

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

OCTOBER 5, 2005

Minutes of the meeting of the Workers' Compensation Industrial Council held on Wednesday, October 5, 2005, at 10:00 a.m., Charleston Civic Center, Parlor D, 100 Civic Center Drive, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman (via telephone)
Bill Dean, Vice-Chairman
Jane L. Cline, Insurance Commissioner
The Honorable Robert S. Kiss
Dan Marshall
The Honorable Brooks McCabe
Walter Pellish
Richard Slater

Call to Order

Richard Slater called the meeting to order at 10:05 a.m.

Election of Officers

Richard Slater: The first order of business will be the election of officers for the Council.

Mr. Slater nominated Charles Bayless to serve as Chairman for the Workers' Compensation Industrial Council. The motion was seconded by Dan Marshall and passed unanimously.

Mr. Slater nominated Bill Dean to serve as Vice-Chairman for the Workers' Compensation Industrial Council. The motion was seconded by Dan Marshall and passed unanimously.

Mr. Slater: I am going to hand it over to President Bayless to Chair the meeting or you may want to defer to Mr. Dean.

[Chairman Charles Bayless turned the meeting over to Vice-Chairman Bill Dean.]

Vice-Chairman Bill Dean: I would like to welcome everybody this morning. I had no idea I was going to Chair this meeting.

Transition Update – Commissioner Jane L. Cline

Jane L. Cline, Commissioner: I will briefly give you an update on the transition and the process we are going through. I know some people have questions with respect to the financials and where we are now in that process. We have been working with the Governor and Delegate Craig and we have been working with the Workers' Compensation Commission to determine. . .[inaudible]. . .

With the changes that the Legislature made during that session we are seeing a significant improvement with respect to the money that is going out the door. And I know some people had some questions about how the bond issue could be less if we were looking at the Old Fund deficit but also through the legislation that the Legislature passed. There were different revenue streams that were put into place to go to the deficit piece of that fund to run the Old Fund off. And instead of a premium tax that you normally see on an insurance product in West Virginia there is a surcharge that will be passed to employers to go to the deficit piece and that will total about \$45 million dollars on an annual basis.

I am just going to go ahead and move onto the rating issue overview and then if people have questions. . .because it all ties in together. With respect to Governor Manchin's discussion that people could receive up to a 15% reduction in their payments for workers' compensation coverage. This results from the fact that currently most employers are paying for workers' compensation coverage through the current system with 25% to 35% of their rate to cover the deficit piece. Because the Legislature, in working with the Governor, put into place other revenue streams to go towards that deficit piece, we will be able to show some relief on the rate. And in addition to that, as we said, the amount of money that is actually being paid out in claims is trending down as a result of the significant changes that the Legislature put into place in 2003. So a lot of the bleeding has stopped and that's a good thing. Also with respect to the rating review, we have been working with NCCI to become the statistical agent in West Virginia. NCCI does work in forty some states. They're the statistical agent in thirty some states. And so as we move forward we want to look more like the rest of the country with respect to ultimately opening up West Virginia's private market for other insurance carriers. It's important I think that we make that transition as easy for them as possible, and the more we look like other jurisdictions the easier that process will be.

My staff has met with both AIA and PCI, which are two of the largest trade groups with the insurance industry and that was one thing that resonated very clearly from both the trade industries. If we are going to consider that, would we please consider looking at NCCI because they are all familiar with NCCI. Most of the states that don't use NCCI as a stat agent are much larger than us. I mean they have a much larger market. You are talking about California, New York, Pennsylvania – states of that size. So that's a brief update in trying to answer some of the questions that were e-mailed back to us with respect to the funding piece. I can get more details or answer questions if you wish.

Walter Pellish: I have a couple of questions. How will this surcharge be applied?

Commissioner Cline: The surcharge will be actually on the premium notice that the employer receives from the insurance company and it will be identified as a surcharge to go to pay the deficit.

Mr. Pellish: Is it a fixed amount for everybody?

Commissioner Cline: It will be a fixed amount. The challenge is determining how we get the \$45 million dollars. . .I mean how we spread that out. But it will be a fixed amount. The total, I think, provision is \$45 million dollars and then there is another surcharge that employers will see to come back to fund the Insurance Commission for the workers' compensation administrative piece. Generally speaking on most insurance policies there is. . .depending on the nature of the policy on annuities and life insurance products you pay a 3% premium tax which we collect that funds various programs within the State. And then there is also on property and casualty a total of 5%. It will change in January from 5.55%. It is charged on fire policies and then casualty policies – it's 5%. So in lieu of those provisions the surcharge is going to pay the deficit pieces rather than to come back and use for general revenue or other purposes. We also fund volunteer fire departments and put money in municipal pensions and a number of other areas.

Mr. Pellish: The other question that I had. . .you mentioned a couple of times additional revenue streams.

Commissioner Cline: There are provisions in the legislation that. . .there was an increase in the severance tax on coal and other extraction industries – oil and gas. The timber industry – there is some proceeds from the racing proceeds. There is lottery. . .Mary Jane, do you have that?

Mary Jane Pickens: Yes. There is also a certain amount of proceeds from the video lottery and also there is some money to be transferred I think from what would normally go into the tobacco settlement, medical trust fund. These are two that come to mind.

Mr. Pellish: Thank you.

Vice-Chairman Dean: Other questions from anybody? Mr. Bayless, do you have any questions? We will move on. Ms. Pickens. . .

First Term INDC Organizations – Mary Jane Pickens, General Counsel

Mary Jane Pickens: Yes. Thank you. I guess just to go back briefly to agenda item number one. This is a point that I just wanted to mention and it probably is more appropriate

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under item number one. At the next meeting of the Industrial Council we would like to present a procedural rule to set forth the framework or how this Council will operate. We didn't have that ready for today's meeting but we can present that rule at the next meeting and I'll talk a little bit here in a few minutes about the rulemaking process and you will kind of know what to expect when we present that rule.

What we wanted to talk about was the role of the Industrial Council with the Insurance Commissioner. We talked about this a little bit at the first orientation educational type meeting and I think the Council had some questions and maybe wanted some more specifics about how we see that role evolving. So I wanted to go down through. . .again, we handed out a copy of the Code section that creates this Council and it has some specific duties in there. It has some general duties. There are also some other duties that are outside of that Code section that were in Senate Bill 1004. So we've gathered all of those duties together and hopefully after today we'll have a better understanding of this body's role.

