

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

**Minutes of the meeting of the
Workers' Compensation Industrial Council
held on Thursday, August 25, 2011,
beginning at 1:04 PM**

**WV OFFICE OF THE INSURANCE COMMISSINER
1124 Smith Street, Room 400
Charleston, West Virginia**

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Certified Court Reporter
and Notary Public**

GARRETT REPORTING SERVICE

"PROFESSIONAL STENOMASK FOR THE RECORD"

INDUSTRIAL COUNCIL

Voting Members:

Bill Dean, Chairman

William Chambers

James H. Dissen

Edward Kent Hartsog, Vice-Chairman

Ex-Officio Members:

Michael D. Riley, Acting Commissioner
WV Offices of the Insurance Commission

OIC Contacts:

Bill Kenny, Deputy Commissioner
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P R O C E E D I N G S

CHAIRMAN DEAN: We'll call the Industrial Council meeting to order. Let the minutes reflect that Mr. Hartsog and Mr. Dissen and Mr. Chambers is here and myself, Bill Dean. The minutes were sent out from the previous meeting. Has everybody had a chance to look at them and go over them? Is there a motion for approval?

MR. DISSEN: Motion.

MR. HARTSOG: Second.

CHAIRMAN DEAN: Mr. Dissen approved them and seconded by Mr. Hartsog. Any question on the motion? All in favor aye?

(Ayes responded.)

CHAIRMAN DEAN: Opposed?

(No response.)

CHAIRMAN DEAN: The ayes have it. Judge Roush, would you like to give your report?

JUDGE ROUSH: Yes. Good afternoon. Yesterday evening I forwarded to you a copy of the Office of Judges Report. These are statistics for the month of July. In the month of July we acknowledge four hundred fifty protests for a total of three thousand sixty-nine for the year. We are on course for our projected goal of five thousand sixty-one protests for calendar year 2011.

1 And one issue that I wanted to point out to
2 the council, because I know that it's an issue that's been
3 important to you, is our final decision timeliness. And I
4 would just like to first of all acknowledge that the
5 numbers that are reflected in this July report are not
6 numbers that we are comfortable with, of course.

7 For the month of July we had approximately
8 17.4 percent of our decisions issued between sixty and
9 ninety days, and as you all are aware, you had requested
10 that the judges make every effort to get their decisions
11 done within sixty days. What we have done in response to
12 these numbers and of course you have to remember that these
13 are statistics for July. So the judges have cases in their
14 inventory for approximately three months before they -- or
15 two months before they rotate in and out.

16 What we have done in response to this is
17 take a better look, a closer look, at our inventories and
18 met with each of our judges individually, particularly
19 those who had issues with time delay in issuance of their
20 decisions, and offered some counseling and coaching
21 sessions for those who were not coming on board with
22 meeting the sixty days. I will say that I want you to know
23 first and foremost that this is not reflective of all of
24 our judges. We were able to pinpoint this down to

1 primarily one individual who is no longer with us. So
2 hopefully on a forward going basis, we will be able to get
3 these back on track.

4 To the extent that our judges weren't aware
5 of the degree, I guess I should say the seriousness of your
6 request, they are aware of it now. And hopefully on a
7 forward going basis, we can get these more in line with
8 your request. So I wanted to point that out to you and be
9 forthright and honest about what's going on in our office.

10 MR. HARTSOG: Judge?

11 JUDGE ROUSH: Yes, sir.

12 MR. HARTSOG: Which information are you
13 referring to?

14 JUDGE ROUSH: The final decision
15 timeliness.

16 MR. HARTSOG: Page six?

17 JUDGE ROUSH: Yes.

18 MR. HARTSOG: Okay.

19 MR. CHAMBERS: Item F.

20 MR. HARTSOG: Oh, okay. I see.

21 MR. DISSON: Judge, I think your year to
22 date statistics continue to be outstanding in that regard.
23 So one month blip, I don't think hurts your track record
24 too much especially given the actions you've taken. You

1 mentioned last month you had a position or two available.
2 Has that had an impact on this and have you filled your
3 positions?

4 JUDGE ROUSH: We have not yet filled our
5 position. I do think that it does play some role in
6 compressing the decisions. Obviously when we lose people,
7 that work has to be disbursed to others. I was going to
8 give you an update a little later, but I'm happy to give it
9 to you now.

10 We did post an ALJ-II position here within
11 the agency with the Division of Personnel. We received an
12 overwhelming response of seventy-one applicants. So it's a
13 phenomenal number, particularly for a new person like me
14 coming into the system trying to hire someone. We
15 obviously have a great slate of candidates. Of those
16 seventy-one, fifty-seven people actually met the minimum
17 qualifications and we were able to sort through the resumes
18 and start the interview process next week. So we're
19 hopeful that we'll get someone hired here within the next
20 few weeks. I'm told, though, that it is a lengthy process
21 and that it may take up to two months, and I'm sure Mary
22 Jane can confirm that it's a lengthy process. But yes, we
23 have posted and are starting to interview for that job.

24 MR. HARTSOG: Do you have a training

1 program or indoctrination or how do you -- is it formal or
2 is it just kind of ad hoc or how do you do that?

3 JUDGE ROUSH: Obviously this will be my
4 first time doing this, but we do have a training plan that
5 we are working with. And I think it will take a little
6 while to get the person up to speed. Obviously we're
7 looking for someone with experience not only in the
8 workers' comp arena, but also in the insurance arena as
9 well, someone who can come in and hopefully start the
10 ground running once they learn our internal case management
11 program and the systems that we offer. But, yes, we do
12 have people in place to train a new attorney to become a
13 judge. Okay. Any other questions about the report?

14 CHAIRMAN DEAN: Mr. Chambers?

15 MR. CHAMBERS: Just curious, on page
16 sixteen, the pending treatment issues were eight hundred
17 seventy-four July of '11 versus six fifty-nine July of '10,
18 which is about a thirty-three percent increase. I wonder
19 if you could comment on what's driving that increase?

20 JUDGE ROUSH: I don't know that I could
21 pinpoint specifically what is driving an increase in the
22 treatment protests at all. I don't think there's any way
23 for me to understand why. Industry-wide there might be an
24 increase, and there's a lot of variables that go into it of

1 course. One particular claimant could have multiple
2 protests on treatment depending on the severity of the
3 injury, and so unfortunately I don't think I can give you a
4 good answer for that.

5 CHAIRMAN DEAN: Mr. Dissen, do you have any
6 questions, sir?

7 MR. DISSEN: I do not, thank you.

8 CHAIRMAN DEAN: Mr. Hartsog?

9 MR. HARTSOG: No, thank you.

10 JUDGE ROUSH: There are a couple more
11 things that I wanted to point out for you. One thing that
12 we have yet to publically announce, but this will be the
13 first time today, is that we intend to close our Fairmont
14 field office effective November 1st. As a result in the
15 decline in litigation, the number of hearings we conduct in
16 that venue also has significantly decreased and one of the
17 main reasons the Office of Judges actually put that office
18 into place was so that we could have a venue to conduct
19 multiple hearings that occur in that part of the state that
20 are of course more remote from the Charleston area.
21 Because of the small volume of hearings, we no longer have
22 the need for the Fairmont office. Although we continue to
23 plan, we continue to want to plan to offer hearings in that
24 part of the state, we just think it's more cost efficient

1 to do that through renting space rather than having a fully
2 operational, fully staffed office.

3 We do have two employees in that location.
4 Neither one of them will be losing their jobs. Of course
5 we intend to offer them positions here in Charleston if
6 they intend to, if they want to come join us here. Their
7 positions will be available for them here. Of course this
8 decision was made after careful thought and deliberation
9 and after talking it over with multiple people, including
10 Commissioner Riley as well as the Department of Tax and
11 Revenue and the Governor's Office.

12 I think in the end those who have the
13 authority along with myself felt that the closure was the
14 most responsible business decision we could make for our
15 office and of course the state. So we think it's the most
16 fiscally responsible thing for us to do in light of the
17 litigation climate here. Do you have any questions about
18 that? One more thing I just want to -- yes, sir?

19 MR. HARTSOG: Where's the next closest
20 office in that vicinity that you're still going to have
21 open?

22 JUDGE ROUSH: We still have offices here in
23 Charleston and Beckley. But we of course travel to several
24 venues throughout the state and we believe we've got the

1 whole, all the regions of the state covered with regard to
2 offering venues for convenience to claimants.

3 MR. HARTSOG: Sounds like a good decision.
4 Thank you.

5 JUDGE ROUSH: One final thing. The Office
6 of Judges intends to hold our fall workshops. We've got
7 some dates set and I want to share those with you. Our
8 first one is October 6th at the Waterfront Place Hotel in
9 Morgantown. And our second one is on October 12th here in
10 Charleston at the Charleston Town Center Marriott. That's
11 all I have.

12 CHAIRMAN DEAN: Very good. Questions, Mr.
13 Chambers?

14 MR. CHAMBERS: No, sir. Thank you.

15 CHAIRMAN DEAN: Mr. Dissen?

16 MR. DISSEN: No, sir.

17 CHAIRMAN DEAN: Mr. Hartsog?

18 MR. HARTSOG: (Negative nod.)

19 CHAIRMAN DEAN: We'll move on to item number
20 four, Title 85, Series 20. Dr. Becker?

21 DR. BECKER: Thank you, Mr. Chairman.
22 Bear with me for a minute while I get these slides. What
23 I'm doing this afternoon is an informational presentation
24 on Rule 20, if I could get the technology to open. As you

1 know, one of the responsibilities of the Insurance
2 Commission at this point -- one of the responsibilities of
3 the Insurance Commission at this point is the maintenance
4 of rules related to workers' compensation care. And one of
5 the rules that you hear quite a bit about is the discussion
6 about Rule 20, which is a lengthy and kind of complicated
7 rule that applies to the medical management of claims.

8 So I thought it would be helpful if this
9 afternoon we did a little discussion of Rule 20 comparison
10 to some other states and some of the challenges that we see
11 with it. I generally handle questions that come in related
12 to Rule 20 since I've been involved in it for quite some
13 time.

14 Today I intend to cover the history of Rule
15 20, general concepts, the notion of claims management using
16 guidelines, the strength of that rule and pitfalls, all in
17 about ten to fifteen minutes, okay? So bear with me.

