

## **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**MARCH 20, 2008**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, March 20, 2008, 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  
Senator Don Caruth  
Bill Dean  
Delegate Nancy Guthrie  
Kent Hartsog  
Dan Marshall  
Walter Pellish (via telephone)

### **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 of business is the approval of the minutes of the last meeting.

Bill Dean made the motion to approve the minutes from the January 24, 2008, meeting. The motion was seconded by Kent Hartsog and passed unanimously.

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

Judge Timothy Leach: Good afternoon members of the Council, members of the public and Deputy Commissioner. I'll go over a couple of our statistical highlights. The first is that the number of new protests acknowledged in February is probably an all time low for us at 563. Looking at the second graph on the first page you will see that there is a plummet in the percentage of Old Fund rulings. That started to drop a little bit in January as well.

Protests by month on page two. . .Mr. Chairman, you asked me several months ago if I thought we'd leveled off – and I thought we had – but it appears the statistics do not indicate it and we're continuing to drop in the number of protests. As a result our pending caseload was down to another all time low of 5,829. On page three I altered that chart slightly. We had it broken out into how many cases we resolved, how many we got in and from what sources. I really didn't think that was of interest and we were actually having some trouble getting those numbers to balance. They were always coming out four or five off, so I just took that part out. We have an accurate count of how many we have and I can compare that to how many we had a month, two months, three months, six months and 12 months ago.

Our Protests Acknowledged within 30 days timeliness is up, but it's not a good result – 5.9% is higher than the previous year by almost double. But you see it is an improvement from January. I can't account for that, but it seems like every January and February we stagger out of the gates and then make it up over the next ten months. This year started at the same slow pace with that particular statistical analysis. However, our Decision Timeliness and our overall Time Standard Compliances found on page four have outstanding results. If you flip ahead into the actual numbers – the seventh and eighth page of the raw numbers – that's a new addition to the chart. It's a report which I have and it is a report from which I determine the number of pending cases [5,829]. I thought it might be of interest because we had some discussion at the last meeting in January about what types of issues are coming before the Offices of Judges. This is the breakout of each type of issue before the Office of Judges. For instance, the first one – the code number is just a computer coding number for us, but the description is compensability and the number in litigation is 999; permanent partial disability, T07 [1,779]. So I thought it might be of some interest to the Council what types of issues make up the bulk or the numbers of our pending issues.

In terms of narrative matters, I indicated at the time I wrote this report and sent it to you that I do not have a final version of the House Bill and amendments to the Code, and that I would expect to present an oral report to you today. However, Mary Jane added it to the agenda and I told her yesterday I would be happy to yield the floor to her to describe the amendments and the Code as it affected the appellate process. I'm going to defer on that one.

In terms of our Procedural Rule, Judge Drescher, Judge Rodak and I have already reviewed that. You may recall we went through most of our rule in 2007. After that session we made several changes but got hung up on one particular issue: Is an insurance carrier a party to the litigation before the Offices of Judges? Then as we got

closer to the start of the '08 Session we knew there were going to be more changes in the '08 Session. So we decided rather than try to amend the rule twice within six months we would just wait until the 2008 Session was over and do an overall amendment there. The result is most of the work is done. But the 2008 amendments, as Mary Jane will explain to you, did change a couple of things and we're going to have to create procedural rule amendments or an entirely new process. The greatest of those is a new process by which disputing carriers may resolve a disagreement between themselves without the injured worker having to lay in the administration and payment of this claim. We've already given that some thought process and have kind of a skeletal outline of how we intend to do that. So I'm confident that we can have a proposed draft out perhaps as early as the middle of next month. Then we'll allow 30 days or so for public comments, and as we generally do have a public hearing. We'll have a public hearing and then respond to the comments, make any revisions and have a final version out sometime in late May perhaps. Its effective 30 days after filing so we will not have it effective before July 1, 2008, which is a key date for reasons that Mary Jane is going to explain to you. That is all I have to report from the Office of Judges and I'll be happy to take any questions.

