

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JULY 5, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, July 5, 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)
Charles Bayless (via telephone)
Delegate Nancy Guthrie
Jane L. Cline, Commissioner

1. Call to Order

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

2. Approval of Minutes

Chairman Dean: The first item on the agenda is the approval of the minutes.

Dan Marshall made the motion to approve the minutes from the May 31, 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 Timothy Leach: Good afternoon everyone, members of the Council, Delegate Guthrie and the Commissioner. The first two charts on your presentation summarize the division of the new protests for the year into the Old Fund, private carrier fund or the New Fund and the self-insured. The second chart shows the convergence of the pattern of those protests.

On the second page of my report is a breakdown of the protests for calendar year and protests by month. I believe it was Chairman Bayless who asked if we had leveled off, and consequently the second chart on page two is my attempt to show over the last four calendar years the levels of protests. For 2007 we had a gradual climb over the last four months and then a very slight drop in June for the number of protests. On page three, the first chart, is the summary of the inventory at the Office of Judges which currently stands now at 7,325 pending issues.

For the benefit of Delegate Guthrie, I'll explain that an issue is a protest to an Order by either the insurance carrier or the self-insured employer. Issues are not the same as claims. We may have at any one time as many as five or even ten or more issues pending in one case or one claim for one injury. So that number does not relate to a number of workers' compensation claims, but just to the number of cases. And the reason it's sort of line itemed in our report is because we have a regulatory rule that requires us to resolve each issue in "x" number of days from when it comes into the Office of Judges. So, we can't lump them all together in one claim and treat that as a consolidated litigation for each case.

The next section of the report on page three is "acknowledgment timeliness." You will note the orange line – for the benefit of those who have the color copy – is the current year. We did take a plummet in May. I never was completely sure why that dropped so steeply in May, but now it's back up to June. And for the year-to-date the untimeliness rate is only 3.34%, which is much better than last year's entire year.

Skipping ahead to page four, Section (F), for the year-to-date we are deciding almost two out of every three decisions within 30 days of assignment to the Judge at the conclusion of the litigation process. Our rule allows for 90 days for the year-to-date. Less than half of one percent is taking us longer than the 90 days, but two out of every three cases are decided within 30 days.

And finally, our time standard compliance at the bottom of page four, which must be 80% by rule, is at 92.9% for the year and was 90.5% for June.

Now in terms of general messages to deliver to the Council's attention and to the audience at large, our amendment to the Office of Judges Procedural Rule, which was required by legislation in 2007, is pretty much ready to go. We're still in consultation with Mary Jane, Ryan and the Commissioner's staff about who is going to be a party and who can participate in our rule and how we define "insurance carriers," and that's still the holdup. We're waiting for that to be resolved. The holdup there is that we're trying to figure out how it is done in other states to determine what is the best fit for West Virginia so that when we fully privatize in July of 2008 and invite in other carriers that it's not a market joining disincentive. So carriers will not say we're not coming there because it's so different than every place else. We're trying to get the best fit for that. This rule amendment is mostly cleanup and technical in nature. We have a temporary process in place now for dealing with the one tiny piece that was changed by the statute this past March. We're prepared to go forward on an interim basis without the rule being formalized. So I don't see that it is urgent that we wrap this up very quickly. It will be put out for public comment. We will have a public hearing, and then we'll have a final version once we get the initial version to look the way we want it to.

Roman numeral three is a summary of the petitions for stay process which the 2007 legislation placed upon us. Since we implemented the process on March 28, 2007, and until

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July 2, 2007, [Monday] when I prepared this report, we have received 50 total petitions. During that time I would estimate that we have resolved more than 500 issues that could have been subject to a stay. So it's something less than one in ten of our decisions being petitioned for a stay. Out of those 50 we've ruled on 47. I have a breakdown of the rulings. Seven were dismissed as either untimely or were not necessary because we had made some correction in the decision; 33 were denied outright and seven were granted outright out of 47 rulings.

One of the agenda items today is a revision of Rule 1. Section 17 of Rule 1 implements a new process which could impact some of these numbers to some degree and we just don't know exactly how that will take effect. But one of the changes in the proposed rule is that it will share the burden of ruling on these stays with the Board of Review. Currently the vast majority – probably 99% or more – are actually filed with the administrative law judge. As I understand, the proposed rule would be an option of the petitioner to file either with the administrative law judge or at the Board of Review. They can go either way but not both. So that will have some impact on our numbers.

Two final matters to discuss with the Council. I wanted to update the Council members. It was reported at our last meeting in May that we were about to provide a training session for the Consumer Complaint Section of the Insurance Commissioner's staff and also their Self-Insured Unit. That took place in early June. I felt like it went pretty well. We got a lot of good questions that indicate people have seen some problems. They may not have been aware of our service on certain remedies that are provided by law. We had some feedback from them and received some favorable e-mails from the people who attended appreciating our appearance over here.

