

WORKERS' COMPENSATION INDUSTRIAL COUNCIL
FEBRUARY 15, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, February 15, 2007, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Dan Marshall
Walter Pellish (via telephone)
Jane L. Cline, Commissioner

1. Call to Order

Chairman Charles Bayless called the meeting to order at 3:00 p.m.

Chairman Bayless: Under our bylaws we need to do a roll call and I'll just note for the record that Mr. Marshall and I are present in person. Mr. Pellish is on the phone. Obviously our legislative members are not with us today due to the Legislature being in session. I would also note that Rick Slater has resigned. His firm merged with a firm and one of that firm's largest clients is BrickStreet which presented a slight conflict. So, Mr. Slater has resigned from the Commission. His letter to the Governor was effective as of the receipt of the letter. We will be looking for another Commissioner that I believe needs to be an accountant. I would like to make a motion that the staff put into record a motion thanking Mr. Slater for his service. Any objections? All in favor?

Mr. Marshall: Aye.

Mr. Pellish: Aye.

[Motion passed unanimously.]

2. Approval of Minutes

The first item on the agenda is the approval of the minutes of January 11, 2007. Does anybody have any comments?

Mr. Marshall made the motion to approve the minutes from the January 11, 2007, meeting. The motion was seconded by Mr. Pellish and passed unanimously.

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

Judge Leach: Good afternoon Mr. Chairman, members of the Council and members of the audience. You should have a copy of my February 15th report which summarizes our January statistics for the first step of the appeal process. I am working on a calendar year so for January it's hard to draw any types of long-range conclusions for the first month of a calendar year. I believe last month's report would summarize the entire 2006. I made a comparison with 2005 and 2004. It would more meaningful in terms of drawing planning conclusions. However, just to highlight upon a few matters. . . on the second page I included a new chart to answer questions or inquiry by the Chairman last month which is – has the fall of protests leveled off or is it still falling? I told him that my impression was I thought it had leveled off. I believe that, as I've organized this chart, it tends to support that. Of course each month is up and down. But if you look at the chart the first year, which for those with the color copies it's kind of a blue color. There is very steep decline in protests for January through December. The second third of the chart, in sort of a maroon color, represents a continued decline but it's a much less steep decline overall from January to December. And then for the yellow third, which is calendar year 2006, January through December, the start and finish points are just about the same. There are some ups and some downs through the year, but overall I'd say that's a flat graph. My prognostication abilities are greatly challenged by this job, but I think that my estimate of things have leveled off. It looks like it held for at least 2006. Now whether that changes in 2007 it's going to be too early to tell.

On page three – the number which the auditor asked us to obtain – pending caseload is now down to 7,941. On Graph (D) which is the timeliness of acknowledgement of protests for the years 2003, 2004 and 2005, there is a flat line because I averaged the year to date total for those years. But I left the yellow line of 2006 in on a month-to-month just as kind of a reminder where we were at this point a year ago. There was a big dipper effect there. It plummeted January, February and March and then it leveled off for the rest of the year. It's hard to see but the January 2007 is a little orange dot which is right at the white line. So we look a whole lot better this calendar year than we did at the same point in time last calendar year.

Chart (F) looks particularly impressive but I would caution that that's a one month result – 99.4% compliance. I would certainly hope to be the year-to-date at the end of the year, but that's possibly an anomaly. Our overall time standard compliance reflected by report (G) is now up to 92.9%. It was 85.9% last year. That's been a steadily climbing figure. I cannot deny the fact that less cases we have to deal with the more efficient we should become in dealing with the numbers.

In terms of other outstanding issues that I wish to comment to the Council, there is just the one. I thought it was time since we are into the Legislative session to update the Council on a matter I raised to your attention last year at this time, which was the Bill proposing to create a central panel on administrative law judges. As I've summarized, that issue appears to be on the back burner for this year. And even for what consideration has been given all signs and

indications that we have heard are that the executive and administration understand and support the idea that the workers' comp appeal process – both the Office of Judges and Board of Review – should not be included in this grand scheme. Mr. Chairman that concludes my report and I would be happy to entertain any questions.