Starting first with the more clearly defined duties in §23-2C-5, which is the Code section that creates the Industrial Council. The first clearly defined duty is to work with the Insurance Commissioner to review, approve, reject or modify rules. The rules will be proposed by the Insurance Commissioner, but this Council will handle the rulemaking process. And it is an exempt rulemaking process, meaning that it doesn't have to go through the legislative approval process that a lot of other agency's rules have to go through. For example, the Insurance Commissioner has to go through the legislative rulemaking process. But this body is exempt from that process. We see the rulemaking function as really being a part of the overall policy review of this Council as it relates to workers' compensation insurance. That's an opportunity for all of the rules from the Workers' Compensation Commission, which will transfer to the Insurance Commissioner, for administration of those rules. That is the way for this Council to weigh in on all of those workers' compensation matters and those issues through the rulemaking process. The Insurance Commissioner at the same time, of course, regulates the insurance industry and all of her Title 114 rules. We interpret all of this as meaning that she will go on to handle all of those insurance rules, but where they relate to workers' compensation then clearly this body will have a role in that. And those are Title 85 rules that are coming over from Workers' Compensation Commission.

The second clearly defined duty in Section 5. . .is to do a budget. This Council has to submit for approval by the Legislature, as an isolated and clearly discernable component of the Insurance Commissioner's budget, a budget for the sufficient administrative resources and funding requirements necessary for their duties under this Article. And I am sure that the Insurance Commissioner will be working with this Council toward getting that budget proposed and having it go through that process.

The third clearly defined duty. . .is that every two years the Industrial Council must conduct an overview of the safety initiatives that are currently being used or which could be used in the workers' compensation insurance market and report those findings to the Joint Committee on Government and Finance. This Code section requires private insurance carriers

and self-insured employers to cooperate with the Council in performing this overview of safety initiatives so that the Council can evaluate insurer services that are provided to the employers; make sure that losses are being controlled; provide information that will hopefully prevent industrial accidents or occupational diseases. So every two years the Industrial Council will conduct this overview of safety initiatives. And this is something where there is no specific department within the Insurance Commission that is charged with similar duties. So I think this is clearly a function of the Industrial Council that is clearly defined in this Code section.

The next clearly defined item is the establishment of the claims index. It is suppose to be an index of claims of injured workers that will make information available concerning the injured workers. One insurer will make it available to other insurers. This is something that is part of the transition. There has been a lot of discussion and thought so far on the claims index and how best to do that. And it would appear appropriate to me for a presentation to be made to the Industrial Council by the Insurance Commissioner, and the group that is studying the whole claims index duty, for this Council's consideration and either modification of that process or approval of the process. Again, this is another duty where there is no specific department within the Insurance Commission that is charged with that.

Then we go to the more general duties conferred upon the Industrial Council by Senate Bill 1004. The first one is in consultation with the Insurance Commission to establish operating guidelines and policies designed to ensure the effective administration of workers' compensation in West Virginia. Again, I think the interpretation that's most consistent with the way workers' compensation is regulated in other states is that there is a line between the insurance regulation and the workers' compensation regulation. With this Council clearly weighing in on issues – and I'll get even more specific here in a couple of minutes – issues that really specifically relate to workers' compensation – the employers, the funds that have been set up, and those types of things. But within this general duty I think what this Council is probably going to expect is reports on a regular basis from different divisions within the Insurance Commissioner's office that really do relate to those specific workers' compensation matters.

The next somewhat more vaguely described "duty" in Section 5 – is to establish and monitor performance standards and measurements to ensure the timeliness and accuracy of activities performed under Chapter 23. This would clearly appear to include labor and claimant concerns, self-insured employer issues and those types of things. Again, it gets back to the rulemaking process and the ability of this Council to approve rules that will be filed for public comment and then ultimately approve them for final filing. And again, as I mentioned just a minute ago, the Industrial Council can monitor the performance standards and measurements through monthly reports from the various divisions in the Insurance Commissioner's office.

Another duty is to perform all record and information gathering functions necessary to carry out the duties of this Council under the Code. Those are going to relate to the claims indexing duty and the safety initiatives study every two years. So this just makes it clear that the duty to gather the information obviously goes along with the duty to perform those particular functions.

And then there is a "catchall" – perform all other duties as specifically provided in Chapter 23, and other duties incidental to the specifically defined duty. So we wanted to go through Chapter 23 and try to find all of those other things that are mentioned. The first one is the duty to request, gather and maintain information regarding employers from the Tax Commission and from the Division of Unemployment Compensation for the purposes of carrying out Chapter 23; and also the duty to receive and maintain insurance policy information or insured status regarding employers, and information about officers, directors and owners of employers. So the Industrial Council and the Insurance Commission are charged with receiving and maintaining insurance policy information as well as information relating to the insured or uninsured status of employers, as well as information relating to officers and directors and ten percent or more owners of each employer.

Under the new privatized system we want to maintain this information for the purposes of monitoring employers to make sure they are maintaining mandatory coverage and that we are taking appropriate action against them – that [we] the Insurance Commissioner is taking appropriate action against employers when they are not covered. This is going to be information that the Insurance Commissioner has and it will be appropriate to have monthly reports or reports as frequently as this Council wants them on the status of legal actions against uninsured employers – efforts we are making to collect money from employers that owe money to the Old Fund or the uninsured employer fund and things of that nature.

Another duty that is in Chapter 23 is all regulatory, oversight and document gathering authority that has been granted to the Workers' Compensation Commission pursuant to §23-2-9, which is the section of Chapter 23 that pertains to the self-insured program. So clearly this Council has a fairly specific role, and a meaningful role, I think in the regulation of self-insureds. That is not insurance. So it isn't something that the Insurance Commissioner regulates. We don't regulate self-insured entities. But this Council I think is clearly supposed to have a role in that.

There will be a Self-Insured Unit within the Insurance Commissioner's office. It would be appropriate I think for that unit to make monthly reports or again reports as frequently as this Council would want them so that this Council can know what's going on with that, can weigh in, comment, direct the unit as it appears appropriate, and may want to be involved in specific issues relating to a specific employer – should an employer be granted self-insured status or not, or should self-insured status be withdrawn if it's appropriate?

Another specific duty relates to the Chief Administrative Law Judge. It is in §23-5-8(b). It relates to removal for cause of the Chief Administrative Law Judge. Other duties that might. . .I guess by way of summing up other duties that might generally be appropriate to confer upon the Industrial Council. I've already mentioned these primarily – critical self-insured employer decisions, the viability of certain funds. As we talked about in the first educational meeting, there are a number of funds that were established by Senate Bill 1004 and it certainly appears

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appropriate for this Council to want to hear about the status of those funds; the status of collection activities for the Old Fund; what's happening with the uninsured employer fund because I think everybody shares a lot of concern about that; for this Council to weigh in on how those things are being handled.

Employer and collection issues – again, making sure that employers are providing coverage for workers' compensation, to make sure that employers that owe money are being pursued for that money. And I think those would be periodic reports from various divisions of the Insurance Commissioner's office.

Another thing that I don't think I have mentioned is medical issues. As everybody knows, workers' compensation has a significant medical aspect to it because, of course, the goal is to make sure that injured workers receive proper medical and rehabilitative care and that they are returning to work as promptly as possible and things of that nature. The Industrial Council. . .it would appear appropriate for it to take an active role in making sure that the medical standards and provisions that are included in some laws and some rules that relate to workers' compensation are up to date. That they are conducive to making sure people get the treatment they need and get back to work as quickly as possible. So that appears to be a specific workers' compensation issue that this Council would want to be involved in. Again, a lot of this I think would be handled through the rulemaking process. And that's it for putting a little bit more definition around the role of the Industrial Council.

I wanted to run through quickly the rulemaking process which, since it's exempt, is pretty quick to go through, but just so everyone will have some familiarity with it. The first step is basically that this Council would give permission to the Insurance Commissioner to file a rule for public comment. And what that would involve is that the Insurance Commissioner presenting a rule to the Industrial Council. They would have an opportunity to ask questions and make sure that they understand and are comfortable with the rule. They would then vote on approving the rule for filing in the *State Register* with the Secretary of State's Office and it would go out for a period of public comment. The rule on rules say that you can either have a public comment period or a public hearing or both. So I guess that's a decision that the Industrial Council would need to make on exactly how it wants to do its rulemaking. The Board of Managers has had a public hearing and they have I think leaned toward providing a lot of notice and trying to get stakeholders involved. I think their experience has been that that has worked very well for them. The next step is, of course, you go through the public comment period and you have the public hearing, if that's the way the Council wants to proceed. Public comment is received and then the Insurance Commissioner would consider those comments and come back to the Board with perhaps amendments. Often people make very good comments. At least it's been my experience with our own rules, and we often do change rules in response to public comments. The Board would then consider any possible changes and ultimately determine whether that rule should be final filed, which is the final action taken with regard to making the rule effective. So that's kind of a brief review of the rulemaking process. And again at the next meeting the first rule would be the Procedural Rule for the operating of this Council. So that's the end of my presentation. If anyone has any questions I'm happy to try to answer them.

Vice-Chairman Dean: Questions? Walter. . .

Mr. Pellish: A couple of comments rather than questions. I think that is a great presentation. It seems to me that as a Council we can do everything in our power to make sure that the system works well and works better – the administrative part of it. Make sure that claimants are handled properly; that they get paid when they should and not get paid when they shouldn't; and that we hold employers responsible for participating the way they're supposed to in this program. But the other thing that I think we can have a major impact with, based on what I have experienced in industry, is that there is a direct relationship between safety and workers' compensation. It seems to me that we can find a way to take a more proactive role in this area so that we can reduce workers' compensation claims and costs by taking a proactive role in promoting safety. I guess what I am getting to is this two year thing. In my mind, looking at it right now, we should be doing something much more frequently than two years. I think that's the way that you help create the better system.

Vice-Chairman Dean: Any other questions Mr. Pellish?

Mr. Pellish: No sir.

Vice-Chairman Dean: Questions from any of the rest of the Council?

Speaker Robert S. Kiss: I have one question along that line. The safety initiative programs that the Board of Managers is already operating under, do those transfer also to this Council to oversee and administer those programs? Or who ultimately is going to be responsible for administering those? I should know that answer. I just don't recall.

Ms. Pickens: Well, I should too. And I apologize. I don't.

Speaker Kiss: That is something that would be helpful because. . .I mean that's something that obviously I think the Legislature agrees with you on. One of the major issues that we've struggled with is the lack of safety initiatives which then started to ramp up over the last several years, and those were previously I think under the jurisdiction and control of the Board of Managers. And I am assuming those would transfer here. If not, where would they transfer to and what would be this Council's interaction with that authority? But I think those things do, under the statute, pass now to the Industrial Council. It would be helpful at the next meeting to have an answer to that question.

Ms. Pickens: We definitely will.

Vice-Chairman Dean: Any other questions from the Council? Okay, if there are no other questions we will move on. Judge Leach would you like to give a presentation of the Office of the Judges?

Office of Judges Presentation – Timothy G. Leach, Chief Administrative Law Judge

Judge Timothy G. Leach: Commissioner and members of the Council, Mr. Speaker, Senator, I wanted to identify the contents of the rather large package which I've passed out to you today and assure you that I will not be going through it page per page. The blue binder is my report to the Board of Managers, which is being mailed out today so you have an advance copy. I indicated at our last introductory meeting that I would send you copies of that because I will be reporting to you in whatever format and manner that you wish, so I am giving you some of these monthly reports. Attached with that is an orange binder. That is a workshop that we are conducting four places around the State starting Friday. I invite you to attend if you could. I thought you might want to have the handout of the workshop just for your general information purposes. It is a power point presentation. Those are power point slides, but we do have some attachments including a copy of our Procedural Rule. I will not be talking about that at this meeting. That is just a courtesy presentation too. Then you have a little two-page color arrow chart. This I needed to give you in response to Mr. Pellish's question about our pending caseload. I am going to walk you through a flow chart very briefly of the process of a claim at the Office of Judges. And then the final handout is a three-page rule. We've heard Ms. Pickens express the rulemaking process. The Office of Judges has two rules and only two rules. We have a very large 30 some pages rule that is called our Procedural Rule for how a protest is handled, received, processed and resolved at the Office of Judges – rules of evidence, if you will, for lawyers. And then we have this very brief rule – a time standard rule, 93CSR2, which sets the time limits that we have to dispose of or resolve any case when it comes in. We have a clock that begins to run the day we receive the piece of paper starting a case in our office and that clock does not stop until that case is decided. . .in so many days. I'll go into a little more detail later. It depends on the complexity of the issue and upon the urgency of the issue. For instance, our very shortest time standard is a treatment denial. An injured worker is seeking treatment, surgery or something of that nature and it is denied by the Workers' Compensation Commission or by the self-insured employer. He has no means of paying for that treatment. His health will deteriorate if he does not have the treatment. So you do not want a long, drawn out legal process to resolve that. So our time standard for a treatment denial is 120 days from when we receive it – four months to receive the protest, get it set up in our system, receive the evidence and arguments that the parties wish to file about whether the treatment should be granted or denied, and then get a decision out that includes findings of fact and conclusions of law. That's our very quickest time standard. A much more complex issue on the other end of the scale is permanent total disability – granted or denied. That's the big "kahuna" of workers' compensation – benefits for the rest of your life. It used to be now until age 70 – monthly guaranteed benefits, very expensive. Actuaries say \$350,000.00 to \$500,000.00 per case charged to the Old Fund or to the employer. So, very important to the injured worker; very important to the employer and the Workers' Compensation Commission, and very, very complex legal issues; lots of medical evidence; lots of testimony; lots of vocational evidence. The time standard on that is something like 450 days. It takes a long time to resolve that kind of case. Fatals, dependents are nearly that long. But we have a triage, if you will, of issues that go from

the simplest and most urgent to get done to the longer more important, "let's get it done right, take our time type of issues." So that is what the time standard rule sets out.

Now to get to Mr. Pellish's question, which if I may paraphrase. Why does Judge Leach have 17,700 cases pending before him? There is a simple answer. It involves math. It involves this rule. I suspect the simple answer will provoke questions. May I first refer you to the blue binder? Turning to page two of the blue binder at the top you will see that our pending caseload is now down to 15,534. The 17,700 and some odd number that Mr. Pellish asked me about was the sample report that I gave to you at our introductory meeting a couple of weeks ago, and that report was dated. It was two or three months old. We've been working on the backlog. Now to explain how we get to that figure. First of all, historically when the Office of Judges was created that number was over 30,000. It has now worked down to 15,000 and some odd protests. You should recall that I mentioned to you that we get approximately 2,000 new cases per month. That figure, again, if you want to refer to your blue binder. On page one the first thing we report is how many protests we received last month and how many protests in column (A) we've had for the year-to-date. That is down from 2,000 a month to about 1,650 or so a year, which works out to about 1,650 a month. It's a low trend right now. However, in the two years before that it was up over 2,000 a month. Now what happens is we don't resolve a case the day it comes in obviously. I just explained the time standard runs from between 120 days to 450 days. So when you start this process out you need think of it. . .to view it sort of – and no disrespect meant to any person that is involved in this system – as an assembly line or a conveyor belt. That's the best way to view my system. So pick up your diagram of your assembly line and the first arrow here says, "protests received and acknowledged in a timeframe order issued." What we do is we get a piece of paper, a letter that says, "I protest the Workers' Compensation Commission's Order of July 15 which denied my treatment." And then we have to go and set up a claim file and a computer case file to track that protest and start our clock running. So that process – we set up a protest file; we put it into the computer; we send out an acknowledgement to the all the parties and that would include an employer who is not aware that the claimant protested. So we send out a notice saying, "We received a protest from the claimant or we received a protest from the employer." And that acknowledgement says what issue is being protested and it also says how long you have to get your evidence to us. It sets a timeframe which runs from our very shortest to 45 days to our longest which is 180 days. You have that long to get evidence to us.

Then the next part of the process – the case then moves along the assembly line and the timeframe is running, the second arrow. Again, that timeframe may last from as short as 45 days to as long 180 days, and there is a joker in the deck. The rule provides that if you cannot get your evidence in by the 45 days or the 180 days or whatever the timeframe is and if you have a good excuse, we have to give you more time. So 50% of those timeframes end up getting extended even longer than what they are now. So that moves along until we get to the end of the timeframe. And during that timeframe we receive and put into your claim file whatever evidence you file with us. We conduct hearings. We receive motions and rule on them. This is the process of developing the case to get it ready to where it is ripe for a decision. Then we move to the third step of the process. The timeframe has ended and I have a

paralegal unit that reviews the file to make sure there are no outstanding motions; we haven't cut somebody off when they were asking for more time; that all the evidence has been gathered and we've received it all. And during that process nothing really is going on except we are reviewing it. And then at the end of that arrow we assign it to a Law Judge who then starts the process of reviewing all the evidence, reviewing the law that is involved, reviewing the arguments of the parties, and issuing a written decision making findings, facts and inclusions of law, which it runs anywhere from three or four pages to as long as 15 or 18 pages. And then that decision gets sent to typing and it is proofed and corrected and eventually it's mailed out, and then the conveyor belt stops. We've finished with the case. But the problem is, while we are doing that one case 2,000 a month were getting put on the conveyor belt.

All right, now if you'll turn to the second page. This breaks down numbers. Now this is the same timeline I gave you in a basic arrow format. That first arrow we averaged 7.96 days in acknowledging the protest from when it comes in to us until we get that timeframe order out. Then you go into the second time period, which is the timeframe. Now you will see a bunch of orange lines there and they vary from 45 down to this 180/360 depending upon the type of issue – the complexity of the issue. At the bottom of the page in the bold, I've actually listed all of the different timeframes we have and what section of that rule I gave you that falls in. So this is all set by rule – how long you have. But bear in mind the point I made to you. In 50% of these cases we give the parties even more time than that because they say, "Judge Leach, I can't be ready. I can't get the doctor's exam scheduled for my examination to give you the evidence in time for your timeframe when it ends. So I need 60 more days, or I need 90 more days." So 50% of these cases we end up giving more time than what is indicated by the rule itself. Then we go to the third part. The third part is where we are reviewing the case to make sure everything is in and before us and that we are ready to assign it to a Judge. That is averaging 61.96 days. That number is way up for a reason I'll explain to you in just a second. And then the third part – the blue part – is the decisions. Now our rule provides that we have to get "X" percent out in 30 days from assignment to the Judge, "Y" percent in 60 days, and all of them out within 90 days. We hit the 90 day mark – that's one of the reports I gave to the Board of Managers – 98.6% of the time. We do 18,000 or so decisions a year and we hit that mark 98.6%. It isn't going to get much better than that. I work at it, but I don't think it's ever going to be 100% compliance. You are always going to have one or two that somehow fall through the cracks. So, our average for decision is only 40 days, 39.91 days. It has been shorter than that, but our friends here from the Legislature have made our jobs more complicated by passing a bunch of new laws which our friends out in the audience who represent employers and claimants haven't figured out what they mean. And our issues are a lot more complicated and it takes a little longer for our Judges to deal with a complicated issue than with something we've been doing for 10 or 12 years. So this number is up a little bit. Well, one time we had that number down to 28 days for an average decision from when we have it assigned to a Judge.

Now, here's the math. Here's the simple answer to Mr. Pellish's question. If you look at that top red line, our average case is pending before us for 328 days. That's 11 months. We get 1,650 cases in a month. We can't take any off the conveyor belt until they've gone through the system. The 1,650 keep piling on the conveyor belt. Now once they're coming on the

conveyor belt and they're coming off the conveyor belt, we can keep up with what's coming on. But we've got that conveyor belt that's 11 months long filled with cases. You multiply 1,650 by 11 and you get 17,000 and some cases. We're down to 15,000. So we've kind of moved the end of the conveyor belt a little bit towards the beginning. This conveyor belt is longer now than it ever has been before because I got 29,000 protests right after Senate Bill 2013 passed in that fiscal year. We are set up for 24,000. We had some options. We could hire some more people but we knew that it would take months to get them trained. We knew that if that was not a new historical level of protests, at the end we would have to be laying off people. Or we could just take the staff that are made for 24,000 and just struggle through until those 29,000 have gone through. It now looks like the right decision because the next year I was down to 19,000. So if I had hired enough staff to handle 29,000, the next year I would be dealing with 19,000. So it looks like we're making the right decision. It looks like we're working through that big spike of protests that I told you about at the last meeting. And it looks like our manageable caseload is always going to be around 15,000 – 16,000 cases. Or a complex answer. . .that was a simple math answer – 1,650 cases a month times 11 equals. . . Obviously you could say, "Well why don't you shorten your 11 months?" Well, again, if you look through this colored chart, you will see that there are four pieces there with days on it – 7.96 and then a big orange variable part – 61.96 and 39.91. If you add up the three that I am directly responsible for, it's a hundred days. But the total of cases before us is 328 days. So 228 days of that average is really outside of our control because that's when the parties on the outside are gathering their evidence and giving it to us. Now you could say, "Judge Leach, crack the whip and get that 100 days down." And I could probably take 10 or 15 or maybe even 20 days off of it. But that's not going to make a major impact on those 17,000 because 20 days is not even a month so the most you would knock the 17,000 down is by 1,650. So I'd be down around 15,000 or something. So I'm always going to have a big caseload. There is just no way around that. The only other way you could shorten that conveyor belt is by putting a squeeze on the lawyers that are presenting the cases to me and that puts the squeeze on your constituents because what you're going to hear is – Judge Leach made the thing go so darn fast I didn't have time to get my case ready. Now. . .the Legislature has offered a solution which we are implementing which is an expedited process and they've identified four specific issues that we could expedite. So we're doing that. We are making that an offer to the parties. We have a really fast track. If you want to get on the really fast track, we'll put you on there and we'll get your decision done in three months or four months or something like that. But you have to understand that your opportunity to present evidence is limited by that fast track. So if you want in, we'll let you, we'll take care of it. If you don't want in, we'll give you the full blown case development that we do now.

Mr. Pellish: Judge, what are these four. . .for expedited process?

Judge Leach: Denial of treatment; denial of the claim itself – the whole claim is not work related so it's all rejected; initial temporary total disability. I misspoke. I said four. It's those three issues only. Now the treatment is an interesting thing for us because as I said our current time standard to get it out of there is 120 days and the Legislature said, "Do it faster." So we've got a process set up that is now in place, which we think we can get it done in 100 to 105 days. It's faster than 120. I don't know if it meets the definition of expedited. . .more like 180 days.

We can certainly whack some time off of that by restricting the time that we allow for case development. If your case is ready for a decision the day you file the protest, we'll get you a decision out of there in a couple of months. Now, did I address your question?

Mr. Pellish: Tim, you did a great job of addressing part of it.

Judge Leach: I was afraid of that.

Mr. Pellish: And I think you've got a great handle on the timelines in trying to expedite things through. What's going through my mind is why are we getting so many protests?

Judge Leach: That's the thing I have no control over.

Mr. Pellish: Well, somehow I think if we could get a feel on why there are so many protests, if we could categorize them, maybe we could find a way to simplify that and then you are not going to get hit with this many protests.

Judge Leach: Sure. We've already got a start towards categorizing them. Again, boring you with this report I present, the first statistical page, which is about six pages, it says "page 1 of 11," this breaks down the type of protests – who filed it and how many I've got for each month. And then immediately following. . .12 pages after that. . .or 11 pages after that, is our year-to-date. So if you want to say, "Well how many claimant protests to treatment denials do we have?" I can give you the number right now. If you want to say, "Well how many employer protests to permanent total?" I can give you the number right now because we track that. We break it down into 30 some categories.

Mr. Pellish: I guess I am more interested to know if there is an underlying reason behind the numbers that would help you in the long run? And I have no clue.

Judge Leach: Well, here's my gut response. I was a claimant's lawyer for 25 years before I got this job. You only ask for things that you think you are entitled to. If you're turned down and there is an appeal process, you are going to take advantage of it. Will you win? That's a whole different issue. But you are going to file the protest because there is a chance you might win. Now you might get into the case and learn more about it and you are talking to your lawyer and you say, "We don't have a chance," and you end up dropping it. That happens sometimes – a couple hundred times a month in fact.

Mr. Pellish: Any maybe there are a series of things that are being denied in a certain category that shouldn't be denied to begin with. And again you are removing some stuff from the caseload. Now I have no idea.

Judge Leach: Our experience is. . .one other thing is I had a running debate with Executive Director Burton. He wanted the reversal rates for different issues, and he wanted to use it as a quality assurance thing. He wanted to know which claims adjusters were getting

reversed individually and over what issues. And my problem with that was I give out these reports and I give him a copy of every decision we issue – all 1,600 a month. He wanted me to break it out statistically. My problem was we are not second guessing the claims manager. We are not saying they did it wrong. The claims manager had a certain document or a certain doctor's report in front of them. They thought it didn't support the case. They ruled. The claimant protested and comes up with a new report from the doctor that the claims manager never saw – gives it to us and our Judge says, "Based upon this new evidence we reverse." So our decision making – and I hope that Chairman Helmick will agree – I get appealed. Our decision making does not reflect upon the quality of the claims managers' decision. It reflects the case record that was developed before. So if you got new evidence, it's not saying the first person did it wrong. It's a new case. It's a new presentation. So I am a little worried about trying to use any of our statistics to draw conclusions about the accuracy or the reliability of the claims adjusters' decisions. On the whole we only reverse them 20% of the time, which means that four out five times – even with new evidence – we are still saying they made the right decision with the new evidence. And on those 20% we do reverse the claims adjuster, it always has new evidence in it. So it's not like we're just saying, "Okay, if you disagree with your claims manager, we'll give you a second opinion." It's not a second opinion. It is a chance to present arguments and evidence that the claims adjuster didn't have. It's a little bit of a problem to use as a tool. And I would hope too that no one would use the reversal rate of the Administrative Law Judge as some kind of a quality tool because different arguments are made to the Board of Review that are made to us. And so we didn't have a chance to consider some of the evidence, just like the claims adjuster didn't. I just don't know how far you can go with my statistics to draw big conclusions about what's the problem with workers' comp.

Mr. Pellish: The answer may be that there is no answer. I guess my other question – is there someone in front of you in the process who could look at. . . ?

Judge Leach: Well, we're going to splinter that up even more. . . I mean. . . up until July 1, 2004, there was one person in front of me. After July 1, 2004, there became 200 and. . . how ever many self-insured employers there are plus the Workers' Compensation Commission making decisions. So you get all different kinds of decision quality from that. Then on July 1, 2008, we will have insurance companies from all over the nation making initial claims decisions. So it is going to be extremely difficult then to judge the quality of those decisions.

Commissioner Cline: But with respect to the insurance piece, as you move forward and you have more traditional claims handling practices in place and more traditionally trained claims handlers in place, I think that that should lend itself. As you get the process put into place and how that procedure works in other jurisdictions, I think we will have an opportunity to perhaps trend down some of what Judge Leach sees. Because, too, once you get to the private industry, if we find a pattern or practice of a company consistently being reversed or if there is a pattern from one adjuster, we have the regulatory ability to go in and address that. We also will be having in place market conduct where we do actually go out and review a company for their compliance and their claims handling processes. And so I think in time that should help.

Mr. Pellish: I think that is a great point.

Judge Leach: We are prepared, Commissioner and Mr. Pellish, to run our reports to break them out by employers if you want it done that way, and by carriers too once we have different carriers. We say the reversal rate of the Workers' Compensation Commission is 20%. We can tell you what the reversal rate of the self-insured community is as a whole or individually. Once we have new carriers in we can tell you what the reversal rate for State Farm is or New York Life or whoever gets into the market. Our system will track that. It's just a matter of how you want the report run.

Commissioner Cline: It's through our Complaint's Department now. I mean if we find a pattern of complaints in a certain area or a certain type of complaint, we will move to address that with a company because that tells you there is something wrong. So there is that opportunity. And then, again, the self-insured piece really came into place more in 2004. So we will have an opportunity to work with the self-insured community too if there is a consistent pattern with any particular employer.

Mr. Slater: Judge, what percent of those protests after your ruling then are appealed?

Judge Leach: Well, at one time I ran a statistic and it was about 25%. Because of all the new laws that came in, in 2003, I think it is up to 40% or 50%. . .are appealed. We are making initial determinations of what was intended by the Legislature when they changed the law very drastically and radically in 2003. And now our decisions are getting appealed to the Board of Review and our appeal levels are up. I don't think it reflects that we're doing anything differently. It is just that the law is unsettled. Until the Supreme Court rules on what the law is, we are making our best interpretation of it, then the Board of Review makes their best interpretation, and then the Supreme Court gets to say what the final ruling is. But we haven't had very many cases under the 2003 legislation end up in the Supreme Court yet. There is not much settled law. So the appeals are up.

Vice-Chairman Dean: Any other questions for Judge Leach?

Judge Leach: Now I have a couple other comments I wanted to ask your pleasure for gentlemen.

Vice-Chairman Dean: Please do.

Judge Leach: I've given you a copy today of the Board of Managers' report and I only did that because I'm just mailing it today. The Board of Managers has historically asked me to mail that report to them a week or so before the meeting as opposed to bringing it to the meeting. What is your preference? I'll be glad to set up my timeline. Secondly, on a related issue I've laid out some copies for the public. I do that for the Board of Managers' meeting. These are public meetings. The public attends. Again, it's a report. . .it will be a report to you. What is

your pleasure? Any idea if you want me to bring 20, 30, 35 copies. How do you want to handle that because these are your meetings? I don't have to have an answer. You can let me know something later, but I was just wondering about. . .

Mr. Pellish: On your first question, I can tell you I would prefer to have in advance. . .if we could do our own reading and analysis and come here prepared.

Judge Leach: The cross examination is more effective.

Mr. Pellish: We're from the government. We're here to help.

Vice-Chairman Dean: But I think we would all like to see in advance. . .

Judge Leach: It depends on when we. . .how far you can get them in advance kind of depends on when we do these meetings. My statistics cannot be compiled until the end of September and the first and the second were Saturday and Sunday, so I put this report together Monday from statistics. And then if the meeting. . .as it was Wednesday. . .that's going to be a tight schedule. If the meeting is the second week of the month, it's no problem getting it to you early. So it just kind of depends. But I will do both. I'll mail them to you and I will also. . .in fact I think I have everybody's e-mail. I can e-mail the body of the report. I can't e-mail the statistical attachments, but I'll work something out.

Dan Marshall: Judge, is this an annual report?

