whatever we can. Is there anything we can particularly do to facilitate help or put pressure on or anything else?

Ms. Messina: From a personal perspective just in dealing so closely with this, I really think this is going to be one that gets away – simply because he's been given an opportunity through whatever mechanism that the Insurance Commissioner allows someone to contest a debt internally through an adjudicative process. I don't know if you have hearing examiners or how that works. But they have been given this opportunity and the door is open. Even though he owed all this money a long time ago, got out from under it, and knew about this lien. He had his attorney contact them but there wasn't a lot of momentum to resolve the issue. This one is an example. . .maybe think about ways that you can tweak your internal processes for allowing someone to contest a debt, to tighten it up so that someone has a limited amount of time. They get the chance, and if they can't prove it, they've got to pay it or they get barred.

Mr. Sims: The reasons that they were saying they could wait so long before contesting. . .due process all the way to the Supreme Court. That's not going to change. The decision that it's not a final debt. . .I really don't know. . .if their attorneys were arguing it's not a final debt until the West Virginia Supreme Court has agreed it's a final debt, I wouldn't necessarily agree with that. That is up to Purchasing's attorney and that is one of the issues here. But what we will do and what we always try to do is work closely with other agencies. On this particular one it's a little different than revoking permits because with that if they're on the default list their permit gets revoked. With this it's actually determining they owe money to the State. We are going to reach out to Purchasing and see if we can get a system. I think what will make sense is for them to always check. . .it might be a little burdensome to check all the bidders. We are aware of the issue and we are aware of this particular case. We are going to work on tightening up this process the best we can and talk to Purchasing, and ask them what we could do to avoid this from happening again. It is on our radar. As far as our current rules or procedures, it's already very clear in both our statute and rules that we can have permits, licenses, etc., and work with other agencies. Each agency has their own way they like to do their due process. And that's one of the issues that comes up with those, is we have to determine they owe the money or that they are default. There are two layers of due process here – what they get over here and determine if they are in default or owe money, and then a whole new layer of due process in this case over in Purchasing where Purchasing says, "Hey, you can't bid on the contract." When

Purchasing tells them that, they get a letter of due process over at Purchasing. They can contest that decision through the ALJ over at Purchasing. It gets rather complex. What we will do is reach out to Purchasing. We're fairly close to them to see if we can come up with some reasonable method of making sure they can catch these guys earlier and get it resolved before the final bidding decision is made.

Ms. Messina: If I might make one final suggestion if you're going to talk to Purchasing – and this may be splitting hairs – but on the affidavit that the contractors must fill out when they are filling out a bid *“that they don't owe the State any money,”* maybe a modification of that affidavit to reflect also. . .“if you have a debt that is being contested.” Because someone could say, “Well, no I don't think that I owe this money and so I'm going to answer 'no' on the affidavit.” If the Division of Purchasing is not doing due diligence and looking into it further. . .I mean it's an affidavit. They will take people on their word. Perhaps modify the language so that it would reflect that there is something out there and at least they could check into it.

Mr. Sims: That would probably be something you should talk to Purchasing about because we really can't. . .I think we would overstep our statutory authority by saying, “Hey, Purchasing, we know we don't have any regulatory authority over this chapter, but go ahead and change your forms.”

Ms. Messina: Right.

Mr. Sims: I would go to the Department of Purchasing if you think there is a flaw in their forms and take that up with them.

Ms. Messina: Sure.

Chairman Dean: Ryan, would you look into this, and Mary Jane [Pickens] and the Commissioner, and report back to us or advise us if there is anything that the Council could do to help in any way?

Mr. Sims: Absolutely.

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

Mr. Marshall: No. I had some questions and comments but they were thoroughly addressed by Ryan's remarks.

Chairman Dean: Mr. Pellish, do you have a comment on this?

Mr. Pellish: No. I agree with what Dan just said.

Chairman Dean: Thank you.

Ms. Messina: Thank you very much for your time.

Chairman Dean: Does anybody else from the general public have any comments they would like to make today?

5. Old Business

Chairman Dean: We'll move onto to old business. Does anybody from the Industrial Council have any old business? Mr. Hartsog? Mr. Marshall? Mr. Pellish?

Mr. Hartsog: No.

Mr. Marshall: No, Mr. Chairman.

Mr. Pellish: No.

6. New Business

Chairman Dean: Does anybody on the Industrial Council have anything they would like to bring up under new business? Mr. Hartsog? Mr. Marshall? Mr. Pellish?

Mr. Hartsog: No.

Mr. Marshall: No.

Mr. Pellish: No.

7. Next Meeting

Chairman Dean: The next meeting will be Thursday, April 30, 2009, at 3:00 p.m. here. Any problems with the meeting date?

8. 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 3:36 p.m.