

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MARCH 25, 2010

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, March 25, 2010, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

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

1. Call to Order

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

2. Approval of Minutes

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

Dan Marshall made the motion to approve the minutes from the February 18, 2010, meeting. The motion was seconded by James Dissen and passed unanimously.

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

Judge Rebecca Roush: Good afternoon. It's a pleasure to be here today speaking on behalf of the fine folks who make up the Office of Judges. I wanted to give you a brief report of the work that we've performed in the month of February.

For February 2010 we have acknowledged 444 protests, and a total of 802 for the year. The trends that we're seeing again are the expected trends – a decline in the Old Fund work and an increase in the private carrier protests. Right now 57% of all the protests pending before the Office of Judges are from private carrier orders. By comparison that is up from 48% in 2008. Interestingly the Old Fund continues to

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decline. They currently stand at around 21.94% of all the protests pending before the Office of Judges, and that's down from about 26% in 2008. For the month of February we resolved 470 protests. So at this point in time we are resolving more protests than what we're bringing in and what we're acknowledging. At the end of February we had approximately 3,800 protests pending before our office.

I wanted to touch base with you briefly on the acknowledgement and timeliness and explain to you what those numbers reflect. We have a certain amount of time to acknowledge a protest once it comes in our door pursuant to 93CSR2, which is the Time Standard Rule. We have 30 days to acknowledge a protest. And I think what you're seeing here is a reflection of a number of different things. But I wanted to point out to you that it is not always an Office of Judges error or omission or a failure to act that extends some of these protest acknowledgements beyond 30 days. Now that we have private industry we're seeing that insurance carriers are not properly filing their EDI reports, and this is probably something Ms. Shepherd could explain to us a little better than I can. But they are not properly filing these reports with the Insurance Commissioner's Office and that causes us to have to delay acknowledging a protest by a claimant because it does not have a jurisdictional claim number. I wanted to clarify that some of these numbers that you see do not reflect an error entirely on the part of the Office of Judges, and that may be something we need to consider modifying in our rule.

With regard to Final Decision Timeliness, we have to get that decision out the door within 90 days of the submit order. You can see a little variance there. We have to have 80% of all the decisions we render out the door within 90 days. We have a slight variance there, and I think that that is due to our quality assurance efforts. We are trying to make certain that we get the right decision out the door, and of course some of these matters are becoming increasingly complex and take a little more time. We are still well within the Time Standard Rule in 93CSR2.

Back to the final page, I wanted to point out a couple of things. We are regularly asked about medical treatment issues. At this point in time, approximately 16% of our protests are medical treatment protests. If you compare that to February of 2009, it is basically the same number. We have currently about 621 treatment protests pending, and these numbers change from day to day. The day that this snapshot was taken we had 621 medical treatment protests pending.

Also, we are regularly asked about pro se claimants – how many do we have trying to navigate our system? Right now of all the protests pending, 578 involve pro se

claimants, and that is roughly 6.68% . . . 7%. That is the report for the Office of Judges. Do you have any questions?

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

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Judge Roush: Thank you.

4. Public Hearing on Rule 8 and Rule 22 – Ryan Sims

TITLE 85, SERIES 8 (AMENDMENT) “Workers’ Compensation Policies, Coverage Issues and Related Topics”

Ryan Sims (Associate Counsel, OIC): We presented these rules at the last meeting and they were approved by you [Industrial Council] to file for a 30-day public comment period. We’ll start with Series 8. We received one written public comment so far. We just received it just a few moments ago and it will certainly be forwarded to you [Industrial Council members]. I’m not sure if anybody has signed up to actually give public comment.

Mr. Hartsog: Actually we have it right in front of us. I think you gave us a copy.

Mr. Sims: Okay.

Chairman Dean: On Title 85, Series 8. . . Henry, you’ve asked to make comments?

Henry Bowen (Executive Secretary, West Virginia Self-Insurers Association): Yes, thank you, Mr. Chairman and members of the Industrial Council. I’m Henry Bowen and I represent the West Virginia Self-Insurers Association. I have a brief comment to make

about the proposed amendment to Rule 8. You will recall from the February 18 meeting that Mr. Sims explained that this rule proposal was simply limited to eliminating the process by which this agency [being the Offices of the West Virginia Insurance Commissioner] has been following since it received the Legislature's mandate to administer and regulate the workers' compensation program beginning on January 1, 2006. And that's the process of providing Letters of Exemption to West Virginia employers. There was a good deal of discussion at the February 18 meeting about that. And while we certainly understand the point of view of the agency that it is work for the agency to issue these exemption letters, it is also well understood that the exemption letter is nothing more than a statement on the date that the letter is issued that the employer requesting the exemption is not required to have mandatory coverage.

The problem that we perceive, and we have heard about it from some of our members, particularly in the mineral field [the energy companies], is that West Virginia has had a long history as a monopoly state by having an agency issue exemptions from coverage as well as certificates of coverage. In that state agency is when the state got serious in the nineties about cracking down on enforcement and compliance with the mandatory obligation that employers had to subscribe to the workers' compensation system when the state administered it; that there is a concern that there's an expectation now within the business community, as well as the regulatory community, that exemptions will be provided by someone. And so there is an angst among coal companies particularly who are regulated by multiple state agencies and federal agencies because of their practice to have mining permits obtained by their affiliate companies that may not have active employees on their payroll when that permitting process is obtained, and therefore they hold that permit in their name of the subsidiary for a variety of business reasons. Their fear is simply that once the agency for its stated reason ceases to provide certificates of exemption, there will be no place in West Virginia to get an independent documentation of that. And so from the perspective of those who benefit from it they would implore that the agency continue its practice no matter how onerous it may be perceptible to the agency that there is a business purpose to be derived and that the documentation is necessary. Many of our members have indicated that the documentation is utilized regularly in the contractual discussion when contracts are about to be entered into when there has to be proof of coverage or documentation of exemption.

