

# **WORKERS' COMPENSATION INDUSTRIAL COUNCIL**

**JULY 3, 2008**

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, July 3, 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:

Bill Dean, Chairman  
Charles Bayless (via telephone)  
Delegate Nancy Guthrie  
Kent Hartsog  
Dan Marshall  
Walter Pellish (via telephone)

### **1. Call to Order**

Chairman Bill Dean called the meeting to order at 3:00 p.m.

### **2. Approval of Minutes**

Chairman Bill Dean: We need approval of the minutes of the previous meeting.

Dan Marshall made the motion to approve the minutes from the May 29, 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: Mr. Chairman, members of the Council and members of the public. We'll skip over the statistical part of my report since those numbers are now a month out of date. In addition to what I sent you I wanted to touch upon three recent Supreme Court cases and their impact on our appellate system and I'll be very brief about that.

We have the scheduled dates for our Office of Judges fall workshops. We have tentatively scheduled six of those in October, running from the second to the 28<sup>th</sup>.

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We're having a full color flier printed up by the Insurance Commissioner's PR people and we're going to get that mailed out to our list as soon as we can and hopefully they can give us some more people to send it to.

Our Procedural Rule which we amended has been filed. It was filed May 30 and it becomes effective July 1, so that is now in effect. We are having an in-house ALJ training on July 30. We are going to go over some of these new regulation changes and the Supreme Court cases. And our Administrative Law Judges are taking a two-day mediation training course put on by the State Bar at Flatwoods on July 15 and 16.

On the recent Supreme Court decisions earlier this year, I told you there were five cases up for oral argument before the Court. At the last meeting we discussed one of the decisions that came out which was the decision dealing with administrative closure of claims, and that actually covered two of the five. So I'll be very brief about this for a number of reasons, and I'm not sure of your level of interest in this dry, legal stuff. And there is a room full lawyers, most whom are going to disagree with my interpretation so I want to keep it as brief and fast and gloss over it as quickly as I can.

There was the Steel of West Virginia case which was an appeal by an employer involving approval of digital hearing aids which the claims administrator had denied, the Office of Judges had denied, the Board of Review reversed and granted. The employer appealed to the Supreme Court and argued that digital hearing aids were not required by the statute. You don't get – I'm paraphrasing here – “the Cadillac of treatment.” You just get “reasonable and necessary treatment.” So the claims administrator had approved “standard” hearing aids, but not “digital” hearing aids. The Board of Review had determined that the only medical evidence in the case stated that the injured worker would benefit from the digital hearing aids. The denial of the case was based upon reasoning other than a medical doctor saying, “These won't work.” So the Board relied upon the fact we only had one expert in this case and that expert said the person gets them, so they get them and the Court affirmed that.

Now I have two editorial notes to comment upon that. Number one, Rule 20 now has a provision about hearing aids and it says it will be “at the sole discretion of the claims administrator of the type of hearing aid.” That provision was not in effect when this case came about. So the Court noted that there is a new rule out there and it's not addressing a new rule. We may have to re-litigate digital hearing aids.

Secondly, it was interesting to me to note that no one asked for digital hearing aids of the claims administrator. The first request for digital hearing aids came at the appellate level and our level. From the records that we were presented the claimant's

doctor filled out the form, filed the claim and asked for just hearing aids. The claims administrator approved standard hearing aids. The claimant protested and submitted evidence they required digital hearing aids. So I thought that was kind of an unusual, sort of confused record they've got up to the Court.

The second case that was decided last week was the case styled Fenton Glass. This too is an unusual case in that we had dealt with a whole series of occupational pneumoconiosis claims arising from that plant – Fenton Glass. This is an unusual occupational pneumoconiosis claim for a number of reasons. We have scientific measurements of the dust levels in the plant from 1989 or something like that. The appeal is based upon the fact that the Office of Judges has concluded that the scientific evidence shows there is no harmful dust exposure from the date of that evidence forward. But we did not conclude that we had any evidence to find no harmful dust exposure. We concluded that there was no evidence to go against the finding of harmful dust exposure before the scientific surveys were taking place. The employer argued to the Court that their “lay” testimony was sufficient to establish that the process was basically the same, so you could conclude that from the scientific evidence in 1989 that there was no dust exposure before 1989. The Court didn't agree with that. Another unusual factor in this case was that the OP Board itself – who normally determine medical issues – had testified in a rarely used legal maneuver about the dust exposure and it concluded that there was hazardous dust exposure. The Court seemed particularly impressed with the Medical Board's expertise on dust exposure and what was harmful. So Fenton Glass lost that part of the appeal. Because of the unusual nature of the case, the dust exposure measurements, and also the Board's testimony, that doesn't apply to very many cases.

There was a second part of the appeal where the OP Board had found no diagnosis of occupational pneumoconiosis at all. The Offices of Judges affirmed that. The Board of Review reversed and granted a 5% award for occupational pneumoconiosis without medical impairment. The Court reversed the Board on that and took away the guy's 5% award stating in essence that the Board had ignored testimony of the OP Board, the experts who are employed to make those determinations. So it was kind of a split win for the claimant and for the employer. They each won a piece of the case.

Another reason this case is unusual and has a limited value is that statutorily the OP 5% award has been taken away back in 2003. By the time this case got to the Court it was still an issue, but all cases reviewed by the OP Board since 2003 could not have been an outcome. This has in our view a limited impact as well.

The third case was that of Llewellyn M. Wilkinson who was an injured worker that sustained a 1987 ankle sprain and contusion, and in 2003 attempted to add major depression and pain syndrome to the case; but who had an intervening heart attack and open heart surgery. It was a question of factual dispute. What caused the major depression and the pain syndrome – the ankle injury [of six or seven years before] or the heart attack and open heart surgery? There were experts employed by both sides who disagreed on the causality. In a little bit of a twist, the TPA for the Insurance Commissioner agreed just before the case was argued that the pain syndrome was related to the ankle injury and added it to the claim, but did not add the major depression. The OIC asked that the case be dismissed as moot but the Court decided it anyway. The Court overruled us and the Board of Review and determined that the psychiatric component was established by enough evidence to the ankle injury. Now this is a peculiar case in our view because it's a facts specific case. You have experts on each side. The judge is going to have to decide. The Court was critical of how we expressed the burden of proof and how we arrived at our analysis of the decision. So we're going to work on some of the, what I would call, "writing problems." I'm not saying that our judge made the wrong decision. I'm not saying our judge made the right decision. But we didn't do a good job of explaining it and the Court kind of jumped on a few of the wording errors. With hindsight we wished we'd expressed a little differently. So that's a facts specific case. It doesn't establish case law. It certainly doesn't establish anything like if you have an ankle injury you automatically get major depression. It's just a one case decision. I'm not sure how much impact it's going to have on litigation other than we will try to do a little better job of explaining ourselves. Those were the remaining three of the five cases that were already before the Court back in April. Any questions?

