

Workers' Compensation Board

Meeting Minutes

July 21 - 22, 2009

I. Call to order

Director Heikes called to order the regular meeting of the Workers' Compensation Board at 9:00 AM on July 21, 2009 in Anchorage, Alaska.

II. Roll call

Director Heikes conducted a roll call. The following persons were present:

Don Gray	Linda Hutchings	David Kester	Kiana Peacock
Daniel Repasky	Damian Thomas	Janet Waldron	Robert Weel
Sarah Lefebvre	Patricia Vollendorf		

III. Approval of minutes from last meeting

Meeting minutes from February 24th meeting were approved with no changes.

IV. Agenda approval

Agenda was approved unanimously

V. New Items

Board Designees list approved unanimously after discussion about not including the Workers' Compensation Officers. Director Heikes explained the changes to how prehearings are being handled and that Workers' Compensation Officers will not be conducting prehearings any further.

Board discussed and approved 2010 Hearing Calendar

VI. Continued business from previous meeting

a) Proposed Regulations Discussion

- Rehabilitation Regulations
 - 8 AAC 45.525 Reemployment benefit eligibility evaluations
 - Board discussed and approved minus subsection (h) with changes
 - 8 AAC 45.525 (h)
 - Board discussed and approved
 - 8 AAC 45.093 Qualifying medical examinations for certain fire fighters
 - Board discussed and approved with changes
 - 8 AAC 45.094 Predisposing conditions for certain fire fighters
 - Board discussed and approved with changes
 - 8 AAC 45.081 Dispensing of generic drug products
 - Board discussed and approved
 - 8 AAC 45.082 Medical Treatment
 - Board discussed and approved
 - 8 AAC 45.086 Physician's reports
 - Board discussed and approved
 - 8 AAC 45.092(h) Selection of an independent medical examiner
 - Board discussed and approved

- 8 AAC 45.175 Issuance of subpoena
 - Board discussed and approved with changes
- 8 AAC 45.176 Assessment of civil penalties
 - Board discussed and approved with changes
- 8 AAC 45.177 Claims against the workers' compensation benefit guaranty fund
 - Board discussed and approved with changes
- 8 AAC 45.105 Alaska Workers' Compensation Board code of conduct
 - Board discussed and approved with changes
- 8 AAC 45.106 Procedures for hearing panel members to avoid conflicts and appearance of impropriety
 - Board discussed approved with changes
- 8 AAC 45.190 Guardianship
 - Board discussed and approved
- 8 AAC 45.890 Determining employee status
 - Board discussed and approved
- 8 AAC 45.900 Definitions
 - Board discussed and approved with changes
- 8 AAC 46.010 Requirements for applying and qualifying for authority to self-insure
 - Board discussed and approved with changes
- 8 AAC 46.015 Requirements for a joint venture to apply and qualify for authorization to self-insure
 - Board discussed and approved with changes
- 8 AAC 46.020 Application procedures for self-insurance authorization
 - Board discussed and approved with changes.
- 8 AAC 46.040 Security deposits
 - Board discussed and approved with changes
- 8 AAC 46.045 Acceptable security deposits
 - Board discussed and approved with changes

b) Public Comment taken from following individuals:

1. Tasha Porcello – Attorney for Liberty Northwest, practicing before the Board since 1985. Her experience with prehearings before the Board is different than the Director's. She requested and was denied a copy of the Attorney General's informal opinion regarding WCOs. She contended she was denied due process because the notice of July 17, 2009 public comments was not well publicized and, therefore, in her opinion, was not proper. Requested the Board open the public comment period again for the proposed regulations and consider the regulations again after reopening the public comments and considering them.
2. Jeffrey Holloway – Defense counsel have concerns regarding the vocational rehabilitation regulations adopted by the Board and have provided a letter signed by many defense attorneys to serve as public comment. It is their opinion these regulations expand the statutes. For example:

8 AAC 45.500(e) requires employers to provide an entire copy of their file within five days and some of the documents contained in the employer's file are not relevant to the employee's workers' compensation claim.

8 AAC 45.510 and 8 AAC 45. 522 contain clauses for hearings on an expedited basis; however, AS 23.30.110 governs hearings, therefore, the regulation violates the statute and due process rights of both parties as these provisions allow no opportunity for discovery, forestalls opportunity for an employer's medical evaluation and an SIME and places in the hands of the RBA whether a hearing on the merits is ripe.

The requirement the employer must notify the RBA after the employee has been off work for 90 days leave no leeway from the adjuster's knowledge.

