

**BWC Board of Directors
Governance Committee**

Thursday, August 27, 2009
Level 2, Room 3 (Mezzanine)
30 West Spring St.
Columbus, OH 43215

Members Present: Ms. Alison Falls, Chair
Mr. Larry Price, Vice Chair
Mr. James Hummel
Mr. William Lhota (left at 9:23 AM)
Mr. Thomas Pitts

Members Absent: None

Other Directors Present: Mr. Charles Bryan
Mr. David Caldwell
Mr. Kenneth Haffey
Mr. James Harris
Mr. James Matesich
Mr. Robert Smith

CALL TO ORDER

Ms. Falls called the meeting to order at 8:02 AM and the roll call was taken. All members were present.

MINUTES OF JULY 30, 2009

Ms. Falls asked for any modifications of the minutes of July 30, 2009. With no modifications recommended, Mr. Lhota moved to have the minutes of July 30, 2009 be approved without change, and Mr. Price seconded the motion. The motion passed with a 5-0 unanimous roll call vote.

REVIEW AND APPROVAL OF AGENDA

Ms. Falls had one recommended change for the agenda. To allow further time for the Governance Committee to review the materials regarding the Board Advisory Structure for Medical Issues, Ms. Falls recommended this agenda item be placed after the rules readings. Mr. Price moved to have the agenda approved, as amended through Ms. Falls' recommendation, and the motion was seconded by Mr. Lhota. The motion passed with a 5-0 unanimous roll call vote.

NEW BUSINESS/ACTION ITEMS

1. Motions for Board Considerations

a. For Second Reading

1. General Policy and Principal Operating Units of Bureau Offices: Rules 4123-9-1 to 4123-9-12

Mr. Tom Sico, Assistant General Counsel, presented the second reading of proposed rule 4123-5-01. Mr. Sico began by noting the current rules, identified as 4123-9-1 through 4123-9-12, describe the operational structure of the Bureau. These rules were required by Ohio Rev. Code Sec. 4121.31.

Presently, there are twelve rules addressing the operational structure of the Bureau. Mr. Sico noted that, during the five year review of these rules, staff recommended a better approach would be to rescind the twelve rules and replace them with one global rule with general language. The one rule would allow the Administrator to make slight changes in operational structure without concern of infringing on the rules. The one rule contains high level descriptions of the operational units of the Bureau.

Mr. Sico added these rules have not led to significant litigation. Mr. Sico noted legal research has revealed only one court case that has ever cited the existing rules.

Finally, Mr. Sico stated external stakeholder input was not sought by the Bureau in revising these rules. Mr. Sico noted this rule describes internal Bureau functions, and for that reason, did not need external input. Mr. Sico noted the rule proposal was available for comment for one month since the last reading; neither the Administrator nor he has received any comments on the rule proposal. Mr. Sico noted it was not customary or practical to have one chapter for just one rule; review of existing chapters found Chapter 5 was the most appropriate location for the new proposed rule.

Ms. Falls inquired if the recasting of these rules would be broadly enough defined and persist over time. Mr. Sico replied the change would provide a better chance the rules would persist over time. In 2014, when the rule proposed is up for its five year review, there may be a change, but the change would be much easier. Mr. Sico noted the proposed rule does not have specific organizational detail, and this feature would make any changes easier over time.

Mr. Price moved that the Governance Committee recommend that the Bureau of Workers' Compensation Board of Directors approve the Administrator's recommendations on the five year rule review of Chapter 4123-9 of the Administrative Code, Bureau of Workers' Compensation General Policy and General Organizational Rules. Mr. Price noted the motion consents to the Administrator rescinding Chapter 4123-9 and adopting new rule 4123-5-01, as

presented this date. Mr. Lhota seconded the motion, and the motion passed by a 5-0 unanimous roll call vote.

**2. 2009 Vocational Rehabilitation Services Fee Schedule:
Rule 4123-18-9**

Mr. Freddie Johnson, Director of Managed Care Services, and Ms. Karen Fitzsimmons, Rehab Policy Unit Manager, appeared before the Governance Committee to introduce the second reading of the proposed 2009 Vocational Rehabilitation Services Fee Schedule (hereinafter "VRSFS"), Rule 4123-18-9.