Chairman Dean: Any questions?

Delegate Nancy Guthrie: Let's go back to the hearing aid case for just a second. Who is it that comprises the Board? Are they medical doctors?

Judge Leach: Well there is no Board in the hearing aid case. The Board I was referring to is one of two groups. It's either the Board of Review, which is the appellate level above the Office of Judges where my decisions get appealed to, or I was talking in the OP case where you have the OP Medical Board. As a practitioner of 30 some years I get a little sloppy and refer to them both as a "Board," so that gets a little confusing. The Board that approved the hearing aids. . .I'm referring to what used to be the Appeal Board and it is now the Board of Review. There are three lawyers. None of them have a medical background that I'm aware of.

Delegate Guthrie: So a doctor says that somebody needs a specific type of device and a group of lawyers decide that is not the case.

Judge Leach: Well not a group of lawyers. One lawyer who works for me decided that they didn't need it and agreed with the claims administrator. Here was the procedural step. The claims administrator granted standard hearing aids, not digital. The claimant appealed; presented her report to me which the claims administrator did not have saying, "He needs digital because of these peculiar facts situations." My judge disagreed and said, "No, he doesn't get the digital." It was then appealed to the Board of Review, which used to be the old Appeal Board. Those three judges ruled that we were wrong and he does get the hearing aids and the Court has now ruled, "No he doesn't."

Walter Pellish: Judge, I missed what you said earlier. What was the logic that they used to say that he did need the digital?

Judge Leach: That he did?

Mr. Pellish: Yes.

Judge Leach: Well the fact that in the entire record of the case before the Office of Judges and the Board of Review there was only one doctor giving an opinion, and that doctor said he needs a digital. There are no doctors on the other side. So that's the logic the Board of Review used to grant the digital hearing aids. I'm sorry. . .the Court affirmed the hearing aids and the Court went with the Board of Review. The employer appealed and argued that the law doesn't require the Cadillac of treatment standard. It's just any degree of treatment that's reasonably workable and the Court says, "No, the Board of Review has got it right."

Mr. Pellish: Okay. Thank you.

Chairman Dean: Delegate Guthrie, do you have other questions?

Delegate Guthrie: I guess the question I've got. . .it's an observation more than anything, just for you all to tuck in your thought process. But I hear often from constituents who have said that their doctors have said that they need a certain type of a treatment only to be overruled by a claims adjuster who has no medical degree, no medical background. But it seems like they are being denied more often than they are being. . .

Judge Leach: Well, I can't speak for the claims adjusters. Of course we've heard the same anecdote. And I'll tell you as a judge if I am presented with a medical doctor against someone with a high school diploma there is no question about which one I am going to want to make a medical decision for me.

Delegate Guthrie: Well I guess the point that I would make – to follow along your line of logic – is that if I'm to accept the word of a doctor over a lawyer, I'm going to take the doctor's opinion if it's a medical issue. The question that I've got is how responsive are we going to actually be to people who have legitimate claims if this is the type of process that we're setting up? Are they all going to have to go to the Supreme Court?

Judge Leach: No. I don't believe that's the case. But a lot of the decisions are based upon a regulation which says this type of treatment is not permitted.

Delegate Guthrie: But a regulation doesn't have an ear problem that a doctor has prescribed as a specific type of remedy for.

Mary Jane Pickens (General Counsel OIC): Can you, just so I know, go back to the beginning. Was there ever a request initially to the examiner for digital hearing aids?

Judge Leach: Not that we could find a record of in reviewing the case.

Ms. Pickens: Okay.

Judge Leach: That probably in hindsight was an error on our part. We probably should have referred it to the claims administrator. They should rule on a request before the Office of Judges does.

Delegate Guthrie: Thank you. And more would be belaboring the point.

Judge Leach: No. What I started to point out is a large majority of the decisions that are rejected are based upon a regulation. Then the argument to us is has the regulation been properly followed? Sometimes, very rarely, we get the argument that the regulation itself is excessively restricted. That's a difficult decision. We're not deciding whether the doctor was right or not. We're not playing doctor, and neither is the Board of Review. None of the lawyers in the case are making a medical decision. They are weighing evidence and determining what regulations and laws apply. Now the problem with the hearing aid case is the regulation until recently was silent about digital hearing aids. So we didn't know whether digital hearing aids were allowed or not allowed. It wasn't a question of whether the doctor was right or not. It was a question

more so of whether they are allowed or not in my view. Now we have a regulation that sheds a little more light on it. The next time this comes up it will be tried again. This case wasn't necessarily denied on a medical basis, although that is what the Board of Review hung their hat on as their reason for reversing the initial decisions. But you raised good points and fair points and I want to make sure you understand we are not playing doctor. We don't know more than doctors. We know less than doctors. But we know more about law than doctors do.

Delegate Guthrie: Right.

Chairman Dean: Does anybody else have questions? Chairman Bayless, do you have any questions?

Charles Bayless: No, I do not.

Chairman Dean: Mr. Pellish?

Mr. Pellish: I have a question on the report if the judge is going to get into that at all.

Judge Leach: You mean the numbers?

Mr. Pellish: Yes.

Judge Leach: I just skipped them because, as I said, they were a month out of date already, but I would be glad to answer any questions.

Mr. Pellish: Well, I'm just curious about the little blip that we're seeing in the last couple of months – an increase in the Old Fund.

