

## **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**MARCH 6, 2014**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, March 6, 2014, 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  
Dan Marshall (via telephone)

### **1. Call to Order**

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

### **2. Approval of Minutes**

Chairman Dean: The minutes of the previous meeting were sent out. Did everybody get a chance to look them over?

Kent Hartsog made the motion to approve the minutes from the January 9, 2014 meeting. The motion was seconded by James Dissen and passed unanimously.

### **3. Office of Judges Report**

Chairman Dean: We received an email that Judge Rebecca Roush and Judge Alan Drescher were both out of the office today, and they wouldn't be able to send anyone in their place. So, we do have the report in front of us. You can email back any questions that you may have, and we will bring it up at our next meeting.

#### **4. General Public Comments**

Chairman Dean: We'll move onto general public comments. Does anybody from the general public have a comment today that they would like to make? [No comments.]

#### **5. Old Business**

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business? Mr. Dissen?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, sir.

Chairman Dean: Commissioner Riley?

Michael Riley, Commissioner, OIC: No.

Chairman Dean: Mr. Pauley, you are going to do the Safety Study.

Andrew Pauley, General Counsel, OIC: Yes sir, and the Access to Justice also. We want to update the Council on the Safety Study, which is due [every two years] by July 1st to the Legislature Joint Committee.

What has transpired since our last meeting, we contacted Marshall University to assist us in doing the Safety Study. We used West Virginia University two years ago, and wanted to give them [Marshall] a shot. They looked at it for a while, and unfortunately after about two weeks told us that they could not help us on it. They suggested someone in private industry that might be applicable to it, and we got a quote from them, but it was very high. So, we went back to WVU because of the urgency of time and circumstances, and the fact that they did it two years ago. We really need to

**Workers' Compensation Industrial Council**  
**March 6, 2014**  
**Page 3**

get moving on this. Their quote was approximately three times less than the private industry, so we think we have to go with that one. So, we've moved forward in working out a MOU with WVU [the same outfit we used two years ago]. In the next couple of days we are going to start getting the surveys out; have the month of March to reply; by April 11 we hope to have those back in. We will be working in compliance in making sure that we get the answers from everyone before then and do some comparison, and put those together. We will probably have a draft ready by the next meeting on May 8. They are going to be available for meetings. We'll probably have to have them at that meeting for any questions you might have. We may need to have a special meeting in June just to approve the final draft. We may come in here, or do a teleconference call, and we can decide that at the next meeting what your schedules look like in June. Does anybody have questions?

Chairman Dean: Mr. Dissen?

James Dissen: The only question I have. . .you're satisfied with the scope of the study that WVU is going to be doing.

Mr. Pauley: Yes. And they are going to take another look at it and do some comparisons and provide us some more input, and we'll provide them with more input. We provided oversight last time and tried to keep them within the scope of what they're doing and making sure it is productive for this Council, and for anyone that would want to review it.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: Is it the same group that did it last year?

Mr. Pauley: Yes, two years ago.

Mr. Hartsog: I wanted to comment. . .trying to avoid a false start of kind of like we had last year, but I'm sure that's in your memory also.

Mr. Pauley: I understand.

Chairman Dean: Mr. Marshall, do you have any questions for Mr. Pauley about the study?

Dan Marshall: No, just proceed.

**Workers' Compensation Industrial Council**  
**March 6, 2014**  
**Page 4**

Mr. Pauley: If there are no other questions, I'll move onto Access to Justice. As the Council knows, we had a proposal from a workers' compensation practitioner, Mr. Bill Gerwig, concerning proposed amendments to Title 85, Series 1, dealing with claims handling, workers' compensation claims. As we've mentioned in the past, there have been discussions at the State Bar meetings, workers' compensation subcommittees, and, of course, Access to Justice Committees. Two issues that flowed from this presentation to the Insurance Commissioner and to the Industrial Council dealt with the acknowledgement of legal representation and file copies. What we did, as we told the Council last time, we did an informal survey. It hasn't been formal rule making at this point. That's a different process, which I'll be happy to go into in a few minutes and discuss what would happen if we do that. I'll give you some general comments, and then if you want more specifics we can always discuss it later.

We did send out requests for informal comments to quite a few members of the Claimants' Bar. In fact that State Bar subcommittee was notified; practitioners; defense practitioners; we sent out requests for the self-insured community to respond; insurance carriers; TPA's; any interested parties. We got back some good responses from all parties for consideration for what the Commissioner wants to do – if you would approve or not approve.