Finally, I want to alert the Council that we are scheduling what we sometimes refer to as a "retreat," but it's a full day training session for judges where we tend to get away to some exotic place, such as Flatwoods, West Virginia, and get our heads together, discuss issues that we're seeing, go over recent policy determinations of our office, discuss some impacts like the revisions to Rule 1, which will be in place by then. And hopefully our Procedural Rule will be amended by that time and that's probably going to take place in September. So, we're getting closer to that time. That's all I have to report, Mr. Chairman. Any questions?

Chairman Dean: Any questions from the Committee? Mr. Pellish, do you have any questions?

Walter Pellish: No questions.

Chairman Dean: We need to stop the meeting just for a second. Chairman Bayless wants to join in on the meeting [by teleconference call].

[Charles Bayless joined the meeting by phone.]

Chairman Dean: We will continue the meeting. We have a Public Hearing on Title 85, Series 1.

4. Public Hearing on Title 85, Series 1, "Claims Management and Administration"

[Please refer to the Public Hearing transcript on Title 85, Series 1.]

5. Title 85, Series 11 – Request to Final File Amended Version, "Employer Default, Enforcement, Collections and Related Matters" – Ryan Sims

Ryan Sims (Associate Counsel OIC): Chairman Bayless and members of the Industrial Council, the other rule we're bringing before you today is Title 85, Series 11, which is entitled "Employer Default, Enforcement, Collections and Related Matters." This is a rule that addresses the Commissioner's vast array of employer enforcement provisions to enforce workers' compensation laws against employers.

At the last meeting we had public comment on it and we only received one comment, and that was really consistent with the written comment we've received from the ACT Foundation. Ninety percent of the changes in this were technical cleanup or non-substantive cleanup just to make it consistent with the new workers' compensation system and give our staff a structure to work with in applying employer enforcement procedures. We really didn't make any significant changes from the last version. I will mention the sole comment received by the ACT Foundation. We believe that the way the repayment provision reads in our ability to waive certain penalties and fees is consistent with the way the law currently reads, and you can refer to our responses to their comment for more details on that. But we believe the way it reads now is consistent with the law. With that I'll present to you the rule for final approval.

Chairman Dean: Any comment on that Mr. Marshall?

Mr. Marshall: No comment, Mr. Chairman.

Chairman Dean: Mr. Pellish, do you have any comment?

Mr. Pellish: No.

Chairman Dean: Chairman Bayless. . . ?

Mr. Bayless: None.

Chairman Dean: Delegate Guthrie. . . ?

Delegate Guthrie: No.

Mr. Marshall: Is this an action item?

Mr. Sims: Yes.

Chairman Dean: There is a request to final file the amended version. Is there a motion to approve?

Mr. Marshall: So approved.

Chairman Dean: Is there a second?

Mr. Pellish: Second.

Chairman Dean: A motion has been made and seconded for the final filing of the amended version. Any questions on the motion? All those in favor signify by saying "aye." All opposed, "nay." The "ayes" have it. [Motion passes to final file amended version of Title 85, Series 11.]

6. General Public Comment

Chairman Dean: We'll move onto General Public Comment. Would anybody from the public make a comment today?

Edward G. Atkins (Atkins & Atkins PLLC): Yes sir. Thank you very much, members of the Committee and all those in attendance. I asked to make some general comments because of some issues that I've run into regarding the "settlement" of workers' compensation claims. The history of workers' compensation, which I've had long experience with, is that you just litigate them through to the bitter end – win, lose or draw. It's being encouraged now to settle cases. Get with the people and try to come up with some resolution that's agreeable to everyone, and I'm beginning to see that more and more. And I think those on the claimant side are beginning to see that more and more.

The process of settlement doesn't work very well. For example, this is "Mr. M." Mr. M has directed me to inquire as to whether settlement can be made. I am directed by Mr. M to make a demand to settle this case in the amount of "X" dollars. That letter was December 14, 2006. It's over at Cambridge right now, and I've talked to the people there and they keep saying that they will do something about it. But they haven't done it yet. Now if we're going to settle cases, I think there is going to have to be some oversight by the Office of the Industrial Council to that process. What is an appropriate process to do this? They don't have to settle anything. There is nothing that requires. . .if I go to the employer or if I go to the insurance company, I say I want "X" dollars – we don't think we should pay you anything. I mean, they can say that. But it would be appreciated if they would say so within a reasonable period of time so that I'll know what to do and how to advise my clients. But I don't get that. The settlement process is extremely slow

and very agonizing. I don't know if anybody has complained about this process before, but come this time next year when a lot of other insurance companies are going to be in here, they're going to be looking to try to settle claims as well. And we ought to have some idea, some way to encourage this. But I don't see what we're doing as far as that's concerned.

