

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JANUARY 21, 2010

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, January 21, 2010, 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 (via telephone)
Walter Pellish (via telephone)

1. Call to Order

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

Walter Pellish (via telephone): Chairman Dean. . .

Chairman Dean: Yes, sir. Mr. Pellish, how are you today?

Mr. Pellish: Good. How are you? I need to ask for some time to address you and others in the room.

Chairman Dean: Very good.

Mr. Pellish: I am no longer a part of the Industrial Council. I have had to tender my resignation because I have opted to run for the position of County Commissioner in Jefferson County. So, I had to tender my resignation as of January 1, 2010. And I just wanted to take a minute of the Council's time and everyone in the room to "thank everyone" for having had the opportunity to work with such a great group of people. I think the Industrial Council has made tremendous strides since the transition of workers' compensation to its new domain. And I want to thank Commissioner Cline, the Delegates and Senators that I had an opportunity to work with, and all of Commissioner Cline's staff, as well as the folks on the Industrial Council. That was the reason I dialed in. And, again, my thanks to everybody.

Chairman Dean: Thank you for serving with us. It's been a "super" pleasure just getting to meet you and knowing you. You've been a warm feeling here, just knowing somebody that understands all sides of what we go through every day as part of the Industrial Council. I hate to see you go.

Mr. Pellish: Well, I hate to leave. But rules are rules and we have to obey them.

Dan Marshall: I just want wish you "good luck" in your future endeavor, and thank you for your service, and let you know I've enjoyed working with you.

Mr. Pellish: And I tremendously enjoyed working with you as well, Dan. Good luck in your future endeavors folks. It's very, very important work.

Mary Jane Pickens (General Counsel, OIC): Mr. Pellish, I know you and I have talked previously. But in the context of a public meeting, I just wanted to mention also on behalf of Commissioner Cline, Deputy Commissioner Bill Kenny, me, Ryan and Margaret, and all the folks that worked so much and have spent a lot of time with you, we really appreciate your time as well. When this thing first started it was certainly new to us, and you guys have been a tremendous amount of help to us. So, I just wanted to offer our "best wishes" as well, and to "thank you" for all of your service.

Mr. Pellish: Thank you very much. I appreciate your comment.

Chairman Dean: Thank you, sir.

2. Approval of Minutes

Chairman Bill Dean: Everybody has a copy of the minutes from the previous meeting. Is there a motion to approve?

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

3. Election of Chairman and Vice-Chairman

Chairman Dean: As you all know, some time ago Chairman Charles Bayless resigned, and it's been quite a while getting his replacement on the Industrial Council. We need to have an election. The election cycle runs June 30 to June 30, so whoever we elect today will serve as Chairman and Vice-Chairman until June 30, 2010. Mary Jane, do you want to comment on that?

Ms. Pickens: That's correct. Our Rule (85CSR13), Series 13, which governs the procedural matters of the Industrial Council, says that you can fill the term of someone that has left. But the terms do run [by rule] from July 1 to June 30. So I think this election would fill that six-month gap period, and then when the end of June comes we'll do it again.

Chairman Dean: Very good. We need a motion for Chairman of the Industrial Council.

Dan Marshall: Mr. Chairman, I would like to nominate Bill Dean for this office. I think he has served us well as Interim Chairman, and we'd be very well served if he would continue in that capacity.

Chairman Dean: There is a motion. Is there a second?

James Dissen: Second.

Chairman Dean: Any questions on the motion? All in favor please signify by saying "aye." The aye's have it. [Motion passed.] I served as Vice-Chairman, so we need to elect a Vice-Chairman to serve.

Mr. Dissen: Mr. Chairman, I would like to move that Mr. Hartsog serve as Vice-Chair.

Chairman Dean: A motion has been made for Mr. Hartsog to serve as Vice-Chairman. Is there a second to that motion?

Mr. Marshall: I'll second.

Chairman Dean: Mr. Marshall seconds the motion. Any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The aye's have it. [Motion passed.]

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

Judge Rebecca Roush: Good afternoon. It's a pleasure to be back here before the Council, and I hope everyone had a great holiday. For my report today I would like to give you an update on three general topics that are important to the Office of Judges. The first would be our standard statistical summary; the second would be a Supreme Court update; and third, I would like to give you an update on the 2009 initiatives that we had, and the progress that we're making in 2010.