Some of the comments I'll just go through. How do you define what should be given up in a claim file? Would it involve emails and private discussions and those kind of issues? There are also issues concerning attorney product – work product. Anything prepared in anticipation of litigation is usually privileged and would not be given out. There would be a need to define the "scope" of what we would be saying if you have to give a copy of the file copy; if we say you have to do that. I will say in the Code currently, or in the rules, there are really no provisions for attorney representation, acknowledgement, and/or requirements of file copies. However, I will say that in any case that is litigated before the Office of Judges there is an ability of the parties to issue a subpoena, and then the Office of Judges if they believe the subpoena is within the scope and course of the litigation, can order certain documents produced and take care of that. I think some of these issues deal with pre-litigation. That is, an attorney may be wanting to pursue a case on behalf of a claimant and they want to get the file to investigate whether they think it's a meritorious case, and whether they want to get involved or not. The question is should a carrier or a self-insured employer provide a claim file to someone that is investigating a case for a claimant trying to get that information pre-litigation?

Other comments from the Defense Bar believe that there is a concern with the language. And a lot of this is comments on language that was written. There is a long

way to go before we get the final language and everyone's approval, if we go that route. The "no limit" on the number of times a claimant can ask for this. Is it something you can come back today, and then come back a month later, and a month later? There's a continuing duty. Orders are probably easy. Orders mean every time an action is taken by a carrier or a self-insured employer responding on a claim. Those are generally supposed to be sent out already and noticed to the claimant and/or their attorney. Again, it's just going to depend on work product, expert opinion, and those kind of things in the file.

Again, a lot of the concern is defining what a "claim file" is, and not giving out attorney/client privileged confidential information; anything in anticipation of litigation. The problem is with comp a lot of times most issues are in anticipation of litigation. If you are going to send a letter out to someone saying, "I'm not going to pay this or I'm not going to pay your claim," that's more or less in anticipation of litigation.

Other comments from a complaint, a bar member: Claimants' counsel continue to have difficulty getting file copies for Claims which severely impairs our ability to provide proper representation to claimants we represent. Often we are forced to make multiple requests to the Administrator for Files, and also have substantial problems with proper payment of benefit checks. One of the issues here is [this request has asked] to put the attorney on all checks – indemnity benefits, wage replacement [those types of benefit checks], and medical benefit checks. Unless it is in a settlement you can't get an attorney fee out of it. It is more of a processing type thing having that information in the file.

We also had some good comments – Defense Bar. You have reimbursements, for instance, like travel expenses. Those usually go directly to the claimant. Out of pocket medical expenses – they have to go to an IME that's 100 miles away and spend the night in a hotel. Are you going to send that through the attorney or do you send that directly to the claimant so they can get reimbursed? In the Code it talks about timely payment of benefits to claimants, and making sure it is efficient timely benefits. These are workers' compensation claim drops. These are long-tailed claims, which means this is not like a quick personal injury settlement or a three or four year litigation. Some of these claims can go 20 to 30 years potentially. There are issues concerning continual payment of the stream; if the attorney continues to be involved in the claim; what the attorney would do as far as representation; would they provide a copy of their contract of representation? Would it clearly spell out who should be on the check? How long is the duration of that litigation if a claimant wants to fire an attorney, so to speak. How you would acknowledge that. Those kinds of issues.

We had some comments from insurers that have concerns. First of all, this is already being taken care of, so why does it need to be codified? Concerns about sending indemnity checks to the attorney representing them and slowing the process down. This is their quote, and we haven't substantiated that. Their quote is, "This is not done in any other state in the United States." We have not substantiated that. However, we do believe that insurers, self-insured employers in other states, and TPA's do this probably as a best practice, whether it's codified or not might be another thing. But do they go ahead and do it? We think they probably do.

We had some breaking down of suggestions regarding language – different to Mr. Gerwig's that would lay out more responsibility, timeframes, notice, acknowledgement of the claim, of the counsel; what you would have to do if the counsel disengages. Defining, again, what a "claim file" is, possibly giving one free copy, and then after that requiring payment so there is not an abuse of the situation, if there would be. I guess there would be outlets if there were other circumstances and the file was lost. And sometimes we don't know the size of these files. If the person has significant injuries the file could be large. The problem being that the file has to be looked at because, again, someone has to determine if there is attorney/client privilege in that file; if there's work product; and those kind of things. An attorney is going to have to look at those files every time they are requested and make sure nothing that's privileged is given out – time, cost, additional involvement there.