If this agency stops issuing the exemption, its shoes will not be filled by any other agency; therefore the practices would be required to be altered. As I understand it, from Mr. Sims' explanation in February, the regulation and implementation of the rule requires the agency to maintain a list of employers who have defaulted or who have never secured coverage, and that agencies are required to access that list in making

licensure and renewal kinds of regulatory decisions. That, of course, isn't a business practice that would be helpful to others, particularly in the contract field where that documentation has been utilized for years. So in that regard the Association was requested by those mining members to make this comment, and we would ask frankly that you consider simply asking the Commissioner to withdraw the proposed amendment until there can be some better way of identifying a potential solution for what will happen if employers have to come up with some kind of objective documentation that a West Virginia employer is not required to have mandatory coverage. I set forth in my written comments the statutory section and the rule section. The rule is comprehensive. It defines what the statute sets forth. There are classes of employers that have never been required to have coverage. And then of course employers who have no active employees engaged in work activities are not required to be covered. It's not the statutory exempt employer that causes the angst here. It's those employers who do not have regular employees, but who otherwise need to be able to conduct business in a way that this documentation in the past allows them to do that because it's a simple documentary proof of that at the time that the exemption is issued that coverage wasn't required. I thank you very much for consideration.

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

Mr. Dissen: I think at the last meeting Mr. Kenny indicated that West Virginia is the only state that has this. From your experience what do companies do. . .is West Virginia so unique that this is necessary? What happens to these companies in other states?

Mr. Bowen: Well, I do not know that I could answer that factually. I do know that West Virginia was unique in that we had from 1913 until December 31, 2005, a state run monopoly. We were one of four that were left in the United States. I think there are currently Ohio, State of Washington, and two others. I guess we were the fifth. I don't know how the other 15 states, in which mining activities are undertaken, deal with this issue. But the issue has to be an issue that confronts those companies in other jurisdictions, and frankly we just ran out of time to find. . .and so I couldn't make an alternative recommendation because I wasn't able to capture that information. At worse we would ask for a delay. I realize their reluctance to withdraw rules. But here it is simply a matter of trying to find a way to make sure that a company isn't stopped cold simply because it can't prove it has no employees when they may be in the middle of some transaction or something that would include transference of a permit. Surely the other mining states have to deal with this issue, and I'd be happy to look into that more or talk further with Ryan [Sims]. I know he has been so busy. He probably hasn't had a chance to look into it either. But that's the primary concern. It keeps coming from the

coal side where this practice is not apparently uncommon for subsidiaries to hold permits that do not have employees. Thank you.

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

Mr. Hartsog: If I understand what you're saying. . .you do not have a problem with the rule per se. It's a matter of will the DEP or the Lottery Commission or whichever agency we are dealing with, are they in sync with not getting a piece of paper from the Insurance Commissioner and still process and issue a permit based upon just doing an e-mail check or however its done of the bad list of defaulted employers that they keep over here. And if there was some satisfaction in writing or otherwise from these other agencies that use this process a lot, then we would be able to basically eliminate this step. Your concern is whether or not the other state agencies are on board with not getting this from the Insurance Commissioner.

Mr. Bowen: Well, that's correct because of the long history we've had in that type of documentation being readily available. Again, I realize that's a concern expressed by members who are in the mining community, and I can't express any information as to whether other employers outside of that have a similar concern or problem. But we have several coal members for which this is a very real problem and concern.

Mr. Hartsog: I do understand.

Mr. Bowen: To answer your question. . .

Mr. Harstog: I'm supportive of eliminating the paperwork if at all possible. But I obviously share your concern since I asked about that same thing at the last Industrial Council meeting. Thank you.

Chairman Dean: Any other questions, Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: Yes, Mr. Chairman. Henry, let me ask you this. Is the concern of your mining members limited to being able to document for the benefit of their relationship with other state offices, or does it go further when there are private contracts involved and the contracting party insists on seeing evidence of compliance? It would seem to me that among the state agencies they ought to be able to satisfy

themselves by contacting the Commission and looking at the index that you have. But I can see where a related problem may exist. If we're closing a deal between private parties and one of the closing documents is that we need to see evidence that you are either in compliance or not required to be in compliance. Is that right or am I looking at it wrong?

Mr. Bowen: That is correct. It is a concern that the regulatory agency is being comfortable that this past practice is not going to continue and therefore they shouldn't just sit on something because there is no exemption documentation. The other issue is an issue of diligence with respect to those kinds of transactions. I do remember a time when my hair was less gray that workers' comp was seldom even a topic of business diligence in discussions that would include transfers of mining properties and permits. That issue was raised. And quite frankly we didn't know how to respond other than to make the specific request that perhaps there is something else we should look at first before we just pass this amendment and then "boom" we find out there are problems out there. Again, I'm reticent to ask you to take an action or to defer taking an action for fear the sky is going to fall when I have no facts to suggest that the problem is anything other than anxiety that the state might not act simply because this documentation isn't available. I do want to make that very clear. I know you have to do what you feel like you have to do and so does the agency. But it has been identified as a legitimate concern, hence the comments today.

