

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MAY 29, 2008

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, May 29, 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
Bill Dean
Senator Don Caruth
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 Charles Bayless: The first item of business is the approval of the minutes of the last meeting.

Bill Dean made the motion to approve the minutes from the April 24, 2008, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

Chairman Bayless: I want to bring one thing up. I don't want comments on it. When I went to Tech [West Virginia University Institute of Technology] I thought I'd stay there for three or four years, and Tech is in great shape right now. We've got a new dorm, a new cafeteria and a lot more money from the Legislature. Applications are up 22% for next year. I've decided to work on energy and I'm leaving Tech July 1st. I am going to be spending probably one to two weeks a month in Morgantown working on energy. But technically I will not be a West Virginia resident, and I would like people to know that. I've talked to the Governor and he says, "Well, we've got a lot of big rules coming up and I'd like you to stay." But I want all the participants to think about this. I

will not be a West Virginia resident and I don't want to hurt the Commission by having some newspaper in two months saying, "Hey, wait a minute. They've got an out-of-state person running this. This is ridiculous." I do not want to know your comments because I don't want somebody to say, "Well, you know, I said you shouldn't serve and you are against me." So if you have any thoughts on that. . .and Mary Jane I'd ask if you would contact the public representatives and get their thoughts. Get your thoughts to Mary Jane or Commissioner Cline and they can get it to the Governor. I was kidding with Bill – this isn't exactly the highest paid job in the world. I don't care. I would be happy to do it if I can serve the State. But at the same time if people believe, and I can see that, that we should have a full-time West Virginia resident doing the job, I would be happy to tender my resignation. So if you have any thoughts on that, get them to Mary Jane [Pickens] or Commissioner Jane Cline.

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

Judge Timothy Leach: Good afternoon, Mr. Chairman, members of the Council and members of the general public. A few brief words about my monthly report that you should have received prior to the meeting. The trend continues to show a decline in protests for the Office of Judges. If the current trend continues, we're going to have less than 8,500 protests for the year. At one time we were dealing with 30,000 protests. It's a welcome relief actually.

Our pending caseload is now down to 5,333 cases. I did want to highlight a couple of accomplishments in our statistical report. For April our Acknowledgment Timeliness was 97.9% on a 2.1% untimely; and 90.3% of our protests in April were acknowledged within 10 days or less of receipt of the protest. The chart on page three (D.) shows the progression from the first month where we stubbed our toes at the start of the year, and for two consecutive months we're well above the last four highest years.

On page four another accomplishment that we are proud of is – this one comes with a cautionary note – our Final Decision Timeliness. We managed to get all 100% of our April decisions out in a timely fashion. We had no failures to meet the rule – 75.9% of the April decisions were done in 30 days. Now the cautionary note is we can actually do a decision too quickly. Our procedural rule allows for up to 10 days after the timeframe expires for the filing of a closing argument, and we have had a handful of issues where a closing argument was filed concurrently with the decision going out. If you get under 30 days you may be moving a little too fast to allow for the lag or the catch up in communications from the outside party.

A couple of non-statistical items in my report – our procedural rule is finalized and will be filed with the Secretary of State tomorrow. We had a public hearing on May 9th. We received three written comments. We had one person give verbal comments at the public hearing. As a result of those comments we have made some changes. The issues that drew the most attention were who should pay the mediator fee. We made a change in the proposed rule based upon those comments. We are going to try to do it for “free.” We want to put into place a system by which if we are pressed for mediators we can use our own administrative law judges. Then obviously they will be prevented from working on that case if they’ve served as a mediator because as a mediator both sides bring you their version of the entire case and then you kind of try to get them together. It would be improper for a judge to have knowledge about the case. It is not part of the record that was presented to the judge for final decision. So if a judge serves as a mediator, he or she is going to know too much about the case. So we’re going to take them out of that case. There are enough judges and enough cases that we believe we can prohibit those conflicts from occurring.