Kent Hartsog: I realize Mary Jane is probably going to get to this in a minute, but before you get away from the podium. . .back looking at page three in your report, I think the protest period was changed in, I don't know, one of the two Bills. I think it was what we've been calling the "big bill" with regard to. . .

Judge Leach: It has been changed from 30 days and lengthened to 60 days.

Mr. Hartsog: To 60 days. What kind of impact do you think that will have – just an opinion – on the number of protests filed?

Judge Leach: Well, with my track history and my projections and opinions I might be better telling who will win the national league pennant this year. Given that caveat. . .

Mr. Hartsog: Okay. Just curious.

Judge Leach: There are two competing theories of thought. Number one; the hope is that extending the protest period will actually reduce the number of protests. And that may sound counter-intuitive. The logic behind it is that parties protested because they had such a short period of time to protest that they didn't have time to get to file, receive the medical evidence that was the basis for the decision, review it and determine, "Aha, that was the right decision." So they filed a protest to. . .as we say "CYA." Then once the protest was in the system it became very difficult to get rid of that protest. And my

numbers, if you want to look at them, will confirm that to an extent because in our resolutions last year there was something like 4,000 cases we dismissed where people protested and never submitted any evidence or argument. So that's a large number per month. If you give people more time to analyze the case, study it and look at the carriers' decision and the basis for the carriers' decision then perhaps there will be fewer – what we might call a “knee jerk” protest. So that's the theory, that lengthening the period of time is going to drive down the number of protests. That seems to make some sense, but historically we have been a litigation contentious society in the workers' compensation arena, and lengthening the protest period may allow for more protests to be filed which previously had been denied as “untimely.” I really can't tell you. I tend to favor the view that it will probably have a third impact, which is none at all.

Senator Don Caruth: Actually I think we put you in a spot here a little bit in making this effective immediately. The 30-day protest period, how are you going to apply that? Are you going to apply that to pending issues or only those issues which are after the effective date?

Judge Leach: We met with Legal from the Insurance Commission so we kind of have a united take on it. We are in agreement, at least our initial starting viewpoint of it is, that that new length in the protest period will apply to any Order entered by the carrier, self-insured employer or TPA for the Insurance Commissioner on and after March 9, 2008, even if it's an old claim. But any Orders entered prior to the change in the law would have had a 30-day protest period and we're not going to go back and lengthen those retroactively. Bear in mind that there is a caveat that it's still not official yet because the Governor hadn't signed it. When the Governor signs the Bill it becomes official retroactively to March 8<sup>th</sup> I guess. So that's our take on it. Now we're the Office of Judges. We understand that not every lawyer in the State is going to agree with that interpretation. So we expect that we'll probably get some arguments for different positions than that. And when those arguments come in we will consider the arguments, and it is still possible that we could be persuaded to change our take on it. But probably the Supreme Court is going to make the call where that applies. Any other questions?

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

#### **4. General Public Comment**

Chairman Bayless: Does anybody from the public have anything they would like to bring up?

I have one thing that I will pass along without ratifying or in any way commenting about. A coal mine operator had called me and was going to be here today and I think will be here next month. But to give you warning to what he wants to talk about – he feels it is very unfair. . .see if I get this right. He believes that it used to be if he were to hire somebody and that person had worked for him for one year and worked for Massey for 30 years and that person filed a black lung claim that it would be apportioned one thirty-first and thirty thirty-first. And it's at least his opinion and I have no opinion on this because I've never looked at it. The law is now written he would bear the whole claim if he was the last person that the person worked for. He would like to bring that up next time. Now I am passing that along. You can think about that to give you fair warning before he comes to the next meeting. I don't know if it's a valid comment or not.

Walter Pellish: Can any of the legal staff comment on that?

