

**WORKERS' COMPENSATION INDUSTRIAL COUNCIL**  
**SEPTEMBER 24, 2009**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, September 24, 2009, 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  
Senator Don Caruth  
Kent Hartsog  
Dan Marshall  
Walter Pellish (via telephone)

**1. Call to Order**

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

**2. Approval of Minutes**

Chairman Bill Dean: We need approval of the previous meeting minutes. Has everyone had a chance to look them over?

Dan Marshall made the motion to approve the minutes from the July 30, 2009, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

Chairman Dean: We have a guest on the telephone today that is going to do a presentation on the NCCI Loss Cost Comparison, Mr. Dennis Kokulak.

**3. Presentation of NCCI Loss Cost Comparison – Dennis Kokulak**

Dennis Kokulak (State Relations Executive, NCCI, Boca Raton, Florida): Hopefully you have in front of you the Loss Cost Comparison as referenced.

Mary Jane Pickens (General Counsel, OIC): I'm sorry, Dennis. I don't think we do have that in front of everybody.

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Mr. Kokulak: Okay. What we were asked to do. . . apparently there was some discussion at one of your prior meetings about where does West Virginia fit in the overall picture as far as the costs to employers for workers' compensation. What we did at NCCI is we developed a chart – and we can only speak to the 37 states that we perform the same services that we do in West Virginia. That is, collecting all the data from the insurance carriers, and actually presenting the Insurance Commissioner with a proposal generally once a year to change the loss costs of the assigned rates. So we can just deal with those 37 states.

Let me describe to you what I have here and we could perhaps make it available to you at a later date. What I have is a graph that shows and identifies the 37 states as to the average loss costs in each state. I think what's most important to you folks is that West Virginia ties for thirteenth lowest out of the 37 states. Let me just speak a little bit more about that. This is again based on the most current rate change effective date in all of those states. Now for West Virginia that's November 1, 2009. So that includes the rate filing that is going to go into effect on November 1, 2009. What we are showing is an average loss cost of 1.55. Again, that's thirteenth lowest of the 37 states. And just to give you some perspective – the lowest would be Indiana at 0.99; the highest would be Montana at 3.65. One thing that we usually caution people to – it makes it difficult when you say, "Well, how does workers' comp costs in this state compare to a neighboring state?" And it's not an apples to apples comparison. What you need to keep in mind is that all the state laws differ. There are different benefit provisions, different benefit levels. The whole structure could be different from state to state.

Another factor in this is that different states have different administrative results. Some states could have a system where the awards to injured workers are on the conservative side. Some states could have a situation where the awards lean toward the more liberal side. Another factor in this is an issue like, "What percentage of claims in the state involve attorney involvement?" Generally states with attorney involvement the costs are going to be higher so the costs in the system are going to be higher, and that will be reflected in these loss costs numbers that I mentioned. Another issue is the industrial makeup of the state. One thing that we did with this chart is we excluded underground coal mine because it is such a heavy industry – a hazardous industry – and it is not an industry that operates in all 37 states. So rather than skew the numbers, we did this comparison excluding underground coal mine operation.

With all those caveats – and I know there were a few as we bottom line this thing – again West Virginia, with the average loss costs of 1.55, comes in thirteenth. And you need to keep in mind that this is a constantly changing chart. Every time a state changes its loss costs provisions or its rates this changes. I think that the bottom line –

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at least with some of you folks on the Council – you were looking to know a little bit more about this.

The other thing I wanted to mention is since we've started working in West Virginia, a lot of our classification rate making is based on a seven-state regional average. Since we didn't have all of the historical data that we do in all the other states that we operate in, we're leaning heavily on this seven-state regional approach. And I'll just mention those states now – Virginia, Maryland, Tennessee, South Carolina, North Carolina, Kentucky and Alabama. Obviously these are seven states that are very close geographically. If you wanted to know of those seven – let's say of the eight if you added West Virginia to that – West Virginia's costs would be the second lowest of those eight states. The seven regional states I mentioned and West Virginia – the lowest would be Virginia, and the highest would be Kentucky. So two neighboring states [on either side of you], you've got the range from high to low at least within the region.

I guess it's difficult without you seeing a lot of this information. But that's what I've been asked – to try to give you a quick snapshot on. I can open this up to any questions you might have.

Chairman Dean: Are there any questions for Mr. Kokulak?

Walter Pellish: I'm not sure what those numbers tell us because underground mining is excluded. Do you have any feel what that would do to it if you tried to factor that in?

Mr. Kokulak: We could do that. I don't think it would move it all that much. But since underground coal is in only a handful of states we thought it would skew the numbers a little bit. I would still think West Virginia would rank in the area of about thirteenth or fourteenth, maybe twelfth lowest of the 37 states. It wouldn't move it all that much.

Mr. Pellish: That surprises me a bit. I would really like to see that factored in somehow, just to take a look at it.

Mr. Kokulak: We'll see if we can do that. It shouldn't be a problem.