The other area that I have is a general one regarding. . .I've had some problems in getting some. . .we still have some PTD cases out there that have been lingering forever and I have one. . .I made an application June 3, 2003. Here we are 2007. It goes on and on and on and on. I even made a complaint to the Insurance Commissioner on August 18, 2006. I still haven't heard anything from that either. So, what are we doing about some of these cases that have been in the pipeline for literally years and years? It's not fair to keep those cases going. They just build paper and frustration from all concerned. I don't know in the settlement process whether they've got enough people at Cambridge or whoever else is doing it to look at it or not. Maybe they just don't have enough people to review this process. I was told that they had settled 400 since last Christmas. What are they going to do when they are asked to settle 4,000? So this is an issue that I wish to bring to the attention of the OIC and maybe I'll be back in the future. But that's my general comment. Thank you.

Chairman Dean: Thank you. Does anybody else in the general public have a comment today?

Mary Jane Pickens (General Counsel OIC): May I respond to Mr. Atkins' comment?

Chairman Dean: Yes, please.

Ms. Pickens: With regard to settlement, we do have a process for handling settlements. There is a settlement team here that meets on a regular basis and takes settlements that are presented to us from Cambridge. Mr. Atkins is correct. Since the beginning of 2007, there have been a number of settlements that involved even more claims. There is a definite effort to get a process together.

I think what is important for everybody to understand is that every process we look at normally bears some relationship to other processes. It is difficult to create a process that's sort of in a vacuum. It has relationships to other many moving parts that we're trying to put together to make this whole process work into the future, and settlements are part of that. But we are doing the best we can with the settlement process. I think we also have to consider the resources of the Old Fund and how many claims can be settled immediately. Those are all concerns. It's not as easy really as just sitting down and saying these are steps, one through ten, and we are just going to take as many as we can get. There are many other considerations beyond simply establishing a process to really get it working well. But I just wanted make sure that everybody here understands that we are absolutely aware of those concerns and we are working on it.

With regard to the PTD issues, I also wanted to mention that this process for the PTD's shifted to Cambridge at the beginning of 2007. As Mr. Atkins pointed out, he's got some applications for PTD's that are several years old. So this did not originate with the Insurance Commissioner's Office. It didn't originate with Cambridge. It's another situation that was inherited here. And, again, we're trying to move them along as well as we can, recognizing that there are a lot these old claims. The process itself – I mean the whole process – once something gets into litigation, it is time consuming and it can take many years to resolve, but that is the process we have. We have identified our universe of old PTD claims. There are a number of them that are either in “pay status” or have settled. There are a number that are still in litigation, in which you have got to just go through that process. And then there are a number that have been remanded to the former IEB, the reviewing body at BrickStreet, in which we're awaiting decisions. Until we get a decision from the IEB nothing further can happen on it. And then there are some where we're awaiting results of IME's and still some that just require some action. We are aware of those claims. We are aware of the status of them and we are working as hard as we can to clear that out. I just wanted to offer those comments.

Commissioner Jane Cline: On settlement, I would like to add a couple of things. Settlements are something that is new to the West Virginia workers' comp system, and trying to get that process in place, and looking at precedent that we might be setting. I think we also need to be mindful that with Cambridge dealing with the Old Fund claims we're not dealing with BrickStreet. They have their own criteria and their own process that they will be using as will other carriers. Where we come into it is if a claimant believes that they've been treated very unfairly – harassed into taking a settlement or the settlement is egregious in nature I think is the statutory language – then from a regulatory standpoint we would be intervening if that complaint was brought to us. What we're talking about now is the Old Fund and getting those processes and procedures in place. And, again, we have done a number. But we also have to be mindful of the revenue stream and so we can't be responsive to every demand because we have so much money coming in and so much money going out because we have to continue the indemnity payments and the ongoing medical payments and the other issues. It's not just a simple matter to say, “Okay, every demand is going to get settled.”

Chairman Dean: Any other comments? Mr. White. . .

Steve White (Affiliated Construction Trades Foundation): A question. When we did the public hearing on Series 11, I think there was another. . .was it Rule 8. . .the other rule? What is the status of 8?

Mr. Sims: It has been deferred until August. The public hearing has concluded, but we're still internally reviewing it and hope to present a final version in August.

Chairman Dean: Any other comments?

7. New Business

Chairman Dean: We'll move on to new business. Does anybody have anything under new business? Mr. Marshall?

Mr. Marshall: No.

Chairman Dean: Mr. Bayless, Mr. Pellish, do you have anything under new business?

Mr. Pellish: No sir.

Mr. Bayless: No sir.

Chairman Dean: Commissioner Cline, do you have anything?

8. Next Meeting

Chairman Dean: Our next meeting will be Thursday, August 9, 2007, at 3:00 p.m. Is that good with everybody?

Mr. Marshall made a motion to adjourn to go into Executive Session. The motions 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 4:08 p.m. and ended at 4:16 p.m. There was no action taken in the Executive Session and it was for informational purposes only.]

Chairman Dean: We are back in regular session. Is there a motion to approve the annual renewals?

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Mr. Pellish: So moved.

Chairman Dean: Is there a second?

Mr. Marshall: Second.

Chairman Dean: A motion was made and seconded to approve the annual renewals. Any questions? All in favor signify by saying "aye." All opposed, "nay." The ayes have it. [Motion passed.]

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 4:20 p.m.