Mr. Marshall: Thank you.

Chairman Dean: Ryan, do you have any further comments?

Mr. Sims: Yes. Our primary concern in fact was that we knew some other agencies relied on this, what we believed is a pretty antiquated process that was tied into our monopolistic system. So we reached out to every agency [which we were aware of] that did rely on these exemptions. None of the agencies, except the DEP, had much concern about it. The DEP had some concern because there is some very specific language in their Code that they felt required them to get some specific affirmative answer as to whether the company is completely exempt or not. We worked through it with the DEP, and I attached a letter in your packet dated January 19, 2010. And that letter was a result of some correspondence that another attorney in our office, Tim Murphy, had with the DEP to work through this issue to hash it out. After talking it out with them, they agreed that it would be fine and that all the law required is that we prove to them that this company applying for the permit is not on our Default List, that under the new system and under our comp Code is what is required. And I think this letter from Thomas L. Clarke, Director, Division of Mining & Reclamation, WV

Department of Environmental Protection, reflects that they will send us, as they have to, something requesting us to tell them the status of the applicant company, and that we will check a box either saying "yes" they are in compliance or "no" they are not in compliance. It is their understanding, and it's clear that they will understand when we check "yes, they are in compliance," that simply means that company is not on our Default List. That if we check "no," it means the company is on our Default List. And that's, in our opinion, clearly all the law requires under Chapter 23. We feel this letter from the DEP clearly indicates that DEP is on board, and we didn't have any other agency express any concern. We told them all you have to do is check our Default List. You do that, you've done your due diligence, and that's it. And I think Chapter 23 is very clear on that. We decided that, given all the agencies seem comfortable with it and particularly the DEP showing in writing that they are comfortable with that, it was good to move on with eliminating this process.

I'll also point out. . .we're aware that this process has been in place for years, but we feel it's more appropriate only in a monopolistic system. What Mr. Bowen said I think is true, that from time to time when businesses are trying to conduct transactions they would prefer some type of exempt certificate. Mr. Dissen mentioned what other states do and that we had researched it. Very few states have this process. I think they found what we found – when you weigh everything it causes more trouble. You get more applicants that are trying to skirt around the law than you get applicants that are trying to use it for a legitimate business purpose, and that was our main concern. We didn't specifically research, for example Kentucky, which I'm fairly certain is one of the states that have this process, how businesses resolved that issue. But the assumption is they resolved it through perhaps their legal department talking to a legal department of the other company and saying, "Are you sure you are exempt?" You can file an affidavit saying we have no employees. At some point the businesses have to be comfortable enough with each other to trust each other to some extent. But I think for documentation there could be many things. There could be an affidavit from somebody at the company showing they don't have to have comp; a number of different things. You can get a legal opinion. That is certainly another option. What we do know is that almost no state has this process anymore – the ones that are privatized. Our belief is that companies are sophisticated that are requiring this kind of documentation and can work it out between themselves as far as looking at the law and saying it appears they're exempt, or no they're not.

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

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Mr. Marshall: Yes. Ryan, is your Default List available to be checked by. . .for example, counsel for a big company that may be involved in a transaction? Can it be accessed for that use?

Mr. Sims: It is absolutely available online.

Mr. Marshall: Good.

Mr. Sims: It is on our website and updated regularly.

Mr. Marshall: In my mind that goes a long way to resolving the issue.

Chairman Dean: Any other questions, Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

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

Mr. Hartsog: What form is it, pursuant to this rule change, that we are getting rid of? Because I know a company would come in and give an application to you to get this Letter of Exemption, and then you would in turn give them back a piece of paper. What's that piece of paper called?

Mr. Sims: A letter with our opinion. We would process the application, and again it was based on what they said their status was. Then we would return to them either a letter saying, "Based on this information you provided us we believe you are exempt," or "Based on this information you provided us we believe you are not exempt and must have workers' compensation."

Mr. Hartsog: And then "Company A" would take that letter to the Lottery Commission or DEP or whomever, along with their application, and they would use that in processing that. In lieu of doing that, what that company would in turn do is go online or call the Offices of the Insurance Commissioner and see if that company appears on the Default List. Their due diligence is the same thing that is going on here right now, correct?

Mr. Sims: Part of this has been an educational process working with other agencies, but essentially what you said is correct. It's the agency's duty to check the Default List. So if "ABC Company" is applying for a Lottery permit, Lottery's job and their due diligence is to make sure "ABC Company" is not on the Default List. And if

they're not, then they can go forth and issue the permit. It's actually not really up to "ABC Company" to prove to Lottery that they are not on the Default List. The way we're working with agencies and explaining this is that somebody – whoever is issuing this permit at Lottery – the Lottery employee needs to check the Default List. If they're not on it, then they are fine to issue.

Mr. Hartsog: I agree and I'm very supportive of this change to the rule – to take that out and replace it the other way. It makes a whole lot of sense. My only concern is the one that Henry expressed. I've read the letter here on what Mr. Clarke thinks this form means and that makes sense. Do you think we could get something from other agencies? I believe Mr. Kenny at the last meeting rattled off three or four agencies that use these quite a bit. Just get a letter that they [agencies] understand with this rule change that they will no longer be getting this "Letter of Exemption," and they realize that the process will be for them to check it themselves.

Mr. Sims: You essentially want what the DEP has sent. . .a similar letter from other agencies.

