

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

AUGUST 24, 2006

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, August 24, 2006, at 3:00 p.m., Charleston Civic Center, Rooms 207-209, 200 Civic Center Drive, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean, Vice-Chairman
Dan Marshall
Senator Brooks McCabe
Walter Pellish (via telephone)
Rick Slater

1. Call to Order

Chairman Charles Bayless called the meeting to order at 3:05 p.m.

2. Approval of Minutes

Chairman Bayless: The first order of business is the approval of the minutes from our last meeting on July 22, 2006.

Rick Slater made the motion to approve the minutes from the July 20, 2006, meeting. The motion was seconded by Bill Dean and passed unanimously.

3. Office of Judges Report – Chief Judge Timothy Leach

Judge Timothy Leach: Good afternoon Mr. Chairman and members of the Council. Statistically from July we wanted to highlight in our report some items that I found of interest. You will see that the New Fund protests for July exceeded the Old Fund 47.0% to 34.2% and then gradually it's gone through seven months of the year. They are approaching a 50/50 split between New Fund and Old Fund. Of course that's a trend that will go on as we move further from July 1, 2005, when the New Fund cases started. But still a very significant part of our caseload involves older claims and that's the history of litigation in workers' compensation. You will see 10 and 15 year old injuries that are in litigation over some new issues that got raised by a claims management decision a month or so ago. Like old soldiers, old workers' comp claims and their litigation tale do not go away very readily.

Chairman Bayless: Judge, I've got a curious question. Self-insured is 19.1%. If you were to take the total volume of self-insured, is that about what you would expect or do they have a higher or lower. . . ?

Judge Leach: I think it is a little higher than I would expect, but I had to put a caveat there. We never understood exactly how many employees in the State are covered by self-insured employers. I have heard the figure of 13% to 15%, somewhere like that. If it's 15%, then 19% is a little bit high. Also, this is a somewhat elevated number because our protests were so low at the beginning of the year coming from BrickStreet Mutual, and yet the self-insured protests were the same as the year before. It kind of tilted the balance a little bit. It doesn't look like there are more protests coming in from self-insured. It just looks like for some reason the BrickStreet insurance part dropped which made the percentage change. Speaking of the total number of protests, as you can see we are now projecting only 15,000 which is about 9,000 under our budgeted estimate, but that budget was prepared two years before this fiscal year. So it is kind of like a long-range weather forecast and you're doing your best based upon past trends and histories and we've obviously overshot the market. As a consequence of that, we're not filling any vacancies. We had one for several months at the Office of Judges. We're not even posting any vacancies. We certainly have enough staff at present to handle that kind of a caseload.

Our Issues Resolved is projected out to be 19,000. That would be about 4,000 more than we are projecting to take in. That would account for why the Pending Caseload Report in Section C is now down to 10,658. Just to remind you, when we started this report in August of 2005 after we were audited, it was suggested by the auditor that we report that number each month. That number was over 18,000 and now it is down to 10,658.

We have a couple of unhappy numbers to report in the next three sections. Our protest acknowledgement crept up to 4.27% longer than 30 days. For 2005 it was 3.66%, so it's less than a half percent. I still felt obligated to highlight that in red in Section D because for that one month it's not a good figure. But if you look at the graph immediately under that, the last four months are right about in the ballpark for the last three previous years in averages.

Page four, Section F, we had two good numbers but one bad number. The good numbers are that for the month and for the year we're getting our decisions out within 30 days of assignment to a Judge in 45.7% last month and 48.5% for the year-to-date. So that means almost half the decisions we decide are decided within 30 days of the assignment to the Judge. And since our rule requires us to do them within 90 days we feel like getting that in 30 days reflects a very efficient system, and also it's beneficial to the parties waiting on the decision. If you win, you are anxious to get the decision. Even if you lose you are anxious to get the decision because you can then appeal that to the next level of the appellate process, and you can't go there to try to win your case again until we're through with it. Winners and losers want quick decisions. That's what we try to deliver. Now the negative number was our 90-day standard. We failed to meet that 4.7% of the month and last year it was only 1.4%. So that's an

issue we are working with administratively and I anticipate that it will probably be a problem next month too. One of the problems is once you miss 90 days it doesn't show up on our report until you actually issue the decision. So someone that's got a decision that's already 100 days late, it hasn't shown up on our report yet and it will be on the next report that comes out. Looking at our inventories, for some reason we had three or four adjudicators that have struggled with that rule and we are trying to deal with that administratively.