Chairman Dean: Any other questions, Mr. Pellish?

Kent Hartsog: Can we get a copy of the information that he is referring to?

Ms. Pickens: Yes, you can. And I apologize to the Council and to Dennis. We did not have that ready for the packets today for the Industrial Council, but we can certainly do that at the next meeting.

Chairman Dean: Mr. Marshall, do you have a question for Mr. Kokulak

Dan Marshall: Well, Mr. Pellish's question pretty much answers my own. I have one other question. Does NCCI work with either Ohio or Pennsylvania?

Mr. Kokulak: No. Each of those states has a separate one-state mechanism. They are not part of the NCCI family of states.

Mr. Marshall: And therefore not part of this database that you prepared?

Mr. Kokulak: No. They are not part of the 37 states that I just mentioned.

Mr. Marshall: Thank you.

Chairman Dean: Senator Caruth, do you have any questions for Mr. Kokulak?

Senator Don Caruth: I do not. Thank you.

Chairman Dean: Very good, Mr. Kokulak. We appreciate the information.

Mr. Hartsog: Is it possible to e-mail this information?

Ms. Pickens: Yes. We can e-mail it.

#### **4. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge**

Judge Rebecca Roush: Good afternoon. I am here today to tender our statistical summary of the work being performed in our office regarding the litigation that is pending. The data that you have in your report really has remained unchanged over the last few months. We are holding firm around 4,100 pending protests. And right now it appears that half of the protests are coming from the private market while the other half is split between the Old Fund and self-insured employers.

I am happy to take any suggestions you have on what kind of improvements we can make to this report or any type of data you think would be more helpful than what is

in here. We seem to be giving you the same information over and over every month. This month I tried to give you something a little different. I wanted to briefly share with you the type of protests that we have pending, and I brought a chart for you to look at. Primarily the main issue we have litigated in our office is a permanent partial disability issue, and we have approximately 1,300 of those pending at this time. That would be followed by compensability or rejected claims where the private carrier or self-insured employer or the Old Fund rejected a claim as application for benefits for some reason or another. We have 788 of those pending at this time. Finally the third most litigated issue is medical treatment. Interestingly, we only have 300 OP cases pending at this time, which is a relatively small number given our history here in the past. I just wanted to share with you briefly the types of issues that we have in litigation. Do you have any questions about the report that I can answer.

Chairman Dean: Mr. Marshall?

Mr. Marshall? No, Mr. Chairman.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: None here.

Judge Roush: If you can think of any information that would be more helpful. . .this really deals with our compliance numbers that's required by the rule as well as just generally the statistical information on the protests that we acknowledge and where they come from. I am happy to take any suggestions you may have on what you would like to see.

We also had our ALJ Retreat last week here in Charleston. All of our judges from the Office of Judges located in Beckley, Fairmont and Charleston convened together to have a meeting. We discussed issues that were important to every day litigation in workers' comp today. We had some guest speakers come in to give us an update on some issues that were within their area of expertise. Commissioner Cline came by and gave a presentation on the "State of the Market," how we progressed from a monopolistic system to its present day. Dan Murdock (Associate Counsel, OIC) gave an update on the Supreme Court decision, *Simpson v. West Virginia Offices of the Insurance Commissioner and Independence Coal Company* [on Rule 20], and also gave an update on those cases that are upcoming for oral argument on October 6. Beth Suter gave a presentation on behalf of the Board of Review on some issues that are important to the Board, some comment suggestions on how we can make improvements from their perspective. And we also had two very distinguished guests,

C. Joan Parker who is General Counsel for the Ethics Commission. She gave a presentation on the ALJ Code of Conduct as well as government ethics. Phyllis Carter, who is the Chief Administrative Law Judge for the West Virginia Human Rights Commission, as well as the President of the West Virginia Administrative Law Judges' Association, gave a presentation on "Bias." All of those presenters did a fine job speaking at our Retreat, and all of our judges really enjoyed the day.

We've scheduled the Office of Judges workshops. Basically those are for counsel, people who participate in our litigation system. We've scheduled that for November 3, 2009, in Morgantown at the Ramada, and November 5, 2009, here in Charleston. Those will be half day sessions that will cover issues that are important – procedural issues that are arising in our office.

Also, as a follow-up to the Supreme Court oral arguments, there are four cases that are pending for oral arguments scheduled for October 6. Is that correct Mary Jane?

Ms. Pickens: Yes. I believe so.

Judge Roush: The first one is *Casdorph v. West Virginia O.I.C. and West Virginia State Police*. That's a chemical exposure case. The issue is whether the evidence of record was sufficient to establish a cause of connection between the claimant's exposure to benzene and his development of chronic myelogenous leukemia. That issue will be argued by E. William Harvit, counsel for the claimant, and David Stuart, Counsel for the OIC.

The second case is *Williby v. West Virginia O.I.C. and First Century Bank*. That's a pretty interesting case which covers whether the claimant was injured within the scope of her employment during work hours. She was on a break, and the issue is whether the injury sustained during the break was covered within the scope of her employment. It covers a legal doctrine known as the "coming and going" rule, so the Court will be addressing that issue.