Mr. Hartsog: That's not what this letter says from the DEP. All Mr. Clarke is saying here is that he understands that if one box is checked on this form it means that they are compliant and. . ."Conversely, by checking 'not in compliance,' the OIC representative is indicating that the applicant is on the Default List on that date." There is nothing here about them saying that they no longer expect to receive a Letter of Exemption.

Mr. Sims: I think the way this is set up if you look at the DEP's Code. . .

Mr. Hartsog: Okay.

Mr. Sims: They do have something in their Code saying they have to get an affirmative "something" from the Insurance Commissioner. And I think their attorneys have said, "You do have to send paper to the Insurance Commissioner unfortunately and get some kind of paper back from the Insurance Commissioner." This is almost a separate process from the Letter of Exemption. Essentially what the DEP did is they felt that if they sent us one of these inquiries, which they have to do before they can issue a permit, that our response would be appropriate in the form of a Letter of Exemption. So they would tell the permittee, "We're going to send the Commissioner this." It was actually a very convoluted process. And my understanding is what happened, the permit applicant would say, "But you also have to fill out this application for exemption with the Insurance Commissioner," and it would be all one in the same. Not only would

the DEP send the request to us – “Is this company in compliance?” – but they would also tell the applicant, “You need to go to the Insurance Commissioner’s Office and fill out a request for an exemption,” which is a seven or eight page application. I think what this says is that exemption application process is no longer necessary. They are now acknowledging that they will just send us their letter from the DEP to us saying what the status of this permittee is, and that will continue because I believe that is required under their Code. And we will check one box or another. I think DEP’s law requires that to still occur.

Mr. Hartsog: And I’m fine with that. Can you show me here where it says that the process that Mr. Clarke is defining in his letter is in lieu of the Letter of Exemption that they are receiving or requiring today?

Mr. Sims: Well, I would probably have to show you some previous correspondence from the DEP. This was a final letter based on some correspondence we had. Our interpretation of this is that when they send us that MR1W3 Form, we’ll check one or another, and that will resolve the issue. We had a meeting with the DEP and other agencies, and the DEP was really concerned about removing this. But this was sort of endgame in these discussions with the DEP and they said, “Okay, if we send you a MR1W3 and you check ‘yes’ that means this, and if you check ‘no’ it means this.” They told us they are no longer going to tell the applicant that you have to go get an exemption. And you’re saying because it doesn’t expressly say that you want a letter from the DEP that expressly says, “We will no longer require applicants. . .”

Mr. Hartsog: Due to this rule change we will no longer require a Letter of Exemption, that we will follow the process that’s outlined here in this letter.

Mr. Sims: Okay. And you’re wanting that from. . .

Mr. Hartsog: Well, I think Mr. Kenny rattled off three or four agencies the last time that were heavy users of this. To ensure we’re all on the same page, I don’t want a business to go get a permit or request a permit and then find out that they can’t get something from here that the other agencies. . .thinking that they are going to require them to have. If we get that, I think that would address my only concern.

Mr. Sims: Okay. So essentially from each agency that traditionally used these exemption letters or told applicants to go the Insurance Commissioner and fill out an exemption, a letter saying, “We understand pursuant to this rule change this process will no longer be available, and all we have to do is check the Default List.”

Mr. Hartsog: That's exactly it.

Mr. Sims: I will work on getting this.

Mr. Hartsog: Thank you.

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

Mr. Dissen: No, I don't. Thank you.

Chairman Dean: Does this need approval today or tabled. . . ?

Mr. Sims: No, we're just in the public comment process. So what I'll do is go back and work on it, getting those letters from the agencies.

Chairman Dean: Very good.

TITLE 85, SERIES 22, "MEDICAL REVIEW"

Chairman Dean: We'll move onto Title 85, Series 22, "Medical Review." There are people who signed up to speak on that rule. Ryan, do you want to speak on that first?

Ryan Sims (Associate Counsel, OIC): We have received numerous comments on this rule. We received a couple before today, but most of them were received today. Some of the comments are very lengthy. I don't think I'm prepared to talk in length about our response to the comments because they are very voluminous. So at this point we'll just go through the public hearing.

Chairman Dean: Very good. Jeff, would like to speak?

Jeffrey B. Brannon (Pullin, Fowler, Flanagan, Brown & Poe PLLC): Thank you, Mr. Chairman. My name is Jeff Brannon. I'm a defense attorney here in Charleston representing employers, working with carriers on a daily basis. I have submitted written comments, which are my own, for your review. They are lengthy. My request is simply that you request that the Insurance Commissioner withdraw these rules as unnecessary unhelpful, duplicative, redundant, given the statutory scheme, the regulatory scheme that we have in place right now. I think that the inclusion of this medical review process as written in this rule will increase the cost of claims and have a negative impact on the carriers as well as the employers of this state. As I said, I've submitted written

comments, and I just provided those today, and I'm not going to take a lot of time. Alternatively I have submitted proposed revisions to the rule if they were to be passed. Thank you.

Chairman Dean: Thank you, sir. Henry, would you like to speak again?