18 I've been involved in workers' compensation
19 for quite a while. I had returned from Guatemala and I was
20 involved in the workers' comp reform effort and an
21 editorial cartoonist perceived me that way. Involved, I
22 guess, wrestling an anaconda in the jungle of comp. But
23 that was an experience that started me on a path that's
24 really been an interesting and rewarding path for me to

1 work in the workers' compensation world.

2 Workers' compensation of course exists for
3 the purpose of returning injured workers to work. And it's
4 really a table that's comprised of four important legs.
5 The leg of permanent impairment, death benefit, medical
6 care, and wage replacement. The death benefit portion of
7 it is not really addressed in Rule 20, but all three of the
8 other legs of that table are really involved in the medical
9 management claims rule.

10 The history of this rule goes back into the
11 early 1990s. I did not really become involved in workers'
12 compensation care until mid 1990s, 1995, and then I joined
13 the healthcare advisory panel starting in 1997. But in the
14 early 1990s there was recognition that there needed to be
15 some sort of treatment guidelines written to assist
16 providers and claims adjustors in the evaluation of what
17 was going on in a medical claim.

18 And so at the direction of the Commissioner
19 of the Bureau of Employment Programs, topics would be
20 brought to the healthcare advisory panel. And the
21 healthcare advisory panel would be charged with writing
22 guidelines and those guidelines would be mailed out to the
23 providers. And I can remember becoming involved and
24 getting a packet when I enrolled as a provider. I got a

1 packet of all these kind of Xeroxed guidelines that I was
2 supposed to become familiar with. And those had all passed
3 through the process of being written by medical experts,
4 reviewed by other medical experts, and then taken over to
5 the what was then I think the Performance Council. And the
6 Performance Council would at that time evaluate those
7 guidelines and then would send them out. They would be in
8 the list. It wasn't a comprehensive list, but that's how
9 the process began and then it went through a lot of
10 updating of these procedures.

11 So experts participated in the drafting of
12 the guidelines. By some estimates over two hundred medical
13 providers can be named in the state who were involved on
14 the committees that drafted these guidelines. Dr. Whitmore
15 is famous for his involvement in hearing loss, Dr. Morgan
16 in hearing loss, Dr. Touma; a whole variety of
17 ophthalmologists, neurosurgeons, orthopedic surgeons over
18 here, folks at Neurological Associates, all those people
19 around the state contributed to the development of these
20 guidelines.

21 And as a result of that, the guidelines were
22 out there in paper form as guidelines for a long time until
23 2003 when Senate Bill 2013 was passed by the legislature
24 and that ordered us to take the guidelines that existed and

1 consolidate them into the form of a rule. And then the
2 bulk of that rule came into being in June of 2004 when it
3 was approved by the Performance Council, and then it went
4 on to add a psychiatric section in 2006, and that's the
5 last section that was added to Rule 20.

6 And then with privatization, the healthcare
7 advisory panel that for those years had been generating
8 these guidelines dissolved as part of the privatization.
9 So the sections of Rule 20, it's really divided into seven
10 sections and I'll just put them up and say a word about
11 each section so you understand. It's a document of about a
12 hundred and eighty-five pages and nobody reads this. I
13 think I might have, but, you know, I know it pretty well.
14 Not too many people get very familiar with it.

15 The initial part of it establishes
16 definitions. And one of the important definitions is the
17 definition of treating physician is included there. And
18 then the standard for becoming an independent medical
19 examiner. Then it talks about provider registration issues
20 and reporting requirements. In the adoptions of standards
21 section it basically says that the Rule 20 guidelines are
22 viewed as being the definitive description of how care is
23 supposed to proceed. And then a large section deals with
24 treatment guidelines and medication limits, and that's the

1 part that's used by claims adjustors to sort of manage
2 claims. Disability periods and PPD we'll get to in a
3 moment.

4 You try to think about what doctors are
5 asked to do. The treating physician might be an emergency
6 room, a primary care physician, a chiropractor, an
7 occupational medicine doctor, a dentist, a podiatrist.
8 Those would be the scenarios for filing your workers'
9 compensation claim.

10 The job of the treating physician is to
11 evaluate that patient, make the diagnosis, and decide if
12 they can return to work and then what treatment they need.
13 If they can return to work, then yes, then they have a no
14 lost time claim, if they can go back to full duty, they
15 return to work. If they have some restrictions, they have
16 to go over into modified work and then eventually see the
17 doctor so that they can be reevaluated for eventual release
18 to return to work.

19 On the other hand, if they cannot return to
20 work, then they become a lost time claim. They go through
21 the various treatments, surgery, maybe a cast on their leg
22 or something like that and continue to return for follow-up
23 with the idea of eventually getting that person recovered
24 to the maximum so they can go back to work. So the way it

1 turns out, the role of the treating physician is not that
2 dissimilar from what other doctors do. But all doctors, I
3 think, establish a diagnoses and all doctors should be
4 treating a condition.

5 Where it gets different in the workers'
6 compensation world is that those involved in workers'
7 compensation are asked to make a decision about the causal
8 relationship of the injury to the work activity. And
9 that's one of the trigger points where we have a lot of
10 disagreements. File the proper paperwork, and you've heard
11 people complain in here, in this venue, that there's too
12 much paperwork involved in workers' comp, but that's one of
13 the requirements to be a treating physician. And then
14 manage the disability and return that person to work.

15 Some of the doctors who work in the system
16 rate permanent impairment and those are the independent
17 medical examiners and some treating physicians do that,
18 too.

19 Well, determining that causal relationship
20 is not easy most of the time. So sometimes you have an
21 easy situation. You certainly know what caused the injury.
22 But the majority of times the work injury can be
23 complicated by maybe underlying other health conditions
24 like chronic degenerative changes in the back or previous

1 hearing loss from other noise exposure. So causality is an
2 important and kind of controversial issue in our system.

3 We sort of require that the -- two things.
4 One is that the alleged factor could have, biologically
5 could have caused the impairment the person has, and then
6 the second is that it in fact did, based on the facts in
7 the matter. So those are the standards that we use. These
8 are stated in the AMA Guides, 4th.

9 The reason we have guidelines is that
10 guidelines help claims adjustors and help doctors stay on
11 track and give patients the best care within certain
12 standards, help control costs, but make sure that people
13 move through the system to recovery as quickly as possible.

14 There are different kinds of guidelines.
15 When we talk about guidelines, we're sometimes talking
16 about treatment guidelines. Sometimes we're talking about
17 disability guidelines. Treatment guidelines obviously
18 affect the treatment of the condition while the disability
19 guidelines project the time that we think it will take till
20 that person recovers.

21 There are guidelines that are based on
22 evidence and guidelines based on consensus. In West
23 Virginia what we have is a hybrid. There is evidence to
24 much of what we have included in the guideline, but because

1 so many specialists in the state participated in it, we
2 also practice to the state's standard of care and do a
3 portion of our care as kind of consensus. So there's not
4 hard evidence to support everything that it recommends, but
5 the experts have said it's so.

6 So other guidelines, I'll show you an
7 example or two in a minute here. Other states have done
8 guidelines also. Some states buy commercially available
9 guidelines and they just adopt those legislatively. Other
10 states have elaborate guideline processes. Colorado
11 probably has the most elaborate, and they have a large
12 panel of doctors who meet regularly and update all their
13 guidelines, post them on the web, and I go there frequently
14 if we have an issues that's not covered in our current
15 guidelines. Rhode Island and Washington State also do
16 their own guidelines. And actually Washington State has
17 borrowed some segments from Rule 20 into their guidelines
18 and we have borrowed some of their sections into our
19 guidelines.

20 So the limits, though, are they are
21 guidelines. They are like sidelines on a football game.
22 You know, they are not a hard and fast rule, but sometimes
23 they are interpreted that way. It all boils down to what
24 the medical evidence shows. Guidelines are really supposed

1 to be a tool for claim management. They are to help the
2 claims adjustor sort of set a floor and say this is the
3 minimum standard, we have to at least do this, and then
4 they are also sometimes a ceiling where we say you can't do
5 this forever, you have to stop at some point if it doesn't
6 appear to be working.

7 So these are examples of a couple of
8 impairment guidelines. This is the impairment guideline
9 that we currently use. This is the Fourth Edition of the
10 AMA Guides. That's the Sixth Edition, the newest edition,
11 and then the treatment guide. Those are impairment
12 guidelines and these are treatment guidelines. This is a
13 commercially available guideline from the American College
14 of Occupational Medicine. And that's a commercially
15 available guideline from the Work Law State and Institute
16 in Texas. People buy those and use those for claim
17 management. Even in West Virginia our carriers use those
18 guidelines in conjunction with Rule 20 and fit them
19 together in sort of a seamless way to make the argument for
20 what might be appropriate care.

21 Well, these are some of the sections of Rule
22 20 in terms of claim management that are particularly
23 important issues and people regularly contact me about
24 interpretation of these sections. Physical medicine is the

1 guideline that regulates some of the chiropractic care and
2 some of the physical therapy that can be done, setting
3 timeframes for it.

4 We recently have had some issues related to
5 physical medicine and we've met with chiropractors about
6 some of the interpretations of physical medicine's
7 services. Musculoskeletal injury, the whole section
8 includes knee, shoulder, back, spinal fusion, and a variety
9 of musculoskeletal injuries.

10 We have limits on certain medications
11 particularly opiate pain medications and who should receive
12 them and for how long. We have other limits. A long term
13 opiate guideline sets a standard for people who haven't
14 recovered fully from their injury and have predominately a
15 pain problem. And those people can meet a standard by
16 which they can stay on controlled substances as long as
17 they are not diverting, not abusing those medications.

18 Psychiatric conditions are governed by a
19 very good section of the rule that deals with psychiatric
20 conditions and it sets some timeframes for treatment and it
21 helps people who have had a bad outcome actually get
22 psychiatric issues incorporated into their claim through an
23 evaluation process.

24 And then pain management is always an issue

1 with workers' comp. IME's refers to some of the
2 instructions to our independent medical examiners about how
3 to do the permanent partial disability rating.

4 I think this is the important part of Rule
5 20. The important part is this document is written in such
6 a way that it provides flexibility for us to consider all
7 of the medical evidence. So it gives us an opportunity to
8 make the decisions based on a case by case basis. It's not
9 a flat out carved in stone, no, never. It's a case by case
10 basis situation with appropriate documentation or at the
11 discretion of. So it encourages a dialogue with providers
12 to get them to try to do a better job of communicating with
13 the insurance carrier to get better outcome.