First is our statistical summary. This is work that was performed in the month of December, as well as calendar year totals for 2009. For the month of December 2009, we acknowledged 482 protests; the total protests received for the year was 6,292, which was a little up than we had anticipated. We are seeing the expected trends. I would like to point out for you on the front page – for private carriers they now make up 50% of all the protests that are pending before our office; the Old Fund makes up 24.13%; and self-insured employers make up 25.59% of all protests that we have. I want to point out to you how that compares to 2007 and 2008. We've actually seen a reversal between the Old Fund and the private carriers. In 2007 the Old Fund made up 56% of the pending litigation while private carriers made up 25.13%. I think that's the trends we are expecting to see – a decrease in the Old Fund while an increase in the private market protests. Interestingly, self-insureds went up just slightly for calendar year 2009. They had 25.59% of the protests compared to 2007 when they 18.19%. It's a small increase over that two year calendar period.

For calendar year 2009, we decided 3,733 issues. Those were written decisions that we actually wrote. Of course there were other cases that were dismissed or withdrawn which also make up quite a significant number, and those are on the bottom of page three. As of the end of December, we had 4,026 protests pending. Our Final Decision and our Time Standard Compliance remains the same. We had 98.6% final decision compliance, meaning that 98.6% of the decisions that we wrote were within the 90-day period required. And 88.9% of our decisions were performed within the time standard. I think the slight differential that we have between this calendar year and the calendar years of the past is that we still continue to strive to achieve the highest quality that we can. And sometimes that bumps us back on our final decision and our time standard compliance.

Those are the statistics for the month of December as well as calendar year 2009. Do you have any questions about the statistics?

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

Mr. Hartsog: No.

Mr. Marshall: No, Mr. Chairman.

Judge Roush: Secondly, I would like to point out to you that the Supreme Court did issue a written Per Curiam opinion in the month of November, which I handed out to you. This is the case of *Robert H. Casdorff, Jr. v. West Virginia Office Insurance Commissioner and West Virginia State Police*. This is the last decision of the four that were orally argued on October 4, 2009. You may or may not recall, this was a chemical exposure case and the issue to be decided was whether there was a sufficient causal connection between the claimant's exposure to benzene in the work place and his development of chronic myelogenous leukemia. There was significant evidence in the record. And of course this is a Per Curiam opinion, and there are no new issues of law found in this decision. But nonetheless the Court did find a causal connection in this particular case and made some syllabus points that really referenced older case law. I don't know that this has a profound impact other than finding that it established a connection in this case. The decision rendered by our office holding this claim compensable was reinstated, so the Judge who wrote that decision finds himself a little victorious. I wanted to point that out for what it's worth. This is the last of the four cases that were orally argued before the Court last fall.

Finally, I wanted to give you an update on the work that we do every day in the Office of Judges. I've been working in the Chief Judge capacity now for 13 months, and the time has really lapsed quickly. Our main goal is still quality assurance. The Executive Office, myself, Judge Drescher and Judge Rodak spend a significant amount of time working one on one with our Judges, and we actually do review a small percentage of the decisions that they write, make decisions on, the evidence. While that's a small percentage of the total amount of cases in litigation, I think it really is an important endeavor to help us increase the quality of our work and put out a greater written work product.

Along that line, with regard to quality assurance, we dismantled the Non-Attorney Adjudication Unit. Those employees are now working in assignment with our Judges, and that seems to be going along very, very successfully. Those employees have transitioned quite well. And our Judges as well have adapted to now having employees assigned to them to assist them in their role in the adjudication process. All of our Judges – I wouldn't say 100%, but almost 99% of the time – are now conducting our

hearings. I personally conduct hearings as well as Judge Drescher and Judge Rodak. That seems to be making a great deal of improvement in the overall hearing process. The Judges can have greater control of what goes on in the hearings; can actually rule on motions; and have a greater feel of the case by the time it reaches their desk for decision. We still haven't made a change in the assignment process, but we think that is going to be coming shortly.

We've made revisions to the way our motions are decided, and now Judges actually review all motions. At one point we had a staff unit reviewing and deciding complex motions. I think that's made a great deal of difference to the litigants in our system, and we continue to receive a lot of positive feedback about that.

I'm happy to point out also that we're making progress in our small mediation program. Since my arrival we had three requests for mediation; two of those are still pending. But I'm happy and proud to report that Judge Drescher successfully mediated a case just this past week. So, that was good news. It was an arduous process on his part. He came back weary. But nonetheless it was a good endeavor.

