

# **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**FEBRUARY 18, 2010**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, February 18, 2010, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

## Industrial Council Members Present:

Bill Dean, Chairman  
James Dissen, Vice-Chairman  
Kent Hartsog  
Dan Marshall

### **1. Call to Order**

Chairman Bill Dean called the meeting to order at 3:00 p.m.

### **2. Approval of Minutes**

Chairman Bill Dean: The minutes were sent out from the previous meeting. Is there a motion to approve the minutes as stated?

Dan Marshall made the motion to approve the minutes from the January 21, 2010, meeting. The motion was seconded by James Dissen and passed unanimously.

### **4. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge**

Judge Rebecca Roush: Good afternoon. It's a pleasure to be here today. I've tendered to you our customary report for the work being performed in our office. It's nice to see such a full house here today, but unfortunately I don't have a lot to report with regard to any significant changes in this data. The numbers continue to trend along the same lines, so there are no significant issues to point out to you. We continue to see a decline in litigation as the report reflects.

The only other thing I would like to mention is with regard to issues pertinent to the Office of Judges. There is pending legislation that was introduced which would establish

a Settlement Review Division within the Office of Judges. But I see from the agenda that was passed out there will be a legislative update by the OIC, so I will defer to them with regard to an explanation of that legislation. If you don't have any questions, and I see that you have a very busy agenda today, I'll keep it at a minimum. Any questions?

Chairman Dean: Any questions for Judge Roush? Mr. Hartsog?

Kent Hartsog: One question – medical protests. In looking at the statistics you can't really compare that in essence with a trend as to whether they're up, down, sideways, how those are turning out.

Judge Roush: Right. When the Interim Committee Meeting took place prior to the beginning of the Session, that was a hot topic with regard to medical protests – what were they looking like in our office? I cannot find [from any of that] where there is an increase in the number of those protests. I am not finding anything significant.

Mr. Hartsog: An increase. . .like over the last couple of years, last year or this year or. . .?

Judge Roush: No. There was no significant increase.

Mr. Hartsog: So the trending down on medical protests is about the same as what we're seeing overall with the protests that you're seeing?

Judge Roush: Yes. That's correct.

Mr. Hartsog: Thank you.

Chairman Dean: Mr. Marshall, do you have any questions?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good. Thank you.

Judge Roush: Thank you.

#### **4. Approval of Proposed Survey/Data Gathering for Safety Report to Legislature**

Chairman Dean: We'll move onto Approval of Proposed Survey/Data Gathering for Safety Report to Legislature. We were given that last week. Ryan, I believe you made some changes on that.

Ryan Sims (Associate Counsel, OIC): That's Correct. I took the feedback that you [Industrial Council] gave me on the proposed surveys, both the self-insured community and the workers' compensation carrier community. I incorporated the suggested additional questions and subject matter that was suggested to me by Mr. Hartsog and Mr. Dissen, and it is now in a format to be sent out to the self-insureds and the carriers. In addition, it was also pointed out that you want us to request a little more specificity from NCCI regarding the scheduled debits and credits, and we are following up with them right now. Also, a suggestion that we try to touch base with the Risk Insurance Management Society (RIMS) and see if they have any information to give us on it. So we're going to do that as well. But the main two areas are the carrier survey and the self-insured survey, and those are attached in your packet. The appropriate thing now is to go ahead and have a motion to officially approve those to be sent out. They are designed to get feedback by May, so that should give us plenty of time to have the report prepared by the time it is due on July 1.

Chairman Dean: I'll give you guys a chance to look them over to see if they are okay for approval.

Mr. Hartsog: Ryan, do you believe that this information that you will get back would give you enough information to update the Legislature as we are required to do?

Mr. Sims: Between the carrier survey, the self-insured survey, the NCCI scheduled debit and credit information – really between those three areas – I think we will have plenty of information to give them. I think it's designed to do a report every two years. So once we give them that then I assume the intent of the Legislature was to build upon whatever shortcomings we might see in the initial data gathering, and then to work on gathering more data the next two years. I'm assuming also that the Legislature can get proposed legislation if they think it's necessary. I think plenty of useful data will be gathered from these surveys.

Chairman Dean: Mr. Dissen, do you have any questions?

Mr. Dissen: I do not, sir.

**Workers' Compensation Industrial Council**  
**February 18, 2010**  
**Page 4**

Chairman Dean: Mr. Hartsog, do you have any other questions?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall, do you have a question?

Mr. Marshall: I have no questions.

Mr. Sims: I want to correct. . . I think I said "NEIC." I meant "NCCI." That is who we are getting the scheduled data from.

Chairman Dean: Is there a motion to approve?

Mr. Marshall: So made, Mr. Chairman.

Chairman Dean: Is there a second?

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded to approve. Are there any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The aye's have it.

[Motion passed to request data on Proposed Survey/Data Gathering for Safety Report to Legislature to be sent out to all West Virginia workers' compensation self-insured employers and workers' compensation insurance carriers.]

Chairman Dean: We'll move onto Request to File Initial Drafts on Rule 8, Rule 16 and Rule 22.

Mr. Dissen: Mr. Chairman, before we start. I never received a copy of these rules. It may be the e-mail. I don't know. But I happened to run into Kent yesterday and I mentioned about anything coming up, and he said the rules. He e-mailed me a copy, so I haven't had an opportunity to go through these.

Commissioner Jane Cline: Usually we get a notification back if it is undeliverable.

Mr. Dissen: I went back into the file log of the company and generally it would show up. I think you sent this out on the tenth? I went back through, and I get e-mails from Ryan. I didn't receive them [rules].

[Mr. Sims will check the current e-mail address that he is using for Mr. Dissen to confirm whether it is the same e-mail address that the OIC staff is using.]

**5. Request to File Initial Drafts on Rule 8, Rule 16 and Rule 22 – Ryan Sims**

Ryan Sims (Associate Counsel, OIC): Chairman Dean, members of the Industrial Council, we are presenting today three Title 85 Rules and requesting your permission to file them with the Secretary of State's Office for 30 days for public comment. There are three series – Series 8, Series 16 and Series 22.

**Title 85, Series 8 (Amendment)**  
**“Workers' Compensation Policies, Coverage Issues and Related Topics”**

I'll start with Series 8.” This is a very narrow amendment to Series 8 to strike a section in the rule that deals with a process that has been in existence for a while where employers can file with the Insurance Commissioner to be deemed for an opinion from the Insurance Commissioner that they are exempt from workers' compensation or from having to carry workers compensation. This sole amendment to the rule is on page six of Rule 8. It is striking Section 4.4 in its entirety, which provides for that process.

The reason we are proposing eliminating it is because we believe it has been used at times by employers to escape their workers' compensation obligations. We also believe the process itself has questionable legal meaning. In other words, when we issue that letter it is based upon what the employer tells us. But we are concerned that perhaps in a subsequent uninsured employer claim, or something like that, they could use that letter from us saying based upon what you told us you are exempt from the workers' compensation. . .”get out of jail free card,” meaning they didn't have to have comp at the time when we felt it would. . .muddy the legal waters than to assist anybody.

We researched other states and found that they don't have this process either – in other privatized states. And there were a couple states that had it and got rid of it over the past five years. Oklahoma is one of them. Essentially the trend seems to be that the regulator issuing these types of opinions doesn't really serve any meaningful purpose, and more often is used by employers to obviously escape their workers' compensation liabilities. We also reached out to several state agencies who work with us on a regular basis on employer enforcement, and there were a few that sometimes told people to get an exemption from us. We explained to them why we didn't think it

was necessary and we worked out arrangements with them, and they agreed that it's okay to eliminate this process.

