

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JANUARY 24, 2008

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, January 24, 2008, 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
Jane L. Cline, Commissioner
Bill Dean
Delegate Nancy Guthrie
Kent Hartsog
Dan Marshall (via telephone)
Senator Brooks McCabe
Walter Pellish (via telephone)

1. Call to Order

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

2. Approval of Minutes

Chairman Bayless: The first item of business is the approval of the minutes of the November 29, 2007, meeting.

Bill Dean made the motion to approve the minutes from the November 29, 2007, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

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

Judge Timothy Leach: Chairman, members of the Council, Commissioner, Deputy Commissioner, Senator and members of the public. All that I was going to present for this meeting was the statistical summary of the year-to-date for the conclusion of calendar year 2007, and I really had no additional items to discuss or bring to your

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attention that are concerns to the Office of Judges at this time. So when I saw the sparsity of the agenda I did think of something else that I could add to my report.

On the statistical front we did complete the calendar year 2007. The decline in the number of protests dropped from 14,748 in calendar year 2006 to 11,794 in calendar year 2007. Off the top of my head that looks like about a 20% decline which continues a trend since calendar year 2004 when we hit our all time high. Again, I think the significance of 2004 was the kind of massive amendments that were passed in 2003. Our protests come in 30 to 60 days after Orders following new law changes. So the law changed in mid year of 2003 and we saw a lot of protests because there was a lot of uncertainty and unsettlement due to those amendments in 2004. And this decline reflects in part the fact that the law has been settling out since 2003.

Our Pending Caseload on page three of my report is now down to 6,393. If you will recall when we were first audited by your predecessors, the Board of Managers' auditor, we had over 18,000 cases in 2003. Because of the decline in the protests and continued production of numbers we reduced that caseload by two thirds.

In our Acknowledgment Timeliness – the jagged chart on page three – if you were to flatten that out to show the average for the year, which was 2.8% untimely, that would be the best number on that chart since 2003. So in five years of reporting that's going to be our best year-to-date number.

On page four, Decisions Mailed, the only thing that's significant there is I've highlighted two numbers of 2006 and 2007 to show the change in the proportion of our decisions now done by administrative law judges as opposed to non-attorney adjudicators. I know in the legal community and the practitioner community there is a lot of discomfort with the idea of having a non-lawyer make a decision on a protest. They would prefer to have lawyers do all the decisions. In 2006 there were 5,304 ALJ decisions and 5,456 non-attorney adjudicator decisions – nearly a 50/50 split. As we have needed fewer adjudicators we have allowed vacancies to go unfilled in the non-attorney positions. Consequently those numbers are now tilting. For 2007 we had almost 3,800 decisions from judges and only 2,800 for non-attorney decisions. So it's 60/40 or somewhere in that neighborhood now and climbing towards judges making all the decisions for the Office of the Judges. I think the joke was it's the "Office of Judges" not the "Offices of Non-Attorney Adjudicators." So that sort of summarized the complaints we used to hear from members of the public about assigning those types of cases.

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Final Decision Timeliness for 2007 – 61.7% of our decisions was decided within 30 days of assignment to a judge. For the year-to-date only 3% exceeded the time limit permitted to us by our performance standard. So we were at 99.7% compliance which is by far the best result in the seven years reported on that chart.

Our last statistic for the year that is worthy of note is our overall Time Standard Compliance rose to 92.6% compared to 85.9% in 2006. I know that in 2001 when I took this office it was something like 21%. I don't offer that number to try to claim credit for that but just to show that due to changes in our management, and particularly in our IT performances, we've improved by four or five fold.

