

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MARCH 21, 2013

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, March 21, 2013, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
James Dissen (via telephone)
Dan Marshall

1. Call to Order

Chairman Bill Dean called the meeting to order at 1:00 p.m.

2. Approval of Minutes

Chairman Bill Dean: The minutes of the previous meeting were sent out. Did everybody get a chance to look them over? Is there a motion for approval?

Kent Hartsog made the motion to approve the minutes from the February 7, 2013 meeting. The motion was seconded by Dan Marshall and passed unanimously.

3. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge

Judge Rebecca Roush: Good afternoon. I'm happy to be here today. I really don't have a whole lot to add to your meeting. Yesterday I tendered to you the report for statistics for the month of February. The trends in here are ones that we generally see every month. On page one you'll see that we acknowledged 369 protests in the month of February, with our projected totals for this year around the 4,800 mark. One thing I will point out to you [on page one of the chart] with regard to the funds involved, you will see that in comparison to 2012 to total numbers for 2013 the Old Fund continues to be on the decline with regard to the number of protests. You will see that [under the column marked in gray] the Old Fund had about 13% of the protests. This

year they are around 10%, as of the month of February. The trend really is to continue to see a decline in the number of protests that we're seeing. Other than that, the statistics are generally the same that we see month to month. I'm happy to take any questions that you may have.

Chairman Dean: Mr. Hartsog, do you have any questions?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Chairman Dean: Commissioner, do you have anything?

Michael Riley, Commissioner, OIC: No, sir.

Chairman Dean: Very good. Thank you.

4. General Public Comments

Chairman Dean: Does anybody from the general public have a comment today that they would like to make? (No comments.)

5. Old Business

Chairman Dean: Seeing none, we'll move onto old business. Does anybody from the Industrial Council have anything they would like to bring up under old business?

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Chairman Dean: Commissioner, do you have anything under old business?

Michael Riley, Commissioner, OIC: I think we have a couple of items.

Andrew Pauley, General Counsel, OIC: We have two issues, Mr. Chairman. There was an issue looking at the comparison of self-insured employers and private carriers, and then an update on some of the audits in the compliance.

Commissioner Riley: At the last meeting Mr. Hartsog had an inquiry on getting some numbers on how the appeals for the private market as opposed to the self-insured market. . .comparing it. It's a little difficult to do a strong analysis, so there are some limitations into what we have here, and that we do not have the actual number of claims that are filed by each group. The comparisons we've made are trying to use the employment – the number of individuals out there and also the payroll. If you go to the bottom three rows [on the chart], "protests resolved each year," as Judge Roush reported, the appeals have been going down each year. If you compare from 2008, the result is about 7,475 of which about 6,000 of those were private market. Now for 2012 it's 3,600 for private market and 967 for the self-insured. Overall appeals are dropping, and as a result of these trends [these ratios] the protests resolved per \$100,000.00 payroll and protests resolved per employee are also declining. And as they go down certainly that's a positive. Strictly from a ratio percentage, everything looks good. It would be what you would expect from the reports that you're hearing here. The self-insured ratio is a little higher than the private market. We also need to understand that the industries that make up the self-insureds do include coal. But you would anticipate they probably have the higher risk of more claims out there, and the appeals would be associated with those. So, from our review I don't see anything here that jumps out or gives us any concern.

Chairman Dean: Very good. Mr. Hartsog, do you have any questions for Commissioner Riley?

Kent Hartsog: When I look at this it looks like basically about 86% – 87% of the payroll dollars are in the private market – 13% roughly represents the payroll dollars that's in self-insured. How does that line up? And this tells me "protests resolved by year" on a percentage basis. How can I relate this back to the activity in each one of those groups to see if there is any. . .if it's waiting. . .if private insurance carriers have 87% of the workers' comp market? Are they having 87% of the protests. . .80%?