Henry Bowen (Executive Secretary, West Virginia Self-Insurers Association): Thank you very much, Mr. Chairman and members of the Industrial Council. I'm Henry Bowen and I represent the West Virginia Self-Insurers Association. I, too, filed written comments today with the Offices of the Insurance Commissioner and provided a copy of those comments to you. I tried to provide some background information to you that Mr. Brannon just alluded to in his comments. That information was the historical development that led to the passage by the former Workers' Compensation Commission and its Board of Managers of Rule 20, which is our comprehensive Medical Claims Management Rule. You've heard Dr. James Becker, the Medical Director of this agency, speak about that rule and its origins. You've heard him also talk about the acknowledgement that West Virginia has received for being a leader in this field of workers' compensation medical claims management. To me, of the 2003 reforms that dramatically altered our workers' compensation system, the mandating of this rule was probably the most significant thing the Legislature could have ever done. If you look at the history of the former agency [that was the monopoly agency] and the amount of money that agency was spending on an annual basis through the 2003 reforms, a huge amount went to medical treatment payments in West Virginia that were significantly reduced when this rule was adopted by the former agency.

You have heard here and you have heard from other sources of the continued concern of West Virginia workers, who are identified by some of their representatives, who are concerned that these injured employees have inadequate access to physicians in West Virginia and inadequate treatment. There have been major changes required by Rule 20, and there is probably nothing more shocking than Old Fund examples that we all hear from time to time anecdotally where people who have been totally disabled under the prior liberal law, which was a legal determination that did not require severity of medical conditions at all, who may have had certain types of medication prescribed by physicians endlessly who, once Sedgwick began the administration of those claims for the Insurance Commission, began the process of applying the rules because the law allows application of this rule in the 2003 reforms that changed the system so dramatically to decisions that are made on or after July 1, 2003, and the effective date of this rule when it was first passed in 2004, and again in 2006.

The self-insured community is concerned about the ongoing complaints that the Legislature hears about inadequate medical treatment, including abrupt termination of prescribed medicines and delays that are allegedly the norm in requests by certain physicians.

The written comments may be something that you want to read at night, particularly if you feel a little sleep deprived and you want to make sure you could go to sleep in a hurry.

When you get into Rule 20. . .and I have a copy of those rules with me – Rule 1, the Claims Administration Rule; Rule 20, which is 115 pages long, as amended; and Rule 21, dealing with managed care. These are the three critical rules that govern workers' compensation administration and decision making with respect to medical treatment. We don't question at all that this agency is well intended in trying to respond to complaints about medical treatment, and its response was to propose this rule. In one and one-half pages, we respectfully suggest that they are irreconcilably putting you into a position of asking you to approve a rule that is irreconcilably in conflict with the provisions of Rules 1, 20 and 21. They are all, as I site in my written comments, a host of regulatory authority and tools that this agency has available in regulation of the insurance community and self-insurance community that allows it to take appropriate remedial action if there is a carrier or a self-insurer that is regularly not complying with the law in its implementing regulations.

The Commissioner has announced to our Association her intent to ramp up market conduct analysis of self-insurers. And we know from this agency's long standing regulation of the insurance industry that it will do market conduct examination of carriers when that is appropriate as well. Quite apart from the market conduct comprehensive reviews there is a complaint process that's already well identified within this agency that is thoroughly investigated by the agency, particularly if there is an allegation that someone is not complying with the law in the implementing regulations. Moreover, the Legislature in 2005, in enacting the transition to privatize the market, gave other remedies including the right for expedited hearing for anyone who feels that they are receiving an inappropriate decision; gives a right of cost shifting for attorney fees or an award of attorney fees under Rule 4 if there is an unreasonable denial of certain claim decisions, including medical treatment – period.

So there are remedies that are available to address those outliers who may not be complying with the law. And I hope that you will never be provided evidence from this agency that it's a self-insurer. But I can tell you I do not have any actual knowledge of how claims may be administered outside of West Virginia. Our Association is very

familiar with the administration of claims in West Virginia by the three or four approved TPA's that are regulated by this agency, and they represent more than 80% of the active self-insured community. BrickStreet has, I believe, the lion's share of the West Virginia employer policies. I do not believe at all that BrickStreet is deliberately not complying with the law in its administration of claims. So if there are monoline carriers, as Mr. Sims alluded in my notes from last February 18 meeting, as he referred to outliers and the insurers and perhaps self-insurers who are not complying. If the noncompliance is deliberate, then this agency ought to smack those non-complying carriers and self-insurers with stern remedial response. There is absolutely no excuse. If a carrier wants permission to write coverage in West Virginia, that it not be aware of what the West Virginia law and regs require of the carrier in claims administration. Likewise, for a self-insurer that's subject to the annual financial review, subject to the complaint process – shame on them if they're not doing it right. If they're not filing the initial reports of injuries correctly, they've had plenty of time. And this agency has worked very effectively and very fairly to publicly work with employers about getting people in compliance and to make them aware that sooner or later there will be a regulatory stick applied for noncompliance.

No matter how well intended this rule is, it is irreconcilably in conflict with Rule 20. Rule 20 is the model that's being looked at and urged in other jurisdictions. And while there are other states that have rules similar to this that require a decision within a matter of days or this sought treatment is deemed approved, I would suggest to you that that is the exact kind of regulatory response that got this state in a huge financial mess in the old workers' compensation system and is an overreaction to the kinds of complaints this agency may hear that somebody is not processing claims directly.