Chairman Bayless: Thank you. Any questions?

Mr. Pellish: Judge, back on page four. Could you just comment for a moment on a “no evidence” dismissals?

Judge Leach: The “no evidence” dismissal appears in report (E). It's the fourth line there, “no evidence” dismissals. We had 3,567 of those last year. That comes out of a total of 18,335 resolved. So approximately one in five, maybe one in six, were what we call a “no evidence” dismissal. When I got to the Office of Judges in 2001 found that we were receiving a high volume of protests in which nothing ever occurred after the protest was filed. It would start, if you will, my bureaucracy into functioning. We would receive the protest acknowledgements, start issuing periodical notices and eventually we would issue a decision. So we spent a lot of time, effort and money on a case which we received no protest, no communications. It was a relatively high number. We decided at that time in 2001 we were dealing with a flood of protests and we needed an administrative process because it appeared to us that we were receiving protests that were filed that the parties decided later were not worth pursuing, but they would notify us that they were officially withdrawing the protest so we were still left to deal with it. So we created a rule that says in a nutshell – if at the conclusion of the timeframe we have not received some evidence from you or at the very least an argument explaining why the protest should be ruled in your favor, we are going to dismiss your protest. And that rule has been in effect since about 2002 and we are using that rule to dismiss – 3,500 last year – protests off of our docket sheet per year. If I had to hire judges or non attorneys to decide that many cases that would represent about 100 months of judge work. It is saving a lot of money for the Office of Judges, for the Insurance Commissioner's budget. It also saves the parties a lot of money because if you're on what we call the “responding side,” you are the employer or you are the injured worker and the other side protests. Before we put in this “no evidence” rule you had to assume the risk that a judge might rule against you even though no evidence had been presented against your side of the case. So you had to go out and defend the case. Maybe arrange for a doctor's exam, gather evidence, submit it just as if there were evidence in the case. This way you can set back and if nothing gets filed you know you are going to win. So, it saves the responding party litigation costs in addition to saving us costs. It's a cost efficiency that we're very happy has worked out well.

Mr. Pellish: Thank you very much.

Chairman Bayless: Thank you.

4. Public Hearing on Title 85, Series 6 – Workers' Compensation Debt Reduction Fund Assessment and Regulatory Surcharge

Chairman Bayless: The next item on the agenda is the Public Hearing on Series 6. Series 6 is a rule which sets up two separate surcharges. One for the Debt Reduction Fund Assessment split between private insurance and self-insureds, and a Regulatory Surcharge to recover the cost of regulation also split that way. We received a couple of comments and I know there are going to be quite a few questions.

[Please refer to the Public Hearing transcript.]

Chairman Bayless: At the last meeting, actually the meeting before that, Mr. White had raised a question on enforcement and then we clarified that last time. I believe that the Commissioner or Mary Jane Pickens is going to give a report on that now. I would point out that the report is a work in progress. I talked to Mary Jane about the report. It is a work in progress. We are trying to find out exactly what needs presented and how so feel free to comment if you think it is too much or not enough. Different things need to be in the report.

5. Report to Council Regarding Employer Enforcement – Mary Jane Pickens

Mary Jane Pickens: Thank you. We do have a process regarding employer compliance as Chairman Bayless said. The process has been through the entire past year under review and continues to be under review. We are always trying to make improvements where we can and it's a very fluid process necessarily because it's changing all the time. We have employers that one day will be uninsured and out of compliance and we may get a phone call placed to that employer that will suddenly put them in compliance and all of sudden the picture changes and the numbers change. So it is very difficult to write this down and have it be meaningful for much longer than the day that it exists in that exact form. Of the employers that were in default to the Old Fund at the termination of the former Workers' Compensation Commission there were a little over 2,000 of those that came over here. There were about 2,075. And through 2006 BrickStreet. . .we added about 6,700 who were what we refer to as "private carrier defaulters." Those were the ones that failed to pay premium due BrickStreet and they got cancelled for nonpayment of premium. We've also located a little over 80 that were just sort of operating under the radar. We weren't notified by BrickStreet that they failed to pay premium because they weren't insured to begin with. So we find those various ways. Often through a complaint from an employer; some contact from somebody. We're always looking for those folks. So we've got these employers.

