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Bobby Jindal, Governor
Curt Eysink, Executive Director

Office of Workers' Compensation Administration

WORKERS' COMPENSATION ADVISORY COUNCIL

Meeting Minutes
3-10-10
9:30a.m. – 12:00p.m.
LABI

Members present:

Chris Broadwater – chair
Chuck Davoli
Greg Hubachek
Ken Hawkins
Dickie Patterson
Cherie Pinac
Eddie Crawford
Troy Prevot
Julie Cherry
Michael Morris

Members absent:

Dr. Dan Gallagher
Jim Patterson
Denis Juge
Mark Kruse
Clark Cosse
Dr. Joe Laughlin

OWCA Staff:

Larry White, Deputy
Sheral Kellar, Chief Judge
Pauline Williams, 2nd Injury Dir.
Kaye Fournet, Fraud Mgr.
Tina Darensbourg, Attorney
Ingrid Johnson, Attorney
Teresa Boeneke, Assistant

Director Broadwater opened the meeting by welcoming everyone. He stated that he wanted to circulate all the drafts being discussed today before a vote would be taken. Therefore, there will be voting on drafts at the next scheduled Council meeting on March 17, 2010. Public comment will be at the end of the meeting. All persons

wanted to comment will have 3 minutes to speak, unless a member of the Council motions to give that person additional time.

2nd Injury Fund Proposal

Director Broadwater stated that there was a pending recommendation from the Commission on Streamlining to abolish the 2nd Injury Fund. This Council has voted previously to work on preparing a draft that would look at re-vamping the fund, to make it better meet its intended purpose. The objective needs to be on any outcome, is to find a way to help the fund meet the purpose of encouraging employers and providing a way of targeting those injured workers and getting them back into the workforce. From Executive Director Eysink's perspective, that can be accomplished by the Louisiana Workforce Commission by finding ways to provide services where there are opportunities for integration between the programs.

Pauline Williams presented the proposed legislation for the 2nd Injury Fund. (copy attached)

Chuck Davoli thanks the members of the committee for their good cooperation.

Director Broadwater thanks Pauline, Tina and Ingrid for their great work.

Confidentiality Provisions

Amends LSA R.S. 23:1293. Director Broadwater goes over the suggested amendments to 23:1293. Will be discussed further at next Council meeting. No vote taken.

SB 17 – Sen. Murray

Amends and reenacts LSA R.S. 23:1021(12)(c). This bill addresses the issue of the interpretation of the average weekly wage for professional athletes. Frank Bruno will be at next week's meeting to give an overview of the bill. No vote taken.

SB 42 – Murray

Amends Article V, Section 8(B) of the Louisiana Constitution. This proposal would include worker compensation claims into the provision dealing with review of decisions. When appellate court reverses the OWC judge and there is at least one dissenting opinion in the case, it would then go to a five judge panel for a re-hearing. Members will discuss more at the next Council meeting. No vote taken.

Mediation

Amends LSA R.S. 23:1310.3. Although the Commission on Streamlining recommended that the mediation process be made voluntary and six OWC mediators be eliminated from the system, that is not what is proposed in this bill. The Director has no plan to eliminate mediators. This would give more choices for the parties involved. No vote taken.

Compliance/Fraud Penalty

There is no draft yet. The current penalty structure for individual who operate without insurance or who misrepresent their payroll to avoid paying sufficient premiums, by not identifying employees, etc. Current penalty is \$250 per employee up to a cap of \$10,000. The proposal is to model something after other states who

have adopted the penalty that says for any employee for whom did not have workers compensation insurance when they were required to do so, the penalty is one and a half times the amount of premium owed on that individual. The revenue from the penalty can be significant and go back into the administrative fund which could offset the assessments, for all those who are paying legitimately into the system. Michael Morris is working on language for this bill. Council members are asked to send the Director feed back for language to this bill. Member will discuss further at next Council meeting. No vote taken.

Return to Work Fund

This is a draft that was started and discussed among the council last year. There was no bill filed last year. The focus of this bill is on re-integration into the workforce. The proposed funding would be re-direction of existing penalty dollars in the system.

