

## **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**NOVEMBER 21, 2013**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, November 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  
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 have a chance to look them over? Is there a motion for approval?

Dan Marshall made the motion to approve the minutes from the September 19, 2013 meeting. The motion was seconded by James Dissen and passed unanimously.

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

Judge Rebecca Roush: Good afternoon. It is a pleasure to see each of you. I forwarded to you a copy of the Office of Judges statistics for the month of October. I don't think there is anything noteworthy in here other than the fact that we have acknowledged 414 protests in October, which is up from what we have done over the past few months. It does appear we will have around 4,700 protests for calendar year 2013 by the end of the year. Do you have any questions about the report?

Chairman Dean: Mr. Dissen?

James Dissen: No, sir.

**Workers' Compensation Industrial Council**  
**November 21, 2013**  
**Page 2**

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Judge Roush: I have two other things. I wanted to note that the Office of Judges and the Board of Review did issue a joint memo on how our offices will implement West Virginia Code §23-5-16(c) with regard to petitions for attorney fees. I am happy to share that memo with you here today. Finally, I wanted to announce that our office has hired a new Administrative Law Judge. Douglas Atkins joined our office November 1. Prior to joining our office he practiced with the law firm of Atkins & Atkins for 15 years, and graduated from West Virginia University in 1998. So far he seems to be adjusting well in our office, and has been writing some good decisions under the supervision of Judge Drescher. We are glad to have him in our office. Any questions for me?

Chairman Dean: Any questions Mr. Dissen?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: Thank you, by the way, for coming up with a format and the way you handled the attorney fees. You got a lot of input from several different parties. As I understand it, it turned out very well. So, thank you.

Judge Roush: You're welcome. The law, as you have seen, leaves a lot to be desired, and we had to come up with a process that was feasible to everyone involved. With the input of the Board of Review we think we found a reasonable solution. Hopefully, one day, maybe they can fix the errors in the statute.

Mr. Hartsog: Unlikely, but thank you.

Judge Roush: You're welcome.

Chairman Dean: Mr. Marshall?

Dan Marshall: Are you now fully staffed or do you still have some vacancies to fill?

Judge Roush: Right now I feel like we are fully staffed, particularly with the decline in the litigation that we continue to see. I wouldn't be surprised to see another retirement in the upcoming year, and we may have to fill that position. I think we're at pretty good levels within our office right now.

Mr. Marshall: Good. Thank you.

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

Chairman Dean: Thank you. We'll move onto general public comments. Bill, you would like to address us today?

Bill Gerwig: Yes. My name is Bill Gerwig, and I am an attorney in Charleston. This is a non-partisan procedural matter that is raised with some frequency on a weekly basis, maybe a daily basis. Workers' compensation claimants have the right to hire counsel, and implicit in that right is the understanding that there is some reasonable opportunity for counsel to provide meaningful representation. To do that all counsel needs access to file material. By "file material," I mean orders that have been issued previously in the claim – what benefits may or may not have been paid. We are having trouble accessing that material. We frequently have insurance companies that ignore subpoenas; that ignore requests for medical records. We are forced to file motions to compel, enforcement of subpoenas, which takes 90 to 120 days to get access to an Order which has a 60-day protest period. The result is that it delays litigation. It occupies time of the Office of Judges unnecessarily. I brought some proposed language which has been passed around numerous times before in various forums, but I will hand these out. Essentially all these proposals do is allow for or require that insurance companies acknowledge the representation of an attorney in writing so that we are aware that from that point forward we will receive copies of correspondence; that we will get benefit checks. And that is extremely important because we have to account for benefit payments to various agencies – whether it's the Social Security Administration, Unemployment, Welfare – countless agencies that want to know what benefits the claimant received; what fees have come out. And the only way we can do that is to have a computer generated report that we can provide to these agencies. When checks are not sent to claimant's counsel, we don't have that same capability. In fact, we frequently don't get the fee at all.