Commissioner Riley: The ratio itself. . .we took the number of employees and we took the number of payroll, and then we compared those to the appeals. On the OOJ

report, the first page is what's received, but we use the number resolved during the year which is very similar. That's how we try to balance it out there. Ideally we would like to have the number of actual claims, but we don't have that level of detail of "number of claims" for self-insureds, especially for private market. We don't have that number. This we thought was probably the best analysis that we could do given the data we have and present the picture there.

Mr. Hartsog: Well, can we conclude from this one way or another as to whether or not the protests or the protests within each one of the groups. . .it's kind of proportional, 87% – 13%. That's kind of where I was trying to get to with my question was. . .is the private. . .

Commissioner Riley: From looking strictly at the numbers, it looks like the self-insureds have more protests. If you look down here it's 0.58% for the private market in 2012 and 1.30% for the self-insureds. First of all we're dealing with smaller numbers in the self-insureds too, so that's going to be off there.

Mr. Hartsog: I understand.

Commissioner Riley: Also the industries that make up the self-insureds probably do have. . .a lot of them are "high hazard" industries. We know we have a lot of coal payroll and a lot of coal individuals working in there. So, I would anticipate that there's going to be an increased number of claims for that industry as a whole as opposed to the private market which has a lot of retail and other things in it. For the data that we have nothing really gives us much concern. If you look at the five year trend for all of these, the numbers continue to go down which shows that the market as a whole, including the self-insureds and the private market, it does show improvement.

Mr. Hartsog: So nothing would stand out in your mind with regard to concluding one way or the other, or concluding that there is any particular skewing on more claims in one group versus the other?

Commissioner Riley: No. But like I said the analysis does have limitations. From this review, what would first jump out to me, I'd say self-insureds are out of whack a little bit. The analysis is self-insureds have higher hazards and should equate to more claims. At 1.30% [that's been decreasing], I don't have any concern there.

Mr. Hartsog: And it's also a whole lot smaller group compared to the private market.

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Commissioner Riley: It is. So you'll have that variance there too. If you look back at 2006, we're talking 16,566 for the private market, and then dropping down to 3,600, I think it does sell a good picture.

Mr. Hartsog: Thank you.

Commissioner Riley: Thank you.

Chairman Dean: Mr. Marshall, do you have any questions?

Dan Marshall: I don't, Mr. Chairman.

Chairman Dean: Mr. Pauley, do you have something?

Mr. Pauley: There was an inquiry concerning the status of self-insured audits. We've talked about it over the years – the enforcement compliance generally in regards to activity. So we put a lot of numbers together. If you have any questions, I know you'll ask. If I can get you something later, that would be great too.

From the self-insured audit standpoint, up to date we've had about 49 in the works. We have approximately three that are called right now, which means a letter has gone out but no field work has been started yet. We have nine where field work has begun. We have eight we're working on, basically an agreed order resolving the matter; three pending a company response; four pending legal review; we've had about 20 agreed orders entered regarding the audits; a couple others closed with no further action. Then we did some analysis, and we have about 18 companies that have less than 20 claims each. The actual average for those companies is five claims each. So it kind of dropped to the lower end of the totem pole so to speak, or the spectrum of analysis on a cost benefit analysis and a resource issue; which leaves about 20 or so we're wanting to get to on an average basis – on how we want to move forward to get through the first full round spectrum of those entities.

There have been some questions about auditors. We currently utilize two outside vendors – a company called Smith Little and a company called Dixon Hughes PLLC. They met the parameters of our previous RFP, which is based on an hourly rate that we require, plus expertise. We also utilize in-house personnel that have expertise in these matters. We have an RFP pending right now for the upcoming fiscal year, which is out currently. One of the questions has been, "Why turn over different auditors?" A lot of

that is simply just employment turnover. Auditors leave. They move on, go to other companies or take other employment.

[James Dissen joined the meeting by telephone.]

When we have additional triggers other than just a routine examination scheduled – additional triggers can be FTA's, which are Failure Timely Acts, have come down to the Commissioner from Enforcement Compliance [other consumer complaints] – we may in some of those instances use our in-house people because of their expertise and their knowledge in the area with a lot of institutional knowledge concerning compensation over the years and how it has evolved. The vast majority of these now are being done remotely so there's less erroneous invasive on-site review and need for personnel. A lot of this is sent electronically and claims looked at here in-house in a desk audit.

