

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 16-CI-552**

**GENERAL DRIVERS, WAREHOUSEMEN  
& HELPERS, LOCAL UNION NO. 89, ET AL.,**

**PETITIONERS,**

**v.**

**AFFIDAVIT OF ROBERT L. SWISHER**

**MATTHEW G. BEVIN, GOVERNOR, ET AL.,**

**RESPONDENTS.**

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I, Robert L. Swisher, Esq., having first been duly sworn, state as follows:

1. I am over the age of twenty-one (21), am of sound mind, have personal knowledge of the facts stated in the Affidavit, all of which are true, and am otherwise competent to make this Affidavit.

2. I am the Chief Administrative Law Judge for the Kentucky Department of Workers' Claims ("DWC"), a position which I have held since on or about December 1, 2014. I was originally appointed by Governor Steve Beshear to the position of Administrative Law Judge via an Executive Order effective January 1, 2010, and subsequently reappointed by Governor Beshear via an Executive Order effective January 1, 2014.

3. In my capacity as the Chief Administrative Law Judge, and pursuant to KRS 342.230(8), I am responsible for managing and supervising the other administrative law judges ("ALJs") in the DWC as well as dealing with staffing issues. Moreover, I make docket assignments and create the hearing site rotations for each of the ALJs in the DWC, supervise the Settlement Agreements section staff and review settlement agreements in claims not assigned to other ALJs, preside over the Frankfort, Kentucky, workers' compensation motion docket, conduct enforcement hearings for the DWC, plan and conduct training for the ALJs, and, when



necessary, assume some, if not all, of the regular docket for any ALJ in the event of a vacancy or unavailability of the assigned judge.

4. In addition to these responsibilities, and pursuant to KRS 342.213(5)(a), I expect to be available to consult about the performance in office of ALJs at the request of the Workers' Compensation Nominating Commission.

5. Prior to April 15, 2016, I worked with DWC Commissioner Dwight Lovan (the "Commissioner") to develop a contingency plan in the event that any one (1) of eight (8) ALJs previously appointed by Governors Beshear and Matt Bevin were not confirmed by the Kentucky Senate. This contingency plan consisted of a process of reassigning the docket of any ALJ not confirmed by the Senate to the other nine (9) ALJs, including myself.

6. On April 15, 2016, the Kentucky Senate confirmed five (5) ALJs. The terms of the three (3) ALJs who were not confirmed by the Senate—Udell B. Levy, J. Gregory Allen, and R. Scott Borders (the "three (3) non-confirmed ALJs")—expired when the Senate adjourned *sine die* around midnight on Friday, April 15, 2016, creating an immediate vacancy in each of their seats.

7. Each of the three (3) non-confirmed ALJs had on their docket benefit review conferences (BRC) or hearings scheduled for the following work week beginning Monday, April 18, 2016. In addition, each of the three (3) non-confirmed ALJs had before them cases under submission, in some of which opinions were due within eight (8) days of the expiration of their term.

8. In response to the Kentucky Senate's decision, on or about April 15, 2016, I began the process of reassigning quickly and permanently the dockets, including the cases under submission, of each of the three (3) non-confirmed ALJs to the remaining fourteen (14) ALJs,

including the five (5) ALJs confirmed by the Kentucky Senate on April 15, 2016, and myself, so that no case in which a formal hearing had already been held would languish without a decision being rendered. On average, this meant each of the remaining fourteen (14) ALJs were assigned four (4) additional opinions, many of which were due within a few weeks of the week of Monday, April 18, 2016.

9. As part of this reallocation of workload, I implemented a plan through which two (2) ALJs would “tend” the pending files of each of the three (3) non-confirmed ALJs so that active motions would be ruled on in the normal progression of each case until those files were permanently reassigned to ALJs appointed to replace the three (3) non-confirmed ALJs. Moreover, any dispositive motion in any such file was to be brought to my attention immediately for direction and action.

10. That system did not create any long-term delays or result in any “lost” claims, though I am aware that a few previously scheduled BRCs had to be cancelled with a view toward rescheduling them at a later date.

11. Having reassigned cases and claims, the next step of the plan was to reassign the May and June dockets of each of the three (3) non-confirmed ALJs to the remaining fourteen (14) ALJs. Though unsupported by any assurances or conversation, it was my expectation at that time that replacement ALJs appointed by Governor Bevin would not be available until at least June 2016, as they likely may have required a period of time to close down private law practices, and that, under the best of circumstances, the new ALJs would not be ready to take on active dockets until July 2016.

