WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JANUARY 11, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, January 11, 2007, 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 (via telephone)
Walter Pellish
Rick Slater

1. Call to Order

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

Chairman Bayless: Mr. Slater will be here shortly. Our rules require that we do a roll call so I'll just note for the record that Walt Pellish, Bill Dean and myself, Charles Bayless, are present. We understand that Bill Kenny and Mary Jane Pickens are sitting in for Jane Cline.

2. Approval of Minutes

The first item on the agenda is the approval of the minutes of December 7, 2006. Does anybody have any additions, corrections, suggestions?

Walter Pellish made the motion to approve the minutes from the December 7, 2006, meeting. The motion was seconded by Bill Dean and passed unanimously.

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

Judge Leach: Good afternoon Mr. Chairman and members of the Council. My statistical report represents a year-to-date type of report because I never got used to using a fiscal year. When I started the job I always reported from January to December. So these statistics give us the 2006 calendar year statistical numbers which I sent to you. As you know, the trend has continued for us this year and our number of protests dropped to slightly under 15,000 for the calendar year. The number of decisions resolved is over 18,000. By doing the math – more going out than coming in – we've reduced our outstanding inventory of cases to a figure of 8,485 cases at the end of December. For comparison sakes, when the auditor for the Board of

Managers asked us to start reporting this it was 18,000. So there has been a very large drop since 2005 to the end of 2006. Twelve months previous it was a little over 14,000. Our timeliness of our acknowledgement is a chart that appears on page three. I know you cannot do it accurately, but if you were to ignore the first three months – the dip that looks like the big dipper there on that graph – you will see that for the remaining nine months we were at or above the previous three calendar years for that performance. I've tried to explain in the past that the reason there was such a dip there is because January 1 of 2006 is when we were denied access to data in the former Workers' Compensation Commission files. So, we had to get our access for setting up a claim file in other fashions than we were used to and it took us about three months. We stumbled for about three months until we hit our stride in April and kept it up from thereon. So we have a system that works now in terms of identifying claim, employer, TPA name, lawyer name – things we need to set up a file is now working smoothly.

Our final decision timeliness dropped ever so slightly from the final three years. On page four I actually prepared two different graphs because, again, in January and February at the start of the year we were way down. We took a little dip in July and August. Those are vacation months. That's a historical trend that's reflected every year. So even though for the year we're down maybe a percent in that performance from the previous year's high, you can see the general trend over each month was an upward trend. I'm satisfied that we have a handle on the decision timeliness. Our rule requires us to get a decision out within 90 days of concluding of evidence and assigning to a Judge. Now what I highlighted at the top of that page – the number with the green arrow beside it in yellow – is that for 2006, overall for the year, we were able to do 49.8% of our decisions within 30 days of assignment to a Judge. So we have a slightly elevated negative number, but a very elevated positive number in that report. As you can see in 2005 that number was only 35.1% – a very large step-up in the pace of getting the decisions out.

The last statistic is report (G) at the bottom of page four. And that's a positive number also, which for the year-to-date we were overall time standard compliance. That is how long we had the case from the day it came in the door until the day it went out the door. We met our rule 85.9% of the time compared to 74.9% the year before that.

Deputy Chief Drescher keeps some of his own statistics which appear for the first time in this report in paragraph (H). Those are just some statistics of interest to me. He reports at the end of each calendar year on this. They show a general trend of positive results. The average number of days from the protest received to acknowledgement was up by 0.68 of a day. Again, that is accounted by the slow start we had at the beginning of the year. The other numbers all showed an improvement. The average number of days to the Submit Order dropped from 32 days to 25 days; an improvement of seven days. The average number of days from the Submit Order to decision dropped from 44 days to 38 days; an improvement of six days. The average number of days the case was in litigation dropped by 16 days; down to 317.

I really don't feel that it is necessary to go over the narrative report there in number two because I just kind of touched upon all the highlights about what we did. In 2006 we were faced

with new tasks that we were not familiar with and had not performed before 2006. But in spite of taking on new responsibilities given to us by the Insurance Commissioner and by the Legislature, we felt like we kept our overall claim numbers up at an acceptable level.