Mr. Sims noted in his last comments on February 18, and according to my notes he made an observation, that most self-insurers and most insurers are in compliance. Most self-insurers would not deny surgery that's requested by just allowing a claims manager to make that decision. They do utilize utilization review and medical directors in those processes. Most importantly, Rule 21, the Managed Care Rule, is the most unarticulated or unstated significant change that the Legislature allowed in §23-4-3 in the 2003 reforms. Clear authority for employers and carriers to enter into preferred provider networks or managed care networks [that have to be these network programs and plans] have to be filed with and approved by this agency. And very specific information is requested by this agency. If an employer is a member of an approved managed care network, then Rule 21 provides for an informal dispute resolution grievance procedure that allows the physician requesting treatment, that may be denied, to participate in discussions with that network specialist and work it out informally with the ultimate preservation of the right of the claimant to protest the

decision and put it in front of Judge Roush's office on expedited basis if the claimant elects to do that. It is not necessary, or more importantly, is it appropriate to have a rule that simply says in the face of all these other rules, by default we're going to approve everything unless you get utilization review as drafted by a West Virginia physician within 15 – 20 days of the request. It isn't possible gentlemen. It isn't possible. There are not enough physicians in West Virginia. So if you modify that provision, it's still not possible for us to get every one of these to the physician in 15 days. Even if he adopts the rule of 15 working day conflict with Rule 22 fifteen days conflict, it's still not going to be something that ought to be required in each and every instance. There are examples. Now admittedly I have no documentation to site this factually, but we all know there are examples where surgery is requested for conditions that are unrelated to compensable claims. No-brainer. . .you deny it.

I don't know why the medical community would be so careless as to attempt to cost shift, but perhaps it happens because people aren't covered with other insurances. The only thing we know to be a fact is sometimes procedures are requested, medicine is prescribed for conditions that are unrelated to compensable components that are set forth in the statute and in the regulation on how a claim compensability decision is to be made and how compensability components can be added. Rule 20 goes through detailed sections on the prescription medication that's appropriate, the periods that are appropriate. And what is the number one complaint you hear in West Virginia? I cannot get scheduled narcotics outside of this Rule 20 even though my doctor says that I need this pain medicine in a 6-years post injury. Dr. Becker addressed that before the Legislature in November at the hearing that the Legislature held on the complaints about access to medical treatment and the difficulty of trying to balance these guidelines against a physician who wants to give ongoing treatment in many instances well after a reasonable time has past for that treatment.

The old system could be characterized in this fashion accurately. There was no legal limitation on medical treatment. The new system does impose limitations and hurdles that have to be met to the presentation of documentary evidence to justify going to the treatment outside of the treatment prescribed under Rule 20.

Rule 22, as drafted, regardless of its intent – it doesn't matter what the intent is – it only matters what this language is. This language requires the decision to be made in 15 days with treatments to be granted. Then what was the point of all that hard work on Rule 20 if you're being asked to just sweep it away with a page and a half rule that would allow these decisions to become automatic.

We oppose this rule. We think it is mis-designed. We really urge that it be withdrawn. But if it is not withdrawn, then our Association will urge that it not be accepted by the Industrial Council. I'd be happy to answer any questions, if there are any.

Chairman Dean: Do you have questions, Mr. Marshall?

Mr. Marshall: Not at this time. But I appreciate your remarks.

Mr. Bowen: Thank you.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No questions.

Chairman Dean: Mr. Dissen?

Mr. Dissen: I had a chance to read some of the public comments. They are all very well written, and I am interested to see the response on them.

Chairman Dean: Lesly, do you have comments?

Lesly Messina (ACT Foundation): Good afternoon, Mr. Chairman, and members of the Industrial Council. I did not submit this comment in written form. I just want to be brief, and I can submit something to Ryan [Sims] at a later date if he needs it.

I am Lesly Messina from the Affiliated Construction Trades Foundation. I am the Research Director there, but most frequently I speak to the Board in my capacity as a workers' comp liaison for our union members of the State Building and Construction Trades. I want to talk about specifically the 15-day deadline and the context of my personal experience. It's all anecdotal. I can see that. But time has demonstrated to me that there is a problem. I cannot speak to the irreconcilable conflicts of this rule with Rule 20. I didn't have time to go into that. I have reviewed it at one time. But what I will say is that – in keeping with the discussion I had with the Council in February – what we are seeing is the significant problem with claimants being pro se, having no access to adequate counsel. They are navigating the system by themselves. And as Judge Roush said, they are trying their best, but they have a very busy caseload and it's not their job. . .they can't assist them in any other way than just basically telling them how to navigate the system. What I am seeing are private carriers providing "provider lists" to pro se claimants that have one provider out of 30 that will even take their call. They are

on the list as a provider for that carrier, but yet the person says we are not taking workers' compensation so the claimants are unable to seek treatment. The delays that I consistently see – and I will stress again – these are union members that come to me that are outside of our Captive self-insured program that the Union Trades have. That program works very well and most of my work doesn't even fall under the purview of that – it's folks that are navigating the system without counsel. And what I see are compensability rulings that are taking a month and a half, if they're lucky. Some people are being told on the phone after a week, "We are denying your claim. You'll get the letter." They don't get the letter. So, they are waiting. They're in limbo. They're not getting treatment. And yet they are still not able to appeal a decision that they have been told orally they are going receive, and yet have not gotten the paperwork so they can actually start the appeals process.