Now more good news is the final statistical category. That is our overall time standard, which is the number of days that our rule allows us from receipt of the protest until issuance of the decision. We're hitting 85% on that and the rule only requires us to meet that 80%, so we've got some cushion there. We're doing better than what our rule requires us to do.

That wraps up the statistical overview. In terms of the more narrative reports, on page five of your report, Section III., I gave you what is lengthy for this part of the report – five paragraph synopsis or summary of what ended up being a 12-page written decision, a memorandum that I mailed out to all the lawyers. I didn't give you all 12 pages. I tried to give you the “down and dirty” version. This involves an amendment in 2005 to the permanent total disability litigation and basically this interpretation. I will not repeat the legal analysis here. It will impact about 550 pending cases that we have in our system. Now the final say will be made by the West Virginia Supreme Court. But the litigation track history of workers' comp cases – barring some kind of special lawsuit or remedy in the Supreme Court – is two to three years after we rule on a case before the Supreme Court is going to rule on it. So let's say it goes really fast. It goes through the Board of Review and through the Supreme Court and two years from now we have a definitive answer from the Supreme Court. We generate about 25 of these decisions a month, which is 300 a year. So in two years we're going to be 600 into a current inventory of 550. We will have decided all of our cases based upon this policy in all likelihood before the Court addresses it. But that's just the way the system is set up. We have the honor or burden of making the first stab of interpreting any amendments in the West Virginia Legislature that come to our shop first, then they go to the Board of Review and then they go to the Supreme Court.

In terms of training, we have scheduled the workshops. We will be sending out invitations and notices very shortly. The first one is in Morgantown on October 12; the second one is in Charleston on October 17; the third one is in Beckley on October 24; and the fourth one is in Charleston on October 31. To summarize again, these are half-day seminars and they are free of charge. We go over our processes and some changes in interpretations of recent amendments to the law. Last month we conducted some in-house training for our non-attorney adjudicator team. We really have not had any training since the law changed in 2005, so we needed to go over some different concepts with them and we covered such things as weighing of evidence. We talk about Rule 20 treatment issues. I get a lot of those and that's a very problematic type of case for us. We changed some blower plate language covering some of the new laws. I think that was very well received and the employees who attended were very appreciative and we thought they were very attentive. Mr. Chairman, that concludes my presentation and I would be happy to take any questions.

Chairman Bayless: I don't want to interject us into your deliberations too much, but I'm just wondering on the PTD protests whether it would be possible to insert a paragraph in there that says, "We use this interpretation. The distinction is gone and these are old cases that we have. . .under the procedural rules before and after and find that the facts and circumstances in the light most favorable to the plaintiff or the defendant, it would have made no difference in our adjudication." Are there cases. . .if you could do that. . .whichever way the Supreme Court comes down. . .

Judge Leach: That's a good thought and in some cases it would not have made any difference but in others it would. It's not a bad argument at all. I recognize your legal training. It's an idea worth considering. . .that I'm not considering this evidence under our procedural rule, but even had I considered it, it would not have been persuasive to me. One of the problems is the standard of review changed from "clearly wrong" to "preponderance of the evidence." Now "clearly wrong" is a much tougher standard to overturn than just mere "preponderance of the evidence." If you're mathematically inclined, "preponderance of the evidence" is 50.1%, but "clearly wrong" is somewhere beyond that. I don't if it's 60%, 70% or 75%, but it's somewhere beyond "preponderance of the evidence." So, if you're applying two different review processes, it's a little more problematic to say, "I would affirm this decision under the 'clearly wrong' and I would also affirm it under 'preponderance of the evidence.'" Anything else, Mr. Chairman? Thank you for the suggestion.