The second portion of this deals with the receipt of file material, which is not just an issue with claimants. Frequently employers' counsel need to offset benefits based on prior rulings. If they can't get access to those files because they are not being provided, then they are also being denied the same reasonable opportunity to litigate these claims. Zurich is a problem; American Mining is a problem; CBCS; Liberty Mutual; Gallagher Bassett; The Hartford; BroadSpire; Tokio Marine; Lumbermen's Insurance Company; Employers' Insurance of Wausau; are files on my floor right now trying to get file material. Sedgwick is not a real problem. BrickStreet is not a real problem. Outside of those two, all bets are off. It is the Wild West. We can't get anything.

The insurance company is the sole keeper of these records. If they rule a claim compensable for a lumbar sprain, and if I can't get that record, then I don't know that. And just because the doctors requesting authorization for treatment for a herniated disc doesn't even mean that's an accepted code in the claim. The only way to find out is for them to provide those records, and when they don't it causes tremendous delays because we are litigating issues on orders that haven't even been issued yet. We don't even know if orders are being issued. A lot of these companies don't issue anything. They'll send an email to a doctor and say, "Yes, you can have it. No, you can't." No protestable language, which is contrary to the statute. But I don't know that that is happening. I cannot enforce the basic fundamental rights of any of these participants.

I brought a claim just so I can give you a specific circumstance. I filed a subpoena on August 21, 2013. It was ignored. I filed a request for the medical authorization for medical records on October 2, 2013. It was ignored. I filed a motion to compel on November 1, 2013. That was acknowledged by the Office of Judges on November 19, 2013, which now gets us to the point of the Office of Judges hearing evidence, seeing if this insurance company wants to respond, which they typically do not, and then compelling them to provide material. If we are successful, half the time I get medical records, and none of the orders. The orders are more important than the medical records. I have other ways to get medical records. No other way to get orders. And here we are, August 21st, I filed the subpoena. We're at November 19th. How many of those orders are out there that need to be protested within 60 days? I have no way to know. These provisions will allow that to be rectified. It gives instruction to these insurance companies. Just because they get a ruling in this claim with this Hartford Company doesn't mean that the next claim administrator is going to do it right. They don't. We have to educate each person individually because the law is not out there. They don't have something to fall back on. If I could start citing a regulation, I think these problems just go away. That means no more complaints to the Insurance Commissioner. No more motions to the Office of Judges. It frees up tremendous time

judicially and allows all of these claims to move forward. I don't think there is, within the industry, any opposition to these regulations that I'm aware of. Any questions?

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

James Dissen: Not at this point, but I would like to review it.

Mr. Gerwig: Okay.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: Do you get timely decisions? And is this mostly from fully insured, self-insured, or it doesn't matter?

Mr. Gerwig: I would say it is almost never self-insured. Most of the self-insured companies have been here, and they comply with the way things have always been done. It is the 250 new companies that have come in, and they are the problem. And to say, "Do I get timely orders?" First of all, I don't know. I'm not getting the order. And I can tell you that [frequently] I do not. Once I'm in a claim and I file a request for treatment, I don't get that. I view that as an opportunity to get this back before the Office of Judges and say they are not issuing orders. Now maybe they are and just not giving them to me. I don't know the answer to that. But it does bring the issue to a head, and helps me at least get a decision from the Office of Judges forcing them to turn over the file material.

Chairman Dean: Mr. Marshall?

Dan Marshall: No questions at this time.

Chairman Dean: Commissioner Riley, any questions?

Michael Riley, Commissioner, OIC: No. Thank you for bringing this forward to take a look at it.

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

Andrew Pauley, General Counsel, OIC: No, thank you.

Chairman Dean: We will certainly take a look at it and hope to help you.

**Workers' Compensation Industrial Council**  
**November 21, 2013**  
**Page 6**

Mr. Gerwig: Thank you.

Mr. Marshall: Mr. Chairman?

Chairman Dean: Yes sir, Mr. Marshall.

Mr. Marshall: If I might, I would like to suggest that perhaps at our next meeting if we could hear from the Commissioner on this issue, I think that would be very helpful because it looks like something that deserves some attention and possibly some curative action.

