

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

AUGUST 9, 2007

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, August 9, 2007, at 3:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Charles Bayless, Chairman
Bill Dean
Dan Marshall
Walter Pellish
Delegate Nancy Guthrie
Delegate Carrie Webster
Jane L. Cline, Commissioner
Senator Brooks McCabe

1. Call to Order

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

Chairman Bayless: The first order of business is not on the agenda. The Governor has made an appointment to fill the position that Mr. Slater resigned from [Industrial Council member]. It is Edward Hartsog of Hurricane, West Virginia. He is a CPA. The Governor appointed Mr. Hartsog on August 6, 2007, to fill the vacancy.

2. Approval of Minutes

Chairman Bayless: The next item on the agenda is the approval of the minutes of July 5th.

Bill Dean made the motion to approve the minutes from the July 5, 2007, 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, Commissioner and members of the Council. I am hoping that you have my report. I recall mailing it out but it was a pretty hectic week last week. And I know I didn't e-mail it because somebody in the audience was asking me when they were getting their copy. One of the people asking me when they were getting their

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copy was my Deputy Chief, so I knew I was in trouble. On the way over here he told me that he never got one. I apologize for that. We had a trial coming up this week and I was deep in trial preparation.

Briefly covering a few of the statistical items, I bring to your attention the number of protests – skipping ahead to page two, “protests by month.” I think it is now fair to conclude this chart was implemented in response to the Chairman’s question, “Have we bottomed out, so to speak, on the protest level?” As you may know, historically we were about 2,000 protests a month for a decade or more. . .a decade and a half. Then in 2003 we hit a peak right after the massive West Virginia Workers’ Comp overhaul at that time of nearly 3,000 a month. But now we’re down to about 1,000 a month. It has appeared to have bottomed there since last July. So for about the last year the little spikes are slightly above 1,000 or slightly below 1,000 but they appear to have leveled off. I intend to keep tracking that out of curiosity to see if any change on July 1, 2008, will make any noticeable difference in the number of protests.

Pending caseload has also leveled off. Those figures for the last several months are right in the low 7,000. So we are now at a balance in receiving new protests and resolving old protests. It appears to have matched or balanced up.

Our acknowledgement timeliness looks good. I highlighted a couple of numbers there. We are well above the last three or four years on that average. And our final decision timeliness is looking very good. For year-to-date 65.5% of our decisions are done within 30 days of assignment to a judge; and less than half of one percent, or took longer than 90 days, which makes us noncompliant.

The final statistical highlight is our time standard compliance. Overall time standard compliance is at 92.7%. It is required to be 80% by law, so we are well above that requirement.

Then touching upon the narrative part of the report, I really just included the amendment to the OoJ Procedural Rule without change from the last month. Again, I’m not trying to cast any kind of blame or anything. We are waiting on some very important policy decisions involving who is a party, who may protest, from the Insurance Commissioner to put that in our rule. As I’ve said before, our rule works in its current situation. So this is just really a technical cleanup of the rule. We can continue under the current system as is.

I did want to comment about our Petitions for Stay of Payment of Awards because that rule is on the agenda for final vote today. . .final passage. To date we have received 61 petitions. Now we started doing this at the end of February, so that’s five months and we have 61 petitions. That’s 12 a month out of the hundreds of decisions we do each month. It’s not a big driving part of our business. Out of those 61 we’ve ruled on 59; we have only granted 10. But as I go on to comment, one of the reasons that figure is kind of skewed is we have 20 some petitions for stays of a compensability ruling. It is not the award of an indemnity benefit. It just says go forth and administer the claim and then whatever results results. So our interpretation of the statute was that was not covered by a statute that allowed a “stay order” stay in a

payment of benefits. This was instead the stay of the administration of a claim – was what we were being asked. We didn't think we had legal authority to go that far. I do want to point out to you – and it's not an editorial comment at all – that the rule in its current version will allow us to issue stays on compensability only so far as that compensability ruling ultimately may result in a payment of indemnity benefits. So if we had been doing the compensability ruling under this version, these numbers would have reflected more grants – a higher percentage of grants. That's very long winded, around the barn explanation to the point I was trying to make. This rule is going to change our numbers so the number of grants will not look as low as it currently does because we threw out a whole category. It was a very large category. It's about a third of the petitions.

In-house training – we have what we call a “retreat.” If you can't get judges to go forward you can always retreat. So we're having an in-house training up at Flatwoods next month, and I mentioned that before. Just a reminder of what we are going to be covering.