Very briefly to touch upon the court reporter issue. We are working with that. There is going to be a bidding process with new contracts for the court reporters. We are hopeful that that can be resolved by late spring. In the meantime some temporary contracts have been extended. That is still an issue for our lawyer friends that practice before us and for ourselves and for the court reporters that do the deposition work for us. All I can say is it is moving forward, maybe a little bureaucratic and a little slow. We are working with the Division of Purchasing and we have to go through highly regulated bidding processes.

Mr. Pellish asked me when I sent him the report if I could comment on the age of our pending cases. I had a report ran after he sent me the e-mail and this report reflected 8,518 pending cases, which is an increase of 33 from the end of the month. It just means we got 33 more cases in since the end of the month than we put out since the beginning of January. So the number is a little bit different. But basically approximately 45% of our pending 8,518 cases have been with us six months or less. From six months to one year it's 22%; from one year to one and a half years or 18 months it's 12%; from 18 months to two years it's 5%; over two years old 14% of our cases – 1,076. But there is a big footnote that goes with that. Over 700 of those involve one massive group litigation which we actually had already resolved once before, and it went up to the Board of Review and they remanded all 700 of them to us and asked us to do them a little differently. Unfortunately we have to track from when they first came in our door. Not from when they came in the second time. So we feel like we timely disposed of those at one time but now they are back on our desks. They are in the process of being shipped out now. So that number is going to drop again significantly. The remaining 300 or so that are over two years old – we run this report periodically and go and actually look at all 300 of the cases. Have we dropped one? Has it fallen through a crack? Is it behind a desk somewhere figuratively? We check on those. Generally what happens is it is a case that we had decided and had gone to the Board of Review or Supreme Court and sent back to us and our computer picks up the first time we got it instead of when it got sent back to us. That concludes my report gentlemen. I would be happy to entertain any questions.

Chairman Bayless: Judge Leach, I noticed that on the front page, year-to-date protests, the Old Fund and the New Fund. The Old Fund obviously over time will be winding down. There are a lot fewer protests in the New Fund. Are you seeing a lot fewer protests now? If you looked at a graph of January, February, March, April, May, June, etcetera, on protests, do you think as a percentage of hours worked they're trending down or holding even or going up?

Judge Leach: No. Although the numbers, if you look at the graph right below that, have dropped. . .they're now leveled out. There is not a continuing drop from. . .if you trace from July of last year through December they leveled out. Something happened in 2004 or 2005 that made them start dropping. But they have now bottomed out I would say and we're at a new historic level instead of still wondering where the bottom is.

Chairman Bayless: I was wondering if we'd hit the bottom or not.

Judge Leach: I believe we have.

Chairman Bayless: Any questions? Does any member of the public have any questions on this report? Just for the record I forgot to mention that Commission Member Dan Marshall is on the phone and has been since the start of the meeting. I forgot to mention that when I took the roll call. Also, just for the record, none of the Legislative Members are here today because the Legislature is in session and they probably won't be here next month either.

The next thing on the agenda is we have two rules to consider today and the first is Series 6, which is the assessment to do two things. One is the Debt Reduction Fund and the other is for regulatory surcharge to cover the cost of regulating the industry which is quite common in regulatory circles.

