

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

NOVEMBER 18, 2005

Minutes of the meeting of the Workers' Compensation Industrial Council held on Friday, November 18, 2005, at 10:00 a.m., Charleston Civic Center, Rooms 207-209, 100 Civic Center Drive, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean, Vice-Chairman (via telephone)
Jane L. Cline, Commissioner
Dan Marshall
The Honorable Sarah Minear
The Honorable Brooks McCabe
Walter Pellish
Rick Slater

1. Call to Order

Chairman Charles Bayless called the meeting to order at 10:15 a.m.

Chairman Bayless: Today we are going to do several things. One of the things we are going to do is look at our rules. Under the law, all we're doing is approving the rules for public comment. There will be a public comment period and after the public comment period we will again look at the rules for 30 days. The first thing that will happen is that the secretary shall call the roll of the members and on the phone we have Bill Dean.

Let me state that under the rules we welcome public comment. I am a lawyer. My vision is that it is much better to hear public comment here if there are any good ideas than to see it on a brief before the Supreme Court when we mess something up. Anybody that wants to speak, you will be heard. There is a procedure. Under the rules the comments are restricted to the issue that is before the Council at the time. However, there is general public comment if you want to bring something else up. On the initial comments we would ask that when the time comes for public comment that you approach the microphone so that you can be recorded, state your name and keep your comments to what is before the Council.

2. Approval of Minutes from October 5, 2005, Meeting

Chairman Bayless: The first item before the Council is the approval of the October 5, 2005, meeting. Is there a motion for approval?

Dan Marshall made the motion to approve the minutes of the October 5, 2005, meeting. The motion was seconded by Walt Pellish and passed unanimously.

3. Presentation on Old Fund and New Fund Capitalization – Rob Alsop

Rob Alsop: Mr. Chairman, thank you. My name is Rob Alsop and I'm General Counsel for the Department of Revenue and I also serve as Governor Manchin's designee on the Provisional Board of the Employers' Mutual Insurance Company, which as you know is going to do business as BrickStreet. I also serve as his designee on. . .I guess predecessor to this body so to speak, the Board of Managers. If I may approach, I have a handout.

Chairman Bayless: Do we have any handouts for the public or is this all we have? I would think in the future it would be a good idea to bring a lot, or see if we could do it in a power point or something so that people can see as we go along.

Mr. Alsop: Yes sir. This document was actually presented to the Legislature during the past Special Session, presented by the Public Resources Advisory Group as an update for the Legislature as to where everything stands with respect to whether a bond deal will be necessary at this time and how we will be moving forward. If you recall in Senate Bill 1004 it called for two funds essentially to be set up. The Old Fund, which would include all claims and liabilities through June 30, 2005. The New Fund which will novate over to BrickStreet and will include all liabilities for July 1, 2005, and thereafter. In January it was believed – based on the numbers that were available – that a bond deal would be necessary to provide for the claims that were to be present in the Old Fund. If you will turn to the second page of the presentation, the estimate of those liabilities was at \$3.8 billion dollars which included a number of factors built into that calculation – mortality assumptions, claims management assumptions, medical escalation, valuation of fatality benefits, temporary total disability benefits, permanent partial disability and permanent total disability benefits.

On page three you can see going forward in 2006 with the tax revenues that were dedicated, the liabilities that will be paid out, which is the yellow line, we had a significant shortfall. That was the necessity for a bond deal to get an infusion of cash into the Old Fund up front. As you can see on the next page. . .

Walt Pellish: Excuse me. I have a question. Why was a 5% discount factor used?

Mr. Alsop: That had been traditionally what was used by the Workers' Compensation Commission. Actually I think it was 7.50% for a while and then it was taken down to 5% for all funds in the Workers' Compensation system.

Mr. Pellish: For any particular reason that it was reduced to 5%?

Mr. Alsop: Equal to market investment rate.

Mr. Pellish: Thank you.

Mr. Alsop: As you can see on page four with the beginning balance of \$375 million dollars in the Old Fund, which is what we believed would be available at that time. You can see that the Old Fund without bonds would have run out of money and fairly quickly. On page five the red line indicates the present value of future liabilities in the Old Fund balance. So with a \$375 million dollar initial balance and bond issue of \$1.5 million dollars you can see that the assets of the Old Fund in the year 2033 matched up with the present value and so the taxes will be able to come off at that point. That's where we were in January, 2005. Over the past several months our financial advisor did an exhaustive analysis and looked at the liabilities from Life Actuarial table, a little bit different analysis. They downloaded 20,000 claims and looked at every known claim believed to be in the Old Fund and they saw dramatic improvements over the past couple of years as far as claims management, management initiatives by the Workers' Compensation Commission as well as the law changes from Senate Bill 2013 – a dramatic impact on the performance of what will be the Old fund.

Mr. Pellish: Is there anything in particular that you could point out that would cause that dramatic of a change in a six-month period?

Mr. Alsop: The numbers that were available in January were on an actuarial study that included liabilities as of June 30, 2004. So you really had an extra year. And then on top of that through June 30, 2004, you had a year of law changes and management initiatives at the Workers' Compensation Commission. Through June 30, 2004, they started to see some downward trends there, but they were really too green to rely on significantly through the other year of study. So you really have two years of initiatives. Those trends continued and started to become reliable. Additionally since the Old Fund closed as of June 20, 2005, most known claims were available. I think we got a better picture of what was in the Old Fund at that time and I think that allowed for some of the improvements, some of the law changes from Senate Bill 2013, anything from the decrease in temporary total disability benefits. And I think in 2003 the average time for a claim turnaround was 40 days. That is down to 13 days now and there is huge cost savings as you manage your claims better over the past couple of years and it's a better job on the employer side of making sure that employers pay their premiums on time so that everything performs better.

Dan Marshall: What I'm hearing is that as a result of better and more complete data and better performance there was a decrease in the liability. But my question would be was the methodology used in evaluating the data different or was it the same methodology you used in the model? Did we change the model to get a change in the bottom line?

Mr. Alsop: No sir, absolutely not. The actuary for the Workers' Compensation Commission did a similar analysis. It's not completely final, but based on the preliminary results that actuary

saw the same thing. Actually we have three actuaries – the Legislative Actuary that they hired, Actuarial Services through PRAG and Workers' Compensation's actuary, Ernst & Young, have all seen similar things. E & Y's actuary looked at it from what is called a loss triangle. They look at the trends over the past several years and then flip those trends to continue forward and look at it. Another actuary looked at a Life Actuary model since claims are paid out over a long. . . That model – correct me if I'm wrong Commissioner – it just looks at those benefits we paid out in time and looks at certain mortality assumptions. It's just a couple of different ways of looking at the same thing, but all of the actuaries here have seen the same trends. So it's not a difference of changing a model to get a different result – absolutely not. And it's not that the liabilities have come down significantly. It's the payout pattern difference. We thought we were going to have this huge uptick in liabilities for a longer period of time and as it turns out, as a result of claims management initiatives, that payout pattern looks different over the next several years. An increase in the initial beginning balance along with the revenue streams that come in indicate that there is no need for a bond deal.

Mr. Marshall: Thank you.

Commissioner Jane Cline: It is basically the cash out the door. The actual payout is not going out as fast as it was prior to the law changes in 2003 and also with respect to the improvement of the management of the claims handling process at Workers' Compensation Commission.

Chairman Bayless: Were there any changes in any investment assumptions?

Mr. Alsop: Going forward, no. I think we used a conservative investment return so that this would be successful. As you can see on page seven, all this really shows is. . .with the higher beginning balance without the tax revenues there would still be. . .this is based on the 2004 numbers. Even with the higher balance there is still a necessity for bonds.

Mr. Marshall: Could you explain how we got two different balance assumptions?

Mr. Alsop: Sure. There is a certain amount of capital that will need to go with the new company for them to succeed, both to support the six months of liabilities that they are taking and as they carry the entire market over the next couple of years. Over the course of the year we just simply believed that we didn't have to send as much money to that entity. We're still finalizing those numbers. As we made that determination and went through this it was clear that that money would come up. So we now believe we'll have at least a \$650 million dollar balance in the Old Fund.

Mr. Marshall: It is certainly a substantial difference.

Commissioner Cline: Well part of the issue is that Workers' Compensation has traditionally done everything on a cash flow basis. The insurance industry does everything on a statutory accounting basis, so you are looking at premiums earned. You take the premium dollar and the

premium is adjusted as it is accounted for as it is earned over time, and then it relates back to the policy accident year. There is a difference in the accounting process and we really didn't have the accounting for the 2005 year because Workers' Compensation is on a government fiscal year basis. Their fiscal year ended on June 30 and generally speaking they would just now be getting their audited financial statements. That process was sped up so that we could have a more detailed analysis to move forward with respect to making these determinations as well.

Mr. Alsop: As you can see on page eight, over the past several months we've looked at the Old Fund, the actuarial methods applied and future medical payments on a claim-by-claim basis. As I mentioned every claim was reviewed. The 50 largest claims were reviewed in detail and discussions amongst the three actuaries, including the actuary from the Insurance Commission, went through and reviewed all the numbers.

On page 10 you can see the cumulative payments for temporary total disability and permanent partial disability benefits by injury year. You can see increased claims in management initiatives, plus the law changes from year 2003 have indicated a decline in those numbers. Moving on to page 11, you can see the claims run off estimates. The yellow line indicates the estimate as of January of this year. You see the huge spike at the beginning and then the payout. And then you see three different models that moved down as to how the claims liabilities will pay out. To move through this process and to make sure that the Old Fund will be sufficient without a bond deal we were conservative and asked that everybody looking at this be conservative. So you can see the red line is significantly higher; blue lines and pink lines for our estimates on that page. The biggest differences between those going forward. . .since we know the known claims, we pretty much know how much is going to be paid out in temporary total, permanent partial and permanent total disability benefits. That bump you see between the maroon line and then the lower lines is really medical inflation. There is a fairly significant rate of medical inflation that we've assumed to make sure that the Old Fund will run off in an appropriate fashion. We think that if things go well, the economy stays okay, and the market stabilizes, that we can beat that. But to be conservative and make sure that everything succeeds, we have been conservative in our assumptions.

Chairman Bayless: What is the yellow line? The original line came off very smoothly and then the new lines came off smoothly and then a bump up. What is that bump?

Mr. Alsop: I think those bumps are the medical inflation.

Chairman Bayless: It's the inflation?

Mr. Alsop: Yes.

Chairman Bayless: Okay. I thought they were referring to the difference between the two, the inflation.

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Mr. Alsop: Page 12 just lists a number of assumptions that were built into the conservative model which we think that things will come in under, but to be safe we've used those in relying on it.

Mr. Pellish: What happens if your medical escalation is different than what you stated in these assumptions?

Mr. Alsop: If it is significantly higher than even our conservative estimate? Well, this model actually has some cushion on that. We're not taking the Old Fund down to a zero balance each year. So if there is something that doesn't happen favorably, the Old Fund can survive. The other option is . . . as a fallback position, and the Governor's Office said this, the Legislature gave \$1.5 billion dollars of bonding authority. And as it looks right now we don't think we are going to have to issue bonds. But a couple of years from now or three years from now after close monitoring if it turns out that things didn't go quite so well, we do have that ability to rectify that situation in the future. It's just at this point there is no need to borrow money if we don't think we have to. It's just not fiscally responsible in looking at it to do so.

Mr. Pellish: I want to make sure I understand what you are saying. Are you saying that at this point in time we don't see the need for any bonds?

Mr. Alsop: That is correct. The starting balance in the Old Fund of at least \$650 million dollars plus the revenue package that was put together in January calls for approximately \$230 million dollars a year from a number of sources. If that revenue stream stays intact with the Old Fund beginning balance of at least \$650 million dollars, we do not believe at this time there will be a necessity for a bond deal.

Chairman Bayless: You may want to defer to one of the two Senators, but is that bonding authority evergreened? Would we have to go back to the Legislature?

Mr. Alsop: Right now there is not a limitation on when we could go to market. But of course we have kept the Legislature through the course of this year abreast as we move forward and certainly would have discussions before the Governor would move forward on a bond deal without the Legislature. The Joint Committee on Government Finance hired an actuary and has been through this process with us, and we have had meetings throughout the course of the year with them.

Mr. Pellish: I'm just picking six months ago as an arbitrary figure, but wasn't the thought process at that time somewhere around \$6 or \$7 million dollars that was going to be needed?

Mr. Alsop: In January it was thought there may be a necessity of up to a billion dollars in bonds to get the infusion of cash early since there is going to be such a huge payout, initially thought, out of the Old Fund.

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Mr. Pellish: Okay, so it was one billion?

Mr. Alsop: Yes sir.

Mr. Pellish: Okay, thank you.

Rick Slater: Rob, what is our end of the year projection for the overall unfunded liability? We're still going to have some piece there, right?

Mr. Alsop: Oh, absolutely. Actually the ultimate number has not come down all that much. It's the actual payout pattern where we don't need the huge infusion of cash at the outset that a bond deal would necessitate. The actual ultimate unfunded liability number has not changed significantly. As I said, if the revenue package was unavailable, the Old Fund would run out of money. It would run out of money very quickly.

Mr. Slater: I think that's the important piece. I mean the public. . .all they've heard about for years is that we've got a \$4 billion dollar unfunded liability and the sky is falling. Now we're at a stage where we are going to have to issue bonds. So that decision. . .I think most here understand it. Everyone that reads the papers and gets out in the community knows that we've got this huge unfunded liability. Why do we not now have to go out to get the bonds, to get the liability paid off? It's really that matching up of revenue and expenses is where we are now to run the fund.

Mr. Alsop: Instead of having an unmanaged, unfunded liability we are now managing that unfunded liability.

Mr. Slater: And do we think then that because of the great management that is now certainly in place and the great work the Legislature has done that that unfunded liability is going to continue to dwindle as we go forward? Or will there have to be other catastrophic steps that we are going to have to take in order to take care of that?

Mr. Alsop: We think the way everything stands right now – and you never know what will happen with the law – several of the law changes have been unchallenged at our Supreme Court and they may be looking at those. What we need for this privatization to succeed is stabilization. There is going to be upticks and downticks as we move along. But what we need to do is stay committed both with the revenue package that is in place, with the law that stands right now, and move this forward. I think the solution that was provided a couple of years ago by the Legislature along with Governor Manchin's proposal in January at the Legislature and moving forward with that really gives us the ability to provide for that huge unfunded liability. But it is still out there and it is real and it still exists. That is why I'm here today to talk to you about why we thought in January there would be a billion dollar bond deal. That's why we brought our financial advisor in for the Special Session this past week to talk to the Legislature about that. It is important. It is real and it still does remain.

Mr. Slater: Thank you.

Mr. Alsop: As I've indicated on page 13, we reviewed it with Ernst & Young, Workers' Compensation Commission's actuary, along with the Legislative actuary. I think everybody is consistent. As you can see on page 14 with the beginning balance of \$650 million dollars, the tax stream is coming in. . .the revenue package. It looks like FY 2031 under the conservative model will be the last year that the revenue package would be necessary. . .what we've been told is a pessimistic view of the Old Fund and how it will run out.

Page 15 indicates we still have a lot of work to do. We can do a better job of improving our benefits delivery, our claims reporting, improved health care management. We can move forward with anti-fraud and subrogation initiatives. We think we've just hit the tip of the iceberg in making sure that if an employee gets hurt at work we can do a much better job of getting him to a doctor; if he is entitled to compensation under the statute, getting that compensation quicker; and doing a better job of rehabilitation in getting these employees better and back to work so that we have improved costs on all sides.

A point about the decision not to issue bonds – it's a great step for the State to be able to manage this unfunded liability without bond. It sometimes is a necessary tool to move forward. But as I said before, the markets will be watching and what we need to do is continue to monitor this situation closely and be responsible as we move forward. I'll answer any questions that anyone might have.

Mr. Slater: Rob, how many actuaries do we have involved in all of this? It seems there are quite a few.

Mr. Alsop: Five. We had eight actuaries on the phone at one point in time.

Mr. Slater: Could you explain to us the roles those actuaries are playing by agency? Do you have Ernst & Young as actuary to Workers' Compensation and PRAG and someone else or. . .?

Mr. Alsop: The Insurance Commission has an actuary on staff that has been reviewing all of this. The actuary that was hired by the Joint Committee on Government and Finance has also been reviewing the work that was done by Ernst & Young who is the actuary for the State through the Workers' Compensation Commission.

Commissioner Cline: Workers' Compensation had Deloitte & Touche.

Mr. Alsop: Deloitte has been a consultant through this process and some of their actuarial folks have provided some services in looking at this process.

Commissioner Cline: PRAG brought with them an actuary from Milliman, who is one of the premier coal worker issues guru, and they also had some other financial consultants with them that were involved in the privatization of Texas' compensation system. They brought people with them that have a significant amount of experience in claims management and claims handling to review Old Fund claims and also the claims handling practice that is current at Workers' Compensation Commission.

Mr. Marshall: Rob, would it be fair to say that all of these actuaries concurred with the conclusions that are in this report as far as the \$650 million dollars and the timing of the run off?

Mr. Alsop: I think they all saw things that were very consistent in the claim run off for the Old Fund. The claims run off from the actuaries has been consistent and if you plug in the \$650 million dollars with the revenue streams that go forward, that amount of revenues work on the claims payouts for those systems.

Mr. Marshall: Jane, is it accurate to say that under the accounting rules that will apply to the Old Fund that that number – \$650 million dollars – is the right number? I'm not an accountant so my area of concern is I see a difference between \$600 million dollars and \$375 million dollars which appears to be mainly the result of a change in accounting methodologies.

Commissioner Cline: It's not all a change in accounting methodologies. Part of it was in January of last year when we were moving forward. It was unknown what amount of surplus was needed to transfer to the Mutual to sustain it. When we evaluated the trends down, the amount of money that needs to transfer to the Mutual to sustain it is not as great as one might have thought it was going to be originally. And part of that is a result of all the changes we've seen in the amount of cash that is going out the door immediately as opposed to how it pays out over the long term. That was a big part of it. It was unknown the amount that was going to be needed to sustain the Mutual and make sure it was set up and was going to be viable for the long term. So that played into it as well. That left more money for the legacy and that impacts the amount that we need to make sure that the Old Fund is manageable. In addition to that, the Legislature put in place a revenue stream that will continue until the Old Fund is retired.

Mr. Slater: What is the number needed to capitalize the Mutual. . . ?

Mr. Alsop: We are still working on that. We are close. We are within a week of getting those numbers.

Mr. Slater: Do we have any idea on the estimated liabilities that are going to transfer over as well?

Mr. Alsop: Well, we think that six months worth of liabilities is going to be in the \$180 to \$200 million dollar range. We're not sure.

Mr. Pellish: Rob, how frequently will the actuaries look at these numbers?

Mr. Alsop: The Insurance Commission actually has tremendous regulatory authority over any insurance company and can require actuarial studies in a moment's notice. BrickStreet will be reporting to the Insurance Commission. I don't know if there will be a full blown actuarial study every month. It may just be every six months or a year. But they will be reporting every month on how the new company is performing and there will be frequent studies done on both the Old Fund and the New Fund as we move forward.

Commissioner Cline: Any insurance company is required to file quarterly statements with us – any insurance company doing business in West Virginia. In the case of the Physicians Mutual when the Legislature provided for the establishment of that, it provided for monthly reporting. It provides for monthly reporting on BrickStreet to us. We will continue to work very closely with them. We have an actuary on staff. We will continue to retain the services of Ernst & Young because of their long history with this. Industry is required to file an actuarial report with us with their end of the year statements, and then subsequent to that an independent CPA audited report as well. First of all it's our responsibility, but also because of the importance of this to continue to work with them and monitor them on a regular basis.

Mr. Pellish: It seems obvious to me that we've taken steps in the right direction to get this under control and you are focusing on the right kind of things. I am just having a difficult time looking at this and seeing that a short time ago. . .use your words. . ."the sky was falling," and now all of a sudden the sky isn't falling. And we really haven't had time to implement things.

Commissioner Cline: We've had significant progress in the last several years with respect to the measures that the Legislature put into place in 2003 and then the change in management. For example, industry standard is that a claim is reported within 24 hours. At Workers' Compensation claims were reported as far out as 40 days. If you don't know you have a claim, you can't begin to manage the claim and so then the potential for problems with that claim become significantly greater. The current management has improved that down to 13 days and we'll continue to improve that down to the industry standards. So that is just one example. Is it permanent total that was being paid out at 204 weeks and the benefit entitlement is 104 weeks? I mean there are all these things that have become managed, as opposed to where they were before, that have a significant impact on the amount of money that goes out the door in the first year.

Mr. Slater: The tough part with all of this – and I've been working with actuaries for many, many years – all of this is an exact science. You can certainly talk about some patterns, but really it's going to come down I think to the management of this fund – the new and old one going forward. Certainly this administration has taken bold steps from the day he stepped into office to make these reforms happen with the cooperation of the Legislature. I think we are a lot better off certainly than what we were and I think everyone is just trying to get resolved as to

those big gaps and with everyone not having the time to spend 12 hours a day on this. We're just asking these questions to make sure. Please don't take offense to our questions.

Commissioner Cline: Oh, no. The public needs to understand, to be educated. And as the Senators can tell you, we're used to many questions.

Mr. Slater: Brooks is sitting over there very quietly, so apparently he is very satisfied with where this thing is and he has been a lead architect in making all of this happen. So certainly we place a great weight on his opinion.

Commissioner Cline: Senator McCabe has been very active in lots of insurance reforms.