12. To cover the May and June dockets, I reassigned parts of the May and June dockets of each of the three (3) non-confirmed ALJs to those of the remaining fourteen (14)

ALJs, some of whom were scheduled to have “residual” dockets during those months. A “residual” docket is essentially a “catch up” month for an ALJ, usually falling every fourth month of the year, during which an ALJ does not have an assigned BRC docket or other, regular hearing docket and will, instead, use the time to write opinions and handle “off-docket” cases that need to be heard. As the Chief Administrative Law Judge, I am not usually scheduled to handle a regular docket, but I have also assigned parts of the May and June dockets of the three (3) non-confirmed ALJs to myself and I am, at present, handling a regular docket in addition to my duties as the Chief Administrative Law Judge.

13. In an effort to be proactive, on May 5, 2016, I sent an email to a representative of the Kentucky Workers’ Association (“KWA”)—the plaintiff’s bar in the workers’ compensation area—and invited him to “spread the word” to the membership of the KWA that if they had questions about the status of a claim assigned to one of the three (3) non-confirmed ALJs they could call me directly. A copy of that email is enclosed with this Affidavit as **Exhibit A**. I also indicated that I wanted to know if any claim needed immediate attention.

14. That same day, I sent an email to a list of attorneys representing the defense bar in the workers’ compensation area through which I informed them that some case files for the three (3) non-confirmed ALJs had been reassigned to one of the remaining fourteen (14) ALJs. A copy of this email is enclosed with this Affidavit as **Exhibit B**. I further wrote that if there were specific questions about the status of a given file, or if some action needed immediate attention in a claim that had not yet been reassigned, then they should give me a call. As I relayed to both groups, my ultimate goal was to ensure that nothing slipped through the cracks.

15. As of the date of this Affidavit, and in response to this outreach, I have been asked to look into and reassign approximately a half-dozen but no more than ten (10) total claims.

16. The Workers' Compensation Nominating Commission met on Monday, April 11, 2016, to discuss the retention of four (4) ALJs—Thomas G. Polites, Steven G. Bolton, Otto D. Wolff, and Jane Rice Williams—whose terms were set to expire on July 14, 2016. On that date, the Workers' Compensation Nominating Commission voted to recommend to Governor Bevin the retention of all four (4) of those ALJs.

17. In early May 2016, I began again to work with the Commissioner to create an additional contingency plan for the possibility that Governor Bevin would not appoint one (1), some, or all of the four (4) ALJs whose terms were to expire on July 14, 2016.

18. On May 9, 2016, Governor Bevin issued an Executive Order reorganizing the Workers' Compensation Nominating Commission. That same Executive Order included the appointment of seven (7) new individuals to the Workers' Compensation Nominating Commission.

19. On or about May 11, 2016, Governor Bevin rejected three (3)—ALJs Polites, Bolton, and Wolff (the “three (3) non-reappointed ALJs”)—of the four (4) ALJs previously recommended for retention by the Workers' Compensation Nominating Commission.

20. That same day, Governor Bevin reappointed ALJ Williams to a four (4) year term expiring on July 14, 2020.

21. Though the terms of the three (3) non-reappointed ALJs do not expire until July 14, 2016, I immediately began to reassign each of their June and July dockets, along with the June and July dockets of the three (3) non-confirmed ALJs to the other eleven (11) ALJs,

including myself. To deal with this additional caseload, I, along with the Commissioner, decided to pull the two (2) ALJs who were handling almost exclusively the medical dispute docket back into the regular docket service, while keeping the medical dispute docket afloat. This has been accomplished by dividing the medical dispute docket for July by four (4) ALJs instead of two (2) ALJs and assigning part of the medical dispute docket to two (2) ALJs, including myself, to assist with the two (2) ALJs already tasked with hearing the medical dispute docket.

22. Additionally, my direction to the three (3) non-reappointed ALJs as of the date of this Affidavit has been to focus almost exclusively on writing and issuing opinions, before their terms expire, for the cases assigned to them which are under submission. My goal is for each of these ALJs to complete as many cases as possible prior to their departure.

23. To facilitate the writing and issuance of opinions by the three (3) non-reappointed ALJs, we have found it necessary to cancel hearings, mostly off-docket cases, that two (2) of those three (3) had scheduled for June and July of 2016. We also made this decision to accommodate parties to cases, whom we have found often prefer to have their cases decided by ALJs who actually conduct the Formal Hearing in any given claim as opposed to ALJs coming in at the last minute.

24. The Petitioners in the litigation filed against Governor Bevin related to the Workers' Compensation Nominating Commission have alleged that an "unprecedented" six (6) ALJs have been removed this year. That is not accurate. As of the date of this Affidavit, there are only three (3) vacancies in the ALJ ranks; the terms of the three (3) non-reappointed ALJs do not expire until July 14, 2016, and I expect that those ALJs will work diligently to write and issue opinions right up to the date their terms expire.