4. Rule 6, Workers' Compensation Debt Reduction Fund Assessments – Ryan Sims

Ryan Sims: Good afternoon Chairman Bayless and members of the Industrial Council. The first rule, as you mentioned, that we are bringing before you today is Series 6, Title 85, also known as Rule 6. This rule was first drafted. . .the original effective date was September 1, 2005. It was drafted on the eve of transition to reflect and to provide some structure and process for the Debt Reduction Fund assessments that are required to be paid by both the self-insured community and the insured employer community in order to be one piece of the funding used to pay off what is now known as the Workers' Compensation Old Fund. That is the remaining debt left over from the old Workers' Compensation Fund. Again, what this rule did was just basically created some structure and process essentially for our staff and for the employer community to know how the assessments worked and when they would be assessed and in what manner they could be changed. There is another assessment that would be described as a regular assessment. Let me back up for a second. The debt reduction assessment will be regularly assessed upon the employer community until the Old Fund is paid off in full. I don't know that there is a particular timeframe for that but it will be at least five or ten years or more. There is another piece that is a continuing assessment or surcharge on both the self-insured and the insured community and that is the regulatory surcharge. That is to say an assessment or surcharge on both the insured and self-insured employer community that pays for the costs of the Insurance Commission to regulate both the insured and the self-insured employer community to essentially regulate the workers' compensation insurance market, both the insured aspect and the self-insured aspect.

The first purpose of this amendment, in addition to the Debt Reduction Fund assessments, is to also add to this rule the regulatory surcharge piece and to provide again some structure, some process for our staff and for the people affected by it to know how the assessments work,

how they can be changed, when they will be assessed, etcetera. And that's really throughout the rule. There are changes made to incorporate in addition to the debt reduction assessment the regulatory surcharge both to the insured community and the self-insured employer community.

The other substantive change being made, if you go to page three [tab 2] of the rule towards the bottom of the page – now with the amended version, subsection 3.8 – the definition of "total premium due" is being changed to basically clarify that the two surcharges now that are involved, the debt reduction and the regulatory surcharge, cannot be compounded upon each other. Previously this statute did not clarify that you can't impose the. . .for example, the debt reduction surcharge and then in addition after that apply the percentage surcharge of the regulatory surcharge on top of that. In other words, you can't compound them. You get your base premium and you apply each surcharge, percentage of surcharge, to the base premium. And that really goes to the insured community. This really wasn't an issue with the self-insured employer community as an issue with the amount of premium you use to determine the surcharge. And, again, just to clarify in 3.8 that there is no compounding in regard to that surcharge. Those are the two primary substantive changes. There is, of course, as we do with all of these rules, there is technical clean-up to take care of some transition language and to make the rule read proper and otherwise technical clean-up as required. But the two primary changes are just as I described. And with that I would present you this draft of Rule 6 and request permission from you to file initially with the Secretary of State.

Chairman Bayless: Is there any discussion among the Members?

Mr. Pellish: Moved.

Chairman Bayless: It has been moved.

Mr. Dean: Second.

Chairman Bayless: It has been moved and seconded. All in favor, aye. We will file it. [Rule 6 passed unanimously to initially file amended version.]

Does any member of the public at this point have anything? You certainly have another couple of months, but if you have anything now. . .if not, please get your comments in to the staff and let's get the process started. You can review it. It is fairly straightforward, but if anybody has any improvements they would like to suggest, get them in.

5. Rule 19, Self-Insurance Risk Pools – Ryan Sims

Ryan Sims: We are bringing to you today Title 85, Series 19, otherwise known as Rule 19 which is the rule that provides some structure regulations for the self-insurance risk pools. There are two self-insurance risk pools. One is the Security Pool which is in place to provide protection for potential defaults for dates of injury and workers' compensation obligations prior to July 1, 2004. And then the second pool is the Guaranty Pool which is there to provide protection in regard to dates of injury, workers' compensation obligation with dates of injuries after July 1, 2004. I think it is safe to say. . .we presented this initially, of course, and filed it initially in November. Then we had a rather lengthy Public Hearing on it at the December 7, 2006, Industrial Council meeting which served as the Public Hearing for this rule. We come back to you today with a final version of Series 19. The version you have. . .there were no significant substantive changes compared to our last version. We, of course, did consider all the comments we received and did our best to analyze them. This version we believe best suits the needs of the. . .particularly the Guaranty Pool which most of the comments surrounded the change in the assessment methodologies and the minimum funding level for the Guaranty Pool. The one substantive change that I will direct you to is on page four of the rule. The rule is found in Tab 3. On page four, Section 6.1, formerly Section 6.1(b), was stricken. Basically that provision has become obsolete. What that provision did was establish that all self-insured employers needed to be fully secured for their obligations by June 30, 2006. And of course that date has come and gone. So at this point 6.1 and 6.1(a) state that they need to be fully secured, period. The provisions which were in the form of 6.1(b), which provided for a secured increase plan and that they all had to be secured by June 30, 2006, of course is now obsolete and all of our self-insured employers now are fully secured as they are supposed to be. We deem that section not to be necessary anymore. That was the only substantive changes. The other changes that you will find that were made compared to the previous version are highlighted in yellow and they all involve just technical clean-up and changes of a technical or procedural nature.

