

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

MARCH 24, 2006

Minutes of the meeting of the Workers' Compensation Industrial Council held on Friday, March 24, 2006, at 3:00 p.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
Jane L. Cline, Commissioner
Dan Marshall
Walter Pellish
Rick Slater

1. Call to Order

Chairman Charles Bayless called the meeting to order at 3:07 p.m.

1. Approval of Minutes

Chairman Bayless: We have the minutes of the February 13th meeting. Are there any comments, additions, deletions, corrections on anything?

Walter Pellish: I made a couple of corrections when I came in. There were two words missing in some comments I made and I provided those words. The amended page will be distributed.

Chairman Bayless: Is there a motion?

Bill Dean made the motion to approve the minutes from the February 13, 2006, meeting. The motion was seconded by Dan Marshall and passed unanimously.

3. Public Hearing on Rule 85CSR12, Relating to Unconscionable Settlements

Chairman Bayless: This is the rule on the compromise, the settlement and how the Commissioner can set aside settlements if she deems them unconscionable, etc. I would propose we start off by having Ryan Sims, an attorney with the Commission, give us a brief overview of the rule and the public comments.

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Ryan Sims: Good afternoon Chairman Bayless and members of the Industrial Council. We came to you a little over a month ago with this rule to initially file before the Secretary of State and we had already received some comments from stakeholders at that time. Now we are here today for the public comment opportunity on that rule. Of course, members of the public can come before you and make comments to you regarding Rule 12 pertaining to compromise and settlement of workers' compensation claims. We received a handful of written comments and they have all really been from what you described as stakeholders rather than from the public. Stakeholders include people such as claimant attorneys, employer attorneys, TPA's, that type of thing – people with a vested interest in this rule and the way it applies to workers' compensation settlements.

I'll just run down what I believe is four predominant topics that came about in regard to this rule after reviewing the written comments we have received to date. All those written comments have been forwarded to you by our secretary, Elizabeth Webb. These are in no particular order. This is what I think are the biggest issues that have risen as a result of the comments we've received. The first one is to place a time limitation in regard to the ability for a claimant to request a review of the settlement by the Insurance Commission. In other words something similar to a statute of limitations if they entered into a settlement, say on April 1 of this year. For example, six months or nine months they would have to ask the Commissioner. . . some repose to employers, particularly the insurer in regard to knowing that the settlement is final. In other words, they don't have to wait two, three years down the road. I think that point was well taken by the Insurance Commission and we will in fact place some type of statute of limitations within the rule. Additional points that have come up that I would say have not been resolved and that we are still deliberating within the Insurance Commission are: A provision which would enable employers to be actively involved in the claim along with the insurance company. For example, can BrickStreet settle the claim within policy limits or within the purview of Chapter 23 and the benefits they are allowed to have? Is the employer allowed to separately settle the claim in conjunction with BrickStreet or does the employer have equal say to the insurer in regard to the settlement of the claim? Another point that was made – there has been some discussion about the standards that are within the rule in regard to what makes a settlement "unconscionable." At the last meeting I explained to you the process we used to come up with those standards. Specifically we got them both from looking in the legal dictionary in regard to the definition of "unconscionable," as well as a West Virginia Supreme case, the Art's Flowers case. I believe our secretary, Elizabeth, has forwarded that case to you, pursuant to your request at the last meeting. Finally there was a request that we put a provision for the receipt of attorney fees – that there be some ability for attorney fees. In most cases there will be an attorney involved when there is a request to review the settlement for unconscionability. Sometimes it could be a pro se request, but normally there will be an attorney involved. And there was a request for a provision to be placed in there that attorneys can recover some type of fees for having to take their client through the process of getting the settlement review, particularly if the settlement was found to be unconscionable. So, those were the real issues that came up. Again, the first one about placing the limitations – I think everyone within our agency is in agreement that there should be some type of statute of limitation placed within the rule so there is some type of

repose for the insurance company or the self-insured employer. On the other three issues that I mentioned, again, this is something we are still internally deliberating and we'd be glad for you all to provide your thoughts on these topics. And, of course, for the public to come and speak about these topics or other topics which they think should be brought before you in regard to this rule. I would be glad to answer any questions.

Chairman Bayless: Does any member of the Council have any questions or comments?

Dan Marshall: What I'm hearing you say is that although we are going to receive some public comments today this matter is not yet right for action by our Body because you are going to come back with some changes and revisions. Correct?

Mr. Sims: That is correct. This is the stage where the public has an opportunity to come before you and speak, and that hasn't been sent to us in written form. What we have received so far is written comments from stakeholders. There is really no vote today. You have the opportunity to hear from the public what they think about this rule. The third stage will be next month when we come before you with a rule that will have already been sent to you at least a week ahead of time – what we believe should be the final version of this rule and you all will be sent that ahead of time. And then at that point you will have an opportunity to vote "yea" or "nay" on the rule.

Mr. Marshall: The question that I have is when the final draft is submitted to us, will there be an additional comment period where stakeholders or the general public can look at the final version and have their say about it? Or is that not the way the process works?

Mr. Sims: If I recall the way the procedure worked before the Board of Managers – I don't specifically recollect – but it seems to me that if you want to you can provide some final public comment opportunity before you vote "yes" or "no" on the final version of the rule we present to you. I think that that would be within the discretion of Chairman Bayless to some degree. This is really the opportunity for the public to comment. But, again, if Chairman Bayless or you all decide that you would like to provide a final opportunity for public comments, you could do that as well. I follow what you are saying because the rule will be amended. The final version will be different from the current version. So, again, I would think that would be within Chairman Bayless' discretion to provide a comment ability right before you vote on the rule, or you could deliberate amongst yourselves during that period as well – publicly.

Mr. Marshall: I would have some concern about voting at the next meeting on this issue when we haven't had any extensive discussion about it. The only opportunity we would have for discussion would be immediately before a vote is taken. I think we've got some serious issues here and I don't want to take too much time, but I think the issue of employer standing is something that deserves a great deal of careful consideration. With respect to the good faith issue – and I know this is difficult and time consuming to do – but I would ask if you could perhaps do a little bit more research on some out of state cases, directly on point to insurance bad faith because the state of our lawyer on bad faith seems to be pretty much limited to that

yellow pages' case. Just make sure that we've looked at options dealing specifically with insurance of bad faith cases.

Mr. Pellish: Mr. Chairman, I have a comment and a question as well. As you know, I stated the last time I was really bothered by the term "unconscionable," and I heard some of the discussion. I'm still not satisfied. It seems to me there's got to be a better way to address the situation than continue to use that word, even though it is in the statute and it would be a pain in the neck to try and get it changed. I read through the court case and when I finished it I just sat there and said, "huh?" It provided no clarity to me, and I know in your attempt to provide some definition you picked up on some of the terminology in that case. But it's still to me very, very unclear. I'm mostly concerned about it from the standpoint of a claimant. If those of us who are somewhat educated have a problem dealing with this subject, I think it is going to be worse with a claimant who is trying to figure the whole thing out. The question I have is why are we so intent on pursuing this as the first rule that needs to be revised? What's the driving force behind moving so quickly with this when there are so many issues to be resolved?