Senator Brooks McCabe: I will make a quick comment in answer to your question. It is not as if the numbers have changed overnight. The 2003 legislation took reform much further than anybody thought we could do and we've had now several years to implement that. The legislation kind of changed the ground rules. The administration through Workers' Compensation Commission has been rewriting all the rules since then with a good bit of interaction with the main groups. Everyone has come to the table and given up some dramatic things. When you look at this and you really peel the onion back there are very real reasons why there are differences. When these actuarial numbers were first put in place, you have to remember that the system was out of control and the actuaries had no confidence that we could change anything dramatically because we hadn't been able to for 20 years. Even passing the legislation they were very hesitant. They said, "Well, it looks good but your track record is abysmal." We had good legislation and good implementation this time and we've gone back a second time and done additional necessary things. So when you put all that together the difference between the 2004 year end numbers and the 2005 year end numbers is dramatic. And one of the reasons we are here now – and it's so late in the year to be working on this – is that we had to wait for the June 30, 2005, numbers to begin to show up these changes. The actuaries looked at that – five different actuaries – and they were never that far apart on their outcomes. Their methodologies in several cases were very different, but they came with quite similar conclusions. We have a different forecast of what it looks like going forward and we have more cash available. There are more dollars in the bank. When we started out we assumed that the Old Fund would take \$400 million dollars and the New Fund would take \$600 million dollars and now we've flopped that around the other way. We are putting more dollars into the Old Fund to absolutely assure its success and the New Fund needed dramatically less, and everyone is generally in concurrence including the folks at what will be the new company. It is dramatic. You have to wonder, did we cry wolf for no reason? That was clearly not the case. We were out of control and nobody believed really anything. Two years later and two year-end statements and audits later we are now really showing it in the numbers. PRAG has done an admirable job in really coming up with these analyses. We are in a different position and we no longer need the bond issue. We never assumed it would be a billion and a half dollar bond issue. We authorized that in case we were wrong again. We assumed it would be in the \$8 to \$9 hundred range. This summer it had dropped down to \$5 or \$6 hundred and then this fall it dropped down to zero. Again, because of the analysis and what PRAG did. They [PRAG]

actually went in and looked case by case at the existing claims that are out there and started analyzing it. They also analyzed the top 50 most expensive claims that we had to see what the range was. So these numbers really are surprisingly tight even though they are based on a variety of assumptions. But the key from my perspective is that we got eight actuaries generally agreeing and I find that remarkable, as my colleague says. These are good numbers and frankly I have to say that Rob Alsop has really done a masterful job at keeping everybody at the table, keeping us civil, and keeping us focused. Because a lot is going on and the dollars are big. As for the report that he has given, I think there is general agreement that it is accurate and no one has cooked the books. This is an example of what "we" in West Virginia can do when we put our mind to it, and let's go after a couple other problems. This is working pretty well and obviously the Insurance Commissioner. . .everybody has been at the table really working hard on this and when that happened – with the taskmaster that keeps everybody focused that Mr. Alsop has been able to do – we are showing dramatic results. I absolutely concur with what's here.

Commissioner Cline: There are other initiatives going on as well. Workers' Compensation has been much more aggressive about going after delinquent employers with respect to collecting payments that are due. There are much stronger fraud processes going on. The Legislature strengthened the language with respect to fraud. That unit actually transferred to us in July. They have been working on getting the tools and the training. We have continued that. You will see now from time to time press releases where somebody has been convicted or plead to workers' compensation fraud, and that is both on the claimant's side and the employer's side. Those initiatives are helping control the costs as well.

Senator Sarah Minear: I think one of the other advantages too that we shouldn't overlook is Greg Burton was in on the ground floor helping us draft a reform for Workers' Compensation. And then moving in as the Director he knew precisely what was needed, what our intent was and he carried it out. People weren't happy. He accepted that responsibility and I think he has done a good job and Jane walked into. . .I wouldn't have been in her shoes for anything. I guess the problems merged and with the expertise of being in at the beginning and seeing the crisis that we had and seeing what we needed to do to pull us out of it and sticking to it – we need to remember that.

Mr. Pellish: I absolutely believe from everything I've heard and read we are going in the right direction and the Commissioner is asking the right kind of questions and addressing the right kind of issues. My only point in this is that the number changes are so dramatic that I think we have to continue to focus on them to make sure that we are dealing with reality. As Senator McCabe said, I take the same amount of comfort when you get that many actuaries who are coming so close because actuaries can tell you what you want to hear or be at absolute odds with one another trying to get the business. If they were all that close, that gives me a little comfort.

Commissioner Cline: It is amazing to be in a room with them all agreeing.

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Senator Minear: I would've liked to have been there.

Chairman Bayless: Are there any more comments? Any questions from the Council? Anybody from the public?

Mr. Marshall: Having heard what I heard this morning I have a great deal of confidence in the entire program going forward and thank everyone involved for their monumental efforts in getting us where we are right now.

Mr. Alsop: I want to thank Senator McCabe for his comments. It really hasn't been me. It has been a huge group of people. The Workers' Compensation Commission has done a tremendous job. One actuary said they hit a home run as far as claims management over the past couple of years, which is a benefit of both employees and employers in this State moving forward. It hasn't been easy over the past couple of years and the past several months have been difficult. It's a huge task to get this done. But with all the hard work at the Insurance Commission, our financial advisors and consultants at Workers' Compensation Commission, the Governor's office, I've been heavily involved as have a couple others – Brian Kastick as well as Joe Martin, the Deputy Chief of Staff – we've spent a significant amount of time over the past several months. It is going to continue to take diligence, as well as the diligence of this Council, to make things work. We are off to a good start and we hope to continue that. Thank you for your time.

Chairman Bayless: Does any member of the public have any questions?

Steve White (ACT Foundation): Steve White, Director of the Affiliated Construction Trades Foundation, based in Charleston. Not to rain on the party, but to do my job representing workers and taxpayers I would just like to put a little different perspective on it. I would credit the Workers' Compensation folks for doing a better job. But I think you can focus on two major pieces to explain a lot of what is going on. It has been mentioned here, but in the priority of things this is the two biggest pieces. One clearly is the shift of the debt from companies from Workers' Compensation premium payers to taxpayers. That's the \$230 million dollar tax plan that was put together for a 30 year period of time – huge money. That is part of that shift. The other is the legislation that passed in 2003 severely cut benefits. It severely changed the cash flow situation for Workers' Compensation. They collect money. Rates were fixed. Benefits were cut. Any business model you can pretty well see the question would be how much – I don't have that number – benefits that injured workers would have gotten under the old scenario are not getting. So it was shifted to injured workers, shifted to taxpayers. Whether it was necessary, that's water over the damn so to speak and I'm not here to rehash those issues. Those are two significant fiscal pieces to this issue going forward.

I also have been troubled about the swing in numbers. It didn't just happen in this regard. It happened many times and I'm sure Senator McCabe would verify in many discussions that we've had. Getting good numbers is very hard. I would encourage you to stay on top of the

numbers. They could be swinging one way, another way. In our experience it has been a problem. Thank you for the opportunity.

Chairman Bayless: Thank you.

Mr. Slater: I would like to respond to that. I think that one of the things that you and the public can count on from this Board is that this will be a very active Board. We are going to be asking questions. We are going to get to the bottom of the numbers. We may not understand all of it, but we're going to make sure that we're not a passive Board or the five of us probably wouldn't be sitting here right now. We committed that to you and certainly to businesses and workers. Again, as the Chairman mentioned earlier, any other ideas or any other issues we would certainly hope to hear those.

Chairman Bayless: The next item on the agenda, as I mentioned earlier, under the West Virginia Procedural Rules we need to adopt rules governing the conduct of meetings. There is a proposed procedural rule and I will let Mary Jane Pickens from the legal office at the Insurance Commission go into the procedure that we have to follow to adopt this.

4. Proposed Procedural Rule – Mary Jane Pickens

Mary Jane Pickens: Thank you Mr. Chairman. We wanted to present the procedural rule. It is required by the West Virginia Open Governmental Proceedings Act and by our Administrative Procedures Act in West Virginia that a body such as the Industrial Council have procedural rules. The purpose of the proposed procedural rule that is before you today is to fulfill the requirements of those statutes and to put in place a framework for providing public notice and notice to the media of regular meetings and emergency meetings and to provide a framework for actually conducting those meetings. I am going to run through the highlights of the proposed rule. It does track very closely both the Open Governmental Proceedings Act and the Board of Managers' rule because there is a model out there. The Board of Managers already exists and we just took that rule as a model and changed it where it was appropriate to change it. This is not a brand new thing. It has been in place and working for the Board of Managers now for a few years.

Section 2 of the rule on the first page simply talks about application and enforcement. Essentially enforcement of this rule is vested with the chairperson of the Council. Any matter that is not covered by these rules is referred to the presiding officer who shall make a decision on any procedural issue as it comes up. The definitions – I'm not going to go into these other than to point out that as you go through the rule there is reference to "Members" and to "Advisory Members." Any reference to a Member is a reference to a voting Member. If it intends both voting and non-voting Members, it will say "Advisory Members and Members." So that may clear up some confusion as you go through the rule.

Mr. Slater: Mary Jane, are there set people that are Advisory Members?

Ms. Pickens: Correct.

Mr. Slater: Who are those?

Ms. Pickens: Those are the four members from the Legislature and Commissioner Cline.

Mr. Slater: Who else am I missing?

Commissioner Cline: Just the five of you have to vote.

Mr. Slater: I understand that. Senator Minear, Senator McCabe, Speaker Kiss, and who is our other member?

Ms. Pickens: Delegate Craig.

Mr. Slater: Thank you.

Ms. Pickens: Section 4 of the rule relates to meetings, rules of order; again very general information. It essentially tells how meetings are called and by whom. It sets a minimum number of meetings per year which is one per quarter, and that is also reflected in Senate Bill 1004 which created the Council. It requires advance notice to members. It also requires public notice of meetings and the contents of the public notice.

[Senator McCabe had another appointment and left the meeting.]

Section 4 also talks a little bit about handling emergency meetings. It allows for continuance of meetings to a later date and when notice is required for that continuance. It also points out that all Members – voting and Advisory Members – have the same right to participate in discussions and matters before the Council and allows for participation by telephone under certain circumstances, which is an effort to make sure that a quorum is present. Everybody recognizes that people have difficult schedules and are traveling for these meetings.

Section 5 of the rule addresses the requirements of the agenda. The Committee will follow the agenda in meetings. There is some ability I think to change items on the agenda with a vote of the Committee to rearrange the agenda if necessary and that kind of thing. The secretary can use the staff of the Commissioner, which is what we've been doing. We envision that going forward on clerical matters for preparing the agenda and getting the agenda published. There is an agenda deadline that requires any Members and Advisory Members who want a matter placed on the agenda to communicate that to the Insurance Commissioner's office by a certain date and time so that it can be included in the public notice because there are some very technical requirements for the public notice which are addressed in sub-section 5.4 of the rule.

Section 5 also allows Members and Advisory Members to continue, defer or not act on agenda items upon motion and passage of that motion.

Section 6 relates to how the meeting is opened, the call to order, the roll call and those types of things.

Section 7 relates to discussion on agenda items. It allows the presiding officer to basically control the discussion of agenda items. All Members should be recognized to speak. Remarks are supposed to be limited to the purpose that that Member was recognized. People are supposed to not be interrupted and those kinds of things. Just general decorum type of requirements. Debate is closed by the presiding officer. Closure can be reversed by a vote of three Members. If the presiding officer closes debate on an issue but the rest of the Council doesn't feel that is appropriate, that can be reversed.

Section 8 relates to motions and voting on motions. Any voting Member can make a motion for the Council to act upon any matter if the motion is germane to the matter being considered. It is very broad in terms of what types of motions can be made. It does in Section 8 prohibit voting by proxy and it requires a vote of three Members, the majority, to pass a motion. It does allow motions for reconsideration although that motion has to be made by a party that was on the prevailing side of the original matter.