I did have a comment which was basically just a repeat from the previous month about the change in the Old Fund administrator. There are now three administrators who have replaced Cambridge. That transition took place the first of December. From our perspective it went very smoothly. We had a handful of cases where we didn't get the right TPA put in and we're working on those on a case by case note. I heard the Commissioner speak this morning on the same subject. From her perspective it sounds like an outstanding result. She reported there was only one Old Fund claim recipient who did not get a check after the transition and they knew that that was going to happen before so they were prepared for that. It wasn't a result of the transition, but it was some other bugaboo that got that. So changing several thousand files over on December 1 without dropping a check or losing very many of our database results was an outstanding effort by the people involved in that.

I told you I had an additional item. I thought it might be a good time since we're with a short agenda to mention to the Council and members of the public that we are aware of five cases which are pending before the West Virginia Supreme Court of Appeals who intend to accept oral argument in April. Generally that means the Court thinks that it is an important issue because in most workers' comp cases they don't entertain oral arguments. They just decide the case on a brief. It also can suggest to us that we might expect some type of change in the interpretation of the law because a lot of times when you have an oral argument before a case you'll get a reported decision instead of what we call a per curiam decision that applies only to that one case. So I thought it would of interest to the Council to know what issues the Court is looking at as being of interest to them.

Two of the appeals were by a claimant's lawyer over a regulation of this body, 85CSR1, Section 14.1, which involves the administrative closing of claim. Now the Office of Judges interpretation of that regulation is that it's just sort of a bookkeeping and in-house accounting mechanism. Whether a case is active or not active depends

on what type of assignment it's given. However, when they change it to an administrative closed claim they issue a protestable order; that is claims carriers do. Because it is a protestable order that triggers some protests.

If I can summarize it in lay terminology, we thought it was a "no harm no file" type of notice. It doesn't deny any benefit to any claimant. However, one claimant's counsel has taken two of these to the Court's attention. Now when the Court gets a hold of a rule, the rule is at risk. I mean the Court could go anywhere with it. So, I just bring it to your attention.

Another case what looked to me like a purely factual issue – I don't know why the Court decided to hear this – was a case where a person had a 1997 left ankle injury and later claimed major depression in 2004. But in 2003 he had a very serious heart attack. The judge and the Board of Review felt that the heart attack was as much at cause or more than the ankle injury of six years prior to that. That has now got the Court's attention. I never thought this would be a factual interpretation rather than a matter of law. I don't know why the Court thought that that is worthy of argument, but it's on the April docket.

Another factual case – but this also has some legal aspects I believe and that is because it's an occupational pneumoconiosis exposure issue and it's a glass worker. Apparently we had some dust samplings or measurements from that plant which would suggest that there was not an abnormal amount of hazardous exposure. But we found that there was. . .and the employer has appealed that one to the Supreme Court. We may get some guidance on what's an abnormal or unusual amount of dust exposure and what role professional environmental hygiene type of measurements play in that part of the law.

And the last case involves kind of an obscure issue but one that actually I think is a good one for the Court to address, and that's hearing aids – whether you are entitled to digital hearing aids or just regular hearing aids. There is confusion over that and what the rule provides for. The claimant requested digital hearing aids, which are the Cadillac of the process, but was denied the digital hearing aids and has appealed. The employer has actually appealed because either the Office of Judges or the Board of Review – I don't remember which one – granted the digital hearing aids. The employer is arguing there needed to be some special showing in order to get the expensive version when a standard hearing aid might be just as effective. At the Office of Judges we're really not clear about what the standard is for hearing aids, so actually we welcome that decision; although that comes up very infrequently in our cases.

Again, I thought the audience might be interested in what issues the Court is going to be looking at this term. They will hear the arguments in April but it might be a year after that before they issue a decision. So we don't know when the impact will be upon us. I'll be glad to entertain any questions, Mr. Chairman.

Chairman Bayless: Does anybody have any questions of Judge Leach? Thank you very much.

4. General Public Comment

Chairman Bayless: Is there any public comment from anybody?

5. New Business

Chairman Bayless: Is there any new business that anybody would like to bring up?

Kent Hartsog: I would like to ask about the status of the financial information that we talked about in the last meeting with regard to the Old Fund and where that's at. When you think we would be able to have that?

Bill Kenny: It's really a waiting of final audit acceptance for the consolidated financial statement. We are real close. And then we are going to analyze it and give you some kind of comparatives. But the issue becomes it's not real clean apples and apples. When it was the State fund it consisted of different things that are consistent now so we're trying to map that for you so you have a good apples and apples comparison. We should have it by the next meeting for sure.

Walter Pellish: Did I hear correctly? You said you would have it by the next meeting?

Mr. Kenny: I don't see any reason we would not. Yes.

Commissioner Jane L. Cline: And actually it may be sooner. As soon as we've had time to go through it and make sure we fully understand what it is. . .I'm hesitant to put something out that I can't fully explain.

Mr. Hartsog: I understand.

Mr. Pellish: Once you folks are comfortable with it I would appreciate if it would be sent out to members so that we can study it a little bit prior to the meeting.

Commissioner Cline: Right. Mr. Pellish, what I would anticipate doing is being able to work through that with Melinda [Kiss] and Bill [Kenny] prior to our budget hearings because I'm sure this is going to be a question that they are going to be interested in, and in fact have been asked. So when I'm ready to disseminate that I will definitely make sure you have it up front too.

Mr. Pellish: Thank you.

Commissioner Cline: Until we can sit down and make sure we are all answering the questions because the challenge has been. . .under the old workers' comp system you had the DWR Fund, the Second Injury Fund, the OP Fund, you had the old Workers' Comp Fund and those were all rolled in and is part of the overall workers' comp debt. And now the way the funds are set up and broken out there is some difference in that and I want to make sure that we have fully reviewed and understand – and our auditors are fully able to explain everything as well – that we all know what we are presenting to you. I mean we can give you general information that we have been sharing with the Legislature on the amount of claims that have been paid out on a monthly basis and whether they are PTD's or TTD's or medical. I mean we can get that information. I have that. We can get that information now.

Mr. Pellish: That would be great.

Chairman Bayless: Is there any more new business or anything that anybody would like to bring up?

6. Next Meeting

Chairman Bayless: The next meeting is Thursday, March 20, 2008, right here.

Commissioner Cline: I would mention one more thing. It was my understanding that Delegate Guthrie had asked if we could provide information with respect to the "body part" that was the primary driver of injuries and how we might run that data. I've had some conversations with NCCI and they believe. . .as we continue to report to them we will be able to mind that data. The problem with the historical minding of the data is the way the old WCIS system was set up. You're not always going to be comparing the same thing because this adjuster may have entered it one way and somebody else may

have entered it another way and it wasn't necessarily capturing all the body parts that might be injured in one injury. It would be what they determined to be the primary body part. So the data would be skewed with respect to what we would mind from WCIS. But also we've been having conversations with our new third party administrators and as they go through the claims information they will be able to sort out and provide us better information.

To give you an update on the transition of the Old Fund claims, as Judge Leach mentioned, that transition in our mind did go rather well. We transitioned 39,000 claims to Sedgwick in December; did a significant amount of outreach. From that Sedgwick generated about 7,500 telephone calls. Of those 7,500 more than 95% were answered by a "live" person and so the person was not sent into the voice mail queue and it didn't take days for them to get returned phone calls. The people reported being most pleased with being able to actually talk with somebody and have somebody answer and walk through things with them. From those 7,500 phone calls we actually had only 17 complaint files that were established. So it's a much better trend than we've had in the past.

Then American Mining and Wells Fargo had the occupational disease claims transferred to them and they have had similar experience. They each got about 4,041 claims a piece. But the good news is the claimants they have been corresponding with they know who their claims adjuster is. There are more than twice as many people adjusting claims. These people have had a significant amount of training and work put up front with them on the IT issues. We've cut our first round of checks without the old BrickStreet/Cambridge arrangement, and that went rather well. There was one check that did not get cut that we identified. Melinda and our third party administrator contacted that individual and worked that out with them and ultimately got the check to them. Just not quite as quickly as everybody else's and that was unfortunate, but through the audit it was caught. She was notified and that went rather smoothly.