Judge Leach: Well, there is an upturn on the graph there, but I think what was more significant to me was the sharp decline that showed up in January and February. Because when you look at the charts before then they were converging towards each other. In January and February they completely flipped-flopped 180 degrees and there was a real decline in the Old Fund protests which are now climbing back up. We expect the Old Fund protests to decline over a period of time. We just didn't expect there to be a plummet for two or three months there at the start of the year.

Mr. Pellish: Okay. You've answered the question. Thank you.

Chairman Dean: Thank you, Judge Leach.

**4. Modifications to Claims Index with Regard to Collection of Child Support  
from Workers' Compensation Claims – Rebecca Roush**

Rebecca Roush (Associate Attorney, OIC): Good afternoon. My name is Rebecca Roush, Associate Counsel here at the Offices of the Insurance Commissioner. I am here today to talk to you briefly about the issue of child support enforcement in the area of workers' compensation.

The Insurance Commissioner has been approached by the federal government to participate in an insurance match initiative program that they have recently come up with in response to legislation in 2005 mandating that the federal government start attempting to make more matches in the area of insurance claims and proceeds as a result of insurance claims. This is going to expand into the area of workers' compensation and that's why they approached us. Because the issue involves the Claims Index we felt it necessary to bring it to your attention. Really that's it. There is not going to be too much of a modification to the Claims Index itself. They are just going to use the demographic information currently available to make matches for those who are delinquent in their child support and match them up to the records utilized by the West Virginia DHHR. They've approached us to do that. Because there are really no programs mandatory in that regard we felt it necessary to reach out a little more into this area to assist in collecting more benefits for those who may be entitled to them. Any questions?

Kent Hartsog: I have one. Is there any additional work or cost involved with regard to claimants, employers or TPA's with regard to this?

Ms. Roush: I don't believe so. The cost actually for the program is borne by the West Virginia DHHR. There is no cost to employers or claimants. There is some responsibility that we have with regard to our IT folks to make sure that all the data that is necessary for the program will be correctly identified and things of that nature.

Mr. Hartsog: So all the data they need is already there basically?

Ms. Roush: Yes.

Mr. Hartsog: Thank you.

Chairman Dean: Any other questions? Chairman Bayless, do you have any questions?

Mr. Bayless: No.

Chairman Dean: Mr. Pellish?

Mr. Pellish: None.

## **5. Request to Final File Rules 1, 2, 6, 8 and 18 – Ryan Sims**

Ryan Sims (Associate Counsel, OIC): Good afternoon, Chairman Dean, and other members of the Industrial Council. We are bringing to you today five rules under Title 85. That will be Series 1, 2, 6, 8 and 18. These were initially presented to you on April 29, 2008, at the April meeting. At that time you gave us permission to file these drafts with the Secretary of State's Office on April 29, 2008. They were filed for 30 days for public comment. The public comment on these rules concluded with the Public Hearing on May 29, 2008, at the Industrial Council meeting which occurred on that same day. During that period we also received substantial written comments from various stakeholders on these five regulations. I am going to approach them one at a time as far as you all voting on them. But I do want to say that we thoroughly reviewed all the written comments. Again, we have received more written comments on these rules than we have on any previous drafts of rules, and we appreciate that very much. It gives us the ability to get the appropriate perspective from the various stakeholders. We have taken a large amount of time going through these rules making sure that they are appropriate, that they match up with the corresponding statutes and are not in conflict with the corresponding statutes. We believe that with the finalization of these rules, particularly with Series 1 and 18 which had the most substantive changes, we have a good core of workers' compensation rules moving forward with the open market both with regard to private carriers and self-insured employers. With that I'll start with Title 85, Series 1, which is "Claims Management and Administration."

With all the rules we've received substantive comments. We primarily rely on the written comment responses which were sent out last week to the Industrial Council in regard to responding to those comments. Changes were made where appropriate. You are going to notice in all of these rules other than Series 18 that there is also a number of yellow areas that are either technical, stylistic or grammatical changes. We actually went through all of these rules with a fine tooth comb as far as the technical and stylistic aspect to make sure that appropriate changes were made and that they read as best as

possible as far as readability; everything being grammatical; the number sequence; and all that. We didn't actually make those changes in Series 18. So when I get to 18 I'll mention that again. But with all these other rules you'll see a number of just very small changes throughout the rule. I'll first start with Title 85, Series 1, and the final version that I sent to you last week. I would first ask if there are any questions of the Industrial Council. If not, I would ask that a motion be presented for finalization of the rule.

Chairman Dean: Chairman Bayless, do you have any questions on Series 1?

Mr. Bayless: No. I do not.

Chairman Dean: Mr. Pellish?

Mr. Pellish: No.

Mr. Hartsog: Can we go to page eight for just a second, 10.5(a.)? In the last sentence of (a.) where it has 30 days, I'd like to propose that we insert the word "working" days in there instead of just "30 days."

Mr. Sims: Okay. I can address that particular issue. We did talk about that in our comment responses. The issue was raised by multiple stakeholders about whether a certain time period should be "days" or "working days." And working days obviously would exclude holidays and weekends, whereas "days" would indicate calendar days. What we did was we carefully looked at the Code and we did go back in here in a couple of sections and inserted "working days" where the Code specifically said "working days." So, we found that there were a couple of areas. . .10.3. The Code actually for those timeframes did say "working days." We obviously interpreted that to mean that the Legislature specifically meant "working days" with regard to those timeframes. And from a policy perspective that would make sense because they're shorter timeframes. They are 15 days. So it makes sense to give the responsible party 15 working days. Then following through based on general rules of statutory construction we interpreted other areas and other timeframes where the Legislature did not specifically reference "working days" to mean that they did not intend those timeframes to be working days. And, again, those timeframes are either 30 days or 90 days – longer timeframes. We felt that it was pretty clear that the Legislature when they meant "working days" said "working days." And when they didn't they meant "calendar days." So that would be my response.

Mr. Pellish: How can we confirm that?

Mr. Sims: Well officially there is no hotline or anything where you can call and find out what the specific intent of the Legislature was. That's why we as lawyers rely on basic rules of statutory construction. And one of them is what I said when the Legislature says one thing in one area, and in this case "working days," and in another it doesn't say. You assume that where they said "working days" they meant "working days." In other words, because they said "working days" in some areas you assume as a general concept of law that they meant "working days" in those areas. But where they didn't use the term "working days" they meant "calendar days." I mean that's really all we have. Normally Chairman Bayless likes to ask Senator McCabe, but he's not here. And I'm not sure we have any legislative members that were here when those certain statutes were promulgated.