The process that I wanted to run through relates to the private carrier defaulters when we are notified by BrickStreet, and of course when the market opens we'll be notified by all carriers when coverage has been terminated. Once we find out about the uninsured employers, under Rule 11 which is the rule that sets forth our collection capabilities, we send what we refer to as the "Rule 11 letter" out to these employers. That letter notifies them that they have been identified as an uninsured employer and they have a period of ten days to file a petition asking for a hearing on that determination. The letter informs them they have been placed on the "default list." And it also informs them of all of the things that can flow from being placed on that list, such as being contacted, having your business premises posted, being enjoined ultimately if you don't clear up the account. We've sent Rule 11 letters to every one of these employers. It's a pretty good tool for cleaning up the accounts. A lot of the responses that we get back to those letters are that either an error has been made in payment to BrickStreet; or they don't need to be insured anymore; they actually had closed their business; or there was some reason to terminate their coverage; or to get an exemption from having workers' comp coverage. So it's a pretty good tool for just cleaning up some of the information about these employers. We also make efforts to contact employers within just a few days of learning that they are uninsured. We do that by telephone. We also have a process whereby we send notices out. I am hesitating because I want to get it right and like I said we've changed the process a little bit as we've gone through the year. We send a notice to an employer before we file an injunction lawsuit. We often have telephone contact with them again before we are out to "post" them. We try to contact them as much as possible in an effort to get the account cleaned up.

An employer, once we contact them and they pay their assessment, their fine – because they are fined for being uninsured – then the status changes in our system to what we call "insurable." And that means that they have paid the State their obligations and they can then go to BrickStreet and get their coverage. They remain in that status for about 30 days. If we fail to find out that they have gotten coverage from BrickStreet within 30 days they go back to an uninsured status and the process starts over with a new assessment of a fine. If they continue to not get insurance from BrickStreet, then we can go back and do the posting and do the injunction until we feel like that they have been brought into compliance or had their business terminated in some fashion.

The folks identified as uninsured employers or were on the default list – the 8,875 – about 28% of those folks still need additional collection activity. That means basically out of the 8,875 we identified 6,475 of them as either being insurable, meaning that they have paid the State the fine owed and they now have 30 days to go to BrickStreet and get coverage, or they have already paid the State and gone to get their coverage, which we refer to as "resolved" – and these terms are more meaningful to us obviously than anybody else – or they have officially terminated their coverage with us by filing documentation that they are out of business or a sole proprietor with no employees. It means they don't need coverage or that they are exempt from coverage, being one of the types of employers for which there are specific provisions in Chapter 23 that relate to exempt employers.

Again, just to recap. Of 8,875 default employers, 6,475 of them are today – or actually as of yesterday when this report was generated – are in a state of compliance basically. Now, again, that can change. That can change tomorrow. But right now that's what the numbers are. Of the postings – and this is something again that Workers' Comp wasn't doing – so we're out there posting employers, businesses. This is where we go out and put the yellow sticker on the door that informs the employees of that employer – essentially that employer is operating uninsured and they've lost their immunity, and they can be sued for injuries that are received there. In 2006 we have posted I believe about 741 successful postings. Now there are others that have not been posted out of a list of roughly a couple thousand. We try to document the reasons. It's kind of hard to keep track of all these reasons, but primarily a lot of times postings will generate someone calling BrickStreet and getting coverage. It can also generate the things that I've already talked about – officially terminating coverage or officially getting an exemption. Sometimes we just don't know where the employer is. The information that we got from Workers' Comp that came over with us when we had the transition either did not have a good physical address or BrickStreet has been unable to give us a good physical address. We are working through those issues. We just need to do more research on those folks and try to get a good physical address. But we're pretty pleased with the postings. We worked really hard on it and we've actually posted a good number of businesses.

On the injunctions, this is another thing where it's kind of hard to follow the numbers because they are constantly changing all the time too. In 2006 we filed just under 300. It looks like 296 injunction cases against default employers. There were 132 hearings held out of the 296. And there's a big difference there because again an injunction action is something that often certainly gets their attention. They don't want their business to be enjoined. It will often prompt them to enter into repayment agreements or to pay their account in full or to take appropriate actions so that we don't have to go forward with the injunction hearing. So out of 132 hearings held there were 132 injunctions granted. The injunction work is an effective tool to get employers in compliance. That's the information that I have. That's what we anticipated people wanted to hear. Certainly we can gather other information if needed.

Dan Marshall: Mr. Chairman. . .Mary Jane, could I ask you about the fines? How much are the fines or what is the amount of the fine based on? What I'm trying to get at here. . .the use of the fine as a tool. Are the fines large enough to be meaningful and effective?

Ms. Pickens: That's one thing I don't have in terms of a total figure of the amount of fines assessed. I don't have that information today. The fines are based on two times the premium for the period of uninsuredness, and there is a statutory TAB of \$10,000.00. The thought was that it would continue to increase every month that you were not in compliance. A new assessment, a new bill basically goes out every month that someone remains uninsured and that that would encourage an employer to deal with it sooner rather than later. From a financial standpoint you're better off taking care of it now as opposed to five months down the road.

Mr. Marshall: Right. Thank you.

Chairman Bayless: Mr. White. . .

Steve White (Affiliated Construction Trades Foundation): Thank you for the opportunity. Steve White with the ACT Foundation. Mary Jane I just wanted to see if I understood. You had mentioned, when you first started your presentation, 2,000 from the Old Fund. If you will, the old defaults 6,700. . .I'm calling "new fund." You had a different term for it, but BrickStreet folks. Eighty never insured, and I guess that's that 80 that I want to focus on just for a moment where one of my biggest concerns is. Working off of the old list, okay, big job and people falling off and I somewhat appreciate the effort it takes to manage that. I am most interested in all those people who never hit the radar. I think that 80 represents part of it if I understand it correctly. That is "Company A" comes in from out of town. "Company A" works for six months with a bunch of employees and never signs up. Got to be in that 80?

Ms. Pickens: Correct.

Mr. White: I guess one of the things I was wanting to know is how many. . .do you have industry breakdowns of who some of these folks are? How many people do we have out there in the streets so to speak finding these people? When they get assessed a penalty and we caught them working off the books, how do we know what the premium would have been? Are we getting into that kind of phase in terms of enforcement?

Ms. Pickens: I don't have an industry breakdown but I would think we could certainly get it on the 84. The penalty assessed is estimated, as I understand it, based on reported wages.

Mr. White: But if they're not reporting wages, I mean, how are we digging into those? We don't have to go over it all right now. Those are just some of the issues that I'm interested in.

Commissioner Jane Cline: We'll look at unemployment and other tools that we're finding available to try to get determination as to what the wages are.

Mr. White: Of course I'm focused on construction, the cash economy, illegal economy. They are all under the radar.

Commissioner Cline: Right.

Mr. White: How are we going after those folks? Who do we have going after those folks? I understand that you're working off of the list as to who was on the system and they fell off. Where are they? But if they were never on the system do we have people out there in enforcement who are actually looking for people?

Commissioner Cline: As we get reports. . .the Fraud Unit looks. We have civil investigators and actually we just added staff to the Civil Investigative Unit to try to assist us in

following up on those particular issues. This is a very evolving process. As you know this is probably the most challenged area we have with respect to resources and tools and reporting systems and all of those things. It is a fluid process and so comments and suggestions are appreciated. Each day we make a little further progress in the whole process.

Mr. White: Just a couple of quick suggestions in some industry categories on postings, injunctions, collections that I think would be helpful. Like how much was in construction versus manufacturing versus services? I think would be helpful. We can see where some of the bigger problems are and then re-focus enforcement efforts.

Commissioner Cline: We can work with our IT staff to try to get more defined reports because, again, it's a fluid process and we do have some data processing issues.

Mr. White: Also, what are we doing with other agencies? How many leads are coming over from labor. . .got someone with a contractor license compliance or from whatever agency is out there doing enforcement. Is there connections created with those folks?