I think a lot of people are just saying, "The devil will be in the details." How do you want to do it? Do you want to just put them on indemnity checks, which is normal, where they are probably going to take a fee out of – not on the medical, not on the travel expenses – and possibly send copies of the rest as opposed to putting the name on the check?

In closing I'll try to sum up. I think there are a lot of issues to continue to discern here. I'll try to name a few of them. You may have others. If we're going to do this, we have got to define a "claim file." What does that include, and what does that not include? The number of times a claims file can be requested, and if there are going to be costs involved – the first one free or not. What's all inclusive in that? What does an acknowledgement of the attorney representation entail? We've got to get that worked out. Of course, the Insurance Commissioner does not regulate attorneys. So, if there are issues with the attorney representation or a fee dispute, that would have to be sent to the State Bar or another tribunal because he [Commissioner] does not have authority to get into an attorney/client situation [in duration of representation because these are long-tailed claims].

That is the overview. The way rule making would work is, if we decide to move forward with amending Rule 1, we would get a prepared Rule together, and this body has been through this before. But just as a refresher, we would get a Rule formally drafted to you, and once there is opinion here, "okay let's move it forward," then you would get that draft; and then if you agree, then we would move forward with public comment, and there would be a period of at least 30 days for public comment. We would tabulate all that formally as opposed to this informal process. You would review all of those. We have to respond to each one of those comments that are provided for the Rule. Once that comment period is over, we would come back. We would have a final Rule. If you sign-off on that final Rule, we would get our parent agency, Secretary of Revenue, to sign-off on that; and then it would go through the Secretary of State and eventually be a formal Rule.

At this point we are just putting this out for discussion for the Council. I think the Commissioner may have some comments. If we move forward, that's along the parameters that we're looking at.

Michael Riley, Commissioner, OIC: I think Andrew did a great job of summarizing the situation. It is a real concern. From my review of this it is a concern that has existed forever. It was back in the old Workers' Compensation Commission days. It was the same type of concerns where a claimant got the notice and the attorney did not, or vice versa. The one thing that kind of sticks out to me is that you don't see that in other states, as far as codified. I think this is practice everywhere whether it's West Virginia, Virginia or whatever. The carrier wants to correspond with the attorney. That's a more sophisticated party normally, not always, but normally, and certainly the claimants are knowledgeable too. I think it is the way the industry operates to recognize an attorney and keep them on the record and also cut them the indemnity check so the payments can be made appropriately. I don't think if it does get codified and put in rules that it's going to significantly interrupt the business practice. It is just that now [as a state] we'll be saying, "If you send a record to a claimant and did not carbon copy [cc] the attorney," then from the states' perspective is a violation of the law.

Chairman Dean: Mr. Dissen, do you have a question, sir?

Mr. Dissen: Commissioner, you are saying from your experience other states have not codified this?

Commissioner Riley: As Andrew said, we are going to verify that. That is one of the comments that we received from a trade group. We need to do our own research on that, and I don't know if we got very far on that.

Mr. Pauley: No.

Commissioner Riley: That is one of the things that we need to look at and verify. It was reported to us, and that is all the information we have right now is that the other states have not codified this. And if we did, we would be the first state in the nation to do that.

Mr. Dissen: I thought maybe we did this. One of the questions I asked was just how prevalent is this? Is this an individual type situation that occurred and was upsetting or is it more widespread that we need to go through these gymnastics?

Mr. Pauley: We've see anecdotal evidence. I don't know that we have a great deal of complaint evidence here. But that does not mean it is not occurring first of all. And then the specifics of it could be different in each case. It is something that has continued to ruminant to the Commissioner's point. I think in State Bar workers' compensation subcommittee meetings, and the Access to Justice issues. I think it does continue to be brought up, and that there are issues.

Commissioner Riley: It makes good sense. I think that's the way the industry operates now. Obviously, if I hire an attorney to represent me and I direct somebody to send all the correspondence to them, and the check to them, that just makes the system work better. If it does get codified or put in rules, it's just an additional step of direction out there, but it does take it to a different level of that's the way we mandate that everybody perform and meet that criteria.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: I think we're going down the right path. I'm very curious as to how other states handle this same thing. Because if it's not in code or regs somewhere else and it is best practice, which it seems logical that it would be, then why do we have the problem that we keep hearing about and other states don't in that regard? And they've handled it or done something in a different manner. I remember under your predecessor, on this same topic, they told us that they had the regulatory ability to handle people that wouldn't provide the information that they needed to in a timely fashion. And certainly if there is something else that we need to do to make that happen, I definitely want to do it. Apparently other states are dealing with it and getting it done differently. So my first question is, is there a better way to do this?