We had a couple of people who objected to our procedural rule which acknowledged that House Bill 4636 limits the employers’ right to protest their own carriers decisions to three specific issues. I believe that is in the current version of Rule 1, and so I expect those comments to be repeated today. That’s a legal argument. It’s not our intention to pre-judge a legal argument before we’ve even heard the argument. So we decided the best way out of that corner was to remove that reference from the language. The first stab at it will come through the Commissioner’s rules in Rule 1. Then arguments can be presented to us, to the Board of Review and the Supreme Court about whether that’s correct interpretation of the statute.

We also heard the same objections to our language which acknowledged that in House Bill 4636 it provides that the carrier has, “Sole authority to act on the employer’s behalf in all aspects related to the litigation of the claim.” All we did was take that statutory language out of the amendment and put it into our rule. That being in the rule was objected to. It was argued that the statute itself was unconstitutional. So that’s a legal argument that we’ll have to address at some time in a legal case that’s brought before us. So rather than to pre-judge that issue we decided the best method for us to do was to remove it from our procedural rule. Both of these two sections were only in the procedural rule in an attempt to educate the public – the part of the public that would ever read our procedural rule. We weren’t attempting to make a decision about what the law is or is not until we have heard all the arguments.

I am filing those tomorrow – the final version – along with the comments, our responses to the comments and a transcript of the public hearing. By filing them

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tomorrow I can make my rule effective 30 days after filing so it will be effective July 1, which is as you all recognize, a significant calendar date for this process.

I wanted to alert the general public and members of the Council that we are now scheduling our Fall workshops. We have these annually around the State. They are about a half day long; they are free; and they provide CLE's for the lawyers. But they are also intended for claims administrators, TPA's and employees of insurance companies. So we anticipate that we'll have a varied audience. We are intending to have six of these – one in Morgantown, one in Shepherdstown, one in Beckley and three in Charleston. We had two in Charleston last year and we had overflow crowds, so we decided to add a third date to Charleston. We've scheduled for the six. We're still working on the last two Charleston dates. Our first venue choice was not available except for the one date that we picked. We are trying to find an alternative site for the other two Charleston meetings.

I briefly touched upon what all we are going to talk about. One of the things we will be talking about is the House Bill 4636; our new procedural rule; these rules which you are addressing today of the Insurance Commissioner. There are Supreme Court cases which have been issued, and a few more may be issued between now and October, and if so we will be discussing all of those topics.

One of the primary things we want to talk about is a new process of litigation between carriers – "it's your fault; no, it's your fault." And who is going to sort out and decide who's got the administrative authority over the case; and how that is going to work; and how we are going to bring people into a case against whom a claim was not filed. It was filed against carrier "A," but carrier "A" says its carrier "B's" responsibility. We'll have to have a whole new process of litigating cases involving parties who are not technically parties to the litigation. We hope to have that up and running by October. And we also hope to have some examples starting in July, August and September that we can share in October as case learning tools.

If you will beg my indulgence, I'll take a moment and briefly describe the impact of one of the Supreme Court cases, which was just decided last week, Lovas v. Consolidation Coal Company. This involves one of your rules [Insurance Commissioner], Rule 1, Section 13. It was Section 14 at the time that the protests were filed. It is now Section 13, Administrative Closing of Claims.

First of all, I think it is important to understand that in none of the cases was there a benefit request denied. In all of these cases it was just an "administrative notice" to the parties that your claim is now inactive, if you will. Although they used the word "closed,"