Commissioner Cline: I don't know that right off. We don't have specific numbers. But I can tell you we are working very closely with other entities and working on improvement of their coordination with us. For example, I know Lottery. . .when they renewed licenses in September, I mean they carte blanche told people you don't have coverage. . .and so that caused a significant increase of activity, which is positive. It is positive. We do have other State agencies working with us in that area and I know that the Department of Labor and Forestry in particular are in constant contact with our Proof of Coverage System and staff.

Mr. White: On the revocation part, do we have any activity on that? You know we have ability to put people on the Employer Violator System and we also have the ability to revoke licensure permits, etc. Has any activity taken place in that part of the enforcement?

Mr. Pickens: You're still I think referring to activity by other agencies. . .?

Mr. White: Well, however it would work. I suppose you might notify an agency, contractor licensing. These people are in default and are you asking them to revoke contractor licenses of these specific groups of folks and are they doing so? And the same with a business license or an environmental permit. It seems to me all those things were eligible for revocation under the Code. I'm just wondering if we're getting into that phase of the enforcement.

Ms. Pickens: We are certainly working on that. A lot of it has to do with information exchange, but we've had a number of meetings with other agencies about those types of things. It's part of the ongoing process.

Commissioner Cline: It's a part of an evolution. The evolutionary process is discussion we're having on more global basis with the Revenue Department because there is no one unique identifier for it. I mean we have an identifier tax as an identifier "ABC." Everybody is

using different identifiers. In the process. . . we're having discussions on how we can move the State forward to one unique identifier for everybody. . . then we would have some specific. . . maybe ours would say "IC" to mean Insurance Commissioner's Office. DEP would have some other designation. But the basic number would all be the same so that all of the State agencies are using it. So that's a longer term plan, but probably one that makes a lot of sense.

Mr. White: Thank you.

Walter Pellish: Mary Jane, this is Walt. First of all, thank you for the report. I think you are right on target with what you covered. This is an evolutionary report. But I think you are off to a great start with it. I want to pass on two comments that I've heard locally here. One of which says that there is a potential communications problem between BrickStreet and some of the employers in terms of notices, letters and perhaps fines being assessed when there allegedly was good faith on part of the employer to maintain coverage on renewal. It might be something you could look into. The second thing is that I was told that somebody went to the regional office here in Martinsburg to pay their renewal fees and they were told that fees could only be paid to the Charleston office. It might be worth taking a look at that or perhaps you know the reason why the regional offices can't accept those payments. I don't understand why it would be an issue on the part of an employer.

Commissioner Cline: Are you referring to a default? This is Jane Cline. Are you referring to a BrickStreet payment? Is that what I understand?

Mr. Pellish: Yes.

Commissioner Cline: I believe it's because BrickStreet has it setup for the invoice to be remitted to. . . when they provide them their invoice there is a remittance process in there and that it is designed to really go to their lockbox at the bank that processes their payments.

Mr. Pellish: Which makes sense.

Commissioner Cline: I believe that's probably why that it is. We can certainly talk with BrickStreet. I think they try to make that process fairly simple and straightforward.

Mr. Pellish: I just bring the issue up because somebody mentioned it to me.

Commissioner Cline: We've often heard that there is confusion about what people need to do and how they need to process that. We can follow up on that.

Mr. Pellish: Okay. Thank you.

Chairman Bayless: Is there any more comments on Ms. Pickens' report? Suggestions? It's an involving matter.

6. New Business

Chairman Bayless: The next item is new business. Is there any new business that anybody would like to bring before the Commission and Council?

7. Next Meeting

Chairman Bayless: Hearing none, our next meeting is March 22nd here [Offices of the West Virginia Insurance Commissioner] at 3:00 p.m. Do we have a motion to adjourn?

Mr. Marshall made the motion to adjourn. The motion was seconded by Mr. Pellish.

Mick Bates: I need to make a comment.

Chairman Bayless: Go ahead.