Judge Leach: No. It's a monthly report. The Board of Managers' meets monthly. The Industrial Council is required by statute to meet at least quarterly – once every three months. I don't know how frequently you are going to meet. But whenever you want the report. . .the report I prepare is compiled monthly and it contains the last month's numbers plus the year-to-date numbers from January to the present. It comes in two formats.

Vice-Chairman Dean: Any other questions for Judge Leach?

Judge Leach: Two other issues to raise. . .first of all, the statute that moved us to the Insurance Commission's umbrella said that the Insurance Commissioner had authority to assign us additional duties. We have agreed with the Insurance Commissioner to conduct – or we are in the process of agreeing – that we will conduct some of their third party bad faith complaints. They don't know and we don't know how many hearings that's going to require. I'll get some judges and they are going to give some training and we are going to do that. . .serve that function for them in addition to our statutory handling of claims. I did want to call your attention because there was an article in yesterday's paper that said since the Bill passed this spring the number of complaints had gone up to 83 from the previous. . .of 29 the year before. I may have volunteered for more than I expected. I am sure that the negotiations are all in good faith.

And finally I wanted to echo something that Mary Jane Pickens said about the claims index. I am working on a transition team, working with the claims index. I also report monthly to the State Bar's Workers' Compensation Committee of Lawyers and we had a meeting last week and I indicated where we stood in the claims index, what the thinking process was, and it caused some disturbance with the Bar community. And so they were raising lots of questions and I said, "Well this index belongs to the Industrial Council and you should talk to the Industrial Council about what you think should be on there." So whether you wish to hear any comments from the members of the Bar who are present today or whether you want to put this as a special agenda item at our next meeting, I think you ought to address or at least hear the concerns about the claims index. We are trying to be as fair as we can in our transition team. We are trying to relay the outside people's positions to those committees and those transition teams, but they may want a more direct voice – is what I'm hearing. So that has to be set up and running and there is a lot of technology involved by January 1. You are on a short timeline to decide what this index is going to look like and how it is going to be comprised. That is all I have to report to the Council. Any other questions?

Mr. Slater: I've got one. I'm not sure actually who to address it to. You mentioned that the third party bad faith claims went up. How does that happen? That was partly the intent of the legislation was not to try to . . .

Speaker Kiss: The Commission may have a better response to this. . .but that's the remedy now. In the past there was a more profitable remedy to pursue. Now your remedy is to go to a third party bad faith complaint through the Commission.

Commissioner Cline: During this same period last. . .starting from July 8 through earlier this week. . .the same time period last year we had 29 complaints filed by a third party. We've got 83, and now there is a whole new process in place that we have to follow and go through. For all of us as citizens it's just more economical for us to rely upon the Office of Judges to do those hearings as opposed to going out and hiring other people to do it.

Vice-Chairman Dean: Any other questions?

Mr. Pellish: It seems to me that when you move down the road, and you had commented about being able to observe employers and trends and that sort of thing, I think we can do the same thing with this.

Commissioner Cline: Oh, clearly. I think that we've seen a trend on the part of one concern and that gives us the ability to address that situation. As the Speaker said, we weren't seeing them before to the same extent because there was another method. . .I mean they were going through the court system as opposed to us.

Vice-Chairman Dean: Any other questions or comments?

Mr. Pellish: My other comment would be if the Judge is recommending that we look at this index – and that's what I thought I heard you say was look at the background – then we ought to do so.

Judge Leach: Yes. I'm not in any way second guessing the work that the transition team is doing so far. I'm just reporting that there is some outside community response or some worries about what they are hearing. And so I suggested to them that this public meeting might be the place to raise those concerns, but it is not on the agenda this month I understand.

Mr. Pellish: Perhaps it ought to be on next month's.

Vice-Chairman Dean: Is there a motion that you want it on next month's?

Mr. Pellish: I so move.

Mr. Marshall: I'll second it.

Vice-Chairman Dean: A motion has been made and seconded that it will be on the agenda for next month and we will review it. Any questions on the motion? All in favor signify by saying "aye." All opposed? The "aye's" have it.

Judge Leach: Thank you gentlemen.

Mr. Pellish: Judge, just one more question. What are the dates of the workshops? Is it in here somewhere?

Judge Leach: It is at the Embassy Suites and that is. . .thank you Judge Drescher. . .the first one is at the Embassy Suites. The fourth one is October 25. That is a Tuesday at the Ramada and the third one is at the Marriott in Charleston on October 20, which is a Thursday. So maybe I ought to read them in date order. Friday, October 7; Thursday, October 13; Thursday October 20; and Tuesday, October 25 – four places. I made this report yesterday and I forgot I put that in there.

Vice-Chairman Dean: Thank you. Judge Helmick, would you like to give the presentation for the Board of Review?

Board of Review Presentation – Judge Rita Hedrick-Helmick

Judge Rita Hedrick-Helmick: Good morning. We came into being under the Legislature's 2003 amendments pursuant to West Virginia Code §23-5-11. The old Appeal Board was abolished and the new Board of Review was created. The Board consists of three members. You met my two colleagues at the last meeting when we had to jump and run because of hearings. We were sworn in and our commissions actually started February 1, 2004. We are the reviewing appellate body to which cases are appealed from the Office of Judges. Our primary duty is to apply the law to the facts of each case and determine whether error has been made below. We decide our cases by majority vote with dissents noted. The Board of Review can affirm, reverse or remand the Office of Judges' final decision – only a final decision. We can't do anything with interlocutory orders. If a claimant or an employer or the Commissioner is dissatisfied with a decision they get from us, they may appeal to the Supreme Court of Appeals.

We gave you a folder that better defines our duties and our role in this process. You will find enclosed a copy of the Board of Review's rules of practice and procedures as well as a copy of our processes. Our latest effective date is currently December 31, 2004. However, we are in the process of updating our rules. But since we are at the tail end of the process, the cases that we are currently deciding must be decided under these current rules. We don't anticipate seeing cases that will be decided under the new rules until mid 2006 and our new rules will be finalized and up and running in full force and in effect by then.

We do have a website and our address is included on the index page. It is a pretty good reference for what we do. Right now we are under, of course, the Workers' Compensation Commission web page. But when the transition is complete we will be linked to the Insurance Commission.