25. The current reshuffling of work, however, is not sustainable in the long-term. Some claims have been delayed, though claims of a particularly pressing nature have been, and will be, reassigned for action upon request. Hearings, particularly those off-docket hearings previously set by any one of the three (3) non-reappointed ALJs, must still be conducted. There exists a strain currently on the system.

26. That the workers' compensation system in Kentucky continues to move forward is due to the fact that eleven (11) ALJs have been willing to step up and work extra hours to keep the system moving. Yet, I cannot expect them to realistically keep up this pace through August and into September of this year. The volume of work for the ALJs simply will not sustain this effort beyond that without serious drops in coverage. We need the Workers' Compensation Nominating Commission to nominate, and Governor Bevin to appoint, ALJs necessary to fill the three (3) current and three soon-to-be-vacant seats as soon as possible.

27. With regard to the Workers' Compensation Nominating Commission itself, since Governor Bevin's reorganization, I have been asked to participate and, when necessary, give input during each of the two (2) meetings held by the Commission since that reorganization, which occurred on May 13, 2016, and May 23, 2016. To be clear, these are the only two (2) instances I can recall having been asked to attend a meeting of the Workers' Compensation Nominating Commission and to provide input on ALJs or candidates for the positions since I became the Chief Administrative Law Judge on or about December 1, 2014, including when the members of the Workers' Compensation Nominating Commission considered and re-nominated eight (8) ALJs in the fall of 2015 and when the members met again and re-nominated four (4) ALJs on April 11, 2016.

The foregoing is true and accurate to the best of my knowledge and belief. Further Affiant sayeth naught.

Rout L. Swisher

COMMONWEALTH OF KENTUCKY )  
 ) SS:  
COUNTY OF JEFFERSON )

Constance L. Fugate  
Notary Public, State at Large

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# **EXHIBIT A**

**Swisher, Robert (LABOR KYWC)**

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**From:** Swisher, Robert (LABOR KYWC)  
**Sent:** Thursday, May 05, 2016 1:53 PM  
**To:** Tim Wilson (twilson@wmkylaw.com)  
**Subject:** Claim status issues

Hey tim: Would you please spread the word to the KWA folks that if they any questions about the status of a claim assigned to Allen, Borders or Levy which has not already been reassigned to another ALJ they can call or email me directly. My direct line here is 502-782-4535. If something needs immediate attention I want to know about it. I am trying to keep anything from falling through the cracks and would appreciate all the help I can get. Thanks.

Bob

*Robert L. Swisher*

Chief Administrative Law Judge  
Kentucky Department of Workers' Claims  
657 Chamberlin Avenue  
Frankfort, KY 40601  
P: 502-782-4535  
F: 502-564-0682

# **EXHIBIT B**

## Swisher, Robert (LABOR KYWC)

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**From:** Swisher, Robert (LABOR KYWC)  
**Sent:** Thursday, May 05, 2016 4:13 PM  
**To:** Jim Fogle Mobile (jfogle@fkplaw.com); Doug U'Sellis (dusellis@uselliskitchenlaw.com); cpf@fulton-devlin.com; Allon Bailey (ABailey@cbmlaw.net); bferreri@ferrerilaw.com; Terri Walters (terriw@jwtslaw.com); Jeff Damron (jdamron@Bairdandbaird.com); Kathy Banks (kbanks@rileyheraldandbanks.com); Joel Aubrey (jaubrey@pohlaubrey.com); kdietz@lucasdietzlaw.com; Steve Goodrum (sgoodrum@goodrumdownslaw.com); dwalton@whtlaw.com; HDJ (djones@joneshowardlaw.com)  
**Subject:** Claims reassignment status/issues

Good afternoon and greetings from Frankfort: In light of recent changes in the ALJ corps questions have arisen regarding the status of claims previously assigned to Judges Allen, Borders and Levy. Some files have been reassigned to other ALJs but many have not (yet). I am trying to get the word out to the WC community generally that if there are specific questions about the status of a given file, or if some action needs immediate attention in a claim which has not yet been reassigned then those inquiries should come directly to me. My direct phone number is 502-782-4535. As you can imagine we are trying to keep cases moving the best we can and certainly do not want anything to fall through the cracks. I ask for your assistance in this regard. I have relayed the same information to the plaintiff's bar and wanted to pass it along to the defense bar as well. (If I have left anyone out it is certainly not by design.) If you would each please spread the word in your firms I would appreciate it. The transition process will be a challenge for all of us and I ask for your patience. Thanks all.

*Robert L. Swisher*

Chief Administrative Law Judge  
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