Mick Bates (Bodyworks Health Fitness and Rehabilitation): I see a few familiar faces. This is certainly a much nicer location than the previous location that we used to be in. This is the first time I think I've addressed this group. I have spoken to the Board of Managers before and also the Performance Council before that. My name is Mick Bates. I'm a physical therapist. I'm from Beckley and Bodyworks Health Fitness and Rehabilitation in Beckley. In the interest of full disclosure I am an employer of 26 employees. I'm a premium payer and therefore a policyholder of BrickStreet. I also serve on the Board of Directors of the Beckley/Raleigh County Chamber of Commerce. We represent about 600 employers, about 26,000 employees. I also serve at BrickStreet in the Office of Medical Management as an advisor in the area of physical rehabilitation, which has been the main reason that I came to speak to this group before.

What I would like to do is to bring a matter to your attention that I think has kind of slip beneath the radar. The last state that kind of went through what we went through took ten years to do it, and that was Nevada. With the wisdom of the Governor and the Legislature they gave us three years to do it in West Virginia. And probably the Insurance Commission has been where a lot of that work got dumped. So there's very, very important work being done. We've come a long way in West Virginia as far as workers' compensation is concerned and overcome a lot of hurdles. One hurdle to overcome that I see the significance, which is the privatization, the opening of the market in July 2008. And there is something I think that slipped off the radar a little bit that I want to bring to your attention and ask for a specific recommendation or a specific action to be taken. And that is for the need of some sort of medical director, medical advisory, panel of experts, chairman of a medical advisory board within the Insurance Commission to advise the Commission and moving forward on issues such as disputes, complex medical issues, review and update of Rule 20, and relating to things like the preferred drug list. I think there are issues that . . .of expertise that deal with the Hearing Loss Rule.

There are some deficits within that. OP claims. The place of the Disciplinary Examining Board, which at the current time is still housed and exists at BrickStreet, and the independence of that group. I am not quite sure what needs to be done and I don't have a specific recommendation. I think we are going to need to take a little from what some other states have done. We're going to need to take a look at what makes sense. I'm not fully aware of what statute exists now. I was on the Health Care Advisory Panel which was a group that advised the Commission and prior to that Workers' Compensation Fund on these medical type issues. That sunsetted with the Commission and there was no new body formed. With that I would say that things are okay to this point. But my concern is that these issues are out there. They're not something that are a problem until they become a problem. And at some point somebody is going to have an issue of a complex medical nature. That could come from an injured worker. It could come from an employer. They are going to file a complaint with the Insurance Commission. They are going to call the Governor's office. They are going to call the Legislature. And before that happens I think we need to have something in place to be able to analyze and make a decision in those cases. So I'm asking that consideration be given by the Industrial Council and the Insurance Commission charge a member of staff with the task of reviewing the situation and come back to you, make a recommendation in terms of what, if anything, needs to be done. That this be looked at perhaps somewhere around July of this year so that we've got 12 months to address this issue before we go into a private market.

Commissioner Cline: If I can comment. . .we agree with you one hundred percent and in fact we've been having some discussions and have been given some guidance on a couple of states to visit and review with respect to that. My counterpart in Arkansas is the former Workers' Comp Commissioner in Arkansas and so she has agreed to provide us some guidance and advice as well. If you would like to leave your card with us, we would be more than happy to hear some more personal perspective from you. First of all we agree. We are in those discussions and in that process. We don't have the expertise to make determination on some of the issues that come before us. It clearly belongs with the medical provider community.

Mr. Bates: I would just hope that we could get to a point where something exists before we have a problem.

Commissioner Cline: That's why we are in that review process as you were speaking to us.

Mr. Bates: So that's really my point and I would asked that that be looked at and we establish some sort of timeline for getting this done ahead of the privatization when it could very well become the wild, wild west. Thank you.

Commissioner Cline: Thank you.

Chairman Bayless: I apologize, Mr. Bates. I totally skipped over general public comment and went to new business. Does any other member of the public have any comments?

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I think we had a motion to adjourn and it has been seconded. All in favor, "aye." We are adjourned.

There being no further business the meeting adjourned at 3:55 p.m.