

## **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**MAY 3, 2006**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Wednesday, May 3, 2006, at 10:30 a.m., Charleston Civic Center, Rooms 207-209, 200 Civic Center Drive, Charleston, West Virginia.

### **Industrial Council Members Present:**

Bill Dean, Vice-Chairman  
Jane L. Cline, Commissioner  
Dan Marshall  
The Honorable Sarah Minear  
Walter Pellish (via telephone)  
Rick Slater (via telephone)

### **Call to Order**

Vice-Chairman Bill Dean called the meeting to order at 10:53 a.m.

Vice-Chairman Dean: Just for the record, we do not have a quorum. One member couldn't get a flight in and we haven't heard from Chairman Bayless. We do not have a quorum so we really can't conduct this meeting today. But we are going to go through some things that we feel we can do without stepping on any toes or breaking any rules. We'll go on with Judge Leach's Office of Judges report.

### **Office of Judges Report – Timothy G. Leach, Chief Administrative Law Judge**

Judge Leach: Mr. Vice-Chair, Commissioner and members of the Council, I have e-mailed you this report except for Senator Minear. I did not have the correct e-mail address for my last three reports. They have been coming back to me and I haven't got that fixed yet. I will get that fixed today. I e-mailed the report this morning.

Because we summarized last month's statistical numbers, those are not available until late in the day on the first of the month, this being the third. These numbers are all accurate and current except for one section – Section (E). I have a note there that that reflects last month's notices. The number of protests has taken a downturn again in April after an upswing in March. The first four months of the calendar year were down about 1,800 protests for four months or over 400 protests a month from the same period last year. Now interestingly the self-insured numbers are running about the same. They averaged 228 a month last year and we had 267 in April and we are averaging right about 230 a month for the first four months. So, self-insured protests remain the same level as last year. The protests that are missing are protests of

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BrickStreet decisions. I have the chart on the second page, which includes the breakdown by categories of what protests are significantly lower.

Our Issues Resolved is still high, but with the reduced inventories it shows a slight slump there; but it has resulted in our pending caseload at the end of April to be 12,500 cases. When the auditor of the Board of Managers asked us to start tracking that last summer it was 18,500. So, we're down 6,000 cases pending before us or almost a third of the total caseload in less than a year. And historically when we started in 1991 that caseload was 30,000. It has really reduced. The good news about that – there are several good points. Number one, we can do it less cost efficiently. We can do it with fewer people if that's necessary. Number two, arguably we can pay closer attention to the evidence and argument than if you're just overwhelmed with 30,000 protests a year. It's very difficult to give each of those 30,000 every bit of the attention to the detail that perhaps is needed. So when it's down to 15,000 a year, theoretically you can give twice as much attention to the case as a Judge than you did before. There are a couple of good points for us from the reduced inventory.

Our efficiency for the month – we staggered at the beginning because of some IT problems and some transition problems in January. But I'm happy to report that our Acknowledgement Timeliness for April was exactly the same level that it averaged last year. And on the chart when you see that in Section (D), there is a big spike back up to what it was in 2005, 2004 and 2003 where it was a very high percentage.

On the next page in Chart (F) our decisions within 90 days is starting to creep back up and is now in the mid range among the six years that we had before. Finally statistic (G) is our overall performance. I've highlighted that in green. When you get your copy by e-mail or see it today, we're up to 86% time standard compliance – how long we have to resolve cases. Last year it was 74.5% when we started tracking this. Now I am more comfortable giving out this figure publicly than I was before. In 2001 we put in our case tracking system. It was 21% compliance. It is 86% now. That is a phenomenal increase and well above the 80% mark that we are required by law to meet.

I can skip over the section about the self-insureds protest. I've already commented on that. I sent you last month – when we did not have a meeting – several pages of the 350 some protest codes that we have at the Office of Judges. The process of preparing an explanation on each of those has caused us to re-think some of those codes. As I informed you last month, we are going to take out possibly about a third of those. We are also trying to redesign this very lengthy report you get, which is 50 some pages long, to take out all of the zeros. There is no sense in reporting we had no protests in this category. So when we get that software rewritten, the reports that I send you will be much shorter and possibly more meaningful to see the actual numbers instead of a whole page full of zeros.