With all that said, we are presenting this rule proposing that we eliminate this process by eliminating that section in Rule 8. I'll be glad to take any questions.

Chairman Dean: Mr. Dissen, do you have questions on that?

Mr. Dissen: What would the process be for an employer that would need to have some proof or something before an agency that they were exempt? What would they do?

Mr. Sims: The way it works right now, it's the Insurance Commissioner's job to investigate default employers. And we get all kinds of leads about employers that might be out there defaulting. Usually it's through the process where an insurance policy is cancelled. We are notified by the insurer that the policy is cancelled. Then we immediately begin following up to make sure they pick up insurance elsewhere. If they don't, we take action against them. We also get leads from different trade groups and things like that. So, it's our job to do employer enforcement. And this process was never really a tool for that. So we work with the agencies and explain to them their duty is to look at our default list. If an employer is not in compliance, we keep them on our default list. And the law is very clear in the comp code that that is the duty of other agencies. The way the law is set up, the only duty of other agencies is to make sure that they are in compliance and they are not on our default list.

Bill Kenny (Deputy Commissioner, OIC): Mr. Dissen, I think you are asking about the employer himself and what should the employer do? What we issued was not an exemption. It was really a letter that says, "You have given us this information and based on the information you have given us, it does not appear that workers' comp is needed." It had no standing of law. It did not really provide any assurance that that employer did not need workers' comp. Because all we were giving them was information that says, "I don't do this. I don't do that." If you can imagine that process. . . somebody comes in today and says, "Well, I'm going to work for so and so. I'm going to do a job for so and so. I'm going to use my own tools." It doesn't mean that the next day or the next month that that contractor might be doing something different that would not be exempt from workers' comp. So it didn't provide the employer any assurance that he didn't need workers' comp. The fact is that an employer needs workers' comp if they meet certain criteria, and there is no real criterion that says, "You are exempt." It's a positive test rather than a negative test. We found that this process was really not achieving anything. It's cumbersome. It's expensive. And it is not at all accurate

because it doesn't really accomplish anything. In investigating what other states do, all states have said we don't issue them. If a person wants to go to work for a particular company, it's between that contractor and the contracted person to decide whether workers' comp is necessary.

Mr. Dissen: In your study of other states, if you take something away generally you have other avenues. What did the other states do when they eliminated this?

Mr. Kenny: Nothing. If you need workers' comp, then you need workers' comp. It is not an investigative process. And even if it were we could only investigate that circumstance at the time. It doesn't mean you're exempt for everything you do for the entire year or two years or five years. It just means this particular set of circumstances might or might not mean you are exempt. There is no field investigation. Like Ryan said, the other regulatory agencies, in other words, whatever agency is in charge of regulating that industry in their normal course of regulating and inspecting will check to see, "Do you have a workers' comp policy?" And then they will make the call whether it's necessary or not. But our process wasn't accomplishing any of that.

Mr. Marshall: Mr. Chairman, it seems to me that under the current process all that's happening is that you can create an inference that people might rely on to their detriment. What's been proposed to me makes a lot of sense. I think you eliminate that problem and at the same time take some burden off of the Commissioner which probably has more than enough to do in other areas. But I think most importantly, nothing positive is obtained in getting this certificate. It might be positive in the mind of the employer who obtains it, and mistakenly so. It just really has no purpose. So I certainly think that the recommendation made is well founded.

Chairman Dean: Very well. Mr. Dissen, do you have other questions?

Mr. Dissen: No.

Chairman Dean: Mr. Hartsog, do you have questions?

Mr. Hartsog: Yes. In a situation that I know a number of companies have to go to different state agencies to get permits. And in the process of getting those permits they have to show that they have workers' comp coverage, which is easy if you have employees or you have workers' comp. It's not so easy in a situation where that entity does not have any employees. What there is in this process here has been relied on in the past to get this to give to the state agency that will then issue the permit. . .until what time, maybe one year later, maybe ten years later. You actually might hire employees

and actually start something up. So what will that state agency require or what will they rely upon to get that coverage or to illustrate that you don't need to have workers' comp coverage when you go to apply for that permit?

Mr. Sims: The latest law that was created by the Legislature addressing employer enforcement in the privatized system it is actually found in §23-2C-19. The duty of other agencies that are licensing is to check our default list. We maintain the default list of those employers that are in noncompliance of comp. And we work with other agencies to explain this to them. It is clear now that the only legal duty of other agencies is to check that the employer is not on the default list. So the agency is certainly free to say, "Show us that you have coverage." And if they have coverage it's fine. End of story. If they don't, the only other duty of the agency is to check our default list to make sure that entity is on the default list. If they don't have coverage and they're not on the default list, the agency is fine moving forward with licensing under the law. That's their duty.

Mr. Hartsog: Okay. That's not what they're doing I don't believe right now. They are requiring this certificate. And I agree with Mr. Marshall that if we can eliminate something or eliminate a process or whatever, that we ought to do it first of all. But at the same time I don't want to cause unintended consequences from that. I guess I would like. . . I don't know if you have any communication or if you have anything that would show that the DEP, or whatever other state agency that requires proof of having coverage or proof that you are exempt from coverage, is going to accept what you just laid out. If they are, then I don't have a question.

Mr. Kenny: Well I think that's maybe the crux of the matter. What we're issuing is not proof of anything. And DEP and DNR, those people that do the loggings, really have the information that we don't have that says, "Yes they should have and no they don't need it." All we're saying is you've come to us and said, "I don't have any employees." And we give you a letter. Under those circumstances you don't need coverage. People are then using that exemption, so to speak, or that letter to say, "See, I don't need workers' comp." And that's not the case at all.

Commissioner Jane Cline: Actually the way I listened to your question led me to believe that at the point they were going in later they would have needed workers' comp because they had employees, and they would have had this paper that they were relying on saying that they were "exempt" because they had filed for this exemption earlier. And that really is part of the crux of the problem. Among the highest percentage of complaints I've had [through the privatization] has been through people that. . .because the rule says you have to get it – having to get it when they are sole

proprietors and have no real need for it. We have a significant number of complaints on the other side of that for those people that have to get it right now.

Mr. Hartsog: I agree with both of you. My concern is whether or not DEP or other state agencies that are requiring those right now. . .if this goes away, what are they going to do?

Commissioner Cline: Actually before we went down this route I sent a letter to all the agencies impacted, and then subsequent to that they had an opportunity to provide comments back and work with Ryan as we moved forward on this.

Mr. Sims: I can actually tell you – on the DEP specifically – there was a misconception by them that they needed, based on the law that's in their code, to get a letter from us saying they are exempt. But the law in their code is actually antiquated, and then it talked about the workers' comp fund. The most recent law that we think is pertinent is that they only have to check on our default list. We work with a few folks over there, and we have a letter from them confirming that they will check our default list. They will send us a letter saying, "Is this company on your default list?" And we'll say, "No, to our knowledge they are in compliance," and that will resolve it. That can be done without what's in this rule. And we work with a number of other agencies as well. Everyone that we identified through our Employer Coverage Unit that used to use this process. . .

Commissioner Cline: Lottery was a big user. There are a number of state agencies. But after we walked through it. . .it's really an example of government bureaucracy. At the end of the day it doesn't get you what you think you're getting.