Mr. Sims: The driving force was the Legislature essentially instructed the Insurance Commissioner to establish some criterion to determine if settlements are unconscionable. At least, based on our interpretation of §23-5-7, until we do that there can be no review whatsoever. I could actually review the statute with you if you like. It's West Virginia Code 23-5-7. And, again, our interpretation is that the Insurance Commissioner can overturn settlements by criterion established in a rule. I might be paraphrasing, but the last part of that statute as it currently reads says, "by rule of the Commissioner." And our interpretation was until we establish a rule there is no ability for us to review settlements. We thought it was important because presumably there will be settlements going on between BrickStreet and claimants and between self-insured employers and claimants that we get this criterion established so on a going forward basis they can get them reviewed.

Mr. Pellish: That's a good answer. Thank you.

Chairman Bayless: I would make a further comment on the time limitation. Let's assume it doesn't get adopted until July. I think it will be before that. I would put in the time limitation it would be six months from the date of the settlement or six months from the date of the adoption of the rule so somebody doesn't get their time period shortened once the rule comes out.

Mr. Sims: Mr. Chairman, we actually have a provision in the rule that provides for retroactive review. The Legislature passed the current version of §23-5-7, which essentially withdraw the ability of the Office of Judges to approve settlements. Until we establish this rule there will be kind of a "no man's land" period where there is no review ability. So what we did is we placed a retroactive provision in there that allows us to review settlements from the date the Legislature passed that until this rule is passed.

Chairman Bayless: I think I would argue sort of the other way from Mr. Pellish and being a lawyer. The word "unconscionable" is a fairly well-defined legal term. I am a member of the Bar

in a couple different states, and that's pretty much the settlement standard or the standard for review of legal decisions. For instance, for an appellate court to overturn the matter of fact from a lower court, it's got to be proved to be unconscionable. And I would presume the Legislature knew precisely what they meant when they said unconscionable. So I wonder if we should tinker with it because the Legislature used the word which is a legal term and there are enough lawyers in there that my guess is that they knew exactly what they meant. And should we go substituting our own judgment over that of the Legislature? I wish some of the legislators were here today to tell us exactly what it was that they meant.

Mr. Pellish: I guess my reaction to that, Mr. Chairman, is that they went to great lengths trying to define what it is and it's still not clear.

Chairman Bayless: Again, I think you have to balance off legal terminology which is very clear. Unfortunately the lawyers. . .you can't have "wishy-washy" standards and sometimes if you try to make it overly clear and write it in non legal language it doesn't. . .I know exactly what you're saying and that's why we have lawyers – people can hire lawyers. They know what the standards are. But we do need to have a very definite standard and people can understand it.

Mr. Pellish: Absolutely. I agree. That's what I'm after.

Chairman Bayless: Things like the overall bargaining power – you can't put that in numbers in legal standard. It's one of those. . .you know it when you see it. The court has to balance that and look at the total facts surrounding the case. It's a tough standard. It's hard to put that in numbers and say was it 70% or was it 70.5% for bargaining power? Commissioner, you can always jump in at any time. Are there any comments from any member of the public on this rule? Let's go down the list [sign-in sheet where people signed up to speak] in the order that people signed up on Rule 12, and the first is Michael Keener from Acordia.

Michael W. Keener (Managing Senior Vice-President, Acordia): My name is Michael Keener and I am Senior Vice-President with Acordia Employers Service. Good afternoon. I have provided you copies of my comments and I will attempt where possible to paraphrase in order to distill as much time as possible. Mike Cavender, who is also here and will offer comment following me, has submitted comments in regard to Rule 12 to Ryan Sims, and we appreciate the opportunity to do that. He has in fact acknowledged specific parts of the statute to which we attribute the compromise and settlement component that we want to talk about a little bit.

We have a lot of experience in other jurisdictions in other states with compromise and settlement. And we acknowledge that the policy under NCCI, that the employer is obligated to sign and be a party to, says that they can in fact settle claims without the participation of the employer. We also know the most enlightened carriers in other states recognize the significance and importance of involving the employer in the communication process and the compromise and settlement process in particular. We are currently in the initial processes of privatization. Although the marketplace prospectively will help shape the behavior of the carriers, we only

have one carrier in place at this time. And I think it makes it even more imperative that we have enlightened regulation to shape the behavior of the carriers going forward and this one in particular going forward simply because we're new at it, if no other purpose.

I have some additional supporting thoughts as to why communication from the employer needs to be involved. I think it is imperative that we cause the carriers to engage the employer in the communication process to cause them to develop a trust relationship with the employer community. Experienced carriers in competitive states also know a few things as well and they pick up on it very quickly. They know that it is ultimately the employer's funds that they are using to settle claims and so what they do is they try to strike a balance between their attempt preserve their assets and build surplus and their need to preserve customers as well. The carrier's primary employer contact also needs to participate in it because they need to know the desired mode and negotiation that the employer would choose to have engaged in with their employees. They also have to mutually agree via communication on what in fact is considered to be a "fair" offer. The employer oftentimes is more knowledgeable of what's going on in the workplace than the carrier obviously can be and so therefore can provide additional points of information and knowledge about how in fact this claim will pay out if in fact it goes to the end of the claim. There are many human resources factors that the employer knows that the carrier will not know and so therefore the employer's representative needs to be engaged. Also, contingent upon a fair offer, it requires updated information. And at this point the employer is not getting updated information. In fact they are not getting any information at all in regard to their claims arrays. Therefore it is difficult to formulate a fair offer or be engaged in developing a fair offer if they don't know in fact what reserves are actually on the books.

We need to actually have access to what in fact is called the employer loss activity statement. You will find that the employer needs to look at that statement to determine what reserves are on there. But we find that when we look at the reserves based upon the mechanism that is in place now, which is called MIRA, which is the Micro Insurance Reserve Analysis automating reserving process. In fact what it does is it places reserves on claims that don't make sense on a claim-by-claim basis and in fact may be over reserve. But in the aggregate, it's probably correct. But when you go in and take a look on a claim-by-claim bases it makes no sense at all. So if in fact you attempt to make a proffer for a claim based upon the reserve and you know more facts about it than the carrier and you make what you consider to be a "fair" offer based upon a risk assessment – if you're just taking a look at the reserve and taking a look at the offer – it may in fact appear to you to be unconscionable because you are offering a significantly reduced amount of money based upon what the reserve is.

All that being said, what I'm trying to say in summary is the following. We have concerns about being able to make a fair offer and therefore it requires accurate and up to date information. It requires communication. We also are concerned about not making decisions that create unfair precedence inside the organization relative to human resources. I've talked to a few people, and let me give you an example. In some instances an individual has been back to work for months and there is still a significant reserve on the books for that particular claim and there has been no activity on that claim. The likelihood of any activity on that claim coming

again is pretty remote. Do you in fact offer a settlement to that particular individual in order to get that reserve off the books when in fact that reserve should have been taken off the books anyway after a reasonable period of time? What I'm concerned about is making sure that the employer at all times is engaged in something that will in fact drive their premium as well as in fact perhaps adversely affect their human resources environment back at their work site if in fact they are not a party to the claim. Thank you very much.

Chairman Bayless: Steve White, you want to make a comment later. You don't want to do it on Rule 12? Okay. Mike Cavender from Acordia

Mike Cavender (Acordia Employers Service): Good afternoon. My name is Mike Cavender and I am also with Acordia Employers Service. Acordia is a third party administrator for workers' comp programs and we represent many West Virginia employers. We have hundreds of clients that are insured for their work comp programs and their combined experience represents over 20% of the insured claim volume in the State. With 2005 changes to our workers' compensation statute gives employers the right to designate a representative to act on their behalf. We offer comment today in that capacity and on behalf of our clients collectively. We appreciate this opportunity to make comment and submit to you that the proposed Rule 12 amendments are in conflict with the clear meaning of the language contained in our statute, specifically through the exclusion of any insured employer from the settlement process. In settlement situations the statute recognizes two types of insured employers – those that are active and those that are not. The amendments to the rule should reflect this fact and any active employer should be recognized as a party of equal standing in the settlement process. The proposed amendments eliminate all employers from the process altogether. The fact is that the language in §23-5-7 make the active insured employers equal participants in the settlement process along with their insurance carrier and the claimant. Any of the three can pursue settlement negotiations, but all three must agree to the settlement terms or no settlement can be entered into. Since all payments made in the settlement situation will be applied to an employer's experience and the employer will pay premiums that are affected by those losses, our statutory language is correct in making employers equal participants in the process. The Series 12 language should do so also. The written comments that we provided previously offer recommendations on changes to Rule 12 that would accomplish the objectives that I've outlined today. Any questions? Thank you.

Henry C. Bowen (Executive Secretary, WV Self-Insurers Association): Thank you very much, Mr. Chairman. Good afternoon members of the Industrial Council and Commissioner Cline. I'm Henry Bowen. I'm Executive Secretary of the West Virginia Self-Insurers Association. This of course is a noticed Public Hearing under the Administrative Procedures Act that is required under the rule making authority that the statute gives the Commissioner that is exempt from rule making review. The past processes that the Workers' Compensation Commission create opportunity for both dialogue before a Public Hearing, historically we've not had any problem whatsoever in continuing to discuss concerns about language contained in rules. And I wanted to publicly acknowledge this Council's position on that. It really is a position that makes

for flexibility among all of us who have interests in this area. I am a stakeholder, but a member of the public and I have some 25 years of workers' compensation claim defense.

I am going to focus primarily on Section 14.2 dealing with "unconscionability." We are stuck with the fact the Legislature chose to use that. As I said in my written comments, the Association certainly acknowledges the difficulty and challenges of trying to define standards and criteria that can be used objectively to evaluate whether or not a settlement – which is of course otherwise a contract for which consideration is paid – whether that may be legally voided. You may recall from looking at §23-5-7, the fundamental tenant is that any contract that is induced for settlement on the basis of fraud is of course a violation of public policy. So regardless of whether or not an individual has legal representation or not, if the issue rises to the level of fraud, that settlement is void in violation of public policy just as the settlement would be void if counsel were involved.

Prior to 2004 only the Workers' Compensation Commission and authorized parties to a claim could settle claims in West Virginia. With the 2003 legislation, self-insurance was expanded and self-administration mandated by law. So, self-insurers who are authorized to direct pay their benefits are required by law to administer their claims just as any carrier will after the market opens in 2008, just as BrickStreet is doing now as the sole carrier authorized by law to write workers' compensation coverage. We are permitted under Chapter 23 to directly negotiate a settlement. We are permitted to directly agree to a settlement that is binding on the claimant, just as any settlement that BrickStreet enters into with any of BrickStreet's insured policyholders will be binding on the injured employee or the claimant so long as the settlement is not found to be either fraudulently obtained under §23-5-7 or fraudulently induced or unconscionable under the criteria that you are going to have to develop. The biggest problem with trying to reduce this to writing is it's a difficult challenge and unfortunately, inevitably, vagueness can occur. I think Mr. Pellish at the last meeting made it very clear that as a non lawyer he read this and he felt it was vague. I'm a lawyer of some 30 years of experience and I can tell you it's replete with vagueness. And this is not intended to be a criticism of the writers. It's just a fact that we cannot allow a criterion to be used in evaluating a veto right of a settlement agreement when the criteria itself is subject to multiple interpretation by those people applying it. So, you simply have to have something more specific. Chairman Bayless, you've already commented "unconscionability" legally is definable. It's got to be something higher, different than or more significant than just simply subjectively concluding that a settlement is grossly unfair. What is grossly unfair? The simple fact of the matter is a man or woman who is injured in West Virginia should not have to engage a lawyer to protect his or her rights. Although as an attorney I'm comfortable with the notion that people certainly are going to have greater confidence if they are represented by counsel in settlement of any dispute.

Why are we concerned about this? It is simply because we are in the same standing as a carrier; regulated by the Commission; subject to annual audit; subject to complaints if we are perceived in self-administration to be doing something wrong. We need two things in this process. We need predictability and we need consistency. Neither of those have been regularly available to the employer community in West Virginia workers' compensation's recent

past. And, of course, it has been considerably different in more recent years. But up until this new legislation and new opportunity, settlement has never really been a part of dispute resolution of workers' comp. People aren't comfortable settling. We don't have any significant settlement history by volume. But it is a very important claims management tool in other jurisdictions. And I believe this Council has committed publicly before that it wishes to see our State evolve from a privatization of workers' compensation insurance in manner similar to those in other states. And if that's the case, I would submit to you settlement must become a part of the culture of West Virginia. It will take time indeed. I predict to you that within the near future we will see increased activity to settle claims because of federal law in accounting and financial disclosure obligations. There is a real need for companies who are authorized to self-insure to be exactly on top of what their liabilities are and to use any lawful means in claims management that will allow them to extinguish those liabilities. So from large employer perspective settlement is a necessary part of the workers' compensation claims management. Whether it's a disputed claim in litigation as alternative resolution to going through administrative litigation to its conclusion or simply in non litigated claims, it is very common practice outside of West Virginia for claims to be settled or resolved without workers' compensation litigation being a part of that process.

As a more recent historical figure that is an example of this, our system really was quite liberal and as a consequence legally incited litigation. It was not anything that individuals should be criticized for if they take advantage of the liberal system to increase cash indemnity by trying to increase awards. That has been addressed by our legislation in the 2003 legislation that was enacted in Senate Bill 2013. We have a very fair and balanced workers' compensation law from the perspective of the employer community, and certainly the self-insured community feels that that's the case.

How do we ensure that we have predictability and finality? Do we want to have an unrepresented claimant have to give a statutory 20% of any cash award to an attorney if the claimant doesn't want to have counsel? This issue won't be an issue if counsel is there because there are other remedies available to that individual worker if his claim is settled and that settlement is subsequently found to be unconscionable and he is represented. This is only an issue that's going to be to address those men and women who don't want to spend the time or money to pay for a workers' compensation counsel.

Prior to this 2005 law change, the Legislature had the Office of Judges require to review and approve all settlements. At that time the review and approval standard was that they had to be fair and reasonable. By practice the Office of Judges had a hearing of any unrepresented claimant's settlement and would make a written record. The officer who presided in the hearing would ask the claimant to explain why the claimant felt it was a fair and reasonable settlement. The Legislature concluded to remove the Office of Judges in the 2003 settlement provisions in the law. As Mr. Sims told you, there is currently no review process there. But the simple fact of the matter is we have to have a definition that makes clear that you can't retrospectively say, "Gee, I settled and I think that's an unfair settlement." We have to find this balance between the individual responsibility and the diligence that's required and vigilance that's required by the

claimant in entering into the settlement. So, once we have that settlement agreed to and that consideration, that cash payment is made, and that liability is then resolved, and those reserves can then be legally removed from the self-insured employers' reserves or the carriers' reserves, and all of that goes in for the carrier. It's the same position. That goes into the insured employers' experience for their future rates. For the self-injured it's a direct cost that has to be dealt with.

We respectfully suggest that the language has to be rewritten. We have suggested some alternative language. There is no magic to our language. All we were trying to do is say please don't adopt the rule that allows anybody to come and say, "Well, you know, I didn't have a lawyer and I needed the money. I settled for this. My family is on the verge of bankruptcy," and that's unconscionable or whatever, and then requiring a response; legal counsel in another type of related process. I'm not suggesting that you do anything that chills the right of anyone to complain or raise a concern, but there should be a very high level of proof required. And the only way I know to do that is to say it's got to be unconscionable as something that is shockingly unfair. Not just something that Ryan and I might go into a discussion in six months and say, "You know that case was settled for \$50,000.00 and that man could have had over the life of that claim \$450,000.00 if paid over life." That's grossly unfair or that's unfair or whatever. And that's where we're going to. . .we're concerned about. I have an incentive representing a self-insured to look for any opportunity on serious injury cases to look for structured settlements and anything that will allow us to properly handle that claim. What we need to do is make sure that someone can't come along later, if there is a settlement, and simply, "Well, I've changed my mind. I'm going to use this process."

I respectfully suggest that the current form would allow complaints and that it is just too confusing. It's simply too arbitrary. Any time that six or eight of us could look at this and probably come to different conclusions on the same facts, I suggest that's criterion that's not appropriate. It's got to be something succinct that allows for objective review in a high level of burden. I thank you for the opportunity of speaking with you and I would be happy to address any questions if you have any.

Chairman Bayless: The standard in 14.2 says, "A workers' compensation settlement shall be considered unconscionable, and therefore be declared void as against public policy, if it is found to constitute a gross miscarriage of justice or is otherwise found to be clearly unfair." And then it lists items that come out of the court cases that say what could be clearly unfair. Your standard that you have suggested just says, "Shall be considered unconscionable and be declared against public policy if it is found to constitute a gross miscarriage of justice." Doesn't that actually sound less clear? That's not as clear to me. I mean if you are saying you want something that's clear, that's actually to me less clear than having these things. You talk about somebody that comes in and says, "I didn't have an attorney and I was almost bankrupt." Isn't that the kind of settlement that ought to be examined?

Mr. Bowen: Not for unconscionability. The issue, it seems to me, Mr. Chairman, would be – and the reason that I suggested the alternative and struck the remainder of that sentence – it's

the remainder of the sentence that causes me the concern or as found to be clearly unfair. Well, what is clearly unfair? And is clearly unfair unconscionable? Well, no. Clearly unfair is what it is. I mean there may be some things that are unfair that are not shockingly unconscionable as "unconscionability" has been defined as in other cases. If that's not where you want to go, you certainly have great discretion to go where you want to go as a Board in defining this. But to me it should not be something that would make. . .perhaps there's a better way of saying it. There is an obligation I think for us all to be mindful that claimants have a right to be protected, and they have a responsibility to be vigilant. I'm ambivalent myself about. . .I mean if you said to me that you wanted to have a rule that said every claimant ought to have an attorney, someone else would say, "Well, that just benefits lawyers." Well does it benefit lawyers or does it protect individuals? It's in the eye of the beholder. You know, what is unconscionability? Is it like what the Supreme Court of the United States said pornography is – hard to define but everybody knows it when it's seen. All I'm suggesting is that our concern is if we enter into a good faith settlement agreement and someone doesn't have a representative, we don't want them to have an easy path forward to simply go into the Insurance Commission and say, "Hey, I didn't have counsel and this thing is grossly unfair. I could have gotten a total disability payment to age 70 that was worth \$300,000.00 and I settled for \$75,000.00. That's unconscionable." Well perhaps if were induced by misrepresentation or some deceit or some misinformation, then those facts might rise to that. There's got to be a balance between making a bad deal, which the law doesn't protect us from, and that balance of protecting individuals from themselves, which historically was always the concern when the Legislature was asked to authorize settlement.

The number one concern of organized labor was a very legitimate concern. People are injured. People will need money. People will settle when it's not to their advantage. That hasn't changed. That's a very legitimate concern. But people may choose to settle and make a decision about settlement that they want to change their mind about later. To me that's not what unconscionability is all about. I'm not saying it has to be equivalent to fraud because the law doesn't make it equivalent to fraud, but it has to be something more. And frankly when I look at the criteria you could say in every case, "Well, the meaningful alternative is available to the claimant." What does that mean? Could he have had an attorney? Could he not have an attorney? The severity of the injury; the timing of the settlement. Frankly what we've seen most of and hopefully we'll see more opportunities prospectively, but who knows. But mostly what we see are people coming in and saying, "I went to the doctor. I'd like to settle this and get my medical benefits paid. I don't have anything else." And sometimes claims managers could say, "Oh, hotdog, let's go settle that. That's great. Let's just do this on a full and final basis." That waives rights under the law. And that's really what we're talking about here is making sure that we have a system that people who waive their rights to benefits and protections under the law are doing that in a knowing way so to make it fair and reasonable.

Our language is simply suggested language that was given to you to say, "Hey, we are concerned about this language in this form." It is not intended to be an insult to the attorneys in the Insurance Commission who drafted this. It is hard to draft this type of definitional criteria. Regardless of whether you like our approach or some other approach, this approach is simply

too ambiguous and would allow for too many interpretations. The more interpretations you have then I submit the more difficult it is to apply objectively the standard, and that's really the point I was trying to make. And I am unfortunately going to make Mr. Keener correct by saying that you would regret letting me speak last.

Chairman Bayless: This language could be reworded and drop the "clearly unfair" and just say, "shall be considered unconscionable," and then you could have indicia of unconscionable because you brought up the point on the adequacy of meaningful alternatives. Although the Supreme Court says unconscionable, our analysis therefore must focus on "the relative position of the parties; the nature of the entire contract; the adequacy of the bargaining position; the meaningful alternatives available. . ." The point is that's what the Supreme Court is going to use. The Legislature has said "unconscionable" and we tell the Commissioner, "Okay, it really means something else in our mind." When it gets to the Supreme Court do they say, "No, no, no that's not what unconscionable is." Are they going to overturn her constantly?

Mr. Bowen: It's a fair point. But when I read some of these syllabus points, some syllabus points say that the law is real clear on how you can set aside a settlement agreement in a civil case. And then it will start referring to mistake or neglect or fraud. Then there is a whole body of law that has interpreted all three of those wholly differently. But you look at the syllabus points – is a mistake the same level as fraud? Well, obviously I don't think that's what the syllabus point stands for, but I could certainly anticipate someone would argue that "mistake" is all that's necessary. If you ultimately conclude, that's fine. An unrepresented party making a mistake should be able to change his or her mind and come back later because the mistake is unconscionable and it leads to an unconscionable settlement, then that's your prerogative. I was simply trying to suggest that we have to balance all of these interests. And from our perspective we want to know that when we enter a fair and reasonable settlement that absent facts that would allow it to be attacked under well established law – absent that sort of thing – that we can remove those reserves and consider that liability gone without worrying six months from now somebody is going to come back in. Or does that mean that all reserves have to be held out there until the six-month period goes by? Then can somebody make a good case – excusable and neglect complaint after six months? That's where I was concerned we were going in terms of leaving it so open ended. At the same time I realize that there are very legitimate rights of individuals that need to be considered and protected. I just don't want to see us adopt something that would allow a clever lawyer to simply say, "Ha, I'm going to be able to attack this because it was this, this and this. . ." That is all I'm suggesting. Thank you very much.

Chairman Bayless: Does anybody else have questions? Does any other member of the public that hasn't had a chance to comment that didn't sign up wish to make a statement? Would you please state your name for the record?

Marion Ray: My name is Marion Ray. Like Henry, I am also a lawyer, but I want to be real brief and I want you to hold me to that. The point that I want to make is this, and I mentioned it to Ryan and I believe I heard him touch on this as I was walking in. But my concern is

any business person – and my Dad was a small business person – believes that when he makes a deal, he makes deal. I'm not suggesting that a claimant should not be able to come back in and say that something is unconscionable. My concern is this – how long do they have to do that? If we can address that, then I think we've moved a long way. Otherwise what happens is no business person ever wants to enter into an agreement because they never know that they actually can put that behind them. That's my comment. Thank you.

Chairman Bayless: Thank you very much.

Rick Slater: Mr. Chairman, is there not a time period?

Chairman Bayless: That was one of the original comments. We need a 60-day or 90-day or six-month statute of limitations, and I haven't heard any real disagreement with that. Does anybody have any more comments? Commissioner, do you have any comments? You are going to end up administering this.

Commissioner Jane Cline: No. Actually the challenge is sometimes in legislation. We are giving things that we have to try to find a way to make them work. In another area of the general insurance code we have the definition of "what is egregious?" And then having to put in processes to allow for the consumers to be able to get redress if there is something they feel is unfair, and I think clearly that is what we've attempted to do. Through the public comment period there is always opportunity to make improvement upon what we originally started with. Ryan has looked at the comments and had discussions with them. I don't know if you have anything to add to that, Ryan.

Mr. Sims: Again, as I said at the beginning, much of what has been discussed by the people that spoke before you today are issues that we are already aware of and we are going to try to work through these in our updated draft of the rule and take into consideration all of the comments we received, and make our best attempt to create a version of the rule that strikes a compromise between all of the comments we have received so far. I think that's all you can really try to do.

Commissioner Cline: I would further point out that people bring different experiences to the table and that's the benefit of the public comment period. We are operating from the experience we have and how the process works for us, but other people that have been practicing in this area obviously have a lot to offer and can sometimes point out and bring to light things that we just quite honestly didn't have the background that would lead us down the path to come to that conclusion as well. Again, it is still sometimes a challenge.

Mr. Pellish: Mr. Chairman, I would just like to add one thing. I think the Legislature, our Governor and our State took a giant step forward to try and fix a very significant problem in this State – workers' compensation. We have a golden opportunity right now administratively to try and get things right, whatever that means. I think we need to walk carefully and make sure we touch all bases and do the best job we can. I don't envy your job at all. You've got to have a

tough time sleeping at night trying to wrestle with all of this stuff. It's very, very difficult and I commend you where you've gotten so far. But it seems to me that we still have a ways to go and we've got to do this very carefully. If we're going to err, let's err on the part of using some common sense in addressing some things.

Mr. Slater: Mr. Chairman, I also would like to echo Mr. Pellish's comments. I'll say at least for me personally Mr. Bowen's comments brought this a little clearer for me as we talk about the ambiguity of reading all of this and what it means. It sounds to me like we're stuck with this term "unconscionable." For me, if that's the case, when you go down through the section and it references "unconscionable" and it references "the gross miscarriage of justice," I mean to me gross miscarriage of justice means something deep, it's threatening, it's callous, it's egregious, it's over the top. Although I think the peripheral examples given in the section is a good attempt to try to lay some of that foundation out. For me it further kind of muddies the water. I think it does open it up to much more interpretation and much more problems when we get to that term "unconscionable." So, I guess what I'll say is that I thought that Mr. Bowen's comments were right on point and I think we need to certainly be careful with the language and maybe in this case "less may be more."

Chairman Bayless: I think the staff has heard the concerns of the Commissioners, and don't ever take my questioning – I'm a lawyer – if Mr. Bowen zigs I will zag. If he zags I will zig. I just try to probe. But I think the staff has heard the comments. If anybody's got any great ideas on what the definition of "unconscionable" is, please get them to Ryan because it is tough. As I said, how do you define it? Every case is different and what the court has tried to do is lay out indicia and said, "These are the things that lead to unconscionability." And that's what the court has tried to do. But you will never find an absolute Webster's dictionary definition that is going to apply to every case. It's almost that you've got to give the Commissioner latitude and just say these are the guidelines. Thank you very much.

If anybody has any more comments, please get them in, in writing. I think that next time we will look at what is there and depending on the magnitude of the changes and the comments at the time, we can decide whether it is time to go ahead or more public hearings.

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

Judge Leach: I am not going to go over my report that I sent to you on a point by point basis. I think the key thing that we're concerned about is the number of protests that we received the first two months. They are significantly lower than what we are historically used to dealing with. I gave you a pretty lengthy speculation list of what might be the causes of it – whether it's issue type or transition or computer problems. If there is any credit to be taken for reducing the number of protests – that seems to be a goal of Mr. Pellish's – I'll be glad to take the credit, although I really don't know what's causing it to happen.

I did check today before I left the office and after three quarters of this month we've received 1,400 protests, which if you prorate that out we're going to be back up to 1,800 and 1,900 a month which is last year's level. It does tend to suggest to me that the transition in January and February – some computer glitches that BrickStreet was having or so I've heard anecdote or evidence of and I know for a fact that we were having – may have accounted for the depressed numbers for the first two months. I'll give you a report in just a couple of weeks that will show what the March numbers are and I think they are going to look much higher.

The balance of my statistical reports does not reflect well on us, particularly our acknowledgement timeliness which is a very poor 15.76%. It takes longer than 30 days after we receive the protest before we send out a letter acknowledging it. I do believe that is a transition issue. Prior to January 1 we had a complete and unfettered access to all employer account information for everyone except self-insured employers. We even had some limited access on self-insured employers, such as the employer's name, address or TPA, the claimant's name, address. When we got a protest in we could just click on the computer and in seconds set up a claim file, if we were initiating a claim file. After January 1, we've been – and rightfully so – denied that access. But that means we have to kind of go around the mountain to get the information that we used to have at the snap of a finger. So that is causing us to take days to get information that we used to have in seconds. We are working out some solutions on that. With technological solutions and software solutions it may take us a few months, but we have a target. It's one of our priorities and we are working on getting a solution. The information is out there. It's in the Insurance Commission's database for first reported injuries. It's just not in a format where our system can touch base with it right now so we have to work out some connections. So I believe that the poor parts of the performance of the Office of Judges reflected in this report are something that we have set our sights upon and we have fixes in mind and I'm confident that within the next few months those reports will go back to what were very good reports for the last few years when we were connected with Workers' Compensation.

In terms of the general reporting matters, I did want to touch base and remind you of our failure of the insurance carrier to timely act. We've only had seven of these. You can think of these as kind of taking the mandamus law suit remedy in the past where a State agency could be sued to take an action that a law required them to take. Well now it is no longer a State agency. It is a private company and the self-insureds could not be sued in that fashion as a State agency. So the legislation in 2003 created this alternative. Kind of a "mini" mandamus so to speak. We have had seven of those claims come in and have resolved five of them. That's not a great number since the policy has been in effect since September 1. It's barely over one a month. So partially that reflects – probably largely that reflects – that the self-insured community is meeting the time standards that are upon them. But it will also reflect the fact that the claimants' community is not aware that those time standards are out there so there may be cases that are not ruled upon that individuals do not know they have this remedy available to them. We are working with the Commissioner's Consumer Counseling Services to get that information out in different ways. That is a process that we are working on and we're kicking

around some ideas on how to get that information out other than me speaking at lawyers' seminars. That is the only way we are getting it out so far.

The appeal brochure is something similar. That will have information in it. That will be a brochure that goes out with every acknowledgement of every one of the 1,800 or so protests we get a month. A brochure goes out, eight columns, four fold piece of colored paper that explains the whole process. One of things that this will explain is that remedy is available. The text is ready. The Insurance Commission's staff is working on the art work, the pretty stuff to make it look good. And once we get that designed and approved, then that will be going out and I'll give you all a copy as soon as that's available.

Legislative issues – I brought to you my concerns about the possibility of all administrative law judges and all hearing examiners for any State agency being moved into a super central panel of administrative hearing examiners. That Bill was tabled in the Session and it is being studied by the Legislature in Interim Session, so it can come back up next Session with perhaps some revisions made to the format it is now. So it is not a "dead" issue, but it's just not a pressing issue at this moment. It is something that I think the Insurance Commissioner will continue to follow. I do not believe that it's her position that she wants her administrative appeals process, myself and the Board of Review taken away and given to some centralized panel. But that, again, will be followed. During the Interim Session there may be some hearings and some opportunity to comment on that.

I finally wanted to comment on one thing that has developed. Since I sent you the written report, we just started this week working on this new process for the Insurance Commissioner's private market default list. A week ago Wednesday, the 15th, the Insurance Commission sent out 1,300 or so notices to employers that do not have insurance coverage. We've been notified by BrickStreet that you do not have insurance coverage; you are in default; you are being fined; you are delinquent; there is going to be some severe legal penalties taken against you; including shutting down your business. That notice by rule required that the employer could appeal on the basis that they were erroneously [clerical error] put on that list, and the appeals had to be filed within 10 days. I had – and I shared with Commissioner Cline – some very cynical concerns that I would get 1,300 appeals filed. Generally my experience has been if you tell somebody you are doing something bad to them and give them a right to appeal, well they appeal. But much to my surprise, very pleasant surprise, through today we've only received 10 requests for hearings out of 1,300. Tomorrow is the deadline, so legally that becomes Monday. Their appeal requests have to be in by Monday. So far it has not flooded us. I did want to commend the Insurance Commissioner's staff for their work in getting these things to us right away for scheduling a hearing and their lawyers for settling. The first three that were scheduled for a hearing we agreed without a hearing that there had been an error made and got that taken care of. So that was beneficial to me and to the employers involved and I think that that work has been outstanding so far.

I wanted to call some conclusions to the Industrial Council that I've seen in these appeals so far that may represent a trend or a pattern that we should be concerned about. It's public

confusion over the privatization of the system. Most of the letters I got asking for an appeal said, "Who is BrickStreet anyway? I'm dealing with Workers' Compensation Commission. What's this insurance company banging on my door asking for money?" One of my letters said, "I took this to be a solicitation for business, this notice." So there is some confusion. Although here in Charleston at least we are all very aware of what the Legislature does, and particularly we are aware of anything that affects the Insurance Commission or the Workers' Compensation Commission. It doesn't appear that the word is getting out that. . .well, that this now is a privatized system and that BrickStreet is "the" carrier.

The other thing that we're getting confused about, the public is confused about, is because they got the notice from Commissioner Cline they are blaming her for receiving the notice. "You" messed up my case. "You" didn't cash my check. "You" didn't return my phone calls. I think it is very crucial that the Insurance Commissioner educate the public that this is BrickStreet that is doing this and not the Insurance Commissioner. We are just required by law to forward on the notice to you. There is this confusion between the insurance carrier and the Insurance Commissioner that I think needs to be addressed. Gentlemen and Commissioner, that sums up my comments. Any questions?

Mr. Slater: Just one comment, Judge. I think you had extended an invitation to all of the Commission members to come and sit through hearings and I was lucky enough to be able to do that about two weeks ago. I wanted to report that I thought the hearings were run in an extremely professional fashion. I had an opportunity to meet with the Judges and talk to them for a while. They are very dedicated individuals. Very, very concerned about their job and how they do that. We walked through the computer system and software being used to administer and get through all of these claims as they come before them – a very, very complex system. But they certainly have it down in a pretty short period of time with all of this transition, getting through all of these things. I want to commend you and certainly all of your staff for the great job that you guys are doing.

Judge Leach: On behalf of my staff, I appreciate those comments. I can't take any credit for that at all. Thank you, sir.

Mr. Pellish: Judge, I have one question for you. Part of your report has about 20 pages worth of categories and there is no real data in them. I don't know whether that's a start-up thing or what. My main question is, is there a list somewhere of definitions to these categories?

Judge Leach: Yes. The first column you are referring to has a three initial code. The second column is sort of the definition. But I would concede that if you're not familiar with the intricacies of the different protest types that this is a shorthand and I can prepare you a list. What these columns are, it's basically four subdivisions of each issue type. Temporary total disability termination can be protested by a claimant, by the employer. It could be an order by a self-injured employer protested by the claimant or employer. So we have four possible protesting situations for each issue type. There are 20 some issue types; you multiply by 40; you get a long list. I'll be glad to provide you with it.

Mr. Pellish: I would appreciate that. Thank you.

Commissioner Cline: Mr. Chairman, I would like to comment on one thing with respect to the employers and the notification to employers. The 1,360 that we're talking about are people that were not in default to the old Workers' Compensation system. They were notified several times by BrickStreet. They have been notified by us prior to this. We have worked through those lists and every time we had a valid telephone number we called those people. I do respect that there are probably some that did fall through the cracks and there are some isolated incidences perhaps that the employer really had some confusion. But there have been numerous pieces of correspondence from BrickStreet and several from us and phone calls made to these employers. Some of them I think have just chosen to not do what they're supposed to do. There are about 1,800 that were in default to the old Workers' Compensation system, so they did not receive a notice from BrickStreet and there are other employers that we are working through. But the ones that Judge Leach is working with us on – those that are in that category – are afforded the opportunity for an expedited hearing. I think by virtue of the fact that we've only heard from a limited few it does tell you that part of them. . . I mean we've heard from 10 of the 1,360 and have worked through some isolated incidences. All in all I think we've worked very hard to communicate that, as has BrickStreet.