14 The other thing that it does that's very
15 unique is, it creates an opportunity to accept or reject
16 treatment for conditions that are not a direct consequence
17 of the injury. So if you find an alcoholic whose
18 alcoholism gets out of control because of a workers' comp
19 injury, you can cover treatment to help him stabilize his
20 alcoholism for some period of time and then help him get
21 assistance to get into other types of coverage.

22 There's a section of Rule 20, the section
23 that deals with disability duration, helps claims adjustors
24 understand when a claim is going wrong. If somebody has a

1 minor injury that they really should only lose a week's
2 worth of work for and they're out now for eight weeks, this
3 helps them to understand the person is exceeding the
4 anticipated recovery time. And so that section is there
5 and it's defined as being under the Reed's Medical
6 Disability Advisor as the guideline that we use. And that
7 is a system that captures Centers for Disease Control data.

8 So the question is always what's the
9 difference between impairment and disability. We toss
10 those terms around a lot of times. People think they're
11 the same thing. The fact is impairment is a measurable
12 loss of use or function, while disability is a social
13 determinate about whether you can work or not.

14 Doctors don't really make the determination
15 that you can work. They can make the determination that
16 you can work safely or that you have the tolerance to be
17 able to work, but they do not declare you disabled,
18 permanently disabled, because it's much more complicated.
19 They can measure impairment using standardized tables and
20 that's what we do.

21 And then other people, judges, social
22 workers, voc-rehab people assist with the determination of
23 disability. Just to remind you of what impairment is,
24 impairment is when you have a healthy hundred percent

1 worker who suffers an injury. They lose function for a
2 period of time and then they make a gradual recovery
3 through a series of plateaus and they never quite get back
4 to that hundred percent. They are left with some loss of
5 range of motion of the hand or the finger or strength in
6 their foot, or something like that.

7 And then based on the tables, we can
8 calculate a percentage, and we can say going forward the
9 person is missing ten percent of their previous function.
10 Our independent medical examiners do this and they serve an
11 important role for us. We have perhaps one hundred and
12 thirty independent medical examiners working in the state,
13 and what they do is, they determine whether the person has
14 reached the maximum recovery. They rate their impairment
15 and give them their percentage, their partial disability.
16 They assist in evaluating causality. They may offer second
17 opinions and redirect further tests and treatment.

18 The reason we're Fourth Edition is that a
19 couple of legal decisions have put us in that direction.
20 We actually have some wording that says that all
21 evaluations, examinations, this is from Rule 20, have to be
22 conducted and composed in accordance with the Guidelines to
23 the Evaluation of Permanent Impairment, Fourth Edition, as
24 published by the AMA. That's why we're a Fourth Edition

1 state, they say, despite the fact that there are two newer
2 editions of the guidelines to evaluation of permanent
3 impairment. And there have been court cases that have
4 upheld the value of our using and the need to use the
5 fourth edition.

6 The problem that we have over here at the
7 workers' comp, at the Insurance Commission is that we have
8 a lot of old claims. And one of the things that I think
9 everybody would agree on is that guidelines are not really
10 written for older aging claims because these guidelines
11 that exist are all designed with the anticipation that the
12 person will recover and go back to work. Claims as they
13 age begin to introduce new factors. So factors like
14 arthritis that was previously not recognized flairs up
15 while the person is trying to recover from an injury.
16 Chronic diseases and other compounded conditions get mixed
17 into that and raise the likelihood that there's going to be
18 controversy in the claim, and then there's just less data
19 about what happens with old claims.

20 So there's less data about what therapies
21 work when you complicate things. It's easier to study a
22 simple injury like a fracture than it is to study an old
23 back injury that's -- and it's been injured four or five
24 times previously.

1 So the guideline, even though it's a hundred
2 and eighty-five page document, is missing a few sections.
3 It's missing an asthma guideline. We use the American
4 Thoracic Society for that standard for treatment of
5 occupational asthma. It does not include things about the
6 newer pain therapies. It does not include a preferred drug
7 list, which was part of the rule of the statute that
8 covered the health care advisory panel.

9 So we don't have a statewide preferred drug
10 list. It doesn't cover any skin conditions. So we rely on
11 other guidelines for that. And it doesn't cover specific
12 toxic exposures, and we don't have guidelines for those.
13 And we don't have a guideline for a traumatic brain injury
14 or catastrophic kind of injuries like that. Generally
15 people just do the best they can to give them all the care
16 that they think they need, but we don't have guidelines in
17 that area.

18 So I just wanted to rocket through that
19 topic and then offer to entertain any questions that you
20 have. I think our challenges are keeping up with the
21 changes in medical progress and new treatments, keeping up
22 with the issue of substance abuse that's been such a big
23 issue in our state, you know. So we could talk about that
24 at length, but I thought it would be nice to just

1 familiarize you with this in sort of an organized way and I
2 hope I didn't go too fast. So thank you.

3 CHAIRMAN DEAN: Mr. Chambers, do you have any
4 questions?

5 MR. CHAMBERS: Dr. Becker, could you help me
6 understand a little bit better about the role of the
7 independent medical examiners? Who pays -- are those
8 people employed by the Insurance Commission or are they
9 employed by providers? How do they fit into the system?
10 I'm not familiar with that.

11 DR. BECKER: Independent medical examiners
12 have been around for a long time. They are nationwide.
13 Everyone relies on them. They are certified through two or
14 three different certification processes. There are a
15 couple of groups that certify them and in our state at one
16 time the State of West Virginia certified them and
17 registered them as vendors and put them through a standard
18 of testing. We sent them three exams that were paper only
19 exams and they had to give them back to us and we scored
20 them. You couldn't become an independent medical examiner
21 unless you met our requirements. That was when we were the
22 Workers' Comp Commission.

23 Most carriers in the state and all around
24 use our same list of examiners that's been out there for a

1 long time. But they are paid by the carrier if the carrier
2 requests the exam. They are paid for by an attorney if an
3 attorney requests the exam. And for our old fund out of
4 our TPA's, they pay for the independent medical exams that
5 are done. And we have a fee schedule for it, and the fee
6 schedule is posted on our website. And they are paid for
7 record review, which can be a lengthy process and then they
8 are paid for the actual exam and units of service. So
9 that's sort of how it pays.

10 MR. CHAMBERS: Thank you.

11 CHAIRMAN DEAN: Mr. Dissen?

12 MR. DISSEN: Doctor, I'd like to thank you
13 for your brevity in pointing out these highlights. Rules
14 that are generally written by lawyers, and I don't believe
15 a lawyer could have done it that quickly. Thank you.

16 CHAIRMAN DEAN: Mr. Hartsog?

17 MR. HARTSOG: Well, thanks for reading all
18 hundred eighty-five pages. I only got the first two
19 sentences. I had understood there were a couple of, one or
20 two, recent Supreme Court decisions that have altered,
21 changed somewhat perhaps Rule 20 to some degree. And the
22 second part of that question is, is there going to be some
23 perhaps slight modifications to Rule 20 needed with regard
24 to that? Do you feel it's necessary to make any changes

1 with regard to the rule for that list of items, for any of
2 those list of items that you had there at the end that
3 aren't addressed in Rule 20?

4 DR. BECKER: Well, yeah, I'll pick that
5 apart a little bit. First of all, the supreme court
6 decisions have been important in the impact that they've
7 had on the use of Rule 20 for certain things, particularly
8 the carpal tunnel and the psychiatric duration for
9 recognition of a psychiatric condition.

10 At this point there's no anticipated need
11 for changing those sections to respond to what the supreme
12 court had ordered. In the past there was a decision on
13 hearing loss in which the supreme court did order workers'
14 compensation, probably in 2001 or 2002, to go back in and
15 work on the hearing loss rule and clarify the hearing loss
16 rule. But that hasn't been ordered by the supreme court
17 with regard to Rule 20.

18 In terms of the need to update, as a medical
19 provider I know that medical treatment is changing and that
20 some of the guidelines, even though they were reviewed
21 extensively in 2003 and 2004, are becoming older. And so
22 there probably does need to be some eventual systematic
23 reevaluation process and it shouldn't just be one person,
24 me, reviewing it. It really should be some type of

1 partnership or group that's stake holder. So I don't know
2 when that will happen. Currently the rule serves very
3 well, so I don't see it as an urgent issue at all, but
4 someday that will have to happen. Other states that do
5 their own post the death date of the last review of their
6 guidelines, and that might be something to consider. We've
7 had that discussion here, but currently they serve just
8 fine, especially since carriers partner those up with some
9 of the commercially available guidelines that are out there
10 in making their argument and kind of guiding the care. So,
11 you know, I think that's the way I would see it at this
12 point.

13 MR. HARTSOG: What was the net effect, if
14 you will, or operable effect of the supreme court decisions
15 with regard to what did they effectively change going
16 forward?

17 DR. BECKER: With regard to the
18 psychiatric rule, there is some wording in that section
19 twelve that says that for a psychiatric condition to be
20 considered related to the work injury, it has to be
21 identified within six months of the injury or the
22 significant work-related complication.

23 So if you think about that, it would be if
24 somebody has a really bad injury, a rock falls on them in a

1 mine and they're really crushed, we can all understand that
2 they might have emotional issues following something
3 catastrophic like that. So that would be recognized within
4 six months as maybe causing them stress disorder,
5 depression, or something.

6 The other way that that might run is that
7 six months into the treatment for some condition like a
8 torn rotator cuff, as a result of treatment you wind up
9 getting a bad infection in your shoulder and now you really
10 lose significant use of the arm. That would be a
11 significant complication and then the clock would start
12 running for the six month interval to recognize the
13 behavior, the psychiatric problem.

14 What changed with the supreme court is, I
15 think, I'm not the expert on this, but I think what they
16 said is that timeframe of six months is arbitrary and
17 couldn't really be relied on. And so we continue to see, I
18 continue to see and hear of cases in which people have
19 disputed whether a psychiatric condition was related to the
20 work, but they're just not relying on the six month time
21 window wording of the rule. They're doing it on the basis
22 of medical evidence. So maybe a preexisting depression.
23 So, you see, I don't think it has a lot of impact, is my
24 answer.