Mr. Hartsog: I totally agree with you. If you could for our next meeting, if nothing else just to make me feel a little better, provide some documentation that they are willing to follow that process; and assuming they are, fine.

Mr. Sims: Just on the DEP. Because I'm not sure we have a clear. . .

Mr. Kenny: DNR, DEP, ABC, Lottery – those are your big users.

Mr. Sims: I guess I'm not sure we received expressed communication from all those agencies. We had a meeting and we explained to them. . .

Mr. Hartsog: Obviously the DEP is the one that the company I work for has a lot of interaction with, and I know this is an issue because I sign for a lot of these form

applications to get these exemptions letters that don't mean a whole lot. I just want to make sure that. . .in concern for other employers also that when that goes to happen that they are going to follow suit and it doesn't end up that they're requesting something that you all won't issue, and it ends in a . . .

Commissioner Cline: We can work through that. Clearly [WVDEP Director] Randy Huffman and I can. . .if there becomes an issue, obviously that would be our responsibility to make sure there was not a glitch in that process.

Mr. Sims: At the next meeting I can show you the letter from the DEP. As long as they can send us a letter and we can confirm that this company is not on the default list, then that will suffice.

Commissioner Cline: And to Ryan's point, part of the DEP issue really was that when the changes in Chapter 23 were incorporated into law, changes were not made in DEP's code as it related to their responsibilities on workers' comp. That was part of their problem.

Mr. Hartsog: Are they going to try to fix that, do you know?

Commissioner Cline: I can't answer. I don't know what DEP. . .

Mr. Sims: Part of their law that's a little confusing was actually surprisingly drafted in 2008, and it was updated to still mention the Workers' Compensation Commission.

Commissioner Cline: It's making a reference to an agency that doesn't exist.

Mr. Sims: Basically. And we're not sure why that happened. After we talked with them a little more they agreed that substantial compliance with that section could be handled by them sending us a letter saying, "This company did not have a comp policy. Can you confirm they are not on your default list?" We say, "Yes."

Mr. Hartsog: Thank you.

Chairman Dean: Any other questions, Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall, do you have any other questions?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Is there a motion to approve the request to file initial draft on Rule 8?

Mr. Marshall: I'll make the motion, Mr. Chairman.

Chairman Dean: We have a motion. Is there a second?

Mr. Hartsog: Second.

Chairman Dean: A motion has been made and seconded. Any questions on the motion? All in favor signify by saying, "aye." All opposed? The aye's have it. [Motion passed on Title 85, Series 8, to file with the Secretary of State's Office for a thirty day public comment period.]

### **Title 85, Series 16, "Trial Return to Work"**

Ryan Sims (Associate Counsel, OIC): This rule is being prepared pursuant to the legislative mandate in W. Va. Code §23-4-7b. In that Code section the Legislature instructed the Insurance Commission to create a rule permitting "trial return to work," and permitting it during the claimant's temporary total disability period, and permitting the total temporary total disability benefits to be suspended during that time. Also, the Legislature specifically says it in this Code section, "providing protections for the claimants."

In meeting the requirements of that Code section we have drafted this rule, Title 85, Series 16. It is a new rule. It has three substantive sections. Starting with Section 3 of Series 16 entitled, "Trial Return to Work," this in a nutshell permits during the temporary total disability benefit period a "trial return to work situation." Essentially four things are done: The private carrier/self-insured employer wants that to occur; the claimant is agreeable to it; the employer or another employer can offer a lighter duty job or a job that can accommodate their medical restrictions; and the doctor agrees to it.

Again, we think that is specifically what the Legislature was asking us to do by way of that Code section. This is really the meat of the rule, Section 3, that it is voluntary on the part of all parties. The claimant, if they are eligible for TTD, does not have to engage in this "trial return to work." The carrier doesn't have to offer it if they don't want to. It is completely voluntary, and it can only occur if the physician approves it. In other

words, if the physician says, "Yes, this claimant can work within his medical restrictions." Again, it is voluntary on the part of the carrier and the claimant, and it has to be approved by the doctor. Those are the important things to stress there.

Section 4 is a clarification that a carrier is permitted in one of these "trial return to work" sections to pay extra benefits to the claimant while they are returning to work. For example, if a claimant gets injured and the employer can offer him a lighter duty job [while he is still eligible for TTD], and he agrees; but the previous job paid \$10.00 an hour and the lighter duty job only pays \$6.00, this section permits the carrier to pay an extra \$4.00 an hour while he is returning to work.

Section 5 has a provision creating a notice requirement. It essentially requires the carrier or self-insured employer, before engaging in this "trial return to work," to send a notice to the claimant explaining all the rights; explaining that this is voluntary on their part; explaining the terms of the "trial return to work;" and all of that.

That is essentially a summary of the rule. With that, I would be glad to take questions.

Chairman Dean: Mr. Dissen, do you have a question?

Mr. Dissen: In light of the fact that we just approved those questions to go out to companies. . .I just went through questions 11 and 12, which asks, "Do you have a written return-to-work program (i.e., restricted, modified or light duty work) complete with a return-to-work manager at each facility? If so, please describe." "Are there incentives concerning return-to-work?" Until we get that feedback back. . .until we see what companies are doing in this State, are we sort of premature and maybe putting something out there that could really – for the sake of a better word – muck up their programs?

Mr. Sims: I don't think so. And the reason I say that is because this really creates the opportunity. . .most employers are insured and not self-insured employers. First, looking at the insured employers. This creates ability for them, the carrier, handling the claim to create a return-to-work situation – again within medical restrictions – working either with an employer, which oftentimes is a small employer or with another employer that can offer some type of light duty job within medical restrictions. So, I think really the question about return-to-work is geared toward self-insured employers. Self-insured employers tend to be the larger employers in the State. I don't know this, but I would guess that most of them already have an established return-to-work program. I do not

think that this rule would at all affect their established return-to-work program. In fact, I think it fits into that established return-to-work program.

Mr. Dissen: I know from some of the courses I teach and some of the hornbooks, I haven't seen many that allows it voluntary on the part. . .if a physician comes in and says this employee. . .it used to be historically if you couldn't do full duty, you didn't come back to work. You get them back to work because it helps them reintegrate into the workplace, etcetera. So companies run okay, and rightfully so. So you bring them back. But if a physician says, "Yes, this employee can do the work," and yet you have work for this employee to do, and then the employee says, "No, I would just as soon stay home," I think under most programs there is a penalty involved for doing that.

Mr. Sims: Well, I think there might be some confusion here between when the claimant is still on total temporary disability benefits and when the claimant has reached maximum medical improvement, or otherwise there has been a job found for that claimant that they can do permanently.

Mr. Dissen: I don't know because I think some of the programs that I have seen a lot of them are for short duration. It's for an alternate type of employment maybe for a period of time of two months to six months until you can come back at full time. There are all kinds of programs out there which I thought that the survey was to try to identify. That's why I said, from an academic point of view, are we premature on addressing this at this point until we know what the companies are doing.

Mr. Sims: Again, I think this just provides a framework for what the Legislature told us to create. We believe that's what this rule does. I'll just have to leave that to the discretion of the Industrial Council.

Mr. Kenny: Is this voluntary on part of the employer and the injured worker?

Mr. Sims: It is.

Mr. Kenny: So an employer does not have to do this?

Mr. Sims: No.

Mr. Kenny: But if the employer currently has a return-to-work policy – which I think is where you were heading – does this now give the injured worker the opportunity to say "no," or does he have that opportunity now?