So, I speak to you today not saying that I have any direct solutions for this, but to also bring up the other side to say that there is still a significant problem, and the scales are very much unbalanced in how the claimants are able to use the workers' compensation system to their advantage when its valid and when they do have a valid claim. It is an issue that needs to be addressed. Perhaps 15 days is not sufficient. I have never worked on the inside to do medical utilization reviews, but I also see on the flipside if someone is able to tell somebody within just a few days that the claim is not compensable, then something is wrong with that scenario. If you can make a decision against something that easily then you should have to take a little bit of time to review it to find out why the claim is not going to be ruled on. I've also seen it for surgery denials. I have seen people waiting for follow-up to find out if they can get surgery – waiting a month, two months. I know that sometimes perhaps the physicians are lax in maybe getting the carrier exactly the documentation, as Mr. Bowen said, that they may need to make an appropriate review. But what I also see is there is no follow-up. The physician waits to see what the decision is going to be, but yet not being contacted by the carrier and being told that they don't have enough information to make that determination.

So, again, I did not have any formal suggestions or solutions to make because I don't feel that I have the inside knowledge of medical utilization to know what's an appropriate timeframe, but I certainly have experience in knowing what is not an appropriate timeframe, and we are seeing that more and more. It is a growing concern of mine that pro se claimants are getting the short shift in many ways, and this is another area of due process that I think that they are not getting, you know, their fair shake. If you do decide to take out the 15 days, I would urge you to really research the issue. And anything that I could do to research to help you with that; to help you come up with maybe a more reasonable timeframe. But there definitely needs to be I think

regulation on this issue. Perhaps the business community does not feel that that is the case. But I wonder because I'm seeing a small sliver of the community filing claims. We represent about 20,000 union construction workers. For every one person that I'm able to help through my role as a liaison, I wonder about the folks that are out there that don't have anyone to call and they don't know that they can file Insurance Commission complaints. And it's a very daunting thing for someone with no counsel to do. I have tried to encourage people from time to time to file a complaint, and even though they trust me and work with me very well, they are reluctant to do it. So, it goes back to the broader issue of lack of counsel, which is not directly related to this rule, but I think it's an indication of the systemic issue that we've got that I think needs to be addressed. So, that's all I have. Do you have any questions?

Chairman Dean: Mr. Marshall, questions?

Mr. Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: Could I ask that you do submit your comments in writing to Ryan within the next couple of days because I would like to see their response to them. I mean you threw out a number of things and I don't have the detailed knowledge. I think there are a number of things that you mentioned that are already addressed in different areas in the statute or in the rules. Perhaps those need to be considered more under "market conduct review" with the Offices of the Insurance Commissioner versus us [Industrial Council] trying to come up with another rule to address her concerns. And if that's what's going on, then those complaints need to get filed, and the Insurance Commissioner investigates them and smacks someone's hand. If you would please submit those in writing because I would be interested in seeing the response.

Ms. Messina: Sure. Absolutely.

Mr. Sims: I just want to point out. Ms. Messina's comments will be part of the record and the rule filed with the Secretary of State's Office. In addition to written comments, we take the excerpt from the transcript of this and that becomes her comments. It's fine if you want her to issue a letter as well.

Mr. Hartsog: I would like to see. . .

Mr. Sims: We can get the transcript for you is what I'm saying.

Mr. Hartsog: And I see the transcript after every meeting. But you mentioned a lot of things.

Ms. Messina: Absolutely.

Mr. Hartsog: And just "bullet point" those a little more for us to see the response to them. It would make it clearer than trying to review that record.

Mr. Sims: That's fine.

Ms. Messina: Just to be clear. I understand that some of what I'm saying is somewhat redundant, but I feel like I would be remiss to our members and to the community at large for not just kind of trying to hammer on this subject whenever I feel that it's in the proper context because I know that the Insurance Commission has a lot of plans and things that they have implemented in order to monitor the private sector and monitor the carriers and make sure that they are in compliance. But when I see the difficulties that the claimants are having pro se, I just feel like I'm always going to encourage any additional ways that you can come up with to ensure that the carriers are doing what they need to do. But I will absolutely put all that down and get it to you guys.

Mr. Hartsog: One very real concern that I have – I keep hearing from the Insurance Commissioner's Office that they're not getting complaints, little if any in the way of formal complaints that people are filing on specific complaints.

Ms. Messina: I have not yet been able to convince someone to formally file one, and I've tried to get them to do that. But I think that there is some sort of. . . I don't know if it's just some fear of this large institution, which is the Insurance Commission, that somehow they are going, you know, get dragged into some other parallel type of litigation. I've tried to explain to them that they could file a complaint alongside of an appeal, you know. It's not the best way to do it. But, you know, we can certainly withdraw a protest, you know, if somebody needs to, if the Insurance Commission does an investigation that bears out more quickly. But it is a problem. I'm trying to work very hard with our folks to make sure that they know that that avenue is available, and it is something absolutely that should be utilized.

Mr. Hartsog: It is. But let's say this group passed a rule that says every decision has to be made in 15 days in writing – period. Okay. And we pass that out. And then six insurance companies decided they're not going to issue written decisions, and that rule may already exist. But they decide, well, we're not going to issue written decisions

and we're going to delay, delay, delay, okay. No matter what we pass or what we do, unless individuals file complaints that the Insurance Commissioner can investigate, you are stymied on doing anything. That's where the problem and the crux of it comes in because I hear what you're saying and I've heard that before from a couple different places, and I'm concerned about that happening. But I think for the most part the avenues are there to address the problem by the Insurance Commissioner. She has told me many times before, until someone starts filing complaints and they can start looking at the market conduct of self-insureds or insurance companies or whatever, we can't get to the root of the problem and solve it.