Mr. Johnson noted the VRSFS addresses all rehabilitation services provided to injured workers, including: vocational case management; occupational rehabilitation, otherwise known as work hardening; work conditioning; job analysis; and job seeking skills. The services under the VRSFS are very focused and well utilized. Mr. Johnson noted over three percent (3%) of all lost time claims use some form of vocational rehabilitation services. In 2008, Mr. Johnson reported there were 7,116 lost time claims referred for vocational rehabilitation services, of which seventy-six percent (76%), or 5,431 lost time claims, were assigned for case management. The average duration of a vocational rehabilitation program in 2008 was 142 days, or approximately five (5) months. Reimbursements pursuant to the VRSFS in 2008 represented three and one-half percent (3.5%) to four percent (4.0%) of the medical service dollars paid out. This figure was \$31.9 million in 2008. Staff estimates the proposed VRSFS would increase outlays 5.86%, from \$31.9 million in 2008 to \$33.8 million in 2009.

Mr. Johnson noted the VRSFS was required under the law, as well as pursuant to the Ohio Hospital Association case. Meetings with stakeholders were held on July 24th. If the proposed rule is passed by the Board of Directors, Mr. Johnson expected the rule to take effect on November 16, 2009 after the JCARR process. Mr. Johnson was of the belief the proposed VRSFS achieved the goal of ensuring access to high quality medical care with a competitive fee schedule. Since the first reading, there were comments received from the Ohio Physical Therapy Association and the Labor Management and Governance Advisory Council. Feedback comments from stakeholders were provided in a grid spreadsheet to the Governance Committee.

Ms. Fitzsimmons noted the first new comment concerned Job Placement and Job Development. Currently the VRSFS uses only one code for both services. Job Placement is a service that helps injured workers locate job opportunities and assists injured workers in presenting themselves to obtain employment. Job Development is a specific service to work with an employer to create a job opening for an injured worker. The first new comment suggested separating the two services into two separate codes because Job Development was a much more difficult and involved service. Ms. Fitzsimmons responded to the comment by stating this issue had been examined two years ago. At that point, stakeholders had concerns, but had agreed to keep one code. Ms. Fitzsimmons noted the suggestion will be discussed in the coming year to see if the VRSFS should be revised to separate out the codes for next year's proposed VRSFS.

Ms. Fitzsimmons said the second comment concerned Career Counseling. The recommendation was to bill this code as a Health Care Procedural Code (HCPC), or Bureau generated local code, as opposed to a Current Procedural Technology ("CPT") code. Currently, Career Counseling is impacted by a \$1,500 limit for treating non-allowed conditions. Career Counseling is considered psychological treatment; consequently, if no psychological condition is allowed in a claim, its cost is applied towards the \$1500 cap. Consequently, when Career Counseling is applied towards the \$1500 cap, it impacts the amount of services that may be provided in a vocational rehabilitation program, including other non-allowed conditions that may need to be addressed.

Ms. Fitzsimmons, in response to the stakeholder comment, noted the current proposed VRSFS has increased the cap on treating non-allowed conditions from \$1500 to \$2000. Ms. Falls asked how this comment reached resolution. Ms. Fitzsimmons replied the comment will be considered in next year's proposed VRSFS. Mr. Johnson noted the VRSFS will be recalibrated continually based on stakeholder comments with the goal of providing the right level of services to meet the needs of injured workers.