Mr. Sims: Well, I think right now as long as the employee remains temporary and totally disabled under our law they cannot be forced. And I have a couple of attorneys that know a little more about claims and benefits. But my understanding is that while an employee is on temporary and total disability, and has not been released from temporary total disability status, he cannot be forced under our law to return to work. Now, I will defer to two attorneys here that are experts on claims and benefits issues, either Dan [Murdock] or Brandy [Felton]. I am not entirely sure that that's accurate.

Henry Bowen (West Virginia Self-Insurers Association): The treating physician releases the person to return to alternative duty. That duty is made available. If the worker refuses to return, then we may terminate the benefit for his refusal under current law.

Mr. Sims: Correct. They are no longer temporary and totally disabled.

Mr. Bowen: No, they are still temporary and totally disabled, but released by treating physicians to return to an employer's alternative work program. That's the difference, Ryan. If one returned under the prior statutory authority, TTD was suspended, and if the return did not work out, benefits were reinstated. However, if a treating physician releases the employee for alternative duty (under an established program), I believe that the employee must return or benefits may be terminated. I guess the main difference between current programs and the proposed rule is whether the employee may refuse to return to work when the treating doctor says the employee is capable of performing the alternative work. I think current law allows the employer (or carrier) to terminate benefits. Whereas the rule, as drafted, makes the employee's decision completely voluntary. The employee could say, "I am not returning," regardless of what the treating doctor says. I hope I made that clear.

Mr. Sims: I understand. We had a lot of internal meetings about that, and we felt the definition of "trial return to work" in here was clear enough – that it is while they are receiving temporary total disability benefits, and while the carrier is not permitted by law to remove them from temporary total status, which makes it a voluntary situation.

Mr. Dissen: This is academic, I'll grant you that. Let's suppose I have a collective bargaining agreement, and in that agreement it doesn't allow for voluntary. If you have a treating physician and it says, "No. If you can come back and do the job, then you come back and do the job," and the party signed off on it. Would this rule then modify the collective bargaining agreement?

Mr. Sims: To my knowledge a collective bargaining agreement can't trump West Virginia workers' compensation laws. Again, that's sort of a benefits claims issue. I don't believe so.

Mr. Dissen: The reason I mentioned it. . .it's academic. I don't know who presented it. . .

Mr. Sims: I know we have a Code section that says a claimant can't waive away his workers' compensation statutory benefits. So to that extent, I would say that a collective bargaining agreement can't trump workers' compensation statutory. . .

Mr. Dissen: Right. This would modify a CBA?

Chairman Dean: Yes it would.

Mr. Dissen: Okay. I don't have any other questions. Thank you.

Chairman Dean: Mr. Hartsog, do you have a question?

Mr. Hartsog: Just to provide an example. A lot of companies right now – I heard from three or four of them within the last few days – have programs to return people to work. And they do it in such a manner as they work with the individual's treating physician to see what they can do and what kind of restrictions they have, because one of the objectives has an employer in the medical community. . .and the OIC. . .I think is to get an individual back to work and productive in rehab and everything as quickly as we possible can. One of the objectives of the program is to work with the treating physician, find out what they can do, and when they can return to work. Then if that employer is able to accommodate that person, or able to bring him back in another job that fits the restrictions, or what he is able to do, or is able to modify his job, or some structure to bring him back and allow him to go to work, they do their best to do that. And in doing so the individual may or may not want to come back to work. And a lot of times they do, and sometimes they don't. An example would be, let's say you have a roof bolter operator that is injured. But he can come back and he can drive a shuttle car. Well, you would want to bring him back and put him the shuttle car until he gets back to 100%, and then he goes back to his normal duties. If the person under this rule, I believe the person would not, in working with the physician. . .the individual would just say, "No, I just prefer to stay home and earn TTD," and not work with the company and their physician in order to try to get him back into some productive mode.

Mr. Sims: I think with your situation my understanding is there would be a vocational rehab provider involved. And often the goal is to indicate that the claimant is able to perform a different job that they are offering. I actually think there is a whole different framework in our statute for that, and that compels them to go back to work. This rule would not at all affect that. This rule would completely allow what you just said. In other words, if he could get the doctor to say, "There's a job that you are capable of doing and the employer is offering it," I don't think the scenario that Henry [Bowen] described would be overruled by this rule. I think that could still occur. In other words, you suspend benefits for that reason. This is essentially a situation probably more often geared towards employers that don't have a formal return-to-work program. It would enable the carrier to come to an agreement with the claimant, the doctor and the smaller employer, "Hey, here's a job. He's willing to do it." And it would enable the carrier to say, "Well, you're at home making \$6.00 an hour, but we'll throw in an extra \$2.00 an hour so you're making what you were before the job." It's more of a different option aside from the one you said which really compels the claimant to go back to work. But I don't think this would trump the process you're talking about, which usually involves a vocational rehab provider and proving that the claimant can perform a job that is being offered by his employer.

Mr. Hartsog: But it may well not. And I don't understand the distinctions that you are trying to make between vocational rehab or just someone that might have a sprained wrist and can't operate a roof bolter, but can operate a shuttle car in the example I gave, okay. In that situation I'm not sure what exactly would be involved. Would it be vocational rehab or just be visiting his doctor and then have something on his wrist? I'm not sure this rule as I'm seeing it here lays that out, or lays out the opportunity for a company or an insured company to work with a doctor in order to get someone back to work and productive and doing something as soon as you can.

Mr. Sims: I don't think this is the rule designed to do that. There's a whole different process and a lot of it is outlined in Rule 15, which is the rule for voc rehab providers. And there are some areas in the Code that discusses what a carrier wants to prove, that there is a viable job the person can perform and therefore their TTD benefits should be suspended. Whereas this is a different type of scenario with less formality where everyone seems in consensus he/she has a job, doctor agrees they can perform it, and claimant agrees to go back, and perhaps with the carrier paying more money. So there is not a need for all the formality we're talking about, and it's just an agreement they'll try going back to work on a trial basis. I think what the Legislature suggested should be made possible here. Our understanding is this already goes on, and we think this just clarifies what is already occurring.

Mr. Hartsog: My concern is this is different than a number of the policies or practices that are in place by a number of employers or insurance companies. I think you mentioned earlier that you are not sure what is being done out there. And that goes to Mr. Dissen's point about can we find out what companies are doing and what's working before we step out and try to do this because I don't know that answer.

Mr. Sims: Again, I would say the mandate to do this "Trial Return to Work" rule is exactly what the Legislature asked us to do. And they said in the Code section to provide protections for the employees in this "trial return to work situation." We think that is what the Legislature asked us to do. They actually enacted that Code section in 2007, so we're a little overdue in drafting this rule. You all are the ones with the ability to put out the public comment, so that's up to you. My recommendation would be to at least put it out for public comment and then let it be vetted through that process, but that is ultimately up to you all.

Chairman Dean: Any other questions, Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: Well I have something to say in reservation with my colleagues here that they expressed. I don't have a problem with putting it out to comment. But at this stage I certainly wouldn't be in favor of adopting a rule unless we can clear up the ambiguities and be assured that we're not giving rise to some untended consequences here.

