

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MAY 31, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, May 31, 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:

Bill Dean, Chairman
Dan Marshall
Walter Pellish (via telephone)
Senator Don Caruth
Senator Brooks McCabe

1. Call to Order

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

2. Approval of Minutes

Chairman Dean: I am sure everybody received the minutes of the previous meeting in the mail.

Dan Marshall made the motion to approve the minutes from the April 26, 2007, meeting. The motion was seconded by Walter 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 my statistical report for April, but tomorrow we'll have May's ready. It's a late meeting and these stats are a little bit dated. We received 1,121 protests for April which is slightly above our most recent average. On the first page of my report, the second chart was added this month to show the trend that we're having a convergence of the Old Fund and the New Fund claims. The yellow line in the graph representing the New Fund cases, those were for all injuries on and after July 1, 2005. The Old Fund has been the bulk of the claims in the past, but you can tell by the trend lines that they're starting to overtake. And that represents the understanding that eventually the Old Fund cases will close out and go away and we will be dealing with. . .New Fund, but that might be 20 years from now. We're starting to see the lines converge.

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On the second page of my report, the second chart was done at the request of. . . I think Chairman Bayless asked for that to see if we had bottomed out in the trend of protests dropping. As you can see there was a steep decline in 2004 and a slighter decline in protests in 2005. It appears to me that it has leveled off from the second half of 2006 until the present in terms of numbers per month. It appears from reviewing this statistic that we have reached a new level that we can count on and budget for, for the foreseeable future.

On page three the total number of pending cases before the Office of Judges is now at 7,231 pending appeals, which is a drop of only 121 from the previous month. Again, this is a number where we expected to bottom out at some time. It is impossible for us to ever. . . I have a caseload of no pending cases. So there is a floor at some point where we will no longer be putting out more product than we're taking in product. . . to use an assembly line analysis of it. When we have more issues resolved than protests received our inventory drops. It dropped 121 last month and I think it's about to equalize. We're getting close to the point where new protests will equal or exceed a protest getting resolved

I have some good performance numbers to report to the Council. In acknowledgement of timeliness, both our April number and our year-to-date number were well above. . . actually because this is an inverse chart, well below our performance for 2006 and represents an improvement for our average performance for 2005, 2004 and 2003. We are getting things acknowledged and into our system more quickly.

Report (F) and the chart under that, there are a couple of things I wish to highlight there. First of all, for April we decided nearly three out of every four cases within 30 days of assignment to the Judge – 72.7%; and for the year it's two out of three – 66.3%. So that's moving pretty fast. That does reflect that our Judges have lower case inventory so they can get onto the case quicker after it is assigned to them than they could in the past.

I also want to point out that this is a non-performance chart that we track. Our rule requires that we get all cases decided within 90 days, and for April we did that in one hundred percent of the cases we decided, which is a zero percent noncompliance. That's the first time I can recall us hitting that mark. For the year-to-date our compliance with that 90-day standard is 99.6%. When you look at that chart, that's easily the highest we've achieved in the previous seven reported years.

And finally one other statistical measure by which we measure our performance is our time standard compliance. I have explained to you before that this number is required by rule to be 80%. For March it was 93.7%. I beg you pardon that's a misprint. It should be April. For April it was 93.7% and for year-to-date it's 93.4% – both figures very comfortably ahead of the 80% target that we have to meet.

On non-statistical matters, first I am reporting to you that we are now in the process of preparing a revision to our Procedural Rule. Now the Code does not require us to bring this rule

to you for approval on voting. The Procedural Rule of the Office of Judges is a separate rule from the Insurance Commission's workers' comp rules, which you have to vote on. However, we do have to have public comment, public hearings. And it was our practice with your predecessor, the Board of Managers and the Performance Council, to keep them informed – although they did not have a vote in it either – as to what we were proposing, what the comments were and what are our reactions and responses to those comments were. And of course I'm going to continue that practice with you folks and I would welcome any comments and suggestions that you have for any changes in the proposal. Mainly it's going to be technical cleanup. Our old version was passed in 2005. We have a lot of references to the Workers' Compensation Commission until terminated and the successor to the Commission. Of course all of that has come to pass now. We will clean all that up and make the actual language conform to the current status.