Mary Jane Pickens (General Counsel, Offices of the Insurance Commissioner): It sounds like what he is talking about is allocation of disease claims. The Code generally places it as a permissive thing that the Insurance Commissioner [Workers' Compensation Commission in the past, now Insurance Commissioner] may allocate claims. I haven't done any actual research. Ryan [Sims] has looked at other states and there are a good number of them that don't allocate disease claims. But it's kind of a mixed bag. There are a lot of states where the carrier that insured that risk is the date of the last exposure takes the claim. It varies from state to state and it is something that we are looking at. At the beginning of 2006 the Insurance Commissioner issued a notice saying that we would no longer allocate in disease claims, so there hasn't been allocation since then. It is something that we hear about from time to time and it's a position that I think could be changed by the Insurance Commissioner, but that's where we are today.

Chairman Bayless: This was not the other gentleman's comment. If I were an employer would I say? "Boy, I'm just not going to hire any older people that have been in the mine for 30 years because I'm not going to get tagged with that claim and run my rate up. I'm only going to hire young 18 year olds that have never been in the mine because I know they won't have black lung." Would that happen? I mean it wouldn't happen this clearly – age discrimination – because that thought would be in the back of somebody's mind.

Ms. Pickens: Yes. I think that it could. Because of that there is a host of things that need to be taken into consideration when you're making that call.

Mr. Pellish: Well I think the other thing that comes into play here is with lung issues. They typically take a long time to show up and then can show up fairly quickly. It seems to me that this is a subject that's worthy of a lot of discussion.

Mr. Hartsog: Well don't you have the same issue with permanent totals? For example, because someone may have been injured at two other jobs and goes across the threshold in a third and gets evaluated and the third employer pays the permanent total and gets charged with that. I mean I think there are a number of examples where, of course, that can cut both ways.

Chairman Bayless: Mr. White, do you have a comment?

Steve White (Affiliated Construction Trades Foundation): In the construction industry it's a big issue. I think Mary Jane said they are doing some research. Obviously it is an issue in other states too. One other issue – coal industry is the perfect example. I hate to pick on it but I will. That guy just hired him and he worked 30 years for company "X" that's been out of business. That's what we call the Second Injury Fund. Well that turned into a fiasco. We have to be careful about that.

Senator Caruth: We're sort of caught between the new system also. These insurance companies are writing claims made policies. Meaning if the claim arises under the policy period they pay and the whole concept of going back to that reallocating somewhere else is sort of an occurrence concept which doesn't fit neatly with claims made concept. That not only is in the Second Injury Fund but also some other allocations that were done previously.

Ryan Sims (Associate Counsel, Offices of the Insurance Commissioner): One other thing that should be pointed out. We did study this issue very, very carefully when we transitioned on January 1, 2006. And another factor that led to our decision not to allocate any more was because, particularly when new carriers come in, it is actually more predictable from an actuarial perspective not to allocate because they can take a picture of what the demography is for the workforce. They are going to be underwriting. And I guess the old saying that sometimes you're the windshield and sometimes you're the bugs. So pretty much every coal company is going to get hit with it, but sometimes they are going to be better off because of the policy not to allocate because some of the people that used to work for them are going to go to other people.

Getting back to studying from an actuarial perspective, it allows them to take a picture of what their potential insured is going to look like if they have more older people mining than they can obviously factor that into the premiums when taken into consideration – OP issues. But the other point is you would be putting new carriers that wouldn't be used to seeing this in a position. . .For example, if they underwrote coal company "ABC" in 2009, this coming year, potentially somebody could say, "Well, this person worked for coal company ABC during the 1990's but the liability actually would be then." So they could potentially be asked to cover. . .it could get sticky. They could be asked to cover that liability or it might go to the Old Fund. But it creates a whole host of issues and I think Senator Caruth sort of touched on that. It really gets sort of complex. We felt the cleanest way was to do it that way. And we have talked to some carriers – major carriers coming into the State that have said, "Yeah, we don't have a problem with the last person standing." And we have particularly studied what our border states are doing. At least take into account the coal mining industry. The closest state to us would be Kentucky. For example, Kentucky for years has had the last carrier standing rule when the exposure occurred. And it seemed, as much as I know, to work for them for a few decades. And we've talked to carriers that recognize some coal states have that rule and seem comfortable with it. I think the point is that the carriers who write the coal companies by doing proper actuarial work should be able to predict the risk and should factor it into the premium.

Senator Caruth: There is another factor that you just mentioned that I hadn't really thought about. And that is when we were talking about claims made policies because of. . .statute of limitations for occupational pneumoconiosis and other claims. I guess somebody could be making a claim for many, many years ago and there is no certain carrier to address that claim. Is there any plan about where those are to go?

Mr. Sims: I think part of it could be allocated to the Old Fund. And again that causes some complications because I don't think carriers are going expect to cover a liability for their insured that occurred well before they ever insured them. So I think it would probably go back to the Old Fund in that scenario.

Bill Kenny (Deputy Commissioner OIC): You have to put the state back into the active business of covering liabilities for which you might or might not have received premiums.

Mr. Sims: Essentially what we did. . .looking at other states, talking to the stakeholders, such as insurers. . .I think we talked to the manufacturers' association. We talked to who we thought the big stakeholders were in regard to occupational

diseases and factored in all those things. Like you said there are pros and cons certainly, but we felt the best thing to do in the interest of the open market was to alleviate allocations since the Code gave us that discretion. Not saying it can't be revisited or anything like that. But again we felt that the overall weight was in favor of eliminating it – one study in all aspects.

Mr. White: The carriers might have a preference but the companies that I've talked to want allocation. There's a difference here. You mentioned that you talked to all the stakeholders. That's good. It's not always about the carriers, the companies. Obviously it's not just the companies. Workers want to get covered regardless.

Mr. Sims: Sure.

Chairman Bayless: I will refer this gentleman to you, Mr. Sims, and you two can have a conversation before the next meeting. I think you're right. There are equities on both sides and it can get very complex. And then you have the missing company issue if they've gone out of business or something like that.

Mr. Sims: What Mr. White said. . .the bottom line I think, other than self-insured employers, is from the company's perspective – is my premium going to be more? What we found out when we studied it is it's sort of a wash. But sure in certain situations there might be one employer that just happens to have a demography that makes his premium more expensive. I guess our understanding was generally speaking the carriers thought the premium would be a wash.

Mr. White: That's insurance talk. It's not company talk. That's all I'm hearing.

Delegate Nancy Guthrie: On another topic, one of the things in re-reading these Bills – and perhaps I am reading it incorrectly – the requirement that we would eliminate private carriers from maintaining an office in this State. With regard to collections, the percentage that is collected. . .If we have a carrier who is not even partially domiciled here, will the combined reporting pick up their percentage? Will the combined reporting requirement for what they are assessed. . .because the way I read the Bill it sort of seemed that we may have inadvertently opened the door to the Insurance Commission not being able to collect the appropriate premium or the same amount or an equitable level of premium as is being paid by carriers that are domiciled here. Am I reading that wrong?

Mr. Kenny: Are you talking about the taxes or the premium? Just capture the data?

Delegate Guthrie: The requirement that the Insurance Commission would collect – was it 5.6%?

Ms. Pickens: The regulatory surcharge and the debt reduction surcharges? No this would have no affect on that.

Delegate Guthrie: It would have nothing to do with combined reporting. But if we are eliminating their requirement to have a presence here in West Virginia, under the auspices of this particular piece of legislation that we passed, are you still going to be able to pick up the surcharge from them?

Ms. Pickens: Yes. Every carrier that is collecting premium has to collect that and remit it to the Insurance Commissioner's Office.

Delegate Guthrie: Regardless of where they are?

Ms. Pickens: Yes, regardless of where they are.

Dan Marshall: Do they not still have to be licensed here and subject to your regulation regardless of their domicile?

Ms. Pickens: Right.

Mr. Sims: And they're doing business here so it's just a physical location. But from a perspective of jurisdiction and all of that, I mean if we wanted to. . .

Mr. Kenny: And that's not unlike all forms of insurance. Insurance companies are required to file a national annual statement. No matter where they are domiciled they file annual statements. It's got all of the premiums by state filed through the NAIC so they don't have to file in every state. We know what premium is attributed to West Virginia and essentially all lines of insurance because of that system.

Delegate Guthrie: I just wanted to be sure of that. Thank you.

Chairman Bayless: Does anything else come up under the public comments?

## **5. New Business**

Chairman Bayless: Ms. Pickens is going to explain the legislative changes to us.

Mary Jane Pickens (General Counsel OIC): Thank you. I would like to start first with a little bit of a review of the Claims Index issue because this is something we need to bring back before the Industrial Council. The Claims Index as we all remember is the subject of Rule 2, which is a fairly recently enacted rule. The Claims Index was created pursuant to a statutory requirement that says we need to make sure there is an index of claims that allows information about prior claims to be available to an adjuster who is handling a current claim. And it's really kind of a pointer for information about where to go to get what you need to adjust your claim.

When we did the Claims Index rule there were certain data elements that we said would be in the index and I'll just review those quickly. The claim number; accident date; date of injury; your last exposure; the claimant's full name; the claimant's Social Security number; the contact information for the carrier or self-insured employer or TPA that you want to go to for more information; and the body part. That's the subject of the claim. And then we added, "Any other fields of information as the Commissioner deems necessary." Sometimes you need to react kind of quickly instead of coming back through the whole possibly 90 plus days of amending a rule. And that's what we've run up against. Again, we've talked to some insurance industry people. We are of the opinion that we need to add a data element in the Claims Index for prior permanent partial disability awards. There may be reasons when you are adjusting a claim that you want to know what prior permanent partial disability awards a claimant got. So we would like to be able to get the IT folks to do the programming necessary to update that Claims Index. We think that insurance companies and self-insured employers will need that information, and if we waited to update the rule then that would put implementation that much farther down the line. We need to have this ready when the market opens. Does anybody have any questions about that concept or what we're thinking in terms of the update for the Claims Index?

Mr. Marshall: Well you clearly have the power in accordance with the rule to do what you're doing administratively without action from us.

Ms. Pickens: The rule does say. . .because the statutory authority says that it's the Industrial Council that does it, we went ahead and put in the rule that whatever changes we made would be with the advice and consent of this body. So we kind of anticipated at least a motion to authorize the Insurance Commissioner's staff to update the index for this purpose. I just wanted to talk about that and see if you all had any questions about it and if not I guess a motion could be made.

Mr. Marshall: Is a motion appropriate?

Ms. Pickens: I think so.

Mr. Marshall: I will move that the change as recommended to be implemented by the Commission be authorized as necessary by the Industrial Council.

Mr. Dean: I'll second the motion.

Chairman Bayless: It has been moved and seconded. Are there any comments or discussion? All in favor, "aye." Opposed? The motion passes.

Ms. Pickens: Thank you. I'll mention before I'm done a few more rules that is likely the Industrial Council will see fairly soon, and we may need to bring Rule 2 back for some actual formal amendments. They will be brief. We have also talked to the insurance industry about second reports of injury and other reporting requirements that relate somewhat to the index. When it was drafted I don't think we appreciated the people that drafted it, including me. I don't think we appreciated what the normal national standards are as far as how often you do second reports of injury and what carriers. . . typically how they program their systems to work in other states. Right now I think our rule requires updates too quickly. So that will be the issue when we come back to you with amendments on Rule 2.

I will go into some of the legislation changes. We had two Bills that related to workers' comp. The first one that I'll talk about is House Bill 4381. That Bill addressed the residual market and the Guaranty Association. This was necessary because as these Code sections existed in the law it required the State to establish funds for these two things. It wasn't the Commissioner's recommendation that the State continues on in the insurance business and create more funds. So the residual market, as everybody here I'm sure is aware, needs to be in place because that's where an employer is going to go if they can't get coverage in the voluntary market. They have to have a market of last resort.

House Bill 4381 amended some Code sections and allows the Insurance Commissioner to develop and administer an assigned risk plan. It needs to be in place for the time when BrickStreet will be authorized to begin non-renewing policyholders which we would anticipate to be November through the end of the year. There is a lot of work to be done on this in the short term and this Bill is in effect for passage. There is information in the Bill about how employers qualify for the assigned risk plan. They

have to be denied by two insurers who aren't affiliated with one another. There is some discussion about rates, but it's kind of general rate type language. The Insurance Commissioner can designate an entity that has experience developing and administering these plans in other states. So in the next fairly short term the Insurance Commissioner is going to be looking at all of that and putting this together, getting it off the ground and ready to be there when the employers need it.

The other amendment relates to the Guaranty Association, which is in Chapter 33, the Insurance Code. When the privatization Bill was enacted it didn't contemplate just adding "workers' comp" to the existing Chapter 33, Property and Casualty Guaranty Association provisions. But that seemed to make the most sense because there is an existing infrastructure and we can just add the "workers' comp" line to that. That's basically what the amendments do which is the easiest and most straightforward way to handle that. That's a fund or an association that's needed in case an insurance company that sells workers' compensation goes insolvent. That's where the claims would be paid out of. So, appropriate amendments were made to that Article in Chapter 33 to account for the fact that workers' comp is a little different from other lines of insurance. So that is a summary of H. B. 4381.

The other Bill which we kept calling the "big Bill" and I think, as Bill mentioned, kept shrinking and shrinking as it went along. It is House Bill 4636. That Bill is in effect for passage too. And as it's already been noted here, that caused us to stir around a little bit and address some issues that are suddenly "issues." The first amendment that I'll talk about is the surcharges relating to the administrative costs of the regulation and to the debt reduction surcharge. There are no changes on either of those surcharges as it relates to the self-insured community. It's just the carriers, the insured community. For administrative ease for us and for the carriers doing business here, the regulatory or the administrative surcharge has been changed to a flat 5.5%. And in five years the Insurance Commissioner will revisit that and determine if that is still an appropriate number to adequately fund the regulatory oversight. The debt reduction surcharge for the insured community has been changed to a flat 9% and that is different as opposed to changing it every single year to determine an amount necessary to raise \$45 million dollars. And again this is really for the ease of administration. Based upon all of the analyses that we did we felt that those were appropriate percentages, and over the long term are going to be the right amount.

There are some amendments that relate to the notice that employers have to post in their place of business to inform claimants who to call about a claim. We've had some discussion I think with BrickStreet about some interpretation of that law. We have an agreement. And again that's an issue that I'll mention again later. Rule 1 may be

coming back to you all and we may be able to clarify some of the uncertainty, if we develop more uncertainties in this Bill when we bring Rule 1 back.

Delegate Guthrie pointed out there was a provision about maintenance of an office in our State and that has been deleted. Also a provision that required insurance companies to constantly update the Insurance Commissioner on owner and officer information has been deleted. There were some provisions about advance written notice for non-renewals and cancellations of workers' comp insurance policies, and those have been amended. It used to be a flat 60 days I believe for everything and now its 30 days for cancellation; 60 days for non-renewal; 10 days if the cancellation is for nonpayment of premium or refusal to comply with a premium audit.

We've also made some changes to the proof of coverage notification. That's the system where insurance companies inform the Insurance Commissioner's Office about what employers have coverage, new policies issued and existing policies that are being cancelled or terminated for whatever reason so we can do the employer compliance duties. And we can make that information available to the public. The changes relate to how quickly the notifications need to come to the Insurance Commissioner's Office in a number of different scenarios.

There is some clarification in the Bill about third party administrators and our regulatory authority over them. If they are adjusting workers' comp claims in the State, we've got an Article in Chapter 33 which is the TPA Act. It's in Article 46, Chapter 33. That Article is now applicable to TPA's that are working for carriers and in the workers' comp line, and there is also rulemaking authority to fill in the blanks.

The section that has caused the most discussion around here is §23-5-1, which is Article 5 of Chapter 23, the judicial review process for claims. The claims decisions I guess. Again the 30-day period to protest to the Office of Judges has been changed to 60 days. As Judge Leach said we're working as we speak on the best interpretation of that. I've drafted a notice that we want to send out very shortly to everybody – everybody being TPA's, the self-insured community and BrickStreet; although we've had direct discussions with them about when the Orders need to be changed to reflect the new 60-day protest period. Someone here internally asked me a question and I thought it was a good question. We're only talking about the period of time to protest to the Office of Judges. It doesn't affect the period of time to appeal to the Board of Review or the Supreme Court.

Other amendments to that section relate to who is the party to a worker's comp claim. The parties are the employer and the claimant. The language that authorized

specifically the employer as an entity with a right to protest a carrier's decision has been struck out. And there is language added that says that in litigation decisions it's really the insurance carrier that is going to call the shots and not the employer. What we're trying to address is a holdover concept from the old three party system where employers did independently have their own lawyers and did protest decisions made by the decision maker at that time, which was a State agency. Now there is going to be a contract between the employer and their insurance company, and the insurance company is going to provide defense counsel to the claim to defend the employer. Employers are not going to be protesting and litigating against their carrier. That just is a concept that is not going to work in the new private insurance system. We try to be careful to preserve the ability to get into litigation certain issues like Orders, incorporating findings of the OP Board, or the statutory percentage for permanent partial disability if it's below 15% and it's recommended by the treating physician. There are some quirks – I call them “quirks” – in Chapter 23 that really kind of require the carrier to adopt a certain decision. So, we were trying to be careful when we worked on the employer protest right to not eliminate the ability for the carrier/employer to get certain issues into litigation if they disagreed; for example, with what the OP Board said or if there was mistake. So that's kind of a long-winded explanation of that.

There is a new brochure requirement. We're working on that. We just thought it was a good idea that every time a new claim came in that some kind of a friendly mailing goes out to the claimant that is easy to read and easy to understand which kind of explains the claims process.

I think Judge Leach alluded to this. Other than “who's the party” and the “60 days,” probably the other big concept in that Code section is the new process to resolve the disputes between two carriers or a carrier, a self-insured employer, or the Old Fund, one of those – relating to whether a claim was properly filed as a new claim or whether it is more properly a reopening of an old claim because of an aggravation or progression of that condition or that injury. Judge Leach said he is working on the procedural rule for how that process will move forward. We really wanted a way to address that so that a claimant at least gets quick treatment and doesn't lose the opportunities to get the treatment, get back to work and get better while potential liable parties are battling it out. There is a tolling of the statute of limitation in case it is ultimately determined that, for example, a reopening application should have been a new claim but it's more than six months down the road.

We talked about corrected Orders, and again I think we had talked to Judge Leach about this early on in our drafting process. We wanted to make it clear that if an Order or a decision is entered and that decision is protested, then it is later corrected because

there was an error in it, that the claimant doesn't need to protest that second corrected Order in order to keep that issue in litigation.

As it was mentioned earlier this Bill was in effect for passage. The things that are not in effect for passage have their own internal effective dates, and that is the new surcharges. Those are going to apply after July 1, 2008. And this new process on the new claim versus reopening, it only applies to applications for benefits filed after July 1, 2008. And that is kind of a high level overview of House Bill 4636.

I just wanted to mention some rules that will come your way, possibly pretty soon, ideally in April. House Bill 4636 included authority for a return work rule and that was a provision in the Code that we were interested in. It had sunset and we were interested in reviving it. But as we began to talk with all the stakeholders it became kind of obvious that it needed a more thoughtful approach. It was determined that the best way is to just do a rule. So there is authority in here to do rules. This would allow a process whereby if a claimant is determined eligible by the treating physician to attempt a "trial return to work," that they could do that. And then we'll have to address the effect on benefits during that period of time and that type of thing. We're going to have to be giving that some serious thought here very shortly and then get you all involved in it.