Chairman Bayless: Did you tell them in their notice that they are personally liable?

Commissioner Cline: This is the second time the Insurance Commission has told them in their personal notice and I know BrickStreet had done the same in several previous. . .Randy, do you know?

Randall Suter: More than one.

Commissioner Cline: It's been more than one from BrickStreet and more than one from us.

Chairman Bayless: You'd think that would get their attention.

Commissioner Cline: Well I think what is starting to get their attention is actually we have begun the posting of. . .in Huntington we began posting some employers' locations and we are starting that next week in Charleston.

5. General Public Comment

Chairman Bayless: The only person that signed up on the list is Mr. White.

Steve White (Affiliated Construction Trades Foundation): It is really a perfect segue into what I wanted to come and talk about. I had sent a letter to Commissioner Cline about some

concerns I had on enforcement issues and just perhaps 3,000 companies – some who are in default prior and some who have come into default. They are still there, some of them. Some might have gone out of existence. But certainly a good chunk of them are still doing business and I'm just bringing concerns forward about what are we going to do next? The Commissioner just mentioned some postings that would be taking place. I think that's great. I just wanted to alert people. We saw some real potential problems – loopholes. We know that some of the huge problems with past Workers' Compensation – the big deficit was unpaid premiums and now of course BrickStreet might solve some of that by getting their money ahead of time and all of that. There is going to be a sector of the business community that chooses to play Russian roulette if you will. They will go out and they'll work and they won't have coverage and that will end up in the uninsured worker fund. It will get dispersed back to the honest employers. It is something we all want to limit. I am sure everybody in this room would agree. So our concern was we're just unclear as to what was going on and we brought a couple concerns. We are in a transitional phase. Maybe we just have to learn the right place to bring our concerns. We had found a few companies that we thought should have been paying premiums, and frankly we are just stuck. We don't even know where to bring that concern to. And subsequent to the letter that I sent I did have some follow-up conversation with the Commissioner, with Melinda Kiss and I feel they took it seriously and they are endeavoring to do more on that issue. In fact I can even bring today a company off the default list that's been on there many times before. I know where they are working. I know where you can find them right today. Construction in particular is this moving target. You might be able to go to existing businesses some place and put a notice up where a manufacturing or some service, but some of these companies – try to find them. We find them all the time. But I don't know where to give it to. I'm going to give it to you, Commissioner.

Commissioner Cline: That would be the right place.

Mr. White: And I will tell you where they are working in the Charleston area and hope that you go post them. That will really alleviate a lot of problems. My concern really is the staff allocations to that whole procedure I'm afraid are woefully inadequate because people are really working hard in the transitional phase perhaps. I feel confident that it will be addressed, but I want you folks to stay on top of it. We got to make sure that these folks who drop out of coverage that say, "Forget, I'm not going to get the coverage or I'll come in from out of state and I don't have to worry about." Who is out there policing them? Count the heads. Right now there are very few heads who are going to do that. You're not ever going to get enough. I think you have some opportunities to work with other government agencies. People are already out there writing permissions and things – the Tax Department, Labor Department, etc., to try to use those points to stop this. But I'm afraid it could be a big problem if it gets out of hand. So with that, I'm going to give this company to you [Commissioner Cline]. It might be more than a simple misunderstanding. They know being on that list, they know to pay but they've gotten by with it for years and it's a serious problem.

Commissioner Cline: We concur and that's why we're being very serious about the whole process. We have had several meetings with our sister agencies – the Tax Department,

Department of Lottery, ABC Commission, Division of Forestry, DEP, Department of Labor. We've had some conversations even with HCA which is the hospital licensing authority with DHHR. We are putting into place a process for our sharing of information with those other entities. Unlike in the past some of these licensing authorities only checked the Employer Violator System at renewal period. Once we work through this first month or two glitch, our staff on a daily basis will notify all the licensing authorities of a company going into default with us and then they will begin the proceedings to take the action to suspend those licenses as well. In addition to that, with respect to the Old Fund, we have actually obtained a number of injunctions and we are working through that process on that list. But at the same time we have been able to get some to pay their outstanding debt or get on payment plans with us so that they can get insured with BrickStreet. We have had some that were in default. We met with BrickStreet this morning on the process of getting that information shared back and forth because BrickStreet also will be required to notify us when somebody defaults with them within 24 hours so that we can begin the proceedings. We, like you, know it's a very serious problem. We have some staffing issues that we are working through and trying to get the right people in the right place to do this. We do have the advantage of having the Fraud Unit that has 20 some investigators. We are going to take advantage of them to do the posting piece and do some policing part of that for us. We are having the same discussion with other State agencies that have investigators that are in the field for their licensing part of this. I think there was progress made under the previous administration at Workers' Compensation Commission. I don't think they ever got totally where they were trying to get with respect to working with other State entities. They were able to do more with the Tax Department than they had been with others. We are involving the other licensing authorities. We've got support from the Governor's office in that endeavor. We are totally with you.

Mr. White: The key is we can send them letters. . .

Commissioner Cline: No, we've got to put them out.

Mr. White: But you know certain people are going to ignore them all. You can go and revoke their license. They don't care. You have to find a way to go that place and shut them down. The posting is very effective in the construction industry because the owner for the most part when they see that posting that contractor is gone.

Commissioner Cline: When it says, "You are personally liable."

Mr. White: Or they are coming in with a checkbook to pay you off. I'm just concerned about that piece in particular falling to the wayside.

Commissioner Cline: With respect to your initial conversation. . .we need you to bring those kind of things to our attention because we don't know that the information is getting disseminated to the right people. We appreciate your helping us in that.

Mr. White: We got another one we can give a try on and we'll see how that goes. Thank you very much.

Commissioner Cline: The uninsured group is our major focus right now.

Chairman Bayless: One thing we may want to consider in the future. . .every corporation that's compliant has to have a whistleblower hotline so any employee can call in and say somebody is doing fraud. It might be to just set up a phone number for the fraud division. If anybody sees anybody that doesn't have workers' comp, call this number. Mr. White knows enough to bring it in here, but other people may say, "How do I get this to them?"

Mr. White: One of the pieces that has to be put in place is how do you know they don't have coverage? So we need to be able to know from our private citizen point of view, does this person have coverage or not or are they on the list? Melinda Kiss was working towards that. But it is an important piece. Then they could look up and see exactly if I am working for somebody who has coverage.

Commissioner Cline: Right. That piece will be in place in the near future, but in the meantime we do have the Employer Violator System that is available through BEP's site and then there is the uninsured list. The private market carrier default list will be available on our web page. So if they are on either one of those lists, then they don't have coverage.

6. New Business

Chairman Bayless: Is there any new business to come before the Council?

Melinda Kiss: Good afternoon. I'm Melinda Kiss, Assistant Commissioner of Finance. I wanted to make a very brief presentation. I'm just going to flip through this and then you will have your handout to take home with you. At the conclusion of this meeting you will be going into a general session for the purpose of reviewing your first self-insured application. We had thought that it might be prudent to kind of do an outline on precisely what the Self-Insured Unit does and what the process is that we do before we bring a self-insured application to you for approval. We thought it might be pertinent to do that.

On the first piece of your handout we just cited the procedural guidelines and we sent those to you last week. Our secretary, Elizabeth Webb, provided you with the pertinent sections of the Code. That is §23-2-9 that talks about an employer's election to be self-insured. We also sent you Rules 18 and 19. Those are the rules that govern self-insurance generally so that you could have those to review. Basically after you look through those, what it specifically tells you in Rule 18 that this Industrial Council will have as its duties with regard to self-insurance regulation: the approval of new applications; the approval of involuntary revocations of self-

insured status; you will need to approve any changes in surety levels that we are proposing; and you also have the duty to review acts of non-compliance.

What we wanted to focus on today just briefly is the application process since that is what we're asking you to take a look at later this afternoon. Basically what happens with the application process is the Self-Insurance Unit reviews the application and all the attachments and they document any findings prior to recommending an application for inclusion in the self-insured program. Specifically what they do is they look at the application to make sure that all the required information has been fully disclosed. They look at company specific facts. They look at industry norms from Dun & Bradstreet. They take the audited financial statements. You are required to present three years of audited statements and they are put into a model that has been developed. That model helps us to compute the ratios that we are going to use to assess the applicant's financial position. Once an applicant is deemed to meet the financial standards set forth in Rule 18, then they are going to check for compliance with other State agencies. Some of the general requirements that a self-insured has to have before we will consider recommending them to you for approval for self-insured status: they are required by Code to have an effective health and safety program; they need to have a qualified internal staff or an approved third party administrator to administer their workers' compensation claims. We consider that to include the ability to transmit the payment data to the Insurance Commission. Upon completion of the application, the notebook is forwarded for review to the Director of Self-Insurance. She is with us today and that is who is going to make the actual recommendation and present the application, and that is Angie Shepherd. She is here in the audience. We also have with us today the supervisor who is in charge of the application and the financial review process for self-insurance. That is Jenny Hoover. I appreciate both of their help with getting this together. The application then goes to myself as the Assistant Commissioner of Finance and then for final approval to the Insurance Commissioner or the Deputy Commissioner. What we actually present to you is the informational summary. We then summarize all of that information and the financial analysis and we prepare a Resolution for this Council to look at so that you can formally do the act to approve the self-insured status. Then once you do approve – considering you take our recommendation and you grant the self-insured status – that status is effective the first day of the quarter following the month in which it was approved. We don't grant self-insurance status retroactively. It's always a prospective act. On the very last page we have some contact information so that you can call us if you have any questions. Any questions right now?

Chairman Bayless: Under the Open Governmental Proceedings Act, in a few moments we are going to go into Executive Session to consider an application from a company to be self-insured. The name of the company is not on the agenda. Should we bring up the name of the company before we go into Executive Session in case anybody has any comments on that company or not?

Ms. Kiss: I am going to defer to general counsel since I'm a CPA, not an attorney, and let her answer the procedural question.

Mary Jane Pickens: My understanding is the way we did it would be appropriate. Not to put it on the agenda. You don't know what the outcome is going to be until after the Executive Session and the information has been relayed. When you vote on it, you come out of Executive Session and it would be public at that point.

Mr. Marshall: Can we put in our minutes which particular citation, which particular exception in the open meeting statute we are using to go into Executive Session on this matter?

Ms. Pickens: Yes. I don't have the act with me.

Mr. Marshall: Can you put that in the minutes – just this particular reference?

Ms. Pickens: Yes.

Mr. Marshall: Thank you.

7. Next Meeting

Chairman Bayless: Before we go into Executive Session we need to set the date for the next meeting.

Ms. Pickens: I have a recommendation that ideally we probably should have done it earlier and I guess I wasn't thinking ahead far enough when we met and decided the second Monday of each month. It is interfering with some things. The National Association of Insurance Commissioners' meetings are typically the beginning of the second week of each month and Columbus Day. If we want to determine when the next meeting is. . .at the next meeting we can come with a calendar for the end of the year where we can work around holidays and so it's not always a reacting to a problem that you didn't anticipate in terms of your meeting. And that really seems like the better way to do it.

Chairman Bayless: We have a problem anyway on April 10. I won't be here. We don't have 30 days for the next reading of Rule 13. Doesn't there have to be a 30 day notice period?

Ms. Pickens: We would have a problem with the quick turnaround time on April 10 because Wednesday of next week we would have to publish the notice for the April 10 meeting. That is extremely quick and it doesn't give much time to consider the comments received on the rule and to take action on them. Later in April would be more helpful.

Chairman Bayless: I am unfortunately going to be overseas until April 25. Please go ahead without me.

[There was discussion among the Council members regarding the date and time of the next meeting.]

Chairman Bayless: The next meeting will be Wednesday, May 3, 2006, at 10:30 a.m. at the Civic Center.

Mr. Slater: It seems like it would better for all of us if we set a date. Whether it's the second Tuesday of each month or the third Thursday of each month so we can get that on the calendar and we don't have to go through this process.

Ms. Pickens: Right. I think that was the original intent and at the time I wasn't thinking of any Insurance Commission meetings. But the second Monday is often a problem with that. If we could go with the third Thursday or just something a little later and then we'll work around things like Thanksgiving. We can come back at the next meeting with a calendar that says these are what your dates are going to be.

8. Executive Session

Chairman Bayless: Other than the Executive Session to consider the application for self-insurance, is there anything else that needs to come before the Council? Any comments? I would then entertain a motion to go into Executive Session.

[Under the provision of West Virginia Code §6-9A-4(b)(12) to consider specific confidential information regarding an employer, which is not considered a public record within the Freedom of Information Act and for which an exemption is provided at West Virginia §23-1-4(b), the matter to be discussed is confidential and involves detailed information about a specific employer in the State of West Virginia. The law, therefore, requires that the Industrial Council address the matter in Executive Session.]

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

[The Executive Session began at 4:46 p.m. and ended at 5:15 p.m. The Council returned to the public session.]

Chairman Bayless: For the people who have rejoined us, the subject before the Commission is the application of Mettiki Coal Company (WV), LLC, for status as a self-insured under the West Virginia Workers' Compensation law. Do you have any other change in the language?

Mr. Marshall: Mr. Chairman, I would like to make a motion in the form proposed by the staff with the addition of one sentence. In the fifth paragraph I would like to add a sentence

before the last sentence that says, "Approval is contingent upon staff review and approval of 2005 audited financial results of Mettiki and its parent corporation."

Chairman Bayless: Okay. Is there a second?

Mr. Slater: Second.

Chairman Bayless: All in favor. Opposed? The motion is granted. Is there anything else to come before the Commission?

Mr. Dean made a motion to adjourn the meeting. The motion was seconded by Mr. Slater and passed unanimously.

There being no further business the meeting adjourned at 5:20 p.m.