AIMS revisions – AIMS is our case management program. It's the way that we keep the work flowing in and out of our office. We are making revisions to that program with our IT Department. They are not only making revisions for our own internal purposes, but they're putting it on a new platform so that the computer language is current and modern. Once we get that finished we will be able to make assignments to our Judges at the outset of the litigation as opposed to waiting until discovery is already concluded and it's pending a final decision. We anticipate that that will be finished March 31. We actually had some testing done today, so we hope we are in the final leg of getting those AIMS revisions completed.

Our office renovations – we're trying to move our hearing space up to our primary location in Charleston. That's been a tedious process. It's been pending with the Department of Administration for quite some time. I'm happy to report that the only approval that's pending is the final contract for signature from the building owner. But once we get that done we will start making preparations for them to come in and redesign and build two courtrooms in our space. That's really good news for us, and we think it will add a lot of value to the whole litigation process in workers' compensation.

For 2010 we really intend to carry on with the initiatives that we started in 2009 to ensure quality assurance and do everything we can to maintain the integrity and independence of our small administrative judiciary. That's really our goal. We can't do it without the hard work of all the Judges and the 63 employees that we have in the

Office of Judges. That's an update and a recap on the work done in 2009 and coming ahead in 2010. I'm happy to take any questions you may have.

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

Mr. Hartsog: Have you seen [in the protests] any particular trend or any particular kinds of protests, or anything that raises a red flag with regard to any issues or problems?

Judge Roush: We do regularly monitor these of course. I would say no trend in particular to the substantive issues, but I think the private carriers are still adjusting to adapting to the way we operate here in West Virginia. We do find some unusual and peculiar orders coming out of some of the new carriers, and I think that they're still just trying to make their way in understanding how to manage claims here in West Virginia. Of course on the flipside of that, I think we're finding too that some of those styles and approaches are not necessarily wrong either. They're just different from the way they've been done in the past. So, we're seeing a little bit of both of those things, but no substantive issues that I can think of. Judge Drescher, can you think of any trends in particular?

Judge Alan Drescher (Office of Judges): No.

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

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Thank you.

Judge Roush: Thank you.

5. Proposed Survey/Data Gathering for Safety Report to Legislature

Ryan Sims (Associate Counsel, OIC): We have been working with you all over the past few months on some surveys to send out to various people involved in comp to gather information about safety pursuant to the report you have to present to the Joint Committee in July [on safety] regarding workers' comp in West Virginia. That can be found in Tab 2. There are two pages, and they're "drafts" right now. Essentially what we're proposing is requests to three different sectors, for lack of a better term. One is requesting information from NCCI on the premium dollars on scheduled debits and

credits that are related to safety. The second one is an inquiry of the top ten carriers in West Virginia basically asking them how many of their policyholders use the safety initiatives that they offer. And if so, what types of initiatives are utilized most often. The third one is a little bit more of a detailed survey to West Virginia self-insured employers asking them about their current safety programs. There is a "draft" of that on the second page. And what we're proposing is that you take these and review it between now and the next meeting, and let us know if you have any suggestions. We ask that you e-mail them to us or send them to Mary Jane or myself so we can finalize this. Then at the February meeting, we will look toward finalizing it and sending the questionnaires out. There is one other thing. Currently as it stands this doesn't really include the request of any sort of hard data about how the implementation of safety programs may affect claims. We're not even sure if that's available to all of these, but that's something to think about and maybe asking. For example, if a self-insured employer has implemented certain programs how it may have affected claims; or how they believe it has affected claims as far as hard data. I just wanted to mention that. The proposal is for you all to review this and give us some feedback between now and the next meeting, and then we finalize it at the February meeting.

Chairman Dean: Very good. Mary Jane, do you want to add anything to that?

Ms. Pickens: Not much. The Code section itself I think gives you the freedom to get as far into it as you want or not want. It doesn't really tell you exactly what you need to do on the study. So I think you've got a lot of leeway. And Ryan is correct. Right now we're not asking for data. It's clear in the Code section that if you ask for it, everybody has to give it to you. So it's clear you can ask for it. My personal thought was you probably wanted to go farther than just finding out what people had. I think you want to find out is it being implemented? Is it being used? And then of course the logical follow-up to that is what effect, if any, has it had? Those are just some ideas. We did what we thought was a starting point, and that's what is in your packet. And then if you look at that and have any more detail or any particular guidance between now and the next meeting, then we can come back to the next meeting with what we would propose as a "final." And that would give us a few months to get it out, get the information back and into a report by June 1.

Mr. Marshall: Mr. Chairman, I didn't get a copy of that material in the packet that was sent to me, and I'm traveling today. I would like to ask Margaret to e-mail me Tab 2 that Ryan was referring to, please.