Ms. Messina: Sure. And I don't know what the reasoning is. But people are much more likely to file a pro se appeal with the Office of Judges. And I don't know if it's more that you guys have such a human face than your staffers – no disrespect to the Insurance Commissioner – but you guys are so helpful and the word gets out that you have been very kind to the folks that don't have counsel and help them understand the system and always take their calls, which they certainly appreciate. I don't know if there would be a way to set up something with the Insurance Commissioner so that instead of filling them out online maybe they could call somebody, you know. I'm certainly willing to brainstorm on ways to do that more, and I've tried to implore to people that if we don't have a record of these things occurring, especially through complaints with the Insurance Commissioner, that no one is going to know that it's going on. Yes, I can see that point, absolutely. But I will put everything down for you and I'll e-mail it within the next few days so you guys will have it.

Mr. Hartsog: If you just please get that to Ryan.

Mr. Sims: You can give it to me. We do have a 1-888 number, and often complaints start with a call. And we do require the complaint form to be filled out, but the complaint examiner will walk the claimant through that process.

Our number is 1-888-TRY-WVIC (1-888-879-9842). It is on our website and we always try to get that number out there. That's the starting point.

Ms. Messina: That's great. I'll get the word out.

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

Mr. Dissen: Just a comment. I can see like with some organizations, but especially yours that is mostly covered by collective bargaining agreements, that your members certainly are used to filing grievances. It seems to me to be analogous. If you

have an issue you file a grievance here, but you could certainly file a complaint here. . . maybe more of a marketing issue. That's all I have. Thank you.

Chairman Dean: Ryan, do you have a comment.

Mr. Sims: Yes. Again, we have received so many comments to this rule. For the most part I think we need to digest these – us and you all – and work through it that way. I did want to point out one thing. In 4.1, I think there is perhaps a misconception, and it might require some better draftsmanship by us – that you have to make the decision in 15 days. I can say absolutely that was not the intent of 4.1. The intent was to touch base, to acknowledge the request in 15 days. We felt that that language reflected that, but now looking at it I can see that there could be an interpretation that it has to be a decision. We certainly appreciate that getting proper review by a doctor could take more than 15 days from the day the request is received, and it was not the intent to do that. The intent was for the carrier or the self-insured, the TPA to acknowledge, "We received your request. We are working on it and reviewing it." Again, we are going to distill all the comments. But on that particular one I just want to clarify that the intent was not to say you have to issue an up or down decision on the request in 15 days because it would be impossible for that to occur. The intent was to get something out there acknowledging it – acknowledgement to the claimant that we've received your request and we will continue to review it. And I just wanted to make that clear. The language can probably be improved to make that clearer.

Chairman Dean: Any other questions for Ryan from the Industrial Council? Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman.

[Since there were no other questions or comments on Title 83, Series 8 and Title 85, Series 22, the public hearing was closed.]

Chairman Dean: Since there are no other questions or comments, we'll move onto the Legislative Update. Ryan, would you like to comment on that?

5. Legislative Update

Ryan Sims: Sure. Mary Jane [Pickens] was going to do that and she is out of town. We had four bills passed that had some relationship to workers' comp. I'm not sure if they are all in the workers' comp Code. But Mary Jane summarized those for you and that is under Tab 4 in your packet. I guess her suggestion was that you [Industrial Council] review those bills. She said if you have questions about them after reading her summary to feel free to e-mail her or she can also follow-up on any questions you may have at the next meeting. I am almost certain that she will be available at the next meeting.

6. General Public Comments

Chairman Dean: Does anybody from the general public have a comment they would like to make today? [No comments.]

7. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business? [No comments.]

8. New Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under new business? [No comments.]

9. Next Meeting

Chairman Dean: The next meeting is Thursday, April 29, 2010, at 3:00 p.m. Does that meet with everybody's approval?

10. Executive Session

Chairman Dean: The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-

insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session. Is there a motion to go into Executive Session?

Mr. Marshall made the motion to go into Executive Session. The motion was seconded by Mr. Dissen and passed unanimously.

[The Executive Session began at 4:20 p.m. and ended at 4:31 p.m. The Industrial Council discussed some other procedural matters while in Executive Session.]

Chairman Dean: We'll call the Industrial Council meeting back to order. We have a resolution in front of us.

It appearing to the Industrial Council that:

WHEREAS, Cobra Natural Resources LLC has applied for workers' compensation self-insured status;

WHEREAS, Based upon the information provided on the application, Cobra Natural Resources LLC meets the financial responsibility requirements set forth in §23-2-9 of the West Virginia Workers' Compensation statute and W.Va. Code St. R. §85-18-1 et seq.;

WHEREAS, Based upon the information provided on the application, Cobra Natural Resources LLC meets the procedural requirements set forth in §23-2-9 of the West Virginia Workers' Compensation statute and W.Va. Code St. R. §85-18-1 et seq.;

THEREFORE, BE IT RESOLVED that the Industrial Council hereby grants self-insurance status to Cobra Natural Resources LLC effective April 1, 2010.

Adopted this 25th day of March, Two Thousand and Ten.

Chairman Dean: Is there a motion to approve the resolution?

Mr. Dissen: So moved.

Chairman Dean: Is there a second?

Mr. Marshall: Second.

Chairman Dean: Questions on the motion? All in favor signify by saying "aye." All opposed, "nay." The ayes have it. [Motion passed.]

11. Adjourn

Chairman Dean: That's all the business at hand today. Is there a motion for adjournment?

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

There being no further business the meeting adjourned at 4:36 p.m.