Chairman Dean: Could you get us something before our next meeting because we won't meet until January? Maybe you could get the Industrial Council some information so we could talk about it here at the next meeting, and maybe move on it.

Mr. Pauley: Sure.

Chairman Dean: Very good.

Mr. Hartsog: Also, looking at providing orders to the claimants, and what the timeliness of those are and have been with getting those kind of decisions made and out, because obviously someone is in need of treatment. It is important. I think we've talked about that before, if I'm not mistaken, Mr. Chairman.

Chairman Dean: We have. Does anybody else from the general public have a comment they would like to make today?

**5. Old Business**

Chairman Dean: We'll move onto to old business. Does anyone from the Industrial Council have anything they would like to bring up under old business?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Commissioner?

Commissioner Riley: No, sir.

Chairman Dean: Mr. Pauley?

Mr. Pauley: No, sir.

## **6. New Business**

Chairman Dean: We'll move onto new business – the Safety Study.

Mr. Pauley: Two years goes fast. That's all I can say. I just wanted to put it on the radar that the Safety Study is going to be required again by the middle of next year. We want to start looking at how we want to accomplish that this time. There were some thoughts, questions last time. I think we used a group out of Morgantown. Dr. Becker, which we're sorry to say has retired, is aware of an entity in Huntington affiliated with Marshall University that might be amenable to it. We don't necessarily need your comments right now, but if you have comments or thoughts about the process. . .I think by the next meeting we'll have an agenda in line, have a game plan to move forward on how we want to do that; and any thoughts from the last process that you want to submit to us, please do.

Mr. Hartsog: Are we supposed to have that done by June 30?

Mr. Pauley: I think so. Yes, that's right. We need to get going if we're going to use an outside entity to help us. We need to get the surveys out to the community; get those back; get them tabulated; and get the final report that we're going to submit to the Legislature that everybody is comfortable with. That's what we've done in the past.

Mr. Hartsog: Thank you.

Chairman Dean: Mr. Dissen, do you have any comments or concerns with the Safety Study?

Mr. Dissen: I do not.

**Workers' Compensation Industrial Council**  
**November 21, 2013**  
**Page 8**

Chairman Dean: Mr. Hartsog, do you have anything else?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: Would it be your intention between now and the next meeting to contact this organization which is affiliated with Marshall University, and gauge their interest and perhaps get a proposal from them?

Mr. Pauley: That's correct. And any other entities that we would potentially be interested in also. We try to gauge what's out there.

Mr. Marshall: Thank you.

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

Mr. Dissen: This is going to sound self-serving. We only have these meetings quarterly, and there are four [members] on the Council. It is difficult to find a place to park. Could someone put in the "visitor parking" four cones, or something, out there where we could park?

Commissioner Riley: Sure. I'll take care of it.

Mr. Dissen: Thank you.

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

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

## **7. Next Meeting**

Chairman Dean: The next meeting will be Thursday, January 9, 2014, at 1:00 p.m. Does that meet everyone's schedule?

Mr. Marshall: Mr. Chairman, I'll be travelling that day, but if I could have a call-in number, I'll be happy to call in.

Chairman Dean: We will provide you with a call-in number. That won't be a problem. Margaret, for the next meeting in January Mr. Marshall will need a call-in number. [The Recording Secretary will email the call-in number to Mr. Marshall's secretary.]

## **8. Executive Session**

Chairman Dean: The next order of business is the 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. Marshall: So made, Mr. Chairman.

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. We will now go into Executive Session.

[The Executive Session began at 1:20 p.m. and ended at 1:50 p.m.]

Chairman Dean: We are now back in regular session. The recommendation is for the renewal of the self-insured status for the 33 companies on the two pages. Is there a motion to approve?

Mr. Dissen: So moved.

Mr. Marshall: Second.

Chairman Dean: A motion has been made and seconded to approve the self-insured status of the 33 companies. 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 discussed under the Industrial Council today?

## **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 1:52 p.m.