For the most part, again, it's a resource analysis. Obviously we regulate the rest of the insurance industry. We have a lot of other processes we have to monitor and decide. So market analysis plays a major key here, and we have market analysts employed that look for the triggers that I've talked about. And as things rise to the top, we feel like we have the tools and the authority to move forward on those particular areas.

One thing I do want to mention – and it has come up over the past – is other compliance, not just self-insureds. The Failure Timely Acts, basically since we've been entering orders, doing recommendations, we have a three part process for those Failure Timely Acts as they come down from the Office of Judges. A claim may be continuing on the normal claims track when the failure to act within that claim comes down to the Commissioner with a recommendation. We actively engage that Failure Timely Act complaint and make sure that there is compliance; that the act that's complained of is taken care of; a protestable order entered; an IME report provided, etc. Then we look at a fine or a penalty if it's a problem. And, of course, we are always doing a market analysis when looking for systemic or continuing problems with particular carriers, self-insured employers and others. Since we've been going to the active order process we have 31 Failure Timely Acts in the SI field – self-insured employers. We have about 94 for private carriers; about 38 were no violations; 125 corrective action plans which is their order to give the Commissioner information as to how they're correcting this problem by training or other treatment concerning how they can fix this in the future. And that's a representation of the Commissioner that later on if they violate that can get them in contempt of that order.

Recent enforcement activity would include two orders against non-domestic carriers for contempt, an OOJ order or a Commissioner order; one being it was a failure to pay a 4% PPD award increase. Over a substantial period of time they failed to take care of that and we went in, and that carrier agreed to an order for contempt. We've also had one where there was a failure to issue a protestable order, provide an examination report, and act timely for successive reports from the OOJ for Failure Timely Acts. We went in on that one.

Lastly, we went in on a comprehensive market conduct compliance order against a non-domestic carrier group, which included five insurance companies doing business in the state. Analysis showed they had above average complaint share, above average reversal share – would mean they are getting reversed. Their decisions and denials are getting reversed; above average protest share; and Failure Timely Act issues. We worked out a comprehensive order with them basically to train their staff and adjusters in a more comprehensive fashion – make them more aware of the law and rules in West Virginia; provide a contact lead person in management; someone above the adjusting level to make sure these are being complied with. We set benchmarks for them over the next three years. Failure to meet those will be increased fines for those particular violations and failures. That's kind of a flavor of the enforcement and compliance on these particular areas over the last several months. I'll be happy to answer any questions.

Chairman Dean: Mr. Hartsog, any questions?

Mr. Hartsog: Is there anything there that looks like it puts us out of line with other states or any of the stats or exceptions that you're seeing that causes you any particular concern?

Mr. Pauley: Not really. If you take the Failure Timely Acts for instance, 125 or so over a three or four year period, and you just look at the number of protests that the Office of Judges are reporting to you, if you want to extrapolate that percentage there alone. . .and again as the Commissioner stated, there are many more claims being adjusted that aren't protested obviously. So it doesn't appear to be a large percentage of an issue at this point, at least what we're seeing.

Mr. Hartsog: It's kind of the exceptions you would expect to see as claims get processed. Nothing out of the ordinary.

Mr. Pauley: That's correct.

Mr. Hartsog: Do you think that. . .with regard to one thing you didn't mention. Have you looked at or maybe you've already done combined audits of like one legal entity so that if they have three or four self-insured entities that you're doing all of those at one time versus kind of sporadically as individual ones?

Mr. Pauley: Yes. We've talked with our Chief Market Conduct Examiner on that, and that's the intent. Sometimes it's just a logistics issue. But as long as there is a reasonable logistic ability to do it, we want to try to endeavor to do that in the future, and that is his goal. We are at the point right now where we want to look at each one of them unless the parent wants to sign off for all of the subs. We really haven't got to that point. But we clearly understand the issue of piecemeal or going to different areas.