Section 9 requires meetings to be open, but it provides an exception for executive session. The Council can go into executive session by invoking the authority in the Open Governmental Proceedings Act for the holding of executive sessions. No decision can be made in executive session. That is only for discussing certain matters that are not appropriate to be public, but then any vote on the matter ultimately has to be taken in the public portion of the meeting.

The subject matter for executive session. . . I won't go through it but it tracks right from the Open Governmental Proceedings Act those matters that are appropriate to be handled in executive session. Section 9 also talks generally about the public addressing the Council, but that is really more handled in Section 10.

The Chairperson can order removal of a member of the public who is being disruptive to the extent that business can't be conducted. But all citizens have a right to address the Council in Section 10. People who would like to address the Council are required to register to speak prior to the meeting and we have a sign-up sheet in the back of the room for people that are interested in doing that. Citizen time should be limited to five minutes, but it's really in the discretion of the presiding officer to increase that as appropriate. The presiding officer also has the option of limiting citizen input on some particular item to a total amount of time to control the meeting and to make sure that meetings are concluded within a reasonable amount of time. Citizen remarks are required to be germane. The presiding officer rules on germaneness. Any matter that is not on the agenda, if there is something that comes up, an affirmative vote of three members can allow citizens to raise something that was not on the agenda. Again, I think all of that is really designed to promote public comment and public input.

Section 11 allows for the establishment of subcommittees. I didn't put in the rule any particular subcommittees. This is a small Council and I think you can address that as the needs arise. The chairperson has discretion to appoint Advisory Members as well as non-voting members of subcommittees.

Section 12 relates to minutes. It requires that minutes after they are approved by the Council be made public and be available to the public. I envision us putting those on our website and whatever other mechanism that the Council may desire to make sure that those matters are public. Section 12 also has some very basic information about what is required to be included in the minutes. Section 13 just requires that records of the Council be public and refers to the Freedom of Information Act for the authority there.

That is everything that is in the Procedural Rule. If anyone has any particular questions, I am happy to address those.

Mr. Pellish: Mary Jane, I would like to comment on something and I would like to hear from the other Council members as well. In Section 4.10, if I read that correctly this kind of a meeting could take place if only two of the Council members were in this room and the others could be tied in by phone. Am I reading that correctly?

Ms. Pickens: Yes.

Mr. Pellish: I'm not comfortable with that.

Ms. Pickens: I assume you feel that it should be more.

Mr. Pellish: Yes.

Ms. Pickens: Okay.

Mr. Pellish: I think you lose a lot if you don't have face to face communications and we've all been on conference calls and distractions can be pretty easy. I'd feel much more comfortable if that were three people in this room.

Ms. Pickens: Okay. Does anybody else have any thoughts on that? That is fine.

Mr. Slater: Mary Jane, as a matter of executive session, would that be something that is on our agenda each time or is that something we can't make a decision on until the meeting itself if we would need to go into executive session for some reason? Will we know about that in advance?

Ms. Pickens: I don't know if you will always know about it in advance. I guess if a matter is on the agenda for discussion and an aspect of that requires discussion of one of these things that are recognized do not have to be done in public, then there would be a motion to go into executive session. When you come back out of executive session there could very well be a vote on the matter that was on the agenda. Does that help?

Mr. Slater: Yes, thank you.

Mr. Marshall: Mary Jane, would it be appropriate to put in form of a motion the change that Mr. Pellish suggested or do you need a motion for that?

Ms. Pickens: I think it would be fine to put that in a motion.

Mr. Marshall: Mr. Chairman, I so move.

Chairman Bayless: Is there a second?

Mr. Pellish: I'll second it.

Chairman Bayless: It has been moved and seconded that in Section 4.10 that the requirement that two Members be physically present be changed to three Members. Any discussion? All in favor signify by saying "aye." [Motion is approved.]

Ms. Pickens: Thank you.

Chairman Bayless: At this point I think we actually need a motion to publish the rules for public comment.

Mr. Pellish made the motion to publish the rules for public comment. The motion was seconded by Mr. Marshall and passed unanimously.

Chairman Bayless: Mary Jane, would you like to tell the public exactly where they can get a copy of these rules, where they will be posted, when comments are due and things like that?

Ms. Pickens: Yes. My office will take appropriate steps to publish or to file these rules with the Secretary of State's office. My understanding is that they will be available from the Secretary of State's office on their website. We will also put them as proposed rules on the Insurance Commissioner's website. That's what we do with our rules and I would assume that this would follow that same process. You can access the Insurance Commissioner's website and look at proposed rules. The next step would be for this Council to convene a Public Hearing which can be done in approximately 30 days. Once they are filed for public comment the public I believe could either respond in writing to our office or publicly at the Public Hearing. At the close of the Public Hearing, that will be the closure of public comment and then we will

consider those public comments and work with the Council and keep the interested parties involved as we go through that process, and then come back at the next meeting of the Industrial Council and present the rule again for a vote of this Council for final filing.

Senator Minear: What if there is no commentary?

Ms. Pickens: Well this is a very straightforward procedural rule. There may not be any. You are going to have the 30-day public comment period anyway. It makes sense to put an item on the agenda for Public Hearing for the rule. There may not be any comment on something as non-controversial as just a Procedural Rule.

Chairman Bayless: I don't think it is necessary to call for public comments at this meeting since everybody has at least 30 days to comment on whatever they want.

The next item on the agenda is the Status of Safety Initiatives in the law that requires that we set up a system to look at safety initiatives every so often.

5. Status of Safety Initiatives of the Board of Managers – Mary Jane Pickens

Ms. Pickens: This question was asked at the last meeting of the Council and I wasn't as prepared as I should have been at that time and didn't know this information and have it today. The question recognized that the Board of Managers had certain duties with regard to safety initiatives and the question was whether those duties would transfer to this Council. If you recall, at that meeting I had done a presentation on the duties of the Council and one of the specific duties of the Council is to study safety initiatives and report to the Joint Committee on Government Finance every two years. That subsection also requires cooperation with this Council in terms of gathering information and data and those types of things. But the question really was more towards the specific duties of the Board of Managers relating to safety and whether those will transfer. And the question is I think to some extent. . .the State will continue to share oversight and have a role in safety initiatives, but it isn't going to be the same way it was with the Board of Managers. In any private environment duties with regard to safety initiatives are going to be handled by private carriers and to some extent the regulatory body that oversees rates and generally oversees the insurance industry. Some of the duties with regard to safety initiatives are going to novate to the private sector, to the Mutual and other carriers ultimately. In addition, some of those duties are going to remain the direct responsibility of the State through the oversight of the Insurance Commissioner and the Industrial Council. But it is important to keep in mind that even though duties are going to novate to the private sector, to the private carriers, again, because the Insurance Commissioner maintains regulation and oversight of pricing, there will still be an involvement certainly of the State in those initiatives. Traditionally the Workers' Compensation Commission has used a number of different factors to promote adherence to good safety standards. Those factors are experience rating plans, return to work programs, safety credits, deductible programs, safety awareness programs and an analysis of industrial accidents and reporting on injury trends.

After privatization, the Insurance Commissioner is going to have the opportunity to impact experience rating plans used by carriers in their pricing. Normally many jurisdictions approve one common experience rating plan for insurance companies to use. Then return to work programs, deductible programs and safety and loss credits are largely a part of the insurance industry's responsibility and part of their underwriting as they underwrite different employers. But, again, as with any industry practice the Insurance Commissioner is going to have oversight and can intervene if there are any problems with the private insurance market. Those specific duties of the Board of Managers established by the Legislature or by the Bill that created this Council aren't contemplated to shift directly, as far as what the Legislature said with safety initiatives and this Council. The only specific duty is the study every two years and the preparation of the report for the Joint Committee on Government and Finance. Again, through doing that and because that is going to be an ongoing constant process gathering data and those types of things that we still need to work through, there is certainly going to be a global interest in safety initiatives and this Council is going to have an impact on that.

Chairman Bayless: This may be a question for Commissioner Cline, but one of the things that worries me. . .I'm an electric utility person and I know that industry and I've studied four or five major deregulations and something usually falls through the cracks. You know best intentions. Everybody thinks, oh, this is the way it's going to work. It gets out in the market and it doesn't work that way. What steps are in place to make sure that the safety programs. . .what if you get some insurer that says, "We'll give you a higher rate, but we're not going to worry about safety." We've got safety programs in place now. Are we pretty confident that they are not going to fall through the cracks? Then in two years we find, oh, my gosh, the safety programs have just evaporated.

Commissioner Cline: I would anticipate that the industry will be much more hands on and involved in that because it will directly relate back to the costs that they are going to incur in the claims handling process if they haven't taken appropriate safety initiatives with their insureds. It will directly impact the cost to the insurer.

Senator Minear: In all the stuff I've read somewhere, aren't there penalties if you violate or you exceed the level of safety risk that the industry is suppose to have? I mean there are other agencies checking in. . .

Commissioner Cline: There are other agencies that are directly responsible for work place safety – OSHA and the Department of Labor – and those initiatives would continue. But also industry themselves has their own safety and loss programs.

Senator Minear: It should have an impact on their premiums too.

Commissioner Cline: It would.

Senator Minear: I think the data would be easy to find.

Mr. Marshall: Mary Jane, just a procedural question. Will we be able to rely on the staff of the Insurance Commission to gather the data necessary to actually compile the report that we are required to make to the Legislature?

Ms. Pickens: Yes, I think so. Again, we need to work through the details of that, but I think we envisioned clearly working with the Council to put a system in place to gather that data.

Mr. Pellish: Mary Jane, I'm not sure how to ask this question. When I raised this issue at the last meeting I did it because it seemed as though we really didn't have to address anything with safety if we didn't want to for two years. There is a requirement that within that period you have to do it. To my way of thinking, safety in the work place really drives workers' compensation. I guess my question is do we need to adopt what was in place to make sure we can immediately begin to focus on the safety or what kind of a procedural thing can we do to put this on the front burner and keep it on the front burner?

Ms. Pickens: Well, in terms of any specific duties that the Legislature has given. . .if the Board of Managers had those specific duties the Legislature simply didn't include it within the duties for this Council. Even though the report is due every two years, it is an ongoing effort. You don't just start a couple of weeks ahead of time and prepare the report. It contemplates I think constant gathering of data so the Council is going to be aware of what is going on out there.

Mr. Pellish: I am new at this. If this thing was in place under the Board of Managers and that disappears at year-end and we don't do something to adopt what was in place, do they in fact just disappear?

Ms. Pickens: With leave of the Council, I would request that Melinda Kiss be allowed to address the Committee because I think she has got a little more background and knowledge on that particular issue than me, and I brought her as backup.

Melinda Ashworth Kiss: We've got a team effort. There are a lot of things going on. I'm trying to learn insurance and I'm a little more familiar with compensation. It doesn't go away. So that is not a concern that you should have. Basically the way I would look at this, the experience rating plan which is the main tool to promote safety and loss initiatives, and it's done through money because that's how you get everybody's attention, is still very much in place and alive. That is, it is intact now. The rates that will go in effect beginning January 1 will have an experience rating plan in it. And that means employers with a good safety record are rewarded with what would be a positive experience mod that makes them pay a little less than other people in the same employer class. People with a poor safety record are going to pay a little bit more. Those things will be in place and they will be in place always, and every workers' compensation jurisdiction that I know of in the country, they're right there. What will happen is

we have adopted NCCI as our statistical agent that is going to help assist us in the base rates that we are going to be working on and have in effect in the future. They also very frequently I think in 30 jurisdictions also come up with a uniform experience rating plan that all insurance carriers are required to use. So that will remain intact. The BrickStreet Mutual Company will still be giving I am certain – I can't imagine they would curtail that – return to work program and safety and loss credits because that is how they get people to the table. They also have a very strong, very strong Safety and Loss Department at the Mutual Company that will assist employers with their safety and loss efforts. They will go in; they will do a walk through of your work place; they will give you suggestions; they will review your safety program; they will help you in any way that they can. They also have a big safety and loss library. What we were hoping to do was to be gathering data, kind of aggregate data on what types of injuries are occurring in the work place that we could be presenting to this Council so that you can see how we are doing. Are we getting more back injuries? Are we getting less back injuries? How are the trends going? What kind of job are we doing? There are safety awareness programs and I think that is something that the Industrial Council might have an interest in. There are promotional things you can do to try to get employers to be positively on board with safety.

Mr. Pellish: You got the right answer. Thank you.

Ms. Pickens: Thank you, Melinda. I appreciate that. If there is anything else, I'll try to answer or defer again to Melinda.

Chairman Pellish: Any Council member have any questions? Anybody from the public have any comments on the safety initiatives?

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

Judge Timothy G. Leach: Good morning, Mr. Chairman and members of the Council, Senator and Commissioner. I sent you a copy of my report to the Board of Managers which I presented last week. I thought maybe to get us back on a time schedule I would just ask if anyone had any questions about the statistical data analysis, which is the first part of the report. When we deal with those questions I can move on and hit a few highlights about the narrative part of the report – the news so to speak rather than the statistics. Again, I have one more of these to present which will be next month at the Board of Managers. If things go as scheduled with the Governor's proclamation, from that point on it will be your report. We can make it look however you want and give you whatever data from the Office of Judges that you want me to track. It is just sort of an introduction for these few months. This has been the traditional format for the entire four years I've been there and I inherited it from my predecessor. The Board of Managers was satisfied with the data types. They would occasionally ask for some specific answer and I would look that information up and give it to them. But in terms of what the monthly report was it's looked this way for a long time, but we're not in concrete here. We can change it.

After the statistical and data analysis, I did make some points to the Board of Managers, which bears repeating for your information. We're comfortable with our technology transition status for January 1. We feel like the computers are working, the lights will come on when we are no longer part of Workers' Compensation Commission. We are not physically moving up on the hill. My 120 employees will be staying there. But the computers will be running a little bit differently than they did, behind the scenes. The workers won't tell any difference. We think all of that is ready to go. Also, we are getting new e-mails this weekend. We are switching over to the Insurance Commission's e-mail address. So the next documents or information which I e-mail to you will have a different sending address for me. If you reply, it will come back to me. But if you have it in an address book, you might want to make note. It will no longer be wwwcc.org. It will be a wvinsurance.gov address starting Monday. We are getting new phone systems along with or in conjunction with the Insurance Commission. The Insurance Commission's phones are going in the first week of December. Our phones are going in about a week or so after that if Verizon and all the vendors deliver on schedule. Phone systems have been historically tricky. We'll see what we see. The ones we have work until we get the new ones so there is no pressing emergency.

A couple of procedural matters – we are now doing some of the new expedited hearing process that I tried to explain to you at the last meeting – the “hurry up, the fast track” adjudication. We've had about 20 requested in the first two months. That's probably fewer than I expected, but we have an education of the public issue. I've talked with the Insurance Commission's staff and we are going to put information on our web page. It will be on their website. Also it is probably something their consumer group needs to know about so when they get calls about workers' compensation instead of just regular insurance questions they can provide that information.

I did conduct four training sessions around the State in which this was a primary topic of discussion. We had approximately 250 attendees. We did it in Morgantown. There was an eight inch snowstorm no one expected. Less than half the people arrived for their conference and then the power went out in the first two minutes of the conference and we did it by candlelight. It was a surreal experience, but 30 people probably had the seminar of their lives. We are repeating that one and trying again in Morgantown a week after the Thanksgiving holidays.

Bad faith complaints – we are sort of the designated hearing examiner now for Commissioner Cline on third party bad faith insurance settlement complaints. We've had several of those scheduled for hearings, but the nature of the beast appears to be that the hearing or the whole process – the whole complaint process – is a motivation for settling the issue with the consumer. Almost every one of them has cancelled right before the hearing. I say “almost” because as far as I know there is one going on in Fairmont as we speak. And if so, that will be our very first since we agreed to do these.

Finally, court reporter fees is a topic that I've raised to the Board of Managers and to yourselves. It is a concern to the attorneys who practice before the Office of Judges. I believe Assistant Commissioner Riley and I have worked out a process where we are going to be prepared to go on January 1 on that so that there will be just a transition of the court reporters. Instead of billing Workers' Compensation, they'll send their bills to either me or Mike Riley and we will get it to the appropriate people and get them taken care of. So for the general public I know they had some interest in that topic. I think we are on track to have that one solved also. That is all I saw the need to report to you. Mr. Chairman, I'll be happy to entertain questions.

Chairman Bayless: Does anyone on the Council have questions? Anybody from the public? The next item on the agenda is the Claims Index. As you know one of the things that has been transferred over to the Industrial Council and the Insurance Commission is the keeping of the Claims Index. It used to be quite easy when it was at Workers' Compensation. Everybody was in the same place, and now we are going to have people in a lot of different places. Judge Leach, if you would like to proceed on that presentation.

7. Claims Index – Timothy G. Leach, Chief Administrative Law Judge

Judge Leach: I have participated in several meetings of a subcommittee on this topic of the Claims Index. I have sent to you a six page document summarizing the discussions, the debates and what the thinking of the Insurance Commission has been up to the current moment. It changed on one topic very recently. With that background I thought that would save us a lot of time if I sent you the document in advance, but to highlight some of the points.

The Bill which created the Industrial Council assigned to the Industrial Council the responsibility for creating and maintaining this list of claim histories for an injured worker so that a subsequent insurer – and we are going to be in the future – we are talking more 2008 or 2010 than we are 2005 and 2006. But once we have had some history of multiple insurance carriers instead of just one insurance carrier; then if a person changes employers or if an employer changes carriers; the new carrier gets an injury claim filed against them; they need to find where the records are for any past – and let us use for an example, knee injuries. If you have a new claim for a new knee injury filed against you and you are an insurance carrier, you want to find out are there any other claims out there for this same knee because we do not want to pay compensation or insurance indemnity for the same injury that has already been compensated in some past claim. As the Chairman correctly analyzed in the past, the repository of all injury histories was the Workers' Compensation Commission. Beginning with self-insured you started to splinter that up somewhat, but the regulations required that self-insured employers report all of their injury histories to Workers' Compensation Commission, who kept an oversight database of the whole thing. As of today you can still call up Workers' Compensation, and if you have proper authority and security – or you can go on-line – you can put in a Social Security number for an injured worker and get his/her claim history. And that's the function that this index has to assume beginning January 1.

The first things we looked at were what the Bill said. The Bill indicated to us the Index was a road map, if you will, of where to go to get the actual information about the claim. The first thing that the public presented to us was we want this Index to be more than an Index. We want it to be a claim history summary for each claim so we can "one stop shop." We would go to the Insurance Commission, put in a Social Security number and see not only all the claims but what was paid, and for what, and the nature of injury, and which doctors treated, and everything you would want to know about a claim would all be there in that "one stop shop." Regretfully, the Committee I worked with decided unanimously that that was not what was intended. The Committee felt that the claim history itself would be maintained by the various insurance carriers and that this Index would just tell you which carrier has which records. The Bill goes on to say that if the insurer wants to see the claim file they can order it directly from the carrier. If they need to order a claim file from the carrier that part would not be in the Bill if they could get the claim history and claim file from the Insurance Commission. So we felt it was intended that we would sort of point the way – Workers' Compensation, BrickStreet Mutual has these 20 claims; self-insured employer "A" has this one claim, and private carrier "B" has the next three claims. If you want to look at any of those claims, here is their address; here is their contact person; here is their policy number for that claim; you go get them. That is how we resolved or think about what the function of the Index is suppose to serve.

The next issue that came to mind was who gets to look? Who gets to touch on the Index? Well at Workers' Compensation if you represent the claimant or the employer as a lawyer and you have a signed contract or permission, you can contact Workers' Compensation and they will give you all the claim information. But the Claims Index statute says it was for "insurers." It didn't say anything about "or their representatives or claimants or their representatives." If you took a very strict interpretation of the reading of the statute, this Index would only be available to insurers like BrickStreet or New York Life or whoever wants to get in touch. However, after a lot of discussion over that, the Insurance Commission's current view is that that information should be accessible to lawyers representing claimants and employers and/or insurance companies actually is what it is going to amount to. The lawyers won't be representing employers so much as they will be representing insurance companies in future litigation. It is my understanding we are going to make that information available. Now there are security problems and I tried to highlight it in the closing part of the Index summary in that a lot of lawyers will get permission, particularly claimant's lawyers. If an injured worker comes in your office – I used to be a claimant's lawyer – you get them to sign some forms; you write to Workers' Compensation; you say tell me all the claim history; and give me all the details of this claim. You look it over and you decide I can't help this guy. Or, yes, maybe I can help this guy so you sign them up to a contract. If it is all on-line, you are registering, getting from security a password, and then you are out of the case next week when you decide you don't want to do the case and some other lawyer is in there looking. So it can become an administrative nightmare for the system administrator to keep all the security. Initially until we can work out some of the security problems, we are going to have a form. The Insurance Commission will have a form and you will fill it out, have somebody sign it, send it in and then we will give you a paper list of all the

claims and who the carriers are. Now for the first year or two of this Index, it is going to be pretty simple because the answer is always going to be, "The Mutual Company has got it." Until we start piling up new injuries with new carriers, it is going to be a real simple Index.

I told you that everybody wanted a "one stop shop" where all the claim history was in the Index so they don't have to go to the actual carrier and get the information. The one item that we are on the fence about – the best way to describe it – is the body part because I gave you the example of knee injury. If a claimant's got 16 back injuries and only two previous knee injuries and you have a knee injury, you really only need the information from the previous knee injuries. You are not too interested in the old back injuries. The outside users wanted us to put a body part in the Index so it would have the claimant's name, Social Security number, carrier information, date of injury and the body part. We're on the fence about that because we see the utility of that and it would certainly prevent you from having to go and order 20 files when you only need two. So we see the value of that. But the problem is that the different Workers' Compensation Commission's self-insured employers/carriers are all going to use different language for different body parts. My knee injury examples, some carriers will call that a "lower extremity injury." Well does that mean knee or does that mean ankle or leg? You have a whole bunch of different kinds of languages. There are some international diagnosis codes that could be used, but those are fractured up into hundreds of different numbers and you are going to get really complex trying to do that. So we were afraid that if we put the Index out there and kind of certified it – this is your Index and you certify that these are all the knee injuries and someone finds out later that there was a knee injury that someone else had called a hip injury or a back injury and it cost them a lot of money that they paid that they shouldn't have paid, then they would not trust the Claims Index information. In the future what they would do is order all the claims and look for themselves and we think that is where it is going to end up anyway. So our suggestion is they should go look at all the claims to start with because we just cannot guarantee the accuracy of the data that is being sent to us by all these multiple parties.

That summarizes the issue as far as I understand it and what we are prepared to do. They are working on the IT part of this to have it ready to go. It may not be available on-line January 1. It may be a week or two or so after January 15 when there will be some technology transfers going on between Workers' Compensation and the Insurance Commission. It may be a paper Index at the very first of it. But again if somebody asks for an Index on January 2, they are still going to have access to the Claim Index at Workers' Compensation and there will not be many new injuries that came in between January 1 and January 2. At the initial onset the currentness of the Index may not be that important is what I am trying to say. It is a big topic. It is one of your responsibilities. I've done my best to summarize it in five minutes and I'll be glad to take on questions.

Mr. Pellish: I thank you for the summary you did on this. It was terrific. It was well done in terms of giving a good overview of what the problems are. If I understand this correctly, the intent of this is to give an insurer an opportunity to look at the total record of a claimant.

Judge Leach: Yes. That's the ultimate goal of the insurer. Now whether the Index is to serve that function or is it to direct them to where they can go look at the total record, that's kind of the issue.

Mr. Pellish: As it exists right now you can look at an individual's total record. Is that correct?

Judge Leach: Yes, assuming you have a claim filed against you if you are an employer or you are an attorney representing that employer or an attorney representing that injured worker and you have the documentation that you are who you are. Yes you can look at the total record for any claim – any past claim.

Mr. Pellish: Why wouldn't we want to do the same thing?

Judge Leach: We don't want to do it because of a number of reasons. It requires constant updating from the carrier to say, "I issued a check this week for two more weeks of loss time disability in the amount of. . .," and to put that into our database. The claimant changed doctors yesterday. These are daily updates that the carriers keep track of themselves and they have their own system. They would have to transmit that electronically to us. We would have to update it. We would have to have constantly changing Indexes. If you looked at it one day it would look different than if you looked at it the next week or even maybe the next day. So that is one problem. The second problem is the experience that Workers' Compensation has had with EDI from self-insureds that there is data garble when you transfer things electronically. It starts out being 20% and it ends up on the receiving end being 800%, as a wild example. The numbers that come out of the electronic transfer are not certifiably accurate so you are correcting them. We felt it was best to give a minimal pointer that you can get the actual file itself from this carrier by contacting them as opposed to saying this is our best summary of what is in that file.

Mr. Pellish: Okay. What you say makes absolute good sense. That just sounds cumbersome and burdensome. I guess where I'm headed is if Charlie Shultz is working for employer "X" and he files a claim for a back injury, is it reasonable for the insurer to be able to go somewhere – wherever that is – and see a listing of claims that Charlie has filed in the past? Whatever the awards might be; not how many weeks something has been paid or whether there is other. . .does Charlie have a history of back claims?

Judge Leach: Yes. I think that touches upon. . .the other items like what is the disability rate, percentage of disability. Those are changeable numbers. But so is the one injury type because the claim may have been filed as a neck injury and somewhere along the process the individual says this is also my lower back that got hurt the same time but it wasn't that important at the time. My neck was killing me. I told the doctor it was my neck. So the back gets added. But then how does the file show up. Is it a neck and the back is secondary so it doesn't get listed? Or is it a neck and the back and a leg and a mental health and all the other things that

can get added onto a claim? Again, if Workers' Compensation was doing that by themselves they can do that because it is their definitions and their rules and they are doing their own data. But we are receiving un-edited material from. . .in 2008 hundreds of different insurance carriers and self-insured employers all of whom decide to call this as a "back." Someone else might call it a "neck" or might call it a "neck and a back." Everyone is speaking a different language. Then they are going to be sending that information to you who has to put it on a record and someone can go and look at it. We can put it on a record, but the first time you get burned by some other carrier calling it a "back" when it's actually a "neck," then you're going to say I am going to have to order all these files. Cumbersome is the answer. It's right. I know one of the problems is that one of the rules requires that a carrier rule within 15 days of the receipt of the claim. Well you don't want to rule until you know what the history, as you just said, of the claimant in previous claims. If you contact the Insurance Commission, we'll say you have to contact BrickStreet, self-insured employer "A" and State Farm. And then you have to order from those carriers. How fast will they respond? That's problematic. So it would be quicker if there was some way for the Insurance Commission to do it and list everything. What we found was every time we would add an item to our minimum required fields then someone else would argue for another item and the list just kept going and going and you couldn't cut it off.

Chairman Bayless: What is the prevailing practice in other states? Maybe there isn't one. Should there be a rule because of the fact that carriers have to respond? Should there be a rule that if you as a carrier get a request you have to respond within three days or something like that?

Judge Leach: I don't know about other states. That kind of makes sense because there are rules that require carriers to give information when they are requested by injured parties and things of that nature. I don't know about from other companies. That makes sense. In terms of what other states do about their Claims Index, it's kind of all over the board. Not all states have a central reporting agency such as the Insurance Commission or a regulatory oversight commission. There is not a Claims Index in every state. There are some Claims Indexes in some states and some of them are more detailed than what we are proposing to do. Some of the Indexes are more detailed. I think that it depends on how injuries are reported to those oversight commissions from the carriers and what they require them to do. The statute clearly says you can order carriers to provide the data that you want. So it's your Index. You can have it the way you want. We just felt like that we were walking a tightrope if we started taking input and then just putting it out there as the gospel when in fact there is no way of verifying it or certifying it.

Mr. Marshall: Judge, aren't there also some significant cost factors involved if we increase the amount of data that we would be providing as far as having it entered and maintained and so forth?

Judge Leach: Mr. Marshall, this is all going to be electronically maintained. We are not going to rent storage files or rooms or something.

Mr. Marshall: Right.

Judge Leach: The more complex you make it the more programming is required. That is sort of a one time payment, the programming cost. I'm not sure how to answer.

Commissioner Cline: We could do a summary for you of the states that do have Claims Indexing. Ryan Sims, who is part of Mary Jane's staff, did a review of that. I believe it is around 18 states that have some form of Claims Indexing and it's in varying degrees. In trying to look at the issue and address the issue there has been a committee that's put a lot of time and effort into this and we could get you a little more detail out in the next few days.

Mr. Marshall: That would be terrific. I would like to see that. I have one other question on the Chairman's point. The statute requires a carrier to respond to a claim within a certain number of days – 15 days – and then there is a short extension period. Do you have in your regulatory power the ability to require the carriers who looked after the prior claims to respond to a request for a file within a certain number of days to enable the carrier [who the claim is against] to respond in a timely fashion. I think that is where you were going, Mr. Chairman, and I think that is a real issue.

Commissioner Cline: I do not believe we have addressed that because we are trying to determine what we are going to adopt. For example, there are other reporting requirements that we place upon a carrier and we could do that through a rule.

Chairman Bayless: Just for everybody's information, what is the timeline? Where does this rule go next? When is it finally adopted?

Judge Leach: I'm not even sure it requires a rule. It's just in a statute that we set something up.

Commissioner Cline: We adopt the procedure. The Council would adopt a procedure and then we would implement it. We may need to look at a rule to require the carrier to respond. We probably would need to address a mandatory turnaround time through a rule.

Ms. Pickens: That is possible.

Commissioner Cline: We'll look at that and get that information out through e-mail to you early next week.

Mr. Pellish: Maybe I'm looking at this the wrong way. The need for somebody to look at the Index, wouldn't that be an exception rather than a rule?

Judge Leach: I don't think it would be an exception. If your employee worked for you and you're the carrier and you've been the only carrier for this company and he worked for you for

30 years, then you don't need to look. Our employment pool kind of moves around from job to job a lot. And you have the ability after 2008 to change carriers every year if you want to. The last carrier in line is going to have to check with all the other carriers to see what histories they have. What the Index is, is a list of the claim history so you know which carriers to start checking with.

Mr. Pellish: But is an insurer going to do this for every case? Isn't some sort of reasonable suspicion of something going to be there for the insurer to want to ask about my buddy Charlie?

Commissioner Cline: I assume that where you are going is the reason 32 other states do not have a Claims Index is because the insurer is going to do their investigation up front.

Chairman Bayless: Are there any privacy laws that would prohibit the insurers from setting up their own universal database where any insurer could log on and look at Charlie Bayless and say. . .

Judge Leach: I'm not an expert on privacy laws. However, there are some national databases now but they are subscription databases. So the insurer could subscribe to those if they wish to and that's a national Index. The problem is, as I understand that database besides being a subscription service, is they only track their members. It is not a 100% database either. I think the answer to your question is "yes" insurance companies could set up something. They just haven't so far except for these subscriber services that are partially accurate.

Chairman Bayless: Let me ask sort of an out of the ordinary question. I just wonder if there is anybody from the public. . .I notice a number of attorneys in the room that represent self-insurers and claimants. Does anybody have any thoughts on this that would help us?

Henry Bowen: Mr. Chairman, my name is Henry Bowen. I have practiced workers' compensation for 29 years in West Virginia. Certainly I understand and have actually worked with Judge Leach on a subcommittee on this issue. While I understand that the Insurance Commission has so many things it has to assimilate in this transfer of regulatory authority, I would simply like to urge this Council to remember that we have a monopoly statute that remains in place. And many jurisdictions around the country don't have a statute anywhere similar to the West Virginia Workers' Compensation law. In that statute, and as a requirement of diligence both from the employer representation through TPA's and so forth, are mechanisms in which the issue of permanency in terms of disability is always a potential issue. There is a specific statutory scheme that allows for presentation of evidence on body parts that have been previously rated, definitely ascertainable impairment rated, and the law requires that that be deducted from an existing impairment rating. That is but one example of many where access to prior information is absolutely essential as a part of the diligence that is required in representing employers and individuals. A claimant's representative would need access to prior claims to know from the outset what prior awards have been granted. Certainly we have competing interests here. The statute and the whole trend the last few years have been to develop a

system where we get quick reports of injuries, quick decisions. So we have imposed on us, by a rule, responsibilities for carriers and self-administrators to act within a very short period of time. Often they will be asked to act without sufficient information. But I can tell you with respect to the litigation process which hopefully will be redefined as part of the culture. But right now we have a system where we have 50,000 plus claims presented a year; 20,000 or more of those become disputed. I believe eight to 10 to one statistically are disputed by claimants. Inevitably you need access to prior information. At a minimum we would endorse the observation from Mr. Pellish. While we certainly understand that you cannot manage an Index that has complete claims information in it – and even though I have great respect for Judge Leach's assessment of this issue – I believe that they have tried to keep it so limited following. . . understandable that that's all a carrier may need, but that is not what parties in the system need. They need quicker access to the information. At least add body part and at least add percentage of permanency awarded. If it is inaccurate, it is our responsibility to get the accurate information. We need something other than having to get 20 claims every time we get one of Mr. White's constituents of the Affiliated Construction Trade. He has got 20,000 members and any number of those members may have multiple employers under which Workers' Compensation would have different policies for these injuries right now. We can't get the information from the Commission very fast. It is going to be more difficult. The anomaly for me as a practitioner is that we've had the best opportunity in the last two years under the current administration for electronic access. While I appreciate the whole issue of trying to balance security, if we can't get the information timely then the information is of no value. It is really in a collision with the statutory requirements because the Legislature didn't take those out. Perhaps in the future they will. Maybe they'll need to modify the statute to reflect the new system. With all due respect while I appreciate very much the need for West Virginia not to be so wholly different in 2009 that carriers wouldn't want to be here. Please remember we're still required to all function under Chapter 23 and any other statutory section that has that implication, in 33 and others. Chapter 23 has been a statutory mandatory law required and administered exclusively by government since 1913. It is not reflective of what you would find in many of these other states where there is no Indexing and many of these issues aren't issues. I know that the ultimate goal for this agency would see this discipline become nothing more than another type of casualty and property. We're not there yet and unfortunately I think we need more access to more information that is currently recommended. Thank you very much.

Mr. Pellish: Mr. Bowen, you mentioned a number, and I didn't quite catch it of claims that would be disputed by a claimant of volume filed.

Mr. Bowen: It is out of the occupational disease area – occupational pneumoconiosis. I believe the data suggests protests historically about eight to one by claimants. That's historical and it's not recent data. That's historical data over the last decade. That should have been changed perhaps by changes in the law. But the issues of medical treatment, temporary total disability or as it is commonly referred to as "wage replacement," it isn't defined in the statute that way but that's how it is thought of in other issues associated with claims, once a claim is ruled jurisdictionally compensable.

Mr. Pellish: I'm still not sure that I understand what you mean by eight to one.

Mr. Bowen: Historically when decisions were entered by the Commission the overwhelming majority of protests I believe – outside of the occupational pneumoconiosis and disease area for traumatic injuries – would have been claimant protests. I hope that is not a huge exaggeration. We used to follow this with Judge Leach and his predecessor Judge Smith in terms of how many protests were being filed by which side.

Mr. Pellish: What would that number be on the employer side?

Mr. Bowen: The overwhelming majority of employer protests go to the jurisdiction of validity of claims. So that's both with respect to occupational pneumoconiosis, the non-medical proceeding and occupational disease, hearing loss and other types of cumulative trauma that fall under that occupational diseases statute. I don't have recent data nor have I seen. . . I don't know if Mr. Keener or any of the other TPA representatives in the room would have more reliable data. The last data that I am familiar with was the data that was accumulated prior to enactment of 2003 amendments to the law. So I don't even know if that data is accurate or reflective of today's experience or not.

Chairman Bayless: The law says, "Establish a method of indexing claims. . ." The Legislature could have said establish a database and they didn't. It says, "Establish a method of indexing claims. . ."

Commissioner Cline: Actually the legislation says "insurer." The insurer has the ability. But in our discussions I personally don't feel you can have information on an individual that you don't share with them or their representative. It really does just say the "insurer" is the only one entitled.

Mr. Bowen: Mr. Chairman, I would respectfully suggest there are many areas in the statute where the amendments have use of language in them that create a number of questions anyway. The Commissioner is exactly right. The way it reads you are not required to do anything but make this Index available to insurers. That is quite literally correct. So we applaud the decision that has been made to share that. I am not trying to be critical of the agency. I am just trying to say that from the stakeholders involved in workers' compensation more is needed. We understand. We cannot ask for any system that would provide detailed information. We are not asking that. We understand there is a risk of inaccurate information, but we just think it should be expanded a little more than what is included.

Commissioner Cline: Well clearly I think, too, for the period of the monopolistic period, we have an opportunity to work through some issues. We can benefit from this learning process for the next two years and that's a good thing.

Chairman Bayless: I think the two years is a real blessing because I'm a database. . . geek. That gives you two years and you can get something like a public key/private key to where you can give people the access literally to other insurers, but you've got to have the right password to get in. I know what Judge Leach is saying about what if the attorney quits, but I think that is a problem anyway and I just think you have to trust the Bar that they're not going to go snooping around. Let me ask. . . anybody else from the audience or from the public have a thought on this indexing? I think it's a real important issue, but I really agree with the Commissioner. While we are just a monopoly for two years it is going to be pretty easy and we have two years to work on that.

Commissioner Cline: We have 112 self-insureds and the monopolistic aspects, so that does give us some benefit to work through. I would suggest that this is going to be an ongoing process that we are going to have to deal with. Tammy is here. There are several people that have spent hours and hours on this subject.

Judge Leach: Mr. Pellish, let me address those numbers that Mr. Bowen seemed to have caused some confusion with. I think what he is saying is that his recollection is that out of every nine protests or appeals filed with my office, eight of them are filed by a claimant. And then you asked him what the numbers would be for employers. Well it would be one. So there was some miscommunication there. Our numbers show overall it's about three to one, not eight to one. It's about 75% claimant protests; 25% of our protests come from employers. I give you these numbers monthly. We don't break them out. We break out each type of category by claimant and employer, but we don't have a summary at the top. I was just looking at some categories. But I have run that study several times during the four years I've been Chief Judge. In fact when I first started it was about two to one; about 66% to 33%. Then with the changes in 2003 claimant protests rose and employers' protests dropped. Now it is somewhere between 75% and 80% would be my estimate for claimant protests. So about four to five, maybe three to four to one instead of eight to one.

Mr. Pellish: Let me look at a different way, different question. If you have 100 claims filed, how many of those are going to be protested by either side?

Judge Leach: We have never received numbers that we can judge that from because. . .

Mr. Pellish: Give me a guess.

Judge Leach: Well it's not fair to say that there are 50,000 claims filed a year, which I think is accurate, with the Workers' Compensation Commission or the self-insured employers. And there are 20,000 protests filed with the Office of Judges, which is also an accurate thing but we are comparing apples and oranges because each claim can have hundreds of claims management decisions and multiple protests come out of one claim. So it's not 20 out of 50 is 40% or protested. My guess is it would be somewhere in the neighborhood of 20% to 25% may

get contested and maybe lower than that. But there has never been a mechanism for challenge.

Mr. Pellish: I'll accept that number or I'll accept the 40% number. I think that was where I was going with my comment that it's the exception rather than the rule.

Judge Leach: Well 40% would be way high.

Mr. Pellish: Then 60% are not fooled with. They move through. Or if I take your 25% then 75% are flowing through. My point would be of that number in order to effectively manage it by either party – either the claimant or the employer – you need some good information. What is suggested on here to my way of thinking doesn't give that to you. This is essentially name, rank and serial number.

Judge Leach: Right. But its name, rank and serial number and he lives at 114 Maple Street in Charleston and you can go see him. So it's a little more than name, rank and serial number. It says every piece of information you want can be obtained. Every correspondence, every document, every percentage of award, every doctor's name, every check cut to that man is in the possession of the BrickStreet Mutual at Charleston, West Virginia, or self-insured company "A," depending on which claim you want to look at. Its name, rank and serial number, but it's one more than that. And the real information can be obtained from BrickStreet Mutual or whoever. Eighty-five percent of them are going to be BrickStreet Mutual for the next several years while they have the monopoly.

Mr. Pellish: That is where we are fortunate that we've got that time.

Judge Leach: The self-insured employer is going to know all the claims filed against the self-insured employer. So they just want to know what claims were filed for some other employer before the guy came to work for them.

Mr. Pellish: I guess where my thinking is headed and I may be way off base is just that for an Index to be effective for either party it ought to say – I go back to my individual – he had a history of 14 claims over the years and here's the Social Security number, etc., and 10 of those have been back related. Then it becomes useful information.

Judge Leach: Yes. As I tried to explain there is a progression of the wish list. The wish list keeps getting longer. You say it should list whether it's a back injury or a knee injury.

Mr. Pellish: No, I'm saying it ought to list whatever the claims were. And I realize that there could be a dispute as to whether the lower extremity is the knee or the thigh or . . .

Judge Leach: So you want to add body part. Mr. Bowen wants to add the percentage of disability award which was eventually rated. Was this a 5% back injury or a 20% disability back injury or whatever? So he wants to add another thing. Mr. Keener wants to add four more

items to the list because those are crucial to how he makes claims decisions. Such as, how much total dollar amount in an indemnity payment so I'll know whether that was a serious claim or not? Who was the doctor so I'll know if there were medical treatments because I know this doctor? So the list just keeps going. . .

Mr. Pellish: Your point is well made. You can run this list to infinity. What you need is some kind of basic information that allows people to make a decision as to whether they wish to pursue it further or not.

Judge Leach: I don't disagree at all. That's where to draw the line as to when we're going to stop the list.

Chairman Bayless: I really think that two years, again, is a blessing. What's going to happen in 20 years is you are going to have the Charlie Coal Company – I'll be this Charlie – and every year I've switched insurers and I've had people coming and people going. So this one person may have worked for 20 different people; person can't hold a job for some reason. I think what you are going to see then in the Index is as soon as you hit me – Charlie – and you see 16 claims with a pointer towards an insurance company it is going to be a red flag. Now if it is only one claim, it's going to be pretty easy to get. So I think the Index does provide a lot of information. If you start seeing claim, claim, claim every year. . .

Mr. Pellish: And that's what you are looking for.

Chairman Bayless: Yes. Everybody will be working together over the next couple of years, but I would look at what other states do. It is always best to really be the second or third. You never want to write the program in the first place. You want to take somebody else's and use it.

Judge Leach: I think the summary shows that there is no universal Claims Index.

Commissioner Cline: There is not.

Judge Leach: Everyone has something different.

Commissioner Cline: Ryan has put together a good bit of that information.

Senator Minear: Mr. Chairman, I agree with you. This says Claims Index and that is precisely what it is. It is more work and more time consuming to produce a good product that is useful, accessible. Once you get it set up the initial work getting this information in to set up a database for Claims Index – that's what this is. That's what we're asking for. Also on the safety initiatives that we have to report on, this would be directly tied to it. We could say, well we got this many claims according to our Index. I mean it is all tied together. Sure it is going to be more work, but we're all going to be working hard for the next couple of years and we want to do

it right. We really do. That information needs to be there. When you pull up a name and if they have 16 or 20 claims, then you are right. It's a red flag.

Commissioner Cline: Well that information will be there regardless where they've had 16 claims.

Senator Minear: But we want more than name, rank and serial number. It says, "Claims Index." We want to know how many claims this individual has had.

Commissioner Cline: That information would be there regardless.

Senator Minear: It's helpful to know – are they on permanent total disability or are they on partial disability? I mean, what is this individual costing the system now?

Chairman Bayless: I think the thing the Index will have is it will say, "Charles Bayless," and then it will say, "January 2003 Liberty Mutual," and a pointer to an Index where you can get right into Liberty Mutual. I really think as it goes along it will almost be a hyperlink that if you are authorized you will be able to click on that and probably immediately see the claim. It isn't technically that hard. But that is down the road.

Senator Minear: It's not like it needs to be done tomorrow. We have a couple of years and there are already probably basic programs out there that can be tweaked to suit our needs.

Mr. Slater: Do we feel that the Legislation allows enough flexibility for the method of this Index so there is no reason to go back and ask for clarification of the legislation or some additional piece put into that to make sure everyone understands it?

Judge Leach: It just says that the Industrial Council decides what data is in the Index. You can make it what you want.

Senator Minear: Our intent was not to. . .we need to do what we need to do to make this system work and work better.

Chairman Bayless: Do we need to make a decision today? January 1 is coming upon us and if we have a meeting in 30 days, that is going to be almost into the Christmas season. If I told you there was no meeting between now and January 1, would you say we need to make a decision today?

Commissioner Cline: I believe we can go ahead and establish the basic Claims Index. I think we have the opportunity to continue to define this because we are dealing with such a small number of people that we have to get the information from. I anticipate that it is going to be an evolving process. We will continue to get you additional information as to what the 18 states that have some form of this are doing. I think for our purposes we can go ahead and move forward with the basic Index because we only have to point to one entity and the 112 self-

insureds right now. Right now those 112 self-insured have reported all their claims to the Mutual so it is all housed there. The claims data would ultimately transfer to us. But right now they are maintaining the systems for us as we evolve through this process.

Chairman Bayless: Do we need a motion saying this is the Claims Index or are you satisfied that you have all the authority you need?

Commissioner Cline: I think we could go ahead and proceed as status quo. We could work with BrickStreet and the self-insured community to maintain status quo as we work through the issues of this problem.

Senator Minear: Do we need a motion to indicate that we will adopt a Claims Index? It's a work in process but we do want a Claims Index.

Commissioner Cline: I don't think you need a motion because the statute tells you to do that and what we can do for now is kind of work on maintaining status quo with the self-insured community and BrickStreet and have this to be an evolving process. That would meet the Claims Index requirement by our working with BrickStreet and having the self-insured community to continue to report to BrickStreet any claims. We are entering into an agreement with them on technology issues now. I think that would work for the self-insured community, and in fact work with BrickStreet and let them continue to accept that data.

Mr. Marshall: If I understand what's going on there will be a Claims Index in a timely manner as of the first of the year. And then as you furnish us more data on what is being done in other jurisdictions and so forth we may determine that we want additional information in the Index and we would then resolve that matter after making those determinations.

Commissioner Cline: I believe what we can do for now is continue to have the same information available that is available now if I can work that out with BrickStreet and I see no reason why they wouldn't cooperate on that. And then as we move forward and that information transfers to. . .I mean it's our data, but BrickStreet has their system in place now. I can work with them to let the information be reported by the self-insured community to BrickStreet. They can maintain that Index for us until we can transition into. . .I could enter into an agreement with BrickStreet to do that.

Mr. Pellish: What data is there right now?

Commissioner Cline: Tammy, can you. . .

Tammy Hypes: I'm sorry. I didn't hear the question.

Commissioner Cline: What is the data that is currently available?

Mr. Pellish: I just want to know what is available right now.

Ms. Hypes: When you go into E-Comp you have the appropriate access that you can actually go into the claims information and see the percentages, the total amount of dollars paid, medical treatment and that type of thing.

Commissioner Cline: So if I can enter into an agreement with BrickStreet, which I see no reason. . .

Mr. Pellish: Makes sense to me.

Commissioner Cline: That takes care of meeting the requirement of the statute that the Claims Index is available. Then that gives us the time to continue to work through this process as that data comes over and I move the system completely to the Insurance Commission. This is not unprecedented because I'm entering into a number of agreements with BrickStreet with respect to IT issues and needs.

Chairman Bayless: The law says every insurer shall provide information as required by the Industrial Council. Is there a need there? Is somebody likely to say, "Well, you never required anything. You never had a motion. You never passed a motion." Mr. Bowen's clients will say, "Well, I'm not going to provide it. It wasn't required by the Council. The Insurance Commissioner can't require it because it has to be the Council." Is that a possibility? I am perfectly happy if everybody says it is going to work.

Commissioner Cline: There is only one insurer for now and 112. . .

Chairman Bayless: The self-insureds. . .

Commissioner Cline: The regulatory oversight of the self-insured transfers to us on January 1.

Joann Cornell: My name is Joann Cornell and I'm with the Board of Review. The biggest problem with having an integrity system is once a claimant has filed and it's filed with a back injury or elbow or something then it goes through a litigation process. When it first comes onto the Index it will become a back injury. Then it would have to be updated each time as it went through the litigation process and the Office of Judges may say, "No, it isn't back. It's shoulder." And then when it comes to the Board of Review we say, "No, it isn't shoulder." It's back to the back. And then it goes to the Supreme Court and the Supreme Court could back it up and say, "No, it's the whole cervical spine." So that would be the problem with the update process and who has to maintain that to bring all of that up to date.

Commissioner Cline: Again, I believe I can work with BrickStreet and we can maintain status quo. As we have more time to give you the additional information you need to make a decision. . .we have time to work through that.

Senator Minear: We just need to know how many claims are made. We don't need to know if it's gone here or it's gone there or it's in the Supreme Court.

Commissioner Cline: That is what this recommendation was – how many claims the person had. That's what the transition team has been working on.

Senator Minear: Well it's up to the Council to dictate what is in the Claims Index.

Commissioner Cline: Right. We've got a team that is doing the work to make the recommendations and explain all the difficulties with the data integrity. We will continue to gather information for you. Mary Jane and I will work on an agreement with BrickStreet and the self-insured community to take care of the immediate future.

Chairman Bayless: Any more comments or questions on the Claims Index?

8. General Public Comment Period

Chairman Bayless: We now have a general public comment period if anybody has any comments on anything that they haven't raised. Mr. White. . .

Steve White (ACT Foundation): I'll be very brief. There is an issue I would like to bring to your attention for future consideration. It has to do with the timeframe in which a company must get workers' compensation coverage within the State. Currently if you are coming in from out of state and you are doing business here for more than 90 days, then you must get coverage. Less than 90 days you can bring your own coverage. It is causing some problems. That's why I'm bringing it to you. There is a very specific situation. I can give more details later. A Fayetteville contractor actually laid people off in order to avoid getting West Virginia Workers' Compensation because they had a project – building a Wal-Mart of all things. I would like to ask that we at least look at what is going in other states. I understand in Kentucky the first day you have to have coverage. I don't know whether when we go to build the market whether it will all become a moot point or not. It seems to me the 90 days is too long and it creates some problems that put our local folks at a competitive disadvantage. So I just wish to put that on your future topics if you so choose for consideration. Thank you.

Chairman Bayless: Thank you very much. Anybody else have a comment? I just have a couple of things I would ask. I think I mentioned this. From now on anybody that makes a presentation and you have a copy of it, bring 20 or 30 extra copies so that people can follow along.

I have a question, which I asked Ms. Pickens, and that is conflict of interest. What are the rules? I have a bank by the name of Northern Trust Bank that I don't even manage my money

in, but I was looking through there and found out that I own 500 shares of Arch Coal. What are the rules that we have as people up here if I happen to own – I wish I did - a million shares of Arch Coal. What are the rules on that?

Ms. Pickens: I was out yesterday on an unanticipated absence, a family matter. But while I was gone Teresa Kirk from the Ethics Commission did return a call and I talked to her a couple of days ago after you and I discussed that very issue. I noticed when I got in this morning she did return my call yesterday, but unfortunately I wasn't there and I am going to call her back. She wanted to take a few days and research the issue and then provide me with enough information that I could then share it with the Council. So we are working on that and I would be happy to schedule a time. Maybe we could conference call or however you want to handle that.

Chairman Bayless: I just don't know what the rules are and I don't want to inadvertently violate. . . I looked through the list of investments that they have. This one jumped out at me.

Senator Minear: If it's in a portfolio, you know, I have the same problem. If you are personally involved in that particular stock entity and you have a lot stock in it, it is a problem. But if you have a portfolio sometimes you don't even realize what is in that portfolio. That may shed some light.

Chairman Bayless: Right.

Mr. Slater: There will be an ethics disclosure, if you haven't received it already, that you'll get and you'll have to fill out.

9. Next Meeting

Chairman Bayless: It is now the 18th. If we have it at 30 days, we're right at the Christmas holidays. Is there any legal reason that we need to have a meeting in December? Is there any action that we need to do prior to the January 1 transition date that hasn't been done?

Commissioner Cline: The only January 1 requirement is the Claims Index. I believe we should be able to get that taken care of for you and communicate that back to you.

Senator Minear: Could we meet during Interim Session so I won't have to drive?

Commissioner Cline: I think it is December 11, 12 and 13. We tried to do that this time, Senator, but because of the Chairman and a couple other Board members. . .several of you were traveling.

Senator Minear: I understand.

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Chairman Bayless: Do we need to have a meeting in December?

Commissioner Cline: Unless something would come up that is unforeseen or unless we had a problem working this agreement out with BrickStreet, I don't foresee that to be a problem.

Mr. Slater: Any formal action. . .

Commissioner Cline: I don't think they need any formal action from us as long as we've got a plan.

Ms. Pickens: I don't think there is a problem with taking formal action. . .I don't think it's necessary. . .

Commissioner Cline: If you want to move that you ask us to explore entering into an agreement, that's fine.

Mr. Slater: I wonder if we should do something just because of the language in the statute. . .with respect to the Claims Index as prescribed by the Industrial Council. We really haven't done any of that yet other than just have general discussion about the Claims Index being taken care of in the interim period. If we could make that motion today, that kind of covers us.

Commissioner Cline: I think that's fine if you want to move that you ask us to enter into an agreement with the Self-Insured Association and BrickStreet Mutual to maintain status quo.

Mr. Slater: I so move.

Mr. Pellish: Second.

Chairman Bayless: It has been moved and seconded. Any discussion? All those in favor signify by saying "aye." Opposed? [Motion is approved.]

[There is discussion among the Council members to establish the date, time and location of the next meeting.]

Mr. Pellish: Mr. Chairman, I think since there are no pressing issues to be addressed it makes sense not to meet in December. But to keep us focused it would be wise to set a monthly schedule, and it makes sense to tie those into the Interim Sessions. That's the approach we ought to pursue.

Commissioner Cline: There are two approaches I think you could pursue. One is establishing the second Tuesday of every month or with respect to Interims they will move

around. They won't necessarily be the same week in every month. We probably won't have that Interim schedule until sometime. . .

Senator Minear: We never get the Interim schedule until a couple of months after. . .

Commissioner Cline: It will probably be sometime in March before we have the Interim schedule.

Senator Minear: We won't have it until April or first of May.

[The discussion continues on the date and time of the next meeting.]

Commissioner Cline: The next meeting will be January 10, 2006, at 10:30 a.m. I will have to find a meeting room.

Chairman Bayless: For the public, the rules that we are adopting provide that if you want to get anything on the agenda you would have to have it in a couple of weeks in advance.

Ms. Pickens: If the meeting is on January 10, 2006, it would have to be December 27, 2005, so we could get it to the Secretary of State's office for publication the following Wednesday. It would actually be published Friday, December 30, and then that would give us enough Notice prior to the meeting on the tenth.

Chairman Bayless: Is there any other matter to come before the Council?

Mr. Pellish: Just one other thing. Something like this. . .if it's possible to get it in our hands prior to coming in here, it would be very useful.

Chairman Bayless: I agree. I would also say to people from the Insurance Commission and BrickStreet, if you've got something that you are going to come in and present, put it on the website so that other people can hold of it. If it's not something that is going into Executive Session, people can see it and come in better prepared. If it is not convenient, don't do it. If you've got it, it's pretty easy to put on the website. But certainly bring them to the meeting so that everybody can see it.

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

There being no further business the meeting adjourned at 1:45 p.m.

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