1 MR. HARTSOG: They effectively took out the
2 six months?

3 DR. BECKER: Yes, that's it. The rule
4 hasn't changed. The rule still reads the same. Just that
5 there is now a court case that changes that. The other
6 one, the more important one, I think is the carpal tunnel
7 rule change. And in the carpal tunnel rule, the supreme
8 court was asked to set a grading schedule for grading mild,
9 moderate, and severe carpal tunnel.

10 And in our AMA Guides, 4th there is a table
11 called Table 16, and in evaluating that, they came to the
12 conclusion that our Rule 20 limits on carpal tunnel
13 couldn't be used in conjunction with that Table 16, which
14 sets mild, moderate, and severe. They didn't make it clear
15 as to whether Table 15 could be used. In fact, they didn't
16 comment on Table 15, which is another way of rating carpal
17 tunnel.

18 So at this point it's kind of the balls are
19 all in the air and all of the independent medical examiners
20 and groups are trying to figure out where it will all fall.
21 But that was the decision. I'm not aware that it's had a
22 lot of -- it's caused a lot of problems in the system
23 except that it increased the amount of activity to look at
24 carpal tunnel.

1 MR. HARTSOG: Is that something that should
2 be clarified, addressed?

3 DR. BECKER: We've met quite a bit to talk
4 about it and I think, Mary Jane correct me if I say this
5 incorrectly, but I think we've kind of decided that we're
6 going to see how the legal process handles the change,
7 because that's where this is mainly focused. It really
8 does not impact patient's treatment. It simply impacts how
9 they would be rated for permanent impairment after the
10 fact.

11 MR. HARTSOG: Permanent partial impairment?

12 DR. BECKER: Right, as far as partial
13 impairment.

14 MR. HARTSOG: And is it the conclusion that
15 permanent partial impairment rating, the way that's done,
16 needs to be looked at or changed in effect with the supreme
17 court decision?

18 DR. BECKER: It would be a legal decision.
19 Medically I can tell you that the more logical way to do it
20 is to use the Table 15 in the Guides. Table 16 has never
21 been the preferred table to use and the Guides was pretty
22 clear about that. So I don't think that it changed. If I
23 were in my role as an IME, I would not, I would still be
24 doing my ratings utilizing Table 15 and then using Rule 20

1 also, but that's my personal take on it. And so I think it
2 is a decision that has to be made at a different level than
3 mine particularly.

4 MR. HARTSOG: One other question. I'll
5 switch directions a little bit. Pharmaceuticals, a lot of
6 businesses have problems with over prescribing and overuse
7 and extended and a lot of people I know can and do become
8 addicted after a period of time, especially after a back
9 injury or something of that nature, and that's really
10 unfortunate for everybody when that occurs obviously.
11 People get them and sell them. I mean there's a whole lot
12 of things like that going on.

13 Is there anything that we could help do to
14 help structure dispensing or providing this type of
15 pharmaceuticals in any better or more structured manner to
16 help the claimant as well as to maybe help put more
17 structure around the delivery of those or something of that
18 nature that we could prescribe that's not currently within
19 the rule?

20 DR. BECKER: I think the rule is pretty
21 strict on the issue of opiates. The good news is that the
22 Board of Pharmacy's website captures workers' compensation
23 paid for prescriptions. So if doctors will utilize the
24 website of the Board of Pharmacy to check, they can find

1 the people who are doctor shopping and the people who are
2 filling prescriptions at multiple different pharmacies. So
3 that information is already out there.

4 For our old fund claims we've been involved
5 in a process of looking at our high dose opiate users with
6 using our pharmacy benefits manager and we're looking
7 closely at which ones are receiving high numbers or really
8 high doses of medication and then evaluating whether
9 medically reasonable or not in an effort to do our part to
10 control the diversion issue in the state.

11 All of the carriers, I think every carrier
12 that I'm aware of have a pharmacy benefits manager that is
13 doing the same thing for them. So I think it's pretty
14 tightly regulated and I would say right now no action is
15 needed by the Industrial Council on the drug issue because
16 it's happening in all these other different levels.

17 MR. HARTSOG: That's good to hear.

18 DR. BECKER: But certainly your support
19 for this would be helpful.

20 MR. HARTSOG: That's good to hear, but
21 don't hesitate to let us know if there's something
22 obviously we can do, because that's an issue that really
23 impacts everybody.

24 DR. BECKER: It is. It is really a major

1 problem. The tragedy, my editorial comment is the real
2 tragedy is that once these people are arrested for drugs
3 and they have a felony on their record, they don't go back
4 to the workforce. They have a great deal of trouble being
5 reincorporated into the workforce. And somewhere
6 industries are going to have to step up and help us with
7 those people who have the felonies on their record, to try
8 to figure out how do you ever bring them back in.
9 Otherwise, they stay out there forever in illegitimate
10 economy selling drugs and doing whatever else they need to
11 do with stealing your copper. That's my editorial for the
12 day.

13 MR. HARTSOG: I appreciate that. That's a
14 problem. Thank you for the good job.

15 DR. BECKER: Thank you very much.

16 CHAIRMAN DEAN: Thank you. We'll move on to
17 item five. Mr. Pauley.

18 MR. PAULEY: Thank you. I'd like to thank
19 you again. My name is Andrew Pauley and I'm honored to be
20 here on behalf of Acting Commissioner Riley to try to
21 provide you a little more supplementation. As some of you
22 may know, I spoke at the last meeting and tried to discuss
23 a little bit about enforcement compliance on behalf of the
24 Commissioner in regards to workers' compensation. And I

1 think there were some questions about some follow-up of
2 what we're seeing, what we're looking at.

3 And so today this presentation is just a
4 brief presentation to try to show you a little bit of some
5 of the issues we've been seeing and maybe provide you a
6 little bit more on data sources and information to give you
7 a comfort level as to our analysis and regulation of the
8 compensation industry in West Virginia.

9 The brief points I want to talk to you about
10 today are again the failure to timely act reports, the
11 self-insured audits, domestic carrier examinations, foreign
12 carrier examinations. We do some consumer services, data
13 mining, there's some national bases that we look at, data
14 bases that we look at. I've added in here, because this
15 can be an educational tool of other people's review,
16 general audit, self-insured audit, and carrier audit
17 examination standards to give you another overview of what
18 we look at. And I've trying to provide a little regulatory
19 perspective, just some numbers and statistics that we have
20 come across generally.

21 The specific areas of regulation, the
22 failure of timely acts and again the failure of timely acts
23 are issues that we receive while the pendency of a claim is
24 potentially going on with the Office of Judges. And it may

1 or may not be, but we get them sent down to us for
2 referral. So far there actually have been more, but we
3 have had regulatory compliance enforcement about eighty-
4 five reports.

5 Those are broken down for you in a chart.
6 Twenty-four have been self-insured. Sixty-one have been
7 carriers. Twenty-two of those have been no findings by the
8 Office of Judges. There's approximately twelve pending.
9 Fifty-one of those have resulted in corrective action plans
10 where we've contacted the entity. We have had them
11 basically admit that this was a problem or that they did
12 admit to this act, and we have that documented. That then
13 goes into internal databases that we have and that we study
14 and we monitor for trends, systemic problems, or further
15 issues with those entities.

16 And as a result of that, as you see, there
17 are two entities that we are looking at, which I cannot of
18 course tell you for confidentiality purposes that we are
19 looking at right now for further enforcement compliance
20 based on a trend over the past year, couple years of
21 failure to timely act issue.

22 And then on the next page I've tried to give
23 you the kitchen sink, if you will, the type of issues that
24 are coming up. These issues are confirmed and unconfirmed.

1 We use confirmed complaints in the insurance industry,
2 confirmed and unconfirmed. Confirmed basically is that the
3 issue was strongly found to be a problem, had strong merit,
4 and/or the responses from the industry or the self-insured
5 entities themselves confirmed that it was in fact a
6 complaint. But we've also included here just for overall
7 purposes even unconfirmed complaints that they may
8 eventually be dismissed or may not be actually found to be
9 a problem, may still be in the system, just for your
10 knowledge. I'll try to break them down by self-insured and
11 private carriers on that for those issues.

12 Moving forward, the next area would be self-
13 insured audits. To date we have completed forty-three or
14 called forty-three at least. There's been fifteen referred
15 to legal for corrective action and/or potential fines or
16 regulatory action, and those are being worked out at this
17 point. We have about eleven right now that have been
18 called that have not begun. We have three in the field at
19 this point, and then I take it from there and show you that
20 there's been some reports submitted that we're still
21 reviewing internally.

22 The next page we have, the next line we have
23 some of the issues we have seen. These are again failures
24 that include matters that are still pending, so some

1 negotiation and some litigation may ensue, but generally
2 this is what we've seen. The standard violations and as I
3 mentioned in the back of this presentation and the slides,
4 we have the standards that are referenced here in a
5 somewhat more entirety, and I think you can see the numbers
6 there.

7 Moving on, the specific issues that we're
8 seeing with the self-insured audits. These are
9 recommendations. The previous one was failures, actual
10 violation of tolerance standard. We try to expect everyone
11 to be perfect, but we know they're not, and so there are
12 error tolerances and we look at for violations and fines.
13 And so the previous line shows some violations of those
14 error tolerances. These are more recommendations, but to
15 kind of give you the flavor of more or less best practices
16 that our auditors and our examiners and we in legal and the
17 Commissioner gives the company. So we try to give the full
18 comprehensive perspective. Some of these may or may not, I
19 mean they're obviously the rules and so if they are
20 violative, you know, of the rules we want to make sure we
21 bring it up, and we want to make sure that even if it's one
22 single violation of failing to preserve a record for less
23 than ten years, we want to bring that to the attention of
24 examination of the board so they understand we're

1 requesting this of you, you're required to do this, it's
2 important to us that you comply. And that kind of gives
3 you some of those recommendations.

4 Moving forward, of course we have the single
5 domestic workers' compensation carrier. We performed a
6 comprehensive exam of that carrier, which was completed in
7 2008/2009 through claims handled through 2007. Some of the
8 issues we found in that were scheduled rating, rated form
9 files, retention of declined applications, handling of
10 premium audits, producer licensing issues. That exam
11 resulted in restitution to policyholders, a corrective
12 action plan that we put the company on and monitored as
13 well as a fine in that particular instance.