Dr. James Becker (Medical Director, OIC): Chairman Dean, may I make a comment? I am Jim Becker and I'm here as the Medical Director for the Insurance Commission, and I'm a health care provider and physician who does participate in the workers' compensation system. I'll limit my comments. I want to say that right from the beginning of an injury the emphasis among the treating physicians and all the people involved in the care of injured workers is on several things. One is on full recovery, full opportunity to recovery. The second interest is in seeing that that person is able to return to a job, preferably their original job as soon as possible. And then the third interest is assuring that their benefits are protected and continue during the time of their recovery. As I understand what has been directed to us from the Legislature, the issue is really protecting benefits from that early period of recovery for that injured worker. From the very first filing of the first reported injury, the treating physician is asked to comment on the ability of that person to return to some work, whether it's modified full

duty or whether they cannot work at all. And then on each subsequent visit, as the 219 Form is completed, the treating physician has to state whether that person needs additional services in the form of physical rehabilitation services, vocational rehabilitation services. And I think what I'm hearing said here is that this is viewed as a very early opportunity to give people an additional outing to return to work while recovering from an injury without risk of losing benefits. And I'm not saying that this rule as its proposed hits the mark on all points, but I think it is a good talking point to encourage this issue of how to get people back in some type of gainful employment early. Because the statistics nationally show that people who go back to work early have good recovery and better opportunity to stay at their same level of earning.

Chairman Dean: Thank you. Mr. Dissen, any other questions?

Mr. Dissen: Just to confirm the doctor's last comments. You do encourage people to get back to work. It helps them, and that's why I think the voluntary part on the claimant being able to say "no" is a bit troublesome.

Chairman Dean: Mr. Hartsog, do you have any other comments?

Mr. Hartsog: I ditto what he said.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No further comments.

Chairman Dean: I'll ask for a motion for a request to file the initial draft on Title 85, Series 16. Is there a motion to do so? Again, is there a motion to do so? Hearing none, this will be turned down. [No motion made on Title 85, Series 16, to file initial draft with Secretary of State's Office.]

### **Title 85, Series 22, "Medical Review"**

Ryan Sims (Associate Counsel, OIC): This is a rule entitled "Medical Review," and it is working close with our Medical Director, Dr. James Becker. We identified certain types of medical requests that we believed needed physician review before being denied. In other words, before denying these medical requests the denial should be authorized by a physician. The hopes are that the appropriate medical review on the front end will reduce litigation later. I can take you through the rule provisions. This is a brief rule and there are only two substantive sections. Starting with Section 3, it

identifies basically four types of requests for this medical review to take place for physician approval before its denied: surgery; durable medical equipment; medications which were previously being paid for by the carrier or the self-insured employer and were in use by the claimant when the claimant reached maximum medical improvement; and the final area is compensability in a claim based upon an assertion. In other words, denying compensability and claim based on assertion. There is no medical causal relationship between the occurrence or exposure and injury or disease. Essentially it says that a physician has to sign off normally from those carriers. That would be their medical director. . .would have to authorize before they could deny those.

Section 4 establishes that if that procedure is not followed – just in those four areas – it would be deemed approved. In other words, if the carrier didn't get additional approval in those four areas on those requests it would be deemed approved. And there is another provision in here that requires within 15 days of receiving the medical requests that the carrier or self-insured employer respond in writing. They can note that they received it and say "we will continue to look into it." But just some type of response in writing or otherwise its deemed approved. So that is essentially what the rule does. Again, the goal is just to require medical review in certain medical requests that should have appropriate medical review. We believe in most cases this started going on. Just put it in a rule. . .probably most prudent carriers and self-insured employers are already doing. With that, I'll take questions.

Chairman Dean: Mr. Dissen, do you have a question?

Mr. Dissen: Like I said before, I just had a chance to look over this yesterday and I've not really had a lot of experience in the workers' comp area. What's the issue? What's the current process that needs to be changed?

Mr. Sims: For this type of approval there is no process. . .for medical review before denying. There are medical guidelines in Rule 20, which is a very lengthy rule that has medical guidelines for all kinds of situations. But it's more geared toward protocols for carriers that need to be followed through – really the opposite of this – before benefits can be granted. We really don't have anything in our rule similar to this. And there really is no process right now, which is essentially why we're presenting this.

Mr. Dissen: When you present rules like this, does anybody do any kind of study to see what the cost impact would be?

Mr. Sims: We did a fiscal note for this on up to the Department of Revenue, and we found that it would have no impact. . .it will go to the state's cost. The current best

practices are to put these through medical review anyway. So we don't really think there would be a significant cost. Most carriers have medical directors already that would review these types of claims.

Chairman Dean: Mr. Hartsog, do you have a question or comment?

Mr. Hartsog: What's driving. . .what problem or what issue is driving the need to do this rule?

Mr. Sims: We had some discussions with labor. It's dealing more with outlying carriers that aren't as familiar with our system – smaller carriers, that type of thing; that maybe they're not given the appropriate medical review in these situations. Again, most carriers do, the prudent self-insured employers do. But we had some indication that there are some outliers that aren't given appropriate medical reviews.

Mr. Hartsog: Have you surveyed. . .or do you have anything that confirms this is the current standard or practice within the community to do this? I know from my own experience that initially claims go through – when you say a medical review – go through a nurse, someone like that and get reviewed, get the documentation, and then that decision gets made; then internally has a procedure where if its denied and the reason stated, or whatever the reasons being at the time, then it goes back to the individual; and then internally a number of companies have their own procedures internally set up as quick as this to go back through an M.D. perhaps; and then come back and get that level of review done at that time.

Mr. Sims: I'll ask Dr. Becker to speak very briefly to this. We actually looked at some utilization programs that a lot of carriers are using in the process of becoming certified, such as URAC. URAC, for example, to my understanding, requires all of these areas probably more review than just a physician. We think any carrier that already uses URAC or some other established certification for utilization review would usually meet this rule and probably doing much more. So, that's our understanding.

Mr. Hartsog: What was that acronym you just threw out?

Commissioner Cline: It's an accreditation process that help insurers that are required to have these processes in place before review. And there are grievance processes and health insurance claims. If a carrier is certified by URAC or NCQA we will accept them.

Mr. Hartsog: . . .like a governing best practices group?

Commissioner Cline: Right.

Chairman Dean: Dr. Becker, do you have a comment?

Dr. Becker: Yes I do to address Mr. Hartsog's question. The two agencies that write most of these standards nationally are URAC and NCQA, and many insurers adopt NCQA or URAC standards. Your question about how this actually arose. It arises primarily from the complaint process and the medical field process because of some delays in getting people treatment decisions, or decisions by claims adjustors to discontinue medications. They are viewed as not being related to the claim. And that poses a direct hazard to some injured workers because medication may need to be tapered. Is it tapered appropriately? Or coverage for the medication is discontinued abruptly. I don't like to see us respond to those situations by writing rules for every bad action. But outlining a few standards for the most important medically significant issues is in my opinion a very valuable thing to have in our rules. And so that's really what has driven the decision to generate a medical review rule. And we do think that the vast majority of the carriers are following rules very similar to this.

Commissioner Cline: When you expose the rule that helps us get more information back on what really the rule needs to look like because it is a very public process, and you're getting information back from those that have a stake or an interest in that particular rule, which helps to inform the debate about what should move forward. Ryan collects that information; then provides you with a summary of that information; makes recommendations to you on what changes to the original proposal might need to be incorporated; and then you ultimately have adopted them. It's a 90-day process so it's not like by exposing this you're agreeing to anything. It gives us the opportunity to get the comments and the feedback to inform the debate, and provide information back to you.