Mr. Pellish: I guess I'm just not comfortable that it's a good assumption.

Mr. Hartsog: And I'm a little concerned too because there are some places where it is "days" and other places it is "working days." There is a great opportunity for confusion and difficulty with the insurance market opening up and more people applying this. You have a lot of inconsistencies throughout here whether it's "days" or "working days." It just makes it harder on the people that have to apply this on a day to day basis.

Ms. Pickens: Just so everyone knows. We went very, very carefully back through the Code, looking back and forth between the Code and the rule. And what is in this rule is what is in the Code. So in an effort to make it as close to what we think the Legislature intended we didn't want to – in a rule – substantively change a number of days where it was our interpretation if it got before a court it would be likely that the court would say, "Yes, the Legislature meant it to be different." Under normal statutory construction if you say "working days" in one place and you say "days" in another, you've said something different and there is an understanding that there is some meaning in that. And when we first started down this road with this rule I think it was our desire to make them all the same. But then we were concerned that the Code – the actual statutes were different. We were attempting to make the rule match the statutes.

Mr. Pellish: Mary Jane, I think you took the right approach. But I'm not certain in my mind that this isn't something the Legislature meant. And I just wonder if it wouldn't be worthwhile to put this on the back burner until the next meeting and have contact made with Senator McCabe and some others to make sure that it wasn't something that they just missed.

Ms. Pickens: If I can respond. First of all this is an important rule. The market is open and I think the rule needs to be voted on and we need to get something in place. When a matter gets before a court – which is where a rule would be challenged if it's going to be challenged – the court is going to look at legislative intent differently than that. They're not going to call up any particular legislator, and I think our case law would indicate that they are not supposed to rely on any particular legislator as to what his or her thought was at the time a Bill was passed. And what the Industrial Council decides today – whether it's "working days" or "days" – is I think up to the Industrial Council. We are recommending what we think was the best interpretation of the law, and if the Industrial Council wants to change that to "working days" there is nothing that would prevent that from happening. But as long as the record is clear about what our legal interpretation is and what our recommendation is.

Mr. Bayless: When the Legislature says one thing in one place and another thing in another place. . .that's what the Supreme Court would say. It's a rule. . .statutory construction. They would say they meant something different. So if you're using statutory construction you would go with "days." And I'm used to seeing "working days" used for numbers like five and seven. Normally when you get into the 30's, 60's and 90's it is calendar days. And you're talking the difference of. . .30 days is four weeks and two days. Thirty working days is six weeks. . .give or take. I don't have a strong feeling one way or the other. I think the staff is exactly right on this if it is presented to the court, they would say "30 days. . ." If we want to adopt "working days," I mean. . .if somebody wanted to bring it to court, they could.

Chairman Dean: Mr. Marshall, do you have a comment?

Mr. Marshall: My comment would be that in drafting these, what you attempted to do as much as you could and as carefully as you did was to track the statutory language. Correct?

Ms. Pickens: Yes. In the version that is before you now.

Mr. Marshall: And I think that is exactly what should have been done.

Chairman Dean: Is there a motion to approve? Any other questions?

Mr. Hartsog: The statute, if I understand it, does not specify a number of days. It just says "days" or "working days" in certain places. It doesn't specify. . .in the example that I brought up in (a.) where it says "30 days," it doesn't say "30 days" in the statute. It just says "days."

Mr. Sims: There are some timeframes in here that there was no statutory guidance on but we felt for policy reasons it was appropriate in a couple of instances in Section 10 to put a timeframe on them. Most of these track the statute and the statute actually either says "x number of days" or "x number of working days." It actually does say 15 or 30. And, again, with "15 days" in Sections 10.1 and 10.3 it said "15 working days" in the statute. With some other ones I know that they do follow the statute. For example, the "90 working days" for ruling on OP claims which is found in Section 10.2, the statute there specifically says "90 days." So it does have the numerical period as well as the phrase "days" without the word "working."

Mr. Hartsog: In 10.5(a.), does the statute have 30 days?

Mr. Sims: I don't recall that one specifically. My recollection is most of these, all but a couple of them, did have statutory language following them. And, again, we came up with them on the same basis. It seems to me there was one or two where there was no language either way in the Code about any "day" timeframe, but we felt for policy reasons that there should be. Like I said, I don't remember exactly in 10.5(a.). We have some attorneys that are more familiar with Article 4 that might be able to answer that question on 10.5(a.), with regard to acting on a permanent disability evaluation report.

Mr. Marshall: I am a bit curious. . .as a practical matter, what is your reasoning that it might be more effective if we used "working days" there?

Mr. Hartsog: Sure. Let's say around Thanksgiving or Christmas, and some of these issues. . .disability evaluations, de-evaluations, things like that are pretty complex; difficult having to collect information. Perhaps collect information outside of what is submitted by the claimant. I would like to make sure that a TPA or a claims administrator is allowed sufficient time to get everything and consider the whole record without having to rule on something or do something more hastily that could go against the claimant; could go for the claimant. When you're talking about 30 calendar days you're talking about another 10 to 15 days potentially that a TPA [or someone like that] would have to get information and rule. . .because this isn't a simple leg fracture or something like that. That is really what I was concerned about.

Mr. Marshall: I see your point.

Mr. Hartsog: It's a fairly short string there.

Mr. Bayless: Yes, that's true around Christmas. I mean the whole State shuts down for about two weeks.

Mr. Hartsog: I was going to propose. . .if we can change the number of days, I would be happy to go with that, or if we could insert "working" that's fine too.

Chairman Dean: Mary Jane, do you all have what the Code says? What the statute says?

Ms. Pickens: Well, that's what I was trying to do. I was trying to go through Section 10 really quick and be able to point out which ones correspond to exact Code references and which ones don't, and I'm not there yet.