We believe the good news about this is that it really improved the claims management for the people that are in the Old Fund. We found people that were getting more drugs than they should have recommended by AMA and FDA guidelines. As far as narcotics, we found people that weren't necessarily getting the appropriate treatment the other way. Not necessarily always getting the right pain management – a whole variety of things. We believe this is really going to be a good thing for the claimants having these new third party administrators administering the claims.

BrickStreet worked very hard with us to help make that transition possible and it was a lot of work on part of their staff and all the IT staffs involved. Again, a significant

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amount of training on the part of our staff and others with the new third party administrators to make sure that transition went well. We would be happy to answer any questions about any of that.

Chairman Bayless: Does anybody have any questions on that or any other matter?

Mr. Pellish: No questions.

Commissioner Cline: Actually, Bill, the last page of this does give you payments by claim type, the medical and PTD and all of that and that should help. If we had a little more time to work through some of this we probably could have gotten you additional information today. It's just that time has been limited.

[Mr. Kenny handed out a chart to the Industrial Council members regarding "FY07 Payments by Claim Type."]

Mr. Hartsog: This is Old Fund?

Commissioner Cline: Yes. This is Old Fund. What the pie chart does is breakout for you what the benefit is that's being paid. We've broken it out by quarter by how much has been paid out in each quarter. What I can tell you is this coming fiscal year we will reach a point where the actual revenue coming in will exceed the actual payments going out on a monthly basis. So that's a good thing as far as we are working on the runoff. But having said that we've been very mindful with the TPA's that you're not a normal runoff business and we want to make sure that you understand we're not about the bottom line dollar. We're about making sure that a claimant that is deserving of benefits is getting the appropriate treatment, and is getting that with little difficulty that they're not having to jump through all these unnecessary hoops.

Chairman Bayless: Why do you think that PTD stayed so constant? I know PPD people have partial. . .and may come off but it varied so. I'm just surprised the one looks like a constant. . .

Commissioner Cline: The partial total disability. . .because that's the indemnity payment. The permanent total disability. . .

Chairman Bayless: People come into the system. . .

Commissioner Cline: People will come in and people will leave the system. A large part of that is the indemnity payment which is pretty stable.

Senator Brooks McCabe: Who is coming into the system?

Mr. Hartsog: Isn't the Old Fund pretty well locked?

Mr. Kenny: You are getting new permanent totals because they are not ruled on yet.

Mr. Hartsog: Are there quite a few in the pipeline?

Judge Leach: On permanent total. . .the case is going to have to mature five or six years after injury probably before you are determined permanent total because you've got to give up fifty percent of permanent partial awards to get through the threshold. A permanent total case, even before the carrier adjusts to the rules on it is going to be five, six or seven years old. They're going to be your older cases. Then if it is denied it goes to us. That's our most lengthy litigation. That's a year and a half or so before us; another year at the Board of Review. If we grant it, that gets added in and if the Board of Review grants it, the Supreme Court grants it. So, you're going to see permanent total numbers get added to your Old Fund for years to come.

Senator McCabe: Five to ten years ahead still?

Judge Leach: Yes.

Senator McCabe: Really?

Mr. Hartsog: Any senses to how many of those are currently being litigated that will end up in the Old Fund?

Judge Leach: Well I can tell you approximately how many are before me, but I can't comment on the Board of Review or the Supreme Court. We probably get about 20 to 25 a month. So we probably have in a year 200 to 250.

Mr. Hartsog: That surprises me.