Again, I had mentioned Rule 1. We are looking at Rule 1 again. That probably rings a bell because it was here not that long ago over the stay provisions. We felt at that time we needed to move quickly because that was right after the 2007 Session and we had to address a legislative change at that time. It will probably be coming back. And at the same time we may address Rule 18, which a self-insured rule, but it would be consistent with our changes to Rule 1.

PEO's, Professional Employer Organizations – Another Bill passed and that was 4079. It requires the Insurance Commissioner to be the entity that license and regulates professional employer organizations. The rule that would be coming your way would be a rule relating to how an insurance company would report experience at the client employer level. This would be to accurately gather data about the experience of individual client employers who may be members of a professional employer organization. It's an important workers' comp issue.

We would also be doing other general licensing type rules but those would be actually Title 114 rules so they won't come before you all. Those would be regular legislative rules.

TPA's – I think we will probably look at doing a rule about third party administrators that might include provisions for agreements between TPA's and carriers, and TPA's and self-insured employers.

Finally, another rule that we are looking at is utilization review. We already have a rule relating to managed care and I don't know if we would be updating or amending that rule or just coming to you with a brand new utilization review rule. But that's one that is going to require I think a little bit more input from the stakeholders and from Dr. Becker, our medical director, and some other people because that deals with areas of expertise beyond what we lawyers have. I'm not sure. In my mind that is a rule that might wait a little bit later. Some of the others are more urgent in getting things ready for the market to open. I think that covers the statutes and the rules changes that I wanted to go over.

Chairman Bayless: Are you going to do the carrier conference?

Ms. Pickens: Yes. Bill can do it. Do you want to talk about the carrier conference?

Mr. Kenny: Some of you may know we had a conference of all respective workers' comp carriers back in September. Very well attended and very well received. But what came out of that conference from those people attending was that they wanted one a little closer to the opening so we could update them on legislative changes, give more in-depth of some claims handling issues; such as that nature. That has been scheduled for Tuesday, April 8, here in Charleston. The attendance is up to 182 attendees, which is larger than the last conference we had. And interestingly enough it is different people. There's not much overlap. Some companies are sending different people in here. We take that as a very good sign that there is an awful lot of interest. We won't just open the market and sit here with an empty room. There will be lots of carriers coming into our marketplace. Just so everybody knows – Tuesday, April 8; registration starts at 8:30 a.m.; the actual meeting starts at 9:00 a.m. and ends at 3:00 p.m. It's at the Marriott.

Mr. Marshall: Mr. Chairman. . .Bill, one question. Could you tell me approximately how many carriers are represented in that list of 182 people?

Mr. Kenny: The last I looked at it and I didn't look at that today, but over 40.

Mr. Marshall: Good.

Ms. Pickens: I had a question before the meeting from Mr. Marshall about the number of other indications of interest and I was able to check before the meeting. I'm told that we've got 85 filings that we've received that are in Rates and Forms, and that we've licensed 20 new companies with four pending. So that's again more indication of healthy interest.

Mr. Marshall: I think that's positive.

Chairman Bayless: Does anybody have any questions for Ms. Pickens on the legislative changes or the proposed rule changes? Comments?

## **6. Next Meeting**

Chairman Bayless: The next meeting is April 24, 2008, at 3:00 p.m., at the same place. Is there anything to come before the meeting?

Delegate Guthrie: I think just some acknowledgement. I know that this particular Session, especially over in the House of Delegates, the General Counsel's patience was tried on more than one occasion to the limit. And I do want to say that as a member of one of the tougher committees that this agency had to come before, I appreciate the candor of the office. I just wanted to let you know that you are all well served. I just wanted to say that out loud.

## **7. Adjourn**

There being no further business the meeting adjourned at 4:05 p.m.