Mr. Pellish: Mary Jane, my only point was one of consistency in terms of either using just "days" or "working days." I spent a lot of my life negotiating labor agreements and we were always careful in every contract to use the term "working days" throughout the contract. Or if we didn't want to use "working days" we used "days." I just don't like bouncing back and forth between the two.

Ms. Pickens: I do have some information. I am told that in Section 10.5(a.), "The responsible party shall act on a permanent disability evaluation report. . ." There is not a corresponding Code requirement for that "30 days." We went with "30 days" there I am sure because in all the other references to "30 or more" we went with "days" instead of "working days."

Mr. Sims: The only thing I would like to point out – in my version of 10.5(a.) – I think that that was the standard established well before we took over regulatory purview.

Ms. Pickens: It was. Correct.

Mr. Sims: I think this has been the standard for years. Not saying that perhaps it shouldn't be changed or should be. I'm not commenting on that, but just saying that we didn't get in here and change this. This "30 days" has been the standard well before we took over.

Ms. Pickens: Right. That's a very good point. There is no amendment proposed by us to that.

Chairman Dean: Delegate Guthrie, do you have a question?

Delegate Guthrie: Mary Jane, the question I would have is if you were to insert the word "working days," would that potentially open the rule up to litigation at some point because it is not consistent?

Ms. Pickens: No. I don't think so. Again, we were trying where there was a specific reference in the Code, with the exception of everything other than 10.5(a.), we did it the way the Legislature said in the statutes. But on this one there is not a statutory reference to go by. But, again, as Ryan pointed out – and it's a good point – this has been in the rule for some time. We weren't proposing an amendment to it. I think if the Industrial Council wanted to make that "working days" they could do that if they wanted to on that particular one because there is no Code section for it to be inconsistent with.

Chairman Dean: Any other questions?

Delegate Guthrie: Well, I guess then the follow-up question would be if it were to be advanced forward in the manner which it is currently written without inserting anything, if there was a discrepancy to be dealt with, could it be dealt with by a future Legislature rather than doing it here. . .going back to the Legislature and finding out exactly what they did then?

Ms. Pickens: Right. But I think on this one there is not a reference in the Code. We are probably spending a lot of time. . .and perhaps this is an important issue. I'm not going to lose sleep one way or the other whether it says "working. . ." We were just trying to do what we thought was right.

Delegate Guthrie: I understand.

Ms. Pickens: Again, this is just in the rule. It has apparently been in the rule for quite some time. It was in the rule when we got it. But I am told that there is not a Code reference to this. It makes sense to have some time limit placed on these types of things.

Mr. Pellish: Absolutely.

Ms. Pickens: But that's one where we just went with "30 days." Again, because that's the way the rule was and we saw no reason to change it.

Mr. Bayless: I was just wondering. I'm sort of inclined to go with "working days" because of the Christmas problem. I don't know if the rest of the government is like Tech, but Tech closes down for two weeks at Christmas.

Mr. Pellish: I would move to amend that we make it "working days."

Mr. Hartsog: I'll second.

Chairman Dean: A motion has been made and seconded to change it from "days" to "working days." Any question on the motion?

Ms. Pickens: For clarification. Is the motion to change the reference to "days" in Section 10.5(a.)?

Mr. Hartsog: Yes ma'am.

Chairman Dean: To "working days." Any other questions on the motion? All in favor signify by saying "aye." All opposed? The aye's have it. Motion passes.

[Motion passes on changing "30 days" to "30 working days" on Title 85, Series 1, Section 10.5(a.).]

Mr. Hartsog: I have exactly the same question on Section 10.5(b.) and 10.5(d.) in taking out "working days." I think it is one to follow fairly much the same discussion.

Chairman Dean: Is there anything in the statute?

Ms. Pickens: Yes. In both of those the Code simply references "days."

Mr. Hartsog: So it's the same issue in your mind as in 10.5(a.)?

Ms. Pickens: It is in my mind. Yes. Well, and I kind of apologize. I didn't realize until deep into the discussion that there was no Code reference on 10.5(a.). So we've already had the discussion.

Mr. Marshall: Is there a specific Code reference with respect to the additional items?

Ms. Pickens: (b.) and (d.), yes.

Chairman Dean: It states 30 days?

Ms. Pickens: Yes.

Mr. Hartsog: I would like to move that we insert the word "working" in Section 10.5(b.) and 10.5(d.). So it would be "30 working days" in (b.) and "30 working days" in (d.).

Chairman Dean: Is that a motion?

Mr. Hartsog: Yes.

Mr. Bayless: I would like to ask a question of Judge Leach.

Ms. Pickens: I think Judge Leach may have stepped out.

Mr. Bayless: Okay. My question is if an aggrieved party. . .on the 33<sup>rd</sup> day which happened on the 27<sup>th</sup> working day and the aggrieved party took it to court. . .this is going to cost me \$500,000.00 and it should have been. . .[inaudible over telephone]. . . Would they have a chance?

Ms. Pickens: Well I think if someone gets caught up in that I think they could challenge the rule because it is inconsistent with the statute.

Chairman Dean: Does that answer your question, Mr. Bayless?

Mr. Bayless: Yes.

Chairman Dean: There is a motion on the floor to change (b.) and (d.) from "30 days" to "30 working days." Correct?

Mr. Hartsog: Yes, sir.

Chairman Dean: Is there a second to that motion?

Mr. Pellish: I will second it.

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Chairman Dean: A motion has been made and seconded to change (b.) and (d.) to "30 working days." Any questions on the motion? All in favor signify by saying "aye." All opposed? The aye's have it. [Motion passes.]

[Motion passes on changing "30 days" to "30 working days" on Title 85, Series 1, Section 10.5(b.) and Section 10.5(d.).]

Chairman Dean: With the changes is there a motion to accept Title 85, Series 1?

Mr. Marshall: So moved.

Mr. Hartsog: I'm sorry. I have two more. At the bottom of page 13, §85-1-16, there is one paragraph that has been inserted. I would like to propose and discuss adding a sentence to that which basically says, "The Commissioner shall thereafter notify the private carrier or self-insured employer of the disposition of the complaint and shall provide all parties copies of any documentation of correspondence with regard to such disposition." This is basically the Insurance Commissioner addressing complaints from claimants, and I would suggest this wording be added to make sure that the TPA or the self-insured employer is kept in the loop with regard to what the ultimate disposition of it is and correspondence.

Chairman Dean: Ryan, do you have comments on that?

Mr. Sims: We were aware of that comment. And the reason we didn't address that in this rule is because we thought that that particular area was getting into the policy and procedure work of the Consumer Services Division rather than what the duty of the carrier to respond was, and that it really didn't belong in the purview of this rule. Our Consumer Services Division has a practice of normally copying the insurer on all correspondence with the claimant. And I guess we assumed that these complaints would be treated just like any complaint against the carrier. So we thought it was sort of opening up a broader issue than should be addressed in this rule, and that would be my only comment.

Ms. Pickens: I agree with that. The point of this paragraph is to talk about what carriers and self-insured employers have to do. I think we are always willing to talk about what our own internal processes are and if they can be improved and that kind of thing. We're happy to do that, to talk to Kathy Beck and see if there need to be any changes and what she says. There may be situations where on a case-by-case basis

you want to be careful just because of the circumstances about what information goes back and forth. You have releases to share information and that kind of thing. I would prefer to not address that in this rule but rather to have that be an ongoing discussion with Kathy and with us. We are always open to improving our own internal processes.

Mr. Hartsog: I don't feel real strong about having it in the rule myself, except as an employer that you ultimately find out or have knowledge of things of happening and how the Commissioner sees it and rules on it because perhaps there is something in there that we can glean from that to improve what an employer, what an insurer is doing.

Ms. Pickens: And I agree absolutely with you there. I would hope honestly that our processes afford that today because that is our role to resolve things at that complaint level. You can't resolve it if one of the parties doesn't know what is going on.

Mr. Hartsog: I agree. My understanding is that's not really occurring today. If putting it in a rule gets it done or us talking gets it done, I'm fine either way.

Ms. Pickens: Again, I would prefer to talk about that with Kathy because I don't know today that I've got a real clear understanding of whether that's. . . I can't imagine that we routinely don't tell a carrier or a self-insured employer how something is ended when that happens. I just don't believe that we would do that. I'd rather follow-up with Kathy Beck and address it that way.

Mr. Hartsog: Okay.

Chairman Dean: Are you good with that?

Mr. Hartsog: Yes, sir.

Chairman Dean: Do you have another comment on this?

Mr. Hartsog: Yes, one more. On page 11, Section 13.1. In discussions that I've had eliminating looking at OD claims – which I think this is what this is discussing – allows the OP Board, and that Board is comprised of very experienced, good physicians, limits them solely to determination of impairment and not causation. With the 15 days, I believe it is, that an insurer has to actually rule on a case, to collect and get adequate evidence that a lot of times, as I understand, TPA's or insurers will kick these up to the OP Board to allow their expertise to be used to evaluate those. I would suggest that we discuss deleting that last sentence, "Provided, that in such claims, the jurisdiction of the Occupational Pneumoconiosis Board is limited solely to the

determination of whole body medical impairment.” And leave it up to them to also look at causality.

Chairman Dean: Comments, Ryan?

Mr. Sims: This is certainly one area where I'm not an expert on. I guess what I will say is we very, very carefully looked at the statutory law in this area. We actually feel that that proviso is very questionable in the law – whether the Occupational Pneumoconiosis Board has the ability to even look at whole body impairment and claims filed as occupational disease claims rather than OP claims. However, since that is something that's been traditionally done we would provide the limited ability to determine whole medical impairment, but that should just be limited to that and occupational disease claims. Now beyond that, what the statute permits and really as to the policy behind all of this language in that proviso I would defer to Becky Roush, our Associate Counsel, to provide any further comment on why it is limited to whole body medical impairment in this section.

Chairman Dean: Ms. Roush. . .

Rebecca Roush: We did take considerable time to address the concerns, and there were numerous concerns expressed in the comments. We attempted to put forth the reasons why we felt that causation is a decision that exclusively remains in the jurisdiction of the claims administrator. In OP cases the issue of causation, compensability, chargeability remains with the carrier, the claims administrator. Only in limited exceptions does the issue of causation actually go to the OP Board, and that's done through a referral by the claims administrator. That was established through case law, not through any statutory authority to the best of my knowledge, and that is a Fraga referral.

I believe we expressed in our comments that should the carrier decide that the issue of exposure – that they need assistance in that regard beyond any medical reports that they already have – it's perfectly within their purview to request that that issue go to the Board under a Fraga referral just as they do in occupational pneumoconiosis cases.

Mr. Hartsog: I think we need to be using this Board that the OIC is paying for as much as we possibly can to get the best information and the best outcome for everyone's benefit. I think the limitation on the timeframe for an insured to make a decision is 15 days.

Ms. Roush: For OP cases it isn't. It is 90 days. So there is a considerable amount of time.

Mr. Hartsog: Yes, for OP cases. I believe this only changes OD cases, and OP cases would still be handled the same. But the OP Board would be able to look at it and determine causality as well as impairment.

Ms. Roush: Actually you can toll the 15 days. I think that the language in the rule actually just says "acted upon" not necessarily "ruled upon." So that does allow for an investigatory period.

Mr. Hartsog: If an insurer acts upon it they either have to say I guess "yes" or "no."

Ms. Roush: No. I think they can actually investigate the matter further with any approach they want to take with perhaps maybe an outside referral, something of that nature to give them more documentation to substantiate a decision.

Mr. Sims: I think the section she is referring to is actually 10.1 of the rule on page seven. Similar language is in there. We reworded it somewhat. But it's that last underlined sentence that says, "Whenever a claim has not been adequately or properly developed for consideration, the responsible party may require the production of additional evidence. The 15 working days to rule on the claim shall be tolled during this evidence gathering process." So in the scenario that we have an occupational disease claim where the claims adjuster thinks more information is needed – a further study of the causation issues, those types of issues, needs to be done – the 15 days would toll while they refer it out for further investigation in that regard.

Mr. Hartsog: If we have the Board, why not use them to the fullest extent that we can?

Ms. Roush: This really is a compromise in trying to keep with the theme of the prior rule in infusing the OP Board into these specialized cases. But the statute for the Occupational Pneumoconiosis Board strictly covers occupational pneumoconiosis and this really was the best compromise that we could reach under the statute.