On the comments, it's safe to say that most of the comments we received were in regard to the Guaranty Pool and the changing of the assessment methodologies and reducing the minimum funding amount from $30 million to $10 million. Again, in our response comments, it's the first item. You can see the response we prepared. In addition we have staff here today; particularly executive leadership here today prepared to present a somewhat more detailed presentation on why we believe these figures should change. They are prepared to do so if you wish.

Chairman Bayless: I know that from reading the comments. . .I'm sorry I was out of the country and just got back a few days ago, but I've read all the comments that I've got and it is clear there is a lot of controversy. So why don't you have the staff go ahead and make that presentation.

Mr. Sims: Sure.

Bill Kenny (Deputy Commissioner, WV Insurance Commission): The members of the Industrial Council have been presented with a synopsis of the changes and why they are recommended. The short version is merely that we have looked at the needs of the Guaranty Fund and what it really is meant to do. Essentially that Fund is established to actually provide the cash flow and the financial needs until such time as security pools can be. . .the securitization posted by the individual self-insureds, if required, can be converted to cash usage to pay claims or until such time as assessments can be made against the self-insured community. The handout we provided you does go through the timelines, but essentially we have taken a very conservative approach on that and believe that we've more than adequately allowed for those needs to be covered and therefore recommended the $10 million dollars. That makes a question, why was it set at $30 million dollars? In review of the history we see that that was a number that was derived at prior to the privatization of the Workers' Compensation, but not much prior to, and based perhaps on some accounting standards but not necessarily actuarially sound or as a look up cash flow needs. And it also reflected the circumstance at the time which revealed that the self-insureds that could not exhibit financial. . . to pay their debts, or perhaps in less financial secure position than others, were not at that time required to fully collateralize their potential liabilities. That is not the case today. Today we can proudly say that any self-insured that does not meet stringent financial requirements are required to post collateral equal to amount that is soon to be their liability for workers' compensation claims should they seek bankruptcy.

With that in mind, we tried to put some series of tests to it to determine is the $30 million dollars logical from any other standpoint and frankly we could not. We checked with Ohio. We see Ohio has ruled an actual statement that says their pool was to be established at the lowest amount possible and merely calls for an assessment of the self-insured community reflective of the prior years' payout by the Guaranty Pool. Given all of those with that consideration, we just did not feel that $30 million dollars is necessary. We felt that it became somewhat of a barrier to companies who are self-insured today or wish to become self-insured and requiring them to actually encumber more capital than is necessary. From a regulatory standpoint we always look at the marketplace and try to determine what is the most efficient way to regulate that marketplace, yet assure that the needs of the State and the citizens are taken into account. It is our judgment that $10 million dollars as a target fund balance is very accurate, more so than necessary.

Chairman Bayless: Do any of the Commission members have questions?

Mr. Pellish: I have a couple. Bill, I think for purposes of the record or anybody who reads the proceedings of this meeting, it would helpful if you would define the difference between the Security and the Guaranty. Secondly, I think it would be helpful if you would state what the largest amount was in the past that was ever funded when you had the old $30 million dollar level sitting out there.

Mr. Kenny: I'll let Melinda Kiss speak to the largest balance. She probably has the most historical knowledge. I don't believe it ever reached $30 million dollars. That was a goal that was set that really just this year was. . .assessments. . .to try to reach. . .obtain that $30 million dollars, but Melinda can give you the history and the current fund balance. As far as the Guaranty Pool and the Security Pool – and correct me if I misspeak – the Security Pool is in place to cover the amount for claims or for injuries that occurred prior to July 1, 2004. The Guaranty Pool is in place to cover any injuries that would have occurred on or after July 1, 2004, which the self-insured company is not able to cover financially themselves.