[Mr. Pellish was briefly disconnected on the telephone. He called back and rejoined the meeting.]

Chairman Bayless: We have had several readings and this is the final reading of Title 85, Series 13. This is the Procedural Rules for the Industrial Council and there was a minor change which we have considered. Mr. Sims. . .

4. Permission to Final File Title 85, Series 13 – Ryan Sims Procedural Rules for the Industrial Council

Ryan Sims: Good afternoon Mr. Chairman and members of the Industrial Council. I am coming to you today with Rule 13. As you know this is for final filing. We are asking you to final file a small change in Rule 13 which clarifies that only "two" members of the Industrial Council have to appear live in order for a quorum to exist and give the Industrial Council the ability to pass rules and make other official decisions. I don't think there has been any controversy over this change. I have not received any public comments on it. I think everyone, as far as I know, the public, the Industrial Council and otherwise is in agreement that this is an appropriate change. Therefore we bring this change to you today and ask for permission to final file this version of this slight change in your procedural rule with the Secretary of State.

Chairman Bayless: Is there any member of the Commission that has any comments? Is there any member of the public that has any comments on the procedural rule? With that, I would move that we adopt a resolution permitting the staff to final file Title 85, Series 13, with the change that we have discussed.

Bill Dean: Second.

Chairman Bayless: Any discussion? All in favor signify by saying "aye." Opposed?

[Mr. Pellish was briefly disconnected on the telephone. He called back and rejoined the meeting.]

Chairman Bayless: We just had a motion and you got right in the middle of the voting, so I think you can still cast your vote. This was the rule, if you recall, that we had considered two or three times. It is Series 13, which is the Procedural Rules for the Industrial Council, and the only change we voted on was that as long as "two members" were physically present in the room and the others were on the telephone then we would have a quorum. And just when you beeped we were all saying "aye." So, if you would like to get in your vote. . .

Mr. Pellish: Aye.

Chairman Bayless: Thank you. Motion passed. [Title 85, Series 13 passed.]

5. General Public Comment

Chairman Bayless: There are several other rules that are currently before the Council. As you remember last time we had some discussion on the rule on self-insurance and there were comments on both sides as to whether or not they should have to cover a defaulting party and the intent of the Legislature. The staff has received numerous comments on that rule and they feel that given the comments they really do need more time to try to craft the solution. The only rule we are going to consider today is the one that we have already considered. So I would urge you if you have any comments. . .in fact if anybody wants to make a comment on anything that is before the Commission, this would be the time to do it. This is general public comment. If you have already submitted it in writing, there is no need to do so. Does anybody wish to make a comment?

Steve White (Affiliated Construction Trades Foundation): I just had a comment with regard to an issue I brought before you at the last meeting. That has to do with the default list and the release of not only the names but additional information like the money owed, the street and address. This is information that previously had been made available about how much is owed. There is no reason not to make it available now. It helps us in a number of ways. It helps us focus on where the problems lie. Certainly there are lots of folks who owe minimal amounts of

money for a variety of reasons, and those things are going to get cleaned up. I don't want to waste my time pursuing those minimal amounts. I want to know where the big dollars are, so to speak. It helps me prioritize the information that's been there before, plus what we're getting right now is just name and county. If you are Smith Construction there could be more than one, so it's hard to figure out sometimes. I urge you to consider supporting some effort to get that dollar amount or at least to understand why we would not get it.

Chairman Bayless: Does any member of the Insurance Commission's staff want to say anything on this subject? Ms. Pickens. . .