Commissioner Cline: As an additional result of the transition to the new third party administrators, we have been working on minding the data about the cases that are open and whether its the old Workers' Comp Commission now the Insurance Commissioner that is a party to the case or whether its the employer that's a party to the case and where those are housed. We're working on minding that data as well. Our

first priority was getting the improved treatment to the actual claimant. This is a very important second part of the whole management process – to determine where things are in the litigation process and what it is we're looking at. As we work with the third party administrators they will be looking at those issues as well. They will be looking at what claim they have that might be in litigation and making recommendations with respect to dispensation of those as well.

Mr. Kenny: Further what we're doing is to see what could be coming into the pipeline. We've asked the TPA's to run reports on those that have reached a 35% impairment. . .and those who have reached a 40% or 45% for the new standards where it's 50%. So obviously those will be the ones that are potential to come into PTD.

Senator McCabe: When you give us the analysis will there be any kind of a forecast that shows the cash flow that is predicted so you can see the bell shape of it and at some point when we get it managed and people start dying off but you can see where this is actually going to come to an end? Can you forecast that?

Mr. Kenny: I got one done last year. I don't have one done. . .and that's done by outsiders for us. Now that these numbers are coming out we can start doing that kind of stuff. We will have that run again.

Senator McCabe: Okay.

Commissioner Cline: Melinda has a meeting set up with the third party administrators in our actuary for early February so we can have them looking at the same thing. The third party administrators are reporting to the actuary the type of information he needs to be able to better analyze and make predictions with respect to this. And mind you, this is the Old Fund. This is not the Pneumoconiosis Fund and other funds. As we've mentioned before the projections from PRAG were that if we continue to improve the management of claims. . .because mind you getting the claimant the appropriate treatment up front improves their quality of life and lessens the cost later on because they've been taken care of more appropriately and things aren't allowed to get to a more chronic situation.

Mr. Hartsog: I guess what caught me by surprise a little bit is now we're what, three years after the cutoff of the Old Fund that we're still seeing 250 PTD's potentially going back against the Old Fund if they were awarded from those dates.

Judge Leach: Well I would guess probably 20% or so of my overall caseload are self-insureds.

Commissioner Cline: Some of those are self-insureds.

Judge Leach: Fifty of them might be self-insured. I don't know. It might be a higher number than that. I can give you an actual breakdown, but 200 or 250 is just the total that are in the hopper right now.

Mr. Hartsog: That's interesting. Thank you.

Judge Leach: And that's way down. We used to get 75 a month. We're down to 20 to 25 a month now.

Mr. Kenny: We're going to have the ability to really slice and dice this claim data we've got now. We have the ability now to have management reports so we know how many telephone calls they are getting; how many are being answered; the average time, whether it be six seconds, ten seconds or. . .

Commissioner Cline: What the nature of the complaint is and what we might need to do to work on that.

Mr. Kenny: This is what was given to the companies that are looking into coming to West Virginia. . .into the marketplace. [Mr. Kenny passed out a pamphlet to Industrial Council members.]

Commissioner Cline: Mr. Pellish and Mr. Marshall, we'll make sure you get copies of the two things that Bill [Kenny] just handed out.

Mr. Pellish: Thank you.

Mr. Marshall: Thank you.

Commissioner Cline: One is actually a piece that we put together as we've been meeting with insurance carriers because one of their concerns is if they enter our marketplace are they going to be tapped for the Old Fund debt; you know, some other general information like that. In the projections that we have in this brochure are those that were done by PRAG last year. We're continuing to work and part of the next piece is the meeting Melinda [Kiss] has with the actuary. We should be able to provide additional numbers for PRAG to work with on further projections, and also what kind of information that the third party administrators can provide us to better make those projections to move forward.

Chairman Bayless: Any other questions or comments?

7. Adjourn

Chairman Bayless: Do we have a motion to adjourn?

Mr. Dean made a motion to adjourn. The motion was seconded by Mr. Hartsog and passed unanimously.

There being no further business the meeting adjourned at 3:40 p.m.