Mr. Hartsog: Well, typically a company is going to have one TPA that processes claims for each one of the separate companies, so you're really doing. . .at one time with one process. And I think that's what they're aiming for. Have you audited any private insurance companies, or are you just doing self-insureds?

Mr. Pauley: Oh, no. That's what I was talking about in the recent compliance. Those are audits of non-domestic private carriers.

Mr. Hartsog: Okay.

Mr. Pauley: Yes. The comprehensive market conduct I was talking about, that was pretty much a full audit of that company's activities, and we're working out an order for them. And some of the criteria that I went into I probably went through them real quick just to get through them. So that data we're continuing to mine – average complaint share, average reversal share, when they are getting reversed, average protest shares. These in and of themselves may not be a problem. All of the protests may not have been legitimate. I don't know. Some of the reversals you would have to look at those. But when it all adds up and then you throw in Failure Timely Act and other issues, you see whether it's a private carrier or a self-insured employer. It kind of rises to the top, and that's something we look at. We always have that authority. Those are the ones that we are targeting right.

Mr. Hartsog: Thank you.

Chairman Dean: Mr. Marshall, do you have questions?

Mr. Marshall: Just one. In these consent orders that you referred to, were the sanctions limited to corrective action on their part such as training and so forth or

additional supervision? Were there any monetary penalties extracted in respect to the fine?

Mr. Pauley: Yes, both. There have been fines and there have been corrective action. In almost every one there is corrective action. So we get them going on the appropriate path forward. In egregious situations or situations where we believe they have crossed the threshold, especially in contempt issues; that is the Office of Judges may have ordered something in a claim unrelated to this, and they just fail to act on that order that hasn't been appealed. We consider that to be basically in "contempt" of that Office of Judges' order. Additionally, if the Commissioner has ordered the corrective action plan [and other corrective action] and they fail to meet those benchmarks or fail to do that, that would be basically in contempt of the Commissioner's Order. So we move much more strongly on those, obviously, because those have to be adhered to as an order of the tribunal in court.

Mr. Marshall: Can you give us an idea of the dollar amounts of the financial sanctions you imposed?

Mr. Pauley: I think some have ranged up towards \$8,000.00 to \$9,000.00. Some of those were in single instances of contempt.

Chairman Dean: Any other questions, Mr. Marshall?

Mr. Marshall: No, Mr. Chairman. Thank you.

Chairman Dean: Mr. Dissen, do you have any questions?

James Dissen: No, sir.

Chairman Dean: Commissioner, anything else you would like to bring up?

Commissioner Riley: No.

6. New Business

Chairman Dean: We'll move onto new business. Does anybody from the Industrial Council have anything they want to bring up under new business? Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: I don't, Mr. Chairman.

Chairman Dean: Mr. Dissen, do you have anything under new business that you'd like to bring up?

Mr. Dissen: No, sir.

Chairman Dean: Commissioner?

Commissioner Riley: No, sir.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

7. Next Meeting

Chairman Dean: The next meeting is Thursday, April 25, 2013 at 1:00 p.m. Does that meet everybody's schedule? Mr. Dissen, are you okay with April 25?

Mr. Dissen: That's good for me. Thank you.

Chairman Dean: Very good. Is that okay with you guys?

Mr. Marshall: Yes.

Mr. Hartsog: Yes.

8. Executive Session

Chairman Dean: 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. Is there a motion to go into Executive Session?

Mr. Marshall: So moved.

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded to go into Executive Session. Any question on the motion? All in favor, aye. All opposed, nay. The aye's have it. Motion passed.

[The Executive Session began at 1:25 p.m. and ended at 1:51 p.m.]

Chairman Dean: We are back in regular session. Is there anything that needs to be brought up with the Industrial Council under the regular session? Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Commissioner?

Commissioner Riley: No, sir.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

9. Adjourn

Chairman Dean: Is there a motion for adjournment?

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

There being no further business the meeting adjourned at 1:52 p.m.