Mr. Hartsog: The process. . . I just want to make sure I have it clear. We put these rules out; vote them out for public comment; we have a 30-day public comment period; we receive the comments back; you summarize them like you have before; get them to us; we have a public hearing where people want to make a comment [orally, written or however they choose], which is great; we get that feedback back; then the OIC, you [Ryan Sims] and Mary Jane [Pickens], gives us back with either accept or rebut the changes that people proposed along the way at the meeting, [immediately subsequent to the public hearing at that point]; and then give us a new rule basically reworded, etc.; and then at that point. . . is it at the following meeting after that then that we actually

finalize it, vote on the rule and put it out? Or is it in that meeting where you give us the actual rule back with the comments?

Mr. Sims: The third meeting is where you finalize the rules. At the first meeting you accept it to be filed for public comment. At the second meeting you have a public hearing. And during the previous 30 days we would have been receiving written comments. Then we digest and process and incorporate all those comments and we present you with the final version. We always send it out to you a week ahead before the final meeting, and then we ask you at the third meeting to approve it.

Mr. Hartsog: So there's this meeting, a public hearing, you come back with the comments. And is it at that meeting that we vote and make it permanent?

Mr. Sims: The third meeting.

Mr. Hartsog: At that third meeting, after you give us back what you feel is the final rule, then we have the opportunity. . .are we limited at all in the changes that we can make to that rule as an Industrial Council in the final version?

Commissioner Cline: No.

Mr. Hartsog: If we make substantive changes to that rule at that point in time, do we have to re-file it for another public hearing or public comments?

Commissioner Cline: Depending on how substantive the change is so that you are fully informing and providing for the transparent process where all the stakeholders have an opportunity to comment, then my recommendation is that you would re-expose it because if it's substantially different. . .

Chairman Dean: If there was a word change or something, we've done it here but nothing major.

Mr. Hartsog: We've done it here.

Commissioner Cline: But substantive changes. . .

Mr. Dissen: Who would determine what is substantive?

Commissioner Cline: Generally that's why you rely on counsel to make that determination.

Mr. Sims: I think the Commissioner hit it on the head. If it was a few tweaks, maybe mildly substantive, you would be fine going forward with it. We've done that before at the final meeting. But if it was overhauling major portions of the rule, you would certainly want to re-expose it.

Mr. Dissen: Let me ask you a question. You refer to counsel. Counsel is counsel for the Insurance Commissioner, correct?

Commissioner Cline: Yes, but they are also your counsel. They provide the legal support for the Industrial Council as well.

Mr. Dissen: Is that a conflict?

Commissioner Cline: No. It's just the way it has been set up.

Mr. Hartsog: I think, if I'm not mistaken, I am sure you can correct me. I think by statute if the Industrial Council chose to they could go out and hire their own counsel basically to consult with and be ours if we chose to do that at some point. Correct?

Mr. Sims: I would have to look at the Code. I think there is some discretionary spending for certain things. I'm not sure if it expressly says "counsel," but that would be in the Code that establishes this body. I would have to review that before giving an opinion.

Chairman Dean: Mr. Marshall, do you have any comments?

Mr. Marshall: I don't have any comments on this particular rule. I'd be prepared to make a motion for moving it to public comment.

Chairman Dean: We have a motion to file initial draft on Rule 22. Is there a second to the motion?

Mr. Hartsog: If I may ask a question. . .

Chairman Dean: We need a second before we go into questions. Is there a second to Mr. Marshall's motion? Seeing none the motion will die.

Mr. Marshall: Mr. Chairman, I meant by my comment that when the Chair called for a motion I would make the motion, and I think maybe it might have been misinterpreted. I wasn't trying to cut off the discussion.

Chairman Dean: I thought you made the motion.

Mr. Marshall: No, I didn't mean to make a motion at that particular time. I think it would be appropriate to hear Mr. Hartsog's comments and then call for a motion.

Chairman Dean: Let me ask you this. I considered that a motion. Will you withdraw your motion?

Mr. Marshall: Let me rescind the motion.

Chairman Dean: The motion has been rescinded. Any other comments? Mr. Hartsog, do you other comments on Rule 22?

Mr. Hartsog: Yes. My concern on the rule is the cost. The relative additional cost of the rule and how it tailors in with the programs that are already in place by insurance companies or self-insureds or whomever in governing. There are references in here that you must have a West Virginia licensed physician. I'm not sure. . .I've just got a lot of questions and concerns about this. And as long as we're not on any fixed timeline in doing this, I'm soliciting public comments in having that discussion again. I want to say up front the reason. . .I wanted to make sure I understood what the process was in getting this done and making changes to it, that we go ahead and get those comments and move forward.

Mr. Sims: I should clarify that the minimum is three meetings. We have, in fact, had so many substantive comments that we delayed it and didn't present it for several more meetings. We do not present a final version of a rule until we feel the rule has been fully vetted, that all stakeholders have had a chance to chime in, and that's why we have this process. The rule is just a starting point. We have gone four and five months on a couple of rules. It's not mandatory. . .I think it has to be done in six months because there are some rules at the Secretary of State's Office. The three meetings is the minimum.

Mr. Hartsog: I just wanted to make it clear. I have a lot of misgivings, and there is a lot of information, a lot of pieces to this that are missing. I encourage everyone to please comment and provide that input.

Chairman Dean: We have always learned a lot from their input, and we've had lots of long discussions in meetings here with the general public's comments. We've turned them down before at the third meeting and went right back to work on it. Nothing to say it has to be approved after the third meeting. We've done that before, as Ryan said, and we'll go back to work it.

Mr. Hartsog: Thank you, Mr. Chairman.

Chairman Dean: Any other questions? Is there a motion for the request to file initial draft on Title 85, Series 22?

Mr. Marshall: So moved, Mr. Chairman.

Chairman Dean: We have a motion. Is there a second?

Mr. Hartsog: Second.

Chairman Dean: A motion has been made and seconded. Any questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The aye's have it. [Motion passed to initial file Title 85, Series 22, "Medical Review," with the Secretary of State's Office.]

## **6. Legislative Update**

Bill Kenny (Deputy Commissioner, OIC): There are a number of bills that have been introduced and we do have a list. If anybody is interested in the list we would be happy to provide it to you. I know of none that are out of committee yet. Does anybody have any different information? So far they are all still in committee. It's difficult to predict what the Legislature will or will not do. It's a long process for pretty much all of them. There is one bill that most likely will move and that has to do with settlements, and it's not our bill. But it is a bill that we've provided some input on at the request of some legislators, and essentially it's establishing a review process for settlements that are done. And frankly we think it's probably a good place to be because settlements can always be reviewed by our agency, and we would rather review them before they happen than after they are done and then find that settlements are not following proper procedure or not suitable. It's a process used in a great number of states, recognizing that when you're settling a workers' compensation claim that you certainly are making a lifelong decision and there is always authority for somebody to look at them and to opine upon them. That bill just establishes that process to be done before they are

finalized as opposed to afterwards. That's really the effect of that bill. That one probably will move some.