14 One of the areas that I think, and some of
15 this presentation kind of zeros in on, is the foreign
16 carrier examinations, because obviously we're doing every
17 self-insured entity. We're trying to do it at least every
18 three years, if not before, and we're accelerating that to
19 some extent. Of course, there's financial review of the
20 self-insured entities every year to make sure they have the
21 financial where with all to be doing what they're doing.
22 And of course, our domestic carriers, we have a requirement
23 under the statute to do them at least once every five
24 years.

1 The foreign carriers are an area that we
2 want to kind of show you that we definitely mine data, we
3 definitely do analysis, and we definitely review for
4 potential issues whether it's on a regular -- I mean it's a
5 regular basis for analysis. We're not under necessarily a
6 statutory requirement to perform every five years or every
7 year, but the point is, if analysis trends or triggers show
8 us that we need to go in, we have the authority to go in at
9 any time period with a sixty-day notification and sooner if
10 it's a more significant or systemic problem and do an
11 examination, whether it be a targeted one that just looks
12 potentially at claims or if it looks at all the operations
13 of the company.

14 And so as it says here, since January of
15 2008 there has been fourteen market conduct examinations
16 called on corporations doing business in West Virginia
17 outside of this jurisdiction by other states. We have
18 access to those examination reports and the actions that
19 were taken against those entities for review for them doing
20 business here. As I stated, six of those were closed with
21 findings. Eight remain open. Additionally, there's been
22 forty-six general market conduct exams on entities. The
23 ones I mentioned, the fourteen, were on the specific line
24 of workers' compensation. The other forty-six that have

1 been called around the United States have been on insurance
2 companies that workers' comp is one of the lines where they
3 look at the total operations of the business. And of
4 those, twenty are closed.

5 And on the next slide, some of those issues
6 found include the marketing and sales practices,
7 underwriting and rating practices, some of the similar
8 issues we may have found here. Company operations,
9 complaint handling, claims, denials, prompt payment,
10 cancellations, and non-renewables. So we have the ability
11 to look at that information.

12 Moving on, we mine our consumer services
13 division. We have a decent sized consumer services
14 division that handles complaints from all of insurance
15 including workers' compensation. In fact, a specific unit
16 or area of the consumer service division is dedicated to
17 workers' compensation claims or workers' compensation
18 complaints, excuse me.

19 We just aggregated some data here and it
20 looks like for 2009/2010 there's approximately a hundred
21 and seventeen. When you look at seven hundred and eighty-
22 one million in premiums during those two years, if you go
23 to the next slide, it kind of puts it in perspective. The
24 domestic market share of our one domestic workers' comp

1 carrier was about sixty-nine percent over that time period
2 and their complaint share was about sixty percent. Premium
3 market share forms about thirty-one percent and then that
4 complaint share. So it's kind of going along the lines of
5 the premium.

6 We look at indexes and indexes are prepared
7 based on premium, because it's one determination of whether
8 there's a problem or not. Because someone writing a small
9 amount of premium, one or two complaints can really throw
10 that index off. And we can look at that and see if it's a
11 problem because of the size of the company. On the other
12 hand, a large company may have, you know, ten or fifteen or
13 twenty complaints and it may not throw their index off that
14 much because of their size. It may be a statistical
15 anomaly or it may be a serious problem, so we want to look
16 at that also.

17 And in some of the issues that have been
18 resolved or that we've come across over the last couple of
19 years from mining that data and consumer services included,
20 non-renewal and cancellation issues, and failure to pay
21 lapses by carriers, notice issues to policyholders on the
22 above-referenced known non-renewal and cancellations.
23 We've had premium payment deposit issues and timing of
24 those issues.

1 And one of the larger issues I think that
2 resulted from a consumer services data mining was that we
3 had a real non-responsive self-insured TPA that we were
4 getting a lot of complaints on failing to pay anyone,
5 providers or anyone else. And that was something that our
6 working with consumer services and with legal allowed us to
7 look and say, you know, a little deeper, do a little more
8 investigation, this TPA was in serious problem, and we
9 actually had to go in and regrettably, but for the benefit
10 of all, go in and shut that person, shut that entity down
11 and enjoin them from doing business in the state. So
12 that's one of the results from mining the data.

13 And you kind of have to put it all together
14 because we have the consumer services data. Of course, we
15 have the Office of Judges data that we look at resulting in
16 the claims and the referrals they make to us. So we put
17 all that together.

18 Another issue I want to talk about briefly
19 is of course the ability for us to mine multiple data bases
20 from the National Association of Insurance Commissioners.
21 There is a great deal of data bases and data accumulation
22 and I've just listed some of them with you with all the
23 monikers. But just to briefly discuss market conduct
24 annual statement, these are carriers that are reporting all

1 types of data and information concerning their handling of
2 claims and so forth. And workers' compensation is not
3 necessarily in this project at this point, but there is
4 some push to try to get them involved in it. But how are
5 companies handling other claims in the insurance industry
6 may be dispositive or may at least lead us to a potential
7 issue in the workers' comp room.

8 I mentioned in previous discussions about
9 collaborative actions, we can work with other states and I
10 am the CAD, which is the Collaborative Action Designee,
11 which allows me to discuss issues on behalf of the
12 Commissioner with other individuals in other states who are
13 having issues with particular companies. We're also
14 fortunate to be a member of the Market Action Working
15 Group, which is only sixteen individuals and alternates
16 around the company, that we get together in a confidential
17 manner in meetings and discuss issues of national carriers
18 and whether we're seeing issues. And that can be brought
19 up at any point.

20 There's financial tracking, which is FOG.
21 I've talked about MOG. There's exam tracking systems,
22 which any time an exam is called across this country on any
23 national carrier or any entity, we can get on there and we
24 can see if that's been called and what the results are.

1 Any initiatives, any investigations opened on a carrier,
2 any special activities, any type of crime or fraud or any
3 type of illegal activity can be marked on the SAD database.

4 Once a company is in fact fined or is found
5 to have had a violation or a problem, they generally, the
6 states will report that, including West Virginia, to the
7 Ryors Reporting System, and we can get on there and see if
8 there's a spike in fines or regulatory action against a
9 particular company and what those issues are.

10 And then we have additional analysis based
11 on data reporting or outliers in data and specific
12 information that a company is doing. We have
13 prioritization tools and of course we have legal bulletin
14 boards. We have market analysis bulletin boards and daily
15 legal. Our market analysis team will have e-mail
16 discussions with people all across the country about issues
17 we're seeing.

18 And so any time we have an issue, let's say
19 with a workers' comp issue in the State of West Virginia,
20 we can always go out on that bulletin board and say how are
21 you other forty-nine states and territories handling this
22 and it's a real help. So there's a lot of working together
23 and a lot of collaborative effort for all this. And of
24 course NIC provides a lot of valuable data and research.

1 Just to end, we've got, I've put the
2 specific areas of what we look at on an audit exam to kind
3 of give you an idea of how in depth we look at a company
4 when we go in. And I finished basically with just again
5 some numbers to put some of this in perspective. The
6 carriers and self-insureds, the policy count, the premium,
7 and with over ten thousand protests, you know, at this
8 point we're not seeing a systemic or a huge problem. Every
9 complaint is important, and of course we take every
10 complaint as important and we look at it. But I hope that
11 provides you a little bit more information concerning what
12 we're seeing at this point and what we're looking at. I'd
13 be happy to take any questions, if you have any.

14 CHAIRMAN DEAN: Mr. Chambers?

15 MR. CHAMBERS: When you have corrective
16 action plans, could you tell us a little bit more about
17 what you do to monitor or follow up to see that the
18 provider is complying with that action plan?

19 MR. PAULEY: Yes. Generally what we do is
20 we, a lot of times we will take the company at their word
21 if they have done additional training, and we think the
22 proof sometimes is in the pudding. If they told us we did
23 additional training, this isn't going to happen again, and
24 we get three more, you know, three months, then we might

1 have a bigger problem, and that's how we follow up. Some
2 of it unfortunately, not unfortunately, but just a reality
3 in the resources is somewhat complaint driven. I mean we
4 need to see a problem, because we're handling issues as we
5 said. But having said that, we do have databases
6 internally that we keep and we continue to monitor at
7 weekly meetings, monthly meetings, and we continue to look
8 and see, are we seeing a systemic problem, are we seeing a
9 problem, are we seeing a pattern that we need to address.
10 And so it is a routine type situation where we are
11 constantly having meetings and we are trying to go back and
12 we're looking at what's coming in and what's going out and
13 so forth.

14 CHAIRMAN DEAN: Mr. Dissen?

15 MR. DISSEN: No, sir.

16 CHAIRMAN DEAN: Mr. Hartsog?

17 MR. HARTSOG: On page two when you look at
18 the pending further analysis, I think you said we're
19 looking at taking some sort of corrective action in that
20 regard. Is that to assume that you will do like, conduct
21 examinations of these two that you found out, these two
22 here?

23 MR. PAULEY: That's a tool that's an
24 option. I think what will happen is -- what we generally

1 do is, we sit there and we will take all the information as
2 I talked about, all the data that we have, and we will
3 decide, you know, is this a problem, is this something that
4 we can handle? Maybe it's clear enough that they've
5 admitted to the conduct from the previous corrective
6 actions and we can just now maybe start discussing a fine
7 and maybe a more enhanced corrective action plan that might
8 be more invasive than the first one.

9 But it could also include, as you said, it
10 could include a targeted exam that we decide maybe we need
11 to actually put examiners on site and go in and look at
12 more breadth of the operation as opposed to just a limited
13 claim situation. So it's based on the analysis and there's
14 a lot of input. We have a chief market conduct examiner.
15 We have a lot of market analysts and obviously there's
16 legal that gets involved in that determination.

17 MR. HARTSOG: If I recall, you mentioned
18 domestic carrier and self-insured companies you try to
19 audit every three years?

20 MR. PAULEY: There's a statutory
21 requirement for carriers that we have to look at them every
22 five years, at least once every five years. The self-
23 insured audits, again it's a determination as to because
24 it's kind of the same in the statutory requirement.

1 There's a financial component to auditing and then there's
2 the operations, the marked conduct. We've tried to be
3 proactive and comprehensive and say we'd like to get them
4 both done every five years.