I promised Mr. Pellish – a promise that I'm having trouble keeping – this is an example of the boss running his mouth before talking to the workers. He has expressed some interest in where are the protests coming from in this State, particularly from his region – the eastern

panhandle. We do not have a lot of hearings in the eastern panhandle – two or three every two or three months. It is not a litigious society in that part of the State or perhaps there is just not as many workers' comp claims filed in that part of the State. So I told him I would give him a breakdown of where the protests came from by both where the claimant lived and where the employer was located, and I thought I could do that by counties. And then after making that promise I asked my data analyst to deliver and she said, "But, Judge Leach, we don't enter into the system what county the person lives in or what county the employer is in. All we have are zip codes." We are in the process of printing it out by zip code and then manually converting the zip code into areas or regions of the State. So I'm a little delayed in getting that report.

As I've already touched upon in the report today, we are looking at our staffing levels and whether or not they need to be as great as they are if this current level of litigation is going to remain low. One of the problems for us is that we have to be sort of future forecasters – because the budget is planned 15 months before it even goes into effect; because it takes about six months to post a position, interview, hire and train a new employee; because adjudicators don't work on the case until 10 or 12 months after they come in, where we need processors to work on it the day it comes in. Depending upon the position we may have to be projecting whether we need a position 10 or 12 months, 15 or 18 months from now as opposed to what we need this very moment. That's a difficult management position, but we're trying our best to anticipate long-term trends in the workers' comp litigation and streamlining our staffing pattern to match only what we need.

Ironically less than two years ago I was before your predecessors, the Board of Managers, telling them we are getting 30,000 protests a year and we're only budgeted for 24,000. I don't have enough staff. Now two years later it appears that we have enough staff and maybe even more positions than we actually need to manage the caseload, so there has been a tremendous pendulum swing. Is that permanent or is that just a back and forth thing? We have to make that call.

Finally, I wanted to touch upon the status of the dependents' benefits termination case, which was reported to you two or three months ago back in January when it hit the newspaper. The Office of Judges made that decision and that interpretation of the law in July 2005. Of course none of you were hearing me report at that time. I was not part of the Insurance Commission, but we did report that position to the Board of Managers. It turned out to be a controversial interpretation. One part of the employer community was not pleased with our interpretation of the law. But I wanted to take this opportunity to use that example to explain to you that for every decision we make – whether it involves one individual worker and one individual employer or as in this case it involves a hundred and some widows and a hundred and some employers or even bigger issues – however we decide the case there is somebody that benefits from our decision and someone who does not benefit from our decision. You generally tend to hear from the people who are not pleased with the decision. We try to present a fair and unbiased opportunity for persons to present their arguments to us. We try to interpret the intent of the Legislature and the law as fairly and unbiased as we can. If we had decided the widows' decisions the opposite way, there still would have been an uproar. It just would

have come from a different community. So I ask you to consider the big picture whenever something controversial comes up of that nature.

Secondly, I want to make a promise to you which reflects exactly how I dealt with the Board of Managers. Whenever we see what we believe to be a controversial topic or whenever we see a decision that we're making that involves more than just one individual worker or one individual employer, I feel it's my obligation to let you be aware that that topic is there and how we have decided it so that you can be prepared for any flack you might catch or any members of the press that are contacting you and asking you what's going on. So, I don't like to make decisions in the dark and then leave you – my bosses – hanging out there. Had I been a part of the Insurance Commission in July of 2005, had you all existed and been the Industrial Council in July of 2005, you would have heard the report at that time. You wouldn't have found out about it in the newspaper six or seven months later. For any embarrassment or any discomfort level that may have caused any of you, I apologize. It would not have happened if the situation had been different. It won't happen in the future. Any questions?

Walter Pellish: Tim, I've got a couple of comments. First of all I agree with your last statement. It is a good approach to take. Secondly, since I didn't hear the round of applause in the room on the last page of your report, I'll tell you that I applaud you for your efforts in taking a look at these reports and trying to skim them down and make them more meaningful. I think you're on the right track with that sort of thing. The better information that we can get the better we can do our jobs, so thank you very much.

Judge Leach: Thank you, Mr. Pellish.

Vice-Chairman Dean: Mr. Slater, do you have any comments?

Rick Slater: I don't.

Vice-Chairman Dean: Judge Leach, do you have anything else?

Judge Leach: No. Thank you very much.

Vice-Chairman Dean: Thank you.

## **Public Comments**

Vice-Chairman: Does anybody in the public have any comments today?