The only other one is a bill that was sent today for introduction, probably introduced tomorrow I guess, which establishes the Insurance Commissioner as having the responsibility to establish a workers' compensation program on behalf of the state employees and the state's obligation. We are currently, of course, insured by BrickStreet, as the statute calls for. But as of this coming July [2010] we would have an option to either move to another carrier, should we choose, or put in some other type of program to make sure we meet our responsibilities but in a different manner. We have that flexibility, and this bill just clarifies what agency in the state government is responsible for putting that program together. The statute as it currently stands is an ambiguous statute. You can't imagine the State Code being ambiguous in any manner, but in this case the BRIM statute does make mention of BRIM, being the Board of Risk Insurance Management as the state agency that purchases or manages the state's insurance program, property and casualty, not health. But it specifically excludes workers' compensation. And that made sense because when that statute was enacted workers' comp was a state function. It was a monopolistic state still so there would be no reason really to go outside of that. This kind of clears that up. And the Governor has decided that this agency has the expertise in doing that since we've been charged with looking at the Old Fund claims and managing that. That's the only other one that I know of that will hopefully move through the process. Other than that, if anybody needs a copy of them we can certainly provide you with a list.

Chairman Dean: Very good. Any questions for Mr. Kenny?

Mr. Hartsog: Could you just give me the bill number for that one you just mentioned?

Mr. Kenny: We just dropped it today. We just got the sponsors today, so it will be introduced tomorrow. It's still in bill drafting.

Mr. Hartsog: Whenever you get a bill number or a copy of it you can just send me the bill number and I can look it up.

Mr. Kenny: I can send you what we sent over there, which is our draft, as a preliminary. And when it's assigned a number we can certainly do that.

Mr. Hartsog: Thank you.

Chairman Dean: Mr. Marshall, do you have any questions for Mr. Kenny?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Very good.

Mr. Hartsog: Mr. Chairman, I wanted to ask about one bill that you mentioned with regard to settlements. It had come up previously and I was curious. There's actually a rule I think that came out of the Industrial Council that addresses that, if I'm not mistaken. There is some concern, and understandably so, when a claimant is acting without the benefits of legal counsel in settling something with an insurance company, I think the pending legislation would actually require all settlements to go to the Office of Judges.

Mr. Kenny: That's correct.

Mr. Hartsog: Is there any reason this group can't modify that settlement rule here to allow for the Office of Judges to review and work with a non-represented claimant to handle that concern instead of legislating it?

Mr. Kenny: Not having a law license I better not answer that. But I am told "no." The answer to that is "no." We cannot do it by rule because we don't have any statutory authority to do it by rule. You might be able to explain that better.

Mr. Sims: I agree with what Bill said. I think the current settlement statute states that carriers and self-insured employers have the right to settle with claimants, and it doesn't provide any authority to the Office of Judges for pre-approval. So I think we would be at the very least stretching the statute if we tried to do that by rule.

Mr. Hartsog: I don't have any idea where that bill is right now, but I don't mind stretching a little bit to help protect the claimants. I'll go with. . .what you gentlemen think too.

Mr. Marshall: Mr. Chairman, with the Legislature in Session it occurred to me it might make more sense to see what the Legislature does, and then based on that possibly revisit the issue after the Session concludes.

Chairman Dean: Are you okay with that?

Mr. Hartsog: Yes sir, I am. That was brought up previously. I heard about it I think at the last meeting. Mary Jane talked about it. And thinking about that, I can certainly see where that would be. . .worthwhile us exploring, if the Legislature doesn't take action.

Mr. Marshall: I agree.

## **7. General Public Comments**

Chairman Dean: Mr. Watson came in and passed out a handout to the Industrial Council. It is in your packet also. He didn't want to speak. He just wanted to pass this out for everybody to get it and review it. General public comments are open now. Is there anybody from the general public that would like to speak?

Bill Gerwig (Attorney): My name is Bill Gerwig. I'm an attorney in Charleston with a workers' compensation practice. Coming from the front line, the problems I'm seeing are primarily with all of these new insurance companies, and they are very basic problems. I passed around some proposed regulations for those people who have not seen what those are. I've recommended a proposal for a regulation which requires acknowledgement of counsel in writing, and that that acknowledgement means that copies of all correspondence, orders, checks, letters, whatever the case may be, sent to counsel upon that request.

The second problem is also pretty fundamental to any representation in a claim, is that the attorney be provided file material. I can tell you from personal experience that I am not getting file material. And the problem is that when I file a motion to compel there is no authority for the Office of Judges to compel production of file material. Everybody recognizes that a claimant has to hire counsel. It should be the inference that that be meaningful representation which requires file material, which means medical records, orders, decisions, whatever has transpired in the claim up that point. There had been a provision in the past which required such production within 30 days of receipt of the request. That regulation is no longer part of workers' compensation laws or regulations, so I'm actually asking that it just be reinstated to require the production of these documents. In the event that anybody is thinking that there may be alternative ways, for example, subpoenas to get records – the problem with that is in order to subpoena records I need to have an order that's been protested. Well, I'm not getting an order to protest so I can't even put it into litigation. I don't think that there is anyone on either side of the bar that would disagree that a right to being acknowledged. . .refusing to provide file material is essential to fulfilling the right the claimant has to hire counsel.

Since I'm here I would like to address the rule on "Trial Return to Work" very briefly to explain why the voluntary aspect on behalf of the claimants may very well be part of that proposal. As the process works now, if the claimant returns to modified work, which turns out not to be modified, they are not being provided work within the restrictions imposed by the doctor then they cease working. Then their claim is closed and it goes into litigation, and they are without benefits. In a voluntary process they could withdraw from work with explanation, and maybe that could be an amendment to that rule – that it's voluntary in a qualified manner. Claimants can't go back to trial work for fear that it's not really modified and they are going to lose their benefits, and they go into litigation. It takes potentially six or eight months to litigate and try to get those benefits reinstated at a time when they should have been receiving those benefits automatically.

With regard to the medical review of certain treatment issues, my problem is much more fundamental than that. These new insurance companies aren't issuing orders at all. They are not approving treatment in writing and they are not denying treatment in writing. And where that becomes a problem. . .I'll have a client that says, "I got a bill from my ambulance service, and the insurance company hasn't paid for it." Well, I don't know if it's denied if there is nothing in writing. There is nothing to protest. And now it's a matter of trying to manufacture some arbitrary method of getting this before the Office of Judges to consider. Even when things are approved, if I don't know they are approved because there is nothing in writing, then I'm working on the assumption as being no action on that. And I may very well file a motion to compel action to authorize a treatment, which in the insurance company's mind has already been authorized because they called the doctor. By the same token when it's denied, claimants don't realize that they have the right to counsel before the right to protest. A written order is required to include protestable language, advising the parties that there is a 60-day period for them to file a timely protest. When they just say, "We're not going to pay for your surgery," that's not happening. Claimants don't have counsel frequently. They don't know they can get counsel. They know they can protest. And there's no documentation that there has ever been a response to these requests. I have no problem with the medical review of surgery during these other treatments. My problem is two steps before that, in making sure that these orders are actually issued in writing. Now I can file a motion to compel that if I know about it. But unrepresented claimants don't know to hire counsel for that purpose and it's just not happening. But I can tell you that the companies that we all know and have known for years are doing everything in writing; they're acknowledging you as counsel; they're proving you with file material. But any time I see a company that's foreign to me, I tell you the hair stands up on the back of my neck. Because I know I'm going to have all these problems all over again. I

know some of these provisions may not deal with that directly, but I wanted everybody to be aware of what's actually happening in the early stages of these claims, and certainly for purposes of getting file material and acknowledged as counsel. I think that the proposals I've made would suffice to correct that, as long as the end result is that I'm acknowledged as counsel and I get the file material.

Chairman Dean: Mr. Dissen, do you have a question for Mr. Gerwig?

Mr. Dissen: No.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Any other comments?