5 The self-insured audits require once every,
6 I think there's a contemplation that they're done every
7 year. I think we are completing the financial component of
8 the audit every year. The operations side, I think right
9 now due to resources and our ability to move forward on
10 this, it's breaking down now roughly to about a third every
11 year because we are going in much more comprehensive than
12 maybe they were done, you know, five or six years ago.

13 We're probably looking more -- we're less
14 going in and just checking a few things off. And I'm not
15 saying anything was done wrong or improper in the past, but
16 I think we've moved our self-insured audits to a much more
17 comprehensive level. Kind of in line with market conduct
18 examinations of insurance carriers. And so other relevant
19 issues of course, underwriting, and there's issues that you
20 would just look at of the carrier that you wouldn't have in
21 a self-insured entity.

22 MR. HARTSOG: When you look at a self-
23 insured entity and you're doing it on average of say once
24 every three years, which is kind of what it seems like --

1 MR. PAULEY: Yes.

2 MR. HARTSOG: -- do you go back and look at
3 like the three prior years before you did it or do you just
4 kind of look at a sampling of what happened during the
5 current year?

6 MR. PAULEY: Oh, no. We're looking back
7 at prior conduct, yes. We're always looking back. That's
8 why there's a lag. That's kind of why I think in the model
9 law from the carrier standpoint, I mean there's a five-year
10 lag there, five-year conduct, okay, before you look at
11 somebody again. Because sometimes the trends and the
12 patterns and the issues are not going to develop, you know,
13 from calendar year 2011. It may have been a systemic
14 problem or may be an issue that we'll go back. So we'll go
15 back several years and look. And then as they go forward
16 you'll always be going back and looking at all of the
17 conduct since the prior exam.

18 MR. HARTSOG: Let's say company A has ten
19 subsidiaries, okay, and all ten of those subsidiaries are
20 individually self-insured, okay? And of course they're
21 relying on the corporate entity for the financial side that
22 gets looked at annually that you mentioned and those
23 financials are used. Do you count in your statistics in
24 that, do you go in and audit each of the ten subsidiaries

1 at different times, even though there may be, there's a
2 controlling parent with one TPA or -- and count those ten
3 as ten separate audits?

4 MR. PAULEY: I think we're trying to do it
5 comprehensively. I think we would include, we would look
6 at all of them, but it would be done at the same time.

7 MR. HARTSOG: You might check on that.

8 MR. PAULEY: Okay.

9 MR. HARTSOG: What I've heard from a couple
10 of individuals is that those are, it's one thing they
11 certainly understand and know that audits are fine and
12 you've got to do them, but it might be helpful if you, you
13 know, approached all the entities within a controlled
14 group, if you will, especially if they're being held in the
15 process by the same TPA. At the same time I think it would
16 be more efficient for you all and save you time and money
17 as well as the companies that you're auditing.

18 MR. PAULEY: Certainly, and I can tell you
19 for sure that's the push in insurance regulation, is to be
20 less invasive, and if we can be and try to cause less
21 issues and downtime for companies and/or carriers. And if
22 we can go in and get it all done at once and if we can do
23 it in a targeted way as opposed to taking up a company's
24 time, that's great, but that, I assure you that's a push

1 and that's definitely direction of insurance regulating as
2 a whole. We want to do it comprehensive, we want to do it
3 thorough with, you know, the least put out of the company
4 that we can.

5 MR. HARTSOG: You may want to take a look
6 at that.

7 MR. PAULEY: I will.

8 MR. HARTSOG: On page three the self-
9 insured audits to date are forty-three and I assume that's
10 forty-three entities, not forty-three like control groups,
11 right?

12 MR. PAULEY: I'm sorry. Where are you at?

13 MR. HARTSOG: Page three at the top under
14 specific areas of regulation, self-insured audits.

15 MR. PAULEY: Yes, sir. Okay.

16 MR. HARTSOG: I assume those aren't
17 controlled entities like I was mentioning, those are
18 individual corporate entities that you've done?

19 MR. PAULEY: Yes, sir.

20 MR. HARTSOG: And it says the number of
21 audits to legal for corrective action, that was fifteen of
22 the forty-three. That's a fairly high percentage, I would
23 think. What typically would trigger you sending something
24 to legal for corrective action?

1 MR. PAULEY: I think it would be some of
2 the issues that are on the next page, that these were
3 considered to be failures that were higher and violated a
4 tolerance standard. These would not have been one singular
5 occurrence. There may have been multiple occurrences by
6 the entity that caused it to violate the standard, the
7 tolerance standard.

8 MR. HARTSOG: As a matter of your process,
9 do you when you have findings in an audit, send those to
10 legal? I mean that's pulling obviously about a third of
11 what you're --

12 MR. PAULEY: I'm actually in legal and so
13 I'm the supervisor of the enforcement compliance in
14 administrative hearings division. So, yes, market conduct,
15 I'm the supervisor of our market conduct division, so
16 normally they would run any finding by us to discuss it for
17 further action to be taken.

18 MR. HARTSOG: I guess what I'm trying to
19 get a sense of is how substantial the findings have to be
20 to go to legal or is it a matter of when you have findings,
21 they're referred to legal, and that this is saying that
22 about two-thirds of your audits generally don't have much
23 in the way of findings and a third do?

24 MR. PAULEY: Yes, that's correct. You can

1 read it that way.

2 MR. HARTSOG: So the bar to going to legal
3 is fairly low as far as this goes?

4 MR. PAULEY: Generally, if there's a
5 violation of a tolerance standard. We will give you some,
6 okay, we understand there may be some violations, but when
7 you reach a threshold that we consider it to be a failure,
8 let's say in claims the violation, you violated seven or
9 eight percent of all the claims you handled. You did it
10 improperly pursuant to claim standard one rule and claims
11 within fifteen days.

12 We had one that apparently did that more
13 than seven times. They violated a tolerance standard that
14 we considered to be a fair understanding of the statistic
15 anomaly as it's gone from a statistical anomaly to now just
16 an issue of you've violated a standard, you know. You
17 didn't handle this, you know, you handled this in less than
18 ninety-three percent of all the claims you handled you
19 violated, so that gets marked up as a violation. Then we
20 look at it and we decide, you know, where do we go with it
21 from there.

22 MR. HARTSOG: So it's a function of a
23 judgment call based on findings and the number of findings
24 whether or not -- there's no discernable level at which

1 this would be referred to legal? I'm just trying, if
2 you're referring every audit to legal that has findings, I
3 don't think you're doing that --

4 MR. PAULEY: Right.

5 MR. HARTSOG: -- but you're subjectively
6 looking at each audit and saying we have, you know, we
7 audited ten of these and six we have problems with, so
8 therefore it probably needs to go to legal to be looked at?

9 MR. PAULEY: Well, yes. I don't think
10 it's subjective. I think it's objective from the
11 standpoint that if they have a number of violations that
12 reach a threshold, then that's considered a failure of a
13 standard that they did not handle appropriately. And then
14 that's going to get written up in a report and that's going
15 to get sent to legal.

16 Because what's ultimately going to happen is
17 we're going to either do one of two things. If we take
18 further corrective action or a fine or what have you, we're
19 going to contact the entity. We're going to offer them to
20 let's work out an agreed order that the Commissioner can
21 sign. And this is going to be entered in most likely a
22 public record. If we can't do that, we may have to go to
23 an administrative proceeding. So it is definitely
24 something that is a progressive situation based on

1 violating a number of issues within a particular claim
2 standard.

3 MS. PICKENS: And I don't know if this
4 really gets to what you're looking at, but when we go in to
5 do an audit, we will pull what is considered a
6 statistically valid sample of claims and then, you know,
7 you look at those and there is a set tolerance level for
8 each of those. So it's really not subjective. You know,
9 there's some -- it's pretty much a line. You're either
10 above it or below it.

11 MR. HARTSOG: That helps make it a lot
12 clearer. So once you hit that level, you don't draw
13 another sample, per se?

14 MS. PICKENS: No.

15 MR. HARTSOG: But you say, oop, they hit
16 that level so therefore, okay. That's very helpful.

17 MR. PAULEY: Yeah, it's a like
18 probability, it's Poisson distribution of what the claims
19 were and what we looked at. We pull that and we look at
20 those and see that the data is credible enough to
21 extrapolate across all issues handled by the company.

22 MR. HARTSOG: Okay. That's very helpful.

23 MR. CHAMBERS: Could I ask a question about
24 that? I'm now a little confused about the math, not

1 unusual for me, but there are forty-three self-insured
2 audits today and you said eleven called, but not begun.
3 Those eleven are part of the forty-three?

4 MR. PAULEY: Yes, sir.

5 MR. CHAMBERS: And then there are three in
6 progress, two awaiting report, and twelve submitted pending
7 review.

8 MR. PAULEY: Correct.

9 MR. CHAMBERS: Those are all part of the
10 forty-three as well?

11 MR. PAULEY: That's correct, sir.

12 MR. CHAMBERS: You take all those out,
13 there's only fifteen left. So does that mean all fifteen
14 that were completed were referred to legal?

15 MR. PAULEY: At this point I believe that
16 would be the case at this point, the initial. And I think
17 we want to see them to get them right. I mean this
18 referral to legal doesn't really have a connotation other
19 than we're looking at it. We may in fact look at the
20 situation -- I mean if they were all violations, then, you
21 know, obviously we're going to take them through our
22 progression and handle it that way.

23 MR. HARTSOG: Excellent question. Does
24 that maybe mean you're referring -- basically that says

1 every audit you've done and completed has gotten referred
2 to legal?

3 MR. PAULEY: I think we want to review
4 them. We may be putting too much connotation -- market
5 conduct is in legal division.

6 MR. CHAMBERS: It says to legal for
7 corrective action.

8 MR. PAULEY: Right.

9 MR. CHAMBERS: So every one that's been
10 fully completed, there was some corrective action
11 necessary?

12 MS. PICKENS: Well, no, and correct me if
13 I'm getting out there. That's not necessarily -- I think
14 that's for consideration of corrective action at this
15 point. This is -- doing these audits on self-insured
16 employers is a fairly new process, and as Andrew has
17 mentioned, it's evolving and it's changing. It's different
18 from the way it was done before the responsibilities came
19 to us, and we're really just sort of gearing up and in fact
20 have a lot of internal discussion in the last several
21 months about how it ought to be done, and we have decided,
22 you know, that we want to get together before these things,
23 before there's determinations, so that really there is a
24 group of people including the lawyers that are talking

1 about it. But I don't think you can take that slide as
2 saying that fifteen have already had corrective action.