Mary Jane Pickens: We have been looking at that because you are not the only person that's made that request. I think where we were. . .I need to go back and double-check – and I would be happy to talk to you about this after the meeting – we believed that it was okay to release the address. I'm not sure what we felt about the amount because we are trying to work within the confidentiality language that we've got here in the Code. We want to make sure that in the transition between the Workers' Compensation Commission – and now we have private carriers in a different type of default – that we don't run into any statutory problems with it. But we are still working on your issue.

Mr. White: Sure. If you can point to me where you feel you are prohibited by law where in the past have been able to give it, then we can talk about legislative fix on it perhaps. Again, I urge the consideration of it because I know there are a lot of folks out there owe \$144.00, a minimal amount they didn't file; they are out of business or whatever. It really helps us focus. I forgot to add that there is a statutory provision that says that anyone who owes the State or subdivisions in total \$1,000.00 or more is prohibited from bidding on State contracts. If they owe here \$500.00 and owe unemployment \$500.00, boom they're blocked. Blocked. And that is something we have been able to use in the past for enforcement that sent them scurrying back to write a check. Now I just don't know. I'm out there saying, "this guy, he's default. . ." it could be a penny for all I know. It helps us focus whether it's a million dollars or \$1,000.00. Thank you.

Chairman Bayless: You could make an argument that it's hard to effectuate the intent of that law if you don't know the amounts. I recognize the privacy arguments and I have nothing to say. Is there anybody else from the public that wants to make a comment on anything that is before the Commission?

6. New Business

Chairman Bayless: Is there any new business to come before the Commission?

7. Next Meeting

Chairman Bayless: Our next meeting is Thursday, September 28, at 3:00 p.m., here at the Civic Center.

8. Executive Session

Chairman Bayless: At this point we have two applications for self-insurance status, and therefore pursuant to the law on confidentiality I would request a motion to go into Executive Session.

Dan Marshall made the motion go into Executive Session. The motion was seconded by Bill Dean and passed unanimously.

[The Executive Session began at 3:40 p.m. and ended at 3:55 p.m.]

Chairman Bayless: We are now back in public session.

[Senator Brooks McCabe just joined the meeting.]

Chairman Bayless: You are just in time to vote. In the Executive Session we considered two applications for self-insurance – St. Mary's Medical Center, Inc., was the first and Rivers Edge Mining, Inc. [Peabody's subsidiary] was the second. I will read these Resolutions.

It appearing to the Industrial Council that:

Whereas, St. Mary's Medical Center, Inc., has applied for workers' compensation self-insured status;

Whereas, based upon the information provided on the application, St. Mary's Medical Center, Inc., meets the financial responsibility requirements set forth in §23-2-9 of the West Virginia Workers' Compensation law and West Virginia Legislative Rule, Title 85, Series 18;

Whereas, based upon the information provided on the application, St. Mary's Medical Center, Inc., meets the procedural requirements set forth in §23-2-9 of the West Virginia Workers' Compensation law and West Virginia Legislative Rule, Title 85, Series 18;

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Therefore, be it resolved that the Industrial Council hereby grants self-insurance status to St. Mary's Medical Center, Inc., effective October 1, 2006.

This approval is conditional and contingent upon the receipt of the policy of excess insurance for catastrophe coverage from Safety National Casualty Corporation in order to satisfy the catastrophe reserve requirement of the Insurance Commissioner.

Adopted this 24th day of August, Two Thousand and Six.

Chairman Bayless: That is a motion.

Mr. Dean: Second.

Chairman Bayless: All in favor signify by saying "aye." Motion passes. To save the reading I will then make an identical motion for Rivers Edge Mining, Inc.

Mr. Dean: Second.

Chairman Bayless: All in favor, "aye." Motion passes.

Is there any other business to come before the Council? We need a motion to adjourn.

Mr. Slater made the motion to adjourn the meeting. The motion was seconded by Mr. Dean and passed unanimously.

There being no further business the meeting adjourned at 5:00 p.m.