Lesly Messina (ACT Foundation): I am Lesly Messina and I am the Research Director at the Affiliated Construction Trades Foundation in Charleston. For the past four years or so I've also worked as a liaison [a troubleshooter] for a workers' comp program that we started within the Trades. It's a labor management where we officially started a Captive this past summer. We have worked informally with BrickStreet for a while, then parted ways and went with Union Labor Life. In that context I am getting a lot of calls from members injured, union construction workers' members, who are not within the Captive. They are claimants with carriers that I don't have any formal relationship with and I cannot assist them in a formal way. But what I'm finding is happening. . .and Judge Roush's comment earlier about the drop in the medical protests triggered this. What I think is happening is that it is impossible for claimants to find counsel on medical issues. The system is set up so that claimant's counsel cannot get paid unless there's a benefit that they could take payment from. So when people have a surgery denial or a denial of a durable medical good or some type of thing that would enable them to work, they cannot find counsel. It's a real problem. I have almost a decade of experience previously from working at ACT in doing paralegal work for workers' compensation claims. I know almost intuitively what evidence would be relevant for them to submit, but I'm not an attorney. So I have to tell these folks submit everything but the kitchen sink and hope that the Office of Judges can sort it out, and that's not efficient for Judge Roush and her staff. It's certainly burdensome for the

claimant. They are confused. They need assistance with determining their timelines, their deadlines. I have people that are overwhelmed. It's patently unfair, and I'm seeing it time and time again. It is frequently a denial of surgery. I can't speak to the hypothetical claimant who has to be dragged kicking and screaming back to work. But I work with folks that make high wages – union construction people. They are not happy to not be working. They make good wages. And the idea of being unable to work and unable to even get their claim started in a lot of cases because they're not being able to find representation. It's very, very disturbing to me, and I'm seeing an increase in it. Actually the people that need my help the most are the ones that I can't really assist because they're not within our Captive. And my question to the Industrial Council and Judge Roush is, is this on everyone's radar screen, and is there any kind of collaborative effort being made so that these folks can get some sort of assistance? I know last year. . . I thought there was a bill in the Legislature that was supposed to address the fee schedule for claimants' counsel, but I don't think it went anywhere. And I'm not aware that there is anything pending this year. But I know that's what I've been doing is I've been recommending to people; helping them figure out when their deadlines are; helping them file just basic protest letters and appeals. If you are getting boxes full of evidence from pro se claimants, I think it's because they are really afraid they don't have that expertise to lead them. And I know it is going to become a problem for your staff. I just wanted to let folks know that that's what I'm seeing. I'm very concerned about it, and hoping that some sort of provision will be made. . . I mean some sort of "stop gap" measure. I don't know. . . people doing some pro bono advice for folks that come to you pro se so that they can get through the system. It's very difficult for them. They're having a really hard time, and I think they are at a disadvantage. And I don't know if saying that they're not getting their due process is the right legal term for this type of litigation, but I think that their rights are being violated, and I think it's becoming a real problem. I'll be interested to know your thoughts on it – not now – but at some point, unless you would like to, about what might. . . what you guys are seeing, if you're seeing a lot of that too. And I'm wondering if people are just giving up, and that's why maybe the medical protests are dropping because they just don't know what to do. Because for every one person that's within the Trades that contacts me, I know there's got to be five others out there that don't have the "someone" like me to call. I just wanted to let folks know that that is what I'm seeing in the field, and I think it's a real problem that needs to be addressed.

Chairman Dean: Judge Roush, do you have a comment?

Judge Roush: The Office of Judges is a neutral independent body. We really would not take any role of advocacy with regard to whether counsel for a claimant should or should not in fact be paid. That's an issue better served with you as well as

the Legislature. But I can confirm, in fact, that we do receive a significant number of pro se claimants trying to navigate this system. If you would like I could bring back some statistics with regard to that matter at the next meeting. To the extent that a claimant does in fact protest and does submit evidence, I can confirm that we do give them significant due process as much as the system does allow. Of course we have an entire staff of folks who regularly assist those who are without the assistance of counsel. When they call in or when they stop in we help them navigate the litigation system as much as humanly possible. I do appreciate your concerns that it is a difficult situation.

Ms. Messina: And I do get nothing but positive feedback from people when I get them to that point where they are trying to work their appeals through the system. I've gotten very good feedback that the staff at the Office of Judges always treats them very kindly, are very patient, very professional, and they always feel like they are being treated fairly. So, I just want to make that very clear.

Judge Roush: Thank you. Good to hear.

Ms. Messina: Thank you very much.

Chairman Dean: Does the Industrial Council have any comments for Lesly? Thank you. Does anybody else from the general public have a comment they would like to make today?

## **8. Old Business**

Chairman Dean: Do we have any old business to discuss from the Industrial Council? Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

**9. New Business**

Chairman Dean: Does anybody from the Industrial Council have anything under new business? Mr. Dissen?

Mr. Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: Actually I've had a couple of comments from a couple of self-insureds about an issue. I would like to make a motion that we go into Executive Session for a few minutes to discuss that with Mr. Sims and Mr. Kenny, if we may, and get some information.

Chairman Dean: Do you have time for Executive Session today?

Mr. Kenny: We'll make the time. Do we need to state a reason?

Mr. Marshall: I think so.

Mr. Hartsog: Do I need to say the reason? It has to do with the assessments that have been sent out to the self-insureds due to a default.

Mr. Sims: I think most of the subject matter in that area would be subject to Executive Session, but I'm not sure.

Mr. Marshall: Mr. Chairman, could I suggest. . . Ryan, I think what we need is something in the minutes before we convene into Executive Session that states what particular exception to the open meeting rule permits us to go into that. If you could supply that. . .

Mr. Sims: It involves confidential information about a self-insured employer.

Mr. Marshall: With that having been put on the record. . .

Mr. Sims: That wouldn't be subject to FOIA. . .

Mr. Kenny: I think you have to caution everybody that no votes or decisions can be made in Executive Session.

Chairman Dean: Until we reconvene.

Mr. Sims: That's correct.

Chairman Dean: I need a motion to go into Executive Session, if that's what we want.

Mr. Hartsog: So moved.

Mr. Marshall: Second.

Chairman Dean: A motion has been made and seconded to go into Executive Session. Any questions on the motion? All in favor, "aye." All opposed, "nay." The aye's have it. [Motion passed to go into Executive Session.]

Could I finish one thing about the next meeting before we go into Executive Session? The next meeting will be Thursday, March 25, 2010, at 3:00 p.m., here in the conference room. We will excuse everybody while we go into Executive Session and we will reconvene after that is over.

[The Industrial Council made the decision not to conduct any business in Executive Session.]

Chairman Dean: I call the meeting back to order. We are still under new business.

Mr. Marshall: Would the Chair like to state for the record that in Executive Session no action was taken?

Chairman Dean: Yes. We are still under new business. We briefly went into what we considered Executive Session, but we conducted no business, and there was nothing discussed in any way under Executive Session. We are opening the meeting back up to the public, [which nobody decided to come back in]. So, we are now in open session for the Industrial Council, and we are still under new business. Would anybody like to discuss anything under new business?

Mr. Dissen: I have none, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: Nothing here.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

**10. Next Meeting**

Chairman Dean: We'll move onto next meeting, which is Thursday, March 25, 2010, at 3:00 o'clock. Does that meet everybody's schedule?

**11. Adjourn**

Mr. Marshall made the motion to adjourn. The motion was seconded by Mr. Dissen and passed unanimously.

There being no further business the meeting adjourned at 4:56 p.m.