3 MR. CHAMBERS: It's more or less a natural
4 last step?

5 MS. PICKENS: Yes.

6 MR. CHAMBERS: Can you find out and then let
7 us know of those fifteen how many did result in corrective
8 action?

9 MR. PAULEY: Yes, sir.

10 MR. CHAMBERS: Thank you.

11 MR. HARTSOG: And I would suggest that you
12 might want to reword that, because when I read that -- that
13 was a good question there, Mr. Chambers. When I read that,
14 I assumed that meant that the audit was done, completed,
15 there were exceptions beyond the threshold that Mary Jane
16 referred to, and that it was being pursued or looked at for
17 legal action, but that doesn't sound like it's the case.

18 MR. PAULEY: Certainly, that's correct.

19 MS. PICKENS: I think you should read for
20 consideration, correct.

21 MR. HARTSOG: On page four it refers to, in
22 the second bullet point, it says issues included in
23 scheduled rating, filings retention of declined
24 applications, premium audits, and producer licensing. What

1 is producer licensing?

2 MR. PAULEY: Producer licensing is
3 basically agents who would be dealing with carriers and the
4 appointment of agents. If an agent is selling on behalf of
5 a carrier, obviously has to be a licensed. Number one, it
6 has to be appointed to act on behalf of that entity before
7 selling a policy or within fifteen days of selling that
8 policy. And then if a carrier terminates a producer, we
9 need that reported. Either if it's just a workforce
10 reduction or whether it's for cause, that is the agent may
11 have did some conduct that caused that appointment, that
12 termination, that ability to act on behalf of that company
13 to cease, that has to be reported to us. And then we will
14 have issues. We may have issues with that producer conduct
15 that they exhibited during that appointment. We may
16 investigate those issues and look at them. And of course
17 we don't want agents out there acting on behalf of entities
18 that aren't appointed, which is the legal authorization
19 that they report to us and we keep track of that they're in
20 fact operating on behalf of this entity.

21 So an examination that went in and looked at
22 that would probably find that maybe the company wasn't on
23 top of either making sure that we knew these agents were
24 acting on their behalf or that they were terminating agents

1 and not letting us know they terminated those agents and
2 stopped using those agents, which are both requirements to
3 be reported to us.

4 MR. HARTSOG: Okay. I think it was on
5 page, yeah, page six where you're looking at the
6 percentages of the premium and foreign domestic and it
7 looks like domestic has about sixty-nine percent and
8 thirty-one percent and that you're focusing your audit
9 efforts primarily on self-insureds in the domestic entity
10 that we have here in West Virginia, and that your market
11 conduct reviews, and I'm paraphrasing what you said so
12 correct me -- and your market conduct reviews as far as
13 companies outside the state are triggered more by
14 complaints being filed and a trend of complaints being
15 filed versus any other sort of looking at them to make sure
16 they're following our rules, per se. Is that a fair
17 assessment?

18 MR. PAULEY: I think that's two of the
19 tools, and then all of the tools that I talked about, the
20 laundry list of the different -- and what the different
21 monikers of all that national carriers. I mean any of
22 those situations could trigger further review by us of an
23 entity. We may get an issue on the bulletin board. We may
24 get analysis of companies that are showing outliers on

1 their data. We may get discussions in collaborative
2 groups. But, yes, sir, data, complaint data, is definitely
3 important when people are letting us know that they're
4 having problems with an entity in this state and we
5 definitely want to look at that. And that will definitely
6 be one of the main triggers to us getting involved in a
7 particular situation.

8 MR. HARTSOG: We've heard as a group
9 several times, both internally from the OIC and both from
10 healthcare providers and from claimants that -- and granted
11 what we're seeing isn't statistical or it's not necessarily
12 compelling that there's an overall problem, but -- and
13 because we tend to have people come in when they have
14 complaints about non-domestic entity insurance companies
15 that aren't following the rules, aren't communicating,
16 aren't doing that. And I've heard that as a justification
17 for needing to look at rules or past rules or do things
18 differently perhaps in the past than what we've been doing.
19 I would suggest and just ask if there's a measure to
20 perhaps doing a more aggressive selection and look at
21 entities outside the state for compliance with our rules
22 and processes to make sure that the claimants and the
23 healthcare providers are being treated appropriately given
24 the concerns that have been expressed here before this

1 meeting.

2 MR. PAULEY: I personally, if you're just
3 asking my personal opinion, I personally think we have
4 enough triggers and we have enough access to data and
5 enough access and enough broad authority of the
6 Commissioner to handle any situation.

7 MS. PICKENS: And we are looking at it. I
8 mean we are today, we're looking at all that.

9 MR. HARTSOG: That's clear and evident in
10 here, but I still would go back and as you well know, we've
11 heard a lot about the problems that have been seen in that
12 area and in the fact that people get tired or they don't
13 file complaints and if complaints are triggering, you're
14 looking at them, perhaps there's another measure or size of
15 premiums that non-domestic entities are writing in the
16 state that deserve to be perhaps looked at to make sure
17 that they're following that. Because obviously we have a
18 keen interest in making sure that they're all treated right
19 and if someone is not following the rules, and by virtue of
20 doing that reducing their cost, that puts our folks in West
21 Virginia that are following the rules at a competitive
22 disadvantage.

23 MR. PAULEY: Certainly, certainly, and I
24 wouldn't disagree with you, but again, I do believe that

1 even with the failure of timely acts, the Office of Judges
2 decisions, which we do look at, all of that data mining in
3 addition to the complaint data that we receive in our
4 consumer service division and these national databases, I
5 do think it's a comprehensive effort.

6 And I think it's pretty hard for a company
7 that has a systemic problem to fall through all of these
8 databases and all of these cracks, because, you know, I
9 just, I mean it's hard for me to get this across to you
10 here. But I mean the National Association of Insurance
11 Commissioners are so comprehensive and when they see any
12 issue, even the smallest issue, it's discussed by the
13 commissioners. There's potential model legislation that's
14 discussed, there are the databases, there are bulletin
15 boards, there are data analyses, there is all kind of
16 trending, there's committees that meet, just a plethora of
17 information and analyses and data.

18 So it would be pretty hard for an entity to
19 slip through, you know, the cracks. And I think a lot of
20 times, I probably shouldn't get into this, but a lot of
21 people don't realize that the AIG issue, most of those
22 companies, those subordinate companies, were regulated by
23 the insurance industry and were solvent and strong. And
24 the parent company was regulated by another entity and

1 obviously we know what happened. But the insurance
2 entities that were regulated by the insurance industry were
3 strong and a lot of those were sold off and were very
4 prosperous entities that were never in financial trouble.

5 MR. HARTSOG: I think I would just
6 encourage you to look at that area and make sure that we
7 feel we're being aggressive enough in that regard. Because
8 from what this group has heard, that's where a lot of the
9 issues that we've heard complaints about were coming from.

10 MR. PAULEY: Certainly. I'll definitely
11 discuss that additionally with our staff.

12 CHAIRMAN DEAN: Any other questions? Okay.
13 Thank you, sir. We'll move on to general public comments.
14 Sue Howard, you would like to speak now?

15 MS. HOWARD: The same issue I spoke to the
16 council a few months ago regarding the issue of stays. And
17 I brought some materials down with me today for your review
18 because I think that it's important in looking at this
19 issue to appreciate how this functions. I brought ten
20 copies. I'm not sure who all needs them.

21 I understand that Mr. Gray spoke last month
22 and Mr. Simms was kind enough to provide me a copy of his
23 memorandum. The first thing that I want to do, though, is
24 to apologize to the council. I believed at the time that I

1 spoke with you that the Office of Judges had standards that
2 were set forth in the actual regulations and I was
3 mistaken. They were not.

4 I have included materials that I believe I
5 was thinking of in terms of having standards, but the best
6 that I could find, these are all materials that relate to
7 the granting of a stay of a decision of an administrative
8 law judge. I've included three statutory provisions. One
9 that pertains to the stay. Another which deals with
10 continuances of hearings that made legislative findings
11 about the prompt payment of benefits to claimants as a
12 matter of public policy in the state. And the last section
13 deals with interest on benefits.

14 The remaining materials concern really the
15 claim that was the impetus for my coming here a few months
16 ago regarding stays. Fortunately my opposing counsel in
17 this case is present here today and can certainly comment
18 on my comments as I go forward. He and I have disagreed in
19 this claim on a number of issues.

20 The first item that I brought, want to bring
21 to your attention was the denial of compensability of the
22 claim where the carrier found that the claimant didn't have
23 an injury in the course of and resulting from his
24 employment. We recently received a decision, which is one

1 of the rare decisions concerning unreasonable denials and
2 this denial was found to be unreasonable. In fact, this
3 gentleman injured his back and the owner of his company
4 actually called the ambulance at the workplace to come and
5 get him.

6 His claim was denied. He was without
7 benefits and without medical treatment. As part of that
8 protest, I requested an expedited hearing. We received a
9 decision from the administrative law judge that found the
10 claim compensable on August 10, 2010. I believe we
11 received that decision on a Thursday and the claimant, who
12 was injured on March 15th, received his compensability on
13 August 10th, which I believe was a Thursday or Friday, was
14 in the doctor's office the following Tuesday. It doesn't
15 get much faster than that. He was very much in need of
16 treatment.

17 The carrier appealed and in conjunction with
18 its appeal filed a position to stay before the Board of
19 Review. That petition is enclosed along with my response
20 to the petition. In essence, the carrier said that there
21 would be irreparable harm, no harm to the claimant, and
22 there was a substantial likelihood of success on appeal of
23 the unreasonable denial.

24 The Board of Review granted the limited stay

1 on the LJ decision. It went back down to the carrier on
2 the issue of compensability to determine how long this
3 young man was off work. And on September 10th and August
4 30th there were duplicate orders issued that processed the
5 administrative law judge decision that held the claim
6 compensable.

7 And, Dr. Becker, this is why I had asked you
8 to stay, because I wanted you to see how Rule 20 is used
9 and I think that it's important, because regarding the
10 stay, this is how Rule 20 was used to issue the decision
11 that brought this compensability that stated you are
12 eligible for temporary total disability benefits up to a
13 total of eight weeks of benefits, period.

