

Workers' Compensation Advisory Council
February 17, 2011
Minutes

Members:

David Olson
Edward Reynoso
Gary Thaden
Mike Bredeck
Mike Wilde for Glen Johnson
Robert Lux
Ryan Holmes
Shar Knutson
Susan Olson
Wayne Ellefson
Senator Ken Kelash
Senator Ted Lillie
State Rep. Andrea Kieffer
State Rep. Tim Mahoney

Visitors & DLI Staff:

Anne Webb
Bev Turner
Brad Lehto
Brett Krumhardt
Brian Zaidman
Carey Demaris

Visitors & DLI Staff:

Carol Norris
Carol Pankow
Caroline Bell Beckman
Cecilia Retelle
Charles Bierman
Charlie Feenstra
Chuck Cochrane
D. Brown
Danielle Bird
Dave Kempston
David Sullican
David Wulff
Dee Torgerson
Donna Olson
Doug Brown
Gary Hall
Gerald Bosch
Grant Harman
Greg Schmidt
Jay Hartman
Jessica Stimac
Jim Searls
John Rajkowski

Visitors & DLI Staff:

Karen Ebert
Karen Kaske-Meinke
Kate Berger
Kathy Carlson
Kathy Smith
Kelly Rodieck
Ken Peterson
Kevin Gregerson
Lisa Wichterman
Mark Fellman
Mary Christenson
Melissa Parish
Michelle Mathiesen
Mike Hill
Nancy Larson
Phil Rogers
Ray Krause
Ray Peterson
Tim O'Malley
Tom Germscheid
Tome Hesse
Wayne Studer
Wendy Legge

The meeting was called to order by Commissioner Ken Peterson at 9:40 a.m. Commissioner Peterson welcomed the council members and visitors and thanked Legislative members for attending. Instead of roll call, council members introduced themselves. The Commissioner gave a brief overview of WCAC and his history with DLI. He also reviewed with council the remainder of 2011 scheduled meetings stating they will be held as it is the best way to communicate and accomplish issues.

Approval of Previous Meeting Minutes

Motion made by Gary Thaden to approve February 26, 2010 meeting minutes, seconded by Susan Olson. Motion approved.

Approval of Agenda

No additional items were added to the agenda. Motion was made by Susan Olson and seconded by Ed Reynoso. Agenda was approved.

New Business

Attorneys Jay Hartman and Tom Mottaz presented handouts on the joint defense and plaintiff bar proposals regarding dispute resolution. Attorney Mottaz gave background for these recommendations and stated that back in July of 2010 correspondence from Chief Administrative Law Judge, Raymond Krause, advised there would be some procedural changes at Office of Administrative Hearings (OAH). The announcement was unusual because the Minnesota Administrative Procedure Act. These changes took place without going through rule making process. Though OAH posted “Frequently Asked Questions” (guidelines) it has created more questions than answers for members of the Bar. This is a joint recommendation from MN Defense Lawyer Association and the Minnesota Association for Justice. Attorney Mottaz referred to an evaluation report from the Office of the Legislative Auditor (OLA), titled “Oversight of Workers’ Compensation” issued February 2009. They believed that Chief Krause’s interpretation was that cases were not moving fast enough through the system. On page 14 of that report, it is stated that DLI and OAH should continue to work on streamlining the dispute resolution process, with an emphasis on reducing the forms used to enter the system and focusing on individual workers and claims instead of disputes. The joint proposal was as follows:

1. **Revise Minn. Stat §176.238 & 176.239** – Currently the same judge is assigned to a discontinuance conference and the subsequent hearing from his/her own conference decision.

Concern: The appearance of fundamental fairness for an employer or injured worker to a true “de novo” hearing is lost. The assignment also poses ethical issues for judge. Administrative Conferences and Settlement Conferences should not be in front of the same Judge. There have been incidents when a Judge is ill or absent; when this happens the conference has to be reset often passing the statutory time frame.

Recommendation: Amend Minn. Stat. § 176.238 (sub. 4 and 5) to reflect that when an employer files an Objection or Petition to Discontinue from an administrative decision pursuant to Minn. Stat. § 176.235, OAH shall schedule a *de novo* hearing before a different judge. Also, change or repeal Minn. Stat. § 176.307.

- Commissioner Peterson allowed time for questions. Representative Mahoney asked for explanation why there is a need to ask for a different judge. Attorney Hartman explained that the concern isn’t the block assigned judge; it is the one hour administrative conference - it should be in front of a different judge. Attorney Mottaz explained that with different courts (family, personal injury, juvenile etc.) there is usually alternative dispute resolution prior to the hearing or trial.

2. **Repeal use of Administrative Law Judge’s in workers’ compensation disputes** – Administrative Law Judges are being used for workers’ compensation hearings (in addition to hiring a “contract” judge for such purposes).

Concern: ALJ’s have little background in work comp law causing in some cases extended hearing time resulting in additional expense to parties. Hearings are not being addressed quickly and efficiently.