Commissioner Riley: My assessment is that we do have the ability, and obviously this is best practice and we expect the industry to operate that way. And I think they attempt to operate that way. There are issues out there or these wouldn't be brought forward to us. How widespread? I don't think we are ever going to be able to give you a scope of what it is, but it does reoccur. From our research and talking to folks, it was an issue back under the Workers' Compensation Commission. Not everything was sent out to each party – it went to the claimant and the attorney said they didn't get it or vice versa. The big objective from our agency is to make sure that the claimant is addressed properly and the information is given to them properly. That is our real focus right now.

Mr. Hartsog: Absolutely. I'll look forward to your follow-up and discussing it at the next meeting.

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

Mr. Marshall: My comment is that I would like to find out, as Kent said, what other states are doing. In conversations that I've had, which I did not elicit, but due to the knowledge that I'm on this Council, I've been approached by some members of the Claimants' Bar. The problem seems to be actual and real, and a problem that comes up quite often. I think it's appropriate for us to move forward and see if we can craft some sort of remedy that makes sense in the overall context of what the problem is, and the other aspects that were addressed to your comments. I would like to see us move forward and try to address this and come up with a solution.

Chairman Dean: Very good, sir. Mr. Pauley, Mr. Riley, do either one of you have any other comments you want to make?

Commissioner Riley: We will continue to research, and we'll be back in touch with you, and hopefully have something one way or the other at the next meeting. But we'll give you a heads up before then.

Chairman Dean: We look forward to discussing it.

Commissioner Riley: Thank you.

## **6. New Business**

Chairman Dean: We'll move onto new business. Does anybody in the Industrial Council have anything they would like to bring up under new business? Mr. Dissen?

James Dissen: I would like to make a comment. I know when you provide a service to customers or clients you hear mostly complaints, but I would like to give you a compliment. I had an opportunity to use the services of the Consumer Division. I must say, in a timely fashion I was contacted by Winford Saunders who did an excellent job in explaining the process to me. He went through a policy with me and pointed out certain things I should be aware of, and be alerted to. He took the time and made sure all the questions were answered and indicated there would be a follow-up in writing. Honestly, I thought it was an excellent, excellent service. You should be congratulated, and please extend my thanks to Mr. Saunders.

Commissioner Riley: Thank you very much. Winford is absolutely a terrific employee, and that whole division down there provides great service to consumers. I am glad you got the service you needed, and I'll pass that onto him.

Mr. Dissen: Thank you.

Chairman Dean: Mr. Hartsog, do you have anything under new business?

Kent Hartsog: I would like to ask. . .and just maybe covering a few random topics that we can learn a little bit more about. Perhaps the status of the Security and Guaranty Funds, and assessments that have been made against it, and kind of the projections in that regard. Just maybe a one-page summary to kind of explain what they are and what they cover. A little bit of information in that regard.

Commissioner Riley: Sure.

Chairman Dean: Anything else Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall, anything you'd like to bring up under new business?

Dan Marshall: No, Mr. Chairman.

Chairman Dean: Commissioner Riley, anything you want to bring up under new business?

Michael Riley, Commissioner, OIC: No, thank you.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

## **7. Next Meeting**

Chairman Dean: The next meeting will be Thursday, May 8, 2014, at 1:00 p.m. Does that meet everyone's schedule? We'll leave it set at that for now unless there is a problem. Please let us know if there is.

## **8. Executive Session**

Chairman Dean: The next order of business is Executive Session. 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. Hartsog: So moved.

Mr. Dissen: Second.

Vice-Chairman Hartsog: 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. We will now go into Executive Session.

[The Executive Session began at 1:31 p.m. and ended at 1:48 p.m.]

Chairman Dean: We are now back in regular session of the Industrial Council. The Resolution is to approve the renewal of the self-insured status of the eleven companies. Is there a motion?

Mr. Marshall: So moved.

Mr. Dissen: Second.

Chairman Dean: A motion as been made and seconded to approve the renewal of self-insured status for the eleven companies. Is there question on the motion? All in favor, "aye." All opposed, "nay." The aye's have it. Motion passed.

Is there anything else that needs to be brought up under regular session of the Industrial Council today? Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, sir.

## **9. Adjourn**

Chairman Dean: Is there a motion for adjournment?

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

There being no further business the meeting adjourned at 1:50 p.m.