Mr. Sims: I think what she is saying is statutorily, like I mentioned before, the OP Board really only has jurisdiction to make any findings or expend their resources on OP claims not OD claims. From a strict statutory perspective it is believed that giving them the ability to review whole body impairment, which is one of the main things they usually

do, it would be appropriate to let them do that in these situations. There is also the case law from the Fraga case that would enable them to refer it out.

Ms. Roush: There is also case law which actually takes into consideration what is a lung cancer case, and the Court has expressly stated that the claimant more or less has the option whether to file that as an occupational disease or as an occupational pneumoconiosis. But depending on that filing there will be certain criteria that must be met, and occupational disease is separate and distinct from occupational pneumoconiosis. We felt that, just as in occupational pneumoconiosis cases, the issue of causation, compensability and chargeability should remain with the claims administrator. It is no different with OP than with OD. And what the prior rule really did was infuse bits and pieces of both the OD and the OP statute, which we felt was inconsistent with the expressed language.

Mr. Hartsog: On an OP claim, can an insurer do what you're calling a Fraga without making a decision and put it at the OP Board to look at it and then they would not be able to do that with an OD decision?

Ms. Roush: No. I think we've said that they could do it. Our compromise would be that whether for an OD or an OP, should the claims administrator choose to send that issue to the OP Board, they can do that under a Fraga referral.

Mr. Hartsog: But the OP Board on an OD claim [occupational disease claim] then could only rule with regard to impairment and not with regard to causality.

Ms. Roush: I think it is a recommendation to the claims administrator just as it is in OP. If it does go to the Occupational Pneumoconiosis Board under a Fraga referral it is a recommendation. It goes back to the claims administrator to make the decision.

Mr. Hartsog: I guess in my mind I am kind of going in a circle. Then why have this sentence? Why have this last sentence?

Ms. Pickens: Let me just ask the question again to make sure I'm getting it. The amendment that we've proposed, would it prohibit an adjuster in an OD claim from making a Fraga referral on causality to the OP Board? Or would that still be allowed?

Ms. Roush: I think it would still be permitted.

Mr. Hartsog: I guess, in my mind. . .can you point me to where that's at because if I look at this last sentence it would seem to me to prohibit them from determining anything with the exception of impairment.

Ms. Roush: Well that's currently what the OP Board does under the statute with regard to OP cases. But the case law created the exception to send the issue of exposure there. So I guess to me there is no difference.

Mr. Hartsog: So then to be consistent we should eliminate this last sentence.

Ms. Roush: I think that is consistent with the statute. Again, I think the case law creates the exception which sends the issue of exposure.

Mr. Hartsog: And I understand that. But to be consistent with OD and OP and what you're saying was the case law, then wouldn't we be better off deleting this last sentence?

Mr. Sims: Let me just jump in here and make one point. I think perhaps the difference that's not been clearly delineated here in this dialogue is that the proviso at the end. . .well actually going back to the top of this new language. You have two things that have to occur – it's an occupational disease claim. It's a lung disease filed as an OD claim. And two, a permanent disability determination is required. Right after that it says, ". . .the claim shall be referred by the responsible party to the Occupational Pneumoconiosis Board. . ." I think there is a difference between that language which says "it always shall be referred" as opposed to a responsible party. And, again, Becky or Dan, correct me if I'm wrong. But I think a Fraga referral is at the discretion of the carrier. So what this current language says is that the OD claim shall be referred to the OP Board for the determination of the whole body impairment, meaning the carrier must use the OP Board for whole body impairment in these types of claims. Whereas if they want help on the causation issue they can seek a recommendation based on the Fraga case law, but they don't have to. And I'm just pointing out that the current law. . .I think the difference between that proviso and the review of the whole body impairment is that it is mandatory under this rule by the OP Board. Whereas with a Fraga referral no review of causation. It's discretionary on the part of the claims adjuster if they want the additional input. And maybe we understood that but I just wanted to point out that there is a difference. I think that the proviso applies to the "shall" whereas Fraga is a discretionary referral.

Chairman Dean: Any other comments or questions? Is there a recommendation?

Mr. Hartsog: I would like to make a motion that we delete. We put a period after "Board" and delete the last sentence: "Provided, That in such claims, the jurisdiction of the Occupational Pneumoconiosis Board is limited solely to the determination of whole body medical impairment." Delete that sentence.

Chairman Dean: Mr. Pellish, Mr. Bayless, do you hear what we're talking about?

Mr. Pellish: Yes.

Mr. Bayless: Yes.

Chairman Dean: Is there a second to the motion? The motion will be tabled for no "second." With the changes, is there a motion to accept Series 1?

Mr. Marshall: I'll so move.

Mr. Hartsog: Second.

Chairman Dean: Motion made and seconded to accept Title 85, Series 1, with the changes. Any questions on the motion? All in favor signify by saying "aye." All opposed? The aye's have it. [Motion passes.]

### **Title 85, Series 2, "Workers' Compensation Claims Index"**

Ryan Sims: Series 2 is a rule which addresses and sets forth standards for the Workers' Compensation Claims Index which is an index with basic information about workers' compensation claims that was created by the Legislature in 2005. Most of this was just kind of tweaking some language. There was nothing substantive in here. We did receive a few comments and responded to them in our written responses and I would ask the Industrial Council if there is any questions on Series 2. If not, I would ask for a motion to approve the rule as the final draft.

Chairman Dean: Questions on Series 2 from the Industrial Council? Is there a motion to approve?

Mr. Hartsog: So moved.

Mr. Marshall: Second.

Chairman Dean: A motion has been made and seconded. Are there any questions on the motion? All in favor, "aye." All opposed? The aye's have it. [Motion passes.]

**Title 85, Series 6, "Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges"**

Mr. Sims: Series 6 is entitled "Workers' Compensation Debt Reduction Fund Assessments and Regulatory Surcharges." Again this is a rule set up to provide some standards and some guidelines for the assessment of debt reduction fund and regulatory surcharges that are assessable against workers' compensation insurance carriers and self-insured employers. Again, most of these changes were not largely substantive. There were a few I guess you could deem substantive changes, but it was mainly to just update the rule. There was some language in House Bill 4636 which set the percentages until 2013 against private carriers that we had to get in there and we used that opportunity to tweak a couple of areas. With that I present you this final version of Title 85, Series 6.

Chairman Dean: Questions on Series 6? Hearing none, is there a motion to approve Series 6?

Mr. Hartsog: So moved.

Mr. Pellish: Second.

Chairman Dean: A motion was made and seconded. Any questions on the motion? All in favor, "aye." All opposed? The aye's have it. [Motion passes.]

**Title 85, Series 8, "Workers' Compensation Policies, Coverage Issues and Related Topics"**

Ryan Sims: Title 85, Series 8, entitled "Workers' Compensation Policies, Coverage Issues and Related Topics." This was just a limited amendment to Series 8, particularly Section 9 of the current draft. The Legislature made some changes to the requirements for carriers with regard to reporting our proof of coverage system in those timeframes and with regard to reporting cancellations or non-renewals to insureds in those timeframes. Essentially we just opened up the rule to get into Section 9 and make the changes to reflect what the Legislature did in House Bill 4636. With that I'll present you with the final version of Title 85, Series 8.

Chairman Dean: Questions on Series 8? No questions. Is there a motion to approve?

Mr. Hartsog: So moved.

Chairman Dean: A motion has been made. Is there a second?

Mr. Marshall: Second.

Chairman Dean: The motion has been made and seconded. Any questions on the motion? All in favor, "aye." All opposed? The aye's have. [Motion passes.]

**Title 85, Series 18, "Self Insurance, Self Administration and Third Party Administrators"**

Ryan Sims: Title 85, Series 18, which is the primary rule that addresses self-insured employers, is entitled "Self Insurance, Self Administration and Third Party Administrators." Obviously there were many substantive changes to this rule. The primary goal we had in opening it up was to take the claims handling standards out of this rule and meld them where appropriate into Rule 1 and create a single set of claims handling standards [in Rule 1] rather than having different standards for self-insured employers versus private carriers. We also took the opportunity to make other changes where appropriate in that rule. I think I mentioned earlier we did not complete our technical, stylistic and grammatical type cleanup in this rule. With the vote on this rule we would include permission to make those various changes all throughout this rule, nothing substantive. There is one substantive change from the last draft we gave you and that would be in the new Section 17 of the rule on page 38 at the bottom of the page. There was some language in House Bill 4636 which referenced the necessity for third party administrators who are administering claims for carriers or self-insured employers. The language in the Bill said "registered or licensed." We originally placed that language "registered or licensed" in there. Our intent is to actually license TPA's that are doing work for self-insured employers or TPA's. Our intent was to say, where it begins to be underlined in the first sentence is, "licensed to perform workers' compensation claims. . .," and strike the words "registered or." Though it's a small change it is significant. We wanted to bring that to your attention before we asked for a final vote on this rule.

Mr. Hartsog: May I ask one question?

Chairman Dean: Sure.

Mr. Hartsog: Since I think the third party administrators or who administers the claims is registered as well as licensed, would we be better to change that to "is registered and licensed to perform" instead of striking "licensed" and "or?"

Ms. Pickens: The registered concept shows up in Article 46 of Chapter 33, relating to TPA's that handle health plan claims for self-funded ERISA plans which we do not regulate and it was an unfortunate carry-over into Chapter 23. It is simply not relevant to property and casualty in our minds. Under that scenario if you are doing TPA work for a self-funded ERISA plan you are registered. You are not licensed. So, in that context (health plans) there is a difference between the two. I don't think saying "registered and" would help because I don't think anyone is going to be "registered and." I mean even if you are registered because you're doing TPA work for a self-funded ERISA plan you won't be licensed by the Offices of the Insurance Commissioner. If you're going to do TPA work for an employer that self-insures its workers' comp risk or for a carrier on workers' comp claims, you are going to have to be licensed in West Virginia.

Chairman Dean: Any other questions?

Mr. Hartsog: I move that we strike in §85-18-17 in the first sentence, strike the words "registered to" and have the sentence read, "self-insured employers may hire third party administrators to administer claims if the third party administrator is licensed to perform workers' compensation claims services, etc."

Chairman Dean: Comments?

Mr. Sims: That's appropriate. The language actually is "registered or" not "registered to."

Mr. Hartsog: Oh, I'm sorry.

Mr. Sims: You read it the way it should appropriately read based on this change. It's fine.

Chairman Dean: Is there a second to that motion?

Mr. Pellish: I'm sorry Ryan. Did you say that you agreed with that change?

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Mr. Sims: That is the change we are asking for. The stricken language is "registered or." But as Mr. Hartsog read it, it is appropriate.

Mr. Hartsog: I didn't read it right.

Chairman Dean: Is there a second to Mr. Hartsog's motion?

Mr. Pellish: I'll second it on the basis that I think Ryan is indicating that that's the way it should read.

Mr. Sims: That's correct. The motion as it is on the table now is what we want it to say.

Chairman Dean: There is a motion and a second. Are there any questions on the motion? All in favor, "aye." All opposed? The aye's have. [Motion passes.] Are there any other questions or recommendations?

Mr. Hartsog: I did have one question. Now that we've made these changes in Rule 18, there are some inconsistencies with Rule 19. I was just wondering what the timeline was for also bringing up Rule 19?

Mr. Sims: As soon as possible.

Ms. Pickens: We will look at that.

Chairman Dean: Any other questions? There being no other questions, is there a motion to approve Series 18?

Mr. Marshall: So moved.

Mr. Hartsog: Second.

Chairman Dean: There is a motion and a second to approve Series 18. Any questions on the motion? All in favor, "aye," All opposed? The aye's have it. [Motion passes.]

Mr. Pellish: Good job with cleaning that up.

**6. General Public Comments**

Chairman Dean: Does the general public have any comments today?

**7. New Business**

Chairman Dean: Do any members of the Industrial Council have anything under new business?

**8. Next Meeting**

Chairman Dean: Our next meeting is Thursday, August 7, 2008, at 3:00 p.m. here.

**9. Adjourn**

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

There being no further business the meeting adjourned at 4:14 p.m.