Now skipping ahead to point six – I mentioned when I prepared this report that we were considering abandoning our public training which we do around that State every Fall. Because there weren't any changes made in the legislation of the last Session, except the stay petition process, we didn't see the need to have a half day or longer seminar to talk about that one rule change. Mary Jane Pickens has been in contact with me and it appears that the Insurance Commissioner's staff has a number of issues they would like to make available to the public, or make the public aware of and the lawyers aware of. So we're going to meet perhaps next week and come up with an agenda and we'll probably put these training sessions back on.

Finally the last report, I do have an annual report to the Governor. It is due September 1st and I'm working on that now. It's a statistical summary. It shows where we met the requirements; it shows where we failed to meet requirements; and what steps we are taking to improve that performance. You will receive a copy as a courtesy perhaps at the next meeting in September. If you have any questions about that, I'll be glad to address those. That's all I have to report, Mr. Chairman, and I'll be happy to entertain questions.

Chairman Bayless: Any questions for Judge Leach? Thank you.

There are two rules on the agenda today. If you saw an earlier version of Rule 8, the staff has detected some internal inconsistencies actually in the law that they need to sort through, so that one will not be here today.

Series 1 was first presented in May, and there was no June meeting, then again in July and so this is hopefully the final version today. There have been quite a few comments and Mr. Sims is going to start and then if any member of the public wishes to address that, they may.

4. Title 85, Series 1, "Claims Management and Administration" – Ryan Sims

Ryan Sims (Associate Counsel OIC): Good afternoon Chairman Bayless and members of the Industrial Council. As the Chairman pointed out, we are bringing before you today Title 85, Series 1, which is entitled "Claims Management and Administration." It addresses various aspects of workers' compensation claims management and administration. We brought this forward as a limited amendment to Rule 1 to basically address three issues. Those being mileage reimbursement in Section 15.1 of the rule; expert witness fees in Section 16 of the rule, and this is the current final draft; and the stay process based on legislative amendments made in Senate Bill 595 in March. We also made it clear – and in our comment responses made it clear – that we intend to do a more comprehensive amendment to Rule 1 in the near future. But at this time we are limiting it to stylistic and technical cleanup as well as the three substantive issues.

Having said that, we did receive substantial comments to the rule and we did prepare comment responses. We made changes where we deemed it appropriate. We did make changes where we deemed that it was not appropriate. And I would refer to our written comment responses which do respond to all substantive comments we received on this rule.

I am going to take you through the few substantive changes we did make in this final version. The first one would be in Section 15.1. That section is the section in Rule 1 that addresses mileage reimbursement to claimants. We originally had this reading that claimants were entitled to the same rate state employees were entitled to. I think right now it is 44.5 cents per mile. But we discovered when we looked at the law that Section 15, the way it read, was inconsistent with the law in §23-4-8. In §23-4-8 the Legislature says that claimants are entitled to mileage reimbursement if it's for an exam as directed by the self-insured employer or the carrier. It doesn't state that they are entitled to any mileage reimbursement for just regular medical treatment. With an eye towards making this section consistent with the statutory law, we cut the part that said the mileage reimbursement is that that is paid to state employees, which again is currently 44.5 cents, and it can change periodically. There is a state agency that is responsible for keeping an eye on that. It is usually consistently with what the feds use. But we struck the provision that permitted the 15 cents per mile for treatment because we believe that that is inconsistent with statutory law.

There is one other technical issue in 15.1. There was a last sentence we felt was duplicative and basically reflected the changes we had already made. I think in the version you were sent by e-mail that last sentence was in there. We have stricken that last sentence from 15.1 because we thought it was duplicative. The version you have now does not have that last sentence and that is the rule we are asking you to approve.

The other substantive change is in Section 17.5 on page 16 of the final draft. Basically we tweaked this to reflect what the law says. There are certain types of benefits that the Legislature has said cannot be stayed under any circumstances. As you can see in 17.5 it

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states that you cannot move to stay any medical, rehabilitation or PTD benefit. And, again, that's consistent with what the Legislature states in the law, particularly in their changes made in Senate Bill 595. With that I present to you this final version of Rule 1 for approval.

Chairman Bayless: Does anybody have any questions for Mr. Sims?

Delegate Carrie Webster: Ryan, my question starts with the mileage that you indicated was struck with respect to what you all felt was inconsistent with State Code.

Mr. Sims: Correct.

Delegate Webster: How long in terms of a practice have we been reimbursing for exams that were not, I guess, ordered by comp?

Mr. Sims: I'm really not sure exactly. I know this rule has been in effect for some time. I'm not sure what the very first effective date of Rule 1 was, but I would say basically as long as this version of Rule 1 that we are amending right now has been in place, a number of years.

Delegate Webster: I might not be clear. I thought when you were. . .what page is the mileage part on?

Mr. Sims: Page 13 of the most updated draft. It is in Section 15.1, the first section.

Delegate Webster: Okay. Where it has been struck, at least on the version I have, it says, "Claimants may be reimbursed for mileage in connection with medical examination or treatment at a rate of 15 cents. . ." But it says in conjunction with "medical or treatment." Now you all are saying the Code does not provide for "or treatment." Is that right?

Mr. Sims: That's correct. The Code provides for reimbursement for examinations that are directed by self-insured employers or by carriers. In other words, examinations that the claimant, as part of receiving workers' compensation benefits, is required to undergo. . .generate to obtain a separate opinion.

Delegate Webster: Now the language that I'm looking at struck, is that struck from what the current rule is? Meaning what it currently exists. . .?

Mr. Sims: Are you referring to the sentence that begins with "Claimants may be reimbursed. . .?"

Delegate Webster: Yes.

Mr. Sims: That was stricken. . .the current rule has that sentence. It is being stricken in this final version. And, again, that is because that is consistent with the mileage reimbursement to which claimants are entitled under §23-4-8.

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Delegate Webster: Prior to the privatization and since that time, notwithstanding what the statute said, has up until this proposed rule there been reimbursement for treatment even if it has been just 15 cents?

Mr. Sims: To my understanding, carriers and self-insureds did follow the rule in 15.1. But our belief was that it is inconsistent with statutory law.

Delegate Webster: As far as you know we've always been reimbursing, even 15 cents for treatment and exams. Right?

Mr. Sims: I would assume as long as this Section 15.1 – which again we believe is inconsistent with the law – has been in place, I would assume that Workers' Compensation Commission and private carriers did follow the rule.

Delegate Webster: And even before. I mean, when we were just comp.

Mr. Sims: Correct. I would assume the Comp Commission followed this rule as well.

Delegate Webster: Although we are going to be increasing the mileage reimbursement rate to that which is comparable to state employees, if we adopt this we are going to strike any reimbursement. And I understand you're saying because you believe it is inconsistent with statute for anything other than an examination that would be ordered. Is that right?

Mr. Sims: Right. The language in the first sentence says, “. . .expenses actually incurred in connection with medical examinations which the claimant is required to undergo by the Insurance Commissioner. . .” That would in a situation if it's an Old Fund or Uninsured Fund claim, private carrier or self-insured employer for the purpose of obtaining a medical opinion. In other words, when the claimant is requested. . .it's not his treating doctor. He has been told to go see another doctor. In that case he or she would be provided mileage reimbursement consistent with §23-4-8.

Delegate Webster: And then finally on that second section, did you say 17.5?

Mr. Sims: Correct.

Delegate Webster: On the last sentence where you have struck “benefit or any,” what's the effect of that by striking “benefit or any?”

Mr. Sims: Well, it was just a technical rewording. When we reviewed the law we saw that you cannot make a stay of motion for medical benefits, for rehabilitation benefits. And that's consistent with §23-5-1(f) as amended by Senate Bill 595. And then further there is another Code section – that exact Code section escapes me – that indicates you can't seek a stay of

permanent total disability benefits. The purpose of these final amendments were to clarify the three types of benefits – that would be medical, rehabilitation and permanent total that you cannot stay under any circumstances.

Delegate Webster: Okay. The word “benefit,” if by striking that, what does that exclude from the category that cannot be “stay?”

Mr. Sims: I’m sorry. I’m not sure if I follow your question.

Delegate Webster: We have “medical, benefit or any rehabilitation or permanent total disability benefits.” That’s on there initially. But then you’ve got. . .at least in the draft I have there is a strikethrough on “benefit or any.”

Mr. Sims: Right. And the way we intended it to read is in that final phrase of the sentence section. . .the full sentence, “No order granting a motion as described in subsection 17.2 of this section may stay any medical, rehabilitation or permanent total disability benefits.”

Delegate Webster: Okay. By the word “benefit” that is struck, presumably you could still stay it for benefit. I just don’t understand what the word “benefit” means.

Mary Jane Pickens (General Counsel OIC): I think what you see here is our own. . .this is not what you are used to seeing in the Legislature. You are seeing our own method. I think, and Ryan can correct me, the language “benefit or any” that is struck was not in the original rule because this is all new. This was our own language that we are striking from a prior version.

Delegate Webster: Okay. So what does “benefit” mean?

Ms. Pickens: We just changed it because we thought it read better if it is any “medical, rehabilitation or permanent total disability benefits.”

Delegate Webster: And that encompasses what a “benefit” would be then?

Ms. Pickens: Yes.

Delegate Webster: That’s what I was wondering.

Ms. Pickens: Well, it is a little confusing.

Delegate Webster: Okay. Thank you.

Chairman Bayless: Let me ask you a question. Let’s assume for the last 20 years that we’ve been paying 15 cents a mile for treatment, but 30-40 cents or whatever for examinations and this has been the practice. Does anybody have any knowledge that the Legislature meant to change that? Or was this just one of those things that nobody focused on? I mean, the law

clearly says now it's reasonable for examinations ordered by the self-employer. . .whoever the carrier, and the practice was to pay 15 cents. Did the Legislature specifically mean to do that or was this just something that happened?

Ms. Pickens: I don't know that any of us. . .and I don't know if Richard Crynock has any knowledge that might shed on the terms of history. My understanding is that the practice was. . .that it was being paid at perhaps even a higher rate than the 15 cents. The last time the rule was amended that was reduced to 15 cents as a compromise between the various interested parties. Again, as Ryan has said, our goal was to not end up with a rule that was inconsistent with the Legislature.

Chairman Bayless: But if you have somebody where the only specialist is in Morgantown or Cleveland, that gets expensive. I agree with you. If the law [§23-4-8] says that, then it's the law.

Ms. Pickens: That was our struggle.

Chairman Bayless: Are there any other questions or comments?

Delegate Nancy Guthrie: Just as a matter of curiosity, on a yearly basis that mileage reimbursement was costing the state how much?

Mr. Sims: I'm not sure I have those statistics in front of me. I think we did at one point.

Mr. Marshall: It was in BrickStreet's comments.

Chairman Bayless: BrickStreet has the numbers.

Delegate Guthrie: As a practical matter, I mean just because you change policy someplace else doesn't mean that the amount of money for reimbursement changed much. Does anybody have any historical knowledge of how much that benefit cost?

[Senator Brooks McCabe has joined the meeting.]

Ms. Pickens: I don't know if this responds to your question, but we did receive a comment from BrickStreet that set forth what they were estimating would be the affects of the amendment. It has not passed. . .I have it here. . .Ryan's responses to the comments.

Mr. Sims: BrickStreet basically submitted the figures of mileage for dates of service during the period July 1, 2004, through June 30, 2005, and that is in their comments. The total they state is \$1,201,327.62. That's for all types of mileage reimbursement during the year.

Mr. Marshall: Fifteen cents was in there at \$1,093 million?

Mr. Sims: Correct.

Delegate Guthrie: I apologize but I don't believe that Delegate Webster and I have that. . .

Delegate Webster: We may. . .

Delegate Guthrie: We may but. . .at the beginning or the end? Here it is.

Chairman Bayless: BrickStreet is right. It says their total mileage reimbursement was 7.55 million miles. This included about 7.3 million miles at 15 cents, so that would have been the treatment miles. That only left 267,000 miles which would have been, I assume, medical examination miles. So the vast majority of it was the 15 cents a mile. If you then take the 267,000 – for approximation – jack that up 50 cents a mile that's only \$130,000.00 where it was running four, five or six. I mean at one time it was up to \$6.8 million and the vast majority of it was the 15 cents a mile. So the current thing is not going to cost very much.

Mr. Marshall: What we're basically looking at here is the Commission's interpretation of statute, that the mileage for treatment is not permissible under the statute. Is that correct?

Mr. Sims: It would be correct to say that we don't think there is any statutory basis for mileage reimbursement for treatment. We believe §23-4-8 only provides a statutory basis for mileage reimbursement for directed exams.

Mr. Marshall: If this Commission determines that an allowance for that purpose was appropriate. . .even if we did so we don't have – do we or do we not – I would think we don't have the authority to enact it.

Mr. Sims: Well our view was there is no statutory authority for providing mileage reimbursement for treatment and we believe these rules are not supposed to exceed the authority of the statute.

Chairman Bayless: And even if we have general powers, where the Legislature has specifically ruled on something you don't then go and say, "Oh, well, we don't agree with that. We're going to go the other way."

Delegate Webster: I would like to make a comment. For those who don't know me I'm Delegate Carrie Webster and the House Judiciary Chair; ex-officio I might add and my first meeting, so I realize I don't have a vote. But I do want to say, or at least comment, from the House perspective a big issue – which is why I'm asking about this mileage – the reimbursement rates were so low. Now obviously that's being addressed through this proposed rule. But when I was addressing Mr. Sims my question was – and now I think Dan or somebody's question followed it – if we do this would it be inconsistent with statute? And my earlier question was directed at the point I want to make. It was my understanding that we have

for as long as I know, and I stand to be corrected here, is notwithstanding the provisions in the statute there has been reimbursement at 15 cents for exams and treatment. So if by adopting this rule which is exempt from legislative rulemaking, we increase the examinations but delete all, any reimbursement for treatment, which to my understanding – I don't do workers' comp law – is substantial. I mean these are compensable claims that the employer pays for which would include trips to the doctor. I would be remiss if I didn't at least offer my concern that the Legislature has not made any changes, at least that I can recall certainly in this first year as Chair, but more importantly maybe in the last couple of years as a member of the Committee that said, "We don't want any reimbursement for treatment."

So my concern would be if the practice has been public and private comp to reimburse something, even if it's only 15 cents for treatment, I would just be concerned that by eliminating any reimbursement for a huge area, i.e., treatment of a compensable claim, we're going to be moving in a direction that the Legislature didn't anticipate even if technically – and I haven't looked at the provisions – it is inconsistent with statute. Because I know you all know the court fine issue which has been big in West Virginia. It's a good example. The Legislature had some law on the book but up until recently it had been not assessing everybody for every charge on a ticket. And now we are going to change that or at least I think the Governor and legislative leadership is considering it because we want to clarify we didn't intend that. I think we may end up in that situation which is why I'm saying if we go and eliminate this because we want to make sure it is consistent with statute, we're going to be right back in the Legislative Session dealing with this unless it's the Legislature's will to eliminate mileage. . . I mean for treatment. And I would personally say that that would not be from a large majority in the House something that the Legislature I think would want to do unless there were good policy reasons. So those are my extra comments.

Mr. Sims: I think your comments have some validity. When we looked at this we just approached it from a legal perspective and looked at the statute.

Delegate Webster: Sure.

Mr. Sims: We deferred to a general principle that you learn in law school of statutory construction that when the Legislature generally speaks of a topic, and in this case "mileage reimbursement," but does not specifically speak to a particular area in this case – treatment mileage – they only speak in that section to. . .

Delegate Webster: What is treatment? I mean what is considered treatment?

Mr. Sims: Any treating doctor, any doctor that you are referred to – getting treatment for your medical ailment is how we interpreted that.

Commissioner Cline: Part of what has happened, when we were asked to look at the actual mileage reimbursement and believed 15 cents, particularly with today's gas prices, was inconsistent but at the same time being cognitive and aware of the other ancillary discussions

we were having with respect to exempt rulemaking and where agencies have gone beyond their statutory responsibility, felt that it was incumbent upon us to go back to what the statutory construction was. And at the same time we were increasing the mileage. Having said that, on the anecdotal and what we were also told was when this compromise was reached for the 15 cents part of the problem that the old Workers' Compensation Commission was having was that you would have someone on a compensable injury taking advantage of that system and driving to Florida for treatment and then seeking reimbursement for the mileage. So there has been some abuse both ways. But at the same time what we were trying to do was come to what we thought was a more appropriate mileage reimbursement, but then at the same time follow what the statutory construction was.

Delegate Webster: When has it not been the practice to reimburse 15 cents for treatment?

Commissioner Cline: The 15 cents, according to what we understand, changed in 2003 or some time. . .

Delegate Webster: And what was it before that?

Commissioner Cline: It was 34 or something. . .

Randall Suter [BrickStreet]: It was 34 or 36. . .

Bill Kenny: The state employees' reimbursement rate. . .

Delegate Webster: But did that include treatment? I mean, does anybody know if we ever "not" provided some reimbursement for treatment? Even contrary to what you all are saying the construction of the statutory §23-4-8 is?

Commissioner Cline: I don't want to answer incorrectly. We will certainly go back and do some more research.

Delegate Webster: I just think, you know, that it is going to be a concern. I don't have any personal heartburn about the percentages and the amounts. That is certainly to the will of this group. I'm just saying that as a legislator who is part of a Committee that's looking at workers' comp and rulemaking exemptions, before this Committee moves in a direction of eliminating all reimbursement for treatment, we may want to confer with legislative people so we don't have this become a huge issue next session and a big issue for groups that are concerned about that between now and then.

Chairman Bayless: I agree with Delegate Webster. I don't think the Legislature meant to do this. I would like to put Senator McCabe on the spot. Do you have any recollection of any conversation?

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Senator Brooks McCabe: I would have to agree with Delegate Webster. I don't remember any kind of discussion separating out-treatment from the exam. It has also been my understanding that it has been paid consistently throughout. I don't know of a time when it hasn't been paid, although I obviously could be wrong on that. I think it is something that . . . whether you look at the legislative intent or not, to not reimburse for treatment I think is . . . I can't . . . from my recollection and the discussions, it's inconsistent to presume that the Legislature was not comfortable with funding on the treatment side.

Chairman Bayless: Is there any provision under West Virginia law that we can get an opinion from . . . anybody, or are we sort of left hanging?

Senator McCabe: Well, I mean, you can clearly talk to . . . you could ask the Governor's Council. What you're asking to be sure of . . . and you need to go back to the Legislature. . . but I'm confident that you could get a reading on that pretty quickly.

Delegate Webster: We could have this as topic on a Joint Senate House Committee.

Senator McCabe: I don't even think you need to do that frankly. I think it's a matter of talking to the Senate Judiciary Chair and one or two of the staff counsel and you could get a clear reading pretty quickly. And I would presume, you know, that the Senate President would line up with that as I would presume the Speaker would. But I think that the Chairman is correct. To exclude that I think is a misstep. What we were trying to deal with was fairness across the board – tough love so to speak. We were making very difficult decisions and we were paring back significant cost structures. So, in hindsight you might look at some of this stuff and say, "you know where was the Legislature coming from?" We were trying to control costs that were out of control, but we were always dealing with the fairness issue. And that really is what drove all of the decisions – what is fair and proper? I can't understand why one would not look at compensating for mileage to go get treatment when you are trying to get back to work as not a reasonable expense.

Mr. Marshall: Mr. Chairman, I think what we've just experienced here is a real good example of why members of the Legislature sit with us. I think those points that were raised by the legislators are very well taken and we ought to take whatever action is appropriate to either amend the rule without that particular provision or just re-commit the whole thing for further work.

Senator McCabe: Actually if you were to ask Senator Caruth, who would have a more detailed understanding of this particular topic since he is a practicing attorney in this area, he and some of the staff attorneys up there would tell you pretty quickly what was the intent.

Ms. Pickens: It's my understanding that it was simply a voluntary practice. I don't know and maybe no one in this room knows why the Workers' Compensation Commission did what they did and paid the higher rate when the Legislature clearly said something different. We just

wanted to take it back to what we thought the purpose of that legislative intent was, which is what you derived from reading it and then you pointed out there is a rule to statutory construction. It is a cost and we wanted to get it back to where we felt that it needed to be.

Senator McCabe: I don't think anyone is taking a shot at you all. I think this is trying to figure out what's the appropriate course of action. I don't view this as being critical. You are expected to look at it narrowly and make sure. . .

Walter Pellish: Ryan, who normally requests or orders further examinations?

Mr. Sims: I'll have to defer to Mary Jane on that. Are you saying to the Legislature?

Mr. Pellish: Pardon. . .?

Mr. Sims: Further examination. . .?

Mr. Pellish: If we have a claimant. . .

Commissioner Cline: Normally what happens. . .if we call one of your staff people and ask them what their interpretation is they will refer back that they don't make the interpretation. So they do send that back to deference to the agency on interpretation. I guess I need to understand. . .I interrupted you, Mr. Pellish, so you need to clarify your question.

Mr. Pellish: You go ahead. I'm just asking who normally. . .?

Commissioner Cline: I mean we will from time to time go back to your staff and say, "well what do you think the interpretation was?" because sometimes this stuff gets so complex and is so challenging and so difficult to weed through. And we've had other instances in the last year and a half where obviously the interpretation that has come from the Insurance Commissioner's Office versus the old Workers' Comp has been different. This is the first time I recall you all disagreeing with what our interpretation is when we had a different interpretation. And that's okay and that's fine, and we we've already discussed a number of things with Chairman Webster and with you that need to be looked at and addressed. So, there is a committee that is studying workers' comp issues with us through the interim course. We had been asked to look at this by a couple of delegates – the mileage issue – with the feeling that the 15 cents was very low and inappropriate. In doing so we came to the other problem where they were paying for mileage that was not consistent with what the statutory construction was. And, again, it's like if the statutory construction that we come up with. . .is what everybody likes, then that's good when it. . .

Senator McCabe: Is there an industry standard on this?

Commissioner Cline: I was just going to suggest that we go back to AIA and PCI and have that discussion. We are in regular contact with them now. We can get that readily and easily

and that is no problem, and what other states do. Ohio, our sister state, is still a monopolistic fund. There is opportunity here to get additional information. I think Ryan was just trying to be responsive to a couple other delegates' concern about 15 cents and when he got into it. . .

Senator McCabe: Right. And I would just go back. . .if it were a major issue in the discussions that were ongoing when we were in legislation, I'm pretty confident those changes would have been made almost immediately. If this was ongoing and you're catching it now, it is kind of a re-analysis of the statute.

Commissioner Cline: How we are catching it is the 15 cents reimbursement.

Senator McCabe: I understand.

Mr. Sims: I think we have all misunderstood what Mr. Pellish's question was. I think he was asking who requires a claimant to be examined.

Mr. Pellish: Yes.

Mr. Sims: We were thinking of legislative examinations. An answer to that is a carrier – the administrator for the private carrier or the TPA [for the self-insured] will decide they need an independent medical exam. . .

Mr. Pellish: Okay.

Mr. Sims: I misunderstood you. I thought you were talking about a legislative. . .

Mr. Pellish: No. I'm getting back to what Senator McCabe was getting to. I think this entire issue revolves around the claimant getting treated fairly and being made whole or legitimate cases. Now I'm not naïve enough to think that people don't try and play games for treatment. But if a company is ordering additional examinations, it seems to me they ought to be paying for it.

Mr. Marshall: I don't think anyone is quarreling with that.

Commissioner Cline: And those would be paid for.

Mr. Pellish: I understand. But I'm going to further muddy the waters by saying that. . .that to me is just a normal business expense for them to reimburse the employee directly if they are saying you've got to go to Cleveland Clinic so that we can ascertain what's going on.

Commissioner Cline: Well, if they were sending them to the Cleveland Clinic, then they would be paying the mileage. That is a carrier order.

Ms. Pickens: It's only when they are seeing their own treating physician.

Commissioner Cline: There are times when. . .

Mr. Pellish: I realize that's a difficult issue here to ascertain what is right and what is wrong. But getting back to what the Senator said, if we have a legitimate issue, the claimant, the employee, ought to be made whole.

Chairman Bayless: I think the law is clear, but I do not think that was the intent of the law. We have the Chair of the House Judiciary Committee, who is an attorney, and you have Senator McCabe who worked extensively on this thing. That's not the intent. We probably should back off and let them try to get some interpretation. I don't know. . .get legislative interims or the committee or whatever we need to do to try to find out if that was the interpretation. It doesn't sound like it is.

Senator McCabe: I don't know going to interims because. . .go to some of the people. . .ask Senator Caruth, as an example. He is a practicing attorney. If he has no recollection to it, then that sends a fairly strong message.

Commissioner Cline: I think the challenge that we have, and we have on a daily basis, is we're supposed to make the interpretation. We end up in court and they tell us if we're right or wrong. I can go to Henry Bowen who has an extensive practice and he will have one interpretation and Senator Caruth. . .I mean with all due respect to the whole situation. I could go to Pat Maroney who has extensive history and they could clearly all be. . .So I think a cleaner way is for us to do some additional research and then come back.

Senator McCabe: Just defend your position.

Commissioner Cline: Well, whether we defend the position or not, it's. . .then if it's something that needs to be fixed. . .

Mr. Pellish: I don't know if it's a matter of defending a position, it's really defining.

Chairman Bayless: Before we finish with this, does anybody in the audience or any of the staff have any questions? Mileage reimbursement was only one part of this. There were also expert witnesses, time period to respond to stay, criteria for stay. Does anybody have any comments on those that the staff ought to hear before we go ahead?

Commissioner Cline: Mary Jane would like to pose something to you from our other need and standpoint as we work through this issue that you would have the power to do today.

Ms. Pickens: We do have the other issues in here. This is a rule that we actually brought forward a little quicker than we would have liked to because, as Ryan has said, we really would like to address other aspects of Rule 1 that are not before the Committee today, but we felt a

need to come forward because of the stay issue. An option – in order to get the rest of the rule enacted is just go back to the old language – well it's not even old – it's current language without the amendment in that subsection that still has the 15 cents a mile and just pass it. I mean, we are going to come back with Rule 1 again and that way at least we have some amendments that we think we need. And that reserves that issue.

Mr. Marshall: Mary Jane, does that basically adopt the amendment but without this issue, without dealing with it in an adverse fashion or any fashion? It would maintain the status quo on that issue of reimbursement for medical. . .for treatment business?

Ms. Pickens: Yes. On this issue.

Mr. Sims: There would be no changes to 15.1 at this time. It would be as it currently reads in the effective version, which is the 15 cents for treatment.

Mr. Marshall: I'll make the motion to adopt the rule with that deletion.

Chairman Bayless: Is there a second?

Mr. Dean: Second.

Chairman Bayless: It has been moved and seconded. Is there any further discussion?

Mr. Pellish: I think somehow we need to highlight along with that that we are going to come back and address this mileage issue. I don't want it to be lost in the shuffle.

Commissioner Cline: It's not going to get lost.

Chairman Bayless: Is there any further comment? It has been moved and seconded that we adopt Rule 1 with the changes noted. All in favor, "aye." Opposed? (Motion passes – Title 85, Series 1, "Claims Management and Administration.")

5. Title 85, Series 2, "Workers' Compensation Claims Index" – Ryan Sims

Ryan Sims: This is Series 2. Series 2 is a new rule to address the workers' compensation claims index that is required to be maintained by W. Va. Code §23-2C-5(c)(8). Basically the Code section requires the Industrial Council to maintain a claims index. Actually we have already been maintaining one. It includes basic initial information about a first report of injury, such as the claimant's name, the claimant's Social Security number, who the employer is, who the carrier is. And that is essentially a tool for private carriers to be able to get a claimant's occupational injury history when dealing with a particular claim. This rule basically provides some additional guidance and detail for the OIC staff who is actually running this claims index. I did provide you with a bullet summary of what the rule does.

We'll start with Section 4. This discusses the establishment of the claims index and the various fields that will be maintained in it. Please feel free to stop me if you have any questions.

Section 5 discusses who can obtain access to a claimant's prior occupational injury history. As you can see, it permits access by the carrier or the TPA and by the claimant. A claimant can get his own claims index history.

Section 6 requires carriers and self-insureds to make a first report of injury. They actually make that report to something that is called EBI. It's a claims database and they report certain information and then we pull the information from EBI and put it on their claims index.

Section 7 requires carriers and self-insureds to make updated reports for the purpose of the claims index as required by the Insurance Commissioner.

Again, we believe it is a relatively simple rule that just sets forth some guidance, primarily for IC staff and of course for carriers and others involved in the workers' compensation market as to what this claims index is; how it is maintained; that type of thing. With that, I present this initial draft to you for permission to file with the Secretary of State for 30 days of public comment.

Chairman Bayless: I have one question. In every computer journal you read it is just full of "identify theft," and it is a growing problem where we have Social Security numbers. Do we have any constraints or any guard that if Charlie Trucking Company. . .they pull it off and it's lying out on the desk. Is there any requirement that people have to provide reasonable safeguards and keep this stuff behind the firewall and keep it locked up? Is there anything in the Code about that?

Mr. Sims: There is nothing in the Code about it. It sounds like you're primarily asking an IT question. You can see in Section 5 of the rule, which discusses access, a carrier can only access it if they have a specific claim involving the claimant.

Chairman Bayless: Right.

Mr. Sims: I don't think there is anything in the law specifically addressing the confidentiality of. . .

Commissioner Cline: Insurers already have responsibility under Chapter 33 for privacy. There are compliance issues in place.

Mr. Sims: Certainly from an IT perspective we will do our job in making sure that the claims index is secure.

Chairman Bayless: It would be a heck of a thing to get hurt and then have your identity stolen.

Mr. Sims: Absolutely.

Commissioner Cline: Actually, to be honest, that's one of the things that concern us on a daily basis. The claimants send us all kinds of personal information and it sometimes gets routed in a roundabout way to us. That causes us great concern.

Chairman Bayless: Does any member of the public or anybody have anything that you would like to comment so they [staff] get the benefit of your comments right now? Hearing none, I'll make a motion to submit this for initial filing.

Mr. Dean: Second.

Chairman Bayless: Discussion? All in favor, "aye." Opposed? Motion passes.

[Title 85, Series 2, "Workers' Compensation Claims Index" passed to file with the Secretary of State's Office.]

6. General Public Comment

Chairman Bayless: Does any member of the public have any comments to make on any subject about workers' compensation?

Steve White (Affiliated Construction Trades Foundation): Rule 8 is my question. Mr. Chairman, you had said that Rule 8 was deferred, but I thought that in the announcement it sounded like Rule 8 was never coming out. What is the status of Rule 8?

Ms. Pickens: Rule 8 will be back. As Chairman Bayless said, we are dealing with some legal issues. What we are concerned about might be inconsistencies some place else in the Code that may bear on the issue of independent contractor status. We're just trying to get it all sorted out.

Commissioner Cline: Its things that are not in our section of the Code that have come to light.

Mr. White: Thank you.

Chairman Bayless: Any other comments?

7. New Business

Chairman Bayless: Any new business?

8. Next Meeting

Chairman Bayless: The next meeting will be here, I assume. It says "location to be decided," but this seems to work. The next meeting will be September 13, 2007, at 3:00 p.m.

9. Executive Session

Chairman Bayless: We now need to go into Executive Session. The purpose of the Executive Session is to look at self-insurance petitions. And of course those petitions have confidential financial data, therefore, pursuant to the Code, I would like a motion to move into Executive Session.

Mr. Marshall made a motion to adjourn to go into Executive Session. The motion was seconded by Mr. Pellish and passed unanimously.

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

The Executive Session began at 4:10 p.m. and returned to regular session at 4:14 p.m. There was no action taken in the Executive Session and it was for informational purposes only.

Chairman Bayless: We are back in regular session and members of the public that are still here that wanted to stay around have rejoined the meeting. Would somebody like to make a motion?

Mr. Dean: I make the motion to approve [Resolution for annual review of self-insurance status].

Mr. Pellish: Second.

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Chairman Bayless: All in favor, "aye." Opposed? [Motion passed.] The Resolution, for the record, is for annual renewals. The staff [Self-Insurance Unit of the Offices of the Insurance Commissioner] looked at the annual renewals and the security that was required, and that's what the motion was about. Does anybody have any more business?

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

There being no further business the meeting adjourned at 4:17 p.m.