3. Shelby Davison – Has been practicing before the Board since 1984 and signed the letter mentioned by Mr. Holloway. She suggests it is appropriate for the correspondence be provided to the Board members prior to the Board voting on the proposed regulations. Ms. Davison awaits notice for public comments on the Code of Conduct. She believes the current proposed regulation contains significant substantive changes and should have been put out for additional public comment. She does not feel it is appropriate to place hearing officers in the role of providing guidance to injured workers and suggests an ombudsman should meet with injured employees prior to hearings and prehearings.
4. Michael Jensen- Has represented claimants before the Board for 25 years. Feels the Board has made some mistakes. Specifically, in January 2009, the Board made WCOs board designees and took them off yesterday. Contends the Board violated the Open Meetings Act which specifically states those doing business of a public nature cannot meet amongst themselves, which is what the Board was directed to do. This is in direct violation of the Open Meetings Act. Finally, the Board's adoption of proposed regulation 8 AAC 45.525(h) makes it impossible for blue collar and public safety workers to get rehabilitation; they do both sedentary work and heavier duty work and by prohibiting combined job descriptions, they will not be found eligible. This regulation is opening Pandora's Box to litigation.
5. Steve Constantino – Represents injured workers and is a former hearing officer with the WC Board. Mr. Constantino commends Director Heikes for her energy and enthusiasm. However, he has concerns the Division has overreacted to the *Bohlmann* decision. Workers' compensation is supposed to be a simple, speedy remedy, but the process is becoming more formalized. Mirroring the rules of court fails to recognize the fundamental differences between tort and workers' compensation claims. A comp claim is continually evolving. He also has concerns over SIME questions creating more potential for litigation. The former prehearing system, with its flaws, worked quite well historically ; the Director's concern over the number of prehearing set and held is unwarranted and the current approach leaves no effective mechanism to recognize the evolving nature of the WC process and claims. In Mr. Constantino's opinion, it is chaotic on the adjudications end and he is concerned changes are based on an Attorney General opinion that is "secret authority," rendering the changes Kafkaesque.

6. Patricia Zobel – Has been practicing before the Board for 30 years. She shares concerns regarding the lack of public comment on the Code of Ethics regulations because those that passed are substantially different than what was originally put out for public comment. She asserts the U.S. Supreme Court in *Caperton v. A.T. Masey Coal Co.*, has defined “appearance of impropriety” in its June 8, 2009 decision and the Board’s regulation just passed requires clear and convincing evidence despite the due process clause of the U.S. Constitution and the Supreme Court’s recent ruling. Ms. Zobel does not feel she can advise her clients what to expect based upon the Board’s lack of historical knowledge and she thinks the Board needs ongoing training to understand their role and to get the Board back on an even keel. She contends everyone has a siege mentality and the Board must stop and train our way through it. She also believes there has been a blurring of roles when hearing officers are advisors to injured worker and asserts a debate amongst the division itself exists regarding what advice must be given injured workers. In Ms. Zobel’s opinion, adjudication of workers’ compensation claims requires the roles of advocacy and investigation to be separate.
7. David Floerchinger – Has represented clients before the Board for years. He believes the Board designees, with training, may be able to meet the requirements of the *Bohlmann* decision.
8. Alizon White – Provider of rehabilitation services since 1987; currently works for Northern Rehabilitation Services. The proposed regulations constitute an infringement on the right to do business and serve to punish firms with more than one rehabilitation specialist. If there are issues with a particular rehabilitation firm, the problems should be dealt with using the Codes of Professional Conduct for rehabilitation specialists, not with the Board’s proposed regulations. Ms. White finds it offensive that, based upon the bad acts of a few, all are being scrutinized and required to send itemized billings. Under the proposed 8 AAC 45.525, she thinks job title submissions should not be sent until the end of the evaluation process. 8 AAC 45.550, which deals with remunerative employability should include, “at the time of development of the plan.”
9. Susan Daniels – Has been an adjuster for 17 years and is currently the President of Northern Adjusters. The Unfair Claims Act places on adjusters a duty to advise employees of their rights and statute of limitations. She proposes looking at how everyone can work together to deal with the *Bohlmann* decision and suggests a “benefits rights letter” similar to that used by her office is appropriate for the Board. A clear understanding of the roles is no longer available with WCOs. Objective information is needed at all levels and it is important to have the right people, managed well. The parties are looking for the Code of Conduct to provide an environment of fair and impartial hearings. Finally, she suggests when employees are injured while working for an uninsured employer, the Board should be involved from day one. She confirmed employers are clueless regarding time loss, medical benefits, forms and the requirements of the WC Act. Such data is not factored into employers’ premiums.

10. Joseph Kalamarides – Has been practicing before the Board for 33 years and has seen changes in procedure before the Board. Mr. Kalamarides has discussed the *Bohlmann* decision with Director Heikes and respectfully disagrees with her interpretation. He sees no reason why WCOs cannot be trained to adapt to the decision and correct the mistakes. WCOs are better than hearing officers to do prehearings because the separation is needed. More importantly, the D&Os need to be issued in a timely fashion; his concern is if hearing officers are doing WCOs' work, they will not have time to write the decisions. Instead of changing the process, he suggests the WCOs be trained.

Mr. Kalamarides opposed the proposed regulation 8 AAC 45.525(a)(3). He does not see combined DOT descriptions as a problem. Combined job descriptions help people keep their jobs. What the proposed regulation does is separate those various jobs employees perform in one position and the employees are denied retraining when all they want to do is go back to work. He disagrees with the Reemployment Benefits Administrator's position on this proposed regulation.

11. Lulie Williams – Has been involved in the WC systems since as a rehabilitation specialist. Input from the rehabilitation community was not welcomed when the regulations were being drafted. She will benefit from the regulations designed to remedy the bad acts of one firm. However, the regulations give the Division too much power, which will ultimately cost carriers more money. It would be better to regulate the amount of time a rehabilitation specialist spends with an employee, not the specific tasks the rehabilitation specialist conducts. The regulations were drafted in reaction to one problem agency and the Board will kill the crop along with the weed if they adopt the proposed regulations. Ms. Williams submitted written comments.

VII. Adjournment

Director Trena Heikes adjourned the meeting at 5:15 pm.

Minutes submitted by: Jeremy W. Dodson, Administrative Officer II

Minutes approved by: