

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JULY 20, 2006

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, July 20, 2006, at 3:00 p.m., Charleston Civic Center, Room 104, Civic Center Drive, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean, Vice-Chairman
Jane L. Cline, Commissioner
Dan Marshall
Senator Brooks McCabe
Walter Pellish
Rick Slater

1. Call to Order

Chairman Charles Bayless called the meeting to order at 3:00 p.m.

2. Approval of Minutes

Chairman Bayless: The first item on the agenda is the approval of the minutes of the June 15, 2006, meeting. Does anyone have any comments?

Dan Marshall made the motion to approve the minutes from the June 15, 2006, meeting. The motion was seconded by Walter Pellish and passed unanimously.

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

Judge Timothy Leach: Good afternoon, Mr. Chairman, and members of the Council. You should have a copy of my report of statistical summary that I sent to you last week and I just want to highlight a couple of things. The number of protests is still a concern to us. They are still running considerably lower than last year at this same time. I will be completing a fiscal year summary that I am required to submit to the Governor and to the leadership of both House's of the Legislature by September 1. That rule required me to submit a copy of that report to the Board of Managers (Performance Council). The rule, which is a rule of the Office of Judges, is silent about the Industrial Council. It would be my intention to supply you with a courtesy copy of the report, but that is based upon a fiscal year. Most of the reports I give you are a calendar year from January to December. These statistics relate to a calendar year, but I

will be doing a year-end summary representing the fiscal year through June 30 on the number of protests.

The second page is where we were concerned that there might be some particular type of issue or the protest levels were dropping. I think that Judge Drescher and I have reviewed this now for six months and we are going to take that out of the report. We don't think it signifies if there is any particular area of concern. It's just down across the board, and the numbers that are down tend to approximate the number of case filings which are down. The percentages are about the same. For instance, referring to the first line of that report what we call "time standard T01 compensability," that's down 32%. Overall claims are down approximately 30% to 31% with workers' comp, from what I'm told, with BrickStreet. Compensability is the first ruling in a claim so those ought to mirror each other. There are a few issues that are a little higher or a little lower. PPD is up a little bit and so were OP boards. We just don't think we're gaining anything by including that breakdown and category type. And unless you all insist that I include it, I'm probably going to take it out of the next report.

Issues Resolved – On that graph you will see that it has dropped from the previous two years. However, it is still well ahead of the number of protests coming in. Of course the fewer cases we have in the system to work on, the fewer we can resolve. Although that is dropping, all three years still represent significant increases over the number of cases that came in that year. And as a consequence, our pending case inventory as of the end of June was 11,261. By way of reference I know that it is already under 11,000 now for July. Again, there is a bottom floor to that number. We are never going to have no cases pending. I'm just not exactly sure how low it can get.

Protest timeliness I highlighted in red – 3.84% is untimely. The reason I highlighted it is because that is slightly worse than we averaged last year, but it's not a significant change. And the 3.66% for last year is an average, so we had numbers higher and lower than that. Those protests acknowledged within ten days of receipt are above last year's average, so there is kind of a balance there.

Another slightly negative report was our decision timeliness which climbed to 3.6% and year-to-date is 4%, which compares not so favorably with the three years previous to that. But if you will recall, we had a horrible start in January, so our year-to-date figure has gradually kind of crept back up. Our time standard compliance is very good, 84.3% for the month and 85.4% for the year compared to 75% last year.

In terms of the self-insurance report, the number of protests received from self-insured employer – the claims decisions – remains almost dead on the number we received each month last year. Although the claims filing with BrickStreet and the order of protested from BrickStreet decisions are down very significantly from last year. The self-insured portion of the caseload remains exactly the same as last year.

On staffing levels, the final part of my written report, Mr. Pellish asked me to convert number of vacancies, which are 18, into a dollar amount. You have that figure there. It's a 14% vacancy rate by positions. It is a little higher vacancy rate by dollar amount. It is almost 19% and it amounts to a total of \$856,042.00. Now the good news is we're not spending that money. The bad news, if there is any, is we do have to have it budgeted. So that's why it's my intention, as I have for five previous years, to get rid of those positions once I'm convinced we don't need them and it's not just a six month downturn in the numbers. That is my report. Can I entertain any questions?

Chairman Bayless: Any questions?

Walter Pellish: Excellent summary.

Chairman Bayless: Thank you.

[Rick Slater and Commissioner Jane Cline joined the meeting during Judge Leach's report.]

4. Public Hearing

Chairman Bayless: Next on the agenda is a Public Hearing. There are three separate rules – Rule 9, 13 and 8. I would propose we do Rule 9 first.

[Please refer to the Public Hearing transcript.]

Chairman Bayless: Next is the initial presentation of Rule 8. Rule 8 is a broad rule which Mr. Sims will describe which talks about who is an employer, what are their rights, their duties, their reporting requirements, etc.

5. Initial Presentation of Rule 8 – Ryan Sims

Ryan Sims: Very well put Chairman Bayless. It is a very broad rule. This rule was originally promulgated by the Workers' Compensation Commission shortly before it was terminated in December. It was finalized by the Board of Managers. As you can see in the title it addresses workers' compensation policies, coverage issues, policy defaults and related topics. Those related topics generally involve which employers have to carry coverage; which don't; issues such as temporary employers; other exemptions; independent contractors; things like that. We made some substantial changes to this rule based on what we think is appropriate, staying consistent with what it is in the statute. The overall goal of this rule was to

make a few changes, but also make some additions to provide more clarity on certain issues such as – independent contractor issues, extraterritorial employers, create more definitions about which employers have to carry coverage, which don't, that type of thing. I'll move forward and touch upon the high points. If there are any questions about a specific change to the rule, feel free. . .

Section 2, page one – We added multiple definitions in that rule. Most of the definitions we added were defined in certain terms in the Code that are found in Article 2 of the Code, which deals with a lot of these issues in regard to which employers have to carry coverage in West Virginia. The one I'll touch on is 3.5.b. on page two which defines, "Carrying on any form of industry, service or business in this state. . ." That's an important term because it's used in the overall definition of "employer" in the Code. In other words, "employer" that has the carrier of West Virginia Workers' Compensation policy. We took a look at a West Virginia Supreme Court case. It's the VanCamp case. I don't actually have the site handy with me right now, but these five factors come directly from that case. And basically what the Court said in that case was if an employer can answer "no" to all five of these factors, then they are not an employer carrying on any form of industry, service or business in this State and therefore they do not have to carry workers' compensation coverage. You will notice at the end of those five factors I pointed out that even if you do meet one of these it is not time for an employer to panic. For example, an employer that has obtained authorization to do business in West Virginia, it doesn't mean they have to get out of workers' compensation coverage. They might not have any employees. If you don't have any employees, you're going to be exempt anyway. I point that out at the end of that definition. This is sort of just a starting point and that proviso there says if you "meet one or more above criteria you may still be exempt." And there are a number of exemptions stated in West Virginia Code §23-2-1, which discusses these issues.

Page four, Section 4.3 – This section is where we actually discuss even if you're an employer carrying on business, industry, etc., in the State why you might still be able to be exempt. And these, again, are in the statute. They are found in West Virginia Code §23-2-1. I think it is subsection (b). All these exemptions are specifically stated in the Code. You can see 4.3.a., "The employer employs only employees in domestic services." The term "domestic services" is defined in this rule. It means when you are a homeowner and you hire someone to do something around your house, you are not an employer. You don't have to get workers' compensation. It is strictly held to that. You have to be basically a homeowner having an affiliation with a residence and you hire someone to mow your lawn, someone to do maid service, that type of thing. That doesn't mean you can start a company of ten lawn mowing people and say, "hey, I'm exempt." It is solely for people hiring people to do things around their home.

Subsection (b), "The employer employs only five or fewer full-time employees in agricultural services." That is self-clarifying criterion. The Legislature felt it appropriate to provide an exemption for those types of employers in agriculture services.

Subsection (c) – All of the employment services are performed outside of the State of West Virginia: “All of the employer’s employees perform labor for the employer outside of West Virginia. . .” Now we have a definition of “temporary.” If the labor is just temporary outside of West Virginia, then the exemption doesn’t apply, but if all your employees are only temporarily performing the labor. . .I might be getting that backwards. At any rate, if all of your employees are temporarily performing labor in West Virginia, you are exempt from the statute.

Subsection (d) is a “casual employer.” That term is defined in this rule. It is basically taken from what it is in the legislation. It is defined in 3.14 on page one of the rule. We basically give the same definition as it’s used in the Code. It “means an employer with three or fewer employees whose work is temporary, intermittent and sporadic in nature and does not exceed ten calendar days in any calendar quarter.” And, again, that’s basically taken directly from the Code.

Subsection (e) is a church, fairly self-explanatory. Churches are exempt from carrying workers’ compensation policies.

Subsection (f) – “The employer is engaged solely in organized professional sports activities. . .” That is essentially a specialized type of exemption created by the Legislature.

Subsection (g) – “The employer is a volunteer rescue squad or volunteer police auxiliary unit. . .” Again, that’s another specialized type of exemption the Legislature created.

Subsection (h) – “The employer employs only employees who are eligible to receive benefits under the federal Longshore and Harbor Workers’ Compensation Act.” That’s a type of federal benefit, and if your employees are only employees subject to receiving Longshoremen benefits then you don’t have to carry a workers’ compensation policy. So, those are all the exemptions. Even if you meet one of those first five criterion. . .if you can meet one of those exemptions, you still don’t have to carry a workers’ compensation policy in West Virginia.

The next point I’ll touch on is 6.2 on page five. That somewhat amends the independent contractor definition that was formerly in this rule. If you look on page six we set forth five specific criterion. Independent contractor status is a very big issue in regard to workers’ compensation. That is whether an employee is an independent contractor or is an employee for which the employer has. . .workers’ compensation. You probably know that often there are arguments made by employers, “Hey, these are all independent contractors. We don’t have to have coverage for them.” But we know from our Supreme Court that in the C & H Taxi case that it is a pretty heavy burden to show someone is an independent contractor. Generally the Court didn’t set out any specific factors in that case, but they said you really look at the control – the degree of control you exercise over the employee. Whether the employees hold themselves out to be their own business; whether the equipment that is being used is owned by the employers; owned by the individual; those types of things. Based on the C & H Taxi case and also looking at some law contained in other states, we created these five factors. As you can see, they

begin on top of page six. The first one is, "The individual holds himself or herself out to be in business for himself or herself. . ." Evidence of that can include possessing their own business license, that type of thing; entering into verbal or written contracts to perform work. The third one in regard to this first factor is whether "The individual regularly solicits business from different persons. . ." In other words, are you solely working for this one individual or do you dole your business out to different individuals?

Subsection (b) – "The individual has control over the time when the work is being performed and the individual's work schedule is not being dictated by the person or entity for whom the work is being performed. . ." Basically are they controlling your schedule? Are they just saying we need this type of work done? Do it at your leisure. Just get it done.

Subsection (c) – "The individual has control and discretion over the means and manner of performance of the work being performed. . ." In other words, are they continuously supervising this individual? Are they standing over their shoulder saying, "do it this way?" Are they saying this is what I need you to do? Get it done. I'll pay you when it's done properly.

Subsection (d) – "The individual is not required at any time to work exclusively. . ." Again, that touches on the earlier one I talked about. If you are required to work exclusively for one person, then that's evidence you are probably not under any contract. Where if you are free to go out to solicit your services to different entities, then that's good evidence that you probably are an independent contractor.

Subsection (e) – Labor oriented type of jobs require the use of equipment – a logger, coal miner, that type of thing. Who owns the equipment that is being used? That is a big factor and that's one that the Court touched on in the C & H Taxi case. The cab company owned the taxi cabs and in that case they found it was a big factor weighing against the taxi cab drivers being independent contractors.

We set forth that criterion with the hopes that it could provide more clarity to insurers, the Office of Judges and other Courts which might be faced with this issue of independent contractor status. Again, we feel very comfortable with them. This is based on reviewing the one case we have in West Virginia, which really didn't set forth criterion, plus reviewing law from other states and how other states approach this very difficult issue.

At the bottom of page six, "extraterritorial coverage." This is another difficult issue basically dealing with employers that have their employees do work in several different states. Some of them might be done in West Virginia and some of them might be done in other states. Basically what the law says is if the employee does at least some of the work in another state – and that is defined in our definitions "at least 30 days in any 365 day period" – the employer can enter into an agreement with the employee that the employer will be covered by another state's workers' comp system and not ours. And, again, the way we have this set up and clarified in here is if the employee is performing at least 30 days or more out of any 365 day period in another state, then the employer can enter into an agreement with that employee that that

employee will be covered by that other state's workers' compensation. But they still have to be covered and that's clarified in here. You can't have them doing any work in West Virginia and not be covered. Again, 6.3.b. expounds on that a little further. That's what we tried to do in that section.

On page 11, "Rating Organizations." This is something that was already in this rule. We just moved it to a different location, made a few changes. It just basically clarifies that the Commissioner can designate a rating organization. I think, as you all know, it is going to be NCCI in West Virginia. NCCI will provide certain policy forms, rating manuals, gather the data to determine the rate for certain classifications and all of that. It basically says that if you are doing business as a comp carrier in West Virginia, you have to abide by the rating rules and rating manuals followed by the designated rating organization.

The last one I'll point out is at the bottom of page 12, Section 10, "Ratemaking." Previously this section discussed ratemaking up through 2008, then 2008 and beyond when the market opens up. We've had a good working relationship with BrickStreet on rates, and the Code addresses sufficiently we think how rates are addressed until 2008. So what we did is we struck the parts that discuss how to work until July 2008 and we just focused on what will occur beginning in 2008, and that's 10.1 where it says, "Fiscal Year 2009." But that is, of course, the year starting July 1, 2008. We hope by leaving that section in there and making some changes to it that it will be clearer to private carriers ahead of time how rates are going to work in West Virginia when they enter the market.

I tried to touch on the main points of the changes we made in this rule and I'll be glad to answer any questions.

Chairman Bayless: Thank you. So this is the first reading of this rule. We will take it up again next time. During that time please get your comments in to the staff if you can before the next meeting. If anybody has any comments now, they are welcome to make them.

The next item on the agenda is a presentation by the Commissioner on the Office of the Insurance Commission's duties relating to uninsured employers.

6. Presentation on OIC Duties Relating to Uninsured Employers – Commissioner Cline

Commissioner Jane L. Cline: Good afternoon. I am passing around a handout that outlines our duties as it relates to our statutory authority with respect to the work that we need to do in addressing default employers. There are copies of that in the back of the room as well for anyone in the audience that might like to see that. The second handout provides you some information on the injunction process that we have been working on since the first of the year.

We actually have two sets of default employers going on. We have the employers that were in default to the old Workers' Compensation Fund, and then we also have the employers

that go in default to BrickStreet. On June 20 we actually published the list of those employers in the newspapers. They were done on a geographic basis based upon the distribution of the particular newspapers. On a regional basis *The Charleston Gazette* had Kanawha County, Fayette County, Cabell and so forth. Of those employers that we have identified at that point there were a little over 1,200 that remained in default to the old Workers' Compensation Commission, and there were about 865 employers that had gone into default to BrickStreet. And those are the two big buckets. But now subsequent to that we are on a daily basis getting information from BrickStreet where employers are going into default. I believe the 865 are employers that were in default around the first part of May, and those were employers that most likely failed to pay their second half premium. They originally had a policy and then paid something.

I am going to talk a little bit about authority but I'm also going to intermingle what we've been doing with respect to those employers thus far. BrickStreet themselves have notified these employers on several different occasions by mail and then some of the employers they also attempted to reach by telephone. Our staff also notified all of these employers by mail on more than one occasion and we have gone back around and worked the telephones on numerous occasions. We can tell you stories about. . .they will answer the phone "ABC Body Shop," and when they find out who we are they are no longer in business. But to make a point, we have been working the list and it is down. Both of those numbers are down significantly from where we started. But, again, BrickStreet has been working the list as well as the Insurance Commissioner's office. This is a great concern and it relates back to any possible funding issues we have with respect to the Uninsured Fund. These employers are now listed on the Default List and that can be viewed on our web page. If someone has a question about an employer that is bidding on a contract with them or has other questions about them, they can go to our website and find out that those individuals are not covered with respect to Workers' Compensation. Again, we do have other types of default employers now and they are being placed on that list on a daily basis. Those employers that went into default to BrickStreet, we are required to provide them an opportunity to a hearing. In the future if they go into default to a private insurer, we are required to give them notice of a hearing. So, that's part of Rule 11. What we are working towards is that once BrickStreet or the future private carrier notifies us, then that automatically triggers the generation of the Rule 11 letter. And then they have ten days to request that hearing. From that point on we will begin to take the process of doing other remedies. So we really have two processes – we have the process we've been working on, on the old list, and then where we hope to be as we get the daily notices. We also have the ability to seek injunctions against employers and we do have staff that has been working on that process. We provided you a handout that shows the progress we have had on seeking injunctions since the first part of the year, and we will continue to work on putting resources towards that process as well.

When the employer goes on the Default List they are now unable to obtain workers' comp coverage until they come back to us and they take certain steps and measures with us. More importantly for the employer, the employer now loses all immunity. So any injured employee of that claimant can now directly sue that employer for remedy as well as our ability to go after that

employer for any funds that they put into the Uninsured Fund. We have that ability to go after that employer. We also have the ability to administer fines against anyone that ends up on the default list. Currently the fine that we have been assessing is two times the premium owed up to \$10,000.00. Also, if we find that there is an employer that is operating illegally – a “rogue” employer never had insurance – we have the ability to fine them \$10,000.00 as well. So those employers must now come to us once they have been fined, and we have identified them, and work out a repayment agreement with us. They can either pay everything in one month or we can put them in a repayment agreement, and at that point we will let BrickStreet know that they are now insurable [or the private market carrier in the future].

As Ryan mentioned earlier, we are no longer in the premium collection business, so we don't collect the premium. We collect the fines, the penalties and any monies that would be due the Uninsured Fund as a result of our having taken care of the claimant on behalf of an employer that was in that Fund. We are not looking at trying to forgive. I mean we're not in the premium business anymore. But on the fine and penalty business, we have come into some situations – by working on some reduced fine or penalty we are able to get the employer into the insured category again. We have to have some judgment call on doing that because that's the real goal – to keep people that are legitimately going to operate a business in business, but at the same time make sure they are insurable and get coverage through BrickStreet. It is not something that we are taking lightly and we are trying to make sure we have our own understanding of what the criteria would be.

In addition to the other processes we have in place, we also have the ability and are working with other state entities with respect to suspension of licenses and permits that other state entities are responsible for issuing. We have met with a number of those state entities on a couple of occasions. We are working with the Revenue Department to put into place the notifications and the process with the Tax Department. Some of that process had been started by the old Workers' Compensation Commission, and we are now further building upon the progress they had been making and beginning to work with other state agencies. Everyone has to have a business license. Now we are working with the Tax Department and they are subsequently suspending their business license and then they will be notifying the Secretary of State's Office if those licenses are suspended. We are working with, for example, Lottery and ABC because many of the licenses that are issued by ABC subsequently have the Lottery license as well. We've met with the Division of Forestry and the Department of Environmental Protection about getting the processes in place to notify them when we take an action, and we've done what we can do to get them insured and now we need their help in shutting that business down. We're working on those processes with the various entities that are involved with that. Now those entities also – before they issue a permit or license to a new business – are supposed to check our Employer Violator System to determine an officer or owner is not on that list or that the employer does not have issues that are unresolved with the Insurance Commissioner's Office or the old Workers' Compensation Commission. We also have the ability to post default employers' place of business with a notice on their front door or a very visible place. In the advent that we cannot determine the actual business location, on the county courthouse steps. We actually plan to begin posting businesses sometime next week.

We felt that by publishing. . .and we have generated some activity with employers coming to us to resolve their default status. By giving them some period of time we wouldn't be duplicating a lot of effort in that manner, but we will begin posting. Our fraud investigators are going to initially help us in that process. We've been talking with other state entities about using their investigative resources because we know in some instances the ABC inspector is going to know the business location and we're not because it is a post office box or an accounting firm. . .or some other nature. We also have some out of state employers on that list that we need to verify how we are going to do that.

Within the Insurance Commissioner's Office we have investigators that are primarily compliance officers and not fraud investigators. We are in the process of hiring five additional investigators in the compliance area and those investigators will be doing this kind of work as well as doing some of the other general insurance work as it relates to civil penalties and fines. We have a challenged situation. We have some instances where the employer will end up in the civil fine area. Others, if there is a pattern, we'll be looking more towards a fraud issue. We are also looking at this from the standpoint of what are the types of businesses that are in default, the amount of premium they are in default and their claims history. As we move forward, the procedure will also address those that have been in and out of the system. In other words we can go back and look at their habitual habit of being in default at some point in time. We are putting those processes in place.

We also have the ability to go after liens and civil lawsuits and take action against personal property and collections and are putting that process together as well. We have some limited resources with respect to the collections issue and have been internally discussing the possibility of hiring outside counsel to help us through that process. Those discussions and processes have been ongoing with our staff that is responsible for this area. There is also personal liability as I mentioned. They lose their immunity. But we also have the ability to personally go after the partners, officers and directors for workers' compensation obligations for individuals that are part of those operations. We have some really broad sweeping powers to use in going after default employers.

We've been doing a lot of news media with respect to this issue and plan to keep that awareness up. We are hopeful that over the course of the next six to 12 months as we improve upon our processes and procedures that we are able to further limit this. We've had some bumps in the road with getting employers to pay their premiums on time, but it's an educational process for them as well because they are used to paying in arrears. Now they have to pay prior. We are working very closely with BrickStreet on the latest round of invoices that went out because we have some employers that have not paid that were due on July 13. I envision early next week getting with BrickStreet to address that list and we will put the same forces forward that we have in the past in assisting them through telephone and written correspondence to these employers to encourage them to get their premium paid to BrickStreet as soon as possible.

That's kind of a brief summary. But it's a lot of activity and it's a lot of processes to put into place. And we also had some system problems with respect to the data that was coming from the old Workers' Compensation Commission and how that was being received by our offices and then how that translated from BrickStreet. Plus there was some backlog with employers that were on the list that had filed their information to get closed out. So we felt it prudent to make sure we had cleared those before we got really aggressive in our action. We are prepared to move forward now in a much more aggressive manner.

Chairman Bayless: I'm curious. Do you have any idea about whether the number of people in default as of today is greater or lesser or about the same as the people that would have been in default and not had workers' comp last year?

Commissioner Cline: If we take out the employers that owe BrickStreet premium dollars today for the renewal period that just occurred, it is less.

Chairman Bayless: Good.

Commissioner Cline: What was on the original list and where we've worked with BrickStreet to pare down is less than it was at the beginning of the process. I know what we had on the original Default List has gone down significantly. Part of that was working through calling, writing. Then others were on there but had filed their audits and they needed to be cleared off. Also, in addressing the "rogue" employers – these are the employers we know of, and we know there are probably employers out there that have skated through the system and don't have coverage. And as those come to light between our civil investigative investigators and the investigators in the Fraud Unit, we'll work towards taking action against those individuals as well.

Mr. Pellish: Commissioner, I'm very glad to hear that we're going to get more aggressive in our approach to the problems that may be out there. I understand that you are dealing with an extremely difficult issue because of the transition, and people getting their names on the list that don't belong there, or somehow a company can get in trouble for a short period of time and miss a payment, but their intent is to comply with the law. My major concern is . . . go after the bad guy and it sounds like you are going to try and do that.

Commissioner Cline: Clearly, we consider this one of the more significant responsibilities with respect to the transfer of duties for administering the regulatory aspect of workers' compensation in the State for several reasons. And one is what can happen with the Uninsured Fund. We do have claims in the Uninsured Fund today and we are watching that very closely. The staff actually just sent the first series of invoices to those employers, and several of those employers we have identified. They are working with us. They have gotten their workers' comp coverage. They know they are liable for these claims and will be expected to pay for them. We deem this to be really one of the most critical responsibilities we have.

Mr. Pellish: That's excellent. My main concern is obviously for the employees because if you have a bad employer out there, they don't care about the way their people are getting treated or what is going to happen to them.

Commissioner Cline: Clearly it is extremely important to the claimant because they need to be taken care of in the advent that they come into some type of injury on the job. It's not fair to the employers who are in good standing because it leaves the opportunity that they are now going to incur costs for somebody's else's liabilities.

Mr. Pellish: Absolutely.

Commissioner Cline: That's another reason why we consider it very important. And it's going to be important to the insurance industry as a whole when they make decisions about entering our market place.

Mr. Pellish: By the way, so that somebody doesn't get the wrong idea, I think this thing is a double-edged sword. I believe in aggressively going after the individuals who are trying to get away with murder on the system with multiple back claims, multiple this, and multiple that.

Rick Slater: Commissioner, how many investigators does the Commission have assigned to the enforcement effort?

Commissioner Cline: That was one of our concerns – staffing issues. We had three investigators in what I would call our Civil Administrative Unit. When we are at full compliment in the Fraud Unit we'll have 24 in that unit. We have other people besides those that are providing assistance in working the phones and doing other aspects of getting them into agreements. We have five positions posted to add to the Compliance Unit. With that we still have vacancies that transferred to us from the old Workers' Compensation Commission, but we are trying to determine where the most need is. That's been our challenge. That is also why we are working with the other State agencies to see if they can lend us some help and resources as we work through this initial round. In the future it will be a much simpler process when we have this 2,000 cleaned up because now BrickStreet, and in the future the private carrier, will be notifying us on a daily basis as employers go into default. That triggers the Rule 11 letter. That triggers some other action on our part and then when we're not able to remedy it, then we will be sending out to the other State agencies and moving forward. But our staff will immediately go post the site and do all those things that we can immediately do and hopefully get them taken care of before we have to go to the Tax Department and other entities.

Mr. Pellish: Judge, I think I figured out how I can spend some of that \$850,000.00.

Commissioner Cline: Well, they get to do the Rule 11 hearings.

Bill Dean: The delinquent employer list that I've seen before always had a dollar amount owed. The one I saw this week didn't have that. Is there a reason for that? Maybe mine just didn't have it on there because I got a copy from someone.

Commissioner Cline: The list is in various forms. We are in the process of adopting a "Proof of Coverage System" that NCCI has in place. We are working through some IT needs. We are hopeful that the Proof of Coverage System is actually up in September and that will allow you to go in and know that the employer actually has coverage because you will have the Proof of Coverage System and then the other system. With respect to what it looks like and what it used to look like I'd have to. . .Melinda thinks she can answer that.

Melinda Ashworth Kiss: One of the differences is they don't actually owe the Insurance Commission premium. So the private carrier default. . .but the amount of premium that they owe the private carrier isn't what they owe the State. So really what we're trying to communicate is just flat out this employer is uninsured because the amount of the premium that they owe is somewhat irrelevant to us. They are now uninsured and their claims would go to Uninsured Fund.

Commissioner Cline: Actually for the period of time now that they are uninsured there is no premium. That coverage period is lost. I mean the carrier is not going to take that premium and then go back and buy coverage. It would be like if you let your auto policy lapse. It moved into a different environment. Then if we get a claim for any period of time that that employer was uninsured, it goes to the Uninsured Fund. Then that triggers our other responsibilities to going after that employer for any amounts that the Uninsured Fund actually pays out. The Uninsured Fund was originally funded with a \$5 million dollar transfer from the old Workers' Compensation Commission. We've deposited close to \$400,000.00 in that fund through our collections on uninsureds – the penalties and assessments – and to date we know we've paid out about \$38,000.00 in claims. I don't know of any catastrophic claim that has hit that fund yet. Thus far it's been fortunate. . .little indemnity for someone that missed a little work time.

Bill Dean: For me to look at that, you know, a delinquent employer wasn't. . .but once you saw the figures there in years gone by there was some outrageous numbers there that were owed.

Commissioner Cline: Owing to the old Workers' Compensation Commission, yes, there were some big numbers there. And that's our responsibility to continue to try to collect those funds. Until we do, owners and officers of those companies should not be able to start another business or obtain workers' compensation coverage.

Chairman Bayless: This may create more problems than it solves. Has any state ever gone to a bounty system where a person turns in an uninsured employer? They get \$50.00 for each employer and Mr. White could probably get rich.

Commissioner Cline: He is one of our biggest resources. Not that I'm aware of. Workers' comp coverage is mandatory in every place but Texas.

Chairman Bayless: Thank you very much.

7. General Public Comment

Chairman Bayless: Our next item is general public comment. Is there any member of the public that wishes to make a comment on anything, whether it was covered or not?

Steve White (Affiliated Construction Trades Foundation): Thank you, Mr. Chairman. I'm just really following up about what was in the paper and the effort and I commend the Commissioner and the staff for the efforts they are making, and I've learned a little bit here. For clarification purposes, there are about 2,000 names on that Default List. About 1,200 you said were Old Fund defaults. There are dollar amounts that are owed there. And there are about 800, if I can do my math. . .

Commissioner Cline: Eight hundred and sixty some were in default.

Mr. White: Owe BrickStreet money and now they owe you or the State an assessment and a penalty, so there is a dollar amount there. The reason I want to focus on the dollar amount is it's important. There is a law on the books that was passed a few years ago that says a company that owes the State or subdivisions \$1,000.00 or more in total cannot bid on public works projects. It is an important law for us in the construction industry. . .if we stop them from bidding, guess what? They are going to come pay their bill or at least they don't get that job and that is a good public policy. That's why the Legislature passed it. Without the numbers. . .this is one of the sources of numbers. You know it could be unemployment. It could be taxes. Liens filed against companies. I'd urge you to look at. . .and I've asked for the numbers, be it Old Fund or new assessments and there is a question about whether it's going to be accessible. Public information is very important to this whole process so we can, you know, understand what's going on. So I'd urge you to look and make that number – whether it's old premium or new assessment – public. Clearly with the ongoing process I think it would help everyone if there was a date published of default too. For those who are watching, be it an agency or a watchdog, you don't want to have to go through the whole list every time and check every company. You just want to check the new ones that are coming in. Are they doing my line of work? Are they bidding on a contract? I don't want to have to check 2,000 every time. . .I want to check just the new ones.

Commissioner Cline: I think that once we have the Proof of Coverage System in place that will make that whole process much easier for you because you will just be using that business entity's name and it will come up and say they have coverage.

Mr. White: Although it's the opposite. That way I have to check everybody. It would also help if you are putting people into a default status. . .or they are putting themselves into a default status and you are recording that information. . .the new people going in. . .that we would know. Then I have a small number of people I can check and I could say, hey, there are ten new people there. Are they doing work anywhere? Are they about to bid on anything? It will help. Otherwise once a quarter we'll just grab that whole list and we'll just start looking all over again. We can talk about it. But it leads me to two other points, if I may.

The Proof of Coverage System I'm afraid is going to be inadequate from my understanding so far because Proof of Coverage will say, "Do they have coverage?" Yes, they've got coverage. Well, what kind of coverage? Now in our business, again, construction – and I was talking to Mr. Dean here earlier – steel erection; a big category, a high premium. We know that in the past that people would avoid that category. And they would say, "We do all sorts of other things. We don't do steel erection." And I would take pictures. Here it is. There is steel erection. They are doing it, and bring it in for enforcement purposes. In the old system you would have to pick. That was information the public had access to. Just like the dollar amounts owed. It was public information. Now I ask if they coverage and the answer is "yes." But I don't know what kind of coverage it is. I don't know if they have coverage for steel erection or steel fabrication, which used to be one of our problem areas. I don't know if they have coverage for above ground lining but not underground lining. There is nothing that says whether they have adequate coverage and clearly that is going to be one of the big areas where people will try to beat the system. Yes, I've got coverage but I'll put it in the cheapest category. That's where I'll turn in my payroll until you catch me. Of course that's BrickStreet's problem. The coverage verification – my understanding is there will be no category at all. We have no idea whether they are set up as a clerical operation or a steel erection firm – the difference between .25% payroll and 33% payroll. It is very important I think for people to be able to see what coverage are they set up for. Why wouldn't we? Certainly if I'm an owner and asking for someone to come out to my site, I want to see that proof of coverage and it would be listed there. Just a point to be made because I think those are steps backwards in the public information side of our system – step backward and not knowing the amounts owed; step backward not knowing the coverage. And I don't think we want to go backwards in the enforcement area. I don't see any justification for going backwards. If there is, I would certainly like to hear it.

Finally, I'd like to point out – and I think part of this is due to the Old Fund/New Fund. Yes, we are getting tough, and I do believe that they are doing good things to get tough on companies. But I started to look through the construction companies and I noticed one of the problems that I have is too long from the time of default to the time of enforcement. So, I would venture to guess that half of the companies that we're going after are ghosts. They're gone. They're long gone. I looked at a few – Elliott Electrical Company. Authority to do business revoked two years ago from the Secretary of State. The last contractor's license was 1998. They are on our "hit list." Well, come on. Jarvis Electric – revoked 2002, Secretary of State. These are not active businesses. There are a lot of active ones. . .

Commissioner Cline: With all due respect, we have gone through and continue to go through and try to clean the list. The enforcement power on the uninsured is our responsibility and I would be more than happy to sit down and meet with you and go through your concerns. It's much less than it was on there. If you have some knowledge that would help us clean that list up, we would welcome it.

Mr. White: That's why I'm coming here and I just wanted to make it clear that there is a historic problem as well. My final question is the 1,200 companies in the Old Fund seems to me a really small number. It seems to me there is a process at some point of taking people off the list. I think we used to call it the "uncollectible list." Is there such a process that people will go from default to we finally say, "let's just give up," which might make sense. If it's a little bit of money and you are spending more money chasing them but. . .when do we know when people are coming off the list, if that is going on? Am I making myself clear? People don't stay on default forever, I assume, or at least they get moved to a different list. Is that taking place? I'd just like to know how we would know when – okay this batch of companies we're just going to move them off to the "forget about them list." I'm not saying it doesn't make sense to do it. I would just like to know when it is going on.

Commissioner Cline: We can get you that information.

Mr. White: Okay. Thank you very much.

Chairman Bayless: Any other public comment?

8. New Business

Chairman Bayless: The next item on the agenda is new business. Does anybody have any new business that they would like to bring before the meeting?

9. Next Meeting

Chairman Bayless: The next meeting will be Thursday, August 24, 2006, at 3:00 p.m., Charleston Civic Center.

10. Executive Session

Chairman Bayless: The next item on the agenda is issues related to self-insured employers. These matters involve discussion of specific confidential information regarding the self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code, §23-1-4(b). Therefore it is appropriate that

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the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. I now entertain a motion to go into Executive Session to consider matters relating to self-insured employers. If there is any action taken regarding these specific matters for an employer, we will reconvene into a public session and take the action at that time. Do I have a motion?

Mr. Marshall: So moved Mr. Chairman.

Mr. Pellish: Second.

Chairman Bayless: All in favor signify by saying "aye." [Motion passed.] Thank you.

[The Executive Session began at 4:45 p.m. and ended at 5:05 p.m.]

Chairman Bayless: We are back in public session. There is one thing I forgot to do so we will do that during this public session. I don't think it is controversial. We need to have a motion to approve the filing of Rule 8 that we discussed in public session for the initial filing with the Secretary of State's office.

Mr. Pellish: So moved.

Mr. Marshall: Second.

Chairman Bayless: All in favor signify by saying "aye." [Motion passed.]

We now have Resolutions before us concerning three companies and I will read them. The first is Genesis HealthCare Corporation.

Whereas, Genesis HealthCare Corporation has applied for workers' compensation self-insurance status;

Whereas, Based upon the information provided on the application, Genesis HealthCare Corporation meets the financial responsibility requirements set for in §23-2-9 of the West Virginia Workers' Compensation law and West Virginia Legislative Rule, Title 85, Series 18;

Whereas, Based upon the information provided on the application, Genesis HealthCare Corporation meets the procedural requirements set forth in §23-2-9 of the West Virginia Workers' Compensation law and West Virginia Legislative Rule, Title 85, Series 18;

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Therefore, Be It Resolved that the Industrial Council hereby grants self-insurance status to Genesis HealthCare Corporation effective October 1, 2006.

This approval is pending the receipt of the policy of excess insurance for catastrophe coverage from ACE American Insurance Company at which time the Self-Insurance Unit will ensure that the policy provided contains the correct language and is in an amount sufficient to satisfy the requirement. Adopted this 20th day of July 2006.

Chairman Bayless: I will make the motion. Is there a second?

Mr. Marshall: Second.

Chairman Bayless: Any discussion? All in favor signify by saying "aye." [Motion passed.]

I will make the same motion and use the same language with respect to Coca-Cola Bottling Company Consolidated, CCBCC, Inc. Is there a second?

Mr. Pellish: Second.

Chairman Bayless: Any discussion? All in favor signify by saying "aye." [Motion passed.] We now have another motion.

It appearing to the Industrial Council that:

Whereas, the Self-Insurance Unit of the Offices of the Insurance Commissioner, as part of its annual review of self-insurance status and as provided in 85 C.S.R. 18.18, has performed a comprehensive financial analysis, compliance and security review of the employer set forth on Exhibit A;

Whereas, based on the reviews and analysis performed by the Self-Insurance Unit, the employer set forth on Exhibit A has failed to meet one or more of the financial benchmarks required by 85 C.S.R. 18.18.3. As a result of the employer's failure to meet one or more of the financial benchmarks and in accordance with 85 C.S.R. 18.18.5, the employer is required to post security for claims liability with dates of injury on or after July 1, 2004, to remain in compliance with self-insurance law as set forth by Title 85, Rule 18;

Whereas, in accordance with 85 C.S.R. 18.18.7, the Self-Insurance Unit has provided notification to the employer of its recommendation;

Whereas, the recommendation to the Industrial Council that the employer listed on Exhibit A, attached hereto, provide security in the amount listed on Exhibit A;

Therefore, Be It Resolved, the Industrial Council hereby finds the self-insurance status granted to the employer set forth on Exhibit A is renewed and the required security amount shall be as set forth on Exhibit A.

The approval is pending the receipt of the current required security from the employer, at which time the Self-Insurance Unit will ensure that the security instruments provided contain the correct language, are in the correct security amount, and reflect a current renewal date. Adopted this day, July 20, 2006.

Chairman Bayless: So moved.

Mr. Marshall: Second.

Chairman Bayless: Any comments or questions? All in favor, "aye." Opposed? [Motion passed.] Is there any other business to come before the meeting?

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

Chairman Bayless: We are adjourned.

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