Mr. Johnson proceeded with a summary of the proposed changes in the VRSFS. First, case management fees were projected to increase by seven percent (7%), with mileage reimbursement increasing from \$0.30 per mile to \$0.45 per mile. Occupational rehabilitation/work conditioning codes were increased by six percent (6%). Mr. Johnson added that changes to units for nine codes were implemented. These changes were the result of the economy affecting the placement of injured workers in a jobsite. Particularly, ergonomic and job analysis were integral components of getting injured workers into a jobsite, and the units associated with these codes were modified. Mr. Johnson reported the VRSFS had a new service, ergonomic implementation and follow-up. Mr. Johnson noted this additional service was required to be separated from existing codes to allow for tracking and insure the type of quality utilization required. Mr. Johnson noted travel expense and mileage for ergonomic study and ergonomic job analysis were now being reimbursed. Mr. Johnson was of the belief these services need travel and mileage reimbursement as their services, to support the injured workers' program, require going to the job site. Overall, Mr. Johnson reiterated a 5.86% increase in reimbursement from the 2008 VRSFS, or from \$31.9 million in 2008 to a projected \$33.8 million in 2009, or a \$1.9 million increase. Mr. Johnson noted this projection was under the assumption that the VRSFS was the only variable, and all other factors remained the same. Mr. Johnson reiterated the proposed VRSFS provides access to quality care by having a competitive fee structure for providers of the services.

Mr. Price commended Mr. Johnson for the responses to the comments made by stakeholders. Mr. Price noted he saw a lot of give and take in the synopsis. Mr. Price asked how the budget would be affected. After some clarification from Mr. Haffey as to the question, Administrator Ryan noted the Administrator's budget is not affected by the VRSFS as these payments are made out of the Ohio State Insurance Fund.

Mr. Pitts commented that rehabilitation services are very important, and the concerns raised not addressed in this VRSFS should be reviewed in the coming year. Career Counseling should be separated out. Mr. Pitts noted the difficulty for providers to find jobs for the injured workers, and the task is labor intensive in these economic times. Mr. Pitts next commended raising the \$1500 limit for treatment of non-allowed conditions to \$2000. Finally, Mr. Pitts made a comment regarding the general fee schedule of the VRSFS. He noted the schedule hourly rate has increased from \$70 per hour to \$75 per hour, which he supports; however, the national reimbursement rate figure he had been provided, if accurate, was \$88 per hour. Mr. Pitts was concerned the rate increase did not go far enough as it was still well below the national average. Mr. Pitts noted anything that can be done to incentivize providers should be done, and he personally supported a larger hourly fee schedule increase; however, he would not make a motion on this issue.

Mr. Johnson responded the VRSFS is continually being reviewed to insure injured workers' needs are being met. As examples, Mr. Johnson noted the splitting out of ergonomic implementation in the current proposed VRSFS from ergonomic assessment. Mr. Johnson noted no opposition to Mr. Pitts' comments, but ultimately rehabilitation is servicing the injured workers and employers of Ohio. Mr. Johnson indicated they do try to determine what local states are paying rehabilitation providers, so that the Bureau may determine an appropriate level of fees that promote access to quality care for the injured workers. If tension arises in the reimbursement rates, the Bureau will address the issue.

Ms. Falls made two concluding comments. First, she desired to have Mr. Johnson next year provide follow up with how actual costs increased due to the adjustment in the fee schedule compared to the projected costs increases presented today. Second, Ms. Falls requested Mr. Johnson, when discussing guiding principles, provide more information on the metrics in next year's presentation; the objective is to better inform the Board on whether the guiding principles are being achieved based upon some objective and specific measurements.

Mr. Price moved that the Governance Committee recommend that the Bureau of Workers' Compensation Board of Directors approve the Administrator's recommendation to adopt rule 4123-18-09 of the Administrative Code, the "Vocational Rehabilitation Provider Fee Schedule" Rule. Mr. Price noted the motion consents to the Administrator adopting rule 4123-18-09 and enacting Appendix A to the rule as presented. The motion was seconded by Mr. Hummel, and the motion passed with a 5-0 unanimous roll call vote.

b. For First Reading

1. Workshops and Factories: Rule 4123-1-5

Mr. Donald Berno, Board Liaison to the Board of Directors, appeared before the Governance Committee to introduce Mr. Donald Bentley, Director, Technical

Support, Division of Safety and Hygiene. Mr. Berno noted the review and revision of the Workshops and Factories: Rule 4123-1-5 was an enormous undertaking. The rule had thirty-two (32) chapters, and each provision in the rule was reviewed to insure compliance with an industry standard, such as OSHA or NIOSH. The rule was also reviewed for conversion to gender neutral references and grammar.