Mr. Pellish: Thank you.

Melinda Kiss: I will certainly answer, but I actually don't know the answer. There has not been a payout per se from the Guaranty Fund. There is only one employer who is having claims paid out of that Guaranty Fund and the total actuarially. . .ultimate value of those claims is only $720,000.00. The $30 million. . .I can't relate that. If you were asking me like what's the historical largest self-insured bankruptcy, we would have to pull that data. I don't have that.

Mr. Pellish: That's not what I was after, Melinda. I assumed that the $30 million dollar number was something that was envisioned to be funded to get near that level. My question is what is the highest balance that ever existed in that?

Ms. Kiss: In the Guaranty Fund? Well, the highest balance would be the amount we have right now. It would be our cash balance and it's about $2.2 million dollars.

Mr. Pellish: That's what I thought the number was. Thank you.

Chairman Bayless: For the record, Mr. Slater has joined the meeting at this point. Melinda, I have a question. What do you do? At one point one of the comments I read that Weirton Steel was $70 million dollars and the Legislature had to pick that up and basically fund it, and we don't want to stick anybody with that again. I've talked to people about this and back then it was maybe not as strictly enforced as to who got into the Fund and who didn't and everybody knew Weirton Steel was in trouble and they still left them in the Fund. But what do you do with an Enron? I know Enron well. I did some investigations on that. They went from the darling of Wall Street to bankrupt in two months. So what happens if there is an Enron and they have a big accident at the same time? What happens then? Do we think actuarially we're still on sound ground for something like that?

Ms. Kiss: I think that what we're saying to you is that we believe the $10 million dollars is enough to cash flow the immediate needs and cover the claims obligations of the claimants. Then if something happened like an Enron, something we never saw coming because we don't have that collateral in place, then there will be a large assessment to the self-insured community.

Mr. Kenny: Mr. Chairman, we asked ourselves that question also and obviously one of the answers is we could not tell you what the Fund balance is to get a hundred percent certainty and that number is infinity. That number is huge. But what we did look at is 11 of the self-insureds whose financial picture required us to require them to post collateralization and we have collateralized that. That number, if all 11 were to in a similar period of time file for bankruptcy, is only $2.8 million dollars. So, again, we think the $10 million dollars is certainly well above that and that would be the worst case probability – we would have 11 go bankrupt at one time. We then looked at our largest self-insured and said what happens if our largest self-insured should fall on financial difficulties, and that number is $5.6 million. So, again, we have twice that. This is just to provide the cash needs until we can assess the community and collect collateral that's been posted. This Fund probably has to be looked at. . .is not a number necessary to pay a $70 million dollar Weirton Steel liability. But how much is needed for us to get to the real "deep pocket" so to speak which is the assessment for the self-insured community.

Mr. Pellish: I think there's another point here too. I may be way off with this but I'll state it anyway. If you look at an Enron situation you had an awful lot of "paper game playing" and there really weren't any products involved. When we review self-funding requests here, as you are well aware, we go through a detailed historical analysis. And I think exposures from a workers' compensation basis are more severe when you are dealing with heavy manufactured. I can't envision that you would have much exposure with an Enron type thing unless somebody blew up a building or something like that. So I think we need to keep in front of us that we're primarily addressing industrial type situations.

Chairman Bayless: Any other Commissioners have comments before we throw it open for the public? Has anybody signed up for public comment? We don't want to set this so high that it drives people away from self-insurance. That's clear. To me the number ought to be whatever the actuarially number is and I agree with you. It's not the final payout. It's just giving you time to get from "point A" to "point B" until you can start collecting the security. Comment from Mr. White?

Steve White (Affiliated Construction Trades Foundation): Not at this time.

