

WORKERS' COMPENSATION INDUSTRIAL COUNCIL
SEPTEMBER 13, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, September 13, 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 (via telephone)
Delegate Nancy Guthrie
Kent Hartsog
Dan Marshall
Walter Pellish (via telephone)
Delegate Carrie Webster (via telephone)

1. Call to Order

Chairman Bill Dean [via telephone] called the meeting to order at 3:00 p.m.

2. Approval of Minutes

Chairman Dean: The next item on the agenda is the approval of minutes of the August 9, 2007, meeting.

Dan Marshall made the motion to approve the minutes from the August 9, 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 members of the Council and the general public. The Council members who have a copy of my September 13th report summarizing our year-to-date statistics and performance for August, just to touch upon a few highlights, the second graph shows the convergence of Old Fund and private carrier cases. Of course the private carrier cases are determined by date of injury or date of last exposure of July 1, 2005. We've almost equalized – or so it appears in

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August – 43% of new protests for Old Fund and 40% were private carrier. So that's interesting to watch those two. Of course there will come a point in time when the lines cross and there will be more New Fund protests than Old Fund.

Our protest levels still appear to be stable to me for the last 12 months or so. The number of protests projected to be received for calendar year 2007 will be. . .it looks like a couple of thousand less than in calendar year 2006. However, we started out in February, March and June with some pretty high numbers in 2006 and then those went away for the rest of the year. We were able to reduce the pending caseload by about 140 cases in the last month. Our case management system can be highlighted by our acknowledgment timeliness where over 98.5% were acknowledged within the 30 day time limit we set for ourselves. And our performance for the year-to-date on graph (D) on page three reflects that we are doing markedly better than we had in the previous four years.

Chart and graph (F) on page four – For year-to-date 64.4% of all decisions have been completed within 30 days of assignment. And last month only one tenth of one percent of all decisions issued were untimely. Our year-to-date figure of 99.6% for timeliness is by far the best in the last seven years that I've been tracking that figure.

Finally our Time Standard Compliance, which is required by regulation to be at 80%, is well above that at 92.0% for the month and 92.7% for the year-to-date, markedly an improvement since last year.

Now on some non-statistical matters to report to you – I have brought to your attention at the last several meetings the status of the amendment to the Office of Judges Procedural Rule. I think we've now reached a point in time where it is strategically best to just put it on the back burner until the Legislature acts this coming session because I anticipate there will be some amendments which will impact our Procedural Rule. So instead of trying to amend right at the end of 2007 and then having to do it again in 2008, we'll just wait. But nothing happened in the session in 2006 which dramatically impacted the Office of Judges Procedural Rule so that we had to have an amendment of some type.

A follow-up comment on the Petitions to Stay – Through the early part of this month we only received four petitions since the last report to you. Of the 56 ruled upon we have granted 11 and denied 45.

The process passed by the Industrial Council last month gives the parties the option to file with the Board of Review or the law judge who granted the decision. Previously to the passage of that rule they had no option. They had to file with the

administrative law judge who granted the decision. It's speculative on my part, but I think that strategically the parties will choose to file with the Board of Review rather than the law judge for a number of reasons. Number one is the feeling that the judge who decided the case may be prejudiced somewhat against granting a stay of his or her benefit award. Number two is the time for filing with the judge is only 10 days from the date of the decision. Whereas if you file at the Board of Review you can have as long as 30 and as many as 60 days to file the Petition for Stay, depending upon when you file your Petition for Appeal. So there is that benefit to go the slower route and take your time to analyze the case. And I think it also strategically gives the petitioning party an opportunity to sort of pre-argue the case to the Board of Review because you have to give the bases for why you think the law judge was clearly wrong. Now naturally you will do that in your appeal brief anyway, but you are going to have the Board of Review consider your case twice in this process. So it's my opinion that a majority will be filed with the Board of Review rather than with the Office of Judges.

The effective date of that rule is not yet established. It's going to be sometime this month. It takes effect 30 days after Mr. Sims filed it with the Secretary of State, and we will be notifying all parties before us and our judges the effective date of the changes. We intend and we already are following those changes in every aspect except changing the 15 day time limit to 10. Until it becomes official we didn't want to cut off anybody's right to file a petition within 15 days.

We've conducted our in-house training of all the administrative law judges, which we try to do annually, yesterday at Flatwoods. I covered some topics that were of concern to us.

Finally, since the last meeting I have filed with the Governor an annual required report of the compliance level of the Office of Judges – our successes, failures, and attempts to correct failures or shortcomings. I supplied the Council members with a copy of that. Just to highlight some of the successes that we were able to report to the Governor:

- Our Final Decision Timeliness improved from the year before and it is the second best in our seven years, as I showed you earlier in a chart. This year it's the best in the seven years;
- Average Time from Assignment until Decision was reduced from 44 days to 33 days;

- Average Time from Receipt of Protest Until Resolution – that's the entire time we have the case before us – reduced from 467 days in fiscal year 2001 to 273 days in just about nine months in fiscal year 2007;
- Motion Resolution Timeliness improved and is the best in seven years;
- Overall Time Standard is the best in seven years;
- Protest Acknowledgment Timeliness is the best in seven years;
- We cut our Pending Caseload and reduced our staff from 147 to 108 full-time positions.

Those figures gave me cause to be very proud of our accomplishments and I hope that the Governor is impressed. Any questions?

Walter Pellish: I think it's a job well done, Judge.

Judge Leach: Thank you, Mr. Pellish.

Chairman Dean: Any other questions?

Kent Hartsog: I'm curious here on the amendment to the OOJ Procedural Rule – the amendments made by the Legislature in the upcoming session. What do you anticipate there?

Judge Leach: We don't propose any legislation. The Insurance Commissioner is working on some proposals. I'm not really privy to everything they have in mind. Some of the topics involve defining who is a party in litigation cases. Is it the employer or is their carrier? I think that will probably be addressed. There are also concerns that come July 1, 2008, when we become a multiple carrier State, we anticipate that there will be debates and disagreements between carriers – "it's your case; no it's your case; you have to cover it." The Insurance Commissioner has indicated that they want to come up with a dispute resolution process that will not hang up the claimants' benefits while the two large insurance companies fight it out with each other. That will require some legislative change. Other than that, I think that they are working on just some items and issues that they anticipate may create some problems on July 1, 2008. So they want to get it done in January.

Mr. Hartsog: Thank you.

Chairman Dean: Any other questions? Thank you, Judge Leach.

Judge Leach: Thank you.

4. Public Hearing on Title 85, Series 2, "Workers' Compensation Claims Index"

[Please refer to the Public Hearing transcript on Title 85, Series 2.]

5. General Public Comment

Chairman Dean: Does any of the public have a comment today?

Steve White (Affiliated Construction Trades Foundation): In reviewing some of the Old Fund debt I'm unclear as to its status in terms of collection efforts and in terms of how the entities who would be considered the debtors in the Old Fund where they stand. They apparently are not on the Employer Violator System. It seems like we have a standard that is pretty tough and not bad with the Employer Violator System on. . . maybe it's not Old Fund/New Fund but a more recent fund debt. But it also appears to me that that Old Fund debt. . . there might be a loophole there that needs to be looked at. Folks who are in the Old Fund debt category are not being held as accountable as more recent debt. That is, if you are an entity and you're on that Old Fund debt and you're still on the books owing tens of millions of dollars, you are not blocked from setting up a new company. Your company is not permanent blocked and the individuals are not permanent blocked. And while the number might be small I'm seeing some people coming back. And I'm faced with the situation where "yes" I found a person who is on the "default list" but they are on the older variety of debt and therefore nothing can be done and they're back in business. And I don't think that's something that anybody wants is to put back in business the folks who contributed to that huge Old Fund debt. So, I'm just unclear as to the status of that Old Fund debt and what prohibitions there are and under "general comment" I figured I'd bring it forward.

Ryan Sims (Associate Counsel, Offices of the WV Insurance Commissioner): I would be glad to respond to Mr. White's comments. The main thing that needs to be considered by the Employer Violator System is that it was established by the Legislature in 2003 – prior to that it did not exist. Our interpretation, which we think is a sound legal interpretation, is we cannot apply EVS retroactively. That is to say it is a system that was put into place in 2003 by the Legislature where the Legislature said from this point

forward if somebody – even an individual who's associated with the previously defaulting company – we'll put them on this new list called "Employer Violator System," and from that point forward they cannot start any other company until they clear up their Old Fund debt. But procedurally and because it is in case law that's out there, we cannot apply that retroactively. So we can't say, "You, employer, who incurred this debt in 1989 before EVS was established, you are subject to this new law we made in 2003." There are some constitutional issues that would prevent us from doing that. And most people in here that are attorneys are probably aware of what those issues are. Having said that, we are doing our best to enforce EVS 2003 and after, and we think it is a very important tool. We agree with Mr. White on that point and we are doing everything we can to use that as a tool. At least from what I was hearing from Mr. White the main issue is, "Why aren't we addressing debt that well precedes 2003?" That is because we cannot apply that law retroactively.

Mr. Hartsog: What tools do you have in your belt that you can use for the "pre 2003" folks that have not paid? And what are you doing to pursue them?

Mr. Sims: Well, there are a number of tools. First of all, anybody that has "pre 2003" debt is to be placed on our default list. They are subject to being enjoined from operating their business. We can post something on their door saying that they are in default to the workers' compensation system. We can sue them for the money. We can place a lien on their property.

Mr. Hartsog: Are you doing those things?

Mr. Sims: Yes. We have a Collections Department. We are in a bit of a transition process. We have hired a new Collections Manager recently and she is working on organizing a system for pursuing not only the Uninsured Fund defaulters, but also the Old Fund defaulters as well. And we are doing everything we can. We think we are sufficiently staffed now and we believe that things will just better.

Mr. White: I agree with what you said, Ryan, and I was not criticizing the efforts that you are making at all and I apologize if that's how it came out. What I'm saying is, I think there is a loophole or there seems to be an inability to do something about the folks, not the companies, because the companies they are long gone. They are bankrupt. But the individuals behind those companies they can come back now and go back into business, and that to me is a problematic thing. I am wondering if there might be some approach that would be considered that might have to go back to the Legislature absolutely to give you the authority to do something in those circumstances. So that's really the nature of my comment – to focus on this problem as I see it; to see if there might be some sort of way we can solve it. Now. . .I'm not a lawyer. If there is

constitutional issues, fill me in on what we can do about. . .but when I see those people coming back that just causes me concern, and I think it causes everybody concern.

Mr. Sims: Again, that would be something for the Legislature to address and something they would look at. It might change things if they specifically said this is to be applied retroactively, but they didn't. And based on our research we don't think we can apply it retroactively. Now if the Legislature were to come in and specifically say this applies to all employers there still might be constitutional issues, but that would be up to the Legislature's attorneys to take a look at.

Mr. White: I understand. I can go to the Legislature and ask them to look at. But I'm coming to this Board and this group here to see if there is something that you might look at because you are the experts in this area. You are the ones who would be suggesting to the Legislature – look we found this issue and here's how we think you should deal with it. I know we could go to the Legislature, but you really have first-hand knowledge. Maybe just getting with the collections people or whatever we could come up with a little bit more tools that would be made available to you. Again, the whole premise – when we see these folks who left us holding the bag for hundreds of millions if not billions of unpaid premiums back and starting new companies, it should send everybody's hair up on the back of everybody's neck. I think we share that. If one thing we all share here is that desire not to have that happen again. I hope that clarifies the position.

Chairman Dean: Any other public comments?

Mr. Pellish: I'll just make a comment on Mr. White's question. I would simply say I appreciate him asking the right kind of questions and keeping us on our toes.

Chairman Dean: Any other public comments? Anybody there, Mr. Marshall?

Mr. Marshall: No. Your next item is new business.

7. New Business

Chairman Dean: We are open for new business. Does anybody have anything under new business?

Mr. Marshall: And the next item is the next meeting, Mr. Chairman.

8. Next Meeting

Chairman Dean: The next meeting is Thursday, October 18, 2007, at 3:00 p.m.

Mr. Marshall: And that will be here?

Chairman Dean: Yes sir. Does the room still accommodate everybody?

Mr. Marshall: Yes.

Chairman Dean: Very good.

9. Adjourn

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

There being no further business the meeting adjourned at 3:37 p.m.