Chairman Dean: She said "yes," she will have it to you. Not a problem.

Mr. Marshall: Thank you.

Chairman Dean: Mr. Hartsog, any questions for Ryan or Mary Jane? Mr. Dissen?

Mr. Hartsog: No.

Mr. Dissen: Which one do you prefer that we e-mail to so you have one point of getting the information?

Ms. Pickens: Probably Ryan, but it really doesn't matter because we'll communicate back and forth. But I would put him as first choice.

Mr. Hartsog: I have your e-mail address, Mary Jane. I'm not sure I have Ryan's.

Mr. Sims: I can send it out to you right after this meeting.

Mr. Hartsog: Thanks.

Chairman Dean: Mr. Marshall, do you have any questions for Mary Jane or Ryan?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good, sir.

6. NCCI Summary of Loss Cost Data

Ms. Pickens: This is just a follow-up. At the last meeting in November we had Dennis Kokulak from NCCI on the phone again, and he provided some more clarification. He's been talking to us for the past few months in the fall, and I think Mr. Hartsog requested that his comments be placed into writing. So this is in your packet. Mr. Kokulak sent us an e-mail and I turned it into this document that is under Tab 3. It's not new information.

Mr. Hartsog: Thank you.

Chairman Dean: Are there any questions on the Loss Cost Data?

7. General Public Comments

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

Bill Gerwig (Attorney): I would like to say something. It's more of a report than it is a comment. My name is Bill Gerwig. I'm an attorney that practices in the workers' compensation system. And as a practitioner, there have been some problems that have arisen. I think Rebecca had alluded to it a little bit with the new insurance companies who are arriving in the State. The problem is getting orders to protest. I suspect that the 50% of the protests that are being filed by new carriers are almost exclusively BrickStreet protests. And that's because we are not getting orders from the new providers. They don't provide "file material." I don't want to say this is 100%. My experience is pretty exhaustive, and I've had a recurring problem with multiple carriers – where they don't allow me access to the file. So I'll have individuals who have claims that have been rejected. They're not getting benefits. They're not getting treatment. They don't have an order that I can protest, and I'm not being provided file material. So I cannot even apprise myself of what the Office of Judges has to provide people in those situations. I do file insurance complaints, and I file a lot of them. The problem is – and again Rebecca alluded to this as well – some of the things they're doing may not be technically wrong. For example, providing file material. There is no regulation that says you have got to provide file material to counsel for the claimant. There used to be a rule that said you had to provide it within 30 days, which no longer exists. So I don't really have a real mechanism for forcing them to give me file material. I can force them to issue orders to protest. But in order for me to do that, I have to wait for what becomes an inordinate period of time to pass just to make that request. Then this backs up on the Office of Judges. In certain issues expedited adjudication is available. If a claim is rejected, we can request a quick docket to get an expedited ruling. Reopening some temporary total disability issues have that same availability.

If I do get an order to protest [that the claimant provides to me] and I file a protest, I can't even get file material in time for my expedited hearing. And I frequently have to go in there with not a single piece of paper, other than the claimant's testimony to litigate those claims. I can certainly make the argument that I'm being denied the opportunity to participate in this procedure, but then I have to rely on the Judge to see it that way as well, and he's got the same problem I have. He doesn't have much documentation in order to rule upon a claim.

Now what's the solution? Well, certainly some more specific regulations on the production of file material, issuance of orders. In fact, it might be very helpful to

eliminate these odd orders to have approved forms. If a claim is ruled in a certain manner, here is what needs to be included in that form. And that could be a pamphlet; a collection of orders that we've used for 25 years in the system that they could then refer to – to issue these types of decisions. And that may help to expedite the actual rulings, as well as give you more consistency on what the rulings look like and what they address. What I'm getting now are a lot of claimants calling me and saying, "They've denied my MRI." I say, "Well, I need the order." "Well, there is no order. They called me and told me on the phone." Now I've got to then make a specific request of them to authorize it. And then after 30 or 45 days pass, I then have to file a "motion to compel" at the Office of Judges to force them to rule on it. By this time 90 to 120 days has past, and they still haven't gotten their MRI. And I didn't know who is aware of what problems we're having with these new companies. I just wanted to take this opportunity to alert you. And the problems may be more extensive. I'm just giving you examples of some of the things that I've seen. I know there are a lot of attorneys in here that may be on either side. This is not really a partisan issue. Getting file material out is obviously something that needs to be done. Acknowledging counsel needs to be done because it effectively prohibits claimants from getting fair representation on any claim on any issue. Are there any questions?