Chairman Bayless: That's fine. Does any member of the public have anything to say on this proposal? We've all reviewed the written comments I believe. Does anybody have anything to say? Any of the staff? I will have to admit. Literally I was in Sydney, Australia, Monday and I just got back, so I will have to ask a dumb question which I should know the answer to. I read all the comments, but I do not know the answer to the question. Is this the final reading? Do we vote on this now or is there another go-around?

Mary Jane Pickens: No. This is it. This is the vote to final file the rule and give it an effective date.

Chairman Bayless: I read the comments and tried to get up to speed on it. I talked to Ms. Pickens and asked her to go through the comments with me, but I didn't ask her that question before the meeting. This is up for final approval. Do we have a motion?

Mr. Pellish: So moved.

Chairman Bayless: Is there a second?

Mr. Dean: Second.

Chairman Bayless: It's been moved and seconded. All in favor, aye. It has passed unanimously. Thank you. [Rule 19, Self-Insurance Risk Pools, passed to final file amended version.]

6. General Public Comments

Chairman Bayless: The next item on the agenda is general public comments. So, we'll start with Mr. White.

Steve White (Affiliated Construction Trades Foundation): Thank you Mr. Chairman. Steve White, Director of the Affiliated Construction Trades Foundation. At the meeting last month I had brought some concerns about enforcement issues. As I recall Mr. Pellish made a motion basically asking for some updating, reporting on enforcement efforts in place. Things like how many postings were done. What kinds of investigations were underway? And I just don't see it on the agenda. So, I just wanted to make sure it was still before this group.

Ms. Pickens: I guess I owe the Board an apology. I was not here at the last meeting. I was out of town, as was the Commissioner, and there may have been some confusion. We do not have that prepared but I will absolutely get that prepared for next month. And I do apologize for that.

Mr. Pellish: I don't think my motion was for it to be on this month's agenda but something that we needed to look at periodically. I think Mr. White is dead-on right, but I don't think there is any apology necessary as far as it not being on here today.

Ms. Pickens: Okay. Thank you.

Mr. Kenny: So we can react to what Council needs, I interpreted that as for us to develop a periodical or quarterly or whatever. . .report of just general standings of our workers' compensation enforcement regulatory initiatives. Is that pretty much what you are looking for?

Mr. Pellish: I think so. But given Mr. White's good memory, I think it would be apropos to have it on next month's agenda the first go-around.

Chairman Bayless: He'll remember it I'll guarantee it.

Mr. Kenny: I can tell you there are 1,722 more on the list. . .

Chairman Bayless: Is there any other public comment on any matter?

7. New Business

Chairman Bayless: Hearing none we will move onto new business which it appears from the agenda a scheduling conflict. March 22, what is our problem there? Does anybody have a problem with March 22? Mr. Marshall has a problem with March 22.

Dan Marshall: No I don't.

Chairman Bayless: It is a room scheduling conflict [with the Civic Center].

Mr. Kenny: Can we not do this at our main conference room?

Ms. Pickens: We probably could.

Mr. Kenny: Just looking at the number of people we can fit this in our main conference room.

Chairman Bayless: I think we could do that and save some money. It would be great. Okay, unless there is further notice, which obviously would be published, it will then be in the main conference room at the Insurance Commission. Is that the same conflict on April 26? Let's just plan on doing the meetings over there [Insurance Commission]. It would be much more convenient for the staff and probably be cheaper, save a little money on the regulatory assessment. Is there any other new business to come before the meeting?

8. Next Meeting

Chairman Bayless: The next meeting is Thursday, February 15, 2007, Charleston Civic Center. Should we also try to do that one over there [Insurance Commission] or do you want to do that here [Civic Center].

Mr. Kenny: We can try it. If doesn't work for the first time we do it then we can always move it back here.

Chairman Bayless: The next meeting will be February 15 at 3:00 p.m. at the Insurance Commission in the main conference room on the fourth floor.

9. Adjourn

Chairman Bayless: We are ready to adjourn. Does anybody have any comments before we adjourn? Is there a motion to adjourn?

Mr. Pellish 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 3:50 p.m.