We generate statistical reports quarterly and monthly. Copies are included at the back of your folder. The easiest one to define the cases before us is the Yearly Disposition Report. It is far easier to read and understand than the Quarterly Report. And if you, as members of the Council, decide that you would like a different format or different data, let us know and we will be happy to comply. I have nothing else to report unless you have questions.

Vice-Chairman Dean: Questions of Judge Helmick? You get off easy.

Judge Helmick: Thank you. Like I told you the last time, we would be more than happy for you to come and visit us at any time. You are welcome.

Questions and Answers

Vice-Chairman Dean: The agenda calls for questions and answers now. I am sure people have questions. Does the Council have questions or anything for Commissioner Cline?

Commissioner Cline: If I may, I would like to make just a couple of comments. First of all, we moved the meeting to the Civic Center because it has been our understanding that the Board of Managers generally generates a lot of attendance. We are happy to host the meeting at the Insurance Commission. I think we could accommodate this crowd. I would also like to thank Margaret Rice for stepping up and helping us organize today and she has been the recorder for the Board of Managers for four years and she has graciously agreed to take on that role for the Industrial Council. We are appreciative of that. So, we can either continue to rent a room here and Margaret has agreed to take care of those logistics for us, or we can go back to the Insurance Commission.

Mr. Pellish: I guess we've got to take guidance from you in that respect.

Commissioner Cline: I guess – erring on the side of caution – maybe we ought to for the next couple of times move to the Civic Center to see what kind of interest is generated so that we are sure that we are able to accommodate everyone. I would rather err on that side than not having enough room for people.

Mr. Marshall: That makes sense.

Commissioner Cline: With respect to the claims indexing issue, what I will do is. . .we do have a transition team that is comprised of employees from the current Workers' Compensation Commission, and the Insurance Commission has been working through the way it is laid out in the legislation. They have not finalized or given me any final report or recommendation. I will ask them to speed that up. When they have given me a final recommendation with their pros and cons on how they think that should proceed we will share that with you prior to the meeting so that you can be more fully prepared to discuss it and then that will give you the opportunity to also hear from the public on their thoughts and their comments.

I would also just like to point out – bear with us because this is all a learning process for us as well. Again, I think we have a lot of opportunity here to make a lot of positive inroads with respect to the whole process.

Mr. Pellish: It looks to me like you are making a tremendous amount of progress in the transition and you're on a fast curve.

Commissioner Cline: Oh, we are on a really fast curve. There are several people in the audience that have put a lot of effort forward to make this all work. And I do know that Governor Manchin appreciates your role and your willingness to serve. I look forward to continuing on.

I know that previously we discussed having meetings around the Legislative Interim Committee time. November interims are schedule for November 13, 14 and 15, which would mean the 16th of November would be a Wednesday.

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Mr. Pellish: And that would give Judge Leach a little time to . . .

Commissioner Cline: That would give him two weeks to get his report. That will give the transition team working on claims indexing a little bit of time to make sure that they can wrap up their work and give us a final recommendation as well.

Charles Bayless: This is Charlie. I have. . .unfortunately I am free almost all week, but Wednesday and Thursday I am going to be out of town, the 16th and 17th. I am free Monday, Tuesday, Friday. . .

Judge Leach: Commissioner, I think the interims are generally over by Tuesday morning.

Commissioner Cline: Well, no, the Joint Committee which the Speaker is involved with. . .I'm thinking Senator Minear as well and perhaps Senator McCabe. . .

Vice-Chairman Dean: Is there a better date than the 16th of November?

Mr. Slater: I am going to be out of town in Houston that Monday and Tuesday of that week.

Commissioner Cline: I know that that was the recommendation from the. . .the Speaker is in Beckley but works in Charleston. Senator McCabe is here. Senator Minear is the one that will have to travel and she is from Tucker County and Delegate Craig comes from Huntington.

Mr. Slater: What about. . .that doesn't help Senator Minear. . .Friday the eleventh.

Commissioner Cline: Friday the eleventh is Veterans Day which is a holiday and that week I am actually out of town.

Mr. Marshall: It looks like we are back to the 15th or we are looking at Thanksgiving week.

Commissioner Cline: Unless we do it that Friday. We could check with the members of the Legislature and see if that Tuesday. . .what their interim schedule. . .I mean obviously the Speaker has ability to have input in the interim schedule so we could check with his office and see if that Tuesday would work.

Vice-Chairman Dean: Mr. Bayless, are you out of town all that week?

Mr. Bayless: I am free all day on the 14th and the 15th, but I've got to leave the night of the 15th. I am on a 5:55 p.m. Continental flight to Houston that night. So I am free all day Monday or Tuesday.

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Commissioner Cline: You are going to be in Houston?

Mr. Slater: I am going to be out. I can make arrangements to call in if I am the only one. I can do it on Wednesday. I cannot be here on that Monday or Tuesday. I could do it on Thursday.

Commissioner Cline: Would you like us to check with the members of the Legislature and see if that Tuesday works for them?

Vice-Chairman: Somebody is going to have to call. Maybe two will have to call in, but we'll make it work.

Mr. Pellish: And it it's a 1:00 or 2:00 o'clock. . .

Commissioner Cline: Just as long as we can get you back on a 5:30 flight. . .

Vice-Chairman Dean: There is no way we can do it on Thursday, the 17th? Charles, what days are you out on that week?

Mr. Bayless: I am leaving Tuesday evening late. I am free all day Tuesday. I will be out the 16th and 17th. I could be available on the 18th.

Commissioner Cline: Which is on a Friday. . .

Mr. Bayless: It's a Friday.

Commissioner Cline: I can check with them with respect to Friday the 18th and the Tuesday. Is Tuesday the only day. . .is that the day. . .? You are gone Monday and Tuesday.

Mr. Slater: Monday and Tuesday. I can be available Wednesday, Thursday or Friday.

Commissioner Cline: We will check on available times on that Tuesday and on that Friday and see what works with the members and get that information back to you.

Mr. Pellish: I have a scheduling problem on Friday, but I could change it with sufficient notice.

Commissioner Cline: Okay. We'll try to get that worked through this week then.

Vice-Chairman Dean: I would like to open now for comments from the public. Anybody in the audience have comments or questions? You have done well today.

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Vice-Chairman Dean made the motion to adjourn the meeting. The motion was seconded by Mr. Pellish and passed unanimously.

There being no further business the meeting adjourned at 11:30 a.m.