Greg Hubacheck - Although retraining is beneficial to the injured workers, he has concerns for the un-compensated effects on injured workers not receiving benefits. He feels they would be further penalized.

Director – Appreciates the concerns for the people representing injured workers, but it is designated as a penalty, not punitive damages.

Troy Prevot – Funding part would have to be clear to go forward with the bill.

Director – He understand that everyone wants the outcome, but doesn't want to pay the bill. This needs to be worked through with everyone. The hard work in front of the Council is to figure out how to fund, it's the right thing to do to deliver the product.

Director Comments– States that this Council previously voted unanimously to support the issues on electronic debit card, IME and Self-Insurance Group funds premium fraud. Sen. Riser has agreed to carry the bill for these issues this year and the bill is pre-filed. Also from last year, approved and pre-filed is the sole-proprietor bill. The council is scheduled to meet again on March 17, 2010.

Public Comment

Mark Zimmerman, Lake Charles, plaintiff comp. attorney, Mediation issue:

With regard to mediation, agrees that mediation can be a pain in the neck, however, if you no longer have mandatory pre-trial mediation, the judge's workload is going to increase a lot. It is quite true that particularly in small cases, it resolved or got the ball rolling towards a bi-resolution of the case before the trial as a result of the pre-trial mediation. Has problems with language "engaged services of a mediator" on line 19, it marks out workers' compensation, which means private mediator. He understands that we want to allow the parties the option to see an outside mediator. This can be done at the present time.

Director Broadwater – What if it was changed "requesting the services of a mediator"?

Zimmerman – Suggests saying workers' compensation mediator. Language can be added this can also be involved outside.

Director Broadwater – The intent is, it would not preclude OWCA mediators, it would include them. But for those parties who are utilizing outside services as well to engage that outside service, but still have to appear at another service, seems to be redundant and a waste of time and costly for those attorneys who have to spend

their time there. To clarify, Mr. Zimmerman, you are proposing to restrict the freedom of choice among the parties and tell them where they should go instead?

Zimmerman – If one is going to utilize the services of an OWC mediator, not if it is someone from the outside. That would be a different situation.

With regard to the new re-training act, the penalties will only pay a small amount. His is concerned with a new system started, and all the penalties of the claimants go there, and nothing gets done at all. Unless the employers will agree to whatever the funding will be after the claimants penalty money is thrown into the pile. If you don't have that, then he feels it would be a waste of time.

Dale Cronin – speaking as a member of public. In regards to the SIF proposal – issue of public knowledge, employer knowledge needs to be clarified. In regard to the Mediation bill, he does not agree with Mr. Zimmerman. He doesn't think one will run into an issue about w. c. mediators being excluded from the process, because of the threshold part of this is the joint consent of the parties. If anyone has a client, and they don't want to use an OWC mediator that is outside of that district, you wouldn't get a joint consent or request, so he doesn't think it will become an issue. He is concerned over the court ordering mediation is one party does not agree, if the court orders private mediation.

Director Broadwater – Explains that choice still remains with the parties.

Dale Cronin – Ret to Work program. If the concern is you are penalizing the injured employee, a compromise can be worked out to where the funding and the penalty that is imposed for failure to pay indemnity to be excluded from that funding source is a potential compromise. In regard to the illegal alien bill, the disincentive needs to work both ways.

Michelle Sorrells, representatives for injured workers. According to the bill, to interrupt prescription, one would have to file in a district of proper venue. Has concerns with the unrepresented claimants who do not know what the proper venue is. The present 1008 form can be filed with OWCA in Baton Rouge. There are discrepancies. Believes that is a mistake to get rid of the mandatory pre-trial mediation. Having a deadline is the way cases proceed and progress. If you allow the parties to select mediators outside of the district, then that is going to backlog the good mediators against those that are within the district. Does not have a problem if a party voluntary agrees to have an outside mediator mediate claims in lieu of the OWCA mediation and upon proof having that mediation completed.