14 Well, he was injured in March. The
15 compensability ruling was in August. He was without
16 medical treatment. The statute says maximum medical
17 improvement, but the carrier used the anticipated period of
18 disability under Rule 20 to pay this gentleman for only
19 eight weeks, nothing more.

20 So I tried to get him paid. I filed a
21 motion to compel the Office of Judges because the treating
22 physician had been sending in the report certifying
23 temporary total disability. That was denied and was
24 treated as a protest. I again requested an expedited

1 hearing. Following the expedited hearing, the
2 administrative law judge at the end of December, December
3 28th, reversed the eight weeks of benefits and granted
4 temporary total disability up to the point in time that the
5 carrier's examining physician on September 24th found
6 maximum medical improvement.

7 Well, this young man has and he's a very
8 slight build. He's thirty-three years old. He's, you
9 know, otherwise in pretty good shape and was very active.
10 But when the treating physician saw him after the
11 compensability ruling and medical coverage was provided,
12 his MRI showed a torn annulus, protruding disc, he has
13 subsequently had an EMG that shows radiculopathy into his
14 right lower extremity.

15 The examining physician of the carrier said
16 that there were no limitations, that there was no herniated
17 disc, that he could be released to return to any type of
18 employment. Both the claimant and the carrier filed
19 appeals to that period of temporary total disability that
20 was granted at the end of December.

21 The petition to stay again is included with
22 your materials, as was my response. The Board of Review
23 granted the stay on January 14th of 2011. Well, because
24 the compensability issue was pending, I thought perhaps

1 they've granted the stay on the temporary total disability
2 despite the financial hardship to the claimant, because
3 they're about to issue a ruling that says it's not
4 compensable for whatever reason.

5 Well, we got a decision from the Board of
6 Review that affirmed the compensability. So I filed a
7 motion to reconsider or in the alternative to lift the
8 motion to stay, because this claimant was desperate for
9 money. My motion was denied. The order is enclosed with
10 your materials, and it states that the Board may lift the
11 stay if the employer seeks an extension and that the stay
12 will be lifted upon the ruling by the Board should it
13 affirm the award of benefits. The Board eventually did
14 affirm the award of benefits. Both parties had again
15 appealed this decision because we feel that this young man
16 continues to be disabled.

17 The Board issued its decision affirming that
18 award of benefits on June 10th. I contacted my opposing
19 counsel the following week because I had not heard anything
20 about the payments since the stay had lifted. And it was
21 his position that they had thirty days to pay from the date
22 of the Board's decision and that he had already e-mailed
23 the carrier to advise her to pay the benefits. I did not
24 file a complaint with the Insurance Commission at that

1 point in time because I felt that by the time that would
2 resolve, the thirty days would expire. Thirty days went
3 by, nothing happened. So I filed a complaint with the
4 Insurance Commission. Nothing happened.

5 I filed the complaint on July 18th. I
6 waited another week following that complaint, which I had
7 also provided a copy of the complaint to the adjustor. I
8 heard nothing and on July 25th I e-mailed counsel and asked
9 him to, advised him that payment had not been made and to
10 advise me on why payment had not been made and when it
11 could be expected. I enclosed a copy of the insurance
12 complaint response that I received, as well as the response
13 from the carrier stating that they had inadvertently set
14 the Board's order aside.

15 I'm aware that statistics have been
16 presented. I don't know how helpful those are, because I
17 think that the council should look at the statistics for
18 the appeals that the Board has handled that are not
19 frequent issues and therefore are issues that are subject
20 to stays. But while as policymakers you are very, very
21 concerned with statistics, it's important to look at what
22 happens to the individual claimants.

23 In this one gentleman's case, after he was
24 injured, his family welcomed a new son. He lost

1 everything. He borrowed money from everyone he could. He
2 was really financially desperate in July when we got the
3 decision from the judge. He had only been paid -- that
4 eight weeks of benefits I think amounted to just over two
5 thousand dollars. That's all he had to live on for all of
6 those months.

7 When the Board stayed the award of benefits,
8 he was so stressed, he was at a family gathering where the
9 grandparents served beer to everybody there and he had some
10 beers because of his stress, he went out after the family
11 gathering and got into the wrong car. And he was not
12 driving. He looked down, there was twenty-eight dollars.
13 His son, they didn't have money to get diapers for his son
14 and he had been nagged about that. Had nowhere to look to
15 get money, so he took the twenty-eight dollars. This
16 person brought charges and this claimant was sent to jail
17 for twenty days on a misdemeanor theft charge to buy
18 diapers because his benefits were stayed. He'd never had a
19 problem before. He had never bounced a check before. He
20 had never run into any legal problems before. It was
21 because of this stay.

22 And my concern is that under those
23 circumstances, when the person who is considering the stay
24 looks at irreparable harm, that's irreparable harm. I

1 can't go back and unring that bell that found him guilty of
2 that misdemeanor now. And as Dr. Becker had mentioned
3 earlier, once you get a record like that, it really hurts
4 your chances of being able to get back to work.

5 In reviewing the memo that the Board of
6 Review provided to you, they stated that they're following
7 standards that have been set forth for injunctions in
8 federal court. Stays are not injunctions. If you look at
9 the Civil Rules of Procedure, both the federal and the
10 state, there are injunctions and there are stays. With
11 respect to the difference between the two, injunctions
12 govern two private parties. Stays govern governmental
13 agencies and private parties.

14 There's a subset of considerations that are
15 implicated in state agencies. And there a subset of
16 considerations that arise whenever a workers' compensation
17 program is involved and a motion for a stay has been filed.
18 The leading case on this is attached. It's Grinnell
19 College, I think I'm pronouncing it correctly, but I went
20 to WVU. We never played them in any football games, so I'm
21 not sure. But that court went in and looked at the motion
22 for stay and set forth standards that are based upon the
23 federal rules and the way that the federal courts apply
24 motions for stay.

1 Based upon that, I've enclosed a list of
2 proposed standards for granting motions to stay that are
3 based upon that court decision as well as West Virginia
4 law, particularly the three sections that I provided to you
5 earlier on. And that is all I have to say.

6 I just wanted to bring this to your
7 attention. I know that there's too much here to read right
8 now, but if you're interested, I think the information is
9 there. And I would just say that even if there are only
10 thirty-seven claims that were stayed for temporary total
11 disability, I know of at least one too many.

12 CHAIRMAN DEAN: Very good. Thank you. Does
13 anybody else from the general public have a comment they'd
14 like to make today? Seeing none, we'll move on to old
15 business. Does anybody from the Industrial Council have
16 anything they'd like to bring up under old business? Mr.
17 Chambers?

18 MR. CHAMBERS: No, sir.

19 CHAIRMAN DEAN: Mr. Dissen?

20 MR. DISSEN: No, sir.

21 CHAIRMAN DEAN: Mr. Hartsog?

22 MR. HARTSOG: No, sir.

23 CHAIRMAN DEAN: We'll move on to new
24 business. Anybody in the Industrial Council have anything

1 to bring up under new business? Mr. Chambers?

2 MR. CHAMBERS: No, sir.

3 CHAIRMAN DEAN: Mr. Dissen?

4 MR. DISSEN: No, sir.

5 CHAIRMAN DEAN: Mr. Hartsog?

6 MR. HARTSOG: No.

7 CHAIRMAN DEAN: Moving right along, then.

8 The next meeting will be Thursday, September 22, 2011, at
9 1:00 PM. Does that meet with the Council's approval?

10 MR. CHAMBERS: (Affirmative nod.)

11 MR. DISSEN: (Affirmative nod.)

12 MR. HARTSOG: (Affirmative nod.)

13 CHAIRMAN DEAN: Next item is executive
14 session. The next item on the agenda is related to self-
15 insured employers. These matters involve discussions of
16 specific confidential information regarding a self-insured
17 employer that would be exempt from disclosure under the
18 West Virginia Freedom of Information Act pursuant to West
19 Virginia Code 23-1-4(b). Therefore it is appropriate that
20 discussion take place in executive session under the
21 provision of the West Virginia Code 6-9A-4. If there is
22 any actions taken regarding any specific matter for an
23 employer, this will be done upon reconvening of the public
24 session. Is there a motion for executive session?

1 MR. DISSEN: So move.

2 MR. HARTSOG: Second.

3 CHAIRMAN DEAN: Motion was made by Mr.
4 Dissen, seconded by Mr. Hartsog. Any questions on the
5 motion? All in favor aye.

6 (Ayes responded.)

7 CHAIRMAN DEAN: All opposed?

8 (No response.)

9 CHAIRMAN DEAN: The ayes have it.

10

11 (The Executive Session began
12 at 2:48 PM and ended at 3:04 PM.)

13

14 CHAIRMAN DEAN: Okay. We'll reconvene the
15 regular session of the Industrial Council. We have a
16 resolution before us for the Industrial Council to approve
17 the self-insured status of the eleven recommended companies
18 and the companies are: Consol Energy Industry; Consol
19 Kentucky Industry; Consolidated Coal Company, Eastern
20 Region; Consolidated Coal Company, Morgantown; Fola Coal
21 Company; McElroy Coal Company; RG Steel Wheeling, LLC; St.
22 Mary's Medical Center Industry; SWVA Industry; Wheeling
23 Park Commission; and Wheeling Hospital Industry. Is there
24 a motion to approve the resolution?

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MR. DISSEN: So moved.

CHAIRMAN DEAN: Motion made by Mr. Dissen.

Is there a second?

MR. CHAMBERS: Second.

CHAIRMAN DEAN: Seconded by Mr. Chambers.

Any questions on the motion? All in favor aye.

(Ayes respond.)

CHAIRMAN DEAN: All opposed?

(No response.)

CHAIRMAN DEAN: The ayes have it. Is there a motion for adjournment?

MR. DISSEN: So moved.

CHAIRMAN DEAN: Motion made for adjournment.

We are adjourned.

(WHEREUPON, the meeting was adjourned at 3:06 PM.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF PUTNAM, To-wit:

I, Penny L. Kerns, Certified Court Reporter,
do hereby certify that the foregoing is to the best of my
ability a correct verbatim record of the proceedings had at
the time and place set forth herein.

Given under my hand this 9th day of
September, 2011.

Penny L. Kerns, CCR
Notary Public

My commission expires May 13, 2018.