There were two cases that were consolidated, *Dotson v. West Virginia O.I.C. and Meadow River Coal Company*, and *Bowers v. West Virginia O.I.C. and Lightning Contract Services, Inc.* In that case we'll be looking at the psychiatric guidelines in Rule 20. There is some challenge to the validity of the rule which states that a psychiatric diagnosis must manifest within six months of the injury. The Court is taking up that issue at this time.

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Finally I wanted to add that we are in the process of internally reviewing our Procedural Rules, to make some amendments to the rules to make our process flow better. We look to have those rules up for comment within the next few months. Any questions?

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Senator Caruth?

Senator Caruth: Just one. . .about the administrative rules. You said you are going to update those in about six months. Is there any change expected in expedited hearings? In the way which you process expedited hearings?

Judge Roush: No. Not at this time. That is not one of the items that we have on the list. One of the more important items that does need amended is the dispute between carriers provision, which was added within the last two years, §23-5-1. It is actually outdated now since we've had some recent amendments, and some of it is just technical cleanup of our rules.

Chairman Dean: Mr. Pellish, do you have any questions for Judge Roush?

Mr. Pellish: I do not.

Chairman Dean: Does anyone have any comments on the report?

Judge Roush: Thank you.

**5. Request to Final File Rules 1, 9 and 32 – Ryan Sims**

Chairman Dean: Ryan, do you have any comments on Rule 1?

Ryan Sims (Associate Counsel, OIC): Other than to note that the Insurance Commissioner received no written comments or any comments during the Public Hearing. I wanted to state that for the record.

Chairman Dean: Does the Industrial Council have any questions or comments on Title 85, Series 1? Mr. Marshall, Mr. Hartsog, Senator Caruth, Mr. Pellish?

Mr. Marshall: No, Mr. Chairman.

Mr. Hartsog: None.

Senator Caruth: No.

Mr. Pellish: No.

Chairman Dean: We'll move onto Title 85, Series 9. Any comments, Ryan?

Mr. Sims: Again, the Insurance Commissioner received no written comments or any comments during the Public Hearing.

Chairman Dean: Any questions or comments from the Industrial Council? Mr. Pellish, do you have any comments on that one?

Mr. Pellish: No.

Chairman Dean: We'll move onto Title 85, Series 32. Ryan, do you have any questions or comments?

Mr. Sims: Again, the Insurance Commissioner received no written comments or any comments during the Public Hearing.

Chairman Dean: Does the Industrial Council have any comments or questions?

Mr. Marshall: I have no questions or comments.

Mr. Hartsog: No.

Senator Caruth: No.

Mr. Pellish: No, sir.

Chairman Dean: I'll ask for a motion to final file Rules 1, 9 and 32. Is there a motion?

Mr. Marshall: So moved, Mr. Chairman.

Chairman Dean: There is a motion. Is there a second?

Mr. Hartsog: Second.

Chairman Dean: A motion has been made and seconded for approval to final file Rules 1, 9 and 32 with the Secretary of State's Office. Any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The ayes have it. Motion passes.

[Motion passed to Final File Title 85, Series 1, Claims Management and Administration; Title 85, Series 9, Workers' Compensation Uninsured Employers' Fund; and Title 85, Series 32, State Agency Revocation or Refusal to Grant, Issue or Renew Contracts, Licenses, Permits, Certificates or Other Authority to Conduct a Trade, Profession or Business to or with an Employing Unit in Default of its Workers' Compensation Obligations.]

## **6. General Public Comments**

Chairman Dean: Does the general public have any comments today? (No comments.)

## **7. Old Business**

Chairman Dean: Does anyone on the Industrial Council have anything under old business they would like to bring up? Mr. Pellish, do you have anything under old business?

Mr. Pellish: No, sir.

## **8. New Business**

Chairman Dean: Does anyone on the Industrial Council have anything they would like to bring up under new business?

Mr. Hartsog: One item. I think that we are supposed to get a briefing on what the OIC is doing with regard to safety every couple of years. I don't remember the last time that occurred – in helping companies, and seeing what kind of safety programs exist, etc.

Ms. Pickens: I think that's in the provision that establishes this Council, as one of its specific duties to take a look at that. Would it be okay if I go over that Code section and report back at the next meeting to see what needs to be done?

Mr. Hartsog: Absolutely.

Mr. Pellish: I think that would be excellent.

Chairman Dean: Very good. Senator Caruth, do you have anything under new business?

Senator Caruth: I have nothing else.

Chairman Dean: Mr. Pellish, do you have anything you would like to bring up under new business?

Mr. Pellish: No.

## **9. Next Meeting**

Chairman Dean: The next meeting will be Thursday, October 15, 2009, at 3:00 p.m. here. Does that meet with everybody's schedule?

## **10. Adjourn**

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

There being no further business the meeting adjourned at 3:31 p.m.