The reason we're actually amending the rule is because of one of the changes in the 2007 Session changed what constitute the record that the Judge may consider. We had a whole section of our rule constituting two or three pages in length describing how we would compel documents from the claims administrator to be produced to the Office of Judges, and that is no longer necessary. So, we have to go in and delete all of that and create some alternative methods for people to get documents to us. That is what is driving us to amend the rule and then we are going to do some cleanup while we're at it. We're pretty much ready to go on that. I hope to get the draft filed this coming month. We're waiting on a couple of suggestions from the Insurance Commissioner on a couple of policy issues we've asked them about, so we're waiting on some feedback on that. The process is that I will file them with the Secretary of State and set a public hearing and a response time, which is about 30 days. It will take us two or three weeks to respond to the comments, make any changes we think are in order according to those comments, then we will file a final version of the rule with the Secretary of State, and the rule takes effect 30 days after we file. We're looking at August, September timeframe to get this done. It's not going to be a major overhaul. But any time you open something like this up for comment you can't limit what the comments are going to be. You might get a whole bunch of new ideas that you have to take into account.

Next I wanted to report briefly about the process that we've started with the petitions for stays of payments of awards made by Administrative Law Judges. This was again a change made in the 2007 legislation and took effect in March of 2007. The report was written on May 17, two weeks ago. Our numbers now are 36 received instead of 35. And during that time we would have issued over 400 decisions that were reversal of claims administration orders and potentially be subject to a stay petition. Right now it's running less than one in ten. Favorable rulings or awards made by an Administrative Law Judge are being asked by the Claims Administrator or an Employer not to be paid until they can appeal. I give you those numbers as a tool or informational purpose in case you're hearing questions from members of the public or from employers about that process.

The final report that I wish to make to the Council is that in 2005 we were given some tools, or actually the public was given some tools by which our offices were used for sort of a

consumer complaint about insurance carriers and self-insured employers. One of these was approval of an attorney fee for an unreasonable denial of a claim. Another one was where there's some time limit for the carrier or self-insured employer to take some action on a claim that is set by law or regulation and that action has not been taken. Then the Office of Judges can be brought into the process to issue a ruling and a report to the Insurance Commissioner which can be used as a tool for regulating proper behavior by the carrier or the self-insured employer. Both processes are not being utilized – eight or ten petitions of each type in over two years. A very likely explanation for that is that the carriers are all performing admirably and meeting all their time limits and that might be very well what the reason is. A possible explanation is that the public is not aware that the remedy is out there and there are problems and they don't know how to bring it to our attention. The Insurance Commissioner has a division to handle consumer complaints about all types of insurance and that division gets workers' comp complaints in addition to homeowners, fire policy complaints and automobile complaints. We've agreed to train the workers' comp people in consumer complaints about the existence of these remedies. So if they get a call involving a workers' comp complaint they can tell the member of the public about the existence of this remedy and sort of direct them to us. That training is taking place next week, the first week of June. Mr. Chairman, that's all I have to report for this month.

Chairman Dean: Any questions from the Council?

Walter Pellish: Yes. Judge, the trend on protests has been very consistent in terms of being down significantly since the change. What do you attribute this to?

Judge Leach: I really have studied it somewhat but I'm kind of limited in my analysis and it's speculative at best. I think to some degree it has to reflect the fact that the number of total claims filings is down. I can remember historically when there were 70,000 new claims filed a year with Workers' Comp. Now the figures are 40,000 or something like that. So it might just be a mathematical correlation that if claims are down 40%, protests would be down 40%. Another speculation on my part is that most of the protests statistically are filed by claimants. If the law is such that the claimants don't win, then they tend to not bother to file a protest. I think the drop in protest reflects a toughening of some of the standards in laws that makes it more difficult for the claimant to prevail at the Office of Judges level and therefore they sort of just give up. And a third factor is – and it's related to the second factor – it is well known that claimants' lawyers are leaving the practice. Anecdotally I could list several attorneys that have retired or given up workers' comp practice, or others who have cut back once massive staffs into small staffs. If people have to deal with a legal complex issue like workers' comp and they can't get a lawyer to help them, then they don't file protests. I think it's a combination of all three of those.

Mr. Pellish: Very good answer. Thank you.

Senator Don Caruth: Tim, is there not a fourth component to that? And that fourth component would be that prior to 2005 many of the protests. . . I don't know what percentage or

proportion were filed by the employer and it's much less likely that the employers would be filing a protest now in the current system. . .

Judge Leach: Well, there has been a balance shift and you are correct. There are far fewer employer protests, but the number of claimant protests we thought would go up. When I first got here it was like 60/40 – 60% of the protests were claimant; 40% were employer. Now it's more like 85/15 or 90/10. There has been a sharp decline in employers' protests. I think part of it is because of these changes in the law have impacted the balance somewhat and employers have less reason to protest. But I think also because they are now dealing with their own insurance carrier, and for self-insured community, are making their own decisions, their rulings are more what is acceptable to them.

Chairman Dean: Senator McCabe, do you have any questions?

Senator McCabe: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No. Thank you.

4. Amendment on Title 85, Series 1 – Ryan Sims

Ryan Sims: Chairman Dean and members of the Industrial Council, on your agenda is an item to present an amendment of Title 85, Series 1. A bullet summary of the substantive changes we are making in this rule should be in your packet with that rule. The first thing I'd like to do is stress that this is a limited amendment to Rule 1 based on what we deem to be urgent issues that needed to be addressed in the rule. Most significantly the "stay" issue that Judge Leach has discussed with you over the past few meetings based on the passage of Senate Bill 595. We're looking to get some standards and guidelines in this rule in regard to the stay process to provide more guidance to the workers' compensation community on this process. But I did want to stress we just have a few things we want to address in this particular amendment of Rule 1. It isn't the intent of this agency to open Rule 1 for unlimited changes or suggestions. We are aware that there are other issues in this important rule that various stakeholders have concern with, and we intend over the course of the summer to get together with them and come to decisions on other areas of Rule 1 to address to do more comprehensive amendment of this rule sometime in early fall of this year. But at this time we're going to do our best to limit this amendment to only those provisions we're addressing in this draft.

Moving on to the actual substantive provisions affected in here, the first one would be at the beginning of Section 15 of the rule. This is a provision dealing with mileage reimbursement to claimants. It's dealing with travel reimbursement in general. We are specifically addressing the mileage reimbursement rate to claimants who are undertaking medical related travel for a

workers' compensation injury and the previous rule set it at fifteen cents per mile. We received comments from a number of individuals concerned that this was a low figure. We agree with that. So we changed the language to say that it would be at the same rate that travel regulations for the State of West Virginia provide to their employees. Right now that would be somewhere in the range of forty-five cents per mile. We have received some preliminary comments on this provision and some concern about suddenly increasing it. We're going to continue to take that into consideration and see what the financial ramifications of increasing it would be. But, again, we're of the opinion that fifteen cents per mile is very low for mileage reimbursement by any standards. We are certainly interested in increasing that figure.

The next substantive change in this rule would now be in the new draft – Section 16. It was formerly Section 17. This is a section that deals with “expert witness appearances.” We basically just cleaned this rule up to try to make it consistent with Judge Leach’s Procedural Rule which addresses some of the same issues – when an expert is called to testify in a workers’ compensation case; establishing a maximum fee schedule which is set at \$100.00 per quarter hour; establishing some parameters in 16.1 and 16.2 regarding the appearance of the physician for the claimant; and then the appearance follow their experts. There were some ambiguities that we are trying to eliminate and make it consistent with the Office of Judges Procedural Rule, Title 93 Rule.

The last substantive change, and of course the most significant one in this draft, would be Section 17. It’s a new section entitled “Implementation and Stay of Orders from the Office of Judges.” What we tried to do in these six sections is we’re essentially implementing what the Legislature passed in Senate Bill 595 which clarified that a defendant – or in most cases it would be an employer or the carrier on behalf of the employer – may move when indemnity benefits are awarded for a “stay” and those benefits at the discretion of either the Office of Judges or the Board of Review. We basically tried in this rule codify a set of standards and guidelines for that process and how it’s going to work to get more guidance to both the claimant and the employer community as to how this motion for “stay of process” is going to work. We believe this is consistent with what the Legislature did in §23-5-1(f) in March. After an Order comes up from the Office of Judges you can make a motion either before the Judge that made the Order or the Board of Review – but not both – to stay the implementation of only indemnity benefits and not PTD’s; only permanent partial or temporary total, but not permanent total. And there are certain timeframes in here. We’re working on some of these timeframes, but right now it provides you 15 days from the time the order comes in if you are going to file with the Office of Judges. Or it provides that you have to file it concurrent with your petition for appeal to the Board of Review if you decide to file it with the Board of Review. Again, you can do one or the other, but not both. It provides five calendar days for the opposition to file a response and then ten calendar days for the Office of Judges or Board of Review to grant or deny the petition for stay.

I am not so sure that substantively we anticipate this really changing the results Judge Leach was getting into today. These stay motions are obviously something that lie very much within the discretion of the Judge or the discretion of the Board of Review. I don’t think anybody

thinks there's something that should be granted liberally, but rather in certain unique situations where the defendant has a good argument; such as it's a unique issue of law that may be very questionable or something like that. We didn't really address putting in specific standards, but we decided rather to leave it to the discretion of the Judge or the Board of Review as to whether to grant a stay in a particular situation. That was our goal in setting forth these standards.

With that I will present this rule to the Industrial Council and request permission to file it with the Secretary of State for a thirty day public comment period.

Chairman Dean: Questions from the Council? Mr. Pellish, do you have any questions?

Mr. Pellish: I do not.

Chairman Dean: Is there a motion for approval.

Mr. Marshall: I move for approval to file the proposed rule with the Secretary of State.

Mr. Pellish: Second.

Chairman Dean: There is a motion and a second to approve to file with the Secretary of State. Any questions on the motion? All in favor, "aye." All opposed, "nay." The "ayes" have it.

[Motion passed to file Title 85, Series 1, "Workers' Compensation Rules of the West Virginia Insurance Commissioner, Claims Management and Administration," with the Secretary of State's Office.]

5. Public Hearing on Title 85, Series 8, "Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics"

Chairman Dean: We'll move on to the Public Hearing on Title 85, Series 8.

Ryan Sims: We have two rules today that we presented during the last meeting – Rule 8 and Rule 11 – that are here today before the Industrial Council for the Public Hearing.

[Please Refer to the Public Hearing Transcript]

6. Public Hearing on Title 85, Series 11, "Enforcement of Reporting and Payment Requirements"

[Please Refer to the Public Hearing Transcript]

7. General Public Comment

Chairman Dean: Does anyone in the public have any comments today? Mr. White. . .

Steve White (Affiliated Construction Trades Foundation): Thank you Mr. Chairman. Steve White with the ACT Foundation. Just a brief comment. I brought it to the attention of the Insurance Commission, but I want to bring it to the attention of the Industrial Council. There is an online site for default companies – companies that are default to workers' comp and it is currently inoperative. And it really I think stems from Unemployment. It was a joint site of Unemployment and workers' comp or the Insurance Commission. It's an unemployment problem, but it has spilled over to become a workers' comp problem. So I just want you folks to be aware of it. We've talked to the administration. We've talked to unemployment. I think there is a resolution in the works. But if it persists, I think it would be a problem. I just want to bring it to your attention. Hopefully it will be fixed and if not, then it will have to be addressed because this is an important list to show who is on default for many people who are doing enforcement. Thank you.

Chairman Dean: Does anybody else from the general public have any comments?

8. New Business

Chairman Dean: We'll move onto new business. Does the Council have anything under new business? Ryan, do you have anything for new business today?

Mr. Sims: No sir.

9. Next Meeting

Chairman Dean: The next meeting will be July 5th at 3:00 p.m. Is the location still okay here? I see no reason to change it.

Mr. Marshall: Is there some reason not to have a meeting in the month of June?

Mr. Sims: Actually for Rule 1 that we are going to be filing we have to permit 30 days for public comment. So occasionally from time to time there will be a month skipped. The statute requires a meeting once per quarter so it is consistent with the statute.

Mr. Marshall: I see. I'm okay with the fifth. But is there anybody present today on the Council, because of the holiday, may not be available on the fifth that would create a quorum problem? Walt, how about you? You okay that day?

Mr. Pellish: I don't see any problems with it, but I think that's a good question.

Chairman Dean: I am good with it.

Mr. Marshall: We should be fine.

Chairman Dean: Very good. The next meeting will be Thursday, July 5, at 3:00 p.m. at this location [Offices of the Insurance Commissioner].

Chairman Dean: I need a motion to close this session and go into Executive Session.

Mr. Marshall made the motion to go into Executive Session. The motion was seconded by Mr. Pellish and passed unanimously.

9. Executive Session

The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session.

[The Executive Session began at 3:54 p.m. and ended at 4:03 p.m.]

Chairman Dean: We have a Resolution before us today for Catlettsburg Refining LLC. They applied for self-insured status. Is there a motion to approve?

Mr. Marshall: Moved for approval.

Mr. Pellish: Second.

Chairman Dean: There has been a motion made and seconded. Any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The "ayes" have it. [Motion passed.]

Chairman Dean: We also have a Resolution before us for the annual renewals of the Self-Insured Unit. Is there a motion to approve?

Mr. Marshall: So moved.

Mr. Pellish: Second.

Chairman Dean: A motion has been made and seconded to approve. Any questions on the motion? All in favor, "aye." All opposed, "nay." The "ayes" have it. [Motion passed.] Any other business we need to attend to today? Motion for adjournment.

Mr. Marshall made the motion to adjourn the meeting. The motion was seconded by Mr. Pellish and passed unanimously.

There being no further business, the meeting adjourned at 4:08 p.m.