Chairman Dean: Comments? Ryan, Mary Jane?

Ms. Pickens: I appreciate Mr. Gerwig's comments and Judge Roush's comments as well. This hasn't been easy. We even get calls from carriers. I got a call a couple weeks ago from counsel for a carrier that is relatively new to our market saying, "I'm not sure we're doing this right." On the particular issue she was calling about, she said, "I see it done various ways and I'm not sure if anyone really knows how to do it right." And it's difficult with the law that we had, and years and years of procedure, and everybody kind of understood it. I think it's difficult for new carriers coming in and new TPA's to understand what to do. I do appreciate the comments. And we probably need to talk about whether there is something that can be done – shorter term – to guide companies through. . . obviously we always try to do it through our educational efforts, but you can't constantly be out there educating people. Through informational letters we can look at the issues to see if there is any guidance we can put out there to try to get consistency among these carriers that I believe are probably looking for some guidance anyway.

Mr. Gerwig: I do know that those companies that have in-state counsel have a tremendous advantage. If you have any of the people that are here today and you call and say, "What do I need to do?" They will give you the right answer. I'm seeing more and more people hire out of state attorneys who don't know anything more than they

know. And I know you have no control over that. But I see that as being a problem which means the answer has to come from somewhere other than their counsel because they can't provide the information that is needed.

Ms. Pickens: Again, I appreciate your comments. We'll continue to work on it.

Chairman Dean: Thank you. Does anyone else from the general public have a comment they would like to make today?

8. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business? Mr. Hartsog? Mr. Dissen? Mr. Marshall, do you have anything you would like to bring up.

Mr. Hartsog: No.

Mr. Dissen: No.

Mr. Marshall: No, Mr. Chairman.

9. New Business

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

Mr. Hartsog: The legislative agenda with regard to whether it's OIC or other bills. Do you see anything developing at the Capitol right now with regard to workers' compensation?

Ms. Pickens: They always re-introduce bills that were there last year. So there are a number of re-introduced bills that have something to do with workers' compensation. As far as issues that we know, there has been interest in certain issues through the interim process. The rule making issue, the last I heard – a bill to take the rule making authority away from this body, the Industrial Council, and place it back with the Legislature, again, the last I heard it was of some interest. But I don't have an updated opinion on that. The approval of settlements before they are finalized – that, as far as I know, is a matter of interest in the Legislature. But to my knowledge, and I didn't look at

the introduction list today, as of yesterday nothing had been introduced on that. That's not our bill. We've got three bills this year and none of them have anything to do with workers' comp. Again, workers' comp is always an issue and it's always a topic of discussion. There are all of the bills that were re-introduced from last year.

Mr. Hartsog: What is the schedule as far as bringing up rules, and which ones will be before the Industrial Council? What is your plan?

Ms. Pickens: For rules next to come here?

Mr. Hartsog: Yes.

Ms. Pickens: We're working on a Return-to-Work Rule and a Utilization Review Rule. And I know we keep saying this, but they've had their challenges. We would like to present those maybe in February. That's what we've been talking about.

Mr. Sims: I think that's doable.

Chairman Dean: Do you have a question, Mr. Dissen?

Mr. Dissen: Just for educational purposes since I'm new here. When you have a rule, do we get that ahead of time to look at it?

Ms. Pickens: Yes. The way the rule making process works here with the Industrial Council is we draft something, we send it out to the voting members ahead, and actually send it to a much larger group of stakeholders. We try our very best to do this a week ahead. We don't always hit that, but we try to do it a week ahead of a meeting. The first time you see it in that meeting is to listen to Ryan typically go through the rule and explain it. Then the vote at that meeting is to publish the rule for written comment and to notice it for a public hearing. So 30 days after that initial meeting you come back and have your public hearing. Then 30 days after that you come back into a final vote on the rule. So it takes a few months to do it, and everyone should be well versed about what the rule involves by the time you get to the final stage.

Mr. Dissen: Thank you.

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

Mr. Marshall: No, Mr. Chairman.

10. Next Meeting

Chairman Dean: The next meeting will be Thursday, February 18, 2010. Does that meet with everybody's approval? Is that date good with you, Mr. Marshall?

Mr. Marshall: Yes, just fine. The time will be at 3:00 p.m.?

Chairman Dean: Yes, sir.

Mr. Marshall: No problem.

11. Adjourn

Mr. Hartsog made the motion to adjourn. The motion was seconded by Mr. Dissen and passed unanimously.

There being no further business the meeting adjourned at 3:41 p.m.