Recommendation: Amend Minn. Stat. § 14.48 and 14.50 to require that all hearings be assigned to a Compensation Judge. Eliminate language which allows for “borrowing” of an ALJ to act in place of compensation judge. Add or eliminate language regarding use of “contract” judge.

- Gary Thaden asked; if there was structure that required the ALJ to be familiar with work comp system wouldn't that take care of the problem? Attorney Mottaz replied that the statute requires that they be learned in the law. The ALJ statute does allow cross-over it just hasn't been used in the past and shouldn't be used on an on-going basis. This takes more time to explain the system and language and doesn't serve either the court or the injured worker well.
- Senator Kelash asked if it was possible to correct this issue with management of the ALJ's (where they are assigned instead of a broad range limiting them to early hearings and leaving the more complicated issues to the compensation judges) rather than involving Legislation.

3. **Mandate by statute the scheduling of settlement conferences** – Assignments of six judges have changed; their primary function was to conduct settlement conferences and they are all hearing judges. This has resulted in a marked reduction in scheduled settlement conferences.

Concern: The loss of settlement conferences reduces opportunities for effective alternative dispute resolution. According to "Oversight of Workers' Compensation," an evaluation report of the Office of the Legislature Auditor (Feb. 2009, pg 77) 56% of Claim Petitions were resolved in the settlement division.

Recommendation: Mandate that settlement conferences are scheduled before a hearing is scheduled on a Claim Petition, Objection for Discontinuance or a Petition to Discontinue. If settlement is not reached, the presiding Judge should conduct a Pretrial Conference and schedule the hearing.

- Mike Wilde asked when this process changed. It was discussed that six judges were assigned primary settlement conference duties, as of September 1, 2010 those judges were put in same category as the trial judges - this has reduced the settlement conferences substantially. In the past, once a Claim Petition was filed, the deposition and medical exam scheduled, there would be a settlement conference followed by the hearing if necessary. This might give the injured worker the impression that the process takes up to one year.
- Representative Mahoney stated that this time frame is much too great.

4. **Mandate scheduling of hearings based upon calendaring system** – It has become financially prohibitive to review the calendars of attorneys, which OAH asks that we continue to provide before scheduling a hearing.

Concern: Since September 2010, there have been several incidents of double or triple bookings.

Recommendation: Amend Minn. Stat. § 176.341 to require attorneys to provide calendars to OAH and to require OAH to schedule hearings base on mutually available dates.

Chief Administrative Law Judge Raymond Krause thanked the council for allowing him to respond to proposal and recommendations. His response to the four topics is as follows:

#1- He agrees with some of the issues brought forth and stated that OAH is not a policy making body; that he is following the statutes he is under oath of doing so. He indicated that he would abide by any changes in the law.

#2 - Administrative Law Judges are not routinely being used for workers' compensation hearings. OAH has used Manuel Cervantes, an ALJ who sat on the Workers' Comp Court of Appeals for five years; he is very qualified. There is also one contract Judge being used to fill in as needed. Judge Jacobs is not on regular payroll, he is only paid when used. OAH has recently posted two positions for hire to fill vacancies.

#3 – There hasn't been any changes in Settlement Conferences, other than the fact that all of the judges (instead of six) take settlement to avoid the backlog of cases. Settlements are extremely important to the system. If any party requests a Settlement Conference, they should indeed get one. Chief Krause asked to be informed if this is not happening. He doesn't believe that mandating by statute is necessary as it will be another step in the process again and not every case needs a Settlement Conference. This would only delay the process for the injured worker/employers.

#4 – OAH still, as always accepts calendars from attorneys. There are currently four schedulers handling assignments. OAH takes all necessary steps to ensure schedules are timely and minimize double booking. Due to statutory timeframes, it is not always possible. Chief Krause states that page six of the handout is false. He has not stated that "financially prohibitive" to review the calendars of attorneys. He also made reference of his letter to Attorney Mottaz on page 15 of the handout stating just that. It was mentioned that having an electronic case management system would be of benefit as previously discussed with the council a couple of years ago. It was suggested that the funding may come from the Special Compensation Fund to obtain the electronic case management system, using the savings to payback the Fund. There is currently a provision in the statute that mandates OAH to take into consideration the attorneys schedule.

Commissioner Peterson offered time for caucus. All sides of the board agreed that a caucus meeting was not necessary.

A motion was moved by Shar Knutson to adopt all four proposals brought forth. This motion was seconded by Sue Olson. The motion passed unanimously on a voice vote. It was asked that Chief Krause, Attorney Mottaz, Attorney Hartman, and Assistant Commissioner Gary Hall would work together to create language.

Conclusion

The Housekeeping Legislation of this agenda will be a future agenda item. Commissioner Peterson announced a special meeting will take place in the next few weeks.

Commissioner made a motion to adjourn at 11:15 a.m. All voted in favor of the motion and it was passed on a voice vote.

Respectfully submitted,

Carey Demaris

Carey Demaris, Executive Secretary