Randy Cox (Spilman Thomas & Battle PLLC): Mr. Vice-Chairman, my name is Randy Cox. I'm an attorney with Spilman Thomas & Battle. I come here somewhat reluctantly and because of your lack of quorum I do so. I represent the American Insurance Association. My comments, which I've conveyed to the Department, go to Rule 12. If it was being taken up I wouldn't bring

to you, but because it appears to be delayed for a month I thought it might be appropriate to give you the perspective from the commercial insurers that are anticipating coming to West Virginia. And I apologize because I sent them the regs when you published them and I finally got comments the last few days. I know I'm late and I know these comments are very late.

The American Insurance Association probably represents the greatest number of commercial writers of insurance, in particular workers' compensation insurance. They are very interested in West Virginia, and I know a number of the members that I've talked to and I represent are interested in doing business in West Virginia in 2008. Their concerns about Rule 12 go to the issue of "unconscionability," and I know there was a statutory change which may have forced it. They are pleased of putting a statutory limit, a jurisdictional limit, so that it isn't open ended when you can question a settlement. Their druthers are to have every settlement reviewed at the time the settlement is made so that it becomes a final settlement and not subject to being reopened. It would give them finality and allow them to then take that number, put it in their books and not deal with a settlement again. What this does is it opens it up for a 180-day period. And we would prefer the Commissioner make that determination when the settlement is entered into – to bless it, determine it isn't unconscionable and let it go.

The second concern is in the definition of "unconscionability" to open up the settlement. And in particular the first two points which I know are directly out of case law – the relative bargaining position of the parties and the adequacy of the bargaining position of the parties. Frankly, in every settlement the claimant is going to have that argument because they are settling with lawyers and with a large insurance company, and they are certainly going to be in a relatively weaker position. Therefore that creates the possibility of opening up every settlement, which is clearly not the intent. I think the Department has done a nice job of making that clear. Those are the concerns they have about the rules. Otherwise they are happy with those. I'll be happy to answer any questions. Again, I apologize for the lateness of this, but my sense is because they're not coming in the marketplace until 2008 they were not as diligent as we would hope they would have been. Thank you.

Vice-Chairman Dean: Any other comments from the public?

Steve White (Director, Affiliated Construction Trades Foundation): I brought some issues at the last meeting about some companies that we didn't feel had coverage and the Commissioner responded in a letter. I want to acknowledge the response and it is appreciated.

In particular, one issue I'd like to see if we could focus on. There is a 90-day window of some sort that is...companies that come into the State have 90 days in which to get their West Virginia comp. That is, if they are going to be here less than 90 days, they don't have to get West Virginia comp if they don't have West Virginia workers. It is unclear how to administer that. There is some vagueness apparently in the law. Perhaps we could work to strengthen it. Number one, I attended the NCCI class that you folks put on which was informative and I asked the NCCI representative, "Is there a standard out there?" And there is no standard was the response I got. It's all over the map. Should you have West Virginia coverage day one in the

State, or day 90 or day 30? I think the 90 days is creating a lot of problems and I would like to see us look to make it a shorter period of time. So I just bring that to your attention and hope maybe we could focus on that piece. Perhaps ask, since you have the NCCI people, what is the policy in surrounding states so we can better understand that. And since it's all over the ball park, what could we do just to make it a 30-day standard for example. That's my suggestion. Thank you very much.

Dan Marshall: Jane, maybe you could answer this. That 90-day period that exists today, is that by virtue of regulation?

Commissioner Jane Cline: It is regulation. Ryan has been doing some research and looking at the issue because Mr. White had brought this to our attention earlier in the year. It's something we've been looking at and trying to get a better understanding, and continuing the dialogue with him so that we can bring something back to you.

Mr. Marshall: Very good.

Vice-Chairman Dean: Any other public comments today?

### **Next Meeting**

Vice-Chairman Dean: Mr. Pellish, our next meeting is scheduled for June 15. Can you be here that day?

Mr. Pellish: Yes.

Vice-Chairman Dean: Mr. Slater?

Mr. Slater: What time is the meeting?

Vice-Chairman Dean: I'm assuming it is 10:30 a.m.

Mr. Marshall: It's on the calendar for 3:00 p.m.

Mr. Slater: I'm good.

Vice-Chairman Dean: Our next meeting will be June 15, 2006, here at 3:00 p.m.

Commissioner Cline: I will not be here, but Mary Jane will be here.

There being no further business the meeting adjourned at 11:14 a.m.