The rule revision had a great amount of stakeholder input. The AFL-CIO, Ohio Manufacturer's Association, AFSCME/OSCEA, and the Ohio City/County Management Association all participated in the rule revision process, and the members present at various meetings discussed a very specific level of detail. Mr. Berno noted there were members of private and public labor unions, as well as private and public management organizations, present at each meeting. Each meeting lasted three to four hours. Ultimately, there were 152 changes recommended through this collaborative effort, and a spreadsheet outlining the changes was provided to the Governance Committee. The spreadsheet is incorporated in the minutes by reference.

Mr. Berno suggested that the rule be reviewed by the Governance Committee in two parts. In the present session, five chapters of the rule will be discussed: Chapter 2, Chapter 3, Chapter 17, Chapter 26, and Chapter 99.1. Mr. Berno reported sixty percent (60%) of the recommended changes in the rule were within these chapters. At next month's meeting, at the second reading of the rule, the remaining chapters will be discussed, and Mr. Bentley will answer any outstanding questions from the Governance Committee or additional comments received from stakeholders. Mr. Berno suggested voting on recommending the rule to the Board of Directors at next month's meeting. Mr. Berno, as a final comment, noted this rule was a thorough review through the volunteer work of many individuals, and the goal was to make changes to the rules as understandable as possible.

Mr. Caldwell asked if the spreadsheet provided to the Governance Committee was all inclusive of the proposed changes. Mr. Berno replied in the affirmative.

Mr. Bentley began his presentation by thanking numerous individuals who had provided significant participation into the revision of this rule. Michael Ely, Safety Technical Advisor for the Bureau's Division of Safety and Hygiene, was thanked for taking the lead role in reviewing the rule. Craig Mayton, Legal Counsel, and Mr. Berno were thanked for their assistance in rule reading and rule review process. Mr. Harris was thanked for witnessing one of the meetings where rule sections were being discussed by various stakeholders.

Mr. Bentley noted there were forty-seven (47) typographical, formatting, or citation errors identified and corrected in the five chapters being discussed, with sixty-two (62) substantive changes.

Mr. Bentley noted the following changes, by Chapter, with numbers referring to the spreadsheet of changes in the handout provided to the Governance Committee:

Chapter	Total	Substantive	Spreadsheet Change Number
2	8	6	Numbers 7, 8, 9, 10, and 11
3	18	8	Numbers 14, 15, 16, 17, 22, 23, 24 and 25
17	17	15	Numbers 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, and 96
26	4	3	Numbers 112, 114, and 115
99.1	N/R	27	Numbers 125, 127, 129, 135, 136, 148, and 149

Mr. Harris inquired about the Chapter 3 provisions, which addressed ladder safety requirements. Mr. Harris wanted to know why chimney ladders were exempt from coverage. Mr. Ely indicated OSHA had exempted chimney ladders from their provisions and noted chimney ladders were usually inside the chimney, which was a very confined space.

Mr. Lhota followed up by inquiring what constituted a chimney. Mr. Lhota could understand Mr. Ely's response for a residential chimney, but he wondered if a smokestack twenty feet in diameter was also a chimney. Mr. Ely replied he would research the issue and respond to Mr. Lhota. Mr. Ely postulated a smokestack may be exempt as a chimney due to the corrosive and toxic materials inside would make maintenance of such a ladder difficult.

Mr. Pitts had two concerns regarding Chapter 17, which addressed personal protective equipment. First, Mr. Pitts commented regarding proposed change number 85. This proposed change removed the requirement on the employer to make foot protection available. Mr. Pitts noted, even if OSHA relieved an employer of the requirement, the requirement has been in place for many years; ultimately, it was Mr. Pitts position that the employer should be held to this requirement. Mr. Ely responded to Mr. Pitts. He noted the current provision only requires the employer the means to purchase protective footwear; the rule does not require the employer to actually purchase the footwear. Mr. Ely noted safety footwear is readily available in the market place; to comply with the current rule, some employers would allow a vendor's truck to the job site to offer safety footwear for purchase by the employees.