which I think personally caused some of the problems. But notice that the claim was "inactive," provided that you could reactivate it later, but they also included a protest clause. So, many of the cases were protested to the Office of Judges. It was urged to us that the regulation of the rule, which was passed by the Performance Council – before you all – that the rule was contrary to the statute. Rather than rule that way what the Office of Judges determined was the impact of the notice has no legal consequence of a negative factor to the claimant. So we are affirming the rule. It's just a notice. Two of those decisions got appealed all the way to the Supreme Court and the Court ruled differently than we did. The Court agreed with us in that the rule could not prohibit future legal rights of the claimant. But the Court ruled that the saying that it was a "closed case" overstepped the bounds of the statute and ruled that the regulation is null, which applies to part of Rule 1 which you are having a public hearing on today. So the impact on the Office of Judges was that we immediately stopped using the language that basically was colloquialism. We ruled that there was no harm, no foul. We've immediately stopped using that language. By tomorrow we will have new language that "parrots," if you will, the Court's language – that that regulation is null in contrary to law.

The Court also ordered that there be a process or some means by which all claimants who have been subject to administrative closure and were still not barred by some statute of limitations had to receive notice that their claim was open. Fortunately, I don't mind saying that does not apply to the Office of Judges. That is a headache that someone else is going to have to deal with because we do not know how many thousands of cases are in that posture. I don't have to deal with that. I just highlight it for your attention.

So that's our take on the Lovas decision. We will be implementing that. We've already stopped the presses, if you will, and we'll have new language in effect by tomorrow. Any questions?

Chairman Bayless: We will now turn to the rules. At the last meeting there were five new rules that were brought for preliminary reading – Title 85, Series 1, 2, 6, 8 and 18. We will take them in numerical order. The first one, Rule 1 is "Claims Management and Administration." There were some things moved out of Rule 18 into this rule on claims handling. Is there a staff presentation to start with on this or are we just going to ask the public for comments?

Mary Jane Pickens (General Counsel OIC): We are going to throw it open for public comments.

Chairman Bayless: We've obviously got presentations and also written comments.

4. Public Hearing on Rules 1, 2, 6, 8 and 18

Title 85, Series 1 – Claims Management and Administration

Title 85, Series 2 – Workers' Compensation Claims Index

Title 85, Series 6 – Workers' Compensation Debt Reduction Fund Assessments
and Regulatory Surcharges

Title 85, Series 8 – Workers' Compensation Policies, Coverage Issues and
Related Topics

Title 85, Series 18 – Self Insurance, Self Administration and Third
Party Administrators

(Please refer to the Public Hearing transcripts.)

The Industrial Council returned to the regular meeting following the Public Hearings on Rules 1, 2, 6, 8 and 18.

Chairman Bayless: Mary Jane, what do we need to do legally?

Ms. Pickens: I don't think any activity is required of the Council today. We have received a number of written comments, as you've mentioned, and of course we've had the benefit of the public comments here today. It is now our job to carefully review all of those comments and come back at the next meeting with what we believe needs to be changed.

Chairman Bayless: What is the deadline for the public comments?

Ms. Pickens: It is today. Today was the end of the 30-day written comment period (May 29, 2008).

Chairman Bayless: If you haven't gotten them in, you need to get them in today.

Kent Hartsog: Mr. Chairman, I'd like to ask, if possible, that we get the OIC's recommendations back on the wording changes, responses, etc., about a week before our next scheduled meeting, which is July 3. Is that doable?

Ms. Pickens: It should be. That is always our goal.

Ryan Sims (Associate Counsel, OIC): Are you talking comments and responses?

Mr. Hartsog: Yes. And your final versions of the wording and things like that. With this many rules out I think everyone would like to have a little time to study it and look at it before the actual meeting.

Mr. Sims: That shouldn't be a problem.

5. General Public Comments

Chairman Bayless: Are there any general public comments on any matter?

6. New Business

Chairman Bayless: Any new business?

7. Next Meeting

Chairman Bayless: The next meeting is Thursday, July 3, 2008, at 3:00 p.m. at this location.

8. Adjourn

Chairman Bayless: Do I hear a motion to adjourn?

Bill Dean made the motion to adjourn. The motion was seconded by Kent Hartsog and passed unanimously.

There being no further business the meeting adjourned at 3:50 p.m.