Terri Collins – defense attorney. Believes we need mandatory process with mediation. Some mediators are good, some aren't, maybe that is a personnel issue. When there is a pre-trial mediation trial date, we are forced to look at our files. Suggests mandatory pre-trial mediation conferences unless both parties agree to waive, and that would be a situation where you would know it is not needed. If the decision is made to do away with mandatory mediation, then suggests to have voluntary, and a mechanism where the judge gets involved with the pre-trial conference. On the penalty issue, there should be some type of compromise. If you have a claim that is denied, and shouldn't be denied, maybe there is a loss to that employee and should be some type of compensation to make up for the loss other than the indemnity and medical benefits. However, when there is a bill being paid on day 61 instead of day 60 and there is a \$2,000 penalty assessment, which many of the judges are doing, that shouldn't go into the pocket of the employee, it should go into the fund.

Gary Knoepfler, RCI. His company is involved with 2nd injury funds claims consulting and represents many of the insurers, self insured funds and self insured employers around the state. Employer acknowledgement requirements. His concern is with the ability of an employer to be able to meet the employer knowledge

requirement by some form of the post accident affidavit. The draft as it is now is going to be unfair to many employers around the state who do not have a personnel system in place, to get the proper form used. And a lot of legitimate claims will be denied. He is not in favor of a huge expansion of the fund. He has sent some suggestions to Director Broadwater, Pauline Williams and Chuck Davoli that would require a better definition and focus of what the affidavit would include, who it would be completed by, to address some of the concerns. If the Council decides to go with the language currently drafted, he questions whether or not there would be a phase in process.

Trey Mustain – represents injured workers. He has concerns over the penalty issue with the return to work bill. Penalties do serve the purpose of compensating employees. Also serves as a deterrent for future bad behavior. According to this draft, plaintiff attorneys are not going to have the incentive to go after penalties if the penalties are going into the fund. The penalties would only fund a very small portion of the fund. Where would the rest of the money come from? Under this proposal, many clients would be giving up their penalties and they are never going to use re-training. The money will be used to help some other employee. This is a fairness issue. The re-training is not only going to help some injured employees, it is going to help insurance carriers to pay less SEB. In fairness, to look for the source of funding, we need to look at the people who are actually benefitting from the re-training program, and not put it on the backs of those who are not.

Jan Barber, attorney represents injured workers. Asks the administration to consider one thing, if the focus is on re-training in Louisiana, why is there not an amendment to 1226. Re-training in 1226 is 5th on the list.

Harry Burdette – attorney, represents injured workers. Asks if there are any other states that have a similar re-training program?

Director Broadwater states no, that Texas tried to give a type of re-training credit that was a reimbursement type mechanism, designed for primarily small businesses, who complained that they didn't have the money to put up front and wait for the reimbursement, so no one used it.

Harry Burdette – Any bill that would include a penalty being taken away from an injured worker, obviously would have to have a large contribution from the insurance industry. It is not fair to take a penalty away from an injured worker who has not been paid indemnity or medical, basically has lost everything. If they are a low wage earner, they will never get any benefit out of this. Penalties that would be paid to a medical provider whose bills have not been paid timely or has been under paid, that provider has no benefit in a re-training program. This is not right. There is a lot of work that needs to be done on this bill. More funding will have to come from other sources. Re-training is great, the funding is a big problem.

Director Broadwater appreciates all the well thought out comments. Regarding the two primary issues that were addressed, mediation and return to work fund, he doesn't disagree with the benefit of getting folks together. The overall objective that we are trying to achieve is to find ways to, in a more efficient manner, bring these cases to resolution for the good of both parties. The intent of this bill is not to eliminate mediators. The intent is to help better focus the OWC to provide the services that are necessary to help the parties do their jobs and resolve these cases. On the return to work fund, 1.4 million dollars is not sufficient to fund the whole fund. Currently the entire costs of re-training go to the employer and the insurer. It becomes a shared investment between both parties that are benefitting from the program. Workers' Compensation and Unemployment are both intended to be bridges to re-employment, to help give folks the benefits until they can get back into the workforce. This Council's responsibility is trying to figure out if we can do this better, so that we are taking

injured workers, getting them the benefits that they are entitled to as quickly and efficiently as possible. So they can get back to gainful employment that is appropriate, when it is appropriate.

Next meeting will be March 17, 2010, 9:30 – 12:00 at LABI.

Director Broadwater motions to adjourn, Ken Hawkins seconds motion.

Adjourned