The second issue Mr. Pitts had with Chapter 17 was proposed change number 91. This proposed change provided additional requirement for employees who wear safety belts, harness lifelines and lanyards, by requiring their use when the operation is performed more than six feet above the ground and must be able to sustain a static load as defined in other areas of the Administrative Code. Mr. Pitts noted it was the responsibility of an employee to wear this safety gear if it is provided by the employer; this responsibility was consistent with Ohio Supreme Court decisions. However Mr. Pitts noted there was no requirement for an employer to allow or require a tie off location. Mr. Pitts remarked that some work environments, such as a residential roof, may not have any available tie off point, or down spouting would be the only available area. Mr. Ely responded that an employee must be securely fastened, and he understood Mr. Pitts' point. However, revising this rule to encompass Mr. Pitts' point would require analysis of

numerous methodologies involved in the construction industry. Mr. Pitts commented OSHA should be the standard in this section of the rule.

Mr. Hummel followed up to Mr. Pitts. He inquired if the rule sections being presented were different than OSHA. Mr. Ely responded that the proposed change number 91 put the rule in agreement with the Construction Code. Mr. Hummel asked, if before the change, an employer was looking at two different sets of rules, and Mr. Ely confirmed that statement was true. Mr. Lhota noted he believed an employer would look at the competing rules and choose the most conservative to follow. He inquired if the wording in the proposed change was from OSHA because he would like to change a "the" to an "a" in one section of the code. Mr. Lhota did not want any confusion for employers who may do construction work one day and some other function the next. Mr. Bentley commented Mr. Lhota's point was a good one. Mr. Bentley will report the OSHA language to the Committee at the September meeting.

Mr. Price remarked, overall, the rule changes were in the right direction.

Ms. Falls, after all rules sections addressed in the table above were presented by Mr. Bentley, had a general question. She asked if it was correct to say unions, employers, and the Bureau had no disagreements. Mr. Ely responded that the meetings which covered the rule sections involved extension discussion of varying points of views, but the meetings did not conclude until consensus was reached in each proposed change. Mr. Ely added there was not as much disagreement as would have been expected because the persons involved in the meetings were all safety professionals.

Administrator Ryan remarked about a recent presentation she made before the Ohio Manufacturers Association. Dianne Grote Adams spoke shortly before Ms. Ryan. Ms. Grote Adams indicated the meetings regarding this safety rule were very fulsome, and she commended the process and openness of discussion.

Ms. Falls inquired if the second reading of this rule was scheduled for next month. Mr. Berno replied in the affirmative.

Mr. Harris commented that the meeting he attended was a very thorough discussion. Mr. Harris commended the constituency groups for working together. While the meetings could not be classified as a "love fest," Mr. Harris did notice very knowledgeable people were involved in the discussions.

Mr. Harris did have a question about Chapter 99.1 and removal of skin contact provisions throughout this chapter. Mr. Harris asked if these proposed changes were a lower safety standard. Mr. Bentley replied that yes, the requirements were relaxed. However the basis for the relaxation of these requirements was twofold. First, OSHA did not have these provisions. Second, the organization that publishes these standards states they should not be used to establish state legal standards.

2. Board Advisory Structure for Input on Medical Issues

Mr. Robert Coury, Chief of Medical Services and Compliance, and Dr. Robert Balchick, Medical Director, appeared before the Governance Committee. Mr. Coury and Dr. Balchick presented an overview of medical services involved in a workers' compensation claim, how the Bureau is involved in delivery of medical services, and proposals for Board of Directors' advisory structure for input on medical issues.

Mr. Coury noted the Bureau had approximately 1.2 million statutorily active claims, with 265,000 claims designated as "active," which means medical treatment had been rendered in the previous thirteen (13) months.

Mr. Coury then provided an overview of the key process steps when an injury occurs. First, there is a First Report of Injury (FROI) and medical documentation provided. Usually, the FROI and medical documentation are provided by a medical provider, and the filing in turn triggers other actions. The Bureau must determine any allowed conditions as they are causally related to the reported injury. In parallel, the medical provider will request the managed care organization (MCO) for medical treatment authorizations. Medical treatment is authorized consistent with an appropriate treatment plan and Bureau benefit plan, and this medical case management is a function of MCOs. Medical treatment disputes are addressed through an alternative dispute resolution (ADR) process that includes the MCO and Bureau sequentially. The medical treatment must comply with what is known as the *Miller* criteria. Ultimately, approved treatment is processed for payment to the provider. Once treatment is approved, the Bureau must pay the providers through the MCO process effectively.

In line with the Deloitte study, Mr. Coury reported there are several medical issues that must be addressed, including: updating the fee schedules regularly; reducing duplication of efforts; statutory and bill review editing; and a myriad of other issues. One example Mr. Coury reported is the recent streamlining of the ADR review process.

Dr. Balchick reported there are a number of ways the Board of Directors can help the Bureau in these processes to make them more efficient. Dr. Balchick stated the Board of Directors could participate in policy development and execution, as well as review of studies regarding quality and cost effectiveness. Dr. Balchick noted the Bureau works to align with its stakeholders to modify or develop policies. There are many resources the Bureau uses, including among others: Bureau medical staff, Health Care Quality Assurance Advisory Committee, The Ohio State University College of Public Health; and stakeholder feedback. These resources are used from conception of an idea to address an issue through developing a proven business model.

Dr. Balchick suggested three options for the Board of Directors to provide input on medical issues: a Board Designee approach, where one or more Directors is increasingly involved in medical issues; a Board Committee approach; or

enhancing the current committee structure to allow more time for the discussion of medical policy.

Ms. Falls opened the floor to the Directors present for their positions or preferences.

Mr. Smith was initially intrigued by the Board Designee option, noting it is taking a step away from the committee structure present in the Board of Directors. Mr. Smith reported he preferred a committee approach, whether a new committee or through the Governance Committee. Mr. Smith noted his preference was due to the potential for a major conflict between the Board's designee and a management position. A committee should reduce the potential for that conflict.

Mr. Lhota commended Mr. Coury and Dr. Balchick for the materials that were distributed. He concurred with Mr. Smith's recommendations, and he believed the Governance Committee, of all committees, was the right place for addressing these issues.

Ms. Falls noted, if a separate medical services committee were formed, the focus of that committee would presumably allow that new committee to take over rules functions concerning medical care. Mr. Hummel concurred with Ms. Falls' statement, and thought a separate committee would increase the focus of the Board.

Mr. Harris supported a medical services committee, as he believed medical care to injured workers was an area that needed more focus.

Mr. Smith inquired whether a subcommittee was ever discussed. Mr. Coury admitted that option was not discussed per se. Mr. Smith indicated a subcommittee would require a fewer number of Board of Directors members. Ms. Falls commented the issue of a subcommittee goes to the importance of the issue to the Bureau; if a subcommittee is formed, that structure may not do justice to the issue. Mr. Price commented a subcommittee may limit the available expertise; for example, if the subcommittee reports to the Governance Committee, the members of the subcommittee would come from the Governance Committee. Mr. Price was concerned a more suitable candidate from the Board of Directors would not be on the Governance Committee. Mr. Pitts stated medical services to injured workers are extremely critical. Mr. Pitts believed Board of Directors oversight was appropriate and needed.

Mr. Coury responded that the choices are not necessarily mutually exclusive. Mr. Smith indicated the Board Designee approach sounded similar to the role of a committee chairperson.

Ms. Falls noted these issues would be discussed at length at the next meeting.

DISCUSSION ITEMS

Due to time constraints, Ms. Falls deferred on discussing the Rule Review Calendar and the Committee Calendar.

ADJOURNMENT

Mr. Pitts moved to adjourn the meeting at 9:27 AM, seconded by Mr. Price. The meeting adjourned with a 4-0 roll call vote.

Prepared